COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1675 **Cir. Ct. No. 2008CV106**

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

VILLAGE OF FREDONIA,

PLAINTIFF-RESPONDENT,

V.

THERESA E. PELTIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Theresa E. Peltier appeals from a judgment of conviction for operating a motor vehicle while under the influence of a controlled substance (first offense) in violation of WIS. STAT. § 346.63(1)(a). Peltier challenges the sufficiency of the evidence upon which the circuit court rendered its verdict. Viewing the evidence in a light most favorable to the verdict, we conclude that the evidence presented at trial was sufficient to determine that Peltier had operated a motor vehicle while under the influence of a controlled substance. We affirm the judgment.

BACKGROUND

¶2 While on routine patrol on the night of November 10, 2006, Deputy Christopher Erickson of the Village of Fredonia Marshal's Office noticed a white Chevrolet Impala with its headlights on in a parking area of Waubedonia Park shortly after eleven o'clock p.m.—well after the park had closed. Erickson got out of his squad car to investigate. He noticed that the vehicle's engine was on, and found Peltier alone in the vehicle, hunched over behind the steering wheel. He saw no evidence of anyone else in the area.

¶3 Erickson knocked on the window of the driver's door, but Peltier showed no sign of response. Next, he opened the driver's door and asked, "Are you okay?" Again, he received no response. He then shook Peltier and told her that if she did not wake up, he would call for an ambulance. Peltier responded with a mere "grunt," so Erickson called for an ambulance. Erickson also noticed

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2007-08). All other references to the Wisconsin Statutes are to the 2007-08 version unless otherwise indicated.

vomit in the car next to Peltier, and beer cans, both empty and full, in the vehicle. He did not, however, smell alcohol on Peltier's breath.

¶4 Peltier was taken by ambulance to St. Mary's Hospital-Ozaukee. In accordance with WIS. STAT. § 343.305(4), Erickson read her the Informing the Accused language, but Peltier remained "out of it" and "[un]able to answer any questions." Pursuant to the statute, Erickson interpreted the non-response as consent, and the hospital staff administered a legal blood draw. The blood samples were forwarded to the Wisconsin State Laboratory of Hygiene (WSLH) for alcohol and drug analysis.

¶5 The results of the alcohol and drug analysis revealed that Peltier's blood contained no ethanol (alcohol), but did contain, among other things, zolpidem, a schedule IV controlled substance, at a concentration of 220 nanograms per milliliter of blood.[2] *See* WIS. STAT. § 961.20(2)(p) (schedule IV controlled substances). Zolpidem, also known by its trade name, Ambien®, is a central nervous system depressant available only by prescription. It is used to treat insomnia; and helps the user to attain sleep sooner and maintain sleep longer.

¶6 Erickson issued Peltier a citation for operating under the influence (first offense) in violation of WIS. STAT. § 346.63(1)(a)[3]. The Mid-Moraine Municipal Court found Peltier not guilty. The Village timely appealed to the Ozaukee County Circuit Court, pursuant to WIS. STAT. § 800.14(1), and requested

[2] The test also revealed the presence of citalopram (120ng/mL) and norcialopram (180ng/mL) in Peltier's blood; however, these substances are not of concern for purposes of this appeal.

[3] A second citation, for violation of WIS. STAT. § 346.63(1)(am), was issued; however, our reading of the record indicates that Peltier was convicted under § 346.63(1)(a).

a trial de novo. The matter was tried before the circuit court, and Peltier was found guilty. Peltier appeals from the circuit court judgment of conviction.

¶7 William Johnson, the reviewing chemist at the WSLH, provided expert testimony at trial. He testified that the concentration of zolpidem discovered in Peltier's blood sample fell within the therapeutic range of 50 to 250 nanograms per millimeter, and was consistent with either a prescribed single five or single ten milligram dose taken very shortly prior to the blood draw, or, a larger dose taken at some earlier time. Johnson revealed that the WSLH had recently conducted a study of twenty-one subjects in whose blood was found only zolpidem. These subjects exhibited incoherence, difficulty speaking, and were often times found asleep behind the wheel. Johnson testified that zolpidem is designed to be taken before eight hours of uninterrupted sleep, and he agreed that anyone who takes zolpidem should be at home in bed—not behind the steering wheel of a vehicle.

DISCUSSION

¶8 In reviewing the sufficiency of the evidence to support a conviction in circumstantial evidence cases, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found the requisite guilt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Therefore, if more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict. ***Id.*** at 506-07.

¶9 A conviction may be supported solely by circumstantial evidence and, in some cases, circumstantial evidence may be stronger and more satisfactory

than direct evidence. ***Id***. at 501-02. On appeal, the standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Id***. at 503. An appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict. ***Id***. at 507-08.

¶10 On appeal, Peltier challenges the sufficiency of the evidence to support the circuit court's finding that she "operated" a motor vehicle with a detectable amount of controlled substance in her blood as required by WIS. STAT. § 346.63(1)(a). First, Peltier argues that there was no evidence as to when she started, or operated, the vehicle, and therefore, it was impossible for the circuit court to infer that she was under the influence at the time she operated the vehicle. Second, she argues that, other than the fact that she was found asleep behind the wheel of the vehicle, there was no credible evidence to demonstrate that the drug zolpidem produced the specific symptoms in Peltier, as observed by the officer.

"Operate"

¶11 Peltier's argument focuses largely on the definition of "operate" under WIS. STAT. § 346.63(3)(b). She contends that the evidence presented at trial was an insufficient basis upon which to infer that she was under the influence at the moment she started (operated) the vehicle. We consider this argument unpersuasive, as it mistakenly limits the widely-accepted understanding of "operate" to the specific act of starting the vehicle.

¶12 WISCONSIN STAT. § 346.63(3)(b) defines "operate" as "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Under ***County of Milwaukee v. Proegler***, 95 Wis. 2d 614, 628-29, 291 N.W.2d 608 (Ct. App. 1980), and its progeny, "'[o]peration' of a vehicle occurs either when a defendant starts the motor and/or leaves it running." *See also*

City of Kenosha v. Phillips, 142 Wis. 2d 549, 552, 419 N.W.2d 236 (1988) (where police discovered defendant passed out or in a heavy sleep behind the steering wheel of his car, parked with the motor running, court found that the defendant had "operated" a motor vehicle); ***Village of Elkhart Lake v. Borzyskowski***, 123 Wis. 2d 185, 189, 366 N.W.2d 506 (Ct. App. 1985) ("operation" of vehicle includes both starting a motor and leaving it running).

¶13 In ***Proegler***, the defendant was found sleeping behind the steering wheel of a vehicle parked on the side of a road. ***Proegler***, 95 Wis. 2d at 618. The keys were in the ignition, and the motor was running. ***Id***. Proegler submitted to a breathalyzer test, which revealed a prohibited blood alcohol content. ***Id.*** He was found guilty of operating while under the influence of an intoxicant. ***Id***. at 619. On appeal, Proegler alleged that the trial court erred in finding that he had "operated" his vehicle while under the influence. ***Id.*** at 624. He argued that sleeping in a car with the motor running on the side of a highway did not fall within the statutory definition of "operate." ***Id.***

¶14 We upheld Proegler's conviction, stating that "the prohibition against the 'activation of any of the controls of a motor vehicle necessary to put it in motion' applies either to turning on the ignition or leaving the motor running while the vehicle is in 'park.'" ***Id***. at 626 (citing WIS. STAT. § 346.63(3)(b)). We reasoned that

> [a]n intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than that involved when the vehicle is actually moving, but it does exist. While at the precise moment defendant was apprehended he may have been exercising no conscious volition with regard to the vehicle, still there is a legitimate inference to be drawn that defendant had of his choice placed himself behind the wheel thereof, and had either started the motor or permitted it to run. He therefore had the "actual physical control" of

> that vehicle, even though the manner in which such control was exercised resulted in the vehicle's remaining motionless at the time of his apprehension.

Proegler, 95 Wis. 2d at 627.

¶15 Like the defendant in ***Proegler***, Peltier may not have been exercising conscious volition with regard to the vehicle at the moment she was found behind the steering wheel of a running vehicle. However, one "could reasonably infer that the car was where it was and was performing as it was because of [Peltier's] choice, from which it followed that [Peltier] was in 'actual physical control' of and so was 'operating' the car while [s]he slept." *See* ***id***. at 628 (citation omitted). As the ***Proegler*** court concluded, "[i]t is in the best interests of the public and consistent with legislative policy to prohibit one who is intoxicated from attempting to get behind the wheel rather than to make a fine distinction once such a person is in the position to cause considerable harm." ***Proegler***, 95 Wis. 2d at 629.

