STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
APPEAL NO. 2023-AP-992

CITY OF WATERTOWN,

Plaintiff-Respondent,

v.

ANDREW WIEST,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT CITY OF WATERTOWN

Appeal from the Judgement of Conviction Entered in 21-CV-84
Jefferson County Circuit Court,
the Honorable William Hue Presiding

AXLEY BRYNELSON, LLP
Attorney for Defendants-Respondents
William S. Cole, SBN 1011623
Danielle Baudhuin Tierney, SBN 1096371
2 E. Mifflin St., Ste. 200 ▪ Madison, WI 53703
P: (608) 257-5661 ▪ F: (608)257-5444
E: wcole@axley.com / dtierney@axley.com

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The City of Watertown does not believe oral argument will assist the Court in resolving the issues presented. Publication is not warranted because this is an appeal pursuant to Wis. Stat. § 752.31(2). *See* Wis. Stat. § 809.23(1)(b)4.

STATEMENT OF THE CASE

Plaintiff-Appellant Andrew Wiest received two municipal citations stemming from an incident on July 6, 2019: operating a motor vehicle while under the influence of an intoxicant (in violation of City of Watertown Ordinance 500-1, adopting Wis. Stat. § 346.63(1)(A)) and operating with a prohibited alcohol concentration (in violation of City of Watertown Ordinance 500-1, adopting Wis. Sat. § 346.63(1)(B)). A jury trial was held before Jefferson County Circuit Court Judge William Hue on March 3, 2023. At the conclusion of the City of Watertown's presentation of evidence, Wiest's counsel made a motion for a directed verdict stating that the City of Watertown had not established the time

of operation. Judge Hue denied the motion, the case went to the jury, and the jury found Wiest guilty on both citations.

STATEMENT OF FACTS

Officer Achilli, an eight-year veteran (at the time of the offense) of the City of Watertown Police Department, was working third shift on July 6, 2019. [R. 69:34 (34:2-23).] Third shift was approximately 10:15 p.m. to 7:30 a.m. [R. 69:34-35 (34:23-35:1).] Officer Achilli's duties that shift were to serve as a patrol officer for the central district of the City of Watertown. [R. 69:34 (34:11-13).] The central district, a "more concentrated area of houses and businesses in the center of the city," was the smallest of the three districts within the City of Watertown. [R. 69:34 (34:12-21).] Officer Achilli described the central district as housing businesses similar to "a typical downtown that you would see" with "regular businesses that are closed at night" and "a number of bars…." [R. 69:35 (35:2-6).]

Officer Achilli testified that when she patrols the central district "around bar time," she "tend[s] to make [the downtown

area] a lot smaller." [R. 69:35 (35:7-11).] Because there are "a lot of one ways…[she] will patrol very heavily and make sure that everything is going well." [R. 69:35 (35:11-13).] Specifically, she testified that she "kind of ha[s] a small area that [she] just, kind of, weave[s] through to include just the central street that runs straight down" and that she "tr[ies] and stay[s] in that area." [R. 69:35 (35:13-16).]

At approximately 3:01 or 3:02 a.m. on July 6, 2019, Officer Achilli was traveling west down East Main Street when she saw high beams on a vehicle "a couple blocks" ahead of her which drew her attention. [R. 69:35-36 (35:19-36:1).] As she drove towards the vehicle, she observed that the vehicle, which had its high beams on, was at the intersection of East Main and First Street on the south side of the street in the City of Watertown. [R. 69:36 (36:3-20).] The vehicle was parked in a no-parking zone (marked with yellow paint on the curb), and its back passenger tire was parked over the curb on the sidewalk. [R. 69:36-37 (36:12-37:12).] Prior to seeing that vehicle parked with its high

beams on, Officer Achilli had not seen any car parked or driving with its high beams on in the area. [R. 69:36 (36:15-18).]

When Officer Achilli was asked about the last time she drove by that specific area of the City of Watertown before she stopped to investigate this specific incident, Officer Achilli testified that it was "very hard to judge that time" and that she had "never actually timed" how long it takes her to "weave through" the "downtown area" and "end up on Main Street," but she said that it was "not a huge amount of time" and that she "hit that area frequently" during her patrol. [R. 69:72-73 (72:25-73:9).] She testified that when she last made the pass through the area, she did not see Wiest's vehicle. [R. 69:73 (73:16-23).] Officer Achilli also testified that, because of the way Wiest's vehicle was parked, the vehicle would have been brought to her attention if it had been there during her last pass through the area; she said it "was very obvious that [the vehicle] was parked somewhere in such a manner that it should not have been" and that she was

"confident in [her]self and [she] think[s] that [she] would have noticed a vehicle parked like that." [R. 69:73 (73:23-74:2).]

