COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2558-CR **Cir. Ct. No. 2010CT2307**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HEIDI L. FLEISCHMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Heidi Fleischmann appeals a judgment of conviction for operating while intoxicated, second offense. She contends the evidence was insufficient to show that she had been operating her vehicle in an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

area "held out to the public for use of their motor vehicles," as required under WIS. STAT. § 346.61. We reject her argument and affirm.

BACKGROUND

¶2 The State charged Fleischmann with operating while intoxicated and operating with a prohibited alcohol concentration, both as second offenses. Fleischmann brought a motion to dismiss, alleging the parking lot where she was discovered was not "held out to the public for use of their motor vehicles." *See* WIS. STAT. § 346.61.

¶3 At the motion hearing, airport security officer Jeffrey Lueck testified that on October 27, 2010, at approximately 1:45 a.m., he observed a vehicle driving around one of the parking lots on airport property. Lueck explained that Brown County owns the airport and adjacent land, and leases the land to private tenants. The parking lot at issue was a business lot located between a hotel and a fuel storage area. The county had most recently leased the lot and adjacent building to a business called Claims Management Services. However, that business had vacated the property over one year ago and the building was currently empty. Lueck testified the parking lot is held out to the public and there are no signs or barriers prohibiting the public from accessing the lot.

¶4 Officer Patrick McGinty testified he was dispatched to the airport, and when he arrived, Lueck told him "he found a suspicious vehicle in the parking lot of one of the buildings at the airport." McGinty believed the parking lot was held out to the public because it is connected to a divided road with speed limit signs and there is nothing that would impede a motorist from entering the lot.

¶5 On cross-examination, Fleischmann read a portion of McGinty's testimony from the refusal hearing into the record. There, McGinty testified he was "summoned" to the area because an airport security officer had found a car that "was suspicious. I believe it was parked … in an area where it shouldn't have been parked. Or no cars should be parked in that area. Or something along that line." Fleischmann then asked, "Basically [her] vehicle was seen to be in a restricted type of area, is that correct?" McGinty responded, "That was my understanding[.]"

¶6 The court concluded the parking lot was held out to the public and denied Fleischmann's dismissal motion. In support of its determination, the court found the parking lot was off a main street and readily accessible to the public. The court determined there were no signs or barriers prohibiting the public from entering and using the lot. Although the lot was currently empty, the court observed it was most recently leased by a business and was available to the public at that time. The court determined that if the county, as owner of the lot, did not intend the lot to be held out to the public after its tenant had vacated the property, the county would have posted signs or built barriers to prevent the public from entering. The court also rejected McGinty's use of the word "restricted" to describe the parking lot. The court reasoned that a dispatch to an officer to go to a "restricted area" did not automatically render the area restricted. Fleischmann subsequently pled guilty.

DISCUSSION

¶7 WISCONSIN STAT. § 346.61 prohibits, in relevant part, individuals from operating while intoxicated on "all premises held out to the public for use of their motor vehicles …." On appeal, Fleischmann argues the evidence is

insufficient to support the circuit court's determination that she was operating her vehicle in an area "held out to the public for use of their motor vehicles." She also appears to contend the evidence actually shows the parking lot is *not* held out to the public.

¶8 Whether a premises is held out to the public depends on the owner's intent. ***City of Kenosha v. Phillips***, 142 Wis. 2d 549, 554, 419 N.W.2d 236 (1988). The State can prove an area is held out to the public "by action or inaction that would make the intent explicit or implicit." ***Id.*** at 558. In ***City of La Crosse v. Richling***, 178 Wis. 2d 856, 860, 505 N.W.2d 448 (Ct. App. 1993), we determined the appropriate test is whether "potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner."

¶9 In ***Phillips***, the supreme court held an employee parking lot that was posted with a sign stating "AMC parking only. Violators will be towed at own expense" was not "held out to the public" because it permitted only a "defined, limited portion of the citizenry" to access the lot. ***Phillips***, 142 Wis. 2d at 553-54, 557. However, in ***Richling***, we determined a business parking lot that was intended for use by the business's patrons but had no posted signs restricting use was held out to the public because practically any motorist could be a customer and park in the lot. ***Richling***, 178 Wis. 2d at 859-60.

¶10 Fleischmann argues the evidence does not sufficiently support a determination that the parking lot is held out to the public. In support, she contends that:

> The State fail[ed] to show: 1) the purpose or use of this area; 2) the size of the area; 3) whether vehicles are allowed in this area; 4) whether vehicles normally travel in this area; 5) [i]f officers routine[ly] patrol this area and prohibit the public from accessing it; 6) whether other vehicles are allowed to enter the lot and if permission is needed; 7) the current or planned use of the lot; 8) who maintains the lot; 9) and whether the prior lessee still has the right to exclude people from the area.

We agree that the State bears the burden of proving the parking lot is held out to the public. *See* ***Phillips***, 142 Wis. 2d at 558. However, to the extent Fleischmann asserts the State is required to introduce evidence regarding each element on her list, she has failed to offer any legal authority in support of that argument. We will not consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶11 However, applying the ***Richling*** test to the facts of this case, we conclude there was sufficient evidence to show the parking lot was held out to the public. The parking lot is a business lot that is located off a public road and is easily accessible to the public. The lot was most recently used by a business. After the business vacated the property, the county, as owner of the lot, did nothing to prevent the public from using its lot. There are no signs or barriers prohibiting the public from entering, passing through, or parking in the lot. Similar to the circuit court, we conclude these findings support the conclusion that the county's inaction shows it implicitly intended the lot to be held out to the public. *See* ***Phillips***, 142 Wis. 2d at 558.

¶12 Fleischmann also appears to argue that the circuit court erred by disregarding the evidence showing the parking lot was "restricted." She contends this evidence supports a determination that the lot is not held out to the public.

¶13 The circuit court, as the finder of fact, declined to find that the lot was "restricted." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990) (fact finder, not appellate court, weighs evidence). We will not set aside a circuit court's factual determination unless clearly erroneous. WIS. STAT. § 805.17(2). In support of its determination that the lot was not restricted, the court reasoned the dispatch McGinty received to respond to a "restricted area" did not necessarily mean that the parking lot was in fact restricted. The court observed the evidence only showed it was "suspicious to have this car in this lot that isn't used anymore at this time of night." The court also noted that Lueck never testified the parking lot was "restricted." The court's finding is not clearly erroneous.

By the Court.—Judgment affirmed.

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