

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0263**

State of Minnesota,
Respondent,

vs.

Michael John Czarnecki,
Appellant.

**Filed March 22, 2021
Affirmed; motion denied
Larkin, Judge**

Meeker County District Court
File No. 47-CR-18-551

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark P. Wood, Litchfield City Attorney, Emily T. Wood, Assistant City Attorney, Wood
& Rue, P.L.L.P., Litchfield, Minnesota (for respondent)

Charles L. Hawkins, Charles Hawkins Law, Minneapolis, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Larkin, Judge; and Gäitas,
Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges his conviction of driving while impaired (DWI), arguing that
the evidence was insufficient to sustain the jury's guilty verdict, that the district court erred

by denying his requested jury instruction, and that the facts did not warrant a finding of guilt as a matter of public policy. Appellant also moves this court to strike a footnote from respondent's brief. We affirm the conviction and deny appellant's motion to strike as moot.

FACTS

In 2018, respondent State of Minnesota charged appellant Michael John Czarnecki with one count of driving under the influence of alcohol and one count of driving a commercial motor vehicle with an alcohol concentration of 0.04 or more. According to the complaint, a witness saw Czarnecki stumble out of a semi-truck in the First District parking lot in Litchfield. The witness was concerned that Czarnecki was intoxicated and that he would drive in that condition. Officers responded and located Czarnecki at a nearby Burger King.

The case was tried to a jury. The parties stipulated to the admission of a surveillance video of the parking lot. The parties also stipulated that: (1) Czarnecki's alcohol concentration was 0.19 at 8:21 p.m., (2) Czarnecki's semi-truck is a commercial vehicle, and (3) "[t]ruck drivers are allowed to stay overnight in the First District parking lot if the driver is hauling product to or from their facility," and Czarnecki's truck "was loaded with their product."

The surveillance video depicts the following events. At 3:15 p.m., a semi-truck pulled into the parking lot and parked.¹ Around 25 minutes later, Czarnecki exited that semi-truck and walked away. At 6:00 p.m., a second man drove a black truck into the

¹ All of this court's references to times depicted in the surveillance video are approximate.

parking lot and parked near Czarnecki's semi-truck. The second man assisted Czarnecki, who appeared to be very intoxicated, out of the passenger side of the black truck and up to the driver's door of the semi-truck. Czarnecki appeared to fumble around for his keys and use them to open the door. At 6:03 p.m., Czarnecki entered the semi-truck with the assistance of the second man. The second man closed the semi-truck's door and drove away at 6:05 p.m.

At 6:07 p.m., Czarnecki exited the semi-truck. The surveillance video depicts a shiny object in his hands. He closed the door, walked into the parking lot, stumbled around in a large circle, and fell backwards on to the ground. A third man, who had just parked nearby, ran over to help Czarnecki. Czarnecki got up, talked to the man, and then stumbled back to his semi-truck. The third man walked back to his vehicle. Czarnecki opened the driver's door to his semi-truck, stepped on the running board or side step, and reached into the truck. Czarnecki then closed the door without entering the semi-truck and stumbled across the parking lot and off camera at 6:10 p.m. The surveillance video depicts police officers arriving at 6:45 p.m.

A police officer with the Litchfield Police Department testified at trial. That officer explained that he was dispatched to the First District parking lot after a caller reported seeing a man exit the driver's seat of a semi-truck in the lot. The caller saw the man stumble and fall and surmised that he was extremely intoxicated. Officers arrived on the scene and located the semi-truck, but they did not see Czarnecki. Officers soon located Czarnecki about a block away at Burger King.

The officer testified that when he arrived at Burger King, Czarnecki was sitting on the curb in the parking lot. The officer observed indicia of intoxication. Czarnecki admitted that he drank Korbel brandy at lunch. The officer administered field sobriety tests and ultimately arrested Czarnecki. A receipt in Czarnecki's pocket indicated that he paid for three double shots of Korbel and a T-shirt from "The Tavern."

