

NOTICE

Decision filed 07/12/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 110228-U  
NO. 5-11-0228  
IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 10-CF-603
	)	
DEREK SCHROYER,	)	Honorable
	)	Jan V. Fiss,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE CHAPMAN delivered the judgment of the court.  
Presiding Justice Spomer and Justice Cates concurred in the judgment.

**ORDER**

- ¶ 1           *Held:* In a trial on a charge of driving while license revoked, undisputed evidence showed that the motorized bicycle the defendant was operating was not a low-speed gas bicycle, as defined by statute, and therefore fit within the statutory definition of a motor vehicle. Thus, (1) defendant was proven guilty beyond a reasonable doubt, and (2) he was not entitled to his requested jury instruction on low-speed gas bicycles.
- ¶ 2           The defendant, Derek Schroyer, appeals his conviction for driving while his license was revoked. At issue in this appeal is whether the motorized bicycle he was riding at the time of his arrest was a low-speed gas bicycle. Such bicycles are an exception to the statutory definition of a motor vehicle. The defendant argues that (1) the State did not prove beyond a reasonable doubt that he was driving a motor vehicle because it did not prove beyond a reasonable doubt that the bicycle was not a low-speed gas bicycle and (2) the court erred in refusing to give his tendered jury instruction, which would have informed the jury that a low-speed gas bicycle is not

a motor vehicle. We affirm.

¶ 3 The defendant was arrested outside his home and charged with driving while license revoked (625 ILCS 5/6-303(a) (West 2010)). At the defendant's trial on the charge, Officer Daniel Hoffarth testified that he was sitting in his patrol car in the vicinity of the defendant's home while responding to another call. Officer Hoffarth saw the defendant drive past him on a "Moped motorized little motorcycle." He saw the defendant for about six to eight seconds before the defendant turned a corner and Officer Hoffarth lost sight of him. Officer Hoffarth testified that he heard the motor running as the defendant drove past him.

¶ 4 Officer Hoffarth assumed that the defendant was on his way home when he spotted him. He explained that he recognized the defendant by sight because he had other dealings with the defendant and members of his family over the years. The officer testified that he knew that the defendant's license had been revoked; however, he was not certain as to whether it had been reinstated. He called dispatch and asked the dispatcher to check the status of the defendant's license. He found out that the defendant's license was still revoked. Officer Hoffarth proceeded to the defendant's home and arrested him for driving while his license was revoked.

¶ 5 On cross-examination, defense counsel asked Officer Hoffarth how fast the defendant was driving, and the following discussion took place:

"Q. How fast do you think he was going? Maybe 15 miles an hour?

A. Fifteen or fifty?

Q. Fifteen, twenty.

A. Twenty, maybe twenty-five. I couldn't say for sure.

Q. Because you didn't clock him?

A. Right."

Officer Hofforth examined the bicycle to try to find a vehicle identification number, but did not find one. However, he acknowledged that he did not make any effort to determine what size motor it had.

¶ 6 The prosecution played a video-recorded statement that the defendant gave to police after his arrest. In it, the defendant stated that the bicycle could travel at speeds of up to 20 to 25 miles per hour. The defendant stipulated that his driver's license was revoked at the time the incident occurred.

¶ 7 At the jury instructions conference, the parties each tendered an instruction on the definition of "motor vehicle." People's Instruction No. 16 informed jurors that a motor vehicle is any self-propelled vehicle except for vehicles operated solely by human power. Defendant's Instruction No. 3 provided that a motor vehicle is any such vehicle with the exception of a low-speed gas bicycle. The court ruled that People's Instruction No. 16 would be given and not Defendant's Instruction No. 3. However, the parties raised the question of whether the defense could argue that the bicycle fell within the low-speed gas bicycle exception, and the court ruled that the defense could argue that the exception was applicable.

¶ 8 The jury found the defendant guilty. The defendant filed a posttrial motion, raising the same issues he raises in this appeal. The court denied the motion, held a sentencing hearing, and sentenced the defendant to 18 months in prison. This appeal followed.

¶ 9 The defendant first argues that he was not proven guilty beyond a reasonable doubt because the State failed to prove that the bicycle he was operating was not a low-speed gas bicycle. He argues that because low-speed gas bicycles are not motor vehicles, the State failed to prove he was operating a motor vehicle, which is an element of the offense. See *People v. Jackson*, 2013 IL 113986, ¶ 16, 983 N.E.2d

1027. The State, by contrast, argues that the low-speed gas bicycle exception simply creates an exemption to the operation of the statute, which is a matter of defense rather than an element of the offense that the State must prove.

