IN THE COURT OF APPEALS OF IOWA

No. 1-422 / 10-1311
Filed July 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KIRK PAUL DAHLHEIMER,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Todd A. Hensley, Judge.

Kirk Dahlheimer appeals from his conviction of operating while intoxicated.

AFFIRMED.

Paul W. Deck of Deck & Deck, L.L.P., Sioux City, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Patrick Jennings, County Attorney, and Kristine Timmins, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

TABOR, J.

A jury convicted Kirk Dahlheimer of operating while intoxicated (OWI) in violation of Iowa Code section 321J.2 (2009). On appeal, Dahlheimer challenges the "operating" element of the offense in two ways. First, he claims testimony that he was seated behind the wheel of a pickup that had its motor running was insufficient to prove that he "operated" the parked truck. Second, he contends the district court erred in declining to instruct the jury that OWI does not apply to a passenger.

Viewing the evidence in the light most favorable to the jury's verdict, we find sufficient proof that Dahlheimer was operating a motor vehicle when the evidence showed he was sitting in the driver's seat of an idling pickup truck. Because the district court properly instructed the jury on the meaning of "operate" and the proposed instruction amounted to a comment on specific evidence, the court did not abuse its discretion in declining to give it.

I. Background Facts and Proceedings

Three patrons of the Corner Pocket bar in Sioux City were standing in the parking lot on the night of December 13, 2008, when they saw a blue Chevy pickup back into a red Dodge Dakota pickup. The witnesses recalled that the Chevy pickup sped away without stopping to assess any damage it caused. The witnesses saw one or two men inside the speeding truck, but could not identify the driver. The bartender told investigators that Kirk Dahlheimer had been drinking at the Corner Pocket that night and may have left in the blue Chevy pickup.

Officer Joshua Tyler responded to the hit-and-run report. The officer found Dahlheimer's address and drove to his residence. Upon arriving at Dahlheimer's house, the officer saw a blue Chevy pickup truck parked in the driveway that matched the description of the one involved in the accident at the bar. Tyler testified to seeing one individual sitting in the driver's seat and no other people outside the vehicle. Tyler called for assistance. Officer Joshua Fleckenstein arrived at the scene within a few minutes. Both officers saw Dahlheimer get out of the driver's side door of the truck. He was holding an open twenty-four-ounce can of Budweiser. The truck's engine was running.

Dahlheimer behaved erratically when confronted by the officers, one moment laughing and joking and the next moment screaming and cursing. Tyler asked Dahlheimer about the accident at the bar. Dahlheimer said he wasn't driving. Dahlheimer told the officers that a friend named Tommy Barker drove the truck home from the bar. Dahlheimer's teenage son also testified to that version of events.

After talking to Dahlheimer, Tyler reached through the open driver's side door and switched off the truck's ignition. Inside the truck he noticed more beer cans. The extended cab was littered with tree-trimming tools that Dahlheimer used in his work as an arborist, leaving little room for a backseat passenger. The outside of the truck revealed minor damage from the collision with the red pickup.

Dahlheimer failed the field sobriety tests and registered a .176 percent blood alcohol concentration on the DataMaster machine. The officer read Dahlheimer his Miranda rights and asked him questions about the accident.

Dahlheimer's responses were inconsistent. At one point he told the officer that Tommy was driving and at another point he said: "I didn't back into a vehicle. I thought I ran that lady over." Dahlheimer gave Tyler a telephone number for Tommy. When the officer made contact, Tommy sounded very intoxicated and, alternately, denied being at the Corner Pocket and acknowledged being there but denied driving Dahlheimer's truck.

The Woodbury County Attorney charged Dahlheimer with third-offense OWI with a habitual felony enhancement. The case went to trial on April 22, 2010. Dahlheimer unsuccessfully moved for judgment of acquittal. He also asked that the court instruct the jury that "OWI does not pertain to a passenger"; the court declined. The jury returned a guilty verdict on the OWI. Dahlheimer admitted his prior felonies and the court sentenced him to an indeterminate term of fifteen years. Dahlheimer now appeals his conviction.

II. Scope and Standard of Review

Our scope of review is for correction of errors at law. *State v. Boleyn,* 547 N.W.2d 202, 204 (Iowa 1996). When reviewing the district court's denial of the defendant's motion for judgment of acquittal, we view the evidence in the light most favorable to the State. *Id.* We accept any legitimate inferences that may reasonably be deduced from the evidence. *State v. Weaver,* 405 N.W.2d 852, 853 (Iowa 1987). We uphold the denial of a motion for judgment of acquittal if there is any substantial evidence in the record supporting the charges. *Id.* Substantial evidence is evidence which would convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.*

We review challenges to jury instructions for errors at law. *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010). But we review the related claim that the district court should have given an instruction requested by the defendant for an abuse of discretion. *Id.*

III. Discussion

A. Substantial evidence of operating

As a threshold matter, we address the State's argument that Dahlheimer's motion for judgment of acquittal was too generic to preserve error. It is true Dahlheimer's motion did not identify the element of OWI he found insufficiently supported by the evidence. A general motion for judgment of acquittal does not preserve error on specific deficiencies. *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996).

