COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2120-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO E. AREBALO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Reversed and cause remanded with directions.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 SNYDER, J. Antonio E. Arebalo appeals from a judgment of conviction of attempted robbery by use of force, contrary to WIS. STAT.

§§ 943.32(1)(a) and 939.32 (1997-98),[1] and from an order denying his motion for postconviction relief. Arebalo was charged with and convicted of attempted robbery by use of force and disorderly conduct, contrary to WIS. STAT. § 947.01,[2] arising out of an incident occurring at R.D.'s Pub and Grub, a Racine restaurant, on July 25, 1998. He raised defenses of mistake of fact, pursuant to WIS. STAT. § 939.43, and involuntary intoxication, pursuant to WIS. STAT. § 939.42(2), to the attempted robbery charge.

¶2 Arebalo was convicted on both charges and filed a postconviction motion for relief from the attempted robbery conviction, alleging that his counsel was ineffective in failing to fully investigate and present his defenses and that he was entitled to a new trial in the interests of justice. Specifically, he contended that blood alcohol concentration (BAC) evidence of his intoxication was not obtained and presented at trial and that a witness to Arebalo's state of intoxication was not interviewed and called to testify. We agree with Arebalo that because the evidence of his intoxication defense was not presented to the jury, the attempted robbery by force charge was not fully tried. We therefore exercise our discretionary power to reverse the attempted robbery conviction and grant Arebalo a new trial.

STANDARD OF REVIEW

¶3 This court may grant a new trial in the interests of justice if it concludes that the "real controversy was not fully tried" or that it is probable that justice has otherwise miscarried. *See* WIS. STAT. § 752.35; *see also* ***State v. Wyss***,

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise stated.

[2] Arebalo does not appeal from the disorderly conduct conviction.

124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985). The court's inherent power and express authority to reverse a conviction and remit a case for a new trial in the interests of justice exist even where the circuit court has denied a motion for such relief. *See* § 752.35; *see also* ***State v. Penigar***, 139 Wis. 2d 569, 577-78, 408 N.W.2d 28 (1985).

¶4 When it is determined that the case has not been fully tried, the appellant need not show that the results of a retrial would probably be different. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 20, 456 N.W.2d 797 (1990). Situations in which the controversy may not have been fully tried generally arise in two factually distinct ways: (1) where the trier of fact was erroneously not given the opportunity to hear important evidence; and (2) where the jury had before it evidence not properly admitted which so clouded a crucial issue that it may fairly be said that the real controversy was not fully tried.[3] *See* ***Wyss***, 124 Wis. 2d at 735. The standard for determining what excluded evidence is sufficiently "important" to require a new trial in the interests of justice is evidence that goes "directly to the crux of the case." ***State v. Cuyler***, 110 Wis. 2d 133, 142, 327 N.W.2d 662 (1983) (quoting ***Logan v. State***, 43 Wis. 2d 128, 137, 168 N.W.2d 171 (1969)).

FACTS

¶5 The jury was presented competing factual versions of the alleged attempted robbery charge and we will first review the defense evidence. Arebalo

[3] Other situations besides the two mentioned in ***State v. Wyss***, 124 Wis. 2d 681, 370 N.W.2d 745 (1985), in which it has been shown that the controversy was not fully tried were described in ***Vollmer v. Luety***, 156 Wis. 2d 1, 25-29, 456 N.W.2d 797 (1990). However, none of the situations mentioned in ***Vollmer*** bear on the case presently before this court; thus, they will not be discussed.

testified that on the afternoon of July 25, 1998, he attended a neighborhood barbecue where between approximately 1:00 p.m. and 6:00 p.m., he consumed about twelve beers. He then left the barbecue and went to a party at the Flat Iron Mall where he proceeded to drink approximately twelve more beers with Jermaine Martin. Martin and Arebalo kept track of their beer consumption and stopped after consuming around twelve beers, but each then took two "good" shots of tequila. Arebalo left the Flat Iron Mall between 11:00 p.m. and 11:30 p.m. and went to R.D.'s Retreat, another bar located a few buildings away.