¶16 Peltier relies on ***Village of Cross Plains v. Haanstad***, 2006 WI 16, ¶¶17-21, 288 Wis. 2d 573, 709 N.W.2d 447, where the defendant, who was found both under the influence and behind the steering wheel of a running vehicle, was not found to have "operated" the vehicle under WIS. STAT. § 346.63(3)(b). The court reasoned that ***Proegler*** did not apply to Haanstad's situation.

> 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. . . . The Village offered no circumstantial evidence to prove that Haanstad had operated the vehicle. The Village does not contest that [Haanstad's friend] was the individual who "operated" the vehicle by driving it, placing it in park, and leaving the motor running.

Haanstad, 288 Wis. 2d 573, ¶21. In ***Haanstad***, it was undisputed that Haanstad had been in the passenger seat until the vehicle had been parked, and the driver exited to help a friend. ***Id.***, ¶¶3-4. At that point, Haanstad slid over to the driver's seat, with her body and feet facing the passenger seat, allowing her friend to enter her car at the front passenger door so they could engage in a discussion about their relationship. ***Id.***, ¶4.

¶17 For the same reasons that ***Proegler*** did not apply to ***Haanstad***, ***Haanstad*** does not apply here. Unlike Haanstad, Peltier has *not* claimed that someone else drove the vehicle to where it was found parked by Erickson. Unlike the Village of Cross Plains, the Village of Fredonia *did* offer circumstantial evidence to prove that Peltier operated the vehicle. Unlike Haanstad, and like Proegler, Peltier was found *alone* and sleeping behind the steering wheel of her vehicle while its engine was running. Recently, we noted the limited applicability of ***Haanstad*** to instances where there is undisputed evidence that a person other than the defendant had driven the vehicle. ***State v. Mertes***, 2008 WI App 179, ¶13 n.5, No. 2007AP2757-CR (Nov. 26, 2008). We agree with the Village of Fredonia, that ***Proegler***, and not ***Haanstad***, is applicable here. Peltier's reliance on ***Haanstad*** is misplaced.

¶18 Accordingly, we hold that the evidence offered by the Village at trial was sufficient to support an inference that Peltier had, for purposes of WIS. STAT. § 346.63(3)(b), "operated" the vehicle.

Zolpidem

¶19 Peltier further argues that, other than the fact that she was found asleep behind the steering wheel of the vehicle, there was no credible evidence to demonstrate that zolpidem was the source of her symptoms, as observed by

Erickson. This argument is unconvincing; the evidence presented at trial was sufficient to support the court's finding that Peltier was impaired due to her use of zolpidem.

¶20 "It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." ***Poellinger***, 153 Wis. 2d at 506. "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." ***Id.*** at 507.

¶21 The evidence presented at trial included (1) testimony as to the presence and quantity of zolpidem in Peltier's blood, (2) evidence of the general nature of that drug, (3) evidence of the general physical state of persons impaired by zolpidem, (4) testimony as to as to Peltier's physical state when she was found by Erickson, and (5) testimony as to the high degree of similarity between the general physical state of persons impaired by zolpidem and Peltier's physical state that night. The fact finder reasonably drew the inference that Peltier's state of impairment was the result of her use of zolpidem.

> Clearly what's happening here is the drug is doing what the drug is intended to do. It has put [Peltier] into a sleep situation. . . . [W]hen you put yourself behind the wheel of a vehicle after taking that, the question is, is your ability substantially or materially impaired by your consumption of these controlled substance[s]?
>
> [W]hat you're looking at is a qualitative analysis of what type of symptoms is this person exhibiting. Can they answer questions, can they function to the degree that one has to function when operating a vehicle? Clearness of mind, steadiness of hand is right from the jury instruction. And she can't. She can't do the basics. She's slumped

> over the steering wheel of a running car, and that would to me indicate a lack of ability to drive the vehicle if you were putting it on the road.

The circuit court fairly resolved conflicts in testimony, weighed the evidence, and drew a reasonable inference. We conclude that the evidence was sufficient to sustain the verdict.

CONCLUSION

¶ 22 We conclude that the evidence, viewed in a light most favorable to the verdict, is sufficient to support the circuit court's finding that Peltier operated a motor vehicle while under the influence of zolpidem, a schedule IV controlled substance in violation of WIS. STAT. § 346.63(1)(a); *see also* WIS. STAT. § 961.20 (2)(p) (schedule IV controlled substances). Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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