COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0357-CR **Cir. Ct. No. 00-CT-1812**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. CASPERSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT A. DeCHAMBEAU, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Michael Caspersen appeals a judgment convicting him of operating a motor vehicle while under the influence of an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

intoxicant (OMVWI), second offense, a traffic crime. He also appeals an order denying postconviction relief. He claims his conviction must be set aside because he was convicted of a crime "which does not exist," in that the jury found him guilty after receiving an instruction which erroneously defined the term "under the influence of an intoxicant." We conclude that Caspersen forfeited the right to claim error in the OMVWI elements instruction because he did not object to the instruction at the instructions conference. We also conclude that he cannot avoid the consequences of his failure to timely object by asserting that the circuit court lost subject matter jurisdiction on account of the alleged instructional error.

BACKGROUND

¶2 The issue Caspersen seeks to raise in this appeal does not relate to any evidence presented at his trial, and thus, we provide only a brief summary of the facts underlying his conviction. A state trooper arrested Caspersen for OMVWI. Caspersen refused to submit to chemical testing for blood alcohol concentration. Accordingly, the State's case at trial consisted exclusively of testimony from the trooper regarding his observations of Caspersen at the time of the arrest, including Caspersen's performance on field sobriety tests.

¶3 Prior to the trial, Caspersen requested that the court give WIS JI—CRIMINAL 2663 regarding the elements of OMVWI as a criminal offense. At the instructions conference, the court proposed to give the standard instruction, omitting, however, any language relating to results of tests for alcohol concentration and presumptions pertaining to them. Neither the State nor Caspersen objected, and the court instructed the jury as follows:

> Sec. 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway while under the influence of an intoxicant.

> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.
>
> The first element requires that the defendant operated a motor vehicle on a highway. ["]Operate["] means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.
>
> The second element requires that the defendant was under the influence of an intoxicant at the time he operated the motor vehicle.
>
> Under the influence of an intoxicant means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.
>
> Not every person who has consumed an alcoholic beverage is under the influence as that term is used here. What must be established is that the person had consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.
>
> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

¶4 The jury returned a guilty verdict and the court entered a judgment of conviction. Caspersen obtained different counsel and moved for a new trial on the grounds that (1) he had received ineffective assistance of counsel, and (2) the State had failed to disclose exculpatory evidence.[2] The motion was set for a hearing, but for reasons that are not apparent from the record, the hearing was not held. The court then "directed that counsel for the defendant contact the Court within [two weeks] to advise whether or not the motion needed to be addressed

[2] Caspersen made no claim in his postconviction motion that the OMVWI instruction given to the jury was erroneous, a claim he first raises in this appeal.

and rescheduled for hearing." Some four months later, the court denied the motion "without hearing, for defense counsel's failure to comply with the Court's order." Caspersen appeals the judgment of conviction and the order denying postconviction relief.

ANALYSIS

¶5 Caspersen raises a single issue in this appeal—whether the instruction quoted at length above was erroneous because it did not define "under the influence of an intoxicant" as requiring that a defendant's ability to operate a motor vehicle be shown to have been "materially impaired."[3] As Caspersen acknowledges but tries to overcome in arguments we address below, his failure to object to the instruction as given by the trial court precludes our review of the issue as a claim of trial court error. WISCONSIN STAT. § 805.13(3) ("Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict."); ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988) ("[W]e conclude that the defendant … has waived his right under sec. 805.13(3), Stats., because of his failure to object to the proposed jury instructions … at the pre-instruction conference held in this case at the circuit court level.").

[3] Caspersen relies on ***State v. Waalen***, 130 Wis. 2d 18, 386 N.W.2d 47 (1986), for the proposition that "under the influence" in the OMVWI statute has the same meaning as in a criminal statute defining the term, which requires a showing that the defendant's ability to operate a vehicle was "materially impaired." ***Id***. at 26-28. Although we do not address the merits of Caspersen's claim, we note that the instruction the supreme court approved in ***Waalen*** also did not employ the term "materially impaired." ***Id***. at 22, 28. The Criminal Jury Instruction Committee has concluded that its present standard instruction comports with the court's holding in ***Waalen***. *See* WIS JI—CRIMINAL 2663, n.9.

