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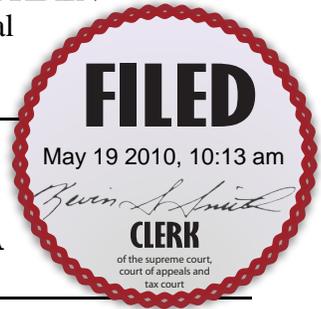
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**IN THE
COURT OF APPEALS OF INDIANA**



ROBERT L. TERRY,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-0910-CR-993

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Barbara A. Collins, Judge
The Honorable John J. Boyce, Commissioner
Cause No. 49F08-0907-CM-63484

May 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a bench trial, Robert L. Terry (“Terry”) was convicted of operating a vehicle while intoxicated¹ as a Class A misdemeanor and public intoxication,² a Class B misdemeanor. On appeal, Terry raises three issues, which we restate as follows:

- I. Whether the trial court’s denial of his Indiana Trial Rule 41(B) motion for involuntary dismissal was clearly erroneous;
- II. Whether there was sufficient evidence to support his convictions; and
- III. Whether the trial court’s order to suspend his driving privileges for a fixed period of two years and ninety days is contrary to law.

We affirm.

FACTS AND PROCEDURAL HISTORY

On July 10, 2009, Donald Coffey (“Coffey”), who lived in the same Indianapolis neighborhood as Terry, was standing on his front porch when he heard a “big smash” coming from the garage-area behind the house across the street, a garage Coffey “was working on.” *Tr.* at 23, 25. Upon hearing the noise, Coffey went to investigate and saw a pick-up truck “going down the alley” away from the garage. *Id.* at 25. Coffey recognized the truck as belonging to Terry.

Terry walked up the alley about five minutes later to speak with Coffey, who Terry thought was the owner of the garage. Coffey testified, “[Terry] walked towards me, he was slurring, swaying back and forth and said that he had hit the garage and said that he had had a couple of beers please do not call the cops, we will take care of this matter between us two.” *Id.* at 27. Although Terry said that he had only had a couple of

¹ See Ind. Code § 9-30-5-2(b).

² See Ind. Code §7.1-5-1-3.

beers, Coffey, who worked at a bar, “could tell [Terry] had more than just a couple of beers.” *Id.* at 32.

Officer Richard Eldridge of the Indianapolis Metropolitan Police Department responded to a radio dispatch regarding a pick-up truck hitting a garage in the alley between Risner and Richland Streets. On July 11, 2009, a probable cause affidavit was filed in which Officer Eldridge described the facts surrounding his response and stated that Terry had refused to consent to a chemical test.³ *Appellant’s App.* at 11-14. Terry was subsequently arrested and charged with the following: Count 1, operating a vehicle while intoxicated in a manner that endangers a person (“OWI”), a Class A misdemeanor; Count 2, failure to stop after damage to property other than a vehicle, a Class B misdemeanor; Count 3, disorderly conduct, a Class B misdemeanor; and Count 4, public intoxication, a Class B misdemeanor. On September 14, 2009, the trial court held a bench trial. Following the State’s case-in-chief, Terry made a motion for involuntary dismissal of the four counts pursuant to Indiana Trial Rule 41(B). The trial court granted the motion as to Counts 2 and 3, but denied the motion as to Counts 1 and 4.

Terry testified at trial and admitted that he had hit the garage while driving his truck, but denied being intoxicated at the time. Instead, he claimed that he “slammed” two beers in the five-minute period between hitting the garage and walking back up the

³ Indiana Code section 9-30-6-1 provides, “A person who operates a vehicle impliedly consents to submit to the chemical test provisions of this chapter as a condition of operating a vehicle in Indiana.” “A person must submit to each chemical test offered by a law enforcement officer in order to comply with the implied consent provisions of this chapter.” Ind. Code § 9-30-6-2(d). “If a person refuses to submit to a chemical test after having been advised that the refusal will result in the suspension of driving privileges . . . the arresting officer shall do the following: . . . (2) Submit a probable cause affidavit to the prosecuting attorney of the county in which the alleged offense occurred. (3) Send a copy of the probable cause affidavit submitted under subdivision (2) to the bureau.” I.C. § 9-30-6-7.

alley to meet Coffey. *Tr.* at 38-39. Terry explained that his car contained empty bottles and cans of alcohol because he collects scrap to sell. *Id.* at 45-46. The trial court found Terry guilty of OWI and public intoxication, and imposed a sentence on each count, which were ordered to run concurrently. Furthermore, the trial court suspended Terry's driving privileges for two years and ninety days. Terry now appeals. We will cite to additional facts where necessary.

