

*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2018-302

AUGUST TERM, 2019

State of Vermont v. William O'Keefe*	}	APPEALED FROM:
	}	
	}	Superior Court, Orleans Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 242-5-17 Oscr
		Trial Judge: Robert R. Bent

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction for operation of a vehicle while under the influence of intoxicating liquor, arguing that the evidence was insufficient to prove that he was the operator of the vehicle. We affirm.

Defendant was charged with three counts as a result of an incident in April 2017: operating a vehicle under the influence of a drug other than alcohol or under the combined influence of alcohol and any other drug; operating a vehicle under the influence of intoxicating liquor; and operating a vehicle with an alcohol concentration of 0.08 or more. Defendant opted to be tried by the court instead of a jury.

The State presented the following evidence at trial. On April 27, 2017, at around 10:00 p.m., a bartender at the Border Lounge on Route 5 in Derby was standing outside smoking in the bullpen, a fenced-off area used for smoking. He saw a red Buick “tear into” the parking lot, causing everyone to look up. The building’s exterior lighting was designed so that the parking lot was visible to people behind the bullpen fence. The fence consisted of a picket fence about four feet tall with about four feet of garden lattice above it. The bartender saw the vehicle park about thirty feet away. He saw a man, whom he identified at trial as defendant, get out of the driver’s side of the vehicle. He was uncertain whether the man was in the driver’s seat. The man was in his fifties, had gray balding hair and a mustache, and was relatively short. The bartender saw a woman get out of the passenger seat. He only saw two people get out of the car. The man and woman were stumbling and being very belligerent and loud. They approached the bullpen, coming within five feet of the bartender, and asked if anybody had drugs. At that time, one of the bar’s regular patrons, Derick Blake, walked out of the bar. After the bar’s bouncer asked the man and woman for identification, they turned around and got into Blake’s car. The police were called shortly afterward.

On cross-examination, the bartender stated that he was standing within six inches of the bullpen fence and from that position could see everything in the parking lot through the spaces in the lattice. He didn’t know for sure if defendant was in the driver’s seat, but he definitely saw him get out of the front, driver’s side of the car. He agreed that defendant’s hair was in fact red.

However, he stated that the lounge has white fluorescent lights in the parking lot, which could have changed the color of defendant's hair. He testified that he was certain that defendant was the man he saw that night.

The bouncer also testified. He saw the Buick pull into the parking lot and went outside to stop people from entering the bar in case they were drunk. He saw defendant standing on the driver's side of the car with his arm on the roof and a female getting out of the passenger side. He also saw another, unidentified man standing at the back of the car. There were several people coming into the bar at that point, and he did not know if the third man was with defendant and the woman. Defendant appeared to be drunk and was asking for drugs.

The Vermont State Police trooper who responded to the call testified that upon his arrival to the scene, at around 10:15 p.m., he saw a Buick sedan with its doors open and three people, two males and one female, walking away from it. They noticed him and began walking toward the Border Motel. He directed them to come back and asked who had been driving. No one admitted to driving. One of the males was shorter, heavysset, and had reddish hair, while the other was thin, taller, and had brown grayish hair. The trooper recognized the taller male as Derick Blake. The other male identified himself to the trooper as defendant. The trooper believed defendant was impaired because defendant's eyes were bloodshot and watery, he smelled of intoxicants, his speech was slurred, and he was making inappropriate comments about male anatomy in the presence of a female trooper. Defendant denied that he had been drinking. The trooper ran the license plates on the Buick and learned that defendant was registered as the owner. The trooper placed defendant under arrest for driving under the influence. When he patted defendant down, he found keys in defendant's pocket, which defendant stated were the keys to the Buick. The trooper also found a bottle of Oxycontin in defendant's pocket. He transported defendant to the Newport City Police barracks, where defendant agreed to give an evidentiary breath sample.

A forensic chemist for the Vermont Forensic Laboratory testified that the evidentiary breath test result showed that defendant had a blood alcohol content of 0.07 at the time the test was performed at 12:38 a.m. Based on that information and assumptions regarding the typical elimination rate for alcohol from the bloodstream, the chemist estimated that defendant had a blood alcohol content of 0.096 to 0.146 at the time of operation.

Defendant did not present any evidence. The court found defendant not guilty of the counts of operating a vehicle under the influence of a drug other than alcohol and operating a vehicle with an alcohol concentration of 0.08 or more. The court found him guilty of operating a vehicle under the influence of intoxicating liquor. Defendant was sentenced to twelve to twenty-four months, all suspended. This appeal followed.

On appeal, defendant challenges the sufficiency of the evidence presented to support his conviction. This Court uses the same standard of review in bench trials and in jury trials in assessing the sufficiency of the evidence. State v. Amsden, 2013 VT 51, ¶ 8, 194 Vt. 128. That is, we consider whether “the evidence, viewed in the light most favorable to the State and excluding modifying evidence, fairly and reasonably supports a finding beyond a reasonable doubt.” Id. (quotation omitted). Here, the State was required to prove that defendant operated or was in actual physical control of a vehicle on a highway while he was under the influence of alcohol. 23 V.S.A. § 1201(a)(2). Defendant does not argue that he was not under the influence of alcohol or that his vehicle was not on a public highway. His sole argument on appeal is that the State failed to prove beyond a reasonable doubt that he was operating the Buick on the night in question.

After reviewing the record, we disagree. “Our case law is clear that the guilt of a defendant in a criminal case may be proved by circumstantial evidence alone, if the evidence is proper and sufficient in itself.” State v. Warner, 151 Vt. 469, 472 (1989). Here, the bartender testified that he saw the Buick enter the parking lot and saw defendant getting out of the driver’s side of the vehicle. The bartender did not see anyone other than the defendant on the driver’s side. The bouncer also testified that he saw the car pull into the lot and that a few moments later, after he walked outside, he saw defendant standing beside the Buick on the driver’s side with his arm on the roof of the car. The car was registered to defendant, and he had the car keys in his pocket when the trooper patted him down. Although circumstantial, this evidence was adequate, when viewed in the light most favorable to the State, to permit a reasonable inference that defendant had been operating the vehicle when it entered the parking lot. See id. (holding that sufficient evidence existed to prove that defendant operated vehicle where defendant’s pickup truck was parked at police station at 2:30 a.m., officer saw defendant open driver’s door at 3:05 a.m., defendant had not used telephone at police station, and defendant was alone when officer arrived at defendant’s house at 3:15 a.m.); see also State v. Stevens, 154 Vt. 614, 617-18, 580 A.2d 493, 495 (1990) (holding evidence sufficient to prove defendant operated vehicle where officer discovered defendant by himself on exit ramp of highway, kicking snow from wheels of running vehicle lodged in snowbank). Because there was credible evidence supporting the court’s finding that defendant operated the vehicle, we will uphold its verdict.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice