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State of Wisconsin
Court of Appeals
District 2
Appeal No. 2019AP000886-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Chidiebiele Praises Ozodi,

Defendant-Appellant.

On appeal from a judgment of the Walworth County Circuit Court, The Honorable Kristine E. Drettwan, presiding

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Defendant-Appellant's Brief and Appendix

Law Offices of Jeffrey W. Jensen
111 E. Wisconsin Avenue, Suite 1925
Milwaukee, WI 53202-4825

414-671-9484

Attorneys for the Appellant

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Statement on Oral Argument and Publication

The issues presented by this appeal is new and unique, and it is not controlled by well-settled law. Therefore, the appellant recommends both oral argument and publication.

Statement of the Issues

Whether the circuit court erroneously exercised its discretion, and denied Ozodi his constitutional right to present a defense, were the judge instructed the jury that, “a defendant's voluntary intoxication is not by itself a defense.”

Answered by the circuit court: No. This is a correct statement of the law, and it does not deny the defendant his constitutional right to present a defense.

Summary of the Argument

Under the evidence presented at trial, it is uncontroverted that, at the time of the offenses, Ozodi was severely intoxicated on L.S.D. and marijuana. Moreover, according to an expert witness, the effect of L.S.D. is to distort reality for the person who is under the influence. As a matter of objective fact, this evidence is clearly relevant to the question of whether Ozodi formed the intent to actually have sexual contact with the

alleged victim, and whether he knew that she did not consent.

Based on the fact that, in 2014, the legislature removed voluntary intoxication as a statutory affirmative defense, the state moved the court in this case to instruct the jury that voluntary intoxication *is not a defense to the charges*. The court partially granted the state's request. The court told the jury that, "A defendant's voluntary intoxication is not by itself a defense."

This is not a correct statement of the law, and it denied Ozodi his constitutional right to present a defense.

The removal of the voluntary intoxication statutory affirmative defense means merely that such evidence is not subject to the affirmative defense procedure in criminal cases. That is, once the defendant meets his burden of persuasion on an affirmative defense, the state is then required to disprove the facts beyond a reasonable doubt.

It does not mean, though, as the state asserts, that voluntary intoxication is not relevant evidence on the issue of intent. Thus, the court's instruction is not a correct statement of the law.

Moreover, the court's instruction that the jury could only consider the voluntary intoxication evidence insofar as it was relevant to the credibility of the witnesses, but not as to whether the defendant committed the crimes charged, denied Ozodi his constitutional right to present a defense.

Statement of the Case

I. Procedural History

The defendant-appellant, Chidiebele Ozodi (hereinafter "Ozodi"), was charged in a criminal complaint filed in Walworth County on October 24, 2016 with attempted second degree sexual assault, operating a motor vehicle without owner's consent, and disorderly conduct. (R:2) The charges arose out of an incident that occurred on October 4, 2016 in the City of Whitewater. In a nutshell, the complaint alleged that Ozodi was severely intoxicated on L.S.D. and, perhaps, other substances. He was observed walking, naked, through the U.W.-Whitewater campus by another young woman, Andrea[1], who offered him some shorts and a T-shirt to wear. After a brief conversation, according to the complaint, Ozodi said something to the effect that he was going to have sex with Andrea, and he pushed her to the ground. At that point another man knocked Ozodi off of Andrea. The complaint also alleged that Ozodi drove a friend's car without consent, and that he was vulgar and disorderly at the hospital.

Ozodi waived his preliminary hearing. (R:67-3) The state filed an information that mirrored the charges in the criminal complaint. Ozodi entered not guilty pleas to all three charges.

[1] This is a pseudonym as required by § 809.86(4), Stats.

(R:68-2)

There were no substantive pretrial motions.

The case proceeded to jury trial beginning on January 29, 2019.

Ozodi testified at trial. He told the jury that he had little recollection of any of the events alleged in the complaint.

The court conducted several jury instruction conferences. The state requested that the court read an instruction that, in part, told the jury that, “Voluntary intoxication of any witness may be relevant evidence and may have bearing on the credibility of that witness. However, a defendant’s voluntary intoxication is not a defense and cannot be used to show that the defendant lacked the necessary knowledge to commit the alleged offense(s) or that the defendant did not intend to commit the alleged offense(s).” (R:18) The defense objected, and argued that Ozodi should be able to argue to the jury that-- although it is not a complete affirmative defense-- voluntary intoxication is relevant evidence as to whether or not he intended to commit the crime, and whether he knew that Andrea did not consent to having sex. (R:72-223; R:73-5, 6))

The court ruled that it would give an abridged version of the instruction that the state requested. Specifically, the judge said, “I'm going to read the instruction as it's written up until that point, and it will read as follows: however, a defendant's voluntary intoxication is not by itself a defense period.“ (R73-12,

13)

Thus, the final instruction to the jury was as follows: "Evidence has been presented which if believed by you tends to show that the defendant was voluntarily intoxicated at the time of the alleged offenses. Voluntary intoxication of any witness may be relevant evidence and may have bearing on the credibility of that witness. However, a defendant's voluntary intoxication is not by itself a defense." (R:73-117)

The jury returned verdicts finding Ozodi guilty of all charges. (R:73-154)

The court sentenced Ozodi to five years probation, with six months in jail as a condition. (R:74-19; R:50).