DISCUSSION AND DECISION

I. Trial Rule 41(B)

Terry first contends that the trial court's denial of his Trial Rule 41(B) motion for involuntary dismissal as to Counts 1 and 4 was clearly erroneous.

Trial Rule 41(B) in pertinent part provides:

Involuntary dismissal: Effect thereof. After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. . . .

Trial Rule 41(B) is made applicable to criminal trials by way of Criminal Rule 21,⁴ and permits a motion for involuntary dismissal based upon a failure of the State's proof. *Todd v. State*, 900 N.E.2d 776, 778 (Ind. Ct. App. 2009).

As this court recently reiterated in *Todd v. State*:

⁴ Indiana Criminal Rule 21 states, "The Indiana rules of trial and appellate procedure shall apply to all criminal proceedings so far as they are not in conflict with any specific rule adopted by this court for the conduct of criminal proceedings."

Our review of the trial court’s Trial Rule 41(B) decision is well-established:

The grant or denial of a motion to dismiss made under Trial Rule 41(B) is reviewed under the clearly erroneous standard. *Taflinger Farm v. Uhl*, 815 N.E.2d 1015, 1017 (Ind. Ct. App. 2004). In reviewing a motion for involuntary dismissal, this court will not reweigh the evidence or judge the credibility of the witnesses. *Id.* We will reverse the trial court only if the evidence is not conflicting and points unerringly to a conclusion different from the one reached by the lower court. *Chemical Waste Mgmt. of Ind., L.L.C. v. City of New Haven*, 755 N.E.2d 624, 635 (Ind. Ct. App. 2001).”

Thornton-Tomasetti Eng’rs v. Indianapolis-Marion County Pub. Library, 851 N.E.2d 1269, 1277 (Ind. Ct. App. 2006)). In a criminal action, “[t]he defendant’s [Trial Rule 41(B)] motion is essentially a test of the sufficiency of the State’s evidence.” *Workman v. State*, 716 N.E.2d 445, 448 (Ind. 1999). Notably, our review of the denial of the motion for involuntary dismissal is limited to the State’s evidence presented during its case-in-chief. *See Harco, Inc. v. Plainfield Interstate Family Dining Assocs.*, 758 N.E.2d 931, 938 (Ind. Ct. App. 2001)

900 N.E.2d at 778 (quoting *Williams v. State*, 892 N.E.2d 666, 670-71 (Ind. Ct. App. 2008) (alterations in original), *trans. denied*).

A. *Operating While Intoxicated*

To convict Terry of Count 1, OWI, the State had to prove beyond a reasonable doubt that he operated a motor vehicle while intoxicated in a manner that endangered a person. *See* Ind. Code § 9-30-5-2(b). Terry does not challenge the State’s proof that he drove in a manner that endangered a person. Instead, he contends that the State’s evidence that he was intoxicated was insufficient to withstand a motion for involuntary dismissal. *Appellant’s Br.* at 6.

Indiana Code section 9-13-2-86 provides, “intoxicated” means being 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." The State is required to establish the defendant was impaired, regardless of his blood alcohol content. *Fields v. State*, 888 N.E.2d 304, 307 (Ind. Ct. App. 2008).

Evidence of the following can establish impairment: (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) failure of field sobriety tests; (7) slurred speech.

Id. (quoting *Ballinger v. State*, 717 N.E.2d 939, 943 (Ind. Ct. App. 1999)).

