**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 9, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2008AP457-CR** **Cir. Ct. No. 2007CT4096**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RICHARD ROSS,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Reversed.*

¶1 CURLEY, P.J.[1] Richard Ross appeals the judgment, entered following a bench trial, convicting him of operating while under the influence of an intoxicant, second offense, contrary to WIS. STAT. §§ 346.63(1)(a) and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06).

346.65(2) (2005-06).[2] On appeal, Ross argues that the trial court erred in finding him guilty because the State failed to prove beyond a reasonable doubt that he operated the motor vehicle, which is an element of the charge. This court agrees and reverses the judgment.

## I. BACKGROUND.

¶2 A University of Wisconsin-Milwaukee police officer testified at Ross's bench trial that on August 4, 2007, he was driving to a campus building when he saw a car stopped in the right-hand lane of traffic on Farwell Avenue. The car had its hazard lights on. The officer went around the block, pulled up behind the car, parked and approached Ross, who was sitting in the driver's seat. The officer, suspecting that Ross was intoxicated because he had "glassy, bloodshot eyes, spoke with slurred speech, and [had] an odor of intoxicant on him," instructed Ross to turn off the engine and exit the car. The officer had Ross perform several field sobriety tests; Ross failed all but one. The officer then placed Ross under arrest and transported him to the police station. There, Ross submitted to an intoximeter, a breath test, which revealed that he had a breath alcohol concentration of .15 grams of alcohol per 210 liters of breath. During an interview, Ross told the officer that he was not driving the car, his girlfriend was.

¶3 At his trial, the girlfriend, Colleen Thomas, by now a former girlfriend, testified. She verified Ross's account that, on the night in question, she and Ross had attended a Brewers game and then stopped at a bar on the east side of Milwaukee. She stated that she was driving his car that evening as she was the

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

"designated driver," and after leaving the bar and driving out of the parking lot, she realized she left her I.D. in the bar. She explained to the judge that, as a result, she then pulled to the side, left the engine running, put on her hazard lights and went back to the bar to fetch her I.D. She recounted that when she left the car, Ross was in the passenger seat. She also told the court that she never spoke to the officer that evening because "I had a few drinks and I didn't want to get in trouble, too."

¶4 Ross also testified. He detailed the evening's events, which mirrored the testimony given by Thomas. He told the court that after Thomas left the car, he realized the car was blocking traffic. As a result, Ross testified: "I had a prior DUI. I did not want to drive the car, so I hopped over to the driver's seat and instead of moving the car, rolled down the window and started waiving [sic] traffic by." Ross denied ever touching the steering wheel, the gear shift, the gas pedal, the clutch, or the brakes. He described how he moved from the passenger side to the driver's side, by stating that he grabbed the door handle, pulled himself over the shifter and sat down.

¶5 In the trial court's findings, the trial court accepted the testimony of Thomas, stating:

> I'm satisfied as the trier of fact that yes, she started driving the vehicle.
>
> She was going to be the designated driver. She knows how to operate a stick. I'm satisfied as to that.
>
> I'm also satisfied from the evidence that while she was driving the vehicle, she started drinking a lot, too. That clearly explains why, when she came out of the bar, she did not want to acknowledge that she was driving, because she did not want to face the potential of having to go through what the defendant Ross went through.

However, the trial court went on to find Ross guilty, stating:

> But this trier of fact is also satisfied beyond a reasonable doubt that Mr. Ross made a choice to get behind the wheel of that vehicle while it was parked improperly when she went in the bar, so he could take control and operation of the motor vehicle at that point in time.
>
> This court does not find at all credible his testimony [that] he did not touch any of the operating apparatuses, such as the stick, steering wheel, brake, clutch pedal, or anything with regard to getting over from the passenger side of the vehicle – over to the driver's side.
>
> The evidence clearly suggests when he was rolling down the window, had the window down, waving vehicles by, that further demonstrates, and this court is satisfied from circumstantial evidence, that there is a reasonable inference, thereafter, that he was actually operating the vehicle.
>
> It's very hard to get over a stick shift on a column with the brake up, because the vehicle would have to be in neutral with the engine running.
>
> It could only be in gear with the engine stopped, so it would have to be in neutral to get over from one side to the other, and [sic] at a [breath alcohol concentration of] .15, without exercising or starting to exercise operation and control over that vehicle.

## II. ANALYSIS.

¶6 This court will not reverse a trial court's findings of fact unless they are shown to be clearly erroneous. WIS. STAT. § 805.17(2).

