

STATEMENT OF THE CASE

Appellant-Defendant, Lonnie Ray Stone (Stone), appeals his conviction for operating a vehicle with a blood alcohol content (BAC) of at least .08 but less than .015, a Class C misdemeanor, Ind. Code § 9-30-5-1.

We affirm.

ISSUE

Stone raises one issue for our review, which we restate as the following: Whether the evidence was sufficient to support his conviction.

FACTS AND PROCEDURAL HISTORY

On February 18, 2009, at approximately 10:00 p.m., Stone drove his semi-truck to deliver products from Bartenville, Illinois, to Caterpillar (CAT) Logistics in Lafayette, Indiana. On the way, he purchased a six pack of beer in Leroy, Illinois. Stone arrived at CAT Logistics at approximately 12:30 a.m. Upon arrival, Laurent Fabries (Fabries), who was working at the receiving dock that evening, approached Stone to talk to him about the delivery and immediately noticed that Stone smelled of alcohol and was acting nervous. Fabries asked Stone to move his truck to dock No. 1 while he continued to unload another truck. Stone complied and backed his truck into dock No. 1.

Tommie Deaton (Deaton), the receiving clerk who tags and enters the products from the trucks into the computer system as they are unloaded, walked to the printer which was located near the area where Stone was waiting. Deaton was approximately four feet away from Stone and also noticed that Stone smelled like alcohol. Deaton went back to her office

to call her supervisor, Joseph Oilar (Oilar). She told Oilar that she noticed that Stone “smelled pretty strongly of alcohol” and she was concerned that if Stone returned to his truck to continue driving he would potentially harm someone. (Transcript p. 22). After she contacted Oilar, Deaton continued to observe Stone, who, other than buying food from a vending machine and going to the restroom, stayed in the driver’s waiting area, which was within Deaton’s view. Deaton also stated that Stone appeared to act nervous and impatient.

When Oilar arrived at Deaton’s office, she told Oilar that Stone smelled like alcohol. Oilar then asked Fabries, who confirmed Deaton’s observation that Stone indeed smelled like alcohol. Based on Fabries and Deaton’s comments, Oilar called the police. Oilar encountered Stone in the hallway as Stone exited the restroom. Oilar noticed that Stone seemed nervous and also that he smelled like alcohol.

Tippecanoe County Sheriff’s Deputy Shane Howard (Deputy Howard) responded to the call and arrived at CAT logistics at approximately 1:14 a.m. As soon as Deputy Howard made contact with Stone, he immediately noticed that Stone was “very nervous” and that he had “[r]eal red bloodshot, glassy eyes” (Tr. p. 42). Additionally, Deputy Howard noticed the odor of alcohol on Stone. Deputy Howard then went to Stone’s truck and took photographs. He observed that the engine was still running and that there was an empty beer can in a plastic bag hanging on the passenger’s seat.

At that point, Deputy Matthew Couch (Deputy Couch) of the Tippecanoe County Sherriff’s Department arrived, and Deputy Howard identified Stone to Deputy Couch. Upon seeing Stone, Deputy Couch immediately noticed that Stone had “red, watery eyes, droopy

eyelids,” and that he started to shake, as if he was “very nervous.” (Tr. p. 55). Deputy Couch then informed Stone that the other employees suspected that he was intoxicated, and Stone responded “I’m not drunk or anything like that . . . they’re mad at me, I don’t know what their problem is.” (Tr. p. 56). Stone denied drinking alcoholic beverages and also refused a portable breath test. He then told Deputy Couch, “you didn’t see me drive and I’m not driving now;” however, Stone admitted that he had in fact driven his truck on the roadways and the roads surrounding the CAT Logistics to arrive at his destination and that no one had been in the car with him. (Tr. p. 56). Additionally, Deputy Couch asked Stone if that was his truck sitting at dock No. 1, and he responded that it was his truck. Stone also denied drinking any alcoholic beverages after he arrived at CAT Logistics. Ultimately, Stone agreed to participate in field sobriety tests. After failing three tests, Deputy Couch determined that Stone was intoxicated and transported him to the Tippecanoe County Jail. Deputy Couch administered a chemical breath test to Stone at approximately 2:08 a.m., and the result indicated that Stone had a BAC of .10% of alcohol.

On March 17, 2009, the State filed an Information charging Stone with Count I, operating a motor vehicle while intoxicated, a Class A misdemeanor, I.C. § 9-30-5-2(b); Count II, operating a vehicle with a BAC of at least .08 but less than .015, a Class C misdemeanor, I.C. § 9-30-5-1; and Count III, open container violation, a Class C infraction, I.C. § 9-30-15-3. A bench trial was held on September 8, 2009. At the conclusion of the evidence, Stone was found guilty of Count II and not guilty of Count I and Count III. On

October 14, 2009, Stone was sentenced to 60 days in the Tippecanoe County Jail; however, his sentence was suspended and he was placed on probation for one year.

Stone now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Stone contends that his conviction is not supported by the evidence. Specifically, he contends that (1) there was insufficient evidence to prove that he operated his truck and (2) the chemical breath test was not administered within three hours of when he drove his truck. We will address each argument in turn.

In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* at 213. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

A. Operation of the Truck

Stone first argues that there was insufficient evidence to prove that he operated a vehicle while intoxicated. In order to convict Stone of operating a vehicle while intoxicated, the State was required to prove that he operated a vehicle with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol but less than fifteen-hundredths (.015) gram of alcohol per either 100 milliliters of his blood or 210 liters of his breath. I.C. §

9-30-5-1(a). The definition of “operates,” in pertinent part, reads as follows: “A person, . . . who drives, or is in actual physical control of, a motor vehicle upon a highway[.]” I.C. § 9-13-2-118(a)(1).

