IN THE COURT OF APPEALS OF IOWA

No. 0-315 / 09-1415
Filed May 26, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL PATRICK WIEZOREK,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Lawrence E. Jahn, District Associate Judge.

Michael Patrick Wiezorek appeals his conviction for operating while intoxicated, second offense. **AFFIRMED.**

Robert G. Rehkemper of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Stephen Holmes, County Attorney, and Jessica Reynolds, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J., takes no part.

MANSFIELD, J.

An Ames police officer found Michael Patrick Wiezorek asleep in the driver's seat of his vehicle in the early morning hours of April 4, 2009. The vehicle was parked in a lot, but the engine was running. The officer determined Wiezorek had been drinking and arrested him. Following a jury trial, Wiezorek was convicted of operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (2009). Wiezorek now appeals. He contends the district court erred in preventing his defense counsel from arguing to the jury that he was not "operating" the vehicle since he was asleep, and in refusing to instruct the jury that the OWI defense requires operation of the vehicle "upon a highway." We disagree with both of Wiezorek's contentions, and therefore affirm his conviction and sentence.

I. Background Facts and Proceedings.

The evidence presented at trial revealed the following: At approximately 2:50 a.m. on April 4, 2009, Ames Police Officer Brook McPherson was dispatched to 117 Kellogg Avenue regarding a vehicle in a business area parking lot. As Officer McPherson approached the vehicle, she observed it to be properly parked within a parking spot with its headlights on and its engine running. When Officer McPherson reached the driver's side window she saw Wiezorek asleep in the driver's seat slightly slumped forward with his head down holding onto a half-eaten sandwich. Wiezorek was the sole occupant of the vehicle.

Officer McPherson awoke Wiezorek by knocking on the window. Wiezorek then appeared to reach for the door handle, but was apparently unable to open the door. When Officer McPherson opened the door for him, she noticed

that he was reaching in the wrong area. Officer McPherson could smell a strong odor of an alcoholic beverage and observed Wiezorek to have bloodshot and watery eyes. When questioned, Wiezorek seemed confused and had slurred speech. He said he was waiting for a ride—although at first he claimed he was waiting for his sister, whereas later he said he was waiting for friends. Wiezorek also provided inconsistent answers when questioned regarding whether he consumed any alcohol before or after arriving at the parking lot. In addition, Wiezorek had trouble producing his driver's license and proof of insurance.

At this point, Officer McPherson asked Wiezorek to get out of the vehicle to perform field sobriety tests. Wiezorek proceeded to fail three tests and was placed under arrest. A search of Wiezorek's vehicle revealed an open half-empty can of beer in a red koozie in the center console cup holder and another empty can of beer on the floorboard of the passenger side of the vehicle. Wiezorek was transported to the Ames Police Station where implied consent was invoked. Wiezorek ultimately refused to submit to chemical testing.

Officer Patrick O'Bryan, who arrived at the scene shortly after Officer McPherson, also observed the vehicle's engine running with Wiezorek asleep in the front driver's seat. Officer O'Bryan also smelled an alcoholic beverage on Wiezorek's breath.

On April 20, 2009, the State charged Wiezorek by trial information with OWI, second offense. The case went to a jury trial on August 18, 2009.

Before trial, the State filed a motion in limine asking the district court to prohibit defense counsel from presenting "any argument that being intoxicated and sleeping behind the wheel of a vehicle with the engine running is not

'operation.'" Defense counsel resisted. Defense counsel argued that while some Iowa cases had affirmed OWI convictions despite the driver having been found asleep or unconscious while the engine was running, it was within the jury's province to determine whether such a driver was actually in "physical control" of the vehicle as required for a finding of guilt. Nevertheless, based on its reading of *State v. Murray*, 539 N.W.2d 368 (Iowa 1995), the district court granted the State's motion in limine. That is, the court advised Wiezorek's counsel:

> So as to what you can argue then, it cannot be argued that this is not the law, that is, that being asleep while the engine is running and being intoxicated on this property was not a crime.

The two Ames police officers were the only witnesses who testified at trial. A DVD of the stop as recorded from McPherson's vehicle was also played for the jury. After the close of evidence, the court instructed the jury:

> The term 'operate' means the immediate, actual physical control over a motor vehicle that is in motion and/or has its engine running.[1]

The court refused Wiezorek's request that the words "upon a highway" be included at the end of the instruction. The court also overruled Wiezorek's motion for judgment of acquittal based upon the State's failure to prove he had been operating the vehicle upon a highway.

