COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP997-CR **Cir. Ct. No. 2011CF153**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PENNY A. DEPPIESSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Penny A. Deppiesse appeals from a judgment of conviction entered after a jury found her guilty of operating while under the influence of a controlled substance (OWI), as a fourth offense within five years, and misdemeanor bail jumping. Deppiesse argues that the trial court erred by

precluding her from raising a statutory intoxication defense and in improperly instructing the jury on the elements of OWI by referring to the various controlled substances in her system in both the conjunctive and the disjunctive. We conclude that the trial court properly denied Deppiesse's request for an intoxication defense instruction and that Deppiesse has forfeited appellate review of the allegedly erroneous OWI jury instruction.

¶2 Deppiesse was driving her car in the right lane of a highway when she began to drift into the left lane, nearly striking another vehicle driven by off-duty police officer Eric Ranthum. As the vehicles were parallel, Ranthum saw Deppiesse start to deviate into his lane, and he accelerated to avoid a collision. In his rear view mirror he saw Deppiesse swing into the left lane, nearly hitting the back of his car. When the cars resumed their parallel position, Deppiesse again began drifting into the left lane causing Ranthum to slam on his brakes. Deppiesse swung into the left lane, nearly hitting the front of Ranthum's car, and quickly corrected. Ranthum followed Deppiesse and saw her deviate to the right and strike the curb, correct, deviate to the left, correct, and then strike the right curb a second time. She moved into a right turn lane and again hit the curb. Without signaling, she turned into a gas station and parked diagonally to a gas pump, with her bumper touching the gas pump median.

¶3 Ranthum called for backup, and Officer Patrick Kosmosky responded and approached Deppiesse's car. She accelerated and then stopped quickly, causing her tires to squeal. Kosmosky tapped on her window and Deppiesse turned her head in an "exaggeratingly slow" manner. She had a "completely blank look on her face" as if dazed. When Kosmosky explained why he was there, Deppiesse stared blankly at him and did not respond. In retrieving her identification, Deppiesse continued to move slowly and dropped the ID in her

console. When she exited the car, she was unsteady on her feet and looked dazed. She was not able to follow the directions for or properly perform field sobriety tests, and when she nearly fell, Kosmosky discontinued the tests. Kosmosky did not smell any alcohol and asked Deppiesse twice if she had taken any medication. The second time, she stated she had taken two Ambien[1] and a Tylenol. Deppiesse was arrested and taken to the hospital for a blood draw. The laboratory test results indicated the presence of the following substances: Hydrocodone, Codeine, Lorazepam, Topiramate, Promethazine, and Zolpidem. No alcohol was detected in her blood.

¶4 Prior to trial, Deppiesse requested a jury instruction on the defense of "involuntary intoxication or drugged condition," proposing that the jury be instructed: "An intoxicated and/or drugged condition is a defense to criminal liability if it is involuntarily produced and makes the person unable to tell whether his acts are right or wrong at the time the acts are committed." On the morning of trial, Deppiesse argued:

> The case law states clearly that the defense of involuntary intoxication is available even in cases where the defendant is forewarned about the intoxicating effects of a prescription drug so long as the—is unable to distinguish right from wrong.
>
> In this case, our defense theory is that Penny took her medication as prescribed several hours before this incident occurred. The lab tests are clear that there were just trace amounts of her medication in her system; not that she took it directly before getting into the vehicle.
>
> Further, we are not arguing that she didn't know the difference between whether it was right or wrong to drive.

[1] Ambien is a brand name for the drug Zolpidem, which is a sleeping pill used to treat insomnia.

> We are arguing that when she got behind that wheel, she did not know that her driving would be impaired as a result of her medication. She didn't know that it was wrong for her to drive because her driving would be impaired because she followed her doctor's prescription. And this is what caused her impaired driving.

¶5 The State objected, arguing that the proposed defense requires that a person's intoxication must render him or her incapable of distinguishing between right and wrong, and does not apply where the person is asserting that when she got behind the wheel, she did not know her driving would be impaired. The trial court indicated that though it tended to agree with the State's position, Deppiesse would be permitted to present her evidence. After hearing the evidence at trial, the court would determine whether an intoxication defense instruction was warranted.

¶6 At trial, Laura Liddicoat, a supervisor at the Wisconsin State Laboratory of Hygiene, testified about Deppiesse's blood test results, including the nature and side effects of the substances present. She testified that the amount of codeine detected indicated a recent dose, the Lorazepam result indicated either a recent dose or that Deppiesse had taken more than prescribed, and the Zolpidem result indicated that it was not being taken as directed.

¶7 Liddicoat testified that though the drugs found were within therapeutic ranges, this was irrelevant to the manifestation of their side effects. She stated that "many times, therapeutic amounts of these types of drugs can be very impairing and affect severely a person's ability to safely operate a motor vehicle," and explained that "[t]he bottom line is therapeutic amounts of drugs can be impairing because this isn't meant to be a safe amount of drug for driving. It's meant to be a guide for what is therapeutic when you take it at the normal dosing amounts." Liddicoat testified that when the types of drugs found in Deppiesse's system are taken together, there may be a synergistic effect which enhances the

side effects of one or all of the drugs. When presented with a hypothetical describing Deppiesse's observed behaviors, Liddicoat opined that they were consistent with the type of impairment that occurs with the drug concentrations revealed in Deppiesse's blood sample.

¶8 Deppiesse testified that she always took her medication as prescribed and that she had experienced side effects in the past. She testified that on the night she was arrested, she was very upset and had been crying. She explained that as she was driving to the gas station to get cigarettes, she dropped her cell phone and swerved while attempting to retrieve it. She explained that she was unable to perform the field sobriety tests because she was in pain and anxious, has poor balance in general, was wearing an electronic bracelet on her ankle, and that her anxiety was exacerbated by the police presence. She testified that her ability to drive was not impaired and she knew it was not impaired.

¶9 At the close of the evidence, the trial court ruled that an involuntary intoxication instruction would be inappropriate because "there was nothing in this record to support giving that instruction." The jury found Deppiesse guilty of both charges.

The trial court properly denied Deppiesse's request for a jury instruction on the statutory intoxication defense.

¶10 To be clear, WIS. STAT. § 939.42 (2011-12)[2] provides for both an involuntary and a voluntary intoxication defense. *See, e.g.*, ***State v. Gardner***, 230

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Wis. 2d 32, 37-38, 601 N.W.2d 670 (Ct. App. 1999). In the trial court, Deppiesse sought to assert the statutory defense of involuntary intoxication under § 939.42(1), which provides a defense when a person's intoxication is involuntarily produced and "renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed."[3] The involuntary intoxication defense under subsec. (1), is coextensive with the mental responsibility test set forth in WIS. STAT. § 971.15(1), which governs the affirmative defense of not guilty by reason of mental disease or defect. ***Gardner***, 230 Wis. 2d at 38.

¶11 On appeal, however, Deppiesse contends that she was entitled to an instruction under WIS. STAT. § 939.42(2), which is commonly referred to as the voluntary intoxication defense, and may be invoked where a person's intoxicated state "[n]egatives the existence of a state of mind essential to the crime." Ultimately, Deppiesse conflates subsecs. (1) and (2) and raises an appellate argument not presented to the trial court.[4] Regardless, we conclude that Deppiesse was not entitled to an instruction on either of the statutory intoxication defenses.

[3] The effects of prescription drugs may form the basis for an involuntary intoxication defense where they are taken according to prescription. ***State v. Gardner***, 230 Wis. 2d 32, 40-41, 601 N.W.2d 670 (Ct. App. 1999) ("Intoxication resulting from such compliance with a physician's advice should not be deemed voluntary just because the patient is aware of potential adverse side effects."). However, the defense is unavailable where a person knowingly takes more than the prescribed dose, mixes a prescription drug with alcohol or other controlled substances, or voluntarily undertakes an activity incompatible with the drug's side effects. ***Id***. at 42.

[4] In her opening appellate brief, Deppiesse incorrectly states that "[t]he defense asserted in this case [in the trial court] was based upon 939.42(2)." On appeal, she contends: "The Statute presents two separate intoxication defenses. The first one is the one [that] follows the insanity defense where the defendant is unable to distinguish right from wrong. The second is the one that negates the existence of a state of mind *as is the case here* …." (Emphasis added.)

¶12 To support a requested jury instruction on the statutory defense of intoxication, the defendant has the initial burden of producing evidence that is "credible and sufficient to warrant the jury's consideration of the issue as to whether the defendant was intoxicated to the extent it materially affected his or her ability to form the requisite intent," or, with an involuntary intoxication defense, that it "affected his [or her] ability to distinguish right from wrong." ***Gardner***, 230 Wis. 2d at 44-45 (quoting ***State v. Strege***, 116 Wis. 2d 477, 485-86, 343 N.W.2d 100). "[B]efore the matter can be considered by the jury, the court must make a preliminary determination of the sufficiency of the evidence to support a jury finding on the issue." ***Strege,*** 116 Wis. 2d at 482. The degree of a defendant's intoxication may be determined from his or her conduct, his or her own testimony regarding her condition, and the testimony of witnesses. ***Larson v. State***, 86 Wis. 2d 187, 195, 271 N.W.2d 647 (1978).

¶13 Because Deppiesse failed to present any evidence that she was so intoxicated as to be unable to distinguish right from wrong, the trial court properly denied her request for an involuntary intoxication jury instruction under WIS. STAT. § 939.42(1). *See* ***Gardner***, 230 Wis. 2d at 44. No expert or lay witness discussed or even mentioned this particular incapacity.[5] To the contrary, Deppiesse testified that she was not impaired at the time of driving. She testified that her erratic driving occurred because she dropped and was attempting to retrieve her cell phone, and that she failed the field sobriety tests because she was

[5] Deppiesse argues that Liddicoat's testimony about the drugs' potential side effects was sufficient to raise a jury question as to Deppiesse's mental capacity. We are not persuaded. Liddicoat did not testify about the side effects Deppiesse was actually suffering, and Deppiesse denied being impaired altogether. Further, Liddicoat never opined that the drugs' side effects either separately or in combination were likely to render a person incapable of distinguishing right from wrong.

anxious, in pain, hobbled by a bracelet, and generally had poor balance. She recalled being upset when the officer approached her car because she "felt harassed, mistreated, pinpointed." Deppiesse's clear recollection along with her testimony that she was not impaired render the involuntary intoxication defense unsupportable. *See* ***Larson***, 86 Wis. 2d at 195-96 (defendant's "remarkable recollection" of the incident in question undercut intoxication defense).

