

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND SKOP,

Defendant-Appellant.

UNPUBLISHED

July 1, 1997

No. 196264

Livingston Circuit Court

LC No. 95-009005-FH

Before: Gribbs, P.J., and Sawyer and Young, JJ.

PER CURIAM.

Defendant Raymond Skop was convicted of operating a motor vehicle while under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(6); MSA 9.2325(6), and operating a motor vehicle with a suspended license, MCL 257.904(1); MSA 9.2604(1). He was sentenced to county jail for a term of fourteen months to five years for the OUIL conviction and ninety days for the suspended license conviction. He appeals as of right. We affirm.

First, defendant argues that there was insufficient evidence to sustain his conviction. We review sufficiency of the evidence claims to determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

Both statutes under which defendant was convicted require that the jury find that defendant had been “operating” a vehicle. MCL 257.625(6); MSA 9.2325(6), MCL 257.904(1); MSA 9.2604(1). Defendant argues that there was insufficient evidence presented only as to this element of “operating” a vehicle.

An “operator” is anyone in actual, physical control of a motor vehicle. *People v Wood*, 450 Mich 399, 403; 538 NW2d 351 (1995). Furthermore, “operating” is to be defined in the terms of the danger the statutes seek to prevent: the collision of the vehicle being operated by the person with other vehicles or property. *Id.* at 404. Consequently, once a person using a motor vehicle has put the vehicle

in motion, or in a position posing a significant risk of causing a collision, that person continues to operate the vehicle until it is returned to a position posing no such risk. *Id.* at 405.

Defendant's friend testified that at approximately 10:15 p.m. she had driven defendant from the boat launch at Whitmore Lake to the spot where he was found in his vehicle. A police officer testified, however, that defendant had told him that he had left a friend's house in Whitmore Lake around 8:00 p.m. and was on his way home. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have reasonably found that the testimony of defendant's friend was not credible and that defendant was the one who had in fact been driving the vehicle.

Further, even if the jury believed defendant's friend, there was sufficient other evidence from which the jury could have found that defendant had been "operating" a vehicle. A police officer testified that when he approached the vehicle, the motor of the vehicle was racing because defendant's foot was on the gas pedal, the vehicle was backed into a parking spot so that forward motion was possible, and defendant made uncoordinated movements in the police officer's presence to attempt to put the vehicle into gear. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that defendant had put the vehicle in a position posing a significant risk and, therefore, was operating the vehicle. Sufficient evidence was presented to sustain defendant's conviction.

Second, defendant argues that the trial court's instruction to the jury regarding "operating" a vehicle was erroneous for numerous reasons. On review, we balance the general tenor of the instructions in their entirety against the potentially misleading effect of any error. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996).

Defendant argues that the instruction was erroneous because it only included factors relating to control without including factors relating to lack of control. Defendant fails to cite any authority for his position. Regardless, defendant's characterization of the instruction is erroneous. The trial court instructed the jury to consider such things as the location of the person in the car in relation to the controls and whether the vehicle could be placed into motion. These factors do not reflect control or lack of control, but rather, could lead to either conclusion depending on the findings of the jury.

Defendant also argues that the instruction was erroneous because the trial court included in its instruction examples of the types of facts the jury could consider in determining whether defendant was operating the vehicle when these examples were not explicitly given in *Wood*. Although the Court in *Wood*, *supra*, did not give an exhaustive list of the facts which should be considered in determining whether a person is operating a vehicle, the court did address many of the same facts that the trial court in the present case gave as examples in its instruction such as that the engine was running and the location of the defendant in relation to the controls of the vehicle.

Defendant additionally argues that the instruction was erroneous because it included open-ended language allowing the jury to consider any additional factors. Again, defendant fails to cite any authority for his position. Regardless, the trial court properly instructed the jury on the definition of operating a vehicle, as given in *Wood*, then gave examples of the types of facts the jury could consider. It was not erroneous for the trial court to illustrate the nature of the facts that the jury could consider and then to allow the jury to consider any other relevant facts that would be helpful in determining whether defendant was operating a vehicle.

Last, defendant argues that the instruction was erroneous because it eliminated the issue of defendant's intent. However, the offense of operating a motor vehicle under the influence of intoxicating liquor is not a specific intent crime and defendant's motive or intent is not relevant to an assessment of the elements. *People v Raisanen*, 114 Mich App 840, 844; 319 NW2d 693 (1982). For these reasons, the trial court's instruction was not erroneous.

Third, defendant argues that the trial court's admission of the breath test results was erroneous because of lack of proper foundation. Whether a sufficient foundation has been laid for the admission of evidence is left to the sound discretion of the trial court. *People v Prelesnik*, 219 Mich App 173, 178; 555 NW2d 505 (1996); *People v Schwab*, 173 Mich App 101, 103; 433 NW2d 824 (1988). We review a trial court's determination as to admissibility for an abuse of discretion. *Id.*

In order for the results of a blood alcohol content test to be admissible, four foundational requirements must be met: (1) the operator must be qualified, (2) proper procedures must have been followed in administering the test, (3) the test must have been performed within a reasonable amount of time after arrest, and (4) the testing device must be shown to be reliable. *Schwab*, *supra* at 103. Failure to meet the foundational requirements precludes the admission of the test results. *People v Boughner*, 209 Mich App 397, 398-399; 531 NW2d 746 (1995). Defendant argues that the foundational requirements were not met because proper procedures were not followed during the administration of the test.

Defendant argues that the rule requiring that all foreign objects be removed from defendant's mouth was violated because defendant did not remove his dentures and alcohol could have been trapped in the dentures. The manager of the state breath alcohol testing program testified that when he drafted the manual requiring that foreign substances be removed from the mouth he was not referring to dentures because he would consider any dental work to be a natural substance in the mouth. He testified further that the testing device is equipped with a system to detect and report the presence of mouth alcohol. The police officer administering the test testified that the testing device did not indicate the presence of mouth alcohol during the test. Based on this evidence, the trial court did not abuse its discretion in finding that the procedures had not been violated by failing to remove defendant's dentures.

Defendant also argues that portable radios were stored in the vicinity of the testing device in violation of the instruction manual. The manager of the state breath alcohol testing program testified that the device is equipped with a radio frequency detecting system which detects and reports radio frequency interference in the area. The police officer administering the test testified that his radio was

turned off, that other portable radios may have been in the station charging, so they would be “off,” there were at least two walls between those radios and the testing device, and the testing device did not detect the presence of radio interference during the test. Based on this evidence, the trial court did not abuse its discretion in finding that the presence of portable radios in the station was not a violation of procedure.

Defendant also argues that proper procedures were not followed when he was allowed to stand near the testing device during setup. The police officer who administered the test testified that the manual states that the operator is not supposed to allow a defendant who “reeks” of alcohol near the testing device during setup, but defendant did not reek of alcohol. Based on this evidence, the trial court did not abuse its discretion in finding that allowing defendant to stand in proximity of the testing device was not a violation of procedure.

Based on these and other findings that the foundational requirements were met, the trial court did not err in admitting the breath test results.

Affirmed.

/s/ Roman S. Gibbs

/s/ David H. Sawyer

/s/ Robert P. Young, Jr.