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IN THE
COURT OF APPEALS OF INDIANA

JOHN WARREN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1009-CR-997
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Annie Christ-Garcia, Judge
The Honorable Teresa Hall, Commissioner
Cause No. 49F24-0810-FD-244085

June 3, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

John Warren ("Warren") appeals his conviction for Driving While Suspended within ten years of a prior similar infraction, a Class A misdemeanor.[1] He raises one issue for our review, whether there was sufficient evidence supporting his conviction.

We affirm in part, reverse in part, and remand.

Facts and Procedural History

We state the facts according to our standard of review.

On October 28, 2008, Warren was driving northbound on Illinois Street in Indianapolis when Officer Greg Slaven ("Officer Slaven") of the Indianapolis Metropolitan Police Department pulled him over for speeding near the intersection of Illinois Street and Sixteenth Street. When Officer Slaven asked Warren for his driver's license and registration, Warren provided his Indiana identification card. Because Warren presented an identification card rather than a driver's license, Officer Slaven suspected that Warren did not have a valid driver's license; Warren admitted that his license had been suspended.

Officer Slaven then asked Warren to exit the car and began to handcuff him for officer safety purposes. Officer Slaven secured a handcuff around one of Warren's hands when an altercation ensued, during which Officer Slaven's Taser gun was knocked loose. Warren picked up the Taser device, and Officer Slaven retreated into the median of Sixteenth Street, radioed for assistance, and drew his service pistol, pointing it at Warren. Warren discharged

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[1] See Ind. Code § 9-24-19-2. He does not challenge his convictions for Criminal Recklessness, as a Class B misdemeanor, and Resisting Law Enforcement, as a Class A misdemeanor.

the Taser gun at an angle; Officer Slaven was not struck by the Taser's prongs.

Warren discarded the now-discharged Taser device and turned to walk back to his car. Officer Slaven holstered his pistol, withdrew a canister of CS spray from his belt, and attempted to spray Warren to stop him from reaching his car and complete an arrest. Both Warren and Officer Slaven were affected by the spray, which caused their eyes to burn and made breathing difficult.

While these events transpired, Officer Matt Bragg ("Officer Bragg"), a Beech Grove police officer, was performing part-time security work for a nearby Walgreens store. An unidentified pedestrian nervously informed Officer Bragg that someone was shooting at a police officer at Illinois Street and Sixteenth Street. Officer Bragg drove his patrol car toward the scene and saw Warren and Officer Slaven in the eastbound lanes of Sixteenth Street, with Officer Slaven's arms up as if "in retreat." (Tr. 135.)

Officer Bragg activated his patrol car's lights. Warren turned and looked at Officer Bragg and then began to flee, running south on Illinois Street. Officer Bragg pursued Warren southbound on Illinois Street[2], pulled out ahead of him, and turned his patrol car into a driveway to block Warren's flight. The car slid and hit a metal barred fence. Warren ran into the front of the driver's side of the patrol car, fell to the ground between the car and the fence, and was arrested.

On October 29, 2008, the State charged Warren with Driving While Suspended; Resisting Law Enforcement, as a Class D felony; two counts of Resisting Law Enforcement,

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[2] Illinois Street at this location is a one-way street that permits only northbound traffic.

each as Class A misdemeanors; and Criminal Recklessness, as a Class B misdemeanor. On November 6, 2008, the State amended the information and added charges of Battery and Unlawful Conduct, each Class D felonies.

A jury trial was conducted on July 13, 2010. During the trial, the State dismissed one of the misdemeanor counts of Resisting Law Enforcement. At the close of the State's evidence, Warren moved for a directed verdict on the count of Driving While Suspended, asserting that the State had failed to prove that Warren's prior license suspensions were results of adverse judgments arising from infractions of certain statutory provisions. The trial court denied Warren's motion. At the trial's conclusion, the jury found Warren guilty of Criminal Recklessness, as a Class B misdemeanor, and Resisting Law Enforcement and Driving While Suspended, each as Class A misdemeanors; the jury found Warren not guilty on the remaining counts.