¶6 Arebalo stated that he ordered a pitcher of beer from "Jessica," the bartender at R.D.'s Retreat, drank about half of a glass of beer and went to the restroom. When he returned, the bartender told Arebalo that he had had "way too much to drink," took the pitcher away and refunded his money. Arebalo testified that he then entered R.D.'s Pub and Grub, a restaurant adjoining the bar, and ordered pizza. Travis Mojeck, the nephew of restaurant co-owner Jerry Mojeck, brought the pizza to Arebalo and asked for payment. Arebalo told Travis that pizza payment was usually in advance and that he thought he had already paid. Travis and restaurant co-owner Michael Mendez told Arebalo that he had not paid for the pizza, asked Arebalo to leave and he left.

¶7 Arebalo testified that he did not recall very clearly returning to the restaurant, but he remembered that as he was walking out of the restaurant "one time," he dug into his pocket and pulled out four dollars. Because he originally had ten dollars and the pizza cost six dollars, Arebalo returned the "final time" to confront Mendez with the four dollars in hand and insisted that he had paid for the pizza. Arebalo stated that Mendez then hit him and the next thing he remembered was Mendez punching him while he was lying on his back. Arebalo testified that he blacked out and woke up in the hospital, remembering little of what had taken

place. After Arebalo was treated at the hospital, he was transported to the jail where he discovered that he had $10.98 in his pocket, more than the four dollars he claimed to have had at the restaurant.

¶8 Bartender Jessica Larson supported Arebalo's testimony, telling the jury that she had served Arebalo a pitcher of beer at R.D.'s Retreat, that she saw him stumble on the way to the restroom and that she took away the beer and refunded his money. Larson testified that Arebalo was "obviously drunk" and that she had seen him in the bar before but never in that condition.

¶9 The prosecution offered the jury a different version of events. Mendez testified that Arebalo came into the restaurant four separate times. The first time Arebalo ordered two pizzas, his order was brought out, and he told Travis that he had already paid and held out two dollars towards Mendez. Mendez interpreted this gesture to mean that Arebalo wanted to buy the pizzas for two dollars. Mendez then asked Arebalo to leave, and Arebalo did so, but he came back two more times demanding the pizzas and claiming to have paid for them. Mendez testified that he told Arebalo to leave each time and the second time threatened to call the police if Arebalo returned. Mendez stated that Arebalo left the restaurant angry and "cussing."

¶10 Mendez stated that Arebalo returned to the restaurant five to ten minutes later, grabbed Mendez by the shirt and said, "Give me them fucking pizzas or I'm going to kill you." A struggle then broke out and the two wrestled to the floor. Mendez asserted that he punched Arebalo several times in self-defense, sat on Arebalo, struck Arebalo when he attempted to grab Mendez by the throat and remained on top of Arebalo until the police arrived. Mendez testified that he smelled alcohol on Arebalo's breath but that Arebalo did not appear to be

intoxicated. Mendez stated that Arebalo spoke clearly, without slurring words, and did not stagger or have problems walking.

¶11 Travis Mojeck also testified that Arebalo did not appear to be drunk and that he did not have any difficulty walking, standing or speaking. Travis stated that Arebalo had charged at Mendez and said "something like kill or something." Travis further testified that he ran into the kitchen to avoid the altercation and could not hear exactly what was being said.

¶12 Jerry Mojeck testified that he did not notice if Arebalo was intoxicated. Jerry testified that Arebalo told him that he had paid Travis for the pizzas after Arebalo had told Travis that he had paid Jerry for the pizzas. Jerry believed that Arebalo appeared to be trying to pull a fast one.

¶13 City of Racine Police Officer Steve Wagner testified that he arrived at the restaurant while rescue personnel were attending to Arebalo and was present in the emergency room while Arebalo received medical treatment. Wagner stated that Arebalo told him that his injuries were sustained in a hit-and-run accident and that Arebalo was surprised when he was informed that he would be formally charged. Wagner testified that Arebalo was slurring his words slightly but that he did not appear to need help walking during transportation to the jail.

POSTCONVICTION HEARING

¶14 At the postconviction hearing, Arebalo presented hospital reports that his BAC level at the time of the alleged attempted robbery was between

0.270% and 0.278% by weight.[4] He also presented the testimony of Martin, with whom Arebalo had been drinking at the Flat Iron Mall before the restaurant incident. Martin testified that he met Arebalo for a party at the Flat Iron Mall about 9:15 p.m. or 9:30 p.m. He further stated that when Arebalo arrived at the Flat Iron Mall, he was already "buzzed up a little," that he and Arebalo had a drinking contest and kept a tally of the number of beers drunk and had stopped after consuming twelve beers each. Martin testified that he and Arebalo then went into the restroom where Arebalo had a "couple shots of Tequila." Martin stated that Arebalo was drunk and he offered to walk Arebalo home, but that Arebalo declined the offer and said that he was going to get something to eat. The State introduced evidence that Martin had five prior adult convictions and a juvenile adjudication.

