COURT OF APPEALS
DECISION
DATED AND FILED

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Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2740-CR **Cir. Ct. No. 99-CF-307**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE P. HOFFMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Reversed and cause remanded.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Lawrence P. Hoffman appeals from a judgment of conviction for homicide by negligent operation of a motor vehicle and from an order denying his motion for postconviction relief. We agree with Hoffman that his theory of defense instruction should have been read to the jury and we reverse

the judgment and remand for a new trial on that ground. We address Hoffman's claim that his pre-***Miranda***[1] statement should have been suppressed because the issue will arise at the new trial. We conclude that the trial court's reliance on the rescue exception to ***Miranda*** was proper.

¶2 Hoffman and five friends were traveling on Lake Michigan from Racine to Sturgeon Bay, Wisconsin, in Hoffman's thirty-seven foot Sea-Ray boat. The boat struck a nineteen-foot boat from which four men were fishing. The smaller boat capsized sending its occupants into the lake. As a result, Mark Rickert drowned. Hoffman was charged with reckless and negligent homicide with respect to Rickert's death and three counts of reckless endangerment with respect to the other occupants of the boat. A jury acquitted Hoffman of the reckless endangerment charges and found him guilty of homicide by negligent operation of a motor vehicle.

¶3 After leaving the Racine harbor, Hoffman had set his course and was running on "autopilot." Throughout the trip, Hoffman maintained his position at the helm. Just prior to the collision, Ed Levernier, a passenger and long-time friend, joined Hoffman at the helm. When Hoffman indicated that he wanted to retrieve a navigational book from the cabin below, Levernier stepped up to the helm to maintain lookout. The collision occurred just as Hoffman was returning to the main deck after storing the navigation book below.

¶4 The prosecution's theory was that Hoffman had failed to maintain a proper lookout or had seen the fishing boat before going below deck and had not

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

taken any action to avoid the collision. The coast guard officer responsible for the search and rescue operation, Mark Barker, testified that when he asked Hoffman what happened, Hoffman replied that he had seen the boat off to his left side. Barker said Hoffman mentioned a "crossing the T" fashion.[2] Coast guard officer Aaron Palmer testified that he overheard Barker's conversation with Hoffman and that Hoffman had replied that he saw the boat 200 yards off his bow.

¶5 Hoffman's theory of defense was that Levernier, an experienced boater, was at the helm and had assumed lookout duties. Hoffman proposed a theory of defense instruction stating: "It is the theory of the defense that the defendant did not violate his duty of lookout or his duty to overtake safely because he had properly delegated those duties to another and that person had assumed those duties." Hoffman argues that the trial court's refusal to give the theory of defense instruction is reversible error.

¶6 We note that some trial court judges seem generally reluctant to give requested theory of defense instructions so as to avoid the appearance of commenting on the evidence. Theory of defense instructions should not be generally viewed with disfavor for they serve to "level the playing field."

> A criminal defendant is entitled to a jury instruction on a theory of defense if: (1) the defense relates to a legal theory of a defense, as opposed to an interpretation of evidence; (2) the request is timely made; (3) the defense is not adequately covered by other instructions; and (4) the defense is supported by sufficient evidence.

[2] "Crossing the T" is a navigational term of art describing one method of passing another boat.

State v. Coleman, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996) (citations omitted).

¶7 There is no dispute here that Hoffman made a timely request for his instruction and that sufficient evidence was presented to support the theory that the duty of lookout could be and was delegated.[3] We consider whether the proposed instruction relates to a valid legal theory of defense as opposed to a mere interpretation of the evidence and whether other instructions adequately conveyed the theory of defense. The trial court refused to give the instruction because the delegation of the duty of lookout served to negate Hoffman as being the operator of the boat and because there is no legal defense for "non-negligent entrustment" of operation. Expanding on the trial court's rationale, the State contends that because the jury was instructed that Hoffman could not be found criminally negligent unless he was or "should have been aware that his conduct created the unreasonable and substantial risk of death or great bodily harm," the theory of defense instruction was not needed.[4]

¶8 We do not view the proposed defense instruction as mere commentary on the facts of the case; it served to explain a relevant legal theory with respect to the delegation of aspects of the duty of operation.[5] The problem

[3] Two expert witnesses testified that under certain circumstances a boat operator may delegate duties of operation and lookout to an experienced individual. Levernier testified that he assumed the duty of lookout when Hoffman went below deck. An occupant of the smaller boat indicated that he observed a man who looked like Levernier at the helm.

[4] We reject the State's unsupported suggestion that the only valid defenses are those listed as examples in WIS JI—CRIMINAL 700, "Law Note: Theory of Defense Instructions." Whether instructions fully and fairly advise the jury on the applicable law is examined on a case-by-case basis.