¶ 10 The statute under which the defendant was charged provides that it is a misdemeanor for any person to operate a motor vehicle on any Illinois highway at a time when the person's driver's license has been revoked or suspended. 625 ILCS 5/6-303(a) (West 2010). In order to be convicted under this statute, a defendant must be driving a motor vehicle. See *People v. Staton*, 248 Ill. App. 3d 799, 801, 619 N.E.2d 777, 779 (1993). A "motor vehicle" is defined under the Illinois Vehicle Code as any vehicle that is self-propelled "except for vehicles moved solely by human power, motorized wheelchairs, low-speed electric bicycles, and low-speed gas bicycles." 625 ILCS 5/1-146 (West 2010). The Illinois Vehicle Code defines a low-speed gas bicycle as "a 2 or 3-wheeled device with fully operable pedals and a gasoline motor of less than one horsepower, whose maximum speed on a paved level surface, when powered solely by such a motor while ridden by an operator who weighs 170 pounds, is less than 20 miles per hour." 625 ILCS 5/1-140.15 (West 2010).

¶ 11 As previously noted, the fact that a defendant is operating a motor vehicle is an element of the offense of driving while license revoked. *Jackson*, 2013 IL 113986, ¶ 16, 983 N.E.2d 1027. As such, it is something the State must prove beyond a reasonable doubt. It is a fundamental principle that the State must prove every element of the offense charged beyond a reasonable doubt. *People v. McPeak*, 2012 IL App (2d) 110557, ¶ 5, 979 N.E.2d 560. However, statutory exceptions, such as the one at issue here, are not always considered elements of the offense.

¶ 12 Generally, when a statutory exception is "part of the body of a substantive offense," the State bears the burden of proving the exception does not apply beyond

a reasonable doubt. *People v. Laubscher*, 183 Ill. 2d 330, 335, 701 N.E.2d 489, 491 (1998). An exception is "part of the body" of the offense "if it 'is so incorporated with the language of the definition that the elements of the offense cannot be accurately described without reference to the exception.'" *People v. Rodgers*, 322 Ill. App. 3d 199, 202, 748 N.E.2d 849, 851 (2001) (quoting *People v. Saltis*, 328 Ill. 494, 201, 160 N.E. 86, 90 (1927)). This is true where the inapplicability of the statutory exception is part of what makes the conduct unlawful. *Rodgers*, 322 Ill. App. 3d at 202, 748 N.E.2d at 851-52. By contrast, if the statutory exception " 'merely withdraws certain acts or certain persons from the operation of the statute,' " the applicability of the exception is a defense, which the State has no burden to prove. *Rodgers*, 322 Ill. App. 3d at 202, 748 N.E.2d at 851 (quoting *Saltis*, 328 Ill. at 201, 160 N.E. at 90).

¶ 13 Here, the defendant argues that because the offense applies only if he is driving a motor vehicle, the statutory exception to that definition is an integral part of one of the elements of the offense. The State argues that the low-speed gas bicycle exception merely withdraws a class of vehicles from operation of the statute. We need not resolve this question. We may assume for purposes of this decision that the State bore the burden of proving that the bicycle did not fit within the exception. Applying this standard, we find that the State met its burden.

¶ 14 In a challenge to the sufficiency of the evidence, we must review the evidence in the light most favorable to the State. We will reverse a conviction on the basis of insufficient evidence only if no rational trier of fact could find each element of the charged offense beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999).

¶ 15 As previously stated, the Illinois Vehicle Code defines a low speed gas bicycle as "a 2 or 3-wheeled device with fully operable pedals and a gasoline motor of less

than one horsepower" that has a maximum speed of less than 20 miles per hour when powered solely by its motor and ridden by an operator who weighs 170 pounds. 625 ILCS 5/1-140.15 (West 2010). The defendant's bicycle had two wheels and fully operable pedals. There was no evidence related to the amount of horsepower of its motor. The undisputed evidence showed that the maximum speed of the bicycle was at least 20 miles per hour when operated by a rider weighing over 170 pounds. The defendant's own statement was that the bicycle had a top speed of 20 to 25 miles per hour, and the arresting officer likewise estimated that the defendant was driving at about 20 to 25 miles per hour when he saw him. The record reveals that the defendant weighed 180 pounds. There was no evidence to contradict the evidence that the bicycle's maximum speed was at least 20 miles per hour. Thus, the defendant was proven guilty beyond a reasonable doubt, even assuming it was the State's burden to prove that the statutory exception did not apply.