On August 17, 2010, the trial court entered judgments of conviction against Warren for Driving While Suspended, Resisting Law Enforcement, and Criminal Recklessness. The trial court then ordered Warren's driving privileges suspended for ninety days and sentenced him to 365 days imprisonment for both Resisting Law Enforcement and Driving While Suspended and 180 days imprisonment for Criminal Recklessness, to be served concurrently. The court ordered 180 days executed, to be served on monitored home detention, with twenty-one days of credit time and the remainder of the sentence suspended to probation.

This appeal followed.

Discussion and Decision

Warren appeals his conviction for Driving While Suspended within ten years of a similar prior infraction. The statute requires proof of entry of at least one judgment finding a predicate violation under any one of Indiana Code sections 9-24-19-1, 9-24-19-2, 9-1-4-52, or 9-24-18-5(a) within ten years of the charged offense. Ind. Code § 9-24-19-2. Warren concedes that he was driving with driving privileges suspended, but he asserts that the State produced insufficient evidence at trial to establish judgment under one of the predicate offenses.

When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh evidence. Id. We will affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). "The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." Id. (quoting Pickens v. State, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001)).

In order to convict Warren of Driving While Suspended as charged, the State was required to prove beyond a reasonable doubt that Warren operated a motor vehicle upon a public highway when he knew that his driving privileges had been suspended, which operation of a motor vehicle was within less than ten years of the date of entry of a judgment against him for a prior unrelated violation of Indiana Code sections 9-24-19-1, 9-24-19-2 (the

statute under which Warren was charged in this case), 9-1-4-52, or 9-24-18-5(a).[3] I.C. § 9-24-19-2; App. 31. Of these four, the State's only potential basis for convicting Warren of Driving While Suspended as charged is its claim that he violated section 9-24-19-1, which establishes a Class A infraction for operation of a motor vehicle upon a highway when an individual's driving privileges are suspended or revoked.

At trial, the State introduced a certified copy of Warren's driving record from the Bureau of Motor Vehicles ("BMV"). The record indicates that Warren's driving privileges had been suspended four times from 2002 through 2006. Three of these resulted from Warren's failure to pay fines and do not fall within the scope of the Driving While Suspended charge at issue here. A fourth suspension, however, indicates that judgment was entered against Warren on September 14, 2006, for "DRIVING WHILE SUSPENDED" or "DRIVING WHILE SUSPEN/INF" under Marion Municipal Court #31 Cause Number 49F310607IF135733. (State's Ex. 17.)

The dispute between Warren and the State centers upon this entry. Warren contends that the entry is insufficient to prove or give rise to a reasonable inference that he had previously been adjudicated to have violated section 9-24-19-1 because the information on the BMV record nowhere indicates what statute Warren violated that resulted in the entry of judgment. The State contends that a process of elimination of possible bases upon which

[3] Section 9-1-4-52 was repealed in 1991, section 9-24-18-5 was repealed in 2001, and the State makes no claim that judgment was entered against Warren under either of these sections, nor does the evidence indicate that such is the case. Thus, the only possible statutory violation for which judgment could have been entered against Warren would rest on either section 9-24-19-1 or -2. The State presented no evidence that indicates that judgment was entered against Warren for a prior misdemeanor indicative of a prior violation of section 9-24-19-2, nor does the State claim that such had occurred.

Warren may have had a judgment entered against him for Driving While Suspended logically results in the conclusion that the only statute upon which the entry of judgment can have occurred is section 9-24-19-1. The State therefore argues that the jury could properly infer, even without a clear statutory reference in the evidence before it, that Warren was driving while suspended after judgment had been entered against him for violating section 9-24-19-1.

We cannot agree. The evidence before the jury that supports Warren's conviction, viewed in a light most favorable to the judgment, is that Warren's license was suspended at the time of the instant offenses, his license had been suspended on previous occasions, and judgment had been entered against him for some form of driving while suspended.

Not before the jury, however, was the statutory basis upon which that driving while suspended adjudication rested. A thorough review of the record reveals no entry into evidence of court records from the Marion Municipal Court #31 cause number, or indeed any form of citation, that could indicate to the jury what statute Warren had violated that in turn served as the basis for the 2006 adjudication.

Moreover, the jury did not receive any instructions from the trial court that clarified the matter. The only instructions the jury received about the Driving While Suspended charge were Preliminary Instructions No. 6 and 9. Preliminary Instruction No. 6 merely quoted the charge for Driving While Suspended from the Charging Information, listing the four statutory citations for the predicate violations as set forth in the statute. (App. 123.) Preliminary Instruction No. 9 provided only the text of the Driving while suspended statute under which Warren was charged; that instruction also lists statutory citations. (App. 127.)