Stone points to several cases where the evidence was found to be insufficient to support a conviction for operating while intoxicated where a defendant was found asleep in a parked car with the engine running. In *Mordacq v. State*, 585 N.E.2d 22, 23 (Ind. Ct. App. 1992), Mordacq was found by an officer sleeping in a car with the engine running. The officer woke her up and he smelled an odor of alcohol on her breath. *Id.* The officer testified that Mordacq told him that she had driven to the location where he found her at least two hours earlier. *Id.* The officer administered a breath test and determined that she was intoxicated and charged her with operating while intoxicated. *Id.* Apart from Mordacq’s admission, the State presented no evidence as to how or when her vehicle arrived at the location she was parked. *Id.* We held that there was insufficient evidence to sustain Mordacq’s conviction. *Id.* at 26. In our discussion, we stated that “[i]n a case where a vehicle is discovered motionless with the engine running, whether a person sitting in the driver’s seat ‘operated’ the vehicle is a question of fact, answered by examining the surrounding circumstances.” *Id.* at 24. Additionally, “[t]here must be some direct or circumstantial evidence to show that defendant operated the vehicle.” *Id.* See also *Clark v. State*, 611 N.E.2d 181, 182 (Ind. Ct. App. 1993), *trans. denied*, (finding that the evidence was insufficient to support a conviction for operating while intoxicated where the defendant was found sleeping in a car that was parked in an apartment with the motor running and the

lights on); *Hiegel v. State*, 538 N.E.2d 265, 266 (Ind. Ct. App. 1989), *trans. denied*; *Corl v. State*, 544 N.E.2d 211 (Ind. Ct. App. 1989).

Unlike the cases cited by Stone, where there was no evidence to prove the time the defendant arrived at the location in which they were found, here, there was sufficient direct and circumstantial evidence to prove when Stone arrived at CAT Logistics intoxicated and that he drove his truck there. First, Fabries initially encountered Stone at approximately 12:30 a.m. and immediately noticed that he smelled of alcohol. After this observation, Fabries then asked Stone to move his truck from the dock he initially parked at to dock No. 1, and Stone complied. Fabries did not see anyone arrive with Stone.

Second, as soon as Deputy Howard arrived, he went out to Stone's truck, which was parked at dock No. 1 and found the engine running. Stone admitted to Deputy Couch that he drove his truck to CAT Logistics and identified the truck sitting in dock No. 1 as his truck. Deputy Couch asked Stone if he had driven on the roadways and roads surrounding the CAT Logistics building and Stone responded "Yes." (Tr. p. 57). Stone also told Deputy Couch that he had not had any alcoholic beverages after he arrived at CAT. Based on the information that Stone arrived at the location smelling like alcohol and his own admission that he drove the truck there and had not had anything to drink once he arrived, there is sufficient evidence to establish that he operated his vehicle while intoxicated.

B. Administration of the Chemical Breath Test

Stone also argues that the evidence fails to show that the chemical test was administered within three hours of when he drove his truck. Specifically, he contends that

“[t]here [was] no proper basis to relate the BAC back to the time he reached the terminal.” (Appellant’s Br. p. 8). Indiana Code section 9-30-6-2(c) states that “A test administered under this chapter must be administered within three (3) hours after the law enforcement officer had probable cause to believe the person committed an offense under [I.C. §] 9-30-5 or a violation under [I.C. §] 9-30-15.”

Stone again cites to *Mordacq*, 585 N.E.2d at 26, where this court discussed whether the chemical breath test can “presumptively relate back to an act of operating a vehicle that occurred before an officer encountered the defendant” Analyzing this issue, we stated the following:

Thus, in a case where the officer did not observe the defendant operating the vehicle, the statutes could be read to impose no limit on the relation back test, provided the test was performed within three hours of the time an officer investigated the defendant. Such an interpretation would distinguish between those defendants stopped (1) by the police while driving, and (2) those who stop of their own accord or by accident. This could lead to absurd and illogical results unintended by the legislature, and would operate to the disadvantage of those who, realizing their continued driving posed a threat to public safety, chose to stop. In our view, the three-hour limit expressed in I.C. [§] 9-30-6-2(c) begins not from the moment an officer ideates probable cause, but rather from the moment at which the vehicle was operated in violation of I.C.[§] 9-30-5.

Id.

We agree with this proposition, however, this is inapplicable to the present case. When Fabries initially encountered Stone at 12:30 a.m., Fabries immediately noticed that Stone smelled like alcohol. After this, Stone complied with Fabries’ request to move his truck from the dock he parked at to dock No. 1. Oilar testified that when truck drivers arrive

at the location, they are required to clock in with a time card as soon as they enter the building. Based on Stone's time card, he clocked in at CAT Logistics at 12:38 a.m., meaning he would have moved his truck to dock No. 1 within minutes prior to clocking in. Deputy Howard arrived at CAT Logistics and encountered Stone at approximately 1:14 a.m. Stone eventually agreed to take a chemical breath test and was transported to the Tippecanoe County Jail. The State admitted into evidence Exhibit 5, without objection, the test results indicating that the sample was provided at 2:08 a.m. and indicated that his breath test was .10% of alcohol. Despite Stone's argument that "[t]he only evidence as to [Stone's] arrival time was his testimony that he arrived between 9:30 and 10 p.m." Stone is essentially asking us to reweigh the evidence and re-judge the credibility of the witnesses, which we will not do. (Appellant's Br. p. 7); *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). Based on the State's presentation of evidence, the evidence was sufficient to prove that pursuant to I.C. § 9-30-6-2(c), the chemical breath test was administered within three hours of when Stone operated the vehicle.

CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to convict Stone of operating a vehicle while intoxicated.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.