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**IN THE
COURT OF APPEALS OF INDIANA**

MARVIN M. WILLIS,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 82A05-1012-CR-807

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-1007-FD-688

July 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Following a jury trial, Marvin M. Willis appeals his conviction of operating a vehicle while intoxicated, as enhanced to a Class D felony. For our review, Willis raises the following issue: whether his conviction of operating a vehicle while intoxicated is supported by sufficient evidence. Concluding the evidence is sufficient, we affirm.

Facts and Procedural History

On July 6, 2010, at approximately 10:00 p.m., Evansville Police Department Officer Casey Ross observed Willis driving his car on Kentucky Avenue in Vanderburgh County, Indiana. Officer Ross recognized Willis as someone whose driver's license was suspended. Therefore, the officer activated his police car's emergency lights and siren and attempted to stop Willis's vehicle. Willis continued driving his car approximately 150 yards before stopping and parking at his home. Upon stopping, Willis attempted to exit the vehicle despite the officer's instructions to the contrary. After Officer Ross confirmed that Willis was driving without a license, he ordered Willis to get out of the car. At trial, Officer Ross testified that when Willis got out of the car, Willis smelled of alcohol, had an unsteady balance, and was mumbling under his breath. The officer searched Willis and found marijuana in his pants pocket.

Officer Ross also testified that Willis failed three standardized field sobriety tests: the horizontal gaze nystagmus test, the one-leg stand test, and the nine-step walk and turn test. Willis displayed four of the six intoxication clues of the horizontal gaze nystagmus test. Before the count of four during the one-leg stand test, Willis put his foot down and told the officer: "Just take me to jail, man." Transcript at 23. During the nine-step walk and turn test, Willis lost his balance and fell off the line while the officer was explaining

the test to him. Willis refused to take a portable breath blood alcohol level test. In Officer Ross's opinion, based on his training and experience, Willis's appearance, behavior, and failure to pass the sobriety tests indicated that he was intoxicated.

Thereafter, Officer Ross transported Willis to the Vanderburgh County Confinement Center, where Willis was offered a certified chemical breath test which he refused. There, Evansville Police Department Officer Michael Cundiff observed Willis's appearance and behavior and opined that Willis was under the influence of an intoxicant.

On July 8, 2010, the State charged Willis with operating a vehicle while intoxicated as a Class C misdemeanor, possession of marijuana as a Class A misdemeanor, and driving while suspended as a Class A misdemeanor. The State also filed an enhancement to the operating while intoxicated charge alleging Willis had a prior conviction of operating a vehicle while intoxicated. A jury found Willis guilty of all charges including the Class D felony enhancement. On November 17, 2010, the trial court imposed an aggregate two-year sentence on Willis for his convictions. Willis now appeals.

Discussion and Decision

I. Standard of Review

When considering a claim of insufficient evidence to support a criminal conviction, we neither reweigh the evidence nor judge witness credibility. Joslyn v. State, 942 N.E.2d 809, 811 (Ind. 2011).

[A]ppellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. . . . To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the

elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, citations, and emphasis omitted).

II. Sufficiency of the Evidence

Willis was charged with and convicted of operating a vehicle while intoxicated as a Class C misdemeanor pursuant to Indiana Code section 9-30-5-2(a): “Except as provided in subsection (b), a person who operates a vehicle while intoxicated commits a Class C misdemeanor.”¹

Contrary to Willis’s contention, in order to prove this charge, the State is not required to show that Willis operated his vehicle in a manner that endangered a person. The State would have to do so if Willis had been charged pursuant to Indiana Code section 9-30-5-2(b): “An offense described in subsection (a) is a Class A misdemeanor if the person operates a vehicle in a manner that endangers a person.” Therefore, the fact that Officer Ross testified Willis was not speeding or driving erratically, though relevant to proving the Class A misdemeanor defined in Indiana Code section 9-30-5-2(b), does not in itself fail to prove the Class C misdemeanor defined in Indiana Code section 9-30-5-2(a).

