COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0487-CR **Cir. Ct. No. 01-CT-794**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HOWARD S. CLEAVES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: BRUCE K. SCHMIDT, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Howard S. Cleaves appeals from a judgment of conviction for operating a motor vehicle while intoxicated, second offense (OWI). Cleaves argues that the trial court erred in modifying the standard jury instruction regarding the definition of operating a motor vehicle. We conclude that the

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

instruction properly reflected the applicable law and the facts of this case. We therefore affirm the judgment of conviction.

FACTS

¶2 While on patrol on February 23, 2001, at around 11:00 p.m., officer Roger Picard of the City of Menasha Police Department received a dispatch call about a suspicious vehicle in a McDonald's parking lot. When Picard arrived at the parking lot, he observed the car, the only one in the lot, with its lights on and exhaust coming from the tail pipe. As he approached the suspect vehicle, he noticed that there was a person in the driver's seat "possibly sleeping." Picard pounded loudly on the window several times before the person, later identified as Cleaves, woke up. Picard asked Cleaves to exit the vehicle.

¶3 As Cleaves exited the vehicle, Picard noticed a strong odor of intoxicants coming from the car and Cleaves's bloodshot eyes. Picard then asked Cleaves to submit to field sobriety tests, which he ultimately failed. Cleaves was then arrested for OWI. Cleaves later submitted to a chemical test of his breath which yielded a result above the legal limit. Cleaves was eventually charged with OWI and operating a motor vehicle with a prohibited blood alcohol concentration.

¶4 A jury trial was held on November 13, 2001. At trial, a witness who had observed the vehicle at McDonald's testified that the car had been parked in the lot with its lights on since approximately 8:00 p.m. Cleaves testified that after he had met a client at a local sports bar, he ate a sandwich in his car and then reclined his seat and proceeded to sleep. He further testified that he activated the ignition to keep warm. Cleaves testified that he never intended to put the car in motion that night.

¶5 After the close of testimony, during a discussion of jury instructions, the trial court elected to modify the standard jury instruction's definition of "operate" to include the following language: "[A] finding of intent to drive or move the vehicle is not required. Operation of a vehicle occurs either when a defendant starts the motor and[/]or leaves it running." Cleaves objected to the modification. Despite this objection, the trial court provided the jury with this modified instruction. Cleaves was convicted of both counts and the trial court entered a judgment of conviction for OWI. Cleaves appeals.

DISCUSSION

¶6 The standard Wisconsin jury instruction for operating a motor vehicle while intoxicated defines "operate" as "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." WIS JI—CRIMINAL 2669. To this definition, the trial court added the following modification: "A finding of intent to drive or move the vehicle is not required. Operation of a vehicle occurs either when a defendant starts the motor and[/]or leaves it running." Cleaves argues that this additional language is erroneous. We disagree.

¶7 A trial court has broad discretion when instructing the jury so long as it fully and fairly informs the jury of the rules and principles of law applicable to the particular case. ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996). In addition, the trial court should instruct the jury with due regard to the facts of the case. ***Id***. An instruction should not be unduly favorable to any party and an appellate court must consider the instructions as a whole to determine whether the challenged instruction or part of an instruction is erroneous; the

instructions are not erroneous if, as a whole, they adequately and properly informed the jury. ***Id***. at 428-29.

¶8 WISCONSIN STAT. § 346.63(1)(a) prohibits a person from driving or operating a motor vehicle while under the influence of an intoxicant. Section 346.63(3)(b) specifically defines "operate" and states: "'Operate' means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion."

¶9 We have before us a factual situation virtually identical to that in ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980), which addressed the definition of "operate" as provided in WIS. STAT. § 346.63(3)(b). In ***Proegler***, the defendant was found sleeping in his car; the keys were in the ignition, the motor was running, the lights and heater were on and the transmission shift lever was in the "park" position. ***Proegler***, 95 Wis. 2d at 618. The defendant was also legally intoxicated. ***Id***. The defendant argued that in order to prove operation of a motor vehicle, the State had to establish an intent to drive the vehicle. ***Id***. at 624. We rejected that argument.

¶10 We concluded that the defendant's conduct fell within the clear definition of "operate" in WIS. STAT. § 346.63(3)(b). ***Proegler***, 95 Wis. 2d at 625-26. We concluded that a person who enters a car while intoxicated and does nothing more than start the engine is as much of a threat to himself or herself and the public as one who actually drives the car while intoxicated because the hazard always exists that the car may move accidentally, or that the one who starts the car may decide to drive it. ***Id***. at 626. The severity of Wisconsin's drunk driving laws is intended to discourage individuals from initially getting behind the wheel of a car while under the influence of alcohol. ***Id***. We concluded that our interpretation

of § 346.63(3)(b) was consistent with the legislature's intent. ***Proegler***, 95 Wis. 2d at 626. We fail to see a difference between ***Proegler*** and Cleaves.

¶11 Cleaves, in a vain attempt to distinguish ***Proegler***, argues that ***Proegler*** never expressly precluded intent as a relevant consideration. This argument ignores the express language of ***Proegler*** where we specifically and pointedly noted:

> *[A] finding of intent to drive or move the vehicle is not required to find a defendant guilty of operating a vehicle while under the influence of an intoxicant*. "Operation" of a vehicle occurs either when a defendant starts the motor and/or leaves it running. The possibility of danger exists in either case.

Id. at 628-29 (emphasis added). This is exactly what the trial court instructed the jury. ("A finding of intent to drive or move the vehicle is not required. Operation of a vehicle occurs either when a defendant starts the motor and[/]or leaves it running.")

¶12 In essence, Cleaves attempts to argue that evidence of intent (or lack thereof) to drive is admissible when addressing the element of "operate." First of all, Cleaves's arguments seem to combine the definition of "operate" with the definition of "drive" and appear to read an intent to "drive" into the definition of "operate." Such an interpretation of WIS. STAT. § 346.63 is erroneous and contrary to the statute's plain language and ***Proegler***. Furthermore, Cleaves was never deprived of the opportunity to present such evidence. But the right to present such evidence is irrelevant to the issue of jury instructions. In viewing the facts and circumstances before it, a trial court may supplement jury instructions as needed, ***State v. Clausen***, 105 Wis. 2d 231, 241, 313 N.W.2d 819 (1982), so long as the instructions fully and fairly inform the jury of the principles of law applicable to a particular case, ***Nowatske***, 198 Wis. 2d at 428.

¶13 Cleaves argues that the trial court's instruction was "tantamount to telling the jury to disregard all of [his] testimony" relating to his intent. We disagree. The trial court did not instruct the jury to disregard Cleaves's mental state. The trial court correctly instructed the jury that a finding of intent to drive or move the vehicle is not required, as directed by ***Proegler***.[2]

¶14 The jury instruction fully and fairly informed the jury of the rules and principles of law applicable here. The instructions conformed with the facts presented at trial. The instruction was not unduly favorable to the State; the fact that the law may be contrary to a defendant's position does not render the jury instruction unfavorable. The jury instruction as a whole adequately and properly informed the jury.

CONCLUSION

¶15 Cleaves's arguments are wholly without merit. The trial court's jury instruction modification properly reflected the applicable law and the facts of this case. We therefore affirm the judgment of conviction.

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[2] We agree with the State that it appears that Cleaves wants us to involve ourselves in the exercise of jury nullification. A defendant has no right to have a jury decide his or her case contrary to law or fact and has no right to jury nullification. ***State v. Bjerkaas***, 163 Wis. 2d 949, 960, 472 N.W.2d 615 (Ct. App. 1991).

By the Court.—Judgment affirmed.

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