COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP536-CR **Cir. Ct. No. 2012CF32**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES N. WALTERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. James N. Walters appeals from a judgment of conviction entered after a jury found him guilty of (1) operating a motor vehicle

while intoxicated (OWI) as a sixth offense, contrary to WIS. STAT. § 346.63(1)(a) (2013-14)[1]; (2) operating a motor vehicle with a prohibited alcohol concentration (PAC) as a sixth offense, contrary to § 346.63(1)(b); (3) possession of THC as a second or subsequent offense; and (4) possession of drug paraphernalia.[2] Walters contends that the trial court improperly denied his motion for a mistrial which was grounded in the court's allegedly improper comments concerning the "operation" element of OWI. We assume without deciding that the court's statements constituted error, but conclude that any error was harmless. We therefore affirm.

¶2 Police were dispatched to Walters's vehicle in response to a call from a streets department worker who was attempting to clear snow. The car was parked on the street in front of a bar. Though the car was stationary, the keys were in the ignition and the engine was running. Officers found Walters asleep in the driver's seat and his pants and shoes were on the floor. All four windows were partially rolled down. Upon smelling marijuana, officers removed Walters from the car and conducted field sobriety tests. Walters was arrested and eventually exercised his right to a jury trial.

¶3 At the start of voir dire, the trial court read portions of the criminal complaint to the pool of prospective jurors. A prospective juror asked the prosecutor to explain the difference between the OWI and PAC charges. After the

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] When both WIS. STAT. § 346.63(1)(a) and § 346.63(1)(b), are charged, "there shall be a single conviction for purposes of sentencing and counting convictions." WIS. STAT. §§ 346.63(1)(c), 346.65(2)(am). Therefore, though Walters was convicted of counts one and two, he was sentenced only in connection with count one.

proffered explanation, the prospective juror stated: "I understand. But he wasn't driving." The prosecutor started to explain further and trial counsel objected:

> [Trial counsel]: I'll object at this point. We have jury instructions.
>
> The Court: The question was raised about how in the world could you charge someone who's in a parked car with driving under the influence. I think it's fair to respond to that question. Say drove or operate is the issue.
>
> [Trial counsel]: If he's going to read the jury instruction, judge, I'm okay with that. I don't want him to give—
>
> The Court: It's drove or operate.
>
> [Trial counsel]: I understand. But as long as you're going to instruct the jury on the law and what the law is. I don't want an interpretation of the law being provided. Then I want the jury to hear the law.

The trial court agreed and told the jury:

> Suffice it to say that, [prospective juror], that you've raised a really good point but the problem was the engine was running and also we got drove or operate. You'll be asked to determine if he drove or operated.

Defense counsel requested a sidebar and objected to the comments. Back on the record, the court stated:

> Jurors, I don't know if the vehicle was running or not. I'm told that the State believes it was running. So, … you'll have to wait until that proof comes in. But if the vehicle was running but parked, it's still operating or if the evidence supports it. So your objection is noted for the record, [trial counsel]. It's a good objection. Please proceed.

¶4 Shortly thereafter, another prospective juror stated that once, when he was drunk during cold weather, he slept in his car on private property with the engine running. The court responded, "[Walters] was in the middle of the road.

They allege he was on a road and he was operating because the ignition was on."[3] The court stated: "You're saying that you've operated under the influence?"

¶5 After voir dire, trial counsel moved for a mistrial based on the court's comments to the jury:

> [Trial counsel]: Judge, I would like to make a record about the objection that was made … in the side bar conference.
>
> The Court: Yes. You said I told the jury that he was sleeping.
>
> [Trial counsel]: No. You told the jury that with the vehicle running, it was operation. I think that's for the jury to decide.… This isn't a court trial.
>
> The Court: That's the instruction. You can argue that.
>
> [Trial counsel]: Well, at this time I would like to move for a mistrial. I think the jury has heard from both Your Honor and from [the prosecutor] that a vehicle running, keys in the ignition is operation. That's for them to decide, based on the language in the jury instruction.

The court denied the mistrial motion, and Walters was convicted of all counts.

¶6 On appeal, Walters asserts that the trial court misstated the legal definition of "operate"[4] by implying that a running vehicle is necessarily in operation. *See* ***Village of Cross Plains v. Haanstad***, 2006 WI 16, ¶23, 288 Wis. 2d 573, 709 N.W.2d 447 (merely sitting in the front seat of a running car does not constitute operation of that car where the undisputed evidence established

[3] Walters asserts, and the State does not dispute, that the court's statement was factually inaccurate in that the State never alleged nor was any evidence presented that Walters was in the middle of the road.

[4] Pursuant to WIS. STAT. § 346.63(3)(b), "'Operate' means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion."

that another person actually started the car). He argues that this constituted an error which deprived him of his right to a jury determination on an essential offense element. *See* ***In re Winship***, 397 U.S. 358, 361-62 (1970) (it is fundamental that in a criminal case, the State must prove each and every element beyond a reasonable doubt).[5]

¶7 Criminal jury instructions that operate as a conclusive presumption on offense elements "subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." ***State v. Harvey***, 2002 WI 93, ¶23, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted). Such errors are subject to a harmless error analysis. ***Id.***, ¶¶5-6. An error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty had the error not occurred. ***Id.***, ¶46. In determining whether an error is harmless, a reviewing court "consider[s] the error in the context of the entire trial, including the nature of the State's evidence against the defendant and the nature of the defense." ***State v. Hansbrough***, 2011 WI App 79, ¶18, 334 Wis. 2d 237, 799 N.W.2d 887.

¶8 We conclude that in the context of the entire trial, any error in misstating the "operate" element during voir dire was harmless. Prior to hearing any evidence, the jury was presented with the correct legal definition of "operate." In its opening statement, the State told the jury that the court would instruct them that "[o]perate means the physical manipulation or activation of any of the

[5] While the parties correctly frame the issue in terms of the trial court's discretionary decision to deny Walters's mistrial motion, *see* ***State v. Hampton***, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998) (this court reviews the denial of a mistrial motion for an erroneous exercise of discretion), we move right to the substantive question of whether the trial court's statements constitute reversible error warranting a new trial.

controls of a motor vehicle necessary to put it into motion." Indeed, the court's preliminary instructions provided:

> Now, it will be for the State to establish every element of each of the four charges beyond a reasonable doubt. Elements are bases that the State much touch. The elements of operating under the influence are two. The State must show that the defendant drove or operated a motor vehicle on premises held out to the public for use of their motor vehicles.
>
> Drive means the exercise of physical control over the speed and direction of the motor vehicle while it is in motion. Operate means the physical manipulation or operation of any of the controls of a motor vehicle necessary to put it in motion.

The jury was thus provided with the correct analytic framework before hearing any testimony.

¶9 Additionally, after the evidence was closed and prior to the jury's deliberation, the trial court again properly instructed the jury on each offense element, including the legally correct definition of "operate."[6] The jury was told that it needed to be satisfied that this element had been proven beyond a reasonable doubt. The jury was instructed to base its verdict "upon the law as given in these instructions and then apply that law to the evidence that was received during the trial." The court told the jury that the attorneys' remarks were not evidence and stated:

> And during the course of the voir dire …, I made certain statements as to what I believe the State's case would be as to what I've been informed by them. The fact that I made those statements is not evidence and you may not consider them.

[6] The trial court instructed the jury that "[o]perate means the physical manipulation or operation of any of the controls of a motor vehicle necessary to put it into motion."

Jurors are presumed to follow the court's instructions. ***State v. Searcy***, 2006 WI App 8, ¶59, 288 Wis. 2d 804, 841, 709 N.W.2d 497 (2005). In light of these instructions, no reasonable juror would have believed that the mere existence of a running engine could satisfy the "operate" element.

¶10 Additionally, the context of the entire trial, including the evidence presented and the parties' theories, made clear to the jury that the disputed issue for their consideration was whether Walters started the car. The fact of Walters's intoxication was not disputed and the jury was presented strong evidence that he had, in fact, operated the car. When officers arrived, the engine was running and the windows were down. Walters, the sole occupant, was asleep in the driver's seat. There was a warm marijuana pipe on the center console. The jury was read a transcript of a telephone call Walters made from the police department that night stating, "I knew I was too drunk so I went out to my car and started it because it was cold." There was no evidence that anyone else had been in the vehicle that evening. Walters made no such claim to the police, and he did not testify at trial. The inescapable inference was that only Walters could have turned the engine on and that he was intoxicated at the time.

¶11 In its closing argument, the State acknowledged that "the real hang-up seems to be did he operate the motor vehicle." Distinguishing between the definition of drive versus operate, the State argued:

> So the drive deals with when the wheels are turning. And here I agree there wasn't driving. If the element required me to prove driving, I would lose because I can't show that he actually drove the vehicle. I can't prove that the wheels were turning.
>
> But … the other part of that is the instruction says drive or operate. So then it becomes did the defendant operate the motor vehicle? And operate means the physical

> manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

The State proposed that the jury should find Walters guilty based on evidence that he operated the vehicle:

> And here clearly there was operation. And I guess the best way to do it is to look at all the information we know regarding operation. We know what the officer saw when they responded to the vehicle. We know that they saw the vehicle's engine was running and not just the key was turned so the radio could play. The engine was actually running.
>
> The defendant was the only person in the vehicle. The defendant was in the driver seat of the vehicle. The defendant's pants and shoes were on the floor.… The defendant was unconscious at the time.…
>
> ….
>
> You also heard him say when he was on his phone where he said: I knew I was too drunk. So I went out to my car and started it because I was cold. Did not drive home. Fell asleep in my car … and the cops came and woke me up and said: Hey, you can't do that. It's winter parking. So they arrested me.
>
> So we know that the defendant's admitted to starting a vehicle. And here for operation, as soon as he turned that key in the ignition, as soon as he started that engine, he's been operating that vehicle because the engine's necessary to put the vehicle in motion.
>
> I would agree that if all he did was crank down a window or something, that's not something that's necessary to put the vehicle in motion. But really, starting the engine sort of the textbook definition of operating a vehicle. It's something that you have to do; both turning the key is the physical manipulation and then the engine starting is the activation of the controls necessary to start the vehicle.

¶12 In light of the jury instructions that the court gave at the outset and conclusion of the trial, as well as the manner in which the State described the meaning of "operate" and its explicit argument that Walters operated his vehicle

by starting the engine, no reasonable juror would have understood that the State could meet or had met its burden of proof simply by demonstrating that Walters was sitting in the driver's seat with the engine running. Rather, a reasonable juror would have understood that the State had to prove beyond a reasonable doubt that Walters operated his vehicle by starting the engine. The evidence that Walters started the car was overwhelming. As such, any error in the trial court's statements during voir dire was harmless.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.