However, the State is required to show that Willis was intoxicated by proving he was:

under the influence of:

¹ The charge was elevated to a Class D felony pursuant to Indiana Code section 9-30-5-3(a)(1) because the jury found Willis had a previous conviction of operating while intoxicated within five years of his violation.

- (1) alcohol;
 - (2) a controlled substance (as defined in [Ind. Code §] 35-48-1);
 - (3) a drug other than alcohol or a controlled substance;
 - (4) a substance described in [Ind. Code §] 35-46-6-2 [toxic vapors] or [Ind. Code §] 35-46-6-3 [nitrous oxide]; or
 - (5) a combination of substances described in subdivisions (1) through (4);
- so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties.

Ind. Code § 9-13-2-86 (defining "intoxicated"). Thus, the State must show that Willis was under the influence of one or more of the substances described in subdivisions (1) through (4) of Indiana Code section 9-13-2-86 so that Willis's thoughts and actions were impaired and he lost normal control of his faculties.

Willis refused to submit to a portable breath test and later to a certified chemical breath test. However, proof of blood alcohol content is not required to establish intoxication for purposes of operating a vehicle while intoxicated. Gatewood v. State, 921 N.E.2d 45, 48 (Ind. Ct. App. 2010). Instead, proof of intoxication may be established by showing the defendant was impaired. Id. Thus, the State may offer evidence of: "(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; [and] (7) slurred speech." Id. (citation omitted).

To show that he was not impaired, Willis notes Officer Ross's testimony that his driving was not erratic and argues his cleft palate was the reason for some of his slurred speech. In Gatewood, this court held there was insufficient evidence of intoxication

where a defendant who stumbled after getting off his moped had recently undergone back surgery and had several medical conditions that affected his walking and there was testimony his driving was normal. Id. at 50. It is possible that Willis's cleft palate was the only reason for his slurred speech, which would negate this clue to Willis's impairment. Furthermore, as in the case of the defendant in Gatewood, Willis's driving was not erratic. However, unlike the circumstances in Gatewood, the instant case presents other factors that support a finding that Willis was impaired.

The evidence most favorable to the conviction indicates that after Officer Ross stopped Willis, Willis got out of the car and the officer noticed his unsteady balance and detected an odor of alcohol emanating from him, which can be evidence of impairment. Id. at 48. The officer searched Willis and discovered in his pants pocket a substance that contained marijuana, as confirmed by a subsequent chemical analysis. Thus, Willis may have been under the influence of drugs. In addition, Willis failed three standardized field sobriety tests, which is additional evidence Willis was impaired. Finally, after Willis was arrested and transported to jail, the officer who offered Willis a certified chemical test for blood alcohol content also testified that Willis's appearance and behavior indicated he was under the influence of an intoxicant.

Willis does not provide any explanation as to why he had unsteady balance, smelled of alcohol, and failed the field sobriety tests. Pursuant to Gatewood, had Willis shown that physical impairments were the reason why he failed the standardized sobriety tests, he could have negated the probative value of the tests. Gatewood, 921 N.E.2d at 50. However, the record is devoid of evidence showing that Willis had any other physical conditions except the cleft palate. Moreover, Willis seemed to have indicated

that he had no good reason for failing the tests by telling Officer Ross to take him to jail when he could not perform the one-leg stand test.

In Vanderlinden v. State, 918 N.E.2d 642 (Ind. Ct. App. 2009), trans. denied, this court held there was sufficient evidence of intoxication when a defendant had red eyes, smelled of alcohol, and failed the horizontal gaze nystagmus field sobriety test. Id. at 644. There was no evidence that Willis's eyes were red; however, Willis smelled of alcohol, and failed not only the horizontal gaze nystagmus test, but also two other standardized field sobriety tests: the one-leg stand test and the nine-step walk and turn test. At trial, Officer Ross, who administered the tests, testified to his training and experience in order to establish the "evidentiary foundation required for the admission of field sobriety tests." Smith v. State, 751 N.E.2d 280, 282 (Ind. Ct. App. 2001). The failure of the three standardized field sobriety tests without evidence on the record providing a reasonable alternative explanation as to why Willