STATE OF WISCONSIN

IN SUPREME COURT

No. 2019AP886-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHIDIEBELE PRAISES OZODI,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The State of Wisconsin, Plaintiff-Respondent, opposes Defendant-Appellant-Petitioner Chidiebele Praises Ozodi's petition for review. Ozodi has not demonstrated any "special and important reasons" why this Court should grant his petition. *See* Wis. Stat. (Rule) § 809.62(1r).

Ozodi asserts that this Court needs to take his case to develop the law addressing the effect of the Legislature's repeal of the voluntary intoxication defense. (Ozodi's Pet. 10–13.) Specifically, he contends that this Court should hold that, post-repeal, evidence of a defendant's intoxication is still relevant to whether the defendant can form the intent to commit a crime. (Ozodi's Pet. 10–12.)

This Court should decline Ozodi's request for review on this ground because this Court's decision on this issue, whether or not it agreed with Ozodi's position, would have no effect on this case. The circuit court's jury instructions allowed the jury to consider evidence of Ozodi's intoxication as it bore on his intent. Ozodi thus got exactly what he wanted from the circuit court, and even if this Court agreed with Ozodi's argument, it could not grant him the new trial that he seeks.

Ozodi also says that this Court should grant review to determine the "due process implications" of the Legislature's repeal of the voluntary intoxication defense. (Ozodi's Pet. 11, 13.) This Court should deny that request as well. Ozodi did not raise this argument in the circuit court or in the court of appeals. And his petition does not develop an argument to support his claim of a due process violation. Ozodi thus has not demonstrated that this is a significant constitutional issue for this Court to review. *See* Wis. Stat. (Rule) § 809.62(1r)(a).

STATEMENT OF THE CASE

A jury convicted Ozodi of attempted second-degree sexual assault, operating a motor vehicle without the owner's consent, and disorderly conduct. (R. 54.) The circuit court placed him on probation. (R. 54.)

Ozodi has never disputed that he committed the actions that led to the charges. In October 2016, Ozodi and a friend, both students at UW-Whitewater, took LSD. (R. 72:206; 73:62–64.) Ozodi later drove his friend's mother's car, crashed into a tree, and fled the accident while naked. (R. 72:118–19, 124–26, 198–200, 210–12.) Ozodi ran to a group of people standing near an athletic field. (R. 72:163–65.) A woman gave him shorts and a shirt to wear. (R. 72:174.) Ozodi then pushed the woman to the ground and told her that he was going to have sex with her. (R. 72:165, 175.) A man pulled Ozodi off the woman. (R. 72:175.) Ozodi then ran to the center of the athletic field, where he began masturbating before police arrested him. (R. 72:127–30, 190–92.)

Ozodi's defense was that he did not commit these acts intentionally. Before trial, Ozodi requested that the court allow a witness to testify that Ozodi had good moral character and would not sexually assault anyone. (R. 17.)

In response, the State requested a jury instruction saying that Ozodi's voluntary intoxication was not a defense to the charges. (R. 71:5.) *See* 2013 Wisconsin Act 307 (amending Wis. Stat. § 939.42 to eliminate voluntary intoxication as a defense). Before repeal, a defendant's voluntary intoxication was a defense if it negated the existence of a crime's mental state. Wis. Stat. § 939.42(2) (2011–12.) The State explained that it was concerned that Ozodi would use the character evidence "in a roundabout way" to establish an intoxication defense. (R. 72:13–14.)

The court ruled that it would allow the witness to testify "that [Ozodi] is a good moral person and that he would not harm or sexually assault someone." (R. 72:15.) But, the court said, the witness could not say that Ozodi had that reputation in the community. (R. 72:15–16.) It also determined that the witness could not say "that it was the drugs that made him act this way." (R. 72:16–17.)

During trial, the parties and the court discussed a proposed jury instruction from the State addressing voluntary intoxication. (R. 72:222–23.) That instruction read:

> Evidence has been presented which, if believed by you, tends to show that the defendant was voluntarily intoxicated at the time of the alleged offense(s). 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. 18:2.)

Ozodi challenged the part of the last sentence saying that his voluntary intoxication was not relevant to his intent. (R. 72:222–23.) He acknowledged that the Legislature had eliminated the defense of voluntary intoxication. (R. 73:3–4.) But, he argued, the jury should still be allowed to consider how his intoxication affected his intent. (R. 73:4–6.) Ozodi also argued that giving the State's instruction might violate his right to present a defense under the Sixth Amendment to the United States Constitution. (R. 73:5–7.)

The State argued that the court should give its instruction because, since voluntary intoxication was no longer a defense, Ozodi's intoxication was not relevant to whether he had the required mental states for his crimes. (R. 73:7–8.) It acknowledged that the evidence of intoxication was relevant to "somebody's credibility or their memory of what happened." (R. 73:9.) But, the State said, "it can't be used as a defense by a defendant to try to show that they didn't intend or know what they were doing." (R. 73:9.)