As Officer Achilli drove past the vehicle, she observed (who she later identified as) Wiest sitting in the vehicle with his head back and his mouth hanging open. [R. 69:37 (37:4-9).] She ultimately turned around, parked her vehicle, and made contact with Wiest. [R. 69:37-38 (37:13-38:3).] The rear running lights were on as Officer Achilli approached the vehicle. [R. 69:40 (40:3-4).] She walked up to the vehicle, knocked on the window, and Wiest woke up. [R. 69:39 (39:9-13).] Officer Achilli "motioned to him…almost the universal symbol to roll down your window…" but Wiest struggled to roll the window down, so he eventually opened the door. [R. 69:39 (39:19-23).]

Officer Achilli spoke with and identified the driver as Andrew Wiest with his Wisconsin driver's license. [R. 69:40 (40:8-12).] When Wiest first opened his vehicle door, Officer Achilli could immediately smell a strong odor of intoxicants coming from the vehicle and she observed an open intoxicant in the center

console. [R. 69:40 (40:17-24).] Officer Achilli also heard the door chime when Wiest opened the vehicle's door and saw the vehicle's car keys in the ignition. [R. 69:41 (41:7-14).] The vehicle was not running when Officer Achilli approached Wiest and Wiest removed the keys from the ignition when asked by Officer Achilli. [R. 69:41 (41:4-20).]

Officer Achilli spoke with Wiest, who said he had been coming from River Bend and that he had "one or two" beers. [R. 69:42 (42:10-21).] (River Bend is a campground just outside of Watertown. [R. 69:43 (43:1-4).]) Wiest told Officer Achilli that he consumed the "one or two" beers at "nine or ten." [R. 69:43 (43:19-22).] When Officer Achilli initially asked Wiest where he was going, he initially "grinned and said he didn't know," but when asked if he was going to the address on his ID, Wiest said yes. [R. 69:43 (43:7-14).] During the conversation, Officer Achilli noticed that Wiest's speech was "slurred, garbled, hard to understand at times." [R. 69:43 (43:15-18).]

Officer Achilli testified about her training, credentials, and experience relative to the detection and arrest of impaired drivers and testified that, based upon her observations and her training, she concluded that Wiest could have been impaired and that she needed to investigate further. [R.69:45-47 (45:14-47:10).] Officer Achilli asked Wiest whether he would go through field sobriety tests, and he agreed. [R. 69:47 (47:13-16).]

After Wiest exited the vehicle and took the keys out of the ignition, the rear lights on the vehicle turned off. [R. 69:55-56 (55:21-56:11).]

Officer Achilli then testified about her training and experiences relative to conducting field sobriety tests and testified that she performed the tests with Wiest consistent with her training. [R. 69:47-48 (47:17-48:10).]

The first test she asked Wiest to perform was the horizontal gaze nystagmus test ("HGN test"). [R. 69:48 (48:11-15).] After Officer Achilli explained how she administered the test, she testified that she observed all six clues of impairment

when she had Wiest perform the HGN test. [R. 69:48-51 (48:13-51:16).]

The second test Officer Achilli asked Wiest to perform was the walk and turn test. [R. 69:51 (51:19-21).] After Officer Achilli testified how she administered that test and the purpose of the test, she testified that she observed five of eight possible clues of impairment when Wiest performed the walk and turn test. [R. 69:51-54 (51:22-54:22).]

The final test that Officer Achilli asked Wiest to perform was the one leg stand test. [R. 69:57 (57:6-9).] Officer Achilli testified how she administered the test and testified that, although she is trained to observe clues of impairment, she had to stop the test early because she did not want Wiest to fall. [R. 69:57-58 (57:10-58:21).] Officer Achilli testified that Wiest raised his foot and then touched it to the ground three times, used his arms for balance, and hopped at one point to attempt to maintain his balance, which suggested impairment. [R. 69:58 (58:12-24).]