Terry contends that the State's evidence of intoxication is insufficient because it came solely through Coffey—a non-expert witness. Terry argues that while the evidence proved that he consumed alcohol, it did not prove that he was intoxicated. Our court has held that a non-expert witness may offer an opinion upon intoxication. *Wright v. State*, 772 N.E.2d 449, 460 (Ind. Ct. App. 2002). Coffey testified that he heard a loud noise near a neighbor's garage, rushed toward the sound, and saw Terry's truck driving away from the garage. Five minutes after Terry drove away, he walked back up the alley to speak with Coffey. Terry, who thought Coffey was the owner of the garage, explained that he had hit the garage with his truck and wanted to provide insurance, but said, "he had had a couple of beers please [don't] call the cops, we will take care of this matter between us two." *Id.* at 27. Coffey noticed that Terry was swaying back and forth and slurring his words as he spoke. *Id.* at 26. This evidence was sufficient to establish impairment.

Based on this evidence, the trial court denied Terry's Trial Rule 41(B) motion for involuntary dismissal. In other words, the trial court found sufficient evidence to lead a

reasonable trier of fact to find that Terry operated a motor vehicle while intoxicated in a manner that endangered a person. The State’s evidence from its case-in-chief does not “‘point[] unerringly to a conclusion different from the one reached’ by the trial court on [Terry’s] Trial Rule 41(B) motion to dismiss, and we must affirm the trial court’s ruling to deny that motion.” *Todd v. State*, 900 N.E.2d 776, 779 (Ind. Ct. App. 2009) (quoting *Williams*, 892 N.E.2d at 672).

B. Public Intoxication

To convict Terry of Count 4, public intoxication, the State had to prove beyond a reasonable doubt that Terry was intoxicated while in a public place or place of public resort. Ind. Code § 7.1-5-1-3. The State submitted evidence that Terry was intoxicated as he spoke with Coffey in the alley. As to this count, Terry does not appeal the evidence supporting his intoxication—evidence that we found sufficient as to Count 1. Instead, Terry contends that the State failed to submit sufficient evidence of the alley’s public nature, and therefore, the trial court erred in denying his motion for involuntary dismissal as to public intoxication.

The term “‘public place’ or ‘place of public resort’ is not defined by statute[.]” Indiana courts have nevertheless always applied a consistent interpretation of the term.” *Fought v. State*, 898 N.E.2d 447, 450 (Ind. Ct. App. 2008). “A ‘public place’ does not mean only a place devoted to the use of the public.” *Id.* (citing *Wright*, 772 N.E.2d at 456). “It also means a place that ‘is in point of fact public, as distinguished from private,- -a place that is visited by many persons, and usually accessible to the neighboring public.’” *Id.* (quoting *Wright*, 772 N.E.2d at 456).

Officer Eldridge testified that he responded to a radio dispatch regarding a pick-up truck hitting a garage in the alley behind Risner Street in Indianapolis, Indiana. *Tr.* at 6. Coffey testified that he first came into contact with Terry in the alley between Risner and Richmond Streets about five minutes after the accident. *Id.* at 24. Coffey had seen Terry drive down the alley away from the garage, and five minutes later, Terry walked back up the alley to speak with him and others that had congregated in the alley to investigate the source of the noise. *Id.*

“The area inside the boundaries of a county comprises its territorial jurisdiction. However, a municipality has exclusive jurisdiction over bridges (subject to IC 8-16-3-1), streets, alleys, sidewalks . . . unless a statute provides otherwise.” Ind. Code § 36-1-3-9. We can find no mention in the record before us where a witness specifically used the word public or private when referring to the alley. By statute, however, alleys, like the one in question, fall under the jurisdiction of a municipality such as Indianapolis. *Id.* We therefore find as a matter of law that where, like here, a municipality has jurisdiction over an alley, and there is no testimony regarding its private nature, such alley is public for the purposes of Indiana Code section 7.1-5-1-3.

Coffey’s testimony revealed that Terry was visibly intoxicated in the alley behind Risner Street—an alley down which people drove and in which people congregated. The trial court found that this evidence and the reasonable inferences drawn therefrom were sufficient to lead a reasonable trier of fact to find that Terry was intoxicated in a public place. We do not find that the evidence points unerringly to a conclusion different from the one reached by the trial court. The trial court did not err in denying Terry’s motion

for involuntary dismissal as to the public intoxication count.

