COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2554-CR **Cir. Ct. No. 2008CF414**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELISEO CORONA VARGAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Eliseo Corona Vargas appeals a judgment, entered upon a jury's verdict, convicting him of second-degree sexual assault by use of force, burglary and felony bail jumping. Vargas also challenges the order denying his motion for postconviction relief. Vargas argues his trial counsel was

ineffective by failing to pursue a voluntary intoxication defense. Vargas alternatively urges this court to grant a new trial in the interest of justice. We reject Vargas's arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Vargas with second-degree sexual assault by use of force, burglary and felony bail jumping, arising from allegations that he forced entry into Kerry K.'s ground floor apartment through a screened window and sexually assaulted her. A jury found Vargas guilty of the crimes charged and the court ultimately imposed concurrent sentences resulting in a total of fifteen years' initial confinement followed by ten years' extended supervision. Vargas filed a postconviction motion alleging his trial counsel was ineffective by failing to pursue a voluntary intoxication defense. After a ***Machner***[1] hearing, the motion was denied. This appeal follows.

DISCUSSION

¶3 To succeed on a claim of ineffective assistance of counsel, a defendant must prove: (1) his or her counsel's performance was deficient; and (2) the deficient performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove counsel's representation was deficient, a defendant must show counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. However, there is "a strong presumption that counsel acted reasonably within professional

[1] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Prejudice is proven if the defendant shows "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. If a defendant fails to establish either prong of the ***Strickland*** test, we need not determine whether the other prong was satisfied. ***Id.*** at 697.

¶4 An ineffective assistance of counsel claim is a mixed question of law and fact. ***Id.*** at 698. We will accept the circuit court's findings of fact unless they are clearly erroneous; however, the determination of whether counsel's performance was deficient and whether it prejudiced the defendant is reviewed independently. ***Johnson***, 153 Wis. 2d at 128.

¶5 Vargas contends his trial counsel was ineffective by failing to pursue a voluntary intoxication defense. We are not persuaded. Voluntary intoxication may be a defense only if it negates a state of mind essential to a crime. WIS. STAT. § 939.42(2) (2009-10).[2] When specific intent is an element of a crime, there is a defense if the defendant was too intoxicated to form the requisite intent. ***State v. Strege***, 116 Wis. 2d 477, 482, 343 N.W.2d 100 (1984). The defendant, however, has the burden to produce enough evidence to make intoxication an issue in the case. ***Id.*** at 485-86. Our supreme court has clarified:

> To be relieved from responsibility for criminal acts it is not enough for a defendant to establish that he was under the influence of intoxicating beverages. He must establish that degree of intoxication that means he was utterly incapable of forming the intent requisite to the commission of the crime charged.

[2] All references to the Wisconsin Statutes are to the 2009-10 version.

State v. Guiden, 46 Wis. 2d 328, 331, 174 N.W.2d 488 (1970). "[T]he degree of a defendant's intoxication may be determined from his conduct, his own testimony regarding his condition, and the testimony of witnesses." ***Larson v. State***, 86 Wis. 2d 187, 195, 271 N.W.2d 647 (1978). A "defendant's actions speak at least as loud as his words." ***Guiden***, 46 Wis. 2d at 332.

¶6 Here, Vargas emphasizes that his interview with police was punctuated with assertions that he was too drunk to remember certain details about the incident. While an inability to remember events that occurred when a person was drinking may be evidence relevant to an intoxication defense, a mere inability to remember does not establish the defense. As the State aptly points out, the question is not whether the defendant was too drunk to remember what he did but, rather, whether he was too drunk to intend what he did. Memory and intent are two different concepts. In any event, while Vargas maintained an inability to remember some of the details of the sexual assault, he admitted recalling other details. If a defendant has vivid and detailed memories of the crime, this weighs against a voluntary intoxication defense. *See* ***State v. Nash***, 123 Wis. 2d 154, 166, 366 N.W.2d 146 (Ct. App. 1985).

¶7 In Vargas's signed statement, introduced as an exhibit at trial, he said he remembered walking into the parking lot of his apartment building and noticing an open window in an adjoining building. Vargas remembered thinking he knew the woman who lived in the apartment. He indicated: "I don't remember going [to] the apartment, but I remember going—confused thinking of another woman." Vargas also stated he went into the apartment wanting to have sex but it "went wrong." Vargas remembered that he grabbed the woman and she bit him on the lip when he tried to kiss her. Vargas also remembered that the woman did not say anything when he "grabbed her vagina." Vargas further stated: "She stopped

me, so I stopped." Vargas remembered that he then left the apartment through the door, "not the window." Vargas's partial recollection weighs against an involuntary intoxication defense.

¶8 Moreover, the physical facts and witness testimony do not provide a basis for concluding Vargas lacked the ability to form intent. Kerry testified that Vargas came into her apartment through a screened window, destroying the screen on his way in. Vargas lay down next to Kerry, rolled her on her back, pulled her nightshirt up over her face, kissed her mouth and breasts, reached down to try to get an erection, pulled her legs open and kissed her vagina. Kerry was ultimately able to push the button on her Lifeline Alert necklace, and when the Lifeline operator indicated she was calling the police, Vargas fled through the apartment door.

¶9 Given Vargas's recollection of events, the manner of his entry into the apartment, the series of sexual acts performed, and his hasty departure once he knew police were on their way, Vargas cannot establish that his alcohol consumption rendered him utterly incapable of forming the intent requisite to the commission of the crimes charged. Because the evidence did not warrant a voluntary intoxication defense instruction, counsel was not deficient for failing to pursue that defense. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel not ineffective for failing to raise meritless claim).

¶10 Alternatively, Vargas seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d

133, 141, 327 N.W.2d 662 (1983). Here, Vargas asserts the real controversy was whether he "was so drunk on the night in question that he did not know what he was doing when he entered the victim's apartment and assaulted her." As noted above, Vargas was not entitled to a voluntary intoxication defense. Therefore, we decline to exercise our discretionary authority under § 752.35 to grant Vargas a new trial.

By the *Court*.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.