COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0254

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

OZAUKEE COUNTY,

PLAINTIFF-RESPONDENT,

V.

NANCY K. MUTSCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed.*

SNYDER, P.J. Nancy K. Mutsch appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant. *See* § 346.63(1)(a), STATS., 1993-94. She contends that the arresting officer did not have probable cause to believe that she had operated her motor

vehicle.[1] We conclude that there are two bases upon which there was probable cause for the arresting officer to conclude that Mutsch was operating the vehicle in violation of the law. First, all of the circumstantial evidence supported an inference that Mutsch had driven her car to its location only a short time before the officer came upon it; and second, in the officer's presence, Mutsch manipulated the key which was in the ignition. We therefore affirm.

The facts are undisputed. Mutsch concedes that she was sitting in the driver's seat of her vehicle which was legally parked on Wauwatosa Road. The vehicle's headlights were on and the engine was turned off at the time the arresting officer, Deputy Brian D. Glocke, came upon it. The keys were in the ignition. In testimony, Glocke stated that the vehicle could not have been at this location for very long because "there was a lot of traffic at that hour on that evening" and "[the department] had not gotten any calls on that vehicle yet."

When Glocke approached Mutsch's van, he observed that she was alone, "slumped to her side unconscious in the driver's seat."[2] Glocke also testified that Mutsch was unresponsive; she failed to respond to a tap on the car window so Glocke began "rapping on the window with [his] open palm, very hard, and finally got her attention." Once Mutsch became aware of Glocke's presence

[1] In two other related claims, Mutsch also argues that: (1) "Sitting in the Driver's Seat of a Legally-Parked Motor Vehicle, with Headlights On and Engine Off, Is Not 'Operating' Within the Meaning of the Statute," and (2) "The Investigating Officer Did Not Have Reasonable Suspicion to Believe That the Defendant-Appellant Was Committing, Was About to Commit, or Had Committed a Violation of Law." Because both of these related claims are addressed by our discussion of the evidence supporting probable cause to arrest, we do not address either of them individually.

[2] Mutsch concedes that Glocke's initial contact was properly supported by his "community caretaker" function and that it was appropriate for him to stop for the purpose of checking on her welfare and the vehicle's condition.

outside the car, Glocke had to repeatedly ask her to open the door, which was locked. She appeared to have difficulty responding to his request. She eventually moved her hand up to the ignition and turned the key in the ignition to where it enabled her to roll down the power window. After asking Mutsch whether she was all right, Glocke requested identification. Mutsch had difficulty retrieving her purse, the contents of which had spilled out on the floor of the car; Glocke also noted an odor of intoxicants on her breath. Glocke testified that he questioned Mutsch regarding "where she was, where she was going, where she came from" and questions related to "if she had driven to that location." Glocke also testified that during this questioning, "[s]he was quite confused."

Glocke then testified that he administered a number of the standard sobriety tests, which Mutsch failed to perform properly. He attempted to have her perform a preliminary breath test, but Mutsch was unable to blow through the tube as requested. She was then placed under arrest for operating while intoxicated.

Counsel for Mutsch brought a pretrial "Motion to Dismiss and to Suppress Evidence Based on Lack of Probable Cause to Arrest." Counsel argued that all of the evidence obtained by the arresting officer, much of which is outlined above, was unlawfully obtained as the result of an unlawful seizure. Counsel claims that the arresting officer did not acquire "the requisite specific and articulable facts from which an inference of 'operating' while intoxicated could be drawn." After hearing testimony, the trial court denied the motion and the matter proceeded to trial. Mutsch was subsequently convicted. She now renews her claim that the evidence was improperly obtained because Glocke did not have probable cause to believe that she was "operating" the vehicle.

Probable cause requires that at the moment an arrest is made, the officer had facts and circumstances within his or her knowledge that "are sufficient to warrant a prudent man in believing that the person arrested had committed … an offense." ***State v. Drogsvold,*** 104 Wis.2d 247, 254, 311 N.W.2d 243, 247 (Ct. App. 1981). The requirement deals with probabilities which are not technical, but instead "'are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" ***Id.*** (quoted source omitted). The facts and circumstances known to the officer need only be sufficient "'to lead a reasonable officer to believe that guilt is more than a possibility.'" ***Id.*** at 255, 311 N.W.2d at 247.

In supporting the constitutional requirement of probable cause to believe that Mutsch had operated her vehicle while under the influence of intoxicants, Glocke possessed the following information: Mutsch was alone in the vehicle, she was seated in the driver's seat, the keys were in the ignition and the car's headlights were still on. In addition, Mutsch was parked on a roadway that was, at that time of the evening, heavily traveled, and yet the sheriff's department had not had a report of any such vehicle by a passerby or another squad. In response to Glocke's questions, Mutsch stated that she was going home. The actual and circumstantial evidence strongly supported a rational inference that Mutsch had very recently been driving the car. In contrast, there was no basis upon which to conclude that there was another explanation for how she came to be

where she was. None of her responses to Glocke gave him reason to think that Mutsch had not been operating the vehicle while in her present state.[3]

We further support the analysis of the circumstantial evidence that Glocke had obtained with consideration of the statutory definition of "operate." The application of a statute to a set of undisputed facts is a question of law which we consider de novo. *See* ***NCR Corp. v. Department of Revenue,*** 112 Wis.2d 406, 409, 332 N.W.2d 865, 867 (Ct. App. 1983). Section 346.63(3)(b), STATS., defines "operate" as "the physical *manipulation or activation* of any of the controls of a motor vehicle necessary to put it in motion." (Emphasis added.)

In ***Milwaukee County v. Proegler,*** 95 Wis.2d 614, 626, 291 N.W.2d 608, 613 (Ct. App. 1980), we held that the activation required to "operate" under the statutory definition included turning on the ignition of the vehicle while it is parked. We quoted with approval, "'An intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than that involved when the vehicle is actually moving, but it does exist.'" ***Id.*** at 627, 291 N.W.2d at 614 (quoted source omitted). We also noted that "circumstantial evidence … was sufficient to substantiate the fact that

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[3] Defense counsel relies on a theory that "without some form of follow-up inquiry or physical inspection (i.e., checking the engine to see if it was warm, etc,) as to whether the Defendant-Appellant was 'operating' this motor vehicle prior to [Glocke's] arrival at the scene, he decidedly passed on his opportunity to acquire the requisite specific and articulable facts from which an inference of 'operating" while intoxicated could be drawn." However, Glocke testified at the motion hearing as follows:

> [Defense Counsel]: Between the time you made contact with defendant and the time you placed her under arrest, did you ask her how she had gotten to that location, specifically yes or no?
>
> [Glocke]: Did I ask her if she had driven to that location, I asked questions to her related to that.

defendant 'operated' his [vehicle] within the meaning of sec. 346.63, Stats." ***Id.*** at 628, 291 N.W.2d at 614.

In addition to the circumstantial evidence Glocke had before him relating to Mutsch's possible operation of the vehicle, which was uncontradicted, Mutsch also turned the key in the ignition and activated the necessary means of placing the vehicle in operation while the officer was attempting to get her to open the door. Under the standard of ***Proegler,*** we conclude that the statutory requirement of operating was established.

All of the evidence Glocke obtained after stopping to assist a potentially disabled vehicle provided him with evidence that both actually and circumstantially supported the probable cause requirement that Mutsch had operated the vehicle while intoxicated. Because of our conclusion that Mutsch's actions satisfied the requirement that Glocke determine that she had "operated" the vehicle while intoxicated, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.