After putting Wiest through field sobriety tests, and based on her observations of Wiest, Officer Achilli came to the conclusion that Wiest was impaired. [R. 69:59 (59:11-16).] She placed Wiest under arrest for OWI, read Wiest the informing the accused form, and asked Wiest whether he would consent to a chemical test of his breath or blood to determine his blood alcohol content. [R. 69:59-61 (59:17-61:3).] When he consented, Officer Achilli transported Wiest to the Watertown Regional Medical Center where she observed a phlebotomist perform a legal blood draw of two vials of blood that Officer Achilli later sent for testing at the Wisconsin Hygiene Lab. [R. 69:61 (61:5-14).]

Officer Achilli also testified that, after she read Wiest a preinterrogation warning, she completed a drug and alcohol influence report. [R. 69:64 (64:13-16).] The drug and alcohol influence report documents an officer's observations of an individual and also includes the individual's responses to questions on the form. [R. 69:64 (64:17-20).] After Officer Achilli read the preinterrogation warning to Wiest, Wiest agreed to

answer Officer Achilli's questions and she accurately recorded his answers on the drug and alcohol influence report. [R. 69:65 (65:1-9).] Notably, Officer Achilli testified that she had asked Wiest if he was operating a motor vehicle, and Wiest responded "yes." [R. 69:65 (65:19-23); *see also* R. 42 (form admitted into evidence at R. 69:66 (66:10-14)).]

After Officer Achilli's testimony had concluded, Thomas Neuser, a level three forensic scientist employed in the toxicology section of the State Laboratory of Hygiene, testified for the City of Watertown. [R. 69:75 (75:12-21).] After Mr. Neuser testified about his education, training, and state-issued permits, he explained how the laboratory performs an analysis of blood specimens to test for the presence of alcohol. [R. 69:75-79 (75:19-79:10).] Mr. Neuser also explained that he also received training to supervise others who conduct alcohol analysis and has, over the course of his career, reviewed the analysis of blood sample results for the presence of alcohol for other analysts "uncounted, thousands of times." [R. 69:76-77 (76:11-77:13).]

With respect to Wiest's blood sample, Mr. Neuser testified that the analysis was performed by Laurine Edwards, who had since retired from the State Lab after approximately 15 years. [R. 69:77-78 (77:19-78:9).] After Mr. Neuser testified about how Ms. Edwards conducted the analysis, he testified about the specific steps he took to verify the results obtained by Ms. Edwards. [R. 69:78-80 (78:12-80:18).] Mr. Neuser testified that the analysis results showed that Wiest had a blood ethanol concentration of .206 grams per 100 milliliters, and that he signed the report with the results after he conducted his analysis and validation of Ms. Edwards' results. [R. 69:80 (80:19-25).] Mr. Neuser also testified that the results reflected the blood alcohol concentration at the time of collection, which was 3:53 a.m. on July 6, 2019. [R. 69:82 (82:2-3).]

At the close of the City of Watertown's case, Wiest's counsel moved for a "direct[ed] verdict on both of the charges because [the City of Watertown] ha[sn't] established the time of the operation…" [R. 69:83 (83:6-8).] The Court denied the motion,

stating "[w]e'll continue to proceed in the light most favorable to the prosecution. A reasonable jury could reach a verdict in this case of conviction. And so I'll deny that motion." [R. 69:83 (83:9-12).]

In closing arguments, the City of Watertown's attorney argued that the evidence presented was sufficient to establish that Wiest had operated a motor vehicle at the time of his intoxication. [*See* R. 69:123-127 (123:7-127:5).] The City of Watertown's attorney highlighted the evidence which could support a finding that Wiest had, indeed, operated while under the influence: Wiest's admissions that he had been drinking at another location outside of the city, his statements that he was coming from that location and going to his home, the officer's testimony about her patrol routines, the officer's testimony about how the vehicle drew her attention, and the officer's testimony about how she had not seen the vehicle earlier during her patrol of the area. [R. 69:124-125 (124:15-125:23).] The City of Watertown's attorney also pointed out that Wiest had been found

sleeping behind the wheel of the vehicle, the keys were in the ignition, and the lights were on. [R. 69:125-126 (125:24-126:3).] The City of Watertown's attorney also argued that the jury could consider what evidence had not been presented; specifically, there was no evidence that anyone else was in the vehicle or had been driving the vehicle, and no evidence that Wiest had been drinking at another local bar and then gotten into his vehicle. [R. 69:124-125 (124:22-125:4); 69:126 (126:8-14).]