During closing argument, defense counsel made the following statements:

> Is somebody asleep in the front seat—even the driver's seat of a motor vehicle in immediate actual physical control of the vehicle? That will be for you all to determine amongst yourselves. You will tell us whether that is sufficient.

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[1] This is the approved Iowa Criminal Jury Instruction No. 2500.6. *See State v. Boleyn*, 547 N.W.2d 202, 205 (Iowa 1996) ("We have approved the definition of 'operate' as 'the immediate, actual physical control over a motor vehicle that is in motion and/or has its engine running.'").

> I would ask you this. How is somebody asleep in the driver's side of a vehicle in any more position and in any more of immediate actual physical control over a motor vehicle than somebody who is wide awake but intoxicated seated in the passenger—front passenger seat of the vehicle? That person would still have to do something to exercise control over the vehicle. You could conclude that somebody who is asleep still has to do something to exercise immediate actual control over the vehicle.

At this time, the State objected to the argument as a misstatement of the law. The trial court thereupon advised the jury as follows:

> All right, folks. We've talked about this. I don't think that Mr. Rehkemper is telling you what the law is. You will read the law in your instructions. He is not allowed to misstate the law and neither is Ms. Reynolds [the prosecutor], and so I just want to give you an admonition here. I heard in Ms. Reynolds' argument that this is a public policy. You're not to consider what you think public policy ought to be. You are to consider what the law is.
>
> In the case of arguing about what actual physical control is, you must determine that yourself from the instructions. Now, Mr. Rehkemper, you're allowed to ask the question if they think that is actual physical control, so if you would limit your argument to that I don't think you would be doing any improper argument.

Thus, the court (in its own words) "sustained" the objection "insofar as you were going toward that—that boundary that I mentioned to you."

After receiving the court's ruling, Wiezorek's counsel proceeded to emphasize to the jury that his client was asleep at the time and told them that "actual physical control" is "for you to decide," without specifically arguing that his client was *not* in physical control of the vehicle. The jury returned a guilty verdict. Wiezorek stipulated to a prior OWI offense, and was sentenced to two years in jail with all but thirty days suspended plus a fine and applicable surcharges and court costs. Wiezorek appeals.

II. Limits on Closing Argument.

A. Standard of Review.

Wiezorek argues that the district court's limits on his defense counsel's closing argument deprived him of his constitutional rights to a fair trial and assistance of counsel such that our review should be de novo. *State v. Taeger*, ___ N.W. ___, ___ (Iowa 2010) ("It is well-established that this court's review of constitutional issues is de novo."). The State agrees that review of constitutional issues is de novo, but seems to argue that the matter here is not of constitutional dimensions. Thus, the State relies on other precedents holding that limits on closing argument rest within the sound discretion of the trial court. *See, e.g., State v. Melk*, 543 N.W.2d 297, 301 (Iowa Ct. App. 1995).

> The scope of closing arguments is not strictly confined, but rests largely with the sound discretion of the trial court. A trial court has broad discretion in deciding on the propriety of closing arguments to the jury. The trial court will be reversed and a new trial granted only when there has been an abuse of discretion which resulted in prejudice to the opposing party.

Lane v. Coe College, 581 N.W.2d 214, 218 (Iowa Ct. App. 1998) (citations omitted).

For the reasons discussed below, we conclude Wiezorek's claim of error should be rejected even if a de novo standard of review is applied.

B. Merits.

In making closing arguments, counsel is entitled to some latitude when analyzing the evidence admitted during the trial. *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975). Counsel is allowed to draw conclusions and argue permissible inferences that may be reasonably derived from the evidence. *Id*.

However, counsel is not allowed to misstate the law. *State v. Shanahan*, 712 N.W.2d 121, 140 (Iowa 2006); *State v. Graves*, 668 N.W.2d 860, 880 (Iowa 2003); *see also* 23A C.J.S. *Criminal Law* § 1729, at 285 (2006) ("Counsel in his or her argument to the jury may refer to and explain the law of the case, but such argument must not misstate the law or be inconsistent with the instructions of the court.").