The officer testified about the surveillance video. He testified that Czarnecki "appeared to be walking and moving just fine" when he initially arrived in the parking lot. Approximately three hours later, a vehicle pulled up, Czarnecki was in the passenger seat, and the driver "was someone else from [an establishment called] The Tavern." The officer testified that Czarnecki appeared "to have keys on a belt loop" and at times the keys could be seen in his hand. The officer testified, "It appeared that they had to get the keys to unlock it." The officer testified that the video showed Czarnecki exit the semi-truck, stumble across the lot, and fall to the ground with "something flashing" in his hand "which looked like it was possibly keys."

On cross-examination, the officer acknowledged that Czarnecki had permission to spend the night in his parking space. Additionally, the following exchange occurred between the officer and defense counsel:

Q: You never saw in the video that he was sitting in the driver's seat, correct?

A: I could see him enter through the driver's door where the driver's seat is --

Q: Correct.

A: -- I could see him moving in that area.

Q: Correct. That's how you got to get in, in order to get into the sleeper area, correct?

A: Correct. I would imagine so.

Q: And if you were going to put something that you'd purchased at a bar -- away before you left to go get something to eat and use a restroom at Burger King; that's how'd you'd enter to get into the "living area" of the tractor, fair?

A: I would assume so, yes.

An employee of The Tavern testified that she spent at least two hours with Czarnecki at The Tavern. She testified that Czarnecki bought a T-shirt. She talked with Czarnecki while he was at The Tavern and learned that he planned to sleep overnight in his semi-truck. She instructed the bartender to give Czarnecki a ride to his semi-truck.

Czarnecki moved for judgment of acquittal, arguing that there was no evidence that he drove, operated, or was in physical control of the vehicle. The state agreed that there were no "facts to support driving or operating," but argued that a fact question existed regarding physical control. The district court agreed that there was no evidence of driving or operating, but disagreed with Czarnecki's assertion that there was no evidence of physical control. The district court decided to include a supplemental jury instruction regarding physical control. Czarnecki asked the district court to instruct the jury that "mere presence in or about the vehicle is not enough for physical control; it is the overall situation that is determinative." The district court denied that request.

The jury found Czarnecki guilty of driving under the influence and not guilty of driving a commercial motor vehicle with an alcohol concentration of 0.04 or more. This appeal followed.

DECISION

I.

Czarnecki contends that the evidence was insufficient to sustain the jury's guilty verdict under Minn. Stat. § 169A.20, subd. 1(1) (2016), which prohibits a person from driving, operating, or being in physical control of a motor vehicle while under the influence of alcohol. Czarnecki argues that the state failed to prove he was in physical control of his semi-truck. We understand Czarnecki's argument to be that the state failed to prove facts that established "physical control" within the meaning of section 169A.20, subdivision 1(1).

Standard of Review

Traditionally, when considering a challenge to the sufficiency of the evidence to support a guilty verdict, we carefully analyze the record to determine whether the evidence, viewed in a light most favorable to the conviction, was sufficient to permit the jury to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We "assume that the jury believed the state's witnesses and disbelieved contrary evidence." *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). We defer to the jury's credibility determinations and will not reweigh the evidence on appeal. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009); *State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002). We will not disturb a guilty verdict if the jury, acting with due regard for the presumption of innocence and requirement of proof beyond a reasonable doubt, could reasonably have concluded that the state proved the defendant's guilt. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

However, if the state relied on circumstantial evidence to prove an element of an offense, we apply a heightened standard of review. *See State v. Harris*, 895 N.W.2d 592, 601-03 (Minn. 2017) (applying circumstantial-evidence standard to individual element of criminal offense that was proved by circumstantial evidence). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *Id.* at 599 (quotation omitted). “In contrast, direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Id.* (quotations omitted).

Czarnecki asserts that this court should apply the heightened circumstantial-evidence standard of review. When this court asked Czarnecki to explain that assertion at oral argument, Czarnecki replied that the evidence is insufficient under either standard. The state argues that we should apply the traditional direct-evidence standard of review.