¶14 Similarly, we reject Deppiesse's argument that she was entitled to a jury instruction on the voluntary intoxication defense under WIS. STAT. § 939.42(2). First, in the trial court, Deppiesse never requested, argued, or even mentioned a defense based on the theory that her intoxication by prescription medication negated the existence of a state of mind essential to the crime of OWI. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (issues not presented to the trial court will not be considered for the first time on appeal). Second, as argued by the State and left unaddressed by Deppiesse, the crime of OWI does not contain a state of mind element to negate. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (propositions are deemed admitted when not refuted by opposing party). Third, the trial evidence did not support an instruction on this defense.[6] Evidence that a defendant was intoxicated is not enough to support a jury finding of lack of intent due to intoxication. ***Strege***, 116 Wis. 2d at 483.

> The intoxicated or drugged condition to which the statute refers is not the condition of alcohol-induced incandescence or being well-lit that lowers the threshold of inhibitions or stirs the impulse to criminal adventures. It is that degree of complete [intoxication] which makes a

[6] We address the lack of supporting evidence because though not argued on appeal, the offense of bail jumping has an "intent" element.

> person incapable of forming intent to perform an act or commit a crime.

Larson, 86 Wis. 2d at 195 (citations omitted). Deppiesse was able to recall and explain the events leading up to, during, and after the traffic stop. She recounted having seen an officer in the gas station before she got back into her car, and recalled that he asked her to come back. She remembered feeling "harassed" by the traffic stop: "Like usual in this area, it's a small town, you do anything wrong, they know who you are." She explained that when asked to perform field sobriety tests, she was preoccupied about being able to get back home to her thirteen-year-old son. Here again, Deppiesse's ability to recall events and disclaimer of any impairment preclude a jury instruction on voluntary intoxication. *See* ***id.*** at 195-96 (trial court properly denied jury instruction where defendant provided a "detailed statement of the events" surrounding the incident and he, himself, testified that he was not completely intoxicated).

By failing to object to the substantive OWI jury instruction at trial, Deppiesse forfeited her claim that the instruction deprived her of the right to a unanimous verdict.

¶15 Deppiesse next contends that in light of the evidence presented at trial, the written OWI jury instruction provided to the jury lacked sufficient clarity to ensure a unanimous verdict.[7] In pertinent part, the written instruction directed the jury that in order to convict Deppiesse, it had to find the following elements beyond a reasonable doubt:

[7] The language Deppiesse complains of was not actually read to the jury and, when asked, trial counsel stated she had no objection to the jury instructions as read. Rather, the language at issue appears in the written instructions provided to the jury for deliberation.

> The defendant was under the influence of ZOLPIDEM, HYDROCODONE, CODEINE AND LORAZEPAM at the time the defendant drove a motor vehicle.
>
> ZOLPIDEM, HYDROCODONE, CODEINE AND LORAZEPAM are controlled substances.
>
> "Under the influence" means that the defendant's ability to drive a vehicle was impaired because of consumption of a controlled substance.
>
> Not every person who has consumed ZOLPIDEM, HYDROCODONE, CODEINE or LORAZEPAM is "under the influence as that term is used here. What must be established is that the person has consumed a sufficient amount [of] ZOLPIDEM, HYDROCODONE, CODEINE and/or LORAZEPAM to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

¶16 Deppiesse challenges the jury instruction on the ground that it referred to the influence of various controlled substances in both the conjunctive and disjunctive. She argues that by modifying the list of drugs found in her system with the words "and/or" in the explanation of "under the influence," she was deprived of her right to a unanimous verdict because the jurors were not required to agree on which substance or combination of substances were consumed or impairing.

¶17 We conclude that Deppiesse has forfeited review of this claim because she failed to make a contemporaneous objection to the instructions in the trial court. *See* WIS. STAT. § 805.13(3) (failure to object at the jury instruction conference constitutes a waiver of any error in the proposed instructions or verdict); ***State v. Cockrell***, 2007 WI App 217, ¶36, 306 Wis. 2d 52, 741 N.W.2d 267 (the purpose of the rule in § 805.13(3) "is to afford the opposing party and the trial court an opportunity to correct the error and to afford appellate review of the grounds for the objection" (citation omitted)). In her reply brief, Deppiesse

concedes forfeiture but asks that we exercise our discretion to order a new trial in the interests of justice, pursuant to WIS. STAT. § 752.35. We decline to address a claim raised for the first time in an appellant's reply brief, especially where it was not addressed in the trial court. ***State v. Lindgren***, 2004 WI App 159, ¶28, 275 Wis. 2d 851, 687 N.W.2d 60 (citing ***State v. Marquardt***, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188).

By the Court.—Judgment affirmed.

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