

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-2890-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99CF000307

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE P. HOFFMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 SNYDER, J. Lawrence P. Hoffman appeals from a judgment of conviction for homicide by negligent operation of a vehicle. He contends that the trial court erred in rejecting his proffered jury instructions and further contends that there was insufficient evidence to support the conviction. We disagree and affirm the judgment of the trial court.

BACKGROUND

¶2 This case returns to us after remand. *See State v. Hoffman*, No. 01-2740-CR, unpublished slip op. (WI App June 26, 2002). The facts are brief and essentially undisputed. On June 25, 1999, Hoffman and five friends were traveling on Lake Michigan from Racine to Sturgeon Bay, Wisconsin, in Hoffman's thirty-seven foot Sea Ray boat. After leaving the Racine harbor, Hoffman set his course and was running on "autopilot." According to the record, it was a beautiful, cloudless day.

¶3 On the way to Sturgeon Bay, Hoffman noticed that the Sea Ray was running low on fuel and determined that he would need to stop at a nearby harbor to buy gas. About that time, Edward Levernier, a passenger, joined Hoffman at the helm. Hoffman left the controls to retrieve a chart book and Levernier remained near the controls while the boat continued on autopilot. Hoffman returned with his chart book and looked up different ports of call while Levernier remained nearby. After confirming the course, Hoffman left the helm a second time to return the chart book.

¶4 Just as Hoffman was returning to the helm, the Sea Ray struck a nineteen-foot aluminum boat from which four men were fishing. At the time of the collision, the Sea Ray was traveling at approximately twenty knots and the fishing boat was at trolling speed. The Sea Ray struck the rear of the fishing boat, capsizing it and sending all four occupants into Lake Michigan. As a result, Mark Rickert, who had been on the fishing boat, drowned. Both Hoffman and Levernier testified that they did not see the fishing boat prior to the collision.

¶5 The State charged Hoffman with reckless homicide for the death of Rickert and three counts of reckless endangerment regarding the other occupants

of the fishing boat. A jury convicted Hoffman of the lesser-included offense of homicide by negligent operation of a vehicle. Hoffman appealed and on review we determined that his theory-of-defense instruction should have been given to the jury. *Hoffman*, unpublished slip op. at ¶8. We reversed the conviction and remanded the matter for a new trial. *Id.* at ¶9.

¶6 On remand, the State charged Hoffman with the sole count of homicide by negligent operation of a vehicle. A jury found Hoffman guilty and he appeals.

DISCUSSION

¶7 Hoffman first argues that the trial court inadequately instructed the jury with regard to the meaning of “operate” as that term is contemplated in the crime of homicide by negligent operation of a vehicle under WIS. STAT. § 940.10 (2001-02).¹ Hoffman contends that the jury should have been instructed using his proposed definition for the situation “where a boat has an automatic piloting device engaged.”

¶8 A trial court has broad discretion in deciding whether to give a particular jury instruction and the court must exercise its discretion to “fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.” *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996) (citation omitted). However, we will independently review whether a jury instruction is appropriate under the specific facts of a given case. *State v. Groth*, 2002 WI App 299, ¶8, 258 Wis. 2d

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

889, 655 N.W.2d 163, *review denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 100 (Wis. Mar. 13, 2003) (No. 01-3000-CR).

¶9 Hoffman proposed the following jury instruction: “In a situation where a boat has an automatic piloting device engaged, a person is operating a boat when he is performing lookout duties and monitoring the controls of the boat which affect speed and direction.”

¶10 The court rejected Hoffman’s instruction in favor of a modified version of WIS JI—CRIMINAL 1170 (2002) “Homicide by Negligent Operation of a Vehicle — § 940.10.”² At the jury instruction conference, the court presented its

² The modified jury instruction used by the trial court reads as follows:

Statutory Definition of the Crime

Homicide by negligent operation of a vehicle, as defined in § 940.10 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by the negligent operation or handling of a vehicle.

State’s Burden of Proof

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 three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a vehicle.

