STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1782

State of Minnesota,
Respondent,

vs.

William Lawrence Butcher,
Appellant.

Filed August 15, 2011
Affirmed
Stoneburner, Judge

Hubbard County District Court
File No. 29CR1033

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Donovan D. Dearstyne, Hubbard County Attorney, Park Rapids, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant challenges his convictions of felony first-degree driving while impaired (DWI) and gross-misdemeanor driving after cancellation (DAC), arguing that (1) the

evidence is insufficient to prove that he was the driver and (2) the prosecutor's characterization of proof beyond a reasonable doubt as proof that leaves one "firmly convinced" of a defendant's guilt was misconduct constituting reversible plain error. We affirm.

FACTS

Park Rapids police officer Justin Frette was on routine patrol shortly before midnight when he noticed a vehicle parked in a commercial area with its lights on. Frette approached the vehicle to investigate.

As Frette was turning down the roadway where the vehicle was parked, he observed a person, later identified as appellant William Lawrence Butcher, who appeared to have been urinating, get into the driver's seat of the vehicle. As Frette pulled his squad behind the vehicle, the vehicle's lights turned off. Frette does not recall whether the vehicle's engine was running, but, when he approached the vehicle, he saw the key in the ignition. There was a passenger, later identified as Nora Jones, in the front passenger's seat.

As Frette spoke with Butcher, Frette noticed that Butcher appeared confused, his eyes were bloodshot and watery, and his speech was slurred. Frette could smell the odor of an alcoholic beverage coming from the vehicle. Butcher told Frette that he was coming from a casino in Walker and going to visit family in Ponsford, and he admitted that he had consumed four to six beers earlier in the evening. Butcher's driver's license had been cancelled as inimical to public safety. Frette administered field-sobriety tests

and arrested Butcher for DWI and DAC. Intoxilyzer test results indicated that Butcher's alcohol concentration was .16.

Butcher was charged with two counts of first-degree DWI for violating Minn. Stat. § 169A.20, subd. 1(1) (driving, operating, or being in physical control of a motor vehicle while under the influence of alcohol), and (5) (driving, operating or being in physical control of a motor vehicle while having an alcohol concentration of .08 or more as measured within two hours of driving, operating, or being in physical control of a motor vehicle) (2008 & Supp. 2009), and one count of gross-misdemeanor DAC in violation of Minn. Stat. § 171.24, subd. 5 (2008) (operating a motor vehicle after cancellation of driving privileges as inimical to public safety). A jury found Butcher guilty of all three charges. This was Butcher's twelfth DWI conviction. Butcher was sentenced to 79 months in prison for one count of first-degree DWI and a concurrent 365 days in jail for gross-misdemeanor DAC. This appeal followed.

D E C I S I O N

I. The evidence is sufficient to sustain Butcher's convictions.

Butcher argues that he cannot be convicted of DWI or DAC because the state did not introduce sufficient evidence to prove that he drove, operated or was in physical control of a motor vehicle under Minn. Stat. § 169A.20, subd. 1(1), (5), or that he operated a motor vehicle under Minn. Stat. § 171.24, subd. 5. Butcher argues that the circumstantial evidence equally supports the conclusion that Nora Jones had been driving the vehicle before it came to a stop along the road where Frette noticed it.

In considering a claim of insufficient evidence, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court assumes that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the jury's verdict if the jury could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

In this case, the undisputed direct evidence shows that Butcher was in physical control of the vehicle as he sat behind the wheel of the vehicle with the key in the ignition, and this evidence is sufficient to sustain his DWI convictions. *See State v. Fleck*, 777 N.W.2d 233, 235 (Minn. 2010) (holding that evidence of a person sleeping behind the wheel of his vehicle with the keys in the center console of the vehicle demonstrates physical control of the vehicle sufficient to sustain a conviction of DWI). The term "physical control" in Minnesota's DWI laws is meant to cover situations when an intoxicated person "is found in a parked vehicle under circumstances where the [vehicle], without too much difficulty, might again be started and become a source of danger to the operator, to others, or to property." *State v. Starfield*, 481 N.W.2d 834, 837 (Minn. 1992). Plainly, Butcher's position behind the wheel of the vehicle along with the fact that the key was in the ignition satisfied the definition of physical control. There is no merit to Butcher's argument that the evidence was insufficient to prove that he was in

physical control of the motor vehicle for purposes of Minn. Stat. § 169A.20, subd. 1(1), (5).

