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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM KERR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0911-CR-639
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Rebekah Pierson-Treacy, Judge
Cause No. 49F19-0906-CM-056213

JULY 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant William Kerr appeals his conviction for operating a vehicle while intoxicated as a class A misdemeanor.[1] We affirm.

ISSUES

Kerr raises three issues for review, which we restate as:

I. Whether the trial court abused its discretion by admitting statements Kerr made to a police officer;

II. Whether the trial court erred by denying Kerr's motion for involuntary dismissal; and

III. Whether the evidence is sufficient to sustain the conviction.

FACTS

On June 14, 2009, Officer Robert Ferguson of the Indianapolis Metropolitan Police Department was dispatched to the intersection of Shelby Street and Southern Avenue in Indianapolis to investigate a report of a motorcycle accident. Upon arriving at the scene, Officer Ferguson saw that another officer, a fire engine and an ambulance were present. Two men, Kerr and his friend Larry Coin, were sitting on motorcycles parked on the side of the road with their kickstands down. Kerr and Coin's motorcycles were not parked in parking spaces and were blocking an alleyway.

As Officer Ferguson approached Kerr and Coin, he saw that Kerr was swaying back and forth in his seat. Officer Ferguson told Kerr that he was dispatched to the scene on a report of a motorcycle accident and asked Kerr what happened. Kerr stated that he

[1] Ind. Code § 9-30-5-2.

was riding his motorcycle southbound on Shelby Street, and as he attempted to turn onto Southern Avenue, he rode his motorcycle up onto the sidewalk and wrecked it. Kerr also admitted that he had been drinking at a bar. Officer Ferguson asked Kerr if he was injured, and Kerr showed Officer Ferguson a large laceration on his elbow.

As the two talked, Officer Ferguson smelled a strong odor of alcohol on Kerr's breath and person. When Officer Ferguson asked to see Kerr's license, Kerr had difficulty removing his wallet from his back pocket and only succeeded after several attempts. In addition, Kerr's voice was slurred, and his eyes were red, bloodshot and watery. Kerr was so unsteady on his feet that he needed assistance from two firemen to walk over to the ambulance for treatment.

Officer Ferguson noted that Kerr's motorcycle was scratched. Furthermore, either the front handbrake or the clutch had broken off of the handlebars on Kerr's motorcycle, which indicated that the motorcycle was "possibly inoperable." Tr. p. 21.

The State charged Kerr with operating a vehicle while intoxicated. After a bench trial, the trial court found Kerr guilty as charged.

DISCUSSION AND DECISION

I. ADMISSION OF KERR'S ANSWERS TO POLICE QUESTIONS

We observe that questions regarding the admission of evidence are within the sound discretion of the trial court, and we review the court's decision only for an abuse of that discretion. *Laster v. State*, 918 N.E.2d 428, 432 (Ind. Ct. App. 2009). A trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before it, or if the court has misinterpreted the law. *Id.*

Kerr contends that the trial court abused its discretion by allowing Officer Ferguson to testify as to what Kerr told him at the scene. Specifically, Kerr contends that his answers to Officer Ferguson's questions were inadmissible under the Fifth Amendment to the United States Constitution because Officer Ferguson did not advise Kerr of his *Miranda* rights prior to asking him what happened.

In *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that when law enforcement officers question a person who has been "taken into custody or otherwise deprived of his freedom of action in any significant way," the person must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Luna v. State*, 788 N.E.2d 832, 833 (Ind. 2003). Rights under *Miranda* apply only to custodial interrogation. *White v. State*, 772 N.E.2d 408, 412 (Ind. 2002).

Kerr asserts that when Officer Ferguson questioned him, Kerr was both in custody and subject to interrogation. When determining whether a person was in custody or deprived of his or her freedom, "the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Luna*, 788 N.E.2d at 832 (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520 77 L.Ed.2d 1275 (1983) (internal quotation omitted)). A person is deemed to be in custody if a reasonable person in the same circumstances would not feel free to leave. *Gauvin v. State*, 878 N.E.2d 515, 520 (Ind. Ct. App. 2007), *transfer denied*.