¶7 In reviewing the sufficiency of evidence to support a conviction, this court "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶8 WISCONSIN STAT. § 346.63(1)(a) states, in relevant part:

> **(1)** No person may drive or operate a motor vehicle while:
>
> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

¶9 The term "operate" is defined in WIS. STAT. § 346.63(3)(b), which reads: "'Operate' means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because this is a criminal charge, the State had the burden of proving the charge beyond a reasonable doubt. *See* WIS JI—CRIMINAL 2669.

¶10 The interpretation of a statute is a question of law that we review without deference to the trial court. *See* ***State v. Sostre***, 198 Wis. 2d 409, 414, 542 N.W.2d 774 (1996).

¶11 The parties have each cited a case which they claim supports their position. The State submits that the facts here fall within the holding in ***County of Milwaukee v. Proegler***, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980), while Ross argues that this case resembles the facts in ***Village of Cross Plains v. Haanstad***, 2006 WI 16, 288 Wis. 2d 573, 709 N.W.2d 447 .

¶12 In ***Proegler***, Proegler was found sleeping, at approximately 4:00 a.m. behind the steering wheel of a pickup truck parked partially on an emergency ramp of an expressway. ***Id.***, 95 Wis. 2d at 618. The motor was running, the truck's shift lever was in the "park" position, and the lights and heater were on. ***Id.*** Proegler admitted parking the car several hours earlier and falling

asleep. ***Id.*** He submitted to a breathalyzer test which revealed he was intoxicated. ***Id.*** Following a court trial, Proegler was found guilty of operating while intoxicated and he appealed. ***Id.*** On appeal, he claimed, *inter alia*, that the evidence was "against the great weight and clear preponderance of the evidence."[3] ***Id.*** at 620. In upholding the conviction, this court addressed the dangers posed by a sleepy drunk driver who pulls off the road and also agreed with the trial court "that the circumstantial evidence … was sufficient to substantiate the fact that defendant 'operated' his truck within the meaning of [WIS. STAT. §] 346.63." ***Proegler***, 95 Wis. 2d at 628. Specifically, this court noted that the intoxicated Proegler drove his truck to the spot where he was found, had "stopped there without completely pulling off the highway, left the motor running and the lights on, and then fell asleep." ***Id.***

¶13 In the ***Haanstad*** case, Haanstad appealed her conviction for operating while intoxicated to the supreme court. ***Id.***, 288 Wis. 2d 573, ¶1. Originally, the trial court acquitted her of the charge; however, this court reversed. ***Id.*** Haanstad did not challenge the fact that she was intoxicated; rather, she claimed she never operated the car after consuming alcohol. ***Id.***, ¶2. The facts were undisputed that Haanstad had permitted Timothy Satterthwaite, a man she met that evening at a bar, to drive her, in her car, to a park. ***Id.***, ¶3. During the trip to the park, Haanstad had been sitting in the passenger seat. ***Id.*** With the "vehicle running and the headlights on," Satterthwaite exited the car to help a friend, who was also a passenger in Haanstad's car, get into Satterthwaite's vehicle, which was parked next to Haanstad's car. ***Id.***, ¶4. When Satterthwaite

[3] Proegler was apparently charged with first time operating while intoxicated which is not a crime. *See* WIS. STAT. §§ 346.63(1) & 346.65(2).

left, Haanstad slid over to the driver's side and positioned herself so that her body and her feet faced the passenger seat. ***Id.*** A police officer discovered Haanstad in this position and she was arrested for operating while intoxicated and operating with a prohibited alcohol concentration. ***Id.***, ¶¶5, 8, 10. In overturning this court's decision, the supreme court observed:

> In contrast (to ***Proegler***), the evidence here is undisputed that Haanstad did not drive the car to the point where the officer found her behind the wheel. Further, there is no evidence that the defendant "activated" or "manipulated" any control in the vehicle that is necessary to put the vehicle in motion. The Village offered no circumstantial evidence to prove that Haanstad had operated the vehicle. The Village does not contest that Satterthwaite was the individual who "operated" the vehicle by driving it, placing it in park, and leaving the motor running. The Village does not claim that Haanstad drove or even touched the controls of the vehicle at any time while she was intoxicated. There is no dispute: Haanstad never touched the controls of the vehicle. As the [trial] court judge so aptly stated, "if she is guilty, she is guilty of sitting while intoxicated."