¶6 Caspersen has not renewed in this court any claim of ineffective assistance of trial counsel. Even if he had, however, we note that his postconviction motion in the trial court did not cite trial counsel's failure to object to the OMVWI instruction as deficient performance. Moreover, no evidentiary hearing was conducted on Caspersen's postconviction motion. Accordingly, even if we were inclined to consider Caspersen's claim of unobjected–to instructional error as an assertion of ineffective assistance of counsel (which, in the absence of any argument to that effect, we are not), the present record would not permit us to address the claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (holding that a postconviction, evidentiary hearing at which trial counsel explains "the reasons underlying his handling of a case" is "a prerequisite to a claim of ineffective representation on appeal").

¶7 We also note that Caspersen has *not* asked us to reverse his conviction under WIS. STAT. § 752.35 on the grounds that either justice has miscarried or the real controversy was not fully tried. *See* ***State v. Perkins***, 2001 WI 46, ¶12, 243 Wis. 2d 141, 626 N.W.2d 762 (explaining that Wisconsin appellate courts may, by statute, exercise discretion to reverse for unobjected-to instructional error). In the absence of a request to do so, we decline to consider whether the present record would provide grounds for us to exercise our discretionary reversal authority.

¶8 The sole argument Caspersen advances that would allow him to escape the consequences of his failure to object to the allegedly erroneous jury instruction is an attempt to convince us that the error in the instruction caused the circuit court to lose subject matter jurisdiction. His argument is essentially this: To be convicted of OMVWI, a defendant's ability to operate a vehicle must be shown to have been "materially impaired." Because the jury was not so

instructed, it found him guilty of a crime that "does not exist." And, because the circuit court has criminal subject matter jurisdiction over only crimes that are "recognized in law," the belatedly raised instructional error is in reality a non-waivable jurisdictional defect which requires us to set aside Caspersen's conviction. *See* ***State v. Briggs***, 218 Wis. 2d 61, 68-69, 579 N.W.2d 783 (Ct. App. 1998).

¶9 To say that Caspersen's argument is unpersuasive overstates its merit. OMVWI is a crime that is "recognized in law": WISCONSIN STAT. § 346.63(1) prohibits operating a motor vehicle while under the influence of an intoxicant.[4] The State's criminal complaint charges this offense, citing the statute and alleging the elements of OMVWI. *See* ***Schleiss v. State***, 71 Wis. 2d 733, 737-38, 239 N.W.2d 68 (1976) (Trial court has subject matter jurisdiction when charging document cites statute defining the offense.). The circuit courts of our state have subject matter jurisdiction over the prosecution of all crimes which the legislature has created. *See* ***Mack v. State***, 93 Wis. 2d 287, 294-95, 286 N.W.2d 563 (1980).

¶10 We conclude that it is beyond dispute that the circuit court had subject matter jurisdiction to entertain the instant complaint, and further, that no error the court may have committed during the trial of the matter can act to deprive it of its jurisdiction. *See* ***id.*** at 295 ("Even where the error in the law or proceedings is fatal to the prosecution, the circuit court has the power to inquire into the sufficiency of the charges before the court."); ***State v. Aniton***, 183 Wis. 2d

[4] WISCONSIN STAT. § 346.65(2) renders OMVWI criminal for second and subsequent offenses.

125, 129-30, 515 N.W.2d 302 (Ct. App. 1994) ("Once criminal subject-matter jurisdiction attaches, it continues until a final disposition of the case.").[5]

¶11 Were we to embrace Caspersen's sophistry, many (if not most) belated claims of error in elements instructions could be transmuted on appeal into forfeitures of the circuit court's jurisdiction. Quite simply, Caspersen neither cites any authority that his novel theory is now the law (see footnote 5), nor has he provided a coherent argument as to why it should become the law. We have described above two recognized avenues by which, in proper cases, a reviewing court may grant relief from convictions resting on erroneous but unobjected-to jury instructions (ineffective assistance of counsel and discretionary reversal). Caspersen has chosen to pursue neither avenue, and we will not address his claim of error. *See* ***Schumacher***, 144 Wis. 2d at 409 (concluding that this court has "no power to reach … unobjected-to instructions").

CONCLUSION

¶12 For the reasons discussed above, we affirm the appealed judgment and order.

By the Court.—Judgment and order affirmed.

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

[5] Caspersen acknowledges in his reply brief that once subject matter jurisdiction attaches, "it stays attached," citing ***State v. Aniton***, 183 Wis. 2d 125, 515 N.W.2d 302 (Ct. App. 1994). He qualifies this concession, however, with the word "usually," and adds, "[b]ut not in the present case." Caspersen fails, however, to cite any authority whatsoever for his claim that the alleged instructional error in this case, because it "defined conduct which is not a crime as one," deprived the circuit court of jurisdiction.