Although Butcher has not specifically argued that proof of being in physical control of a motor vehicle is insufficient to constitute "operating" a motor vehicle under Minn. Stat. § 171.24, subd. 5, this court has interpreted the "operating . . . any motor vehicle" language of Minn. Stat. § 171.24 to encompass "sitting behind the wheel with the engine running and the lights on." *In re Welfare of T.J.B.*, 488 N.W.2d 1, 2 (Minn. App. 1992), *review denied* (Minn. Sept. 30, 1992). In *T.J.B.*, this court cited, in support of its decision, persuasive authority including *State v. Townsend*, 294 A.2d 650, 652 (Conn. App. 1972). *Id*. at 3. In *Townsend*, the Appellate Division of the Circuit Court of Connecticut concluded that a person "operates" a motor vehicle under the statute that, similar to Minn. Stat. § 171.24, prohibits operation of a motor vehicle after the suspension of the driver's license, when "'he intentionally does any act or makes use of any mechanical or electrical agency which alone *or in sequence* will set in motion the motive power of the vehicle.'" *T.J.B.*, 488 N.W.2d at 3 (emphasis added) (quoting *Townsend*, 294 A.2d at 652 (quoting *State v. Swift*, 6 A.2d 359, 361 (Conn. 1939))). The Supreme Court of Connecticut has since further elaborated on the meaning of "operate" and has concluded that "[t]he act of inserting the key into the ignition and the act of turning the key within the ignition are preliminary to starting the vehicle's motor. Each act, in sequence with other steps, will set in motion the motive power of the vehicle. Each act therefore constitutes 'operation.'" *State v. Haight*, 903 A.2d 217, 221 (Conn. 2006) (quotation omitted) (addressing the issue of whether defendant "operated" a motor

vehicle while under the influence of intoxicating liquor in violation of a state statute and relying on *Swift*, 6 A.2d 359).

In this case, Frette could not recall if the vehicle was running when he stopped behind it, but he observed Butcher sitting behind the wheel, with the keys in the ignition when the lights were turned off. And Butcher told Frette where he had come from and where he was going without any indication that he had not been operating the vehicle. We conclude that Butcher's location in the driver's seat of a vehicle stopped in a commercial area with the keys in the ignition is sufficient evidence that Butcher, and not the passenger, was operating the vehicle at the time the officer approached the vehicle, despite the lack of evidence that the engine was running at that time. This evidence is sufficient to sustain his conviction of DAC under Minn. Stat. § 171.24.

II. The prosecutor did not commit reversible error.

Butcher argues that the prosecutor committed reversible error in closing argument when he stated that proof beyond a reasonable doubt is proof that leaves one "firmly convinced" of a defendant's guilt, while showing a graphic with this language to the jury. Butcher did not object to the prosecutor's statement or graphic at trial.

A defendant who fails to object or request a cautionary instruction at trial ordinarily forfeits the right to appellate review, *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984), but this court has the discretion to review unobjected-to prosecutorial error if plain error is established. Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). To establish plain error based on a claim of prosecutorial error, (1) the prosecutor's unobjected-to argument must be erroneous; (2) the error must be plain; and

(3) the error must affect the appellant's substantial rights. *Ramey*, 721 N.W.2d at 302 (citing *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998)). "An error is plain if it was clear or obvious," *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotation omitted), or if it "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302.

The burden rests with the appellant to demonstrate that plain error has occurred. *Id.* If plain error is established, the burden shifts to the state to demonstrate that the plain error did not affect the defendant's substantial rights. *Id.* An error affects substantial rights when it was "prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. If plain error affecting substantial rights is established, we then assess whether to address the error "to ensure fairness and the integrity of the judicial proceedings." *Id.* at 740.

Butcher argues that the prosecutor misstated the reasonable-doubt standard because he did not use the language of 10 *Minnesota Practice*, CRIMJIG 3.03 (2006) that the district court used in instructing the jury:

> Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.

See State v. Sap, 408 N.W.2d 638, 641 (Minn. App. 1987) (holding that courts are "always safe in using the instruction of CRIM.JIG. II, 3.03"). The prosecutor described

the concept of reasonable doubt to the jury based on the Federal Judicial Center's instruction, which reads:

> Proof beyond a reasonable doubt is proof that leaves you *firmly convinced* of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are *firmly convinced* that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Fed. Judicial Ctr., *Pattern Criminal Jury Instructions*, Instruction 21 (1987) (emphasis added).

But it is not necessary to use any particular form of words to define reasonable doubt as long as, taken as a whole, the concept of reasonable doubt is correctly conveyed to the jury. *State v. Smith*, 674 N.W.2d 398, 400–01 (Minn. 2004). And Butcher utterly fails to explain how the Federal Judicial Center's instruction incorrectly described to the jury the concept of reasonable doubt. *See Victor v. Nebraska*, 511 U.S. 1, 27, 114 S. Ct. 1239, 1253 (1994) (Ginsburg, J., concurring in part and concurring in the judgment) (endorsing the Federal Judicial Center's instruction and stating, "[t]his model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly"); *see also State v. Andersen*, 784 N.W.2d 320, 339–40 (Minn. 2010) (Meyer, J., concurring) (noting that a number of courts have specifically approved the Federal Judicial Center's instruction in addressing potential juror confusion and misunderstanding posed by instructions similar to Minnesota's reasonable-doubt

definition, and legal commentators prefer the Federal Judicial Center's instruction over other formulations).

Additionally, because the district court instructed the jurors to disregard any statements made by counsel that differed from the law described by the court, and because it provided jurors with written copies of the instructions that included CRIMJIG 3.03 for their deliberations, Butcher cannot establish any prejudice from the prosecutor's use of a definition that differed from the definition given by the district court.

Butcher also argues, in his pro se brief, without analysis or citation to authority, that the prosecutor committed misconduct by privately conversing with the state's witnesses during a recess at trial. This argument is meritless.

Affirmed.