During the rebuttal closing argument, the City of Watertown's attorney argued that "[v]ehicles don't just show up somewhere. Somebody has to drive them. And the only evidence in this case is that a vehicle was not there, it showed up later on the next patrol. We've got admissions from the [D]efendant, I was coming; I was going." [R. 69:130 (130:8-12).] The City of Watertown's attorney also highlighted Wiest's admission from the drug and alcohol influence report, where Wiest responded "yes" to the question of "were you operating a motor vehicle?" [R. 69:130 (130:13-20).] The City of Watertown's attorney concluded

by arguing that the "[c]ircumstantial evidence and admissions and a lack of any other explanation other than just spontaneous arrival on scene, apparition, [or] whatever you want to call it…" leads to the sole conclusions that Wiest "drove to that location, parked his car, turned it off, tried to take a nap, and an officer came upon him." [R. 69:130-131 (130:21-131:2).]

After the jury instructions were read,[1] the jury went into deliberations for approximately 38 minutes before submitting two questions. [R. 69:146 (146:19-22).] The first question asked for Exhibit 4 (the drug and alcohol influence report) to be sent back to the jury and, because it had been admitted into evidence, it was sent to the jury. [R. 69:146-147 (146:21-147:3).] The second question the jury asked was "is the insertion of the key in the ignition considered a manipulation in operating the vehicle." [R.

[1] The instructions included the following: "The law states that the alcohol concentration in a defendant's blood sample taken within three hours of operating a motor vehicle is evidence of the defendant's alcohol concentration at the time of the operating. If you are satisfied that there was .08 grams or more of alcohol in 100 milliliters of defendant's blood at the time the test was taken, you may find from that fact alone that defendant was under the influence of an intoxicant at the time of the alleged operating, or that defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, but you are not required to do so." [R. 69:138-139 (138:16-139:1).]

69:147 (147:14-16).] Judge Hue said that he "wouldn't answer a question yes or no on that" but that he wanted to decide "how … to respond to that." [R. 69:147 (147:16-18).]

Wiest's counsel argued that the 1980 Court of Appeals decision Milwaukee County v. Proegler defined "operate" as "either turning on the ignition or leaving the motor vehicle running while the vehicle is in park…." [R. 69:147 (147:22-25).] Judge Hue questioned whether that case involved a situation where keys were in the ignition but the vehicle was not running and asked "[w]hat exactly are they saying in [Proegler]?" [R. 69:148 (148:5-9).] Wiest's counsel responded, "I don't know, Your Honor. I know what Proegler said, and I think the Proegler, the case, the car was running is the case." [R. 69:148 (148:10-12).] After continued discussion, Wiest's counsel again asserted that "Proegler is pretty clear, Judge. It says, the prohibition against the activation of any of the controls of the motor vehicle necessary to put it in motion applies either to turning on the ignition or leaving the motor vehicle running while the motor

vehicle is in park." [R. 69:148-149 (148:13-149:13).] Judge Hue noted that in the Proegler case, the Court of Appeals had found that those two actions had constituted "operate," but pointed out that – because the Court of Appeals would not speculate on other actions – the Proegler decision "doesn't necessarily mean those are the only instances or to the exclusion of all other instances" that could constitute "operate." [R. 69:149 (149:14-21).]

The City of Watertown's attorney then cited to Wisconsin v. Mertes, a Court of Appeals decision from 2008 and explained that the case

> "makes that exact distinction and says, well, yeah, Proegler says that, however, we disagree. The defendant was still – Mertes argues that because the motor of his vehicle was not started or running he could not have been found to have operated it. We disagree. And it goes on to explain that just because we found it that way in Proegler, does not mean it is that way. Well [*sic*] the motor in this case was not running. The keys were in the ignition, the parking and dash lights were on. We believe that even in absent -- even absent a running motor,

> a jury is entitled to consider circumstantial evidence in this case."[2]

Ultimately, the Court instructed the jury to review Instruction 2668 for the definition of operate. [R. 69:154 (154:14-22).]