II. Sufficiency of the Evidence

Terry next contends that there was insufficient evidence to support his convictions for OWI and public intoxication. Specifically, Terry claims that the evidence does not establish: (1) the temporal element of operating while intoxicated; or (2) the public place element of public intoxication.

When reviewing a claim of insufficient evidence, we do not reweigh the evidence, nor do we reevaluate the credibility of witnesses. *Rohr v. State*, 866 N.E.2d 242, 248 (Ind. 2007). We will consider only the evidence most favorable to the judgment and will draw all reasonable inferences therefrom. *Bockler v. State*, 908 N.E.2d 342, 346 (Ind. Ct. App. 2009). We will affirm the conviction if there is substantial evidence of probative value from which a reasonable fact finder could find the defendant guilty beyond a reasonable doubt. *Id.*

A. Operating While Intoxicated

As discussed above, to convict Terry of OWI, the State had to prove that he operated a motor vehicle while intoxicated in a manner that endangered a person. *See* Ind. Code § 9-30-5-2(b). Again, Terry does not challenge the endangerment element. Instead, he contends that his admissions that he struck the garage while driving down the alley and later drank beer were insufficient to support a conviction of driving *while* intoxicated.

As support for his argument, Terry directs our attention to *Flanagan v. State*, 832 N.E.2d 1139 (Ind. Ct. App. 2005) and *Robinson v. State*, 835 N.E.2d 518 (Ind. Ct. App.

2005). In *Flanagan*, the defendant and his passenger were traveling from Allen County when their vehicle broke down. *Flanagan*, 832 N.E.2d at 1140. Sometime after 4:00 p.m. on that day, a sheriff's deputy observed a disabled vehicle by the side of the road with two men, later identified as the defendant and his passenger, standing near the rear of the vehicle. *Id.* The deputy, who was transporting a prisoner, was unable to stop for the disabled vehicle, but returned later. By this time, the defendant and his passenger had started to walk to a local convenience store, and the deputy, upon seeing them, offered them a ride. Once inside the car, the deputy detected the odor of alcohol and observed that the defendant had red and watery eyes and that his speech was slurred. A certified blood test revealed that the defendant's blood alcohol content was .22. *Id.* He was convicted of OWI and public intoxication.

The defendant appealed his OWI conviction, contending that, while he admitted to driving and to drinking, the State failed to prove the temporal element that he was driving *while* intoxicated. Our court agreed. Noting that the deputy did not know how long the car had been disabled before he encountered it at 4:00 p.m., that there were empty beer cans on the floor of the car, and that there was no evidence as to whether the defendant consumed the alcohol before he drove or after the car broke down, our court reversed the conviction.

In *Robinson*, law enforcement officers were dispatched to the scene of an accident and discovered the defendant's unoccupied semi-truck in a ditch. The officers ultimately discovered the defendant four miles from the accident scene, smelling of alcohol and showing signs of intoxication. The defendant was convicted of driving while intoxicated,

but we reversed his conviction on appeal, holding:

[t]he evidence before us reveals that Robinson was found two to four miles from the accident sometime after its occurrence. . . . [T]here was no testimony as to the length of time between when the accident happened and when the officers found Robinson. . . . [T]o say with certainty that Robinson drove the semi while he was intoxicated under these facts is to rest the conviction upon conjecture and not proper and reasonable inferences drawn from the evidence.

Robinson, 835 N.E.2d at 524-25.

The facts before us are distinguishable from those in *Flanagan* and *Robinson*. Here, Coffey heard a “big smash,” ran to the alley, and saw Terry’s pick-up truck driving down the alley away from the garage. *Tr.* at 25. Five minutes later, while Coffey was talking with a neighbor who had also come outside to investigate the noise, Terry walked back up the alley. Coffey noticed that Terry was swaying back and forth and slurring his words as he spoke. *Id.* at 26. Although Terry stated that he had only had a couple of beers, Coffey, who worked at a bar “could tell [Terry] had more than just a couple of beers.” *Id.* at 32.

Terry testified that he drove down the alley, hit the garage with his truck, and returned about five to ten minutes later to talk with Coffey. *Id.* at 39. Terry insisted, however, that he did not drive *while* intoxicated. Instead, he said that after hitting the garage, he drove to his home, “slammed” down two beers to take care of his headache, and walked up the alley to provide his insurance. *Id.* at 39, 40.

On appeal, Terry contends that the trial court found credible his testimony regarding hitting the garage and yet did not believe his claim that he did not drive while intoxicated. “When two witnesses give contradictory accounts, it is not true that the

finder of fact must believe one or the other. The finder of fact may choose to believe neither witness, believe aspects of the testimony of each, or believe the testimony but also believe in a different interpretation of the facts than that espoused by the witnesses, among other possibilities.” *Gantt v. State*, 825 N.E.2d 874, 878 (Ind. Ct. App. 2005). Here, the trial court believed Terry’s testimony that he drove the truck and hit the garage, but did not believe his testimony that he was not intoxicated at the time. Instead, the trial court believed Coffey’s testimony that Terry walked up the alley five minutes after hitting the garage, that he was slurring and repeating his words and swaying as he spoke, that he appeared to have had more than two beers, and told Coffey “please do not call the cops, we will take care of this matter between us two.” *Tr.* at 27. Here the temporal element of driving while intoxicated was proven. Unlike the facts in *Flanagan* and *Robinson*, the time period between when Terry was seen driving and when he was seen intoxicated was a mere five minutes. We find substantial evidence of probative value from which a reasonable fact finder could find Terry guilty beyond a reasonable doubt of driving *while* intoxicated in a manner that endangers a person.

B. Public Intoxication

Indiana Code Section 7.1-5-1-3 provides, “It is a Class B misdemeanor for a person to be in a public place or a place of public resort in a state of intoxication” As noted above, the trial court found credible Coffey’s testimony that he encountered Terry in the alley behind Risner Street and that Terry was slurring his words, swaying while he spoke, and appeared to have had more than two beers. Additionally, when

asked on rebuttal whether “there’s a difference between what [Terry] is like today and what he was like that night,” Coffey responded, “Yeah, you could tell that he had had more than just two beers that day” *Tr.* at 49. There was sufficient evidence of Terry’s impaired condition of thought and action and loss of normal control of faculties to support the trial court’s conclusion that Terry was “intoxicated.” Ind. Code § 9-13-2-86. Likewise, as noted above, there was sufficient evidence that the alley was a public place.

While finding sufficient evidence of public intoxication, we address Terry’s contention that a finding of public intoxication under the facts of this case is inconsistent with the spirit of the public intoxication statute. “The spirit of the public intoxication statute is to prevent people from becoming inebriated and then bothering and/or threatening the safety of other people in public places.” *Jones v. State*, 881 N.E.2d 1095, 1098 (Ind. Ct. App. 2008) (citing *Wright*, 772 N.E.2d at 456). Here, Coffey testified that Terry “kept saying the same things over and over to me, getting frustrated about something, . . . I really didn’t want to talk to him to [sic] much because he was intoxicated and I didn’t want any problems with him, but I mean he was definitely intoxicated.” *Tr.* at 33. This is just the kind of situation that the public intoxication statute aims to prevent.

III. Suspension of Driver’s License

Terry finally contends that the trial court improperly suspended his driver’s license for a fixed period of two years and ninety days. *Appellant’s Br.* at 4. Specifically, he

contends that the trial court did not have the discretion to suspend his license for two years based on his refusal to submit to a chemical test. *Id.*

Indiana Code section 9-30-6-9 provides for the administrative suspension of driving privileges under circumstances where a driver refuses to submit to a chemical test. That section in pertinent part provides:

- (b) If the [probable cause] affidavit [for operating while intoxicated] under section 8(b) of this chapter states that a person refused to submit to a chemical test, the bureau shall suspend the driving privileges of the person:
 - (1) for:
 - (A) one (1) year; or
 - (B) if the person has at least one (1) previous conviction for operating while intoxicated, two (2) years; or
 - (2) until the suspension is ordered terminated under IC 9-30-5.