¶15 Arebalo was initially represented by State Public Defender Robert Peterson, who appeared with Arebalo at the preliminary examination hearing. Peterson testified that after that hearing he had sent an investigator to obtain releases from Arebalo so that any hospital reports concerning Arebalo's intoxication could be obtained. However, Peterson never obtained the releases because Arebalo had already retained private counsel.

¶16 Arebalo's wife, Amanda Arebalo, retained Attorney John Cabranes to represent her husband. Cabranes's initial interview notes mention Martin and indicate that Amanda could tell Cabranes where Martin lived. Cabranes testified that Arebalo denied having any BAC tests performed at the hospital. Cabranes

[4] The hospital report and blood test resulted from Arebalo's medical treatment after the altercation with Mendez. The report stated that Arebalo had a BAC level of 0.248% at 1:10 a.m., and the published Department of Transportation chart was used at the postconviction hearing to calculate Arebalo's BAC level at the time of the alleged attempted robbery.

admitted that it was possible his notes were inaccurate but that he did not "believe that [was] the case."

¶17 Cabranes testified that even if he had known about the hospital reports, he may not have sought to obtain them. He stated that he feared that a low BAC would be detrimental to an involuntary intoxication defense and that obtaining the hospital reports would be "too risky" because the prosecutor could then discover the test results and use them against Arebalo. Cabranes further opined that the hospital reports were unnecessary to establish the defense of mistake or involuntary intoxication. Cabranes stated that he believed it was essential for Arebalo to testify, even with his seven prior convictions, because the defenses of mistake and involuntary intoxication both address the intent of the defendant at the time of the crime.

¶18 Cabranes testified that he instructed an investigator not to interview Martin because Martin's testimony would be cumulative and "dangerous" in that it might allow the prosecution to exploit any differences between the testimony of Martin and Arebalo, and that "in [Cabranes's] experience," the testimony of two individuals can never be expected to be the same even if they witnessed the exact same event. Consequently, neither Cabranes nor a defense investigator ever interviewed Martin.

¶19 Arebalo related that he did not want to testify during the trial because his guilt would be prejudged because of his prior criminal record. He also testified that he wanted Cabranes to obtain the hospital records because he knew that he had been "real intoxicated" at the time of the incident and believed that the hospital records would help his defense of involuntary intoxication.

DISCUSSION

¶20 Arebalo argues that the case was not fully tried because the jury was not provided the results of his BAC test or presented with Martin's testimony as to Arebalo's intoxicated condition. This evidence, according to Arebalo, would have allowed his defense to be adequately presented without the necessity of his testifying and exposing his seven prior criminal convictions to the jury. Arebalo need not demonstrate the probability of a different result upon retrial to maintain a successful appeal, but must only show that the exclusion of this evidence sufficiently clouded a crucial issue so that it cannot be said with any certainty that he received a fair trial. *See* ***State v. Hicks***, 202 Wis. 2d 150, 153, 549 N.W.2d 435 (1996).

¶21 A new trial in the interests of justice may be ordered when the jury did not have an opportunity to hear material and significant evidence on a critical issue which resulted in unfair prejudice against the defendant. Not every criminal trial and conviction in which a jury must decide whether to believe the testimony of an accused or the accuser requires a new trial in the interests of justice. However, sometimes evidence that is crucial to the case may be wrongly prevented from reaching the jury, which thus prevents the controversy from being fully tried. *See* ***Wyss***, 124 Wis. 2d at 735. Such situations require a new trial in the interests of justice. *See* ***id***.