The jury found Wiest guilty of operating under the influence as charged in the first citation and guilty of operating with prohibited alcohol concentration as charged in the second citation. [R. 69:155 (155:17-25).] The judgment of conviction of the municipal court was affirmed. [R. 69:156-157 (156:19-157:5; R. 69:158 (158:21-24); R. 69:164 (164:1-3).] Wiest filed a Notice of Appeal on June 5, 2023. [R. 60.]

STANDARDS OF REVIEW

"A motion for a directed verdict challenges the sufficiency of the evidence" at trial. Marquez v. Mercedes-Benz USA, LLC, 2012 WI 57, ¶ 47, 341 Wis. 2d 119, 815 N.W.2d 314, *decision*

[2] Though the transcript lacked internal quotation marks, counsel was reading from the Mertes opinion: "Mertes argues that because the motor of his vehicle was not started or running, he could not be found to have operated it. We disagree. … While the motor in this case was not running, the keys were in the ignition, the parking and dash lights were on. We believe that even absent a running motor, the jury was entitled to consider the circumstantial evidence in this case." State v. Mertes, 2008 WI App 179, ¶¶ 15-16, 315 Wis. 2d 756, 762 N.W.2d 813.

clarified on denial of reconsideration, 2012 WI 74, ¶ 47, 342 Wis. 2d 254, 823 N.W.2d 266. The motion may be granted by a trial court if the trial court "is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." *Id.* (quoting Wis. Stat. § 805.14(1)). However, "[w]hen there is *any* credible evidence to support a jury's verdict, even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand." *Id.* (emphasis in original; internal quotation marks omitted; quoting Weiss v. United Fire & Cas. Co., 197 Wis.2d 365, 389–90, 541 N.W.2d 753 (1995)). Trial judges are urged to "withhold ruling on a directed verdict" and allow for the jury to decide the matter "[e]xcept in the clearest of cases…." Warren v. Am. Fam. Mut. Ins. Co., 122 Wis. 2d 381, 384, 361 N.W.2d 724 (Ct. App. 1984) (citing Wis. Stat. § 805.14(1); Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 96 Wis.2d 314, 338, 291 N.W.2d 825 (1980)).

On appeal, this Court "conducts the same search for credible evidence to sustain the jury's verdict." Marquez, 2012 WI 57, ¶ 48. Appellate courts give trial courts "substantial deference" because "circuit courts are better positioned to decide the weight and relevancy of the testimony" adduced at trial. Haase v. Badger Mining Corp., 2004 WI 97, ¶ 17, 274 Wis. 2d 143, 682 N.W.2d 389.

Further, when an appellate court is tasked with evaluating the sufficiency of evidence after a conviction, "an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [prosecution] and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found" the defendant guilty. State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If there is "any possibility" that the "trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not

overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." *Id.*

Convictions "may be supported solely by circumstantial evidence" and "[o]nce the jury accepts the theory of guilt" that has been presented through the use of circumstantial evidence, "an appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict." State v. Mertes, 2008 WI App 179, ¶ 11, 315 Wis. 2d 756, 762 N.W.2d 813.

ARGUMENT

I. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUPPORT THE CONVICTION.

At trial, the jury was instructed that, in order to find Wiest guilty of the two citations, the City of Watertown needed to establish that Wiest drove or operated a motor vehicle on a highway, and that Wiest either had a prohibited alcohol concentration or was under the influence of an intoxicant at the time. [R. 52:2-5 (2668).] Wiest's sole argument on appeal is that there was insufficient evidence presented at trial for the jury to

have found that Wiest operated a motor vehicle. [Brief of Appellant, pp. 12-13.] (Indeed, that was the sole issue raised by Wiest in his defense's closing argument.[3])

The evidence presented at trial was sufficient for the jury to properly conclude that Wiest had, indeed, operated a motor vehicle. There were multiple pieces of circumstantial evidence which allowed the jury to reasonably conclude that Wiest had operated a motor vehicle, as well as a direct admission from Wiest. Wiest argues that the evidence is insufficient, but when viewed in the light most favorable to the prosecution, the jury's conclusion is reasonable and should not be disturbed.

Wisconsin statute provides the definition of "operate" as utilized in the two statutes at issue in his case: "the physical

[3] "[W]e're not contesting impairment. … The issue comes down to whether or not the State [*sic*] has established to a reasonable certainty that Mr. Wiest operated the motor vehicle while impaired." [R. 69:128 (128:13-19).]

manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Wis. Stat. § 346.63(3)(b).[4]

Even without considering the circumstantial evidence to support the conclusion that Wiest operated the motor vehicle, there is a piece of direct evidence – an admission from Wiest – to support the jury's verdict: when Wiest had been asked if he was operating a motor vehicle, Wiest responded "yes." [R. 69:65 (65:19-23); *see also* R. 42 (form admitted into evidence at R. 69:66 (66:10-14)).] That admission alone is sufficient for the jury to have concluded that Wiest operated a motor vehicle and is sufficient to uphold the verdict.

Additionally, there is ample circumstantial evidence to support the jury's verdicts. To establish a party violated Wis. Stat. § 346.63(1)(A) or Wis. Stat. § 346.63(1)(B) (or, a municipal

[4] Wiest argues that County of Milwaukee v. Proegler held that "operation" only can be found when the ignition is turned on or the motor vehicle is left running while the vehicle is in park. *See* Brief of Appellant, p. 12. His argument is incorrect. As the Court of Appeals explained nearly thirty years after the Proegler decision, a running motor is not necessary to have found "operation," and cases after Proegler confirmed the same. Mertes, 2008 WI App 179, ¶¶ 15-16 (citing Burg ex rel. Weichert v. Cincinnati Casualty Insurance Co., 2002 WI 76, ¶ 27 n. 8, 254 Wis.2d 36, 645 N.W.2d 880).

ordinance adopting the statute/s), the prosecution may rely on circumstantial evidence to prove that the defendant drove the vehicle to the location where the defendant had contact with law enforcement. Mertes, 2008 WI App 179, ¶¶ 11, 13. Circumstantial evidence is "evidence from which a jury may logically find other facts according to common knowledge and experience." Mertes, 2008 WI App 179, ¶ 14 (quoting WIS JI-CRIMINAL 170). [*See also* R. 52:5-6 (WI JI-Civil 230).]

Here, there was ample circumstantial evidence for a jury to reasonably infer that Wiest operated his vehicle and drove it to the location within a short time prior to his contact with Officer Achilli: (1) Wiest was seated in the driver's seat; (2) the keys were in the ignition; (3) the head lights (high beams) were activated, as were the rear running lights; (4) the head lights (high beams) and rear running lights turned off after Wiest removed the keys from the ignition; (5) Wiest's statement that he was coming from River Bend and driving to his home; (6) Wiest's statement that he drank around 9:00 or 10:00 p.m., (7) the lack of evidence that

anyone else had driven the vehicle (and lack of passenger); (8) lack of evidence that Wiest had recently been drinking at a local establishment; and (9) Officer Achilli's testimony that she had not seen Wiest's vehicle (or any vehicle with high beams on) on her last patrol loop, and her testimony that she frequently drove by the area where his car had been parked.

"[E]ven absent a running motor, the jury was entitled to consider the circumstantial evidence in this case to determine how and when the car arrived where it did and whether" it was Wiest "who operated it." Mertes, 2008 WI App 179, ¶ 16. The City of Watertown's theory was that Wiest drove his vehicle and parked it on the curb (where it was ultimately found by Officer Achilli) during the time where Officer Achilli was making a brief patrol loop through the central district. The City of Watertown relied on the circumstantial evidence presented to support that theory (as well as Wiest's admission regarding operation), and the jury obviously accepted the City of Watertown's theory when it returned two convictions. Viewing the evidence in the light

most favorable to the conviction, this Court should similarly conclude that the abundance of circumstantial evidence was sufficient to sustain the verdict.

Prior cases demonstrate that a running engine is not required for proof of operation where other circumstantial evidence was presented. In Mertes, a jury found that a defendant had operated a motor vehicle when he was (1) seated behind the wheel of a vehicle parked at a gas pump with keys in the auxiliary position, (2) admitted he had been there approximately ten minutes, (3) stated he had come from Milwaukee and was headed back to Milwaukee, and (4) there was a lack of evidence that his passenger had drove the vehicle. Mertes, 2008 WI App 179, ¶ 14. In State v. Viliunas, the appellate court was tasked with evaluating an argument regarding exculpatory evidence and, in making that evaluation, noted that "even if the car was not running, finding [the defendant] in the driver's seat of his vehicle in a ditch with the keys in the ignition would be sufficient to circumstantially prove that [the defendant] drove the vehicle