In this case, the surveillance video provided direct evidence of the facts necessary to establish physical control. The jury did not need to make any inferences to determine the existence of those facts. It simply had to apply the district court’s instruction regarding the definition of physical-control to the facts found and determine whether those facts established physical control. We therefore apply the traditional standard of review, and not the heightened circumstantial standard. And, we determine *de novo* whether the facts of this case constitute physical control within the meaning of section 169A.20, subdivision 1(1). *See State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013) (stating that whether certain conduct meets a statutory definition is reviewed *de novo*).

Physical Control

In *State, Dep't of Pub. Safety v. Junczewski*, the supreme court acknowledged that neither it, nor the legislature, has precisely defined physical control. 308 N.W.2d 316, 319 (Minn. 1981). In that case, the supreme court held that physical control does not require a vehicle's engine to be running. *Id.* at 317. Subsequent cases have elaborated on the concept of physical control. For example, "[p]hysical control is meant to cover situations when an intoxicated person is found in a parked vehicle under circumstances in which 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. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010) (quotation omitted). "Thus, a person is in physical control of a vehicle if he has the means to initiate any movement of that vehicle, and he is in close proximity to the operating controls of the vehicle." *Id.* The supreme court has held that the term physical control should be interpreted as broadly as possible. *Id.*; see *Junczewski*, 308 N.W.2d at 319 (holding that the statute was amended to modify the requirement that a driver be in "actual physical control" by deleting the word "actual" so that the statute be given the broadest possible effect).

"The purpose underlying the offense of being in physical control of a motor vehicle while under the influence of alcohol is to deter intoxicated persons from getting into vehicles except as passengers and to act as a preventive measure to enable the drunken driver to be apprehended before he strikes." *Fleck*, 777 N.W.2d at 236 (quotation omitted). "The offense, however, is not intended to cover situations in which an intoxicated person is a passenger, having relinquished control of the vehicle to a designated driver." *Id.* "Mere

presence in or about a vehicle is insufficient to show physical control; it is the overall situation that is determinative.” *Id.* A number of factors are considered in determining whether a person is in physical control of a vehicle, including: “the person’s location in proximity to the vehicle; the location of the keys; whether the person was a passenger in the vehicle; who owned the vehicle; and the vehicle’s operability.” *Id.*

The supreme court has addressed the physical-control concept on several occasions.

In *Fleck*, the defendant argued:

the evidence was legally insufficient to convict him of being in physical control of a motor vehicle when he was sleeping in his vehicle, which was parked in an assigned residential parking spot with the driver’s door open, keys in the center console, no devices of the vehicle in operation, and the vehicle had not recently been operated.

Id. at 235. The supreme court affirmed the conviction, reasoning that a jury could reasonably have found that the defendant “was in a position to exercise dominion or control over the vehicle and that he could, without too much difficulty, make the vehicle a source of danger.” *Id.* at 237.

In *State v. Starfield*, the supreme court reinstated the conviction of a person found behind the wheel of a vehicle that was stuck in a snow-filled ditch even though the vehicle could not be moved without the assistance of a tow truck. 481 N.W.2d 834, 835 (Minn. 1992). The case had gone to the jury solely on the question of physical control. *Id.* at 836. The jury found the appellant guilty, but this court reversed the conviction. *Id.* In reinstating the conviction, the supreme court held that intent to operate is not an element of the offense and reasoned that the jury could have found beyond a reasonable doubt that the appellant

was in physical control of the vehicle given the evidence that she was behind the wheel, in her own vehicle, with keys in her pocket, and towing assistance was likely available. *Id.* at 838-39.

As to application of the physical-control factors in this case, the surveillance video showed Czarnecki enter his semi-truck through the driver's door and remain in the truck for about four minutes. It is undisputed that Czarnecki was intoxicated at that time. In fact, the surveillance video showed him stagger and stumble before he entered the truck. The video also showed him stagger and fall backwards to the ground after he exited the truck. The video, viewed in the light most favorable to the verdict, showed that he had the keys to his semi-truck in his possession when he entered the truck. Indeed, that fact is undisputed.