A motorboat is a vehicle. Operate means controlling the speed or direction of a motorboat. When the auto-pilot is engaged, a person may be in control of the speed or direction of a motorboat even though he does not physically manipulate the throttle or the wheel.

2. The defendant operated a vehicle in a manner constituting criminal negligence.

(continued)

3. The defendant's criminal negligence caused the death of Mark Rickert.

"Cause" means that the defendant's act was a substantial factor in producing the death.

The Meaning of "Criminal Negligence"

"Criminal negligence" means:

- the defendant's operation of a vehicle created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that his operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

A navigational rule provides that:

Look-out

Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

Another navigational rule provides that:

Risk of Collision

(a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.

(b) Proper use shall be made of radar equipment if fitted and operational, including long-range scanning to obtain early warning of risk of collision and radar plotting or equivalent systematic observation of detected objects.

Violating these navigational rules does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.

Jury's Decision

(continued)

modified instruction to both parties. After hearing the instruction, Hoffman's attorney stated:

I had originally proposed a different definition of "operating" that I will submit in writing. It's handwritten, but I want it made part of the record. My recollection is that in response to that then the court modified the substantive instruction regarding operating into what we have now. And I am in agreement that that incorporates the spirit of -- of my proposed modification and I don't object to that.

¶11 The State argues that Hoffman waived any right to object to the jury instruction defining the term "operate." We agree. A party's failure to object to the instruction at trial constitutes a waiver of that party's right to raise the objection on appeal. *State v. McBride*, 187 Wis. 2d 409, 420, 523 N.W.2d 106 (Ct. App. 1994). The waiver rule is codified in WIS. STAT. § 805.13(3). Hoffman expressly accepted the jury instruction as presented by the trial court and cannot now object to the court's use of that instruction.³

¶12 Hoffman also challenges the trial court's decision not to present an instruction on negligent entrustment. Hoffman's theory at trial was that he was

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

³ When a party waives the right to object to a jury instruction, the court of appeals is "powerless to entertain an objection ... unless it is persuaded ... that a new trial is required in the interest of justice." *State v. McBride*, 187 Wis. 2d 409, 420, 523 N.W.2d 106 (Ct. App. 1994). Also, a party's failure to object does not prevent us from reviewing a jury instruction when the defendant attributes the failure to object to ineffective assistance of counsel. *State v. Ziebart*, 2003 WI App 258, ¶14, 268 Wis. 2d 468, 673 N.W.2d 369, *review denied*, 2004 WI 20, 269 Wis. 2d 201, 675 N.W.2d 807 (Wis. Feb. 24, 2004) (No. 03-0795). Here, Hoffman has not argued for discretionary reversal, nor has he alleged ineffective assistance of counsel. Therefore, we consider his objection to the jury instruction waived.

not operating the boat at the time of the collision. Rather, he asserts that he had delegated operational duties to Levernier, who had remained at the helm when he walked away. Hoffman requested the following instruction regarding negligent entrustment:

To find Larry Hoffman criminally negligent in permitting Edward Levernier to assume control of his boat, you must find that:

1. Larry Hoffman was initially in control of the boat;
2. Larry Hoffman permitted Edward Levernier to assume control of his boat;
3. Larry Hoffman either knew or in the exercise of ordinary care should have known that Edward Levernier intended or was likely to control the boat in a way that would create an unreasonable and substantial risk of death or great bodily harm to another.

The trial court rejected Hoffman’s proposed instruction, concluding that the instruction “create[d] an issue in that regard where there is none.”

¶13 We agree with the trial court. A defendant is entitled to a theory-of-defense instruction where: (1) the defense relates to a legal theory as opposed to an interpretation of evidence, (2) the request is timely made, (3) the defense is not adequately covered by other instructions, and (4) the defense is supported by sufficient evidence. *Coleman*, 206 Wis. 2d at 212-13.

