COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2197 **Cir. Ct. No. 2009CV2758**

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

CITY OF BELOIT,

PLAINTIFF-RESPONDENT,

V.

STEVEN A. HERBST, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: KENNETH W. FORBECK, Judge. *Reversed and cause remanded with directions.*

¶1 HIGGINBOTHAM, J.[1] Steven Herbst was convicted following a jury trial of operating a motor vehicle while intoxicated, first offense, and for

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

operating a motor vehicle with a prohibited blood alcohol concentration. He makes two arguments on appeal: (1) the court erred by allowing the City of Beloit to argue to the jury that simply touching a steering wheel constitutes "operating" within the meaning of the drunk driving statute, WIS. STAT. § 346.63, and that the court's error was not harmless; and (2) that the evidence was insufficient to convict him of either charge. We conclude the evidence was sufficient to convict Herbst of OWI or prohibited alcohol concentration. However, we also conclude that the court erred by allowing the City to argue to the jury that simple touching of a steering wheel constitutes "operate" under § 346.63 and that the court's error was not harmless. We therefore reverse and remand for a new trial.

BACKGROUND

¶2 The following facts are taken from Herbst's July 19, 2010 trial. City of Beloit police officer Corey Howes was on duty during the early morning hours of June 6, 2009, when he received a "man down" dispatch. He responded by going to the Town Club Bar in the 1900 block of St. Lawrence and Townline Road in the City of Beloit. Upon his arrival, Howes observed a white van parked in the bar's parking lot and a man, later identified as Herbst, seated in the driver's seat slumped over the steering wheel, with the engine running. After waking Herbst, Howes had Herbst perform field sobriety tests and subsequently arrested him for OWI. Howes administered an intoximeter test on Herbst at the police station, which reported a value of .15 of alcohol in Herbst's system.

¶3 The case proceeded to a jury trial. At the close of evidence, the court read the jury instructions to the jury. During the City's closing arguments, the City explained to the jury the meaning of "operate" under the OWI statute, which, according to the City, included having a person's "hands on the steering

wheel." The City provided the same explanation of "operate" during its rebuttal closing argument. Defense counsel objected and argued that "having hands on the steering wheel is [not] operation or manipulation of a vehicle." The court overruled the objection and the case was subsequently submitted to the jury. The jury returned guilty verdicts on both charges. Herbst appeals. Additional pertinent facts will be provided in the discussion section below.

DISCUSSION

¶4 Herbst argues that the court erred by allowing the City to argue to the jury that the meaning of "operate" under WIS. STAT. § 346.63(3)(b) includes having hands on the steering wheel and that the court's error was not harmless. He also argues the evidence was insufficient to convict him of OWI and having a prohibited alcohol concentration. Although we conclude the evidence was sufficient to convict Herbst of both charges, we also conclude that the court erred by allowing the City to argue to the jury that having hands on the steering wheel, without more, falls within the statutory meaning of "operate" and that the court's error was not harmless.

A. Sufficiency of the Evidence

¶5 In reviewing a challenge to the sufficiency of the evidence to support a conviction, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the verdict, is so lacking in probative force and value that no trier of fact, acting reasonably, could have found guilt to a reasonable certainty based upon clear, satisfactory and convincing evidence. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (beyond a reasonable doubt). Whether evidence is sufficient to support the conviction is a question of

law, which we review de novo. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶6 Herbst argues that the evidence was insufficient to convict him of both OWI and for having a prohibited alcohol concentration. The elements of OWI are: (1) the defendant was operating a motor vehicle, and (2) the defendant was under the influence of alcohol at the time of operating the motor vehicle. WIS JI—CRIMINAL 2668. "Operate" is defined by WIS. STAT. § 346.63(3)(b) as meaning: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Herbst contends there was insufficient evidence to establish that he had "operated" his van while under the influence of an intoxicant. What constitutes "operate" within the meaning of § 346.63(3)(b) is a matter of statutory interpretation, which is a question of law subject to de novo review. ***Village of Cross Plains v. Haanstad***, 2006 WI 16, ¶9, 288 Wis. 2d 573, 709 N.W.2d 447.

¶7 Herbst contends there was no evidence that he ever "operated" his motor vehicle. Specifically, he contends there is no evidence that he manipulated any of the vehicle's controls, such as the van's ignition, the gas pedal, or the steering wheel after he began drinking at Jimmy's Pub earlier in the evening of his arrest. He argues that the undisputed facts show that he had a designated driver for the evening and that he was found sleeping behind the steering wheel of his van in the Town Club Bar parking lot. He contends the facts of this case are similar to those in ***Haanstad***, where the court concluded the defendant was not "operating" by simply sitting behind the steering wheel of a motor vehicle with its engine running. *See* ***id.***, ¶¶10, 24.

¶8 The City contends there was sufficient circumstantial evidence to prove that Herbst had "operated" his van by sitting behind the steering wheel and starting the vehicle. The City points to evidence that Herbst was given the keys by his designated driver while at the Town Club Bar so that Herbst could sleep in his van and that the only reasonable inference from the evidence is that Herbst was the one who started the vehicle while he was seated behind the steering wheel. The City argues that the facts of this case are more analogous to ***County of Milwaukee v. Proegler***, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980).