***Id.***, ¶21 (parenthetical added).

¶14 This court is satisfied that the facts here are similar to those in ***Haanstad***. Ross was found in the driver's seat, but denied that he had operated the car. His witness confirmed that she drove the car to its location and left Ross in the passenger's side. No evidence was submitted that the car had moved from this location. No testimony was ever presented that Ross had touched any of the controls.

¶15 While the trial court's findings are a bit cryptic, the trial court clearly accepted the testimony of Thomas that she drove that evening after leaving the bar and left the car running while she retrieved her identification. "I'm satisfied as the trier of fact that yes, she started driving the vehicle. She was going to be the

designated driver. She knows how to operate a stick. I'm satisfied as to that." Consequently, Ross's actions that constituted operating while intoxicated had to have occurred after Thomas exited the car. The trial court went on to find that it did not believe Ross's testimony as to what occurred after Thomas exited. However, the only other evidence in the record concerning the evening's events in the car after Thomas left was that of the officer who saw Ross in the driver's seat and Ross later told him he was waiting for his girlfriend, which is consistent with Thomas's testimony.

¶16 Despite the trial court's apparent displeasure with Ross's account that he never touched any of the vital operating parts of the car, the trial court must have believed some of Ross's testimony because only Ross testified to the events which led the court to believe he was guilty. The trial court stated: "The evidence clearly suggests when he was rolling down the window, had the window down, waving vehicles by, that further demonstrates, and this court is satisfied from circumstantial evidence, that there is a reasonable inference, thereafter, that he was actually operating the vehicle." However, rolling down a window and waving vehicles by it does not constitute "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). Nor does rolling down a window and waving cars by lead to the inevitable conclusion, as found by the trial court that, following these acts, Ross operated the car. Thus, these actions testified to by Ross would not be sufficient to convict him.

¶17 The only other finding made by the trial court had to do with the manner in which Ross moved to the driver's seat. After discrediting Ross's explanation that he grabbed the door handle, pulled himself over the shifter and sat down to move into the driver's seat, the trial court theorized:

> It's very hard to get over a stick shift on a column with the brake up, because the vehicle would have to be in neutral with the engine running.
>
> It could only be in gear with the engine stopped, so it would have to be in neutral to get over from one side to the other, and [sic] at a [breath alcohol concentration of] .15, without exercising or starting to exercise operation.

¶18 First, the trial court's conclusion that Ross could not get into the driver's seat without manipulating the controls is pure speculation. No testimony supports such a finding. The trial court never saw the car in which this occurred. It may well be that it is easier to maneuver in Ross's car than in cars the trial judge has driven. Moreover, the trial court did not explain what Ross would have had to do to operate the car in order to reach the driver's side under the trial court's hypothesis. Second, stating it was very hard to get over a stick shift does not make it impossible. According to the ticket issued to Ross by the police officer, Ross was twenty-three years old, was 5'10" tall, and weighed only 145 pounds. At that age and weight it is quite possible that Ross moved to the driver's seat without touching the controls as he testified . Further, even if Ross had touched one of the controls, this does not lead to the automatic conclusion that Ross physically manipulated or activated the motor vehicle, as is required for a conviction. Finally, this finding by the trial court is not the type of circumstantial evidence that can be relied upon for a conviction. WISCONSIN JI—CRIMINAL 170 explains:

> Circumstantial evidence is evidence from which a jury may logically find other facts according to common knowledge and experience.
>
> Circumstantial evidence is not necessarily better or worse than direct evidence. Either type of evidence can prove a fact.
>
> Whether evidence is direct or circumstantial, it must satisfy you beyond a reasonable doubt that the defendant committed the offense before you may find the defendant guilty.

¶19 Here, the trial court could not find beyond a reasonable doubt that Ross physically manipulated or activated any of the controls on the motor vehicle necessary to put it in motion when changing seats. *See* WIS. STAT. § 346.63(3)(b). It does not logically follow that because the trial court found Ross's explanation incredible, that the only way he could have entered the driver's seat was by manipulating or activating the controls. There were other routes that Ross could have taken to get into the driver's seat. For instance, he could have simply gotten out of the car on the passenger side and walked around to the other side. Moreover, if Ross was operating the car, as the court believed, he would have simply moved it, rather than leaving it awkwardly positioned in the roadway, while waving vehicles around it.

¶20 Thus, this court concludes that the trial court's findings in this case are "so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Poellinger***, 153 Wis. 2d at 507. As a result, the judgment of conviction is reversed.

*By the Court.*—Judgment reversed.

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