¶22 For example, in ***Garcia v. State***, 73 Wis. 2d 651, 245 N.W.2d 654 (1976), a new trial was required in the interests of justice where a defendant was convicted of discharging a firearm into a building as a party to a crime. *See* ***id.*** at 653. The key evidence supporting the charge was testimony from the building owner, who positively identified Garcia as the person who instructed the gunman

to shoot into her home. *See* ***id.*** Garcia denied the accusation and produced an alibi. *See* ***id.***

¶23 In a postconviction motion, Garcia offered as a witness the driver of the car involved in the shooting who claimed that Garcia was not present or in any way involved with the shooting. *See* ***id.*** Garcia had known of this testimony before trial but did not want to involve his friends and did not believe that he would be convicted of the charge. *See* ***id.*** The trial court refused to allow the witness to testify. *See* ***id.*** at 654. Our supreme court reversed and remanded the case for a new trial, stating that "[t]he administration of justice is and should be a search for the truth." ***Id.*** at 655. The court held that the witness's testimony directly called into question whether the controversy was fully tried. *See* ***id.*** In ordering a new trial, the court noted that the excluded testimony directly contradicted the testimony of the building owner and could have influenced the jury's verdict. *See* ***id.***

¶24 Similarly, in ***Cuyler*** the trial court excluded testimony offered by the defense to bolster the defendant's credibility. *See* ***Cuyler***, 110 Wis. 2d at 139. Cuyler was charged with second-degree sexual assault and two counts of enticing a child for immoral purposes with the trial being a credibility battle between the accuser and the accused. *See* ***id.*** at 134. Cuyler attempted to offer as witnesses two police officers who would have testified to his character for truthfulness, but the trial court ruled that such testimony was not admissible. *See* ***id.*** at 136. Our supreme court reversed in the interests of justice, holding that because credibility was a determinative issue, the exclusion of such evidence adversely affected Cuyler's defense and he should have been allowed to offer evidence as to his truthfulness. *See* ***id.*** at 141. The court further noted that "the jury cannot search

for truth if it cannot consider relevant and admissible evidence on a crucial issue in the case." ***Id.*** at 142.

¶25 Evidence need not be excluded by a judicial ruling in order to warrant a new trial in the interests of justice. Evidence excluded in some manner by the defense attorney may also form the basis for reversal in the interests of justice if such evidence goes to the heart of the case. *See* ***Logan***, 43 Wis. 2d at 137.

¶26 In ***Logan***, the defense attorney, confused about the difference between admissible corroboration testimony and procedurally inadmissible alibi testimony, withdrew a key witness who would have corroborated the defendant's version of events. *See* ***id.*** at 136. The court was therefore presented only with the conflicting testimony of the accuser and of Logan, and found Logan to be less credible. *See* ***id.*** Our supreme court concluded that even though it was defense counsel who had excluded the admissible corroboration evidence, the exclusion was prejudicial because the credibility of Logan was a major factor in the determination of guilt or innocence; thus, a new trial in the interests of justice was warranted. *See* ***id.*** at 136-37.

¶27 We conclude that the evidence excluded in this case, the BAC test results and Martin's testimony addressing Arebalo's intoxication, is as significant as the excluded evidence in the above cases. In a credibility battle involving a defendant with seven prior convictions, Arebalo's defense would have been enhanced both by the BAC test results and by the testimony of a third party who had been drinking with Arebalo prior to the alleged criminal incident and who could confirm that Arebalo was intoxicated.

¶28 The absence of the BAC test results was particularly prejudicial because the results addressed a crucial defense issue. At trial, the only evidence addressing Arebalo's intoxication was the testimony of bartender Larson and Arebalo. The BAC evidence was concrete evidence of the level of intoxication and directly contradicted the testimony of the three restaurant witnesses and the arresting police officer as to Arebalo's level of intoxication. The BAC evidence may well have influenced the jury concerning Arebalo's ability to form the requisite intent to attempt a robbery of the restaurant by use of force.

¶29 In addition, we note that the prosecution relied upon the absence of the BAC results and upon Arebalo's criminal record in pointing out that its witnesses did not notice that Arebalo slurred his speech, had difficulty in walking or that his breath smelled of alcohol. The prosecution told the jury in its rebuttal argument:

> You have Travis Mojeck and Michael Mendez who say this guy came after him. You have the defendant's words and only the defendant's words. No pictures of injuries. You know he was at St. Luke's Hospital. No medical records. You have his word, the word of somebody who was convicted seven times before….