The surveillance video also showed Czarnecki approach his semi-truck a second time, open the driver's door, step on the running board or side step, and reach into the truck. Although the evidence indicated that a trucking company owned the semi-truck, when viewed in a light most favorable to the verdict, the evidence showed that Czarnecki was authorized to drive the truck. The evidence also established that the truck was operable. Lastly, there was no evidence suggesting that Czarnecki relinquished control of the semi-truck to any other person, and the video does not show any other person enter the semi-truck.

The sum of the evidence was adequate to establish physical control under the caselaw discussed above, especially given the supreme court's directive that physical control is to be interpreted as broadly as possible and its statement that the purpose of the

statute is to deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers. *Fleck*, 777 N.W.2d at 236.

Czarnecki's arguments that the evidence was insufficient to establish physical control are unpersuasive. For example, although it is undisputed that the police did not find Czarnecki in or around his vehicle, proximity is but one relevant factor. *Id.* And regardless of where the police encountered Czarnecki, the surveillance video establishes that he entered the truck through the driver's door, remained in the truck for a short period of time, approached the truck a second time, opened the driver's door, and reached inside. *See Starfield*, 481 N.W.2d at 839 (noting that the state need not prove that a defendant entered a vehicle for the purpose of operating it). Thus, the surveillance video establishes the necessary proximity between Czarnecki and his semi-truck. Moreover, Czarnecki's argument that the evidence was nonetheless insufficient just because the police did not observe him in or near the vehicle is inconsistent with the directive that physical control be interpreted as broadly as possible.

Czarnecki's reliance on caselaw indicating that a passenger is not in physical control of a vehicle is unavailing. Those cases describe a passenger as a person who was not the driver or as someone who relinquished control of a vehicle so another person could drive it. *See Fleck*, 777 N.W.2d at 236 ("The offense, however, is not intended to cover situations in which an intoxicated person is a passenger, having relinquished control of the vehicle to a designated driver."); *Starfield*, 481 N.W.2d at 838 ("A passenger, by definition, is someone who is merely along for the ride."). Indeed, the law favors such a relinquishment by an intoxicated person. *Hansen v. Comm'r of Pub. Safety*, 478 N.W.2d 229, 231 (Minn.

App. 1991) (“Although the laws against driving while intoxicated are interpreted broadly in the public interest, public policy also encourages people who have been drinking to find another person to drive.”). But here, there is no evidence that Czarnecki relinquished control of his truck to any other person. Simply put, Czarnecki was not a passenger.

Lastly, Czarnecki argues that the evidence shows that he intended to spend the night in the sleeping quarters of his semi-truck and did not intend to drive his truck until morning. That argument is unavailing because

[a]n intent to operate is not an element of the criminal offense; if it were, defendants found in a drunken stupor behind the wheel could argue they lacked any intent to move the vehicle. A drunken intent is highly problematic and too easily manipulated after the fact. Indeed, an attempt to make lack of intent an affirmative defense was defeated in the 1989 legislature.

Starfield, 481 N.W.2d at 839.

Czarnecki asserts that although intent is not an element of the offense, it is a relevant circumstance in determining physical control. As to that point, Czarnecki heavily relies on *State, City of Falcon Heights v. Pazderski*, in which this court concluded:

Where [defendant] was found sleeping in the front seat of his properly parked car in his own driveway, and where [defendant] had been sleeping there for three hours with the keys out of the ignition without any sign the car was being operated, and without any indication it was intended to be operated, [defendant] was not in physical control of the automobile while under the influence of alcohol.

352 N.W.2d 85, 86 (Minn. App. 1984). In reaching that conclusion, this court focused on the defendant’s intent, reasoning that “no facts in the record supported any inference other than that [defendant] had been soundly sleeping and had the intention of sleeping the rest

of the night there as he claimed,” that defendant “had no intention of restarting the vehicle and/or driving any place else,” and that defendant “returned to his car, not with any intention of using or operating it as a motor vehicle but merely using it as a place to get some sleep.” *See id.* at 87-88.

