

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-3150-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TYLER J. KINGSFIELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County:
JAMES M. MASON, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Tyler J. Kingsfield appeals his convictions for operating a motor vehicle while intoxicated and operating a motor vehicle with a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

prohibited blood alcohol concentration. His argument on appeal is that first, there was insufficient evidence to convict him of the charged offenses, and second, that the element of operating a motor vehicle on a highway was not satisfied. We affirm as to both issues.

FACTS

¶2 On November 10, 1999, two sisters, Michelle and Holly Borths, reported discovering a truck parked in a roadway with the defendant, Kingsfield, either sleeping or passed out in the front seat. One of the women had noticed the truck as they passed because its headlights were shining into the woods. The time was between 2:00 and 2:30 in the morning. At that time, Kingsfield told the women that he was coming from a bar and trying to get to his girlfriend's house.

¶3 Officer Douglas Christianson of the Wood County Sheriff's Department arrived at the scene to discover Kingsfield lying across the front seat of the truck with his feet hanging out the driver's-side door. The truck was not running, and the ignition keys were on the ground outside the vehicle. The hood was warm to the touch. Kingsfield told the officer that after parking the car he had removed the keys from the ignition and thrown them on the ground. He also stated that he had been driving from a friend's house in Juneau County.

¶4 After reading Kingsfield the Informing the Accused form, Officer Christianson informed Kingsfield of his *Miranda* rights and had Kingsfield answer a series of questions on a written form. In response to the question "Were you operating a motor vehicle?" Kingsfield responded in the affirmative.

¶5 Later at trial, Kingsfield testified that he had consumed eight to twelve drinks that night, that he remembered nothing in between telling a friend he

was going to sleep in his truck and seeing the lights of the police car, and that he did not recall any of the conversations he had with the women who found him or Officer Christianson. He testified that he was usually disoriented upon waking up, and that the disorientation was twice as bad when he was drunk.

¶6 Kingsfield's blood alcohol content that night was .194. He testified that although he did not remember anything after telling his friend he was going to sleep in his truck, he was "positive" that he did not drive his truck out of the driveway of the nearby party he had been attending. He went on to state that he did not remember being questioned or responding to any questions.

DISCUSSION

¶7 Kingsfield raises two issues on appeal. First, he argues that there was insufficient evidence to sustain the trial court's finding that he operated a motor vehicle while under the influence of alcohol. Second, he contends that the definition of "operating" a motor vehicle under WIS. STAT. § 346.63 (1997-98), which he was convicted of violating, does not apply to the facts of his case.

Insufficient Evidence

¶8 Kingsfield contends that the evidence presented at trial was insufficient to sustain a finding that he operated a motor vehicle while under the influence of alcohol. Specifically, he argues that the State failed to prove that he either operated a motor vehicle or that any such operation was on a highway. *See* WIS JI—CRIMINAL 2660.

¶9 The test for overturning a jury's verdict is well established:

[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate 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. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted). We therefore examine the evidence produced by both parties to see if any reasonable jury could have found the requisite degree of guilt. A guiding principle in examining the evidence produced at a jury trial is that, where testimony is conflicting, we do not substitute our judgment for the jury's in determining which testimony is more credible. *State v. Sharp*, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993). Our consideration of the sufficiency of the evidence is also guided by the rule that “[i]f more than one inference can be drawn from the evidence, the inference which supports the jury finding must be followed unless the testimony was incredible as a matter of law.” *State v. Wilson*, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989).

¶10 Supporting the jury's verdict was the testimony of two police officers and two eyewitnesses to the circumstances of Kingsfield's arrest. The woman who first noticed Kingsfield's truck stated that she saw the truck's headlights shining into the woods at about 2:30 in the morning. She had not seen the truck in that location at 11:30 the previous night. Kingsfield had been at a nearby party since at least 9:30.

¶11 The rear wheels of Kingsfield's truck were near the center line of the road. The truck was parked at a forty-five-degree angle to the center line. When

Officer Christianson reached the scene, the truck's headlights were off but the hood was still warm to the touch. When questioned, Kingsfield accurately informed the officer of the location of the truck's keys, which were on the ground outside the driver's-side door.

¶12 Kingsfield told several witnesses the night of his arrest that he had been driving. He told Michelle Borths that he was coming from a bar and trying to get to his girlfriend's home. He told Officer Christianson that he had been driving from a friend's house in Juneau County. When filling out the Alcoholic Influence Report, Kingsfield indicated that he had been driving the vehicle from a friend's house in Wisconsin Rapids.

¶13 Kingsfield testified at trial that he did not remember anything about the night in question from the time of his last contact with a friend at the party he was attending until he first saw the flashing lights of the police car. Officer Christianson described Kingsfield's manner as "confused." Kingsfield testified that he did not recall getting into his truck, but was "positive" that he had not left the party and did not believe that he had moved his vehicle.

¶14 One of Kingsfield's friends, Clinton Woods, testified that he had seen Kingsfield walk towards his truck and that Kingsfield had said that he was going to sleep there. Woods stated that he left the party "in the two o'clock hour" and that his encounter with Kingsfield had taken place just before he left.

¶15 Viewing this evidence as a whole, there was more than sufficient evidence for a jury to conclude that Kingsfield had been operating his truck on a highway. Kingsfield told witnesses at the scene that he had been driving just prior to his arrest, and the warmth of the engine supported his story. Based on the position of

the vehicle in the road, and the fact that it had not been seen there earlier in the evening when Kingsfield said he was attending a nearby party, a jury could find beyond a reasonable doubt that the truck had been driven at least a short distance. And given the fact that Kingsfield knew the exact location of the keys outside the truck, and that nobody else was around, that same jury could find that Kingsfield had been the one who moved the truck.

Definition of “Operating a Motor Vehicle on a Highway”

¶16 Kingsfield’s second argument is that the definition of “operating a motor vehicle on a highway” under WIS. STAT. § 346.63 found in WIS JI—CRIMINAL 2660 does not encompass the facts of his case: an individual found sleeping behind the wheel of a motor vehicle with the engine turned off, the keys outside the vehicle, and the vehicle “not wholly on the roadway.” Kingsfield’s contention is that he could not be found to have “operated” his truck within the meaning of this statutory definition because “there [was] no affirmative activity—no starting, no restraining, no dominion.” We need not address the merits of this argument because Kingsfield assumes facts that are contrary to those that we must assume for purposes of this legal argument. As explained above, the trial evidence supported the finding that Kingsfield actually drove his car to the place in the roadway where the Borths sisters found it.²

² To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. See *State v. Waste Mgmt. of Wisconsin, Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

By the Court.—Judgment affirmed.

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