In respect to the manner in which the prosecution argued this case to the jury, an analogy can be drawn to the holding in ***Hicks***, 202 Wis. 2d at 150. In ***Hicks***, the prosecution relied heavily on four pubic hairs found in the victim's apartment as evidence of the defendant's guilt. *See* ***id.*** at 153. After the trial, a DNA analysis of two of the four hairs was conducted and Hicks was excluded as the primary source of the DNA. *See* ***id.*** at 155-56. Given this new DNA evidence and the fact that the prosecution had repeatedly used the hair evidence as affirmative proof of Hicks's guilt throughout the trial, the supreme court ordered a new trial in the interests of justice, *see* ***id.*** at 172, concluding that:

> We do not live in a perfect world. In cases such as this, we must depend upon the jury to deliver justice. To maintain the integrity of our system of criminal justice, the jury must be afforded the opportunity to hear and evaluate such critical, relevant, and material evidence, or at the very least, not be presented with evidence on a critical issue that is later determined to be inconsistent with the facts. Only then can we say with confidence that justice has prevailed.

Id. at 171-72.

¶30 Here, the jury was not afforded the opportunity to consider the material and significant BAC evidence of Arebalo's level of intoxication. Further, the prosecution emphasized the lack of concrete evidence of intoxication and relied on the testimony of its witnesses who testified that they did not note any effects of intoxication. We cannot say with confidence that justice prevailed where evidence supporting Arebalo's mistake and intoxication defenses was excluded and the prosecutor argued that Arebalo's defense therefore lacked evidentiary support. In addition, while Martin's testimony alone is not as persuasive as the BAC evidence, his testimony would have provided the jury with the measure of alcohol that Arebalo had consumed and his condition during the period prior to the alleged criminal acts.

¶31 The State argues that a new trial is not necessary because there is ample evidence of Arebalo's intoxicated state in the record and that additional BAC and witness evidence is merely cumulative. This argument directly contradicts the prosecution's trial strategy in attacking the inadequacy of Arebalo's involuntary intoxication defense by citing to the lack of hospital records and questioning the reliability of the testimony of a witness with seven prior convictions. We are not persuaded by the State's argument here that the hospital records addressing Arebalo's level of intoxication are unnecessary and that his testimony was sufficient without further corroboration.

¶32 The State also contends that the BAC evidence is insufficient to establish the defense of involuntary intoxication even if presented to the jury. According to the State, Arebalo must prove that he was unable to form the intent to commit the crime due to his intoxication and the BAC test results are not probative of lack of intent and are, therefore, superfluous. In this contention, the State relies upon ***State v. Bailey***, 54 Wis. 2d 679, 196 N.W.2d 664 (1972).

¶33 ***Bailey*** was a first-degree murder case where the defendant had a BAC level of 0.23% shortly after his arrest on the night of the crime and he asserted an intoxication defense. *See* ***id.*** at 684. After his conviction, Bailey moved for a new trial and sought to introduce as newly discovered evidence a sworn affidavit in which a witness testified that Bailey was intoxicated at the time of the murder. *See* ***id.*** at 685. The court denied the motion, holding that although the affidavit was "highly probative of the fact that the defendant was 'very intoxicated,' it is not probative of the degree of intoxication that would negative the requisite intent to kill." ***Id.***

¶34 We are not persuaded by the State's reliance on ***Bailey***. First, in ***Bailey***, no evidence was presented at trial that the defendant was unable to form the intent to commit murder due to his intoxicated state. *See* ***id.*** Bailey himself testified that he knew what the consequences of his acts would be, and at no time did he indicate that he was unable to fully appreciate the events as they transpired on the night of the murder. *See* ***id.*** Here, Arebalo denied throughout the trial that he intended to rob the restaurant of its pizzas but thought that he had already paid for them. Therefore, if the BAC test results alone are not probative of the degree of intoxication that would negate the requisite intent to attempt a robbery by use of force, other evidence exists that is corroborated by the BAC results.

¶35 Second, unlike the ***Bailey*** affidavit, the Arebalo BAC test results are not "merely cumulative." In ***Bailey***, there was an abundance of evidence of intoxication but no evidence of Bailey's inability to form the intent to kill. Here, there is sufficient evidence of Arebalo's lack of intent to attempt a robbery by use of force but a dearth of evidence regarding his level of intoxication as emphasized in the prosecution's closing argument. Both the BAC test results and Martin's testimony serve to provide such evidence.

¶36 We reverse the order denying Arebalo's postconviction motion for a new trial and the judgment of conviction for attempted robbery by use of force. Because the case was not fully tried, we remand that charge for a new trial in the interests of justice pursuant to WIS. STAT. § 752.35.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.