

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACEY ANN SKALSKI,

Defendant-Appellant.

UNPUBLISHED

April 13, 2004

No. 244555

Oakland Circuit Court

LC No. 02-182572-FH

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right her jury conviction for OUIL, third offense. MCL 257.625(1), (8)(c). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant asserts that she was denied a fair trial by the court's refusal to give a special instruction on operating a vehicle. Claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)* 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Kris Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). No error results from the omission of an instruction if the instructions as a whole cover the substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997).

The Michigan Criminal Jury Instructions do not have the official sanction of the Supreme Court, and their use is not required. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). Trial judges are encouraged to examine them carefully before using them, in order to ensure their accuracy and appropriateness to the case at hand. *Id.*

MCL 257.625 bars a person from operating a vehicle on a public highway while under the influence of intoxicating liquor. MCL 257.35a defines "operating" as being in actual physical control of a vehicle. The jury instruction given stated that "operate" means driving or having actual physical control of the vehicle.

Defendant relies on two cases to show that a modification of CJI2d 15.2 was necessary in this case. In *People v Wood*, 450 Mich 399; 538 NW2d 351 (1995), police officers found the defendant unconscious at the wheel of a van in a parking lot. The engine was running, the transmission was in drive, and the defendant's foot was on the brake. The Court concluded that the defendant was operating the vehicle, finding that an unconscious person could have actual physical control over a stationary vehicle. *Id.* at 405. The OUIL statute seeks to prevent collisions of a vehicle operated by an intoxicated person with other persons or property, and a person remains an operator until the vehicle is returned to a position where it does not pose such a risk. *Id.* at 404-405.

In *People v Burton*, 252 Mich App 130; 651 NW2d 143 (2002), officers found the defendant asleep at the wheel of his truck in a parking lot with the engine running. Applying the *Wood* definition of operating, the Court found that where the defendant was asleep and the vehicle was not in gear, there was no significant risk to others. *Id.* at 144. Although the defendant may have been one step from committing OUIL, the final step was not implied by his conduct. *Id.* at 145-146.

Defendant asserts that the jury should have been instructed in accord with the *Wood* definition, and if the jury found that the vehicle did not pose a significant risk of collision, it could find that she was not operating. However, defendant's car was not parked; it was stopped in a traffic lane on a public street. Indeed, defendant told a responding officer that she had been on her way home when she came to a stop in the roadway. Her vehicle posed a significant risk to other drivers. More importantly, the jury instructions comported with the statutory definition of operating. The jury was properly instructed that it could find defendant was an operator if she was in actual physical control of the vehicle.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski