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ATTORNEY FOR APPELLANT:

JESSE R. POAG
Newburgh, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

BRIAN REITZ
Deputy Attorney General
Indianapolis, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

JOE E. SMITSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A04-1004-CR-248
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-0907-FD-662

February 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Joe E. Smitson was convicted after a jury trial for operating a vehicle while intoxicated[1] and operating a vehicle with a BAC of .08 or greater,[2] both as Class C misdemeanors. Smitson then pleaded guilty to felony enhancements elevating the charges to Class D felonies.[3] The trial court then merged the two convictions. On appeal, Smitson challenges the sufficiency of the evidence to support the convictions.

We affirm.

FACTS AND PROCEDURAL HISTORY

At approximately midnight on July 15, 2009, Smitson approached a man and woman at a street corner in Evansville, apparently seeking drugs. Several men nearby then jumped Smitson, and an area resident called 911 to report the altercation. Smitson got back into his truck and drove around the block. When he returned to the corner, he exited the vehicle wielding an ax handle and another piece of wood and challenged any takers to a fight. Smitson was still yelling when Officers Daniel Deeg and Joshua Calhoun arrived. Officer Deeg noted that Smitson had the odor of alcohol on his breath, bloodshot and watery eyes, and an unsteady and wobbly stance needing to lean against the truck for support. In response to Officer Calhoun's questions, Smitson admitted that he had been driving the truck.

Smitson was transported to the jail where field sobriety tests were administered. Smitson failed the horizontal gaze nystagmus and the walk and turn tests, but passed the one

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[1] *See* Ind. Code § 9-30-5-1.

[2] *See* Ind. Code § 9-30-5-2.

[3] *See* Ind. Code § 9-30-5-3.

leg stand test. Officer Deeg administered certified chemical tests which showed a .08 on the BAC Datamaster.

Smitson was convicted on both counts after a jury trial. The trial court merged the two convictions, and Smitson filed a timely appeal. Additional facts will be supplied where necessary.

DISCUSSION AND DECISION

Our standard for reviewing claims of sufficiency of the evidence is well settled. When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. *Mork v. State*, 912 N.E.2d 408, 411 (Ind. Ct. App. 2009) (citing *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007)). We do not reweigh the evidence or assess witness credibility. *Id*. We consider conflicting evidence most favorable to the judgment. *Id*. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*. It is not necessary that the evidence overcome every reasonable hypothesis of innocence. *Id*. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id*

Smitson first argues that the evidence that he actually operated a vehicle is insufficient. While it is undisputed that no police officer actually saw Smitson driving his truck, Smitson admitted to Officer Calhoun that he had had a couple of beers and that he had driven his truck to the area. Furthermore, Latawnay Irvin, who lives a few houses from where the altercation took place, testified that around midnight on the night in question she witnessed the initial altercation and then saw Smitson get into his truck, drive off and circle

the block several times. *Tr.* at 6-10.

Smitson also argues that the State failed to present evidence of the time at which Smitson drove the truck, thereby failing to prove that the BAC test was administered within three hours after Smitson operated the vehicle. Latawnay Irvin witnessed the initial altercation around midnight and saw Smitson driving his truck. She called 9-1-1 at approximately midnight, and officers arrived shortly thereafter. Smitson was handcuffed and transmitted forthwith to the jail garage where the chemical tests were administered at 1:11 a.m. on July 15, 2009.

Although Smitson argues that there is insufficient evidence that the chemical tests were administered within three hours of his operating of the vehicle, the evidence showed that the 911 call that occurred at about midnight included a statement that Smitson had driven his truck around the block and returned to scene of the original altercation and that the chemical tests were administered at 1:11 a.m. Even the impreciseness of "around midnight" provides a sufficient starting point for determining that the chemical tests administered at 1:11 a.m. were well within the three-hour time limit required by the statute. Ind. Code § 9-30-6-2(c).

"'Prima facie evidence of intoxication' includes evidence that at the time of an alleged violation the person had" at least a .08 BAC. Ind. Code § 9-13-2-131. Prima facie evidence is evidence that will establish a fact or sustain judgment unless contradictory evidence is produced. Black's Law Dictionary 638-39 (9th ed. 2009). Intoxicated means under the influence of alcohol 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. The evidence showed that, prior to the officers arriving at the scene, Smitson drove his truck around the block and returned to the scene of the original altercation, he was yelling and acting in a erratic manner by hitting the stop sign with an ax handle, shouting racial epithets, and challenging unknown persons to fight. Furthermore, Smitson exhibited bloodshot and watery eyes, slurred speech, an unsteady stance and leaning on his truck, and the odor of alcohol on his breath, all of which was apparent to the officers who spoke with him at the scene.

In the present case, the facts showed that Smitson had a BAC of .08 and that his blood had been drawn within the time period permitted by statute. Therefore, the State established prima facie evidence of intoxication through the blood test evidence, in addition to the testimony concerning Smitson's behavior at the scene, and the jury properly found Smitson guilty. Smitson's argument is merely a request to reweigh the evidence, which we cannot do. We conclude that sufficient evidence was presented to prove both operating while intoxicated and operating with a BAC of .08 or greater.

Affirmed.

CRONE, J., and BRADFORD, J., concur.