into the ditch." State v. Viliunas, 2013 WI App 41, ¶ 7, 346 Wis. 2d 734, 828 N.W.2d 594.[5] In State v. Lewer, the appellate court explicitly noted that "the definition of operating in Wis. Stat. § 346.63(3)(b) is not restricted to a running engine." State v. Lewer, 2022 WI App 7, ¶ 12, 970 N.W.2d 575.[6] In State v. Mulvenna, the appellate court held that an officer had reasonable suspicion that the defendant operated a motor vehicle when (1) a caller reported that a possibly intoxicated man had tipped over a motorcycle in the wrong lane of traffic, (2) the defendant was lying in the grass next to the motorcycle (engine off) when the officer arrived on scene, and (3) the motorcycle was registered to the defendant. State v. Mulvenna, 2020 WI App 55, ¶ 18, 948 N.W.2d 502.[7]

[5] Pursuant to Wis. Stat. § 809.23(3)(b), the decision is being cited for persuasive value. The decision was authored by a member of a three-panel judge and was issued after July 1, 2009. A copy of the decision is included in the City of Watertown's Appendix.

[6] Pursuant to Wis. Stat. § 809.23(3)(b), the decision is being cited for persuasive value. The decision was authored by a member of a three-panel judge and was issued after July 1, 2009. A copy of the decision is included in the City of Watertown's Appendix.

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Finally, the Wisconsin Supreme Court also noted in Burg ex rel. Weichert v. Cincinnati Cas. Ins. Co. that "operation" could be established by circumstantial evidence even when a vehicle is turned off. Burg, 2002 WI 78, ¶ 27 n. 8. These cases all demonstrate that no single set of circumstantial evidence is required to find operation and that "operation" is a fact-specific inquiry.

In this case, Officer Achilli may not have touched the hood of the vehicle to ascertain whether it had been driven recently and Wiest's statements did not provide clear information about when he had been driving, but other evidence (Officer Achilli's testimony about her methods of patrolling and not seeing Wiest's vehicle on her last patrol loop, Wiest's statements about his comings and goings, keys in the ignition with head lights and rear running lights on until keys were removed) allowed for a jury to reasonably infer that Wiest drove his vehicle shortly before his interaction with Officer Achilli. That reasonable inference is sufficient to uphold the convictions.

This Court's review on appeal is limited to whether there is evidence to support the verdict. Wiest challenges the sufficiency of the evidence relative to whether he operated his vehicle, and the evidence is such that a jury could have (and did) reasonably concluded that Wiest did operate his motor vehicle. The evidence supports the verdicts, and the Court should uphold those verdicts.

CONCLUSION

For the reasons stated herein, this Court should affirm the Judgments of Conviction.

Dated this 7th day of December, 2023.

AXLEY BRYNELSON, LLP
Attorneys for Plaintiff-Respondent

Electronically signed by Danielle Baudhuin Tierney
William S. Cole, SBN 1011623
Danielle Baudhuin Tierney, SBN 1096371
2 E. Mifflin St., Ste. 200 ▪ Madison, WI 53703
P: (608) 257-5661 ▪ F: (608)257-5444
E: wcole@axley.com / dtierney@axley.com

FORM, LENGTH, AND APPENDIX CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), & (c) as to form and certification for a brief and appendix produced with a proportional serif font (Century 13 pt. for body text and 11 pt. for quotes and footnotes). The length of this brief, including the statement of the case, the argument, footnotes, and the conclusion (and excluding other content) is 5,088 words.

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § 809.19 (2) (a) and that contains a copy of any unpublished opinion cited under Wis. Stat. § 809.23 (3) (a) or (b).

Dated this 7th day of December, 2023.

AXLEY BRYNELSON, LLP
Attorneys for Plaintiff-Respondent

Electronically signed by Danielle Baudhuin Tierney
William S. Cole, SBN 1011623
Danielle Baudhuin Tierney, SBN 1096371
2 E. Mifflin St., Ste. 200 ▪ Madison, WI 53703
P: (608) 257-5661 ▪ F: (608)257-5444
E: wcole@axley.com / dtierney@axley.com
Fax (608) 257-5444