

Marvin M. Willis appeals his conviction for operating a vehicle while intoxicated as a class D felony.¹ Willis raises two issues which we revise and restate as:

- I. Whether the evidence is sufficient to sustain Willis's conviction for operating a vehicle while intoxicated as a class C misdemeanor; and
- II. Whether the court properly enhanced Willis's conviction to a class D felony.

We affirm in part and dismiss in part.

The facts most favorable to the conviction follow. On January 2, 2010, Evansville Police Officer Jacob Taylor observed Willis driving a car northbound on Stringtown Road at a "high rate of speed" around 3:42 a.m. Transcript at 10. Officer Taylor observed the vehicle "drift over into the southbound lanes" until it was "completely in the southbound lanes." Id. Officer Taylor pulled his police vehicle over and "ended up on the sidewalk" as Willis's vehicle passed him. Id. Officer Taylor turned around, followed Willis's vehicle for "about a block and a half," and observed that Willis was traveling westbound on Buena Vista but was in the eastbound lanes. Id. Officer Taylor activated his emergency lights, and Willis "gradually eased back over to the right side of the road" and eventually stopped "kind of out in the lane of traffic." Id. at 10-11.

Officer Taylor approached Willis's vehicle, identified himself, asked Willis, who was the only occupant, for his license and registration, and noticed a "strong odor of alcoholic beverage coming from inside the car." Id. at 11. Willis was "extremely agitated," refused to identify himself or say "how much he had had to drink," and did not

¹ Ind. Code §§ 9-30-5-2 (2004); 9-30-5-3 (Supp. 2008).

deny that he had anything to drink. Id. at 18-19. Officer Taylor observed that Willis “fumbled around looking for his license.” Id. at 11. Willis asked Officer Taylor “who [he] was,” and Officer Taylor identified himself again. Id. Officer Taylor observed that Willis had slurred speech, glossy eyes, and had some trouble finding his ID in his wallet. Willis eventually identified himself and continued to ask Officer Taylor “who [he] was.” Id. at 12. Officer Taylor asked Willis to step out of the vehicle, and Willis stated that he “wanted to go home and he didn’t want to get out of the car.” Id.

Willis “pulled himself out of the car and he kind of used the car to get back to the back of the car and then leaned against the trunk” as he talked with Officer Taylor, Officer Joey Weigant, and Sergeant Wilson, who had arrived on the scene shortly after the stop. Id. Officer Taylor asked Willis numerous times if he would take some field sobriety tests and offered a portable breath test, and Willis refused. Officer Taylor then informed Willis that they needed him to take a chemical test, and Willis refused. At one point, Willis “almost fell over at the back of the car,” and Officer Taylor and Sergeant Wilson caught him. Id. at 14. Officers Taylor and Weigant then escorted Willis back to Officer Taylor’s vehicle, and Officer Taylor transported Willis to the jail.

Officer Tyrone Wood was asked “to run the intox machine” at the jail. Id. at 29. Officer Wood read Willis an implied consent, and Willis refused to take the test. Willis was video recorded while in the “intoxilyzer room” at the jail, and shouted “no” numerous times, repeatedly asked who the officer was, and stood up from a chair several times despite being told to sit down. Id. at 35; State’s Exhibit 5.

On January 5, 2010, the State charged Willis with operating a vehicle while intoxicated as a class C misdemeanor. The charging information stated the offense was enhanced to a class D felony based upon a prior conviction under Cause No. 82D05-0802-CM-803 (“Cause No. 803”). During a jury trial, the State presented the testimony of Officer Taylor, Officer Weigant, and Officer Wood. The State also presented the video recording of Willis at the jail.