Whether a person was in custody depends on objective circumstances, not upon the subjective views of the interrogating officers or the subject being questioned. *Id.*

In *State v. Hicks*, 882 N.E.2d 238, 239 (Ind. Ct. App. 2008), an officer was dispatched to the scene of a vehicle stopped on railroad tracks. Several people were standing near the vehicle, which was unoccupied. *Id.* at 240. The officer spoke with several persons, who stated that they did not know who had driven the vehicle. *Id.* Hicks, who was also present, accused one of the other persons of driving the truck. *Id.* The officer noticed that Hicks smelled of alcohol and had slurred speech, bloodshot eyes, and unsteady balance. *Id.* The officer asked Hicks a series of questions, and she conceded that she had driven the truck. *Id.* On appeal, the Court concluded that Hicks was not in custody when the officer questioned her. *Id.* at 243. The Court noted that the officer "in no way restrained Hicks' movement or used other coercive tactics, and merely asked her who had been driving the vehicle. Importantly, this questioning took place in a public setting, in front of other individuals." *Id.* at 242.

In this case, when Officer Ferguson approached Kerr, Kerr and a friend were sitting on their motorcycles on a public street. Another police officer, a fire engine, and an ambulance were also present. Officer Ferguson told Kerr he was dispatched to the scene for a motorcycle accident and asked him what happened, at which point Kerr stated that he had been drinking and subsequently wrecked his motorcycle while attempting to make a turn. After ascertaining that Kerr was injured, firemen took Kerr to the ambulance. Under these circumstances, as in *Hicks*, we conclude that Officer Ferguson was not restraining Kerr to a degree associated with a formal arrest, and that a reasonable

person would have felt free to leave, as Kerr did to seek treatment. Thus, Kerr was not in custody for purposes of *Miranda*.

Kerr argues that he was in custody pursuant to the holding in *Johnson v. State*, 269 Ind. 370, 380 N.E.2d 1236, 1240 (Ind. 1978), but that case is distinguishable. In that case, prior to approaching Johnson at his residence, the police were told by witnesses that Johnson had murdered someone and where Johnson could be found. *Id.* at 1240. Our Supreme Court concluded that when three officers approached Johnson on his front porch, they intended to arrest Johnson for murder, so he clearly was not free to leave and was in custody for purposes of *Miranda*. *Id.* By contrast, in Kerr's case Officer Ferguson was simply investigating an accident report and had no reason to believe that Kerr or anyone else had committed a crime when he first spoke to Kerr.[2] Therefore, *Johnson* is inapplicable.

Because we conclude that Kerr was not in custody for purposes of *Miranda*, we do not reach the question of whether Officer Ferguson's questioning of Kerr was an interrogation pursuant to *Miranda*. The trial court did not abuse its discretion by admitting Officer Ferguson's testimony as to what Kerr told him at the scene of the accident.

II. DENIAL OF KERR'S MOTION FOR INVOLUNTARY DISMISSAL

[2] We also note that *Johnson*, to the extent that the decision was based on the officers' subjective intention to arrest Johnson when they approached him, is not in step with our Supreme Court's more recent caselaw, which holds that an officer's subjective intent is irrelevant to determining whether a person is in custody. *See Loving v. State*, 647 N.E.2d 1123, 1125 (Ind. 1995).

Indiana Trial Rule 41(B) governs motions for involuntary dismissal during bench trials. That rule, which applies to criminal trials by way of Indiana Criminal Rule 21,[3] provides, in relevant part:

> 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.

Ind. Trial Rule 41(B).

The grant or denial of a motion to dismiss under Trial Rule 41(B) is reviewed under the clearly erroneous standard. *Thornton-Tomasetti Eng'rs v. Indianapolis-Marion County Public Library*, 851 N.E.2d 1269, 1277 (Ind. Ct. App. 2006). 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. *Id.*

In this case, Kerr contends that the State's case was subject to dismissal because the State failed to present independent evidence of the *corpus delicti* of operating while intoxicated, so his statement to Officer Ferguson was inadmissible.

[3] 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."

A crime may not be proven solely on the basis of a confession. *Light v. State*, 547 N.E.2d 1073, 1080 (Ind. 1989), *reh'g denied*. We require some other proof of the crime, in order to prevent confessions to crimes which never occurred. *Id.* Therefore, in order to support the introduction of a defendant's confession into evidence, the *corpus delicti* of the crime must be established by independent evidence of: (1) the occurrence of the specific kind of injury; and (2) someone's criminal act as the cause of the injury. *Willougby v. State*, 552 N.E.2d 462, 466 (Ind. 1990). The independent evidence need not be shown beyond a reasonable doubt nor demonstrate prima facie proof as to each element of the charged offense, but must support an inference that the crime was committed. *Id.* at 467. The corroborating evidence may be circumstantial.[4] *Id.*

