COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP971-CR **Cir. Ct. No. 2010CF5812**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD A. DIX,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Richard A. Dix appeals from a judgment of conviction, entered upon a jury's verdict, on one count of operating a motor vehicle while intoxicated as an eighth offense. Dix contends that there was insufficient evidence to support a conclusion that he was "operating" his vehicle,

and he contends that the circuit court erred when it refused to instruct the jury on the necessity defense. We reject Dix's arguments and affirm the judgment.

¶2 On November 25, 2010, around 3 a.m., Jeffrey Fojtik was walking along Packard Avenue in Cudahy. The temperature that evening was approximately thirty degrees Fahrenheit. Fojtik observed a Jeep, parked twenty to thirty yards from a tavern, with its engine running and a man, later determined to be Dix, in the driver's seat. Fojtik could not tell whether Dix was dead, passed out, or unconscious. He attempted to wake Dix by pounding on the window, but Dix did not respond. Fojtik then opened the door, shook Dix to wake him up, took the keys from the ignition, and walked Dix to the passenger seat. Fojtik also notified police.

¶3 When Officer Aaron Agenten arrived on the scene, Dix was in the passenger seat and the Jeep was not running. Dix was incoherent and had difficulty standing. In fact, Dix was so out of balance that Agenten determined he could not conduct field sobriety tests. Dix told Agenten that he had been at several locations that night, including the nearby tavern. Dix also admitted that he had intended to drive home from the present location, a mere six blocks from his residence. A preliminary breath test showed a .21% blood-alcohol concentration; a later blood draw revealed a concentration of .36%.

¶4 Dix was charged with operating while intoxicated and operating with a prohibited alcohol concentration, both as an eighth offense. Dix moved to dismiss at the close of the State's case, claiming there was insufficient evidence that he had been operating the vehicle. The circuit court denied the motion, stating that sitting "behind the motor vehicle with the motor running is sufficient." Dix also asked the circuit court to instruct the jury on the necessity defense, asserting

that because it was below freezing, it was necessary for him to get in the Jeep and turn it on to stay warm. The circuit court refused to give that instruction because Dix had not testified, so there were insufficient facts to warrant the instruction. After five minutes of deliberation, the jury returned guilty verdicts on both counts. The circuit court sentenced Dix to four years' initial confinement and five years' extended supervision for the operating-while-intoxicated count.[1] Dix appeals.

¶5 Dix raises two arguments on appeal. The first is whether there was sufficient evidence for the jury to conclude that he had operated a motor vehicle; he does not dispute that he was intoxicated. When we review whether there is sufficient evidence to support a verdict, "we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and to 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. Mertes***, 2008 WI App 179, ¶10, 315 Wis. 2d 756, 762 N.W.2d 813. "[I]f more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict." ***Id.***

¶6 "A conviction may be supported solely by circumstantial evidence." ***Id.***, ¶11. "Circumstantial evidence is evidence from which a jury may logically find other facts according to common knowledge and experience." WIS JI—CRIMINAL 170. "[I]n some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence." ***Mertes***, 315 Wis. 2d 756, ¶11. "Once the

[1] *See* WIS. STAT. § 346.63(1)(c) (2009-10): a defendant may be charged for both operating while intoxicated and operating with a prohibited alcohol concentration but, if he is convicted of both offenses, there is a single conviction for sentencing purposes. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

jury accepts the theory of guilt, an appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict." ***Id.***

¶7 No person may drive or operate a motor vehicle while under the influence of an intoxicant. WIS. STAT. § 346.63(1)(a). "'Operate' means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." WIS. STAT. § 346.63(3)(b). We have previously concluded that this language of the statute is clear, and "[t]he 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 vehicle running while the vehicle is in 'park.'" ***County of Milwaukee v. Proegler***, 95 Wis. 2d 614, 626, 291 N.W.2d 608 (Ct. App. 1980).

¶8 Fojtik's testimony about finding Dix at the wheel of the running Jeep, coupled with Dix's admission that he intended to drive home,[2] supports an inference that Dix had gotten into the vehicle and started it just before passing out. Based on WIS. STAT. § 346.63 and ***Proegler***, this inference is more than adequate to support the conviction.

