COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2971-CR **Cir. Ct. No. 2004CF705**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALGWYN L. STANLEY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Reversed and cause remanded with directions*.

Before Brown, C.J., Nettesheim and Snyder, JJ.

¶1 SNYDER, J. Algwyn L. Stanley, Jr. appeals from a judgment of conviction for operating a vehicle while intoxicated and from an order denying his motion for a new trial. Stanley contends the circuit court erred when it instructed the jury on the operation of a vehicle under the State's drunk driving law. We agree that the jury was improperly instructed and therefore we reverse and remand for a new trial.

FACTS AND PROCEDURAL BACKGROUND

¶2 On June 29, 2004, Kenosha County Deputy Sheriff Ryan Schabo responded to an anonymous tip about a reckless driver in an older green pickup truck. When Schabo arrived on the scene, he observed a green Dodge truck on the side of the road. He approached the vehicle and found Stanley in the driver's seat, unconscious, with his chin touching his chest. The keys were in the ignition, the truck engine was running, and the transmission was in "park." Schabo reached through the open driver side window and turned off the engine.

¶3 When Stanley roused, Schabo noted that there was a strong odor of intoxicants and that Stanley's eyes were bloodshot. During field sobriety testing, Stanley admitted to Schabo that he was drunk. Stanley was arrested and charged with operating a vehicle while intoxicated, fifth or greater offense, operating with a prohibited alcohol concentration, fifth or greater offense, and operating after revocation as a habitual offender.

¶4 At trial, Stanley presented several witnesses in his defense. He called William Mathews, who testified that he was at a bar called Foxy's on June 29 and he saw Stanley there. Mathews offered to give Stanley a ride because Stanley appeared drunk at the time. Stanley declined the offer, stating that he had

people coming to pick him up. Mathews saw two men enter the bar, they introduced themselves to Mathews and then "basically escorted [Stanley] out."

¶5 The next witness, Kenneth Erickson, testified that on June 29 he had been at his son's baseball game when he received a call on his two-way radio. It was Stanley calling to say he was intoxicated and asking for a ride home. Another witness, William Byrne, was at the baseball game and decided to go with Erickson to pick up Stanley. Both men took Erickson's truck to Foxy's where they found Stanley and were introduced to Mathews. They left the bar and Byrne drove Stanley's truck while Erickson followed in his. Stanley rode in the passenger seat of his own truck.

¶6 After they had traveled "a little ways," Erickson noticed that Stanley's truck was "driving all over the road." He watched the truck pull over to the side of the road and saw Byrne exit. Byrne testified that he got into Stanley's truck intending to drive him home, but Stanley "was pretty loaded, and he was kind of getting obnoxious, and he was getting a little unruly in the car and elbowing and bouncing around." When Stanley did not settle down, Byrne pulled the truck over and got out. He went to Erickson's truck, got in, and Byrne and Erickson left.

¶7 At the close of evidence, the State argued that Stanley "was drunk; he was behind the wheel of a car; he was passed out; he was five and a half miles from the tavern and several miles away from home." The State noted that Stanley "was not at the location where either one of his friends said he was when they dropped him off" and suggested that "the only reasonable inference … is that he was driving the vehicle." Stanley stipulated that he was intoxicated, but argued that the State had not proven that he had operated a motor vehicle on a highway

that night. Stanley emphasized that the location of his truck while stopped on the side of the road was described in exactly the same way by Byrne, Erickson and Schabo; consequently, he argued, the State had not proven that the vehicle was moved after Byrne stopped driving it. The court instructed the jury that to operate a vehicle means "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion."

¶8 During deliberations, the jury sent the following question to the court: "Under the Wisconsin statutory definition if an intoxicated individual gets behind the wheel of a motor vehicle that is already running by definition is that operation of a vehicle?" The court's first inclination was to direct the jury back to the written jury instruction, and both attorneys agreed. However, the State came back to court after a recess and argued that the court should give a different answer to the jury. The prosecutor explained that he had done some research during the break and located ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 628-29, 291 N.W.2d 608 (Ct. App. 1980), which states that operation of a vehicle occurs "either when a defendant starts the motor and/or leaves it running." Stanley vehemently objected to giving the jury the ***Proegler*** definition, arguing that the case was factually distinguishable and the instruction would contribute to jury confusion.

¶9 The circuit court decided to further instruct the jury with the ***Proegler*** language. It reasoned that giving the instruction was consistent with the best interests of the public and the legislative policy to prohibit a person who is intoxicated "from attempting to get behind the wheel." The jury returned a verdict of guilty on all counts.