¶14 Hoffman’s negligent entrustment instruction would have been appropriate if the State had argued that he was negligent for entrusting operation of the Sea Ray to Levernier. Instead, the State argued that Hoffman left the helm without making any provision for operation of the boat.

¶15 The trial court instructed the jury that: “It is the theory of the defense that Larry Hoffman did not violate his duty of lookout or his duty regarding risk of collision because he had delegated those duties to Edward Levernier and Levernier had assumed those duties.” If jurors had concluded that by the time of the collision Hoffman had turned control of the boat over to Levernier, they would have no reason to find Hoffman causally negligent. We conclude that this instruction, in concert with others given, adequately covered Hoffman’s defense and therefore the trial court’s decision to reject the negligent entrustment instruction was not clearly erroneous.

¶16 Finally, Hoffman contends that the evidence presented was not sufficient to support a conviction. The crime of homicide by negligent operation of a vehicle consists of three elements. WIS JI—CRIMINAL 1170. The State must prove that the defendant operated a vehicle. *Id.* It must also prove that the defendant operated the vehicle in a manner constituting criminal negligence. *Id.* Finally, it must prove that the defendant’s criminal negligence caused the death of another human being. *Id.*

¶17 Hoffman contends that the State failed to present evidence that he was operating the boat at the time of the collision or that he was in any way causally negligent. We will not, however, substitute our judgment for that of the trier of fact unless the fact finder relied on evidence that was “inherently or patently incredible.” *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). If there is any credible evidence which in any reasonable view supports the jury verdict, we will not disturb it on appeal. *Morden v. Continental AG*, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659.

¶18 Hoffman’s operation of the boat is sufficiently demonstrated by the record. The State presented evidence that Hoffman was at the controls of the Sea Ray for hours prior to the collision. The State’s expert witness, Dale Morey, testified that to safely operate the boat when autopilot is engaged, the operator should maintain a proper lookout and monitor the controls of the boat. Hoffman left the helm for a minute to retrieve a chart book. He left again for “under two minutes” to return the chart book. Levernier testified that when Hoffman left the helm, he did not “say anything to [Levernier] about taking over the helm of the boat.” As Hoffman returned to the helm after putting the chart book away, the collision occurred and Hoffman grabbed the throttle and put the boat in idle.

¶19 Hoffman points to testimony that Levernier was at the helm when the collision occurred and therefore the only reasonable finding the jury could have made is that Levernier was operating the boat at the time of the collision. Although testimony supporting Hoffman’s theory of defense was indeed presented at trial, it is our role to search the record for evidence to support the jury’s verdict, not for evidence to support a verdict the jury could have reached but did not. *See id.*, ¶39. Because credible evidence demonstrates that Hoffman never turned over control of the boat to Levernier, the record supports the jury’s finding that Hoffman was operating the boat and we will not disturb the jury’s verdict on appeal. *See id.*, ¶38.

¶20 With regard to the element of causation, Hoffman relies on the testimony of Morey to contest the jury’s verdict. Hoffman cites the following exchange with Morey:

Q. Okay. And maybe this is common sense too, but is it fair to say that the cause of the accident in this case was that whoever’s duty it was on the Sea Ray to maintain

lookout and to maintain their duty to overtake safely breached that duty?

A. Yes.

¶21 Had the jury determined that Levernier was operating the boat at the time of the collision, Morey’s testimony might support Hoffman’s position. As we concluded earlier, however, the jury’s finding that Hoffman was operating the boat was supported by credible evidence; therefore, Morey’s testimony supports the jury finding that Hoffman caused the death of Rickert. Because credible evidence exists in the record to support the jury’s finding of causation, we will not disturb the verdict on appeal. *See id.*

CONCLUSION

¶22 We conclude that Hoffman expressly waived any objection to the jury instruction defining the term “operate” and cannot now object to the trial court’s use of that instruction. We further conclude that the court’s rejection of Hoffman’s proffered instruction on negligent entrustment was not clearly erroneous. Finally, we hold that credible evidence supports the conviction and therefore we will not disturb the jury’s verdict on appeal.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

