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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0278**

State of Minnesota,
Respondent,

vs.

Justin Donald Lubins,
Appellant

**Filed November 13, 2017
Affirmed
Worke, Judge**

Aitkin County District Court
File No. 01-CR-16-545

Lori Swanson, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

James P. Ratz, Aitkin County Attorney, Aitkin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his convictions of first-degree driving while impaired (DWI), arguing that the district court abused its discretion by denying his requested jury instruction explaining physical control and inoperable vehicles. We affirm.

DECISION

A jury found appellant Justin Donald Lubins guilty of two counts of first-degree DWI and one count of driving after cancellation. Lubins argues that the district court abused its discretion by not giving the jury an instruction regarding the circumstances that a jury may consider in determining whether a person was in physical control of a vehicle and whether a vehicle was inoperable.

The district court declined to give the requested jury instruction because the facts of the case did not support it. It is within a district court's discretion to refuse to give a requested jury instruction. *State v. Daniels*, 361 N.W.2d 819, 831 (Minn. 1985). "No error results from a refusal to instruct whe[n] the evidence does not support the proposed instruction and no abuse of discretion is shown." *Id.*

Lubins requested a jury instruction from *State v. Starfield*, in which the supreme court stated:

In considering whether or not the defendant was in physical control of the motor vehicle while under the influence of alcohol, you may consider defendant's location in or by the vehicle, the location of the ignition keys, whether the defendant had been a passenger in the vehicle before it came to rest, who owned the vehicle, the extent to which the vehicle was inoperable, and whether the vehicle if inoperable might have

been rendered operable so as to be a danger to persons or property. You may consider these as well as any other facts or circumstances bearing on whether or not the defendant was then in physical control of a motor vehicle which was or reasonably could become a danger to persons or property while the defendant was under the influence of alcohol.

481 N.W.2d 834, 839 (Minn. 1992). But the court in *Starfield* also stated that inoperability is simply a factor to be evaluated with all of the surrounding circumstances. *Id.* The court also stated that “when it appears that the defendant drove the car to where it came to rest, this is also evidence that the defendant, when found in the parked car, was in physical control of the car while it was parked.” *Id.* at 838. The district court correctly determined that the facts of this case did not support the jury instruction.

Here, Officer Shawn Brown testified that he was in his squad car approximately half a block behind a motor scooter that was “heading eastbound.” Officer Brown “watched [the motor scooter] going eastbound” before he pulled up to an intersection and turned right. The officer continued to drive around the block, ending up on the street where he began, when he saw the motor scooter “now stopped with the rider standing beside it.”

Officer Brown pulled up behind the motor scooter and observed fuel pouring out of the motor scooter’s carburetor. Officer Brown asked the driver, Lubins, if he needed assistance. Lubins replied that he could not get the motor scooter started. Officer Brown recognized Lubins as the person he saw “operating the motor scooter.” Lubins stated that he was “on his way home” from a friend’s house. Lubins lived several miles from where he was stopped. Officer Brown noticed that the motor scooter did not have a license plate and ran a check on Lubins’s driver’s license and was informed that it was cancelled as

inimical to public safety. Lubins asked if he was going to get a ticket or a ride home, admitting that he knew that he had been driving and that he did not have a driver's license.

There is direct evidence of Lubins driving. Officer Brown observed a motor scooter "heading" eastbound. Officer Brown watched the motor scooter "going" eastbound. Officer Brown later saw the motor scooter "now stopped," indicating that, previously, it had not been stopped. Officer Brown drove around a block and saw Lubins further down the street from where he originally observed him, indicating that Lubins drove the motor scooter to where it was stopped. And Officer Brown recognized Lubins as the person he saw "operating" the motor scooter.

There is additional evidence of Lubins driving aside from Officer Brown's observations. Officer Brown testified that Lubins told him that he was "on his way home." Another officer who was called for backup testified that Lubins "stated that he had just been trying to get home." Further, when Lubins asked the officer if he was going to get a ticket or a ride home, he admitted that he had been driving. This evidence supports a finding that Lubins was driving the motor scooter before it broke down.

Lubins claims that on cross-examination, Officer Brown "acknowledged that his report . . . indicated that he only saw a scooter before turning; the officer did not report if he saw the rider or the rider's identity." But Officer Brown testified that he recognized Lubins as the person he saw "operating the motor scooter." Lubins also claims that during an exchange at the jail, Officer Brown indicated that he "did not see Lubins riding the scooter when the officer approached." The recording of the conversation between Lubins and Officer Brown shows the following:

LUBINS: But you said what you said, that I wasn't driving when you approached me, right?

OFFICER: Okay.

LUBINS: Right?

.....
LUBINS: What you, I wasn't driving when you approached me?

OFFICER: When I, when I approached you you were not driving.

LUBINS: All right.

This conversation is consistent with the officer's testimony that he saw the motor scooter stopped and the rider standing beside it. This does not contradict the officer's testimony that he saw Lubins driving the motor scooter before it was stopped. Because the evidence does not support Lubins's defense that he was not driving or in physical control of an inoperable motor scooter, the district court did not abuse its discretion by refusing to give the jury Lubins's requested jury instruction.

Affirmed.