After the State rested, Willis testified and apologized for his behavior during booking and indicated that he “got up several times from” the chair because he “was not booked like [he] wanted.” Id. at 55-56. Willis testified that around the time of his arrest there was a woman who was bothering him and “it seemed like every time [he] called [the police] from [his house] no one came.” Id. at 51. Willis testified that he did not cross the center line while driving and that he told Officer Taylor that he had not had a drink. Willis also testified that he was disabled because he had a hernia, that he “was getting medication from the VA for almost breaking [his] arm,” that he was prescribed medicine for his hernia, and that he was born with a cleft palate which causes people to think that he is slurring his speech. Id. at 50. On redirect examination, when asked whether he knew the medication he took, Willis testified: “I do not have the records from the VA but they have it on record, sir.” Id. at 60. The following exchange also occurred during redirect examination:

Q Would what you had taken by way of medication been enough to make it appear that you were intoxicated?

A Not drinking enough water. Dehydrated. That's about the only thing I could say was wrong.

Id. at 61.

The jury found Willis guilty of operating a vehicle while intoxicated as a class C misdemeanor. The court then began the second phase of the trial addressing the enhancement to a class D felony. After questioning by the trial court, Willis pled guilty to the enhancement of the offense to a class D felony. Specifically, Willis indicated that he was found guilty of operating a vehicle while intoxicated on December 22, 2008, under Cause No. 803. The court accepted Willis's plea and sentenced him to one year.

I.

The first issue is whether the evidence is sufficient to sustain Willis's conviction for operating a vehicle while intoxicated as a class C misdemeanor. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

The offense of operating a vehicle while intoxicated is governed by Ind. Code § 9-30-5-2, which provides that "a person who operates a vehicle while intoxicated commits a Class C misdemeanor." Willis argues that the State failed to prove that he was

intoxicated. “Intoxicated” means under the influence of alcohol, a controlled substance or a combination of them “so that there is an impaired condition of thought and action and the loss of normal control of a person’s faculties.” Ind. Code § 9-13-2-86 (Supp. 2006). “Intoxication may . . . be established through evidence of consumption of significant amounts of alcohol, impaired attention and reflexes, watery or bloodshot eyes, an odor of alcohol on the breath, unsteady balance, failed field sobriety tests and slurred speech.” Dunkley v. State, 787 N.E.2d 962, 965 (Ind. Ct. App. 2003) (quoting Mann v. State, 754 N.E.2d 544, 547 (Ind. Ct. App. 2001), trans. denied). Proof of intoxication may be established by showing impairment and it does not require proof of a Blood Alcohol Content level. Ballinger v. State, 717 N.E.2d 939, 943 (Ind. Ct. App. 1999); Jellison v. State, 656 N.E.2d 532, 535 (Ind. Ct. App. 1995).

Willis argues that “the only piece of evidence perhaps linking Willis with alcohol consumption which does not otherwise lend itself to a non-criminal explanation is the testimony of the arresting officer that he detected ‘the strong odor of alcoholic beverage’ as he approached Willis’ vehicle.” Appellant’s Brief at 5 (quoting Transcript at 11). Willis argues that “[c]onsidering only that evidence which supports the guilty verdict, we have erratic driving, the odor of alcohol, glossy eyes and slurred speech, unsteady balance, and a less than accommodating suspect.” Id. at 5-6. Willis also argues that “[w]hile it may be argued that there is sufficient evidence that Willis was impaired that evening . . . it has not been established by sufficient evidence of probative value that said impairment was *due to the influence of alcohol or any other drug or controlled substance*

. . . .” Id. at 6. Willis also points out that although he nearly lost his balance, he is disabled and that while he had slurred speech, he was born with a cleft palate. Willis’s arguments are merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Jordan, 656 N.E.2d at 817.

Here, the record reveals that Willis was traveling at a high rate of speed, crossed the center line, and traveled in the wrong lanes. Officer Taylor noticed a “strong odor of alcoholic beverage coming from inside the car,” and observed that Willis had slurred speech, glossy eyes, and trouble finding his ID in his wallet. Transcript at 11. Willis “pulled himself out of the car and he kind of used the car to get back to the back of the car and then leaned against the trunk” Id. at 12. At one point, Willis “almost fell over at the back of the car.” Id. at 14. At the jail, Willis shouted and stood up from a chair several times despite being told to sit down. At trial, Officer Taylor testified that he had arrested probably 800 intoxicated individuals, had undergone training to identify intoxicated individuals, and believed that Willis was “extremely intoxicated.” Id. at 15. Officer Weigant testified that Willis “was really wobbly on his feet and appeared really intoxicated.” Id. at 26.