In this case, the district court's somewhat Solomonic ruling allowed defense counsel to argue to the jury (1) that his client was asleep at the time and (2) that they had to find his client was in "physical control" of the vehicle. However, defense counsel was not allowed to connect the dots and argue that Wiezorek was not in physical control *because* he was asleep. Wiezorek concedes his counsel had no right to misstate the law. However, he insists that Iowa precedents do not foreclose the possibility of the defendant *not* being in control of a vehicle while asleep in the driver's seat with the engine running. At most, according to Wiezorek, they hold that there is sufficient evidence for a jury to convict in these circumstances. As Wiezorek explains in his well-written brief:

> Thus, resolution of this issue boils down to whether or not defense counsel's closing argument that a particular set of facts do not meet the definition of an essential element to an offense as set forth in the jury instructions, constitutes a misstatement of the law if an appellate court has previously determined similar facts were sufficient to sustain a conviction for the same offense.

Wiezorek's argument requires us to review and analyze the relevant Iowa precedents. In *State v. Hines*, 478 N.W.2d 888, 889-90 (Iowa Ct. App. 1991), we upheld the defendant's OWI conviction where he was found "slumped over the steering wheel" of a vehicle whose engine was running. We observed, "Hines

was 'operating' his vehicle when he started the car's engine, thereby exerting control over the vehicle." *Hines*, 478 N.W.2d at 889. In *Murray*, 539 N.W.2d at 369, the supreme court upheld the conviction of a defendant who was found intoxicated and slumped over the wheel of a vehicle whose engine was running. The defendant had "apparently driven the vehicle until it became disabled . . . and became intoxicated thereafter, having decided to wait until morning to seek help." *Murray*, 539 N.W.2d at 369. There, the supreme court "focus[ed] on whether the word 'operating' encompasses an intoxicated person sleeping behind the wheel of a disabled car which has its engine running," ultimately concluding that it does. *Id*. at 369-70.

Of these two precedents, *Murray* is the more significant, because it is a decision of the supreme court, it is more recent, and its facts are, if anything, more favorable to the defendant than those of the present case. Murray's vehicle, unlike Wiezorek's, was disabled. The question for present purposes is how to read *Murray*. Wiezorek points out correctly that *Murray* involved a challenge to the sufficiency of the evidence. Thus, in Wiezorek's view, the supreme court was merely holding that an intoxicated person sleeping behind the wheel of a car could be found by a jury to be in physical control. The State, however, argues that *Murray* announces a rule of law, namely that an intoxicated person sleeping behind the wheel of a disabled car with its engine running is "operating" that vehicle.

We acknowledge both readings of *Murray* are plausible. However, we ultimately read *Murray* as a further refinement on the legal definition of "operating," not merely as a sufficiency of the evidence case. In characterizing

the subject matter of its decision, the supreme court said that it was "focus[ing] on whether the word 'operating' encompasses an intoxicated person sleeping behind the wheel of a disabled car which has its engine running." *Id*. This sounds like the court was deciding a legal point. If the court were only determining whether the evidence was sufficient, it could have said that it was "focusing on whether a rational factfinder could find that an intoxicated person sleeping behind the wheel of a disabled car which has its engine running was operating that vehicle."

Hines contains similar wording to *Murray*. There we said that "Hines was 'operating' his vehicle when he started the car's engine, thereby exerting control over the vehicle." *Hines*, 478 N.W.2d at 889. Again, this phrasing reads like a decision on a question of law.

We find further support for the State's position in the expansive public policy language set forth in *Murray*. As the supreme court stated,

> *OWI statutes attempt to deter intoxicated individuals from getting into their vehicles except as passengers*. This protects against any possible results from a drunken condition of a driver. Moreover, the State has broad discretion in exercising its inherent power to pass laws to promote the public health, safety, and welfare. Among these laws are OWI statutes which are remedial in nature and should be liberally interpreted in favor of the public interest and against the private interests of the drivers involved.

Murray, 539 N.W.2d at 369-70 (citations omitted) (emphasis added). The rationale behind this policy is that an intoxicated person behind the steering wheel of a motor vehicle that has its engine running is a clear threat to the safety and welfare of the public. *See State v. Webb*, 274 P.2d 338, 340 (Ariz. 1954). This danger does not disappear even though the driver may fall asleep and

therefore exercise no "conscious volition" with regard to the vehicle. *Id*. "[T]here is [still] a legitimate inference to be drawn that defendant had of his own choice placed himself behind the wheel thereof, and had either started the motor or permitted it to run." *Id*.

We also find support for our view from decisions in certain other jurisdictions. *See Jacobsen v. State*, 551 P.2d 935, 938 (Alaska 1976) (affirming a district court ruling that a person is "operating" a motor vehicle, as a matter of law, if the person is sitting in the driver's seat with the motor running); *State v. Godfrey*, 400 A.2d 1026, 1026-27 (Vt. 1979) ("Being behind the driver's seat with the motor running is . . . being in actual physical control."); *see also United States v. McFarland*, 369 F. Supp. 2d 54, 58 (D. Me. 2005) ("A significant majority of courts has concluded the danger to the public posed by the intoxicated, but sleeping driver, requires he be deemed in actual physical control.").