¶9 We conclude there was sufficient evidence to convict Herbst of OWI.

¶10 We reject Herbst's contention that the facts in this case are similar to the facts in ***Haanstad***. In ***Haanstad***, the supreme court reversed the court of appeals' decision that defendant's conduct constituted OWI. ***Haanstad***, 288 Wis. 2d 573, ¶1. The trial court had found that there was no evidence that the defendant had physically manipulated or activated any of the controls of the vehicle in which she was found. ***Id.***, ¶¶10, 16. Specifically, the undisputed evidence established that the defendant "did nothing more than sit in the driver's seat with her feet and body facing the passenger seat, never touching or manipulating the gas pedal, steering wheel, or the keys which were in the ignition, or any of the other controls of the car." ***Id.***, ¶10. There was also evidence that the defendant was driven by a friend to the park where she was arrested, who left the vehicle running and the headlights on, after which the defendant slid over from the passenger's seat into the driver's seat. ***Id.***, ¶¶3-4. The supreme court concluded that simply sitting "in the driver's seat with her feet and body pointed towards the passenger seat ... did not [constitute] 'operate'" within the meaning of the statute. ***Id.***, ¶16.

¶11 Here, the City presented circumstantial evidence from which a reasonable inference could be drawn that Herbst did "operate" his vehicle within the meaning of WIS. STAT. § 346.63(3)(b). Specifically, there was evidence that Herbst had activated the controls of his van by turning on the ignition. Officer Howes testified that when he arrived at the Town Club Bar parking lot in response to a "man down" dispatch there, he observed Herbst seated in the driver's seat of a white van, slumped over the steering wheel, with the engine running. Howes believed Herbst's foot was on the gas pedal because, in his opinion, the vehicle sounded louder than normal.

¶12 Renee Wood, the bartender at the Town Club Bar, testified that Herbst had come into the bar and asked her to call him a cab. She said that approximately a half an hour after she saw Herbst leave the bar, someone told her there was a man sleeping in a van in the parking lot. Wood went outside to verify the report and observed Herbst in the van with the engine running.

¶13 Amy Korn, one of Herbst's employees, testified that earlier that evening she ran into Herbst at Jimmy's Pub. She said that she and others at the Pub, including Herbst, planned on going to the Town Club Bar and that Herbst asked her to drive his van. Herbst testified that he gave Amy the van keys because he had been drinking. After Herbst gave Korn the keys, she drove Herbst to the Town Club Bar. Once at the bar, Korn kept the keys because she had agreed to drive him home later that evening. However, later that evening, Herbst fell asleep on the bar and Korn suggested that Herbst sleep in the van until Korn's daughter could come to the bar and follow Korn and Herbst to Herbst's home. Korn testified she gave Herbst the keys to the van, that she did not start the van's engine, and that she did not see Herbst again until the police officers arrived.

¶14 Herbst argues there was no evidence that he turned on the van's engine. He relies on testimony from Howes that the police officer did not observe Herbst physically activate or manipulate any of the controls of the van necessary to put it in motion. Herbst points out that there is no evidence that anyone saw him turn on the car or manipulate any controls and that he denied starting the car or otherwise manipulating any of the van's controls.

¶15 Herbst ignores our standard of review. Certainly there was disputed evidence as to whether Herbst had turned on the ignition. However, there was ample circumstantial evidence that he did in fact turn on the ignition. Howes saw Herbst slumped over the van's steering wheel with the engine running. Wood also observed the engine running. Korn testified she gave Herbst the van keys so that he could sleep in the van and that she did not turn on the van's ignition. The only reasonable inference from this evidence is that Herbst manipulated the ignition by turning it on. While there is no direct evidence that Herbst activated the ignition, the circumstantial evidence amply supports the jury's verdict.

¶16 However, this does not end our inquiry. Herbst argues the trial court erred by allowing the City to argue to the jury that simply having hands on the steering wheel falls within the definition of "operate." We agree.

¶17 The City, both in its direct and rebuttal closing arguments, informed the jury of the meaning of "operate" that the jury was to apply to the facts to determine whether Herbst was guilty of OWI and of having a prohibited blood alcohol concentration. The City provided the general meaning of "operate" as provided in the statute, and then said the following:

> Setting aside the fact the defendant claims he didn't turn over the ignition, you still have him with his hands on the

> steering wheel. That's necessary to put a vehicle into motion. You have him slumped over the steering wheel.

Defense counsel did not challenge this part of the City's argument at this time. Counsel, however, did object to the following statement made by the City during its rebuttal argument:

> The more likely event is that he actually went in the car and put the key in the ignition and turned it over. But, again, that's not the only thing that you're looking at. You have the physical manipulation of any of the controls of the motor vehicle necessary to put it into motion. *And, as I stated on my first argument, that can be the steering wheel, that can be the gas pedal.*

(Emphasis added.)

