COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2403-CR **Cir. Ct. No. 02CT000042**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES R. SEIBEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County: DALE L. ENGLISH, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Charles R. Seibel was convicted of operating a motor vehicle while intoxicated—second offense. He contends that the trial court erred when it rejected his proposed revision to the standard OWI jury instruction. Seibel

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise stated.

asserts that the standard jury instruction was improper because it employed a lower threshold for conviction than is prescribed by statute. We disagree and affirm the judgment of the circuit court.

¶2 The sole issue in this case is whether the trial court properly instructed the jury on the definition of "under the influence" pursuant to WIS. STAT. § 346.63(1)(a).

FACTS

¶3 The facts as presented by Seibel are undisputed by the State. Officer Robert Baldwin of the City of New Holstein Police Department observed a vehicle weaving within its lane of traffic. Baldwin followed the vehicle for another mile and a half and observed more weaving. He pulled the car over and identified the driver as Seibel. Baldwin noticed that Seibel's speech was slurred. Baldwin asked Seibel to perform field sobriety tests, and when Seibel failed these tests Baldwin placed him under arrest.

¶4 Seibel was charged with Operating a Motor Vehicle While Intoxicated—second offense, and Operating a Motor Vehicle With a Prohibited Alcohol Concentration—second offense. Seibel pled not guilty.

¶5 On April 29, 2003, the matter was tried to a jury. At the close of evidence, the court excused the jury to discuss jury instructions and verdict forms with the parties. Seibel submitted a revised version of WIS JI—CIVIL 2669, which combines instructions for OWI and PAC charges. Seibel submitted an alternative definition for "under the influence," replacing the words "less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle"

with the phrase "incapable of safely operating a motor vehicle." The court declined to use the revision and kept the original language of the instruction.

¶6 The jury returned a verdict of guilty on the OWI charge, and not guilty on the PAC charge. Seibel appeals the OWI conviction.

DISCUSSION

¶7 The trial court has broad discretion in determining what instructions to give the jury and what language to use in those instructions. ***State v. Boshcka,*** 178 Wis. 2d 628, 636, 496 N.W.2d 627 (Ct. App. 1992). Generally, our review of a request for a jury instruction is limited to whether the trial court acted within its discretion when it refused to give the requested instruction. ***State v. Randall***, 222 Wis. 2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998). We will reverse and order a new trial only if the instructions, taken as a whole, communicated an incorrect statement of the law or otherwise probably misled the jury. ***Id.*** at 59-60.

¶8 Seibel argues that the standard OWI instruction is an incorrect statement of the law under WIS. STAT. § 346.63(1)(a), which provides in relevant part: "No person may drive or operate a motor vehicle while ... [u]nder the influence of an intoxicant … to a degree which renders him or her incapable of safely driving." ***Id***. "To determine the propriety of the instruction in this case, we must construe sec. 346.63(1)(a), Stats., to give the proper definition to the phrase 'under the influence.'" ***State v. Waalen***, 130 Wis. 2d 18, 24, 386 N.W.2d 47 (1986). Statutory construction presents a question of law; therefore, this court owes no deference to the circuit court. ***Id.***

¶9 Here, Seibel specifically challenges the instruction for OWI, WIS JI—CRIMINAL 2669, which instructs the jury that they must make two

findings regarding the charge: (1) that the defendant operated a motor vehicle on a highway, and (2) that the defendant was under the influence of an intoxicant at the time the defendant operated a motor vehicle. ***Id.*** The jury instruction further advises that:

> Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

Id. Seibel's proposed change to the instruction replaced the words "less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle" with the phrase "incapable of safely operating a motor vehicle." He argues that the phrase "less capable" in the standard instruction is a "far lower threshold than being incapable of doing something."

¶10 Seibel contends that the court's rejection of his proposed change constitutes error for five reasons: (1) the jury was not fully and fairly informed of the issue in this case, (2) the standard jury instruction gives an unfair advantage to the State, (3) the verdict would have been different had the revised jury instruction been given, (4) his rights were affected by the erroneous jury instruction, and (5) the real controversy was not tried because the jury instruction obfuscated the issue. *See* ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 428-29, 543 N.W.2d 265 (1996).

¶11 Seibel fails to acknowledge, however, the controlling Wisconsin case law on the disputed language of the OWI jury instruction. Our supreme court approved language almost identical to the current OWI jury instruction when it affirmed the validity of the following instruction:

> "A person who is even to the slightest extent under the influence of an intoxicant in the common and well-

> understood acceptation of the term is—to some degree at least—less able either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle as powerful and dangerous a mechanism as a modern motor vehicle with safety to himself and the public."

State v. Waalen, 130 Wis. 2d at 25, (citing ***Fond du Lac v. Hernandez***, 42 Wis. 2d 473, 475-76, 167 N.W.2d 408 (1969)). In the case before us, the language of the standard jury instruction employed by the trial court is nearly identical to that approved by the supreme court in ***Hernandez*** and cited with approval in ***Waalen***.

¶12 In ***Waalen***, the trial court disregarded the 1982 version of the standard OWI jury instruction because it defined "under the influence" as a "material impairment." ***Waalen***, 130 Wis. 2d at 21-22.[2] The trial court instead instructed the jury that "under the influence" meant the intoxicant "tend[ed] to deprive one of the clearness of intellect and self control which one would otherwise possess." ***Id.*** at 22. Observing that the definition of "under the influence" in the Motor Vehicle Code is equivalent to that in the Criminal Code,[3]

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[2] The 1982 standard jury instruction for OWI further stated: "What must be established is that the person has consumed a sufficient amount of alcohol to cause him to be *substantially less able* to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." ***State v. Waalen***, 130 Wis. 2d 18, 21 n.6, 386 N.W.2d 47 (1986) (citing WIS JI—CRIMINAL 2663 (1982) (emphasis added)).

[3] WISCONSIN STAT. § 939.22(42) defines "under the influence of an intoxicant" as follows:

> [T]he actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

the supreme court concluded that the purpose of WIS. STAT. § 346.63(1)(a) is to "foster highway safety," and that requiring "substantial impairment" of an individual's ability to operate a vehicle before that person could be found "under the influence" would be inconsistent with the expressed legislative intent because it would not provide maximum safety for all users of state highways." ***Waalen,*** 130 Wis. 2d at 27-28.

¶13 Notably, the ***Waalen*** court acknowledged that WIS. STAT. § 346.63(1)(a) prohibits operation of a vehicle while under the influence "to a degree which renders [the operator] *incapable of safely driving*." ***Waalen***, 130 Wis. 2d at 27-28 (citation omitted). The court concluded that the legislature clearly intended the Motor Vehicle Code definition of "under the influence" to be consistent with that in the Criminal Code and that the jury instruction used in ***Waalen***, with language virtually identical to that approved in ***Hernandez***, was proper. ***Waalen***, 130 Wis. 2d at 28. We agree that here, the trial court's instruction to the jury "accurately describes the circumstances in which a jury can infer whether an operator's ability to operate a vehicle is 'materially impaired' or when a driver is 'incapable of safely driving.'" *See* ***id.*** at 28.

¶14 We conclude that the trial court's use of the standard jury instruction, WIS JI—CRIMINAL 2669, communicated a correct statement of the law regarding the definition of "under the influence" and affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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