¶9 Dix attempts to analogize his case to ***Village of Cross Plains v. Haanstad***, 2006 WI 16, 288 Wis. 2d 573, 709 N.W.2d 447, where the supreme court concluded that Haanstad, seated behind the wheel of a running car, was not operating the vehicle while intoxicated. ***Id.***, ¶¶1-2. ***Haanstad***, however, is distinguishable: there was uncontroverted evidence that Haanstad had not turned

[2] It should be noted that intent itself is not an element of operating while intoxicated. *See* ***County of Milwaukee v. Proegler***, 95 Wis. 2d 614, 628, 291 N.W.2d 608 (Ct. App. 1980). Dix's expressed intent is, nevertheless, adequate circumstantial evidence for a jury to consider.

on the car or driven it to the location where police found her. ***Id.***, ¶¶3-4, 21. Instead, she had been a passenger and, when the driver parked the car and got out, Haanstad slid over into the driver's seat while keeping her feet and body facing the passenger side. ***Id.***, ¶4. There was also no evidence to suggest that Haanstad had recently operated the vehicle in some other capacity. ***Id.***, ¶23.

¶10 Here, there is no evidence to suggest that anyone other than Dix had started the Jeep's ignition. There was sufficient evidence from which the jury could conclude that Dix had operated a motor vehicle while intoxicated.

¶11 The other issue Dix raises is whether the circuit court erred when it refused to instruct the jury on the affirmative defense of necessity. Dix asserted that the jury should determine whether Dix had simply turned on the Jeep for heat in the chilly night air. The circuit court denied the request because Dix had not testified that he feared freezing, and the circuit court found that people in Wisconsin can walk a few blocks in the cold.

¶12 A circuit court has discretion in instructing the jury. ***State v. Ferguson***, 2009 WI 50, ¶9, 317 Wis. 2d 586, 767 N.W.2d 187. It is an erroneous exercise of discretion to refuse to give an instruction supported by the evidence. *See* ***State v. Giminski***, 2001 WI App 211, ¶8, 247 Wis. 2d 750, 634 N.W.2d 604; *see also* ***State v. Coleman***, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996). Whether sufficient evidence supports giving the jury a particular instruction is a question of law we review *de novo*. ***Giminski***, 247 Wis. 2d 750, ¶11.

¶13 A defendant may claim "necessity" as a defense to most crimes if there is a "[p]ressure of natural physical forces which causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to the actor or another and which

causes him or her so to act." WIS. STAT. § 939.47. There are four elements comprising this defense:

> (1) the defendant must have acted under pressure from natural physical forces;
>
> (2) the defendant's act was the only means of preventing imminent public disaster, or death or great bodily harm;
>
> (3) the defendant had no alternative means of preventing the harm; and
>
> (4) the defendant's beliefs were reasonable.

State v. Anthuber, 201 Wis. 2d 512, 518, 549 N.W.2d 477 (Ct. App. 1996). A defendant asserting the necessity defense has the initial burden of presenting sufficient evidence to show he was entitled to claim the defense. *See* ***State v. Stoehr***, 134 Wis. 2d 66, 87, 396 N.W.2d 177 (1986).

¶14 Assuming without deciding that Dix satisfies the first two elements,[3] he has not offered sufficient evidence on the third; that is, he has not shown he lacked an alternative means for preventing the "harm" of freezing in the night air. For instance, Dix does not establish that he was unable to call a friend or relative for a ride home, that he was unable to call a cab, that he was unable to ask the bartender to call a cab, or that the city bus was unavailable. He also does not demonstrate that he was improperly dressed for the climate or for walking—however clumsily—to his home. Accordingly, we conclude that Dix has proffered insufficient evidence to support a necessity defense, so the circuit court properly refused to so instruct the jury.

[3] The State contends that Dix has not satisfied the first two elements because "a chilly autumn night" is not on the same level of the "natural physical forces" contemplated, like storms or wildfires, and because Dix's entire situation was set into motion by his own drinking.

By the Court.—Judgment affirmed.

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