If "operating" occurs whenever an intoxicated person is behind the wheel of a car with its engine started, which is what we read *Murray* (and *Hines*) to say, then Wiezorek's counsel's argument was a misstatement of the law, and the district court properly barred Wiezorek from making it. We affirm the district court's ruling on this point.

III. Jury Instruction Defining "Operate."

A. Standard of Review.

Wiezorek also asserts the trial court erred in refusing to include the words "upon a highway" in the jury instruction that defined "operate." We review challenges to jury instructions for correction of errors at law. *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010). Our review is to determine whether the

challenged instruction accurately states the law and is supported by substantial evidence. *Id*. Error in giving a particular instruction does not warrant reversal unless the error was prejudicial to the party. *Id*. Prejudice is presumed when the jury has been misled by a material misstatement of the law. *Kurth v. Iowa Dep't of Transp.*, 628 N.W.2d 1, 5 (Iowa 2001).

B. Merits.

In this case, the trial court instructed the jury that "[t]he term 'operate' means the immediate, actual physical control over a motor vehicle that is in motion and/or has its engine running." As noted, this is Iowa's standard jury instruction and has been approved by our supreme court on several occasions. Iowa Crim. Jury Instruct. 2500.6; *see also Boleyn*, 547 N.W.2d at 205; *Murray*, 539 N.W.2d at 369; *Munson v. Iowa Dep't of Transp.*, 513 N.W.2d 722, 724-25 (Iowa 1994).

Wiezorek contends the instruction is incomplete. He argues that in order to be "operating" a motor vehicle a person must be an "operator" as defined under Iowa Code section 321.1(46), which requires the person to be "in actual physical control of a motor vehicle *upon a highway*." (Emphasis added.) Accordingly, Wiezorek asserts that operating a motor vehicle "upon a highway" is an essential element of a violation of the OWI statute. We do not agree with this reasoning.

Iowa case law has made clear that the OWI offense is not limited to operation of a vehicle upon a public highway, but includes operation of a vehicle on private property. *State v. Rosenstiel*, 473 N.W.2d 59, 62 (Iowa 1991); *State v. Miller*, 204 N.W.2d 834, 837 (Iowa 1973); *State v. Heisdorffer*, 171 N.W.2d 513,

514 (Iowa 1969); *State v. Valeu*, 134 N.W.2d 911, 912 (Iowa 1965); *State v. Dowling*, 204 Iowa 977, 979-80, 216 N.W. 271, 271-72 (1927).

Wiezorek argues that these precedents are inapposite, because they involved an older version of Iowa's OWI law. Before 1986, the OWI provisions were part of chapter 321, rather than a separate chapter. In *Valeu*, interpreting those earlier provisions, the supreme court held that section 321.228, which stated that the OWI provisions "shall apply upon highways and elsewhere throughout the state," meant that the OWI offense was not limited "to operation on a public highway," but extended to private property as well. 134 N.W.2d at 912. Wiezorek points that when the OWI offense was moved to chapter 321J, the reference to the broad territorial scope of the OWI offense was removed from section 321.228. However, Wiezorek ignores that chapter 321J by its own terms does not limit the offense to "public highways" either. Rather, under chapter 321J, the basic OWI offense consists of only two essential elements: (1) operat[ing] a motor vehicle *in this state*" and (2) doing so "[w]hile under the influence of an alcoholic beverage or other drug." Iowa Code § 321J.2(1) (emphasis added).

Furthermore, *Rosenstiel*, 473 N.W.2d at 62, was actually decided after the 1986 change, and held that the reach of the OWI statute "extends to drivers on both public and private property in this state." In *State v. Peters*, 525 N.W.2d 854, 858 (Iowa 1994), the supreme court reiterated that section 321J.2 "may apply whether the offense is committed on public or private property."

Accordingly, the district court did not err in denying Wiezorek's request to add the words "upon a highway" to the standard jury instruction defining "operate."[2]

For the foregoing reasons, we affirm Wiezorek's conviction and sentence.

AFFIRMED.

[2] Wiezorek also argues there was insufficient evidence to sustain his conviction because no evidence was presented from which a reasonable jury could find he was operating his vehicle while intoxicated upon a highway. For the same reasons that we reject his jury instruction argument, we also reject this argument.