I.C. § 9-30-6-9.

Indiana Code section 9-30-5-10 provides for the suspension of driving privileges following a conviction for OWI. That section reads in pertinent part as follows:

- (a) In addition to a criminal penalty imposed for an offense under this chapter . . . , the court shall, after reviewing the person's bureau driving record and other relevant evidence, recommend the suspension of the person's driving privileges for the fixed period of time specified under this section. . . .
- (b) If the court finds that the person:
 - (1) does not have a previous conviction of operating a vehicle or a motorboat while intoxicated; or
 - (2) has a previous conviction of operating a vehicle or a motorboat while intoxicated that occurred at least ten (10) years before the conviction under consideration by the court;the court shall recommend the suspension of the person's driving privileges for at least ninety (90) days but not more than two (2) years.

....

I.C. § 9-30-5-10. “If a court recommends suspension of the driving privileges under [IC 9-30-6], IC 9-30-5, or IC 9-30-9: (1) the bureau [of motor vehicles] shall comply with the recommendation of suspension” Ind. Code § 9-30-6-12(a).

Both parties contend, and we agree, that the basis for the suspension of Terry’s driving privileges is not the model of clarity. At the close of the sentencing hearing, the trial court asked, “anything else I need to address today? Oh, his license, was it suspended at the time of his arrest?” *Tr.* at 67. Terry’s attorney responded, “There was a refusal so I believe that probably applies.” *Id.* Thereafter, the following exchange occurred:

THE COURT: So the minimum suspension that’s required here is . . .

UNIDENTIFIED PROSECUTOR: When was his last prior conviction Your Honor?

[PROSECUTOR] LENOX: ’96.

UNIDENTIFIED PROSECUTOR: ’96, the minimum suspension would be the full two years suspension from the refusal because of the prior followed by ninety days suspension, so two years and ninety days

THE COURT: Okay, from the time of the arrest?

UNIDENTIFIED PROSECUTOR: From the date he was suspended by the commissioner at the APC.⁵

THE COURT: Okay, all right, so I better follow the law there and do what the law says I have to do which is two years plus ninety days, that’s probably all ready [sic] started from the time the Bureau of Motor Vehicles entered an administrative suspension.

Id. at 67-68.

Terry was convicted of OWI with a prior OWI conviction in 1996. For the OWI conviction, the trial court was *required* to recommend the suspension of Terry’s driving privileges for at least ninety (90) days but not more than two (2) years. Ind. Code § 9-30-

⁵ It appears that the prosecutor was referring to the commissioner of the Bureau of Motor Vehicles at the Arrestee Processing Center.

5-10(b). The trial court recommended ninety days. The bureau, in turn, was required to “comply with the recommendation of suspension.” Ind. Code § 9-30-6-12(a).

At the close of the sentencing hearing, Terry’s counsel admitted that Terry had refused to consent to a chemical test. The trial court was informed that this refusal required a two-year minimum suspension of driving privileges. *Tr.* at 67. The trial court concluded, “so I better follow the law there and do what the law says I have to do which is two years plus ninety days, that’s probably all ready [sic] started from the time the Bureau of Motor Vehicles entered an administrative suspension.” *Id.* at 67-68. The trial court did not cite to Indiana Code section 9-30-6-9; however, the above language reveals the court’s understanding that the driving privileges were, in part, being suspended administratively through the Bureau of Motor Vehicles.

While we recognize that Indiana Code section 9-30-6-12(a) speaks in terms of the trial court *recommending* suspension of the driving privileges under Indiana Code sections 9-30-6, 9-30-5, or 9-30-9, that section also mandates, “the bureau [of motor vehicles] shall comply with the recommendation of suspension.” A recommendation that the bureau must comply with, is akin to the trial court ordering the suspension. Under the facts of this case, we find that the trial court did not err in suspending Terry’s driving privileges for two years and ninety days, the minimum sentence that was required by statute. *Tr.* at 67.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.