[5] The jury was instructed that "[o]perate means controlling the speed or direction of a vehicle. A boat is a vehicle."

with the State's argument that other instructions were sufficient is that the operation of a motor vehicle involves many different duties at the same time. Here, the State focused on elements of operation not confined to control of speed and direction—lookout and the duty to overtake safely. Once the jury was instructed on the duties of lookout and to overtake safely as elements of Hoffman's conduct,[6] Hoffman was entitled to an instruction that explained that he could delegate those duties. We conclude that the theory of defense instruction should have been given.

¶9 Having found error, we must consider whether it is harmless error. "An error is harmless if there is no reasonable possibility that the error contributed to the conviction." ***Id.*** at 215. We recognize that Hoffman was allowed to argue to the jury that he had delegated lookout to a responsible individual. However, mere argument cannot take the place of a proper instruction that delegation of the duty was permissible. ***State v. Perkins***, 2001 WI 46, ¶41, 243 Wis. 2d 141, 626 N.W.2d 762. The prosecution relied heavily on Hoffman's role as the owner/operator of the boat to the exclusion of any consideration of Levernier's position at the helm. In explaining that the contributory negligence of the other

[6] After being instructed on the second element of criminal negligence, the jury was told that navigational rules require that:

> Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and the risk of collision.... Every person operating a boat shall comply with the following traffic rules. A boat may overtake and pass another boat on either side if it can be done with safety but the boat doing the overtaking shall yield the right-of-way to the boat being overtaken, not withstanding any other rule in this section to the contrary. A boat granted the right-of-way by this section shall maintain her course and speed, unless to do so may result in a collision.

boat operator was not to be considered, the prosecutor made the broad statement, "If someone else makes the mistake you don't get a pass." In light of the arguments made and the specific instructions on lookout and duty to overtake properly, the failure to instruct on the theory of defense creates a possibility that the jury believed it could not consider Hoffman's theory of defense. We conclude that the failure to give the theory of defense instruction was not harmless error. We reverse the conviction and remand for a new trial.

¶10 Hoffman moved to suppress the statement he gave to officer Barker as a custodial statement made before he was advised of his ***Miranda*** rights. The trial court ruled that the statement was admissible under the "rescue" doctrine.

¶11 The rescue doctrine is a particular species of "exigent circumstances" which permits police interrogation in the absence of ***Miranda*** warnings or despite the invocation of ***Miranda*** rights. ***State v. Kunkel***, 137 Wis. 2d 172, 185, 404 N.W.2d 69 (Ct. App. 1987). When police interrogation is undertaken for the paramount reason of obtaining information to save a life, the rescue doctrine excuses the ***Miranda*** violation because "[t]he interest in saving a human life is considered to be outside of the parameters of the constitutional protection afforded against self-incrimination." ***Id.*** Application of the doctrine depends on the existence of the following elements: "1. urgency of need in that no other course of action promises relief; 2. the possibility of saving human life by rescuing a person whose life is in danger; 3. rescue as the primary purpose and motive of the interrogators." ***Id.*** (quoted source omitted).

¶12 Hoffman contends that there was no need for urgency because nearly two hours had passed when Barker questioned him, rescue activity was already well underway, and no other course of action promised relief. He also claims that

Barker's single question, "what happened?" was too vague to be an attempt to elicit information that would assist the rescue operation. The trial court found that conflicting observations of Rickert before he disappeared into the water justified Barker's quest for information to further rescue efforts. When he brought Hoffman and the operator of the other boat back to shore and asked what happened, Barker did not have a clear picture of what had taken place. Barker noted that initial search efforts had been unsuccessful and he hoped that information directly from the boat operators would clarify which search technique to utilize. The trial court noted that the search technique was dependent on the known facts. Thus, information could have led to other courses of action in the rescue operation. The court concluded that urgency of need still existed and there was still a possibility of saving a human life.

¶13 The trial court's findings are not clearly erroneous. While we agree with Hoffman that Barker's testimony that questioning was for the purpose of rescue is not controlling, it is a factor for the trial court to consider. The court found Barker to be a credible witness when explaining the purpose of the interrogation. Finally, the inartfully worded inquiry to Hoffman and the lack of follow-up are not determinative of whether the interrogation was for rescue purposes. They are but factors which could be considered. Other evidence exists to support the trial court's determination that the interrogation was undertaken to aid rescue. We affirm the trial court's holding that Hoffman's statement was admissible under the rescue doctrine.

By the Court.—Judgment and order reversed and cause remanded.

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