¶18 The trial court overruled the objection, stating: "This is final—this is argument, counsel. She's allowed that latitude. I will allow her to do that. These people are intelligent people. They can make that decision. That's their job."

¶19 We acknowledge that, in general, counsel has wide latitude in closing argument and that it is within the trial court's sound discretion to control the content of closing arguments. *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 457, 247 N.W.2d 80 (1976); ***State v. Cockrell***, 2007 WI App 217, ¶41, 306 Wis. 2d 52, 741 N.W.2d 267. However, "[c]ounsel is not permitted to make statements of the law which are of dubious correctness." ***State v. Bougneit***, 97 Wis. 2d 687, 699-700, 294 N.W.2d 675 (Ct. App. 1980). Where counsel's inaccurate statements likely affected the jury's verdict, reversal is appropriate where the trial court erroneously exercised its discretion. *See* ***Lenarchick***, 74 Wis. 2d at 457-58.

¶20 We conclude the trial court improperly exercised its discretion by overruling Herbst's objection to the City's erroneous statement of the law that manipulation of the controls of a motor vehicle includes placing hands on the

steering wheel. If the City meant to say that turning on the ignition of a motor vehicle *and* manipulating the steering wheel constitutes "operate" within the meaning of WIS. STAT. § 347.63(3)(b), that is a correct statement of the law. But that is not how the City framed its discussion of the meaning of "operate." The City plainly intended to convey to the jury that "operate" includes turning on the ignition, or, in the alternative, placing hands on the steering wheel. We know of no case law that stands for this proposition.[2]

¶21 Moreover, in overruling defense counsel's objection to the City's inaccurate statement of the law regarding what constitutes "operate," the trial court appeared to defer to the jury's understanding of whether simply having hands on a steering wheel is "operating" within the meaning of the statute by stating: "This is final—this is argument, counsel. She's allowed that latitude. I will allow her to do that. *These people are intelligent people. They can make that decision. That's their job."* (Emphasis added.) It is not clear what the court intended by responding to defense counsel's objection in this manner. However, it is possible that a reasonable juror, listening to the City's erroneous statement of the law, defense counsel's objection, and the court's response, would be confused as to a

[2] The court's reasoning in ***Village of Cross Plains v. Haanstad***, 2006 WI 16, ¶10, 288 Wis. 2d 573, 709 N.W.2d 447, in support of its conclusion that the defendant did not "operate" the motor vehicle in that case might be read as suggesting that simply touching a steering wheel constitutes "operate" within the meaning of WIS. STAT. § 346.63(3)(b) (the defendant "did nothing more than sit in the driver's seat with her feet and body facing the passenger seat, never touching or manipulating the gas pedal, *steering wheel*, or the keys which were in the ignition, or any of the other controls of the car") (emphasis added). However, when read in context of the entire opinion, it is readily apparent that the court's focus was on the lack of evidence that the defendant there had driven the car to the park. In addition, whether simply touching the steering wheel falls within the definition of "operate" under the statute was not at issue in ***Haanstad***. Thus, we do not read ***Haanstad*** as establishing a holding that touching a steering wheel alone constitutes "operate" under § 346.63(3)(b). In any event, we take the City's lack of response to Herbst's argument that just touching the steering wheel is not "operating" within the meaning of the statute as a concession that Herbst correctly stated the law.

juror's proper role in deciding what constitutes "operate" and whether simple placement of hands on a steering wheel is manipulating or activating the controls of a motor vehicle.

¶22 Usually, errors of the type committed here may be cured by the court reading the appropriate jury instruction. The court did so here. However, the jury instruction explaining the meaning of "operate," WIS JI-CRIMINAL 2668, is stated in general terms, consistent with its statutory definition. The instruction itself does not parse out the various ways by which a person may manipulate or activate the controls of a motor vehicle as a way of providing concrete examples of what constitutes "operate." That is a problem here because the jury was left with the erroneous impression that manipulating the controls of a motor vehicle included turning on the ignition, or pressing down the gas pedal, *or*—significant here—placing one's hands on a steering wheel. The City appears to concede this error, never addressing at all in their briefing the issues of the closing argument or the jury instruction relating to "operate."

¶23 Consequently, although we conclude there was sufficient evidence to convict Herbst of OWI, it is impossible to discern whether the jury convicted Herbst of OWI because he turned on the ignition, which was in dispute; pressed his foot on the gas pedal, which was also in dispute; or by having his hands on the steering wheel, which was not in dispute. We therefore conclude that the court's error was not harmless because it is not possible to determine from the record whether the jury applied the correct law in finding Herbst guilty of OWI. *See* ***State v. Dyess***, 124 Wis. 2d 525, 542-43, 370 N.W.2d 222 (1985) (The test for harmless error is "whether there was a reasonable possibility that the error contributed to the conviction."); ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919 ("A reasonable possibility is a possibility sufficient to

undermine our confidence in the conviction."). If the jury did rely on the City's misstatement that "operate" includes touching the steering wheel, it is likely that this affected the jury's verdict.

¶24 For the foregoing reasons, we reverse and remand for a new trial.

By the Court.—Judgment reversed and cause remanded with directions.

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