Ozodi timely filed a notice of intent to pursue postconviction relief. He then filed a postconviction motion alleging that Wis. JI-140 misstated the law concerning the meaning of "reasonable doubt." (R:59) The court denied that motion on April 30, 2019. (R:98)[2]

Ozodi now appeals to the Wisconsin Court of Appeals.

II. Factual Background

According to Ozodi's friend Arthur[3], one afternoon they took acid (L.S.D.) and smoked marijuana at Arthur's apartment.

[2] Due to the Supreme Court's decision in *State v. Trammell*, 382 Wis. 2d 832, 917 N.W.2d 233 (2018), Ozodi does not raise this issue on appeal.

[3] This is also a pseudonym since, arguably, Arthur is a victim of the charge of operating auto without owner's consent.

(R:72-205) Athur was having a bad trip so he went into the bedroom with his girlfriend. (R:72-206)

Despite having his own car outside the apartment, Ozodi apparently then took Arthur's car and drove off (R:72-206). Arthur began receiving text messages from various people to the effect that Ozodi had crashed Arthur's car into a tree in the UW-Whitewater parking lot. (R:72-206) Ozodi testified that he had no recollection of taking the car or crashing it. (R:73-68)

Witnesses said that, after the crash, Ozodi got out of the car, and was approached by Andrea, who offered him some shorts and a t-shirt. (R:72-173) According to Andrea, it was pretty apparent that Ozodi was not in a normal state of mind. He was very agitated and very paranoid. (R:72-174) Ozodi put the clothes on, and then he told Andrea that he was "tripping on acid" and he asked her if she was God. (R:72-175). He told her he was going to have sex with her, he pushed her to the ground, and then he tried to get on top of her. *Id.* A male rugby player pushed him off. (R:72-175) Ozodi then ran off.

Significantly, Andrea testified that Ozodi never actually had contact with any of her intimate parts. (R:72-18) Ozodi was still wearing the clothes he had put on. *Id.*

Ozodi was later found by officers masturbating in the middle of a sports field at UW-Whitewater. (R:72-125)

The state presented evidence that Ozodi's blood was positive for THC, the active ingredient in marijuana, but that it is

not possible to test for LSD. (R:73-20, 22, 23) Concerning the effects of LSD, an expert witness from the State Laboratory of Hygiene, Stephanie Weber, told the jury that, “As far as psychological impact. . . essentially this category of drugs will alter a person's perception of reality. So this can be a perception of time. It can be a perception of what's actually happening around you. So after ingesting LSD someone may sense that time is moving much slower than it actually is or it could speed up . . . This category of drugs can also have impact on what people see. So it can cause visual hallucinations in that a blank wall to them may have objects moving on it or objects might be morphing into each other whereas in reality they're not doing that, obviously. So this drug basically will completely change someone's perception of reality and what is happening around them.” (R:73-24, 25)

Argument

I. The court erroneously exercised its discretion in instructing the jury that voluntary intoxication is not a defense to the charge. This is an incorrect statement of the law, and it denied Ozodi his constitutional right to present a defense.

Under the evidence presented at trial, it is uncontroverted that, at the time of the offenses, Ozodi was severely intoxicated on L.S.D. and marijuana. Moreover, according to an expert

witness, the effect of L.S.D. is to distort reality for the person who is under the influence.

Based on the fact that, in 2014, the legislature removed voluntary intoxication as a statutory affirmative defense, the state moved the court in this case to instruct the jury that voluntary intoxication *is not a defense to the charges*. The court partially granted the state's request. The court told the jury that, "A defendant's voluntary intoxication is not by itself a defense."

This is not a correct statement of the law, and it denied Ozodi his constitutional right to present a defense.

The removal of the voluntary intoxication statutory affirmative defense merely means that such evidence is not subject to the affirmative defense procedure in criminal cases. That is, once the defendant meets his burden of persuasion on an affirmative defense, the state is then required to disprove the facts beyond a reasonable doubt.

It does not mean, though, as the state asserts, that voluntary intoxication is not relevant evidence on the issue of intent or knowledge. Thus, the court's instruction is not a correct statement of the law.

Moreover, the court's instruction that the jury could only consider the voluntary intoxication evidence insofar as it was relevant to credibility of the witnesses, but not as to whether the defendant committed the crimes charged, denied Ozodi his

constitutional right to present a defense.

A. Standard of Appellate Review

"A trial court has broad discretion in deciding whether to give a particular jury instruction, and the court must exercise its discretion to 'fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence. [internal citation omitted] However, we will independently review whether a jury instruction is appropriate under the specific facts of a given case." *State v. Jensen*, 2007 WI App 256, ¶ 8, 306 Wis. 2d 572, 581, 743 N.W.2d 468, 472–73.

Here, Ozodi's contention is that the circuit court's instruction to the jury concerning voluntary intoxication also denied him his constitutional right to present a defense. "[W]hether a defendant was denied the constitutional right to present a defense . . . is a question of constitutional fact, which we review *de novo.*" *Jensen,* 306 Wis. 2d at 581, 743 N.W.2d at 473

B. The circuit court's instruction concerning voluntary intoxication is not a correct statement of the law, and it denied Ozodi his constitutional right to present a defense.

Formerly, voluntary intoxication was a complete

affirmative defense where the defendant was able to present sufficient evidence to suggest that he was so thoroughly intoxicated that he was incapable of forming the intent to perform an act or commit a crime. *State v. Strege,* 116 Wis. 2d 477, 483, 343 N.W.2d 100, 104 (1984)

However, the legislature eliminated the statutory voluntary intoxication affirmative defense effective April 18, 2014. *See* 2013 Wis. Act 307.

At the outset, it is important to discuss the procedural implications of a statutory affirmative defense in a criminal case. Concerning a statutory affirmative defense, the defendant has a "burden of persuasion" to present sufficient evidence to raise the affirmative defense as an issue. If he succeeds, then the burden of proof switches to the state to disprove, beyond a reasonable doubt, those facts. *See,* § 939.70, Stats.; *see, generally, State v. Saternus,* 127 Wis. 2d 460, 479, 381 N.W.2d 290, 298 (1986)

Thus, when the legislature eliminated voluntary intoxication as a statutory affirmative defense, it meant merely that, where the defendant presented evidence of voluntary intoxication, the state was not then required to disprove those facts beyond a reasonable doubt. The repeal of the statute--contrary to what the state seems to believe-- does not mean that evidence of the defendant's voluntary intoxication is irrelevant to the issue of whether the defendant intended to

commit the crime in question. Really, the state's instruction goes even further. The jury was told that it *may not* consider voluntary intoxication as it bears upon Ozodi's intent.

This, of course, is not a correct statement of the law.

Additionally, the instruction utterly denied Ozodi his constitutional right to present a defense.

It is well-settled that a defendant in a criminal case has the constitutional right to present a defense. "We have recognized, as the defendant asserts, that the confrontation and compulsory process clauses of the Sixth Amendment of the U.S. Constitution and Article I, Section 7 of the Wisconsin Constitution "grant defendants a constitutional right to present evidence." Our court has stated that "[t]he rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial." The confrontation clause grants defendants "the right to 'effective' cross-examination of witnesses whose testimony is adverse,"[10] and the compulsory process clause "grants defendants the right to admit favorable testimony." *State v. St. George,* 2002 WI 50, ¶ 14, 252 Wis. 2d 499, 512–13, 643 N.W.2d 777, 781–82

The only limitation is that, "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence." *State v. Walker,* 154 Wis.2d 158, 192, 453 N.W.2d

127 (1990) When evidence is irrelevant or not offered for a proper purpose, the exclusion of that evidence does not violate a defendant's constitutional right to present a defense.

Here, the court's instruction concerning voluntary intoxication, in effect, excluded that evidence as it related to the issue of knowledge and intent. The court told the jury that the evidence could only be considered insofar as it relates to the credibility of a witness. This plainly violates Ozodi's right to present a defense.

Conclusion

For these reasons, it is respectfully requested that the court of appeals reverse Ozodi's conviction, and remand the matter for a new trial with instructions that the court not instruct the jury that voluntary intoxication is not a defense.

Dated at Milwaukee, Wisconsin, this _____ day of July, 2019.

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

111 E. Wisconsin Avenue
Suite 1925
Milwaukee, WI 53202-4825

414.671.9484

Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2988 words.

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Dated this _____ day of July, 2019:

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Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No.

State of Wisconsin,

Plaintiff-Respondent,

v.

John Doe,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Excerpt of transcript concerning the court's ruling on the proposed instruction
B. Excerpt of the transcript concerning the instruction given to the jury

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of

fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of July, 2019.

_____

Jeffrey W. Jensen