In *Parsons*, 333 N.E.2d at 872, a state trooper was dispatched to investigate an accident and found an automobile parked at an angle across a roadway. Skid marks extended from the rear of the car to a point 100 feet down the road. *Id.* The driver's side car door was open and an odor of alcohol was present. *Id.* Parsons, who also smelled of alcohol, was staggering in front of the car. *Id.* The state trooper asked Parsons if he had been driving the car, and Parsons answered in the affirmative. *Id*. Parsons was convicted of driving under the influence of liquor, among other offenses. *Id*. On appeal, we determined that the State had established the *corpus delicti* for driving under the

[4] We note that Kerr's statement to Officer Ferguson was not a confession but rather an admission. A confession must include all essential elements of the crime, whereas an admission merely admits some fact which tends to connect the defendant with the alleged defense. *Parsons v. State*, 166 Ind. App. 152, 156, 333 N.E.2d 871, 873 (Ind. Ct. App. 1975). Kerr's statement that he had been drinking and then rode his motorcycle did not address all of the elements of the offense of operating while intoxicated as a class A misdemeanor. However, the distinction is immaterial to issues of *corpus delicti* because the *corpus delicti* requirement applies to the introduction of admissions as well as confessions. *See id.*

influence of liquor because Parsons was found in close proximity to the automobile, no one else was present, and a breathalyzer test demonstrated that Parsons was intoxicated. *Id.* at 873.

In this case, when Officer Ferguson arrived at the scene he saw Kerr seated on his motorcycle with the kickstand down. Kerr's motorcycle was on the side of the road. It was not in a parking spot and was blocking an alleyway. In addition, Kerr's motorcycle had scratches on it and either the front handbrake or the clutch had broken off of the motorcycle's handlebars, which rendered the motorcycle "possibly inoperable." Tr. p. 21. As Officer Ferguson approached Kerr, Kerr was swaying back and forth in his seat. Kerr's breath smelled strongly of alcohol, he had difficulty removing his wallet from his back pocket, his eyes were red, bloodshot, and watery, and his voice was slurred. Kerr had a large laceration on his elbow and was unable to walk to an ambulance without assistance. These facts, as in *Parsons*, support an inference that Kerr had ridden his motorcycle while intoxicated and had wrecked his motorcycle, resulting in an injury. Thus, the State presented sufficient facts to establish the *corpus delicti* for operating a vehicle while intoxicated as a class A misdemeanor. We conclude that the trial court's decision to deny Kerr's motion for involuntary dismissal was not clearly erroneous.

III. SUFFICIENCY OF THE EVIDENCE

Our standard of review for sufficiency of the evidence is well settled. We neither reweigh the evidence nor judge the credibility of witnesses. *Whitlow v. State*, 901 N.E.2d 659, 660 (Ind. Ct. App. 2007). Rather, we consider the evidence most favorable to the verdict and draw all reasonable inferences that support the ruling below. *Id.* at 660-661.

We affirm the conviction if there is probative evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.* at 661. It is not necessary that the evidence "overcome every reasonable hypothesis of innocence." *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (*quoting Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995), *reh'g denied*).

To convict Kerr for operating a vehicle while intoxicated as a class A misdemeanor, the State had to establish that Kerr: (1) operated a vehicle; (b) while intoxicated; (c) in a manner that endangered a person. Ind. Code § 9-30-5-2.

Kerr claims that the State failed to prove that Kerr operated his motorcycle. An "operator" is a person who "drives or is in actual control of a motor vehicle upon a highway." Ind. Code § 9-13-2-118(a). Here, Kerr admitted to Officer Ferguson that he was riding his motorcycle down a street when, while attempting to make a turn, he drove his motorcycle up onto a curb and wrecked it. We have already determined that the trial court properly admitted Kerr's statement into evidence. Therefore, the evidence is sufficient to support a conclusion that Kerr operated his motorcycle for the purposes of Indiana Code § 9-30-5-2.

Kerr also contends that the State failed to prove that he operated his motorcycle in a manner that endangered a person. The element of endangerment can be established by evidence showing that the defendant's condition or operating manner could have endangered any person, including the public, the police, or the defendant. *Vanderlinden v. State*, 918 N.E.2d 642, 644 (Ind. Ct. App. 2009), *transfer denied*. Endangerment does not require that a person other than the defendant be in the path of the defendant's vehicle

or in the same area to obtain a conviction. *Id.* at 644-645. By definition, Indiana Code § 9-30-5-2 requires more than intoxication to prove endangerment. *Id.* at 645.

In this case, Kerr sustained a large laceration to his elbow from wrecking his motorcycle. In fact, medics transported Kerr to the hospital for treatment. Kerr's injury is sufficient to prove that Kerr operated his motorcycle in a manner that endangered a person, specifically himself.

The evidence is sufficient to sustain Kerr's conviction.

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

DARDEN, J., and BARNES, J., concur.