¶10 After the supreme court's decision in ***Village of Cross Plains v. Haanstad***, 2006 WI 16, 288 Wis. 2d 573, 709 N.W.2d 447, Stanley filed a motion for a new trial. Stanley seized upon the court's reasoning that because Haanstad had not "touched any controls of the vehicle necessary to put it in motion while she was intoxicated," she did not "operate" a vehicle under WIS. STAT. § 346.63. ***Haanstad***, 288 Wis. 2d 573, ¶24. The circuit court denied Stanley's motion, concluding that ***Haanstad*** was "very distinguishable from [Stanley's] case" and that the ***Proegler*** language had been properly submitted to the jury. Stanley appeals.

DISCUSSION

¶11 Stanley presents two questions on appeal. First he asks whether the circuit court erred when it responded to a jury request for clarification of the term "operate" by providing the language in ***Proegler*** instead of directing the jury to consult the standard jury instruction for assistance. If we conclude that the court properly instructed the jury, Stanley asks that we invoke our discretionary reversal power under WIS. STAT. § 752.35 (2005-06)[1] and order a new trial in the interests of justice.

¶12 A circuit court has broad discretion when instructing the jury and must exercise its discretion to fully and fairly inform the jury of the applicable rules of law. *See* ***State v. Ellington***, 2005 WI App 243, ¶7, 288 Wis. 2d 264, 707 N.W.2d 907. We must determine whether the circuit court responded to the jury's inquiry without communicating an incorrect statement of the law or otherwise

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

misleading the jury. *See* ***State v. Randall***, 222 Wis. 2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998). Here, the circuit court initially instructed the jury that "[o]perate means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." This language reflects the statutory definition in WIS. STAT. § 346.63(3)(b). After the jury's request for clarification, the court provided the following supplemental instruction: "operation" of a vehicle occurs either when the defendant starts the motor and/or leaves it running. We employ a de novo standard of review for jury instruction issues that involve the construction of a statutory term. *See* ***State v. Harmon***, 2006 WI App 214, ¶8, 296 Wis. 2d 861, 723 N.W.2d 732.

¶13 Stanley argues that the circuit court's resort to ***Proegler*** for clarification of the statutory term "operates" was error because Proegler admitted that he had "driven to the spot where the officers found his truck" on the night he was arrested. *See* ***Proegler***, 95 Wis. 2d at 628. Therefore, the key issue in Stanley's defense (that he did not drive that night) was not at issue in ***Proegler***. Stanley contends that, by providing the jury with the ***Proegler*** definition, which states that leaving a car's motor running constitutes operation of the vehicle, the circuit court essentially took the factual question from the jury and answered it as a matter of law.

¶14 For support, Stanley directs us to ***Haanstad***, where the court held that sitting in the driver's seat of a parked car with its motor running, without more, is not operating a vehicle under WIS. STAT. § 346.63. *See* ***Haanstad***, 288 Wis. 2d 573, ¶¶23-4. Stanley argues that ***Haanstad*** clarified the substantive law regarding the meaning of the statutory term "operates" and that he is entitled to a new trial with a properly instructed jury.

¶15 The State responds that Stanley cannot rely on ***Haanstad*** because that decision cannot be applied retroactively.[2] Retroactivity is governed by ***State v. Lo***, 2003 WI 107, 264 Wis. 2d 1, 665 N.W.2d 756. In ***Lo***, the supreme court stated that when a new decision declares that the government did not have the authority to prohibit the conduct at issue or when the new decision creates a watershed rule that is implicit in the concept of ordered liberty, it may apply retroactively. *See* ***id.***, ¶63. The State contends that ***Haanstad*** did neither and therefore the circuit court provided the jury with a proper and correct statement of the law as it existed at the time of the trial.

¶16 We do not reach the issue of retroactivity because we conclude that even without the supreme court's clarification in ***Haanstad***, the ***Proegler*** instruction, under the particular facts of this case, misled the jury. The ***Proegler*** court expressed a concern about public safety, and observed that "[t]he severity of Wisconsin's drunk driving law is intended to discourage individuals from initially getting behind the wheel of a motor vehicle while under the influence of alcohol." ***Proegler***, 95 Wis. 2d at 626. ***Proegler*** clearly suggests that the legislature intended that the term "operate" be given a broad definition and application. However, because the ***Proegler*** court defines operators as those who start a car "and/or leave[] it running," *see* ***id.*** at 629, it casts the net so wide that it will catch up any intoxicated person sitting in a running car. We can envision many

[2] Stanley's two-day jury trial began on April 11, 2005. ***Village of Cross Plains v. Haanstad***, 2006 WI 16, 288 Wis. 2d 573, 709 N.W.2d 447, was decided on February 14, 2006.

scenarios where such a broad definition would lead to absurd results.[3] Therefore, a careful look at the facts of each case is necessary to inject some contextual common sense.