The court decided to give the State's instruction, but it removed the language that Ozodi had objected to. (R. 73:12–13.) The court explained that "the real question here" was how far the Legislature's repeal of the voluntary intoxication defense went. (R. 73:11.) It noted that a post-repeal comment to the pattern jury instruction on voluntary intoxication said that "questions remain" whether the repeal categorically prohibited "evidence relevant to the nonexistence of the mental element." (R. 73:10–11.) *See* Wis. JI–Criminal 765 (2015).

Giving the instruction with the language removed, the court said, would tell the jury that voluntary intoxication was not a defense. (R. 73:13.) But, it added, the instruction "also allows the defense to present their case in showing that, yes, there is this voluntary intoxication but look at all these facts and circumstances that negate the mental state in addition to the voluntary intoxication." (R. 73:13.)

The instruction that the court gave at trial said:

> 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.)

Ozodi appealed. He argued that the circuit court's instruction misstated the law because it prevented the jury from considering the effect of his intoxication on his ability to form criminal intent. (Ozodi's Ct. App. Br. 11–13.) For the same reason, he argued that the instruction violated his right to present a defense under the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. (Ozodi's Ct. App. Br. 13–14.)

In response, the State argued that the circuit court's instructions as a whole told the jury that it could consider the effect of Ozodi's intoxication on his ability to form his intent. (State's Ct. App. Br. 6–8.) Thus, assuming that Ozodi was correct that the law allowed the jury to consider this evidence, the court properly instructed the jury. (State's Ct. App. Br. 6–8.)

The court of appeals affirmed. *State v. Ozodi*, No. 2019AP886-CR, ¶¶ 20, 26, 2020 WL 7380279 (Wis. Ct. App., Dec. 16, 2020). (Pet. App. C 9, 12.) The court noted that there was no case law addressing the repeal of the voluntary intoxication defense or what effect it might have on a defendant's due process rights. *Id.* 12–13. It also said that the parties had not addressed these issues. *Id.* 12–13. The court, though, concluded that it did not need to address the effect of the repeal or its due process implications because the State was correct that the jury instructions as a whole allowed the jury to consider how Ozodi's intoxication affected his intent.

Id. 13–16. The court also rejected Ozodi's argument that the instructions violated his right to present a defense. It held that the argument was conclusory and failed on the merits because the circuit court allowed Ozodi to present evidence of his intoxication and argue that it showed his lack of intent. *Id.* 16–18.

ARGUMENT

I. Review is not warranted because Ozodi has already received what he wants from this Court: a trial where the jury can consider the effect of his intoxication on his intent.

This Court should deny Ozodi's petition for review, first, because any decision it would issue could not give Ozodi the relief he seeks. Ozodi wants a new trial where the jury can consider the effect of his intoxication on his intent. But Ozodi already received such a trial. Thus, even if this Court agreed with Ozodi that the law allows consideration of his intoxication's effect on his intent, this Court could not give him the remedy he wants.

No matter what this Court would decide in this case, it would affirm the court of appeals. If the Court were to agree with Ozodi that the law allows consideration of his intoxication's effect on his intent, it would affirm the court of appeals' decision because Ozodi's jury was instructed that this was the law. But if the Court concluded that the law does not allow consideration of intoxication, it would also affirm because the jury has already convicted Ozodi despite what this Court would hold to be an error in his favor in the instructions. This Court should wait for a case where a dispute over the court's instructions would actually affect the parties' rights.

And to be sure, the circuit court's instructions allowed the jury to consider the effect of Ozodi's intoxication on his intent. The court instructed the jury that evidence of voluntary intoxication "may be relevant evidence." (R. 73:117.) It also instructed the jury about intent on the sexual-assault and operating-without-consent charges. (R. 73:107–08.) Those instructions told the jury that "[y]ou cannot look into [Ozodi's] mind to find intent." (R. 73:107–08.) Instead, they said that "[i]ntent . . . must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent." (R. 73:107.)

As the court of appeals correctly held, these instructions informed the jury that it could consider Ozodi's intoxication when determining if he acted intentionally. *Ozodi,* 2020WL7380279, ¶¶ 15–17, 29–32. (Pet. App. C 7–8, 14–16.) Moreover, as the court explained, Ozodi presented evidence that suggested that he might not have been able to act intentionally because of his intoxication, and his attorney argued in closing that his intoxication negated his intent. *Id.* ¶ 33. (Pet. App. C 16.) Thus, Ozodi has already received all that he asks for from this Court.

Ozodi disagrees that the instruction let the jury consider his intoxication's effect on his intent. (Ozodi's Pet. 11–12.) He acknowledges the evidence that he presented and his trial counsel's closing argument. (Ozodi's Pet. 12.) But the court told the jury that "intoxication by itself is not a defense," which Ozodi claims prevented it from considering his intoxication. (Ozodi's Pet. 12.)

This instruction did not tell the jury not to consider Ozodi's intoxication. Critically, Ozodi ignores the rest of the court's instructions, which, as explained, allowed the jury to weigh his intoxication. Jury instructions must be reviewed "in light of the proceedings as a whole, instead of viewing a single

instruction in artificial isolation." *State v. Badzinski*, 2014 WI 6, ¶ 38, 352 Wis. 2d 329, 843 N.W.2d 29 (citation omitted). In addition, this instruction did not misstate the law; Ozodi's voluntarily induced intoxication is not a defense under Wisconsin law after the Legislature's repeal. *See* 2013 Wisconsin Act 307; Wis. Stat. § 939.42.