¶ 16 The defendant next argues that the court erred in refusing to give his tendered jury instruction and giving People's Instruction No. 16 instead. We do not agree.

¶ 17 People's Instruction No. 16 was based on Illinois Pattern Jury Instructions, Criminal, No. 23.43B (4th ed. 2000) (IPI Criminal 4th) and informed the jury, "The term 'motor vehicle' means every vehicle which is self-propelled except for vehicles moved solely by human power." Defendant's Instruction No. 3 would have provided, "The term 'motor vehicle' means every vehicle which is self-propelled except for low-speed gas bicycles." This instruction was a modified version of IPI Criminal 4th No. 23.43B. In relevant part, the IPI instruction provides that the term "motor vehicle" includes any self-propelled vehicle "[except for [(vehicles moved solely by human power) (motorized wheelchairs)]]". IPI Criminal 4th No. 23.43B. The committee note to the instruction directs courts to use the "applicable bracketed material" and

explains, "The last clause of this definition is bracketed because in most cases the exception contained within that clause will not be an issue." IPI Criminal 4th No. 23.43B, Committee Note.

¶ 18 The purpose of jury instructions is to explain to the jury the legal principles applicable to the evidence presented. *People v. Jackson*, 331 Ill. App. 3d 279, 290, 771 N.E.2d 982, 992 (2002) (citing *People v. Novak*, 163 Ill. 2d 93, 115-16, 643 N.E.2d 762, 773-74 (1994)). In a criminal trial, jurors must be instructed using IPI instructions unless the court determines that the applicable IPI instruction " 'does not accurately state the law.' " *Jackson*, 331 Ill. App. 3d at 290, 771 N.E.2d at 992 (quoting Ill. S. Ct. R. 451(a) (eff. July 1, 1997)). A non-IPI instruction may be used if it is simple, brief, and impartial. *Jackson*, 331 Ill. App. 3d at 290, 771 N.E.2d at 992 (citing Ill. S. Ct. R. 451(a) (eff. July 1, 1997)).

¶ 19 A defendant is entitled to have the jury instructed as to any theory of the case that is supported by at least some evidence. *People v. Davis*, 213 Ill. 2d 459, 478, 821 N.E.2d 1154, 1165 (2004). Although the amount of evidence needed to support the giving of an instruction is slight, the instruction must still be supported by some evidence. It is not error to decline to give a requested instruction that is not supported by the evidence. *People v. Wolf*, 185 Ill. App. 3d 552, 559, 541 N.E.2d 823, 828 (1989). Whether to give a non-IPI instruction is a decision within the sound discretion of the trial court. We will not reverse unless the court has abused this discretion. We will find an abuse of discretion if "the jury is left to deliberate with instructions that are unclear, misleading or contain inaccurate statements of law." *Jackson*, 331 Ill. App. 3d at 290, 771 N.E.2d at 992.

¶ 20 Here, as previously discussed, there was evidence that the defendant's bicycle had some of the characteristics of a low-speed gas bicycle, as defined by statute. It

was a two-wheeled bicycle with operable pedals. However, there was also uncontroverted evidence that the defendant's gas bicycle could operate at speeds of at least 20 miles an hour, thus making the low-speed gas bicycle exception inapplicable. This evidence included the defendant's own statement.

¶ 21 The defendant contends, however, that it was for the jury to determine the credibility of this evidence, including his own statement. We might find merit to this argument if the only evidence regarding the bicycle's speed was Officer Hoffarth's testimony. As noted previously, Officer Hoffarth only saw the defendant driving the bicycle for six to eight seconds. He estimated the defendant's speed to be between 20 and 25 miles per hour, but he admitted he could not be certain of this because he did not clock the defendant's speed. The defendant, by contrast, was familiar with his own bicycle. There was no reason for the jury to reject his statement regarding the top speed of the bicycle when there was no conflicting evidence. We find no abuse of discretion.

¶ 22 Finally, we note that challenges to jury instructions are subject to harmless error analysis. An error will be deemed harmless if the outcome of the trial would not have been different had the proper instruction been given. *People v. Washington*, 2012 IL 110283, ¶ 60, 962 N.E.2d 902. Given the uncontested evidence that the bicycle could reach speeds of at least 20 miles an hour, we do not believe any rational jury could have reached a different conclusion. Thus, any error in refusing to give the instruction was harmless beyond a reasonable doubt.

¶ 23 For the reasons stated, we affirm the defendant's conviction.

¶ 24 Affirmed.