¶17 Proegler argued that even though he initially drove the vehicle, he should not be penalized because he ultimately pulled over; or in other words, he had "the brains to get off the road." ***Id.*** at 626. The court rejected this idea, stating that the better rule is to "have the brains to avoid any attempt to operate a vehicle while intoxicated." ***Id.*** at 627. The court borrowed from Montana case law and held that actual physical control of a vehicle was not limited to putting a car in motion but could include restraining the movement of a running vehicle. ***Id.*** Thus, the ***Proegler*** court crafted the definition of "operate" to include starting the motor and/or leaving it running. ***Id.***

¶18 The relevant facts of this case are substantially different than those in ***Proegler***. To borrow the phrase from ***Proegler***, Stanley contends that he did "have the brains" to call for a sober driver after he'd been drinking at Foxy's. *See* ***id.*** at 627. Stanley insists he did not start the motor of his truck, did not drive it, did not park it on the side of the road, and did not move it once it was parked. According to witness testimony, it was Byrne who stopped the car and made the choice to leave the motor running.

[3] ***Haanstad*** provides one such scenario, where the accused had moved from the passenger seat over to the driver's side simply to sit and talk with someone else in the vehicle. ***Haanstad***, 288 Wis. 2d 573, ¶4. Taken out of context, the "and/or leaves [the motor] running" language from ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 628-29, 291 N.W.2d 608 (Ct. App. 1980), could even apply to a passenger who remained in the passenger seat of a running vehicle and did nothing.

¶19 To convict Stanley of operating a motor vehicle while intoxicated, the jury was required to find two facts: (1) that Stanley operated a vehicle on a highway, and (2) that Stanley was intoxicated at the time. *See* WIS JI—CRIMINAL 2663 (2006). By statute, to operate a vehicle one must engage in "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." See WIS. STAT. § 346.63(3)(b). We do not read the statute or the ***Proegler*** case to include as operators passengers who slide into the driver's seat of a running vehicle and fall asleep. Taking the ***Proegler*** language out of context and using it to instruct Stanley's jury under the facts of this case was error.

¶20 When the circuit court errs in instructing the jury, we must ascertain whether the error affected the substantial rights of a party such that there was a reasonable possibility that the error contributed to the outcome. *See* ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶52, 246 Wis. 2d 132, 629 N.W.2d 301. We have no trouble concluding that the error here did indeed contribute to the outcome of the case. As the State aptly observes, "whether there is sufficient evidence to prove that an individual operated a motor vehicle depends on all of the circumstances in the case." The court initially instructed the jury that "operate" means to physically manipulate or activate any of the controls of the vehicle "necessary to put it in motion," and the jury was charged with finding facts that met or failed to meet that definition.

¶21 The jury had heard evidence and arguments that Stanley was arrested right where Byrne left him and also heard evidence and argument suggesting Stanley had moved the truck after Byrne left. We agree with Stanley that it is reasonable to conclude that the jury had accepted Stanley's version of the facts when it then submitted its question about the meaning of the term "operate." Had the jury been persuaded that Stanley had driven his truck to a new location

after Byrne left, the finer points of what constitutes operation of a vehicle would have been irrelevant. Thus, having concluded that Stanley did not drive the vehicle, the only question left for the jury was whether Stanley physically manipulated or activated the controls in some other way. However, the court relieved the jury of its duty to make that determination. By instructing that leaving a motor running constitutes operation, the court misled the jury to believe that only one conclusion was possible: Stanley had operated his truck.

CONCLUSION

¶22 The ***Proegler*** language regarding the statutory definition of "operate" for purposes of drunk driving prosecutions is very broad and must be applied in the context for which it was intended. Rote application will criminalize behavior that is outside the intended scope of the statute. Here, the error affected Stanley's right to have the jury determine, beyond a reasonable doubt, that he operated a motor vehicle while he was intoxicated. Accordingly, we reverse the judgment and order and remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded.

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