Based upon the record, we cannot say that the inferences made by the jury here were unreasonable. Thus, we conclude that evidence of probative value exists from which the jury could have found Willis guilty beyond a reasonable doubt of operating a vehicle while intoxicated as a class C misdemeanor. See Broderick v. State, 249 Ind. 476, 479-480, 231 N.E.2d 526, 527-528 (1967) (holding that the jury was warranted in

finding that the defendant was intoxicated where two witnesses testified that in their opinion the defendant was intoxicated, defendant's car smelled of alcohol, defendant weaved from side to side of the road, and defendant's speech was "thick"), cert. denied, 393 U.S. 872, 89 S. Ct. 161 (1968); Fought v. State, 898 N.E.2d 447, 451 (Ind. Ct. App. 2008) (holding that the evidence was sufficient to sustain the defendant's conviction for public intoxication where police officers smelled a strong odor of alcohol emanating from the interior of the vehicle and from the defendant's breath, the defendant was uncooperative, unsteady, slurred his speech, and his eyes were red, watery, and bloodshot); Hall v. State, 174 Ind. App. 334, 336-337, 367 N.E.2d 1103, 1106-1107 (1977) (holding that the evidence was sufficient to sustain the defendant's conviction for driving while under the influence of liquor where witnesses who saw the defendant immediately following the accident believed that she was intoxicated, the defendant's car smelled of alcohol, and her vehicle was "driving very fast" and "out of control").

II.

The next issue is whether the court properly enhanced Willis's conviction to a class D felony. Willis argues that "[a]ccording to the December 22, 2008 entry on the Chronological Case Summary, Willis requested appointed counsel to appeal his conviction for operating a motor vehicle while intoxicated in [Cause No. 803], and the trial court denied that request without discussion of Willis' financial state." Appellant's Brief at 7. Willis argues that "[i]n doing so, the trial court violated Willis' right to due

process, and therefore any charge using that conviction as the basis of an enhancement is built upon a faulty and unconstitutional foundation and must be overturned.” Id.

Because Willis pled guilty to the enhancement, he cannot challenge the propriety of his conviction on direct appeal. See Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004) (“A person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal.”); Tumulty v. State, 666 N.E.2d 394, 395 (Ind. 1996) (“One consequence of pleading guilty is restriction of the ability to challenge the conviction on direct appeal.”). Rather, the appropriate forum is post-conviction relief. See Hall v. State, 849 N.E.2d 466, 472 (Ind. 2006) (“[B]ecause a conviction imposed as a result of a guilty plea is not an issue that is available to a defendant on direct appeal, any challenge to a conviction thus imposed must be made through the procedure afforded by the Indiana Rules of Procedure for Post-Conviction Remedies.”); Tumulty, 666 N.E.2d at 396 (holding that post-conviction relief was exactly the vehicle for pursuing the defendant’s claim); Mapp v. State, 770 N.E.2d 332, 333-334 (Ind. 2002) (holding that a direct appeal is not the proper procedural avenue for a defendant to attack a plea agreement on double jeopardy grounds and that the proper venue for challenging a plea agreement is the filing of a petition for post-conviction relief). Accordingly, we dismiss Willis’s appeal as it relates to his challenge of the enhancement of the offense to a class D felony. See Crain v. State, 875 N.E.2d 446, 447 (Ind. Ct. App. 2007) (dismissing defendant’s appeal because his claim must be brought through a petition for post-conviction relief).

For the foregoing reasons, we affirm Willis's conviction for operating a vehicle while intoxicated as a class D felony and dismiss Willis's appeal as it relates to his challenge of the enhancement.

Affirmed in part and dismissed in part.

ROBB, C.J., and RILEY, J., concur.