But our supreme court has recognized an exception to this error-preservation rule where the record indicates that grounds for the motion were obvious to counsel and the court. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). That exception applies here. Dahlheimer stipulated he was intoxicated; the only remaining element was proof of operating a motor vehicle. *See Boleyn*, 547 N.W.2d at 204 (reciting the two elements of OWI). The assistant county attorney directed the court's attention to the testimony of the peace officers concerning Dahlheimer's location on the driver's side of the truck. On this record, we conclude error was preserved.

Turning to the merits of the claim, we must decide whether the State offered substantial evidence that Dahlheimer was "operating" the pickup truck.

Our supreme court has defined "operating" as being in "the immediate, actual physical control over a motor vehicle that is in motion and/or has its engine running." *Munson v. Iowa Dep't. of Transp.*, 513 N.W.2d 722, 724 (Iowa 1994). When determining whether an individual is "operating" within the meaning of our OWI statute, we keep in mind the remedial nature of the law and our duty to construe it liberally in favor of the public interest and against the private interests of the driver involved. *State v. Murray*, 539 N.W.2d 368, 369-70 (Iowa 1995). Our OWI statute aims to deter intoxicated individuals from occupying a vehicle, except as passengers, and "seeks to protect against possible results from a drunken condition of a driver." *Weaver*, 405 N.W.2d at 854.

Dahlheimer challenges the State's proof that he was "operating" his truck when police officers located him in his own driveway. He asserts that it was not enough for the State's witnesses to establish he was sitting in the driver's seat of the truck with the motor running. In his appeal brief, Dahlheimer reiterates his version of events—that he did not start the truck and did not drive to that location, but left the engine running for warmth while he finished drinking his beer. He claims he had no intent to drive the truck.

The State counters that "[t]he present case is not the first in which a person was operating a motor vehicle by virtue of having the engine running." The State relies on *Weaver* and *Murray.* In *Weaver*, the police found the defendant seated behind the steering wheel of his pickup, parked in the middle of a gravel road, with its engine running, but gears jammed. *Weaver*, 405 N.W.2d at 853. Our supreme court found that Weaver was "operating" the vehicle, which

had a separate meaning from "driving" a vehicle. *Id.* at 854-55. Similarly, in *Murray*, the court concluded the defendant was "operating" within the meaning of the OWI statute when police found him intoxicated and slumped over the wheel of his vehicle with its engine running, despite the fact that the clutch wasn't working. *Murray*, 539 N.W.2d at 369.

Dahlheimer fails to cite any Iowa case law in support of his argument. Rather he points to what he calls a "leading" case from the Minnesota Court of Appeals, *State v. Pazderski*, 352 N.W.2d 85 (Minn. Ct. App. 1984), for the proposition that a defendant has a legal right to drink beer while sitting in his vehicle in his own driveway. We do not find *Pazderski* helps Dahlheimer's cause because the facts in that case differ significantly from his situation. Police found defendant Pazderski asleep in his car on the property where he lived; the key was not in the ignition and the engine was not running.[1] *Pazderski*, 325 N.W.2d at 88. Those facts "did not support the conclusion that appellant exercised the necessary physical control" of a motor vehicle." *Id*. By contrast, Dahlheimer was awake, seated in the driver's position, with the keys in the ignition and the motor running.

Under the interpretation of "operating" in *Weaver* and *Murray,* Dahlheimer was in "immediate, actual physical control over a motor vehicle" because the keys were in the ignition and the engine was running. *See Boleyn*, 547 N.W.2d at 205. The fact Dahlheimer's truck was parked in his own driveway does not

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[1] The Minnesota courts have limited *Pazderski* to its facts and have determined that intent is not dispositive in determining whether a person is in physical control of a vehicle. *See State v. Fleck*, 763 N.W.2d 39, 41-42 (Minn. Ct. App. 2009).

change the outcome of the analysis. Upon arriving at Dahlheimer's house, Officer Tyler saw an individual in the driver's seat of the idling pickup and moments later both officers saw Dahlheimer exit the driver's side door, beer in hand. It was evident from Officer Tyler's description of Dahlheimer's erratic behavior that the defendant's judgment was impaired.

We liberally interpret the "operating" language of our OWI chapter because the goal is "to enable the drunken driver to be apprehended before he strikes." *See State v. Schuler*, 243 N.W.2d 367, 370 (N.D. 1976) (highlighting the importance of preventing operators who are under the influence from "entering upon highways and into the stream of traffic"). Our case law highlights the fact that an intoxicated person seated behind the steering wheel of a motor vehicle with key in the ignition and the engine running poses a threat to public safety. *See Murray*, 539 N.W.2d at 369. Because the State offered substantial evidence that Dahlheimer was "operating" his pickup truck, the district court correctly denied the motion for judgment of acquittal.

