COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2676-CR **Cir. Ct. No. 00 CT 3582**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL P. MOEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed*.

¶1 WEDEMEYER, P.J.[1] Daniel P. Moen appeals from a judgment of conviction on one count of operating a motor vehicle while intoxicated, contrary to WIS. STAT. § 346.63(1)(a) (1999-2000).[2] Moen claims that the evidence

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

presented at trial was insufficient to prove beyond a reasonable doubt that he operated a motor vehicle while under the influence of an intoxicant. He also claims the trial court erred when it denied his motions to dismiss and his motion for judgment notwithstanding the verdict. Because there was sufficient evidence for the trier of fact to convict Moen, and because the trial court did not erroneously exercise its discretion when ruling on the motions, this court affirms.

I. BACKGROUND

¶2 On July 13, 2000, the police were summoned to investigate the activities taking place inside a vehicle parked in the lot of Kopp's Frozen Custard, located in Greenfield. The police found Moen in the driver's seat of the vehicle and his sister, Joy, located in the passenger's seat. Both Moen and his sister were intoxicated. When the police approached the vehicle, Moen's hand was on the steering wheel. Moen told the police officer that he had not been driving. The police officer stated that he did not believe Moen because the keys were in the ignition and the car was awkwardly parked. When asked to exit the vehicle, Moen grabbed the door and the side of the car to retain his balance. Moen again repeated that he had not been driving the vehicle, but when the police officer asked Moen if he was lying, Moen replied, "Yes."

¶3 The police conducted field sobriety tests, which Moen failed. The vehicle began to roll during the search, and further inspection revealed that the vehicle was not in park, but rather was in neutral. The police officers did not observe any console lights on in the vehicle when they conducted their search. A half empty bottle of vodka was also found in the vehicle. No one offered testimony that they had actually observed Moen drive the vehicle into the Kopp's parking lot.

¶4 Following a jury trial, Moen was found guilty of violating WIS. STAT. § 346.63(1)(a) and sentenced to eight months in the House of Correction. Section 346.63(1)(a) states that no person may drive or operate a motor vehicle while under the influence of an intoxicant. WISCONSIN STAT. § 346.63(3) defines the operation of a motor vehicle as the physical manipulation or activation of any of the controls of the motor vehicle necessary to put it in motion. Moen appeals from the judgment.

II. DISCUSSION

A. Sufficiency of Evidence.

¶5 Moen claims that the evidence presented at trial was insufficient for the trier of fact to conclude that he had been operating the motor vehicle while intoxicated. The issue on appeal is not whether the appellate court is convinced of the defendant's guilt beyond a reasonable doubt. Rather, the issue is whether the trier of fact, acting reasonably, could be convinced by the evidence to the required degree of certitude. ***State v. Poellinger***, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990). When a defendant challenges the sufficiency of the evidence, the test on review is whether the evidence is so insufficient in probative value and force that as a matter of law, no reasonable jury could have found guilt beyond a reasonable doubt. ***State v. Wyss***, 124 Wis. 2d 681, 693, 370 N.W.2d 745 (1985). Generally, when there are inconsistencies within or between the testimony of witnesses, the trier of fact determines the credibility of each witness and the weight given to their testimony. *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985).

¶6 Moen argues that the evidence presented at trial failed to prove beyond a reasonable doubt that he was guilty of the intoxicated operation of a

motor vehicle. Moen concedes that he was intoxicated, but maintains that he did not drive or operate the motor vehicle. He points out that no one saw him actually drive the vehicle and argues that merely sitting in the driver's seat with a hand on the steering wheel is insufficient to constitute "operation" of the vehicle. Moen claims that cases where the defendant was found to have been operating a motor vehicle are distinguishable from his case. *See* ***County of Milwaukee v. Proegler***, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980); ***State v. Modory***, 204 Wis. 2d 538, 555 N.W.2d 399 (Ct. App. 1996) (operation of a motor vehicle found where the motor vehicle was running and the lights were on).