Neither Preliminary Instruction provides any guidance as to which, if any, of the predicate offenses Warren had violated, nor was any more specific evidence introduced at trial.

Under these circumstances, we cannot agree with the State that there was sufficient evidence for the jury to infer that Warren had violated either of the specific statutory provisions, sections 9-24-19-1 or -2. To obtain a conviction, the State was required to provide evidence that proves this element of the offense beyond a reasonable doubt. Given the evidence and instructions before it, the most a reasonable jury could have inferred, without instruction or evidence that there are no other statutes under which Warren could have been adjudicated to have previously driven while suspended, is that Warren had previously committed some form of infraction called "driving while suspended." A reasonable jury could not, however, conclude that Warren had previously violated either of the sections specified by the statute as predicate offenses required as an element of proof in this case. Absent such evidence, the jury's verdict suffers from failure of proof and must be overturned as to the Class A misdemeanor conviction, and it was error for the trial court to deny Warren's motion for a directed verdict.[4]

The State points out, and we recognize, that a certified computer printout or electronic copy of BMV records is "admissible as prima facie evidence" of a prior conviction where such must be proved in a prosecution related to a prior offense under Indiana Code title 9.

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[4] Our decision in this case is similar to that of this court in Trotter v. State, 838 N.E.2d 553 (Ind. Ct. App. 2005), upon which Warren relies in his argument to this court. In Trotter, another panel of this court reversed a trial court's entry judgment of Driving While Suspended, as a Class A misdemeanor, where the BMV record indicated that "the driver was suspended for 'failure to comply for DDC,'" id. at 556, and the State conceded its failure of proof. Id. at 559.

I.C. § 9-30-3-15. Under section 9-30-3-15, Warren's BMV record is prima facie evidence that judgment had been entered against him for driving while suspended—but absent a statement on the BMV record to that effect, it is not prima facie evidence of the statutory basis of the offense, proof of which was required for a conviction.

Given the evidence and instruction provided in this case, there was not sufficient evidence before the jury to infer that Warren's prior driving while suspended adjudication fell within one of the four predicate offense statutes. Warren nevertheless admits that he was driving with suspended driving privileges on October 28, 2008, in violation of section 9-24-19-1, a Class A infraction, and the jury determined as much when it found him guilty of the elevated Class A misdemeanor. As we noted in Upshaw v. State, 934 N.E.2d 178, 183 (Ind. Ct. App. 2010), trans. denied, "[d]riving while suspended as a class A infraction is an inherently lesser included offense" of section 9-24-19-2. Also Trotter v. State, 838 N.E.2d 553, 560 (Ind. Ct. App. 2005). As in Upshaw, because the State met its burden in establishing that Warren was driving with a suspended license at the time of his arrest, we remand this case with instructions to amend the judgment of conviction by vacating the Class A misdemeanor conviction and entering the Class A infraction in its place.

Warren challenges no other aspects of his conviction, and there is sufficient evidence to support the judgment on the remaining counts. We therefore leave Warren's convictions for Resisting Law Enforcement and Criminal Recklessness undisturbed.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., concurs.

BROWN, J., dissents with opinion.

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vs.	)	No. 49A02-1009-CR-997
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

Brown, Judge, dissenting

I respectfully dissent and would find the evidence sufficient to support the judgment of conviction as a class A misdemeanor for driving while suspended. The record provides sufficient evidence not only that Warren's license had been previously suspended but that a court had previously entered judgment finding that he had committed the infraction of driving while suspended. Only a violation of Section 1 of Indiana Code Chapter 9-24-19 classifies driving while suspended as an infraction. Thus, as the State asserts, even though the code section is not specifically listed in the BMV record, the fact that it is a judgment for an infraction proves that Warren's prior violation was under Section 1 and a qualified prior judgment under the terms of Section 2.

Further, and as asserted by the State, this case is readily distinguishable from Trotter v. State, 838 N.E.2d 553 (Ind. Ct. App. 2005) in which it appears that Trotter's BMV record established only that his license had been indefinitely suspended. There was no indication that the record showed any prior judgments for driving while suspended.

For these reasons, I would affirm the judgment of the trial court.