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FILED
Jun 23 2009, 9:31 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

TYSHAWNA CARPENTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0808-CR-459
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Linda Brown, Judge
Cause No. 49G10-0803-CM-55477

June 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Tyshawna Carpenter appeals her conviction of public intoxication, a Class B misdemeanor.[1] Finding the evidence insufficient, we reverse.

FACTS AND PROCEDURAL HISTORY

On March 9, 2008, Officer Donald Bender responded to a disturbance at Knockout Bar. When he arrived, there were people standing "all over the parking lot." (Tr. at 6.) Officer Bender saw some people walking away, and he stopped them to find out whether they were involved in the disturbance. While he was speaking with a small group of people, Carpenter approached him and told him "this was only being done because they were black." (*Id*. at 9.) Carpenter's speech was slurred. Officer Bender told Carpenter he was trying to identify people and end the disturbance. He told her she would be free to leave once she was identified. However, Carpenter would not provide identification and continued to argue. Carpenter kept moving around, although she was asked to stand still. Officer Bender arrested Carpenter for public intoxication "because of her slurred speech and her inability to cooperate with the officers there." (*Id*.) He did not recall smelling anything that would lead him to believe Carpenter was intoxicated.

Carpenter gave a substantially different account of her encounter with Officer Bender. Carpenter testified she went to the bar with some friends, and they were there less than thirty minutes when a fight broke out. Carpenter testified she never made it to the bar, had nothing to drink that day, and could not drink because she was taking blood pressure medication. Carpenter claimed she and her friends had nothing to do with the fight and decided to leave.

[1] Ind. Code § 7.1-5-1-3.

Carpenter was tried to the bench on July 7, 2008, and the court found her guilty of public intoxication.

DISCUSSION AND DECISION

Carpenter argues the evidence was insufficient because the State introduced no evidence regarding the cause of her alleged intoxication. When reviewing the sufficiency of evidence, we do not reweigh the evidence or judge the credibility of witnesses. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the evidence favorable to the verdict and the reasonable inferences to be drawn therefrom. *Id*. We will affirm if a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id*.

Ind. Code § 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 *caused by the person's use of alcohol or a controlled substance (as defined in IC 35-48-1-9)*." (emphases added). The italicized words were added by Pub. L. No. 213-2001, § 2. Prior to that amendment, we had held "[t]he offense of public intoxication includes two elements: (1) being in a public place (2) in a state of intoxication." *Dennis v. State*, 736 N.E.2d 300, 302 (Ind. Ct. App. 2000), *reh'g denied*. After the 2001 amendment, we reversed a conviction of public intoxication where the defendant's intoxication was caused by sniffing glue, which is not a controlled substance:

> The State concedes that the evidence is insufficient to support Appellant's conviction for public intoxication. Appellant mistakenly was charged under a prior version of Ind. Code § 7.1-5-1-3. The version of the statute in effect at the time of the offense required the person's intoxication to be caused by the person's use of alcohol or a controlled substance as defined

> by Ind. Code § 35-48-1-9. In the present case, the cause of Appellant's intoxication was from sniffing glue. There was no evidence that his intoxication was the result of the use of alcohol or a controlled substance as defined by statute.

Upp v. State, 808 N.E.2d 706, 707 (Ind. Ct. App. 2004).

The State has not identified any evidence Carpenter's alleged intoxication was caused by alcohol or controlled substances, nor does it respond to Carpenter's argument. The State's failure to respond is akin to failing to file a brief; therefore, Carpenter need establish only *prima facie* error. *See Cox v. State*, 780 N.E.2d 1150, 1162 (Ind. Ct. App. 2002). We find no evidence in the record, circumstantial or direct, that alcohol or a controlled substance caused establishing Carpenter's state of intoxication. *Cf., e.g., Rembusch v. State*, 836 N.E.2d 979, 984-85 (Ind. Ct. App. 2005) (affirming conviction of public intoxication where officer smelled odor of alcohol on Rembusch), *trans. denied* 855 N.E.2d 1004 (Ind. 2006). Therefore, we reverse her conviction.

Reversed.

FRIEDLANDER, J., and BRADFORD, J., concur.