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ATTORNEY FOR APPELLANT:

TIMOTHY J. BURNS
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ALEJANDRO BATANA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0810-CR-634
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Rebekah Pierson-Treacy, Judge
Cause No. 49F19-0805-CM-102785

May 18, 2009

MEMORANDUM DECISION– NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Alejandro Batana appeals his convictions for Operating a Vehicle While Intoxicated,[1] a class A misdemeanor, and Public Intoxication,[2] a class B misdemeanor. Specifically, Batana argues that his convictions violate Indiana's Double Jeopardy Clause under the actual evidence test. In addition, Batana contends that there was insufficient evidence to support his convictions. Finding that Batana's conviction for public intoxication does violate Indiana's prohibition against double jeopardy and that there was sufficient evidence to convict Batana of operating a vehicle while intoxicated, we affirm in part, reverse in part, and remand with instructions to the trial court to vacate Batana's conviction and sentence for public intoxication.

FACTS

Shortly after 10:30 p.m. on May 2, 2008, police officers from the Indianapolis Metropolitan Police Department were dispatched to an accident at the intersection of Rural and East Washington Streets in Indianapolis. Officer Ronald Sayles was the first to arrive and found three individuals surrounding Batana's vehicle to prevent him from driving away. These individuals told Officer Sayles that Batana had struck their vehicle from behind and then attempted to drive away.

Officer Sayles approached Batana and asked him what had happened and if he had been driving. Batana did not respond and appeared dazed. At Officer Sayles's request,

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[1] Ind. Code § 9-30-5-2.

[2] Ind. Code § 7.1-5-1-3.

Batana slowly exited the vehicle. Because Batana was having difficulty with his balance, he leaned against his vehicle. Officer Sayles detected a strong odor of alcohol coming from Batana's breath and his vehicle, and observed several containers of alcoholic beverages inside the vehicle.

Shortly thereafter, Officer Jerry Piland arrived on the scene. He also smelled alcohol on Batana's breath and noticed that his eyes were glassy and bloodshot. Batana was still leaning against his vehicle to maintain his balance. Batana admitted that he had consumed six beers at a friend's house earlier in the evening, and a cold beer can had spilled liquid onto the vehicle's dash.

Batana agreed to submit to field sobriety testing. He failed the horizontal gaze nystagmus test, the nine-step walk and turn test, and the one-leg stand test. After agreeing to take a breathalyzer test, Batana then refused to take it properly. Officer Piland's observations of Batana led him to believe that Batana was intoxicated.

On May 3, 2008, the State charged Batana with operating a vehicle while intoxicated, a class A misdemeanor, and public intoxication, a class B misdemeanor. Batana's bench trial commenced on September 3, 2008, and the trial court found him guilty of both offenses. The trial court immediately proceeded to sentencing and sentenced Batana to 365 days imprisonment for operating a vehicle while intoxicated. For public intoxication, Batana was sentenced to 180 days imprisonment, to run concurrently with his term of 365 days, for an aggregate term of 365 days. Batana now appeals.

DISCUSSION AND DECISION

I. Double Jeopardy

Batana argues that his convictions violate Indiana's Double Jeopardy Clause. Specifically, Batana contends that both convictions arise from the same factual evidence, and requests that we vacate his conviction and sentence for public intoxication.

Article I, section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Under the actual evidence test, multiple convictions constitute double jeopardy if there is "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Richardson v. State, 717 N.E.2d 32, 53 (Ind. 1999). However, Indiana's Double Jeopardy Clause "is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense." Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002).

In Smith v. State, a police officer stopped the defendant's vehicle after observing several traffic violations. 725 N.E.2d 160, 161 (Ind. Ct. App. 2000). The police officer detective the odor of alcohol and noticed that the defendant had bloodshot eyes and slurred speech. Id. The defendant admitted that he had been drinking alcohol and failed three field sobriety tests. Id. Smith was convicted of operating a vehicle while intoxicated and public intoxication. Id. A panel of this court vacated the public intoxication conviction, reasoning that "[t]he trial court necessarily used evidence that [the defendant] operated his vehicle on a

public road while intoxicated to establish the convictions for both operating while intoxicated and public intoxication." Id. at 162. Therefore, the defendant's dual convictions violated Indiana's Double Jeopardy Clause under the actual evidence test. Id.

In the instant case, the evidence establishes that Batana was found by the police in his vehicle at the intersection of Rural and Washington Streets in an intoxicated condition after his vehicle had struck another vehicle. As in Scott, evidence that Batana operated his vehicle on a public road while intoxicated necessarily supported both convictions. Indeed, the State concedes that "the trial court most likely used the same evidence to support both convictions." Appellee's Br. p. 7. Therefore, we conclude that Batana's convictions violate Indiana's Double Jeopardy Clause and remand to the trial court with instructions to vacate Batana's conviction and sentence for public intoxication.

II. Sufficiency of the Evidence

Batana contends that there was insufficient evidence to support his conviction of operating a vehicle while intoxicated.[3] Specifically, Batana asserts that there was insufficient evidence to indicate that he was intoxicated.

In reviewing a challenge to the sufficiency of the evidence, we will not reweigh the evidence or assess the credibility of witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). This court considers only the evidence favorable to the verdict and all reasonable

[3] Batana also maintains that there was insufficient evidence to convict him of public intoxication. However, because we concluded that Batana's conviction for public intoxication must be vacated on double jeopardy grounds, we need not address whether there was sufficient evidence to convict him.

inferences to be drawn therefrom. Id. We will affirm the conviction unless "no rational fact finder could have found the defendant guilty beyond a reasonable doubt." Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000). However, it is "not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quoting Moore v. State, 652 N.E.2d 53, 55 (Ind. 1995)).

Indiana Code section 9-13-2-86 defines "intoxicated" as "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." This court has held that an impaired condition may be established through evidence of: "1) the consumption of significant amounts of alcohol; 2) impaired attention and reflexes; 3) watery or bloodshot eyes; 4) the odor of alcohol on the breath; 5) unsteady balance; 6) failed field sobriety tests; and 7) slurred speech." Fields v. State, 888 N.E.2d 304, 307 (Ind. Ct. App. 2008) (citing Ballinger v. State, 717 N.E.2d 939, 943 (Ind. Ct. App. 1999)).

In the instant case, two police officers observed Batana and both detected a strong odor of alcohol on his breath and inside the vehicle. In addition, Batana was unsteady and had to lean on his vehicle to maintain his balance. Likewise, Batana's eyes were glassy and bloodshot, and he admitted to Officer Piland that he had consumed six beers at a friend's house earlier that evening. Furthermore, Batana failed three field sobriety tests and had struck another vehicle from behind. In light of these circumstances, we conclude that there was sufficient evidence to support that trial court's finding that Batana was intoxicated at the time he operated his vehicle. See Dunkley v. State, 787 N.E.2d 962, 965 (Ind. Ct. App.

2003) (concluding that sufficient evidence of intoxication existed where one police officer testified that the defendant had slurred speech, bloodshot eyes, poor dexterity, smelled strongly of alcohol, and failed two sobriety tests).

Nevertheless, Batana points out that the most compelling testimony was that of Officer Sayles, who admitted that it was possible that Batana's lack of balance was from the accident itself. This argument is no more than an invitation for this court to reweigh the evidence, which we decline to do. Consequently, this argument fails.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to the trial court to vacate Batana's conviction and sentence for public intoxication.

MAY, J., and BARNES, J., concur.