In addition to the evidence that Dahlheimer was "operating" his truck when it was parked in his driveway, circumstantial evidence supports the reasonable inference that he actually drove the truck home from the Corner Pocket bar. *See State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998); *Boleyn*, 547 N.W.2d at 204-06. The officers found him in the driver's seat of a vehicle recently involved in a hit-and-run accident. Although generally denying that he drove home, at one point, Dahlheimer admitted to officers that he thought he "ran a lady over." When contacted by the officer, Tommy did not corroborate Dahlheimer's story.

Although Dahlheimer did call witnesses who backed up his version of events at trial, the jury was free to disbelieve their testimony. *See Boleyn*, 547 N.W.2d at 206 (noting that fact-finder has the prerogative to reject defendant's self-serving version of events and corroborative testimony of family members).

We conclude the jury's verdict was supported by substantial evidence that Dahlheimer drove his truck home from the bar after the accident. Alternatively, we find the evidence was sufficient to show he operated the truck when he was sitting in the driver's seat with the engine running.

B. Dahlheimer's requested jury instruction

The district court is required to instruct the jury as to all law that applies to the material issues in a case. *Marin*, 788 N.W.2d at 837. In doing so, the court must deliver a party's requested instruction if it correctly conveys the law and the concept is not otherwise embodied in the instructions. *Id.* The court is not required to give any particular form of an instruction so long as the court fairly states the law as applied to the facts of the case. *Id*. at 838.

At trial, Dahlheimer urged the district court to instruct the jury that "OWI does not pertain to a passenger." The State objected to Dahlheimer's proposal, suggesting that the instruction would presuppose where the defendant was sitting "and it's up to the fact finder to determine where the defendant was sitting." The court denied the request, finding that Instruction No. 16 allowed

> the parties to make whatever argument they believe the facts did show. The defendant has the option under that instruction to, in fact, argue that he was in the passenger seat and that he did not have immediate actual physical control over the motor vehicle.

Instruction No. 16 defined "operate" for the jury as that word was used in the marshaling instruction:

> The term "operate" means the immediate, actual physical control over a motor vehicle that is in motion and/or has its engine running.

We agree with the district court's decision not to give Dahlheimer's proposed instruction. On appeal, Dahlheimer maintains the proposed instruction was necessary to prevent the jury from assuming that "if the engine in a vehicle is running the term 'operate' under the statute is inclusive of any and all passengers who are in the motor vehicle."

Initially, we are not convinced the defendant's proposed instruction is a correct expression of the OWI law. We can imagine situations where the definition of "operate" may apply to an intoxicated passenger who causes the driver to lose control of the vehicle. *See, e.g.*, *Columbus v. Freeman*, 908 N.E.2d 1026, 1029 (Ohio Ct. App. 2009).

But even if the instruction was a correct statement of the law, Dahlheimer's concern about the jury's adoption of an over-inclusive definition of "operate" was alleviated by the use of the phrase "immediate, actual physical control" in Instruction No. 16. Only an individual who is in immediate and actual physical control over a motor vehicle can be found guilty of OWI. In a Minnesota case cited by Dahlheimer, the appellate court held that "physical control" could be determined by a variety of circumstances, including where the defendant is sitting in the car and whether the car belonged to the defendant. *State v. Starfield*, 481 N.W.2d 834, 838 (Minn. 1992). The plain meaning of the word

"immediate" is "being near at hand: not far apart or distant." *State v. Eickelberg*, 574 N.W.2d 1, 4 (Iowa 1997) (citing Webster's Third New International Dictionary 1129 (unabr. ed.1993)). When the definition of "operate" is read in its entirety, it would be clear to a juror that an intoxicated person's mere presence in a motor vehicle is not sufficient to find the person was operating. The defendant's point was accurately embodied in Instruction No. 16. His counsel was free to argue his position regarding the lack of passenger culpability based on the existing instructions. *See Hutchinson v. Broadlawns Med. Ctr.*, 459 N.W.2d 273, 277 (Iowa 1990) (noting defendants were free to argue misdiagnosis alone did not necessarily constitute breach of standard of care without specific instruction so stating). Consequently, under the record made in this case, the court did not err in refusing the proposed instruction. *See Marin*, 788 N.W.2d at 838.

We also agree with the district court's reluctance to give an instruction that magnified the importance of one party's evidence. Jury instructions are not intended to "marshal the evidence or give undue prominence to certain evidence involved in the case." *State v. Marsh*, 392 N.W.2d 132, 133 (Iowa 1986). Dahlheimer's son told the jury his dad was in the passenger's seat on the ride home from the bar. Dahlheimer testified he was "in the pickup on the passenger side" when the police arrived at his residence. A jury instruction that specifically addressed the lack of culpability of a passenger would have risked drawing attention to that specific evidence. The district court acted within its discretion in rejecting Dahlheimer's proposed instruction.

Finding the court properly instructed the jury on the meaning of "operate" and finding substantial evidence that Dahlheimer operated his pickup truck on the night of December 13, 2008, we affirm.

AFFIRMED.