Ozodi also argues that, despite the State's argument to the contrary in the circuit court, the Legislature "could not have intended to make intoxication wholly irrelevant to the defendant's state of mind" when it repealed the voluntary intoxication defense. (Ozodi's Pet. 12.)

The State believes that this is precisely what the Legislature intended for cases involving a defendant's voluntary intoxication. Before repeal, a defendant could argue that his voluntary intoxication made him not responsible for a crime if it negated the crime's mental state. The Legislature's repeal would mean little if defendants could continue to raise the same argument afterward.

But for the purposes of this case's outcome, the State's views are irrelevant. Ozodi convinced the circuit court to instruct the jury that it could consider his intoxication's effect on his intent. He then presented evidence of his intoxication and argued that it prevented him from acting intentionally. Thus, Ozodi got exactly what he claims the law owed him. There is no reason for this Court to grant his petition.

II. This Court's review is not warranted on Ozodi's undeveloped and forfeited due process claim.

Ozodi also argues that this Court should grant his petition to address the "due process implications" of the Legislature's repeal of the voluntary intoxication defense. (Ozodi's Pet. 10–13.) This Court should not grant review on this issue because it is undeveloped and forfeited.

This Court does not consider undeveloped arguments. *State v. Lepsch*, 2017 WI 27, ¶ 42, 374 Wis. 2d 98, 892 N.W.2d 682. Ozodi contends that due process requires the State to treat voluntarily and involuntarily intoxicated defendants the same to prevent the risk of convicting a person who cannot form criminal intent. (Ozodi's Br. 12–13.) But Ozodi does not explain exactly how that risk arises from the Legislature's repeal of voluntary intoxication as a specific statutory defense. He also does not develop any argument why due process requires states to treat all intoxicated people the same for the purposes of criminal liability.

Crucially, Ozodi's argument ignores that the State still has the burden of proving a crime's elements beyond a reasonable doubt, including that the defendant acted intentionally in cases where that is the relevant state of mind. *See State v. Bell*, 2018 WI 28, ¶ 17, 380 Wis. 2d 616, 909 N.W.2d 750 (citation omitted). He also fails to mention that a plurality of the United States Supreme Court has held that due process does not require states to recognize a voluntary intoxication defense. *See Montana v. Egelhoff*, 518 U.S. 37, 51 (1996).

Further, as the court of appeals explained, the unquestionable effect of the repeal was that the State no longer has to disprove beyond a reasonable doubt that a defendant's voluntary intoxication negated the mental element of a crime. *See Ozodi*, 2020 WL 7380279, ¶ 28 n.5. (Pet. App. C 13–14.) Ozodi does not cite any case law or

otherwise develop an argument that the repeal of this obligation violates due process. He has thus not shown that his claim presents "[a] real and significant question" of constitutional law that this Court should address. Wis. Stat. § (Rule) 809.62(1r)(a).

Ozodi's due process claim is also forfeited. "Forfeiture occurs when a party fails to raise an objection." *State v. Mercado*, 2021 WI 2, ¶ 35, 395 Wis. 2d 296, 953 N.W.2d 337. A defendant must raise a claim in the circuit court and the court of appeals to preserve it for this Court's review. *See State v. Counihan*, 2020 WI 12, ¶ 27, 390 Wis. 2d 172, 938 N.W.2d 530; *Veritas Steel, LLC v. Lunda Constr. Co.*, 2020 WI 3, ¶ 38, 389 Wis. 2d 722, 937 N.W.2d 19. This Court generally declines to address raised for the first time on appeal. *See McKee Fam. I, LLC v. City of Fitchburg*, 2017 WI 34, ¶ 32, 374 Wis. 2d 487, 893 N.W.2d 12.

Ozodi did not argue in either the circuit court or the court of appeals that the Legislature's repeal of the voluntary intoxication defense violated due process. Instead, he argued that not allowing him to present evidence of his intoxication to argue that he lacked intent would violate his Sixth Amendment and Article I, Section 7 right to present a defense. (R. 73:5–7; Ozodi's Ct. App. Br. 13–14.) While the court of appeals mentioned that the repeal could have due process implications, it did not address what they might be because neither Ozodi nor the State addressed them. *Ozodi*, 2020 WL 7380279, ¶ 27. (Pet. App. C 12–13.) That was because Ozodi never raised a due process challenge to the repeal. There is no decision from either of the courts below addressing Ozodi's due process argument for this Court to review. This Court should not grant review to address Ozodi's forfeited claim.

CONCLUSION

This Court should deny Ozodi's petition for review.

Dated April 28, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § 809.62(4) for a response to petition for review produced with a proportional serif font. The length of this response is 2866 words.

Aaron R. O'Neil

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this response to petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic response to petition for review is identical in content and format to the printed form of the response to petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this response to petition for review filed with the court and served on all opposing parties.

Dated this 28th day of April 2021.

Aaron R. O'Neil

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