COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3626

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

MILWAUKEE COUNTY,

PLAINTIFF-RESPONDENT,

v.

ROBERT E. BERRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Affirmed.*

WEDEMEYER, P.J.[1] Robert E. Berry appeals from a judgment entered after a jury convicted him of operating a motor vehicle while intoxicated, contrary to § 346.63(1)(a), STATS. He claims: (1) that the road on which he was driving when arrested was not "held out to the public" as defined in § 346.61,

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

STATS.; and (2) the trial court erroneously exercised its discretion in instructing the jury by failing to define "held out for public use." Because there was sufficient evidence to support the jury's determination that the road involved here was "held out to the public" and because the trial court did not erroneously exercise its discretion when it instructed the jury, this court affirms.

I. BACKGROUND

On July 2, 1998, at approximately 9:00 p.m., Berry was driving his vehicle on the wrong side of the access road which connects 44th Street to the parking area at Milwaukee County Stadium. Deputy Denny Galipo observed this and stopped Berry for driving the wrong way. During the traffic stop, Galipo noticed that Berry smelled of alcohol, had bloodshot eyes and slurred his speech. Galipo asked Berry to perform several field sobriety tests, which Berry was unable to complete. Berry was arrested for operating a motor vehicle while under the influence. Berry submitted to a chemical test of his breath, which showed a blood alcohol count of .24.

Berry was issued a citation for operating a motor vehicle with a prohibited alcohol concentration. A jury trial was held on October 6, 1998. A disputed issue at trial was whether the access road was "held out for public use." The trial court denied Berry's request to define "held out for public use" in the jury instruction. The jury convicted. Berry now appeals.

II. DISCUSSION

A. Sufficiency of the Evidence.

Berry asserts that whether the access road was held out to the public is an issue which requires the application of a statute to a set of undisputed facts.

However, he is essentially arguing that the evidence was insufficient to show that he operated a vehicle under the influence *"upon [a] premises held out to the public for use of their motor vehicles."* Section 346.61, STATS. (emphasis added).

In reviewing a sufficiency of the evidence claim, this court's standard is limited.

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted). Case law has defined "held out for public use" as "whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the [road] in an authorized manner." ***City of LaCrosse v. Richling***, 178 Wis.2d 856, 860, 505 N.W.2d 448, 449 (Ct. App. 1993).

Here, there is sufficient evidence in the record from which the jury could infer that the access road at issue was "held out for public use." The arresting officer testified that the road is open to the public, he has seen other vehicles use the road, and people do not have to pay to use the road. This evidence is sufficient to allow a reasonable jury to conclude that the access road was "held out for public use."

Berry's arguments to the contrary, however, do not fall on deaf ears. The fact that this is a road that generally is used by patrons attending baseball games or stadium workers, rather than the public at large, certainly supports an argument that the access road does not satisfy the ***Richling*** definition. However, the jury did not accept the argument and, under the standard of review governing this case, this court cannot disregard the jury's determination.[2]

B. Jury Instruction.

Next, Berry contends that the trial court erroneously exercised its discretion in instructing the jury. Specifically, Berry argued that the trial court should have granted his request to insert the ***Richling*** definition of "held out for public use" right into the jury instruction. This court rejects his contention.

"A trial court has wide discretion in presenting instructions to the jury. If its instructions adequately cover the law applied to the facts, a reviewing court will not find error in refusing special instructions even though the refused instructions would not be erroneous." ***State v. Amos***, 153 Wis.2d 257, 278, 450 N.W.2d 503, 511 (Ct. App. 1989).

Here, the trial court did not erroneously exercise its discretion when it instructed the jury. The jury instructions adequately stated the law. The instruction used was the standard instruction with the addition of language inserted from § 346.61, STATS. It was not necessary to specifically define "held out for public use" as this term was within the common knowledge of the jury. The fact

[2] The State argues that recent legislative amendments to the statute broaden its scope. However, based on the foregoing analysis, this court need not engage in an examination of the legislative intent relative to the recent amendments of § 346.61, STATS.

that case law has delineated a definition for the term does not mean that the definition must be included in the jury instructions. Berry was free to argue to the jury using the ***Richling*** definition.

By the Court.—Judgment affirmed.

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