¶7 Although there is no published case on point with these facts, this does not mean that the evidence was insufficient to convict. The ***Proegler*** court advised that, "It is in the best interests of the public and consistent with legislative policy to prohibit one who is intoxicated from attempting to get behind the wheel rather than to make a fine distinction once such a person is in the position to cause considerable harm." ***Proegler***, 95 Wis. 2d at 629. "One who enters a vehicle while intoxicated, and does nothing more than start the engine is as much of a threat to himself and the public as one who actually drives while intoxicated. The hazard always exists that the car may be caused to move accidentally, or that the one who starts the car may decide to drive it." ***Id.*** at 626. The court in ***Proegler*** also referenced other jurisdictions that have concluded that a person seated behind the wheel could have actual physical control over a vehicle while it is parked and remain[ing] motionless without the engine running. *See* ***Jacobson v. State,*** 551 P.2d 935, 938 (Alaska 1976).

¶8 A conviction can be based in whole or in part upon circumstantial evidence. ***Peters v. State***, 70 Wis. 2d 22, 33-34, 233 N.W.2d 420, 426 (1975). Circumstantial evidence is often more probative than direct evidence; it is clear

that circumstantial evidence alone may be sufficient to convict. ***Wyss***, 124 Wis. 2d at 693. The test for circumstantial evidence is whether it is strong enough to exclude every reasonable hypothesis of innocence. ***State v. Drusch***, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Ct. App. 1987). It does not follow that if any of the circumstantial evidence presented at trial may suggest innocence, the trier of fact cannot find the defendant guilty. ***Peters***, 70 Wis. 2d at 34. The function of the trier of fact is to determine which evidence is credible and to decide how conflicts in the evidence should be resolved.

¶9 Here, the jury found the evidence was sufficient to convict Moen of operating while intoxicated. He was discovered in the driver's seat of a vehicle with the keys in the ignition, the shift in neutral position and his hand on the steering wheel. It was reasonable for the jury to infer from these facts that he was operating the vehicle.

B. Defense Motions to Dismiss Were Properly Denied.

¶10 Moen also suggests that the trial court erred when it denied the defense's first motion to dismiss. This court disagrees. The trial court applied the correct standard, which requires the court to review and weigh the evidence in the light most favorable to the state. ***Lofton v. State***, 83 Wis. 2d 472, 483, 266 N.W.2d 576 (1978). In this case, there was enough evidence to establish a presumption that Moen drove the vehicle to Kopp's Frozen Custard. First, Moen was observed sitting in the driver's seat by the police officers; second, the keys were in the ignition; third, the vehicle was parked between two and three feet past the parking stall; fourth, the vehicle was in neutral; fifth, the key remained in the "on" position, although the vehicle was no longer running; finally, one of Moen's hands remained on the steering wheel. Moreover, the motion to dismiss after the

close of the State's case-in-chief was tardy and the issue was not properly preserved for appeal. *See* ***State v. Kelley***, 107 Wis. 2d 540, 544, 910 N.W.2d 869 (1982). For the same reasons, the court also properly denied Moen's second motion to dismiss.

C. Denial for Judgment Notwithstanding the Verdict.

¶11 Moen also challenges the trial court's ruling denying his motion for judgment notwithstanding the verdict (JNOV). This court is not persuaded.

¶12 This court's review of a motion for JNOV is de novo, and will be granted when evidence supports the verdict, but other reasons justify judgment in favor of the moving party. ***Johnson v. Neuville***, 226 Wis. 2d 365, 373, 595 N.W.2d 100 (Ct. App. 1999).

¶13 Moen has failed to present any "other reasons" to justify judgment in his favor. Although this was a close case, and there was evidence in the record to support more than one reasonable inference, an appellate court must accept the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law. ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). Accordingly, this court concludes that Moen is not entitled to relief on appeal.

By the Court.—Judgment affirmed.

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