This court’s emphasis on the *Pazderski* defendant’s intent is inconsistent with the Minnesota Supreme Court’s later statement that the state need not prove that a defendant was in a vehicle for the purpose of operating it because “intent to operate is not an element of the criminal offense” and the court’s notation that “an attempt to make lack of intent an affirmative defense was defeated in the 1989 legislature.” *Starfield*, 481 N.W.2d at 839. Moreover, to the extent that intent is a relevant factor, we must consider the evidence in the light most favorable to the verdict, which leads us to conclude that the jury did not find or weigh that factor in Czarnecki’s favor.

Admittedly, the jury could have rejected the state’s evidence and concluded that Czarnecki was not in physical control of the vehicle. Nonetheless, the jury’s verdict is consistent with the concept of physical control described in caselaw. Viewed in a light most favorable to the conviction, the evidence was sufficient to permit a reasonable jury to conclude that Czarnecki was in a position to exercise dominion or control over the vehicle and that he could, without too much difficulty, make the vehicle a source of danger. We therefore do not disturb the verdict.

II.

Czarnecki contends that the district court committed reversible error by refusing to instruct the jury that “mere presence in or about the vehicle is not enough for physical control; it is the overall situation that is determinative.”

A district court has “considerable latitude” in selecting the language for its jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). Nevertheless, an instruction must not “confuse, mislead, or materially misstate the law.” *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). On appeal, the instructions are reviewed “in their entirety to determine whether they fairly and adequately explained the law of the case.” *State v. Kuhnau*, 622 N.W.2d 552, 555-56 (Minn. 2001). We will not reverse a district court’s decision on jury instructions absent an abuse of discretion. *State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007). If the district court abused its discretion, we will reverse unless we conclude that “beyond a reasonable doubt . . . the error had no significant impact on the verdict.” *State v. Koppi*, 798 N.W.2d 358, 364 (Minn. 2011) (quotations omitted).

Generally, a district court must give an instruction regarding the defendant’s theory of the case if there is evidence to support it. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006). In evaluating whether to give an instruction, “the evidence is viewed in the light most favorable to the party requesting the instruction.” *State v. Edwards*, 717 N.W.2d 405, 410 (Minn. 2006). Nonetheless, even where the evidence supports giving a party’s proposed instruction, “[t]he court need not give the instruction as requested by the party if

it determines that the substance of that request is contained in the court's charge."

State v. Ruud, 259 N.W.2d 567, 578 (Minn. 1977).

The district court gave the following jury instruction regarding physical control:

A person is in physical control of a motor vehicle when the person is present in a motor vehicle and is in position to either direct the movement of the vehicle or keep the vehicle in restraint. It is not necessary for the engine to be running in order for a person to be in physical control of a motor vehicle.

The district court further instructed the jury that

[i]n considering whether or not the defendant was in physical control of the motor vehicle while under the influence of alcohol, you may consider defendant's location in or by the vehicle, the location of the ignition keys, whether the defendant had been a passenger in the vehicle before it came to rest, who owned the vehicle, the extent to which the vehicle was inoperable, and whether the vehicle if inoperable might have been rendered operable so as to be a danger to persons or property. You may consider these as well as any other facts or circumstances bearing on whether or not the defendant was then in physical control of a motor vehicle which was or reasonably could become a danger to persons or property while the defendant was under the influence of alcohol.

That portion of the instruction is identical to the instructional language suggested by the Minnesota Supreme Court in *Starfield*. See 481 N.W.2d at 839.

In denying Czarnecki's requested instruction regarding mere presence, the district court explained:

All right. So, in considering that request I'll note that I think that that language is inclusive when it talks about determining all of the facts and circumstances. Also, ordinarily I don't want to draw attention to particular kinds of evidence and so in this case I think I'm going to limit it to what the [s]upreme [c]ourt has already proved for supple – for

supplemental instruction and so I'll deny that additional piece at this time.

The district court's instruction regarding physical control accurately stated the law. Although the supreme court has said that "mere presence" in a vehicle is insufficient to establish physical control, *Starfield*, 481 N.W.2d at 838, the instruction provided by the district court required more than mere presence. It required a determination that Czarnecki was "in position to either direct the movement of the vehicle or keep the vehicle in restraint." See *Ruud*, 259 N.W.2d at 578. Moreover, the substance of Czarnecki's requested instruction was contained in the district court's instruction that the jury could consider "*any other facts or circumstances* bearing on whether or not the defendant was then in physical control of a motor vehicle which was or reasonably could become a danger to persons or property while the defendant was under the influence of alcohol." (Emphasis added.) In sum, the district court did not abuse its discretion by denying Czarnecki's request to include language regarding mere presence.²

² Because we conclude that the district court did not err, we do not address the parties' arguments regarding whether the alleged instructional error was harmless. Nonetheless, we note that when determining whether a district court's refusal to instruct a jury on a particular concept was harmless, an appellate court may consider whether the defense argued the excluded concept to the jury in closing argument. See *State v. Daniels*, 361 N.W.2d 819, 832 (Minn. 1985) (concluding that the district court's refusal to give a requested instruction was not prejudicial because counsel for both parties argued the issue in closing argument). We would not be able to do so here because Czarnecki did not provide a transcript of the closing arguments. "[A] party seeking review has a duty to see that the appellate court is presented with a record which is sufficient to show the alleged errors and all matters necessary to consider the questions presented." *State v. Carlson*, 161 N.W.2d 38, 40 (Minn. 1968). An appellate court may decline to address an assignment of error if an appellant has failed to provide the transcripts necessary for review. See, e.g., *State v. Heithecker*, 395 N.W.2d 382, 383 (Minn. App. 1986) (declining to consider issues because appellant failed to provide trial transcript necessary for appellate review).

III.

Czarnecki contends that a finding of guilt in this case is inconsistent with the purpose of the DWI statute and is bad policy. He argues that this court should hold, as a matter of policy, that the “DWI physical control statute is not applicable in these circumstances because it is inconsistent with the purposes of the statute.”

This court is limited in its function to correcting errors; it cannot create public policy. *State v. Christenson*, 827 N.W.2d 436, 441 n.2 (Minn. App. 2012), *review denied* (Minn. Feb. 19, 2013); *LaChapelle v. Mitten*, 607 N.W.2d 151, 159 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). In any event, in *State v. Thurmer*, this court stated that the physical-control offense “is a preventive measure intended to deter drunken drivers from getting into their vehicles except as passengers.” 348 N.W.2d 776, 778 (Minn. App. 1984). Given the facts of this case, the jury’s finding of guilt is not inconsistent with the purpose of the driving-while-impaired statute.

Czarnecki also argues that this court should create a presumption that semi-truck drivers “lawfully parked for the night who have a tractor with a sleeping berth or sleeping compartment” are not in physical control of that vehicle. Such a presumption would be inconsistent with the supreme court’s directive that laws prohibiting a person from driving a motor vehicle while intoxicated are to be “liberally interpreted in favor of the public interest and against the private interests of the drivers involved.” *Juncewski*, 308 N.W.2d at 319. It would also be inconsistent with the legislature’s intent to have the DWI statute cover “the broadest possible range of conduct” and to be given “the broadest possible effect.” *Id.* Lastly, the creation of such a presumption is a matter of public policy for the

legislature, and not a matter to be decided by an intermediate error-correcting appellate court. *See Christenson*, 827 N.W.2d at 441 n.2.

IV.

Czarnecki moved to strike a footnote from the state's brief to this court. The footnote referenced testimony from the omnibus hearing in this case. We have not relied on the footnote or considered the alleged testimony in reaching our decisions. We therefore deny the motion to strike as moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying motion to strike as moot because the supreme court did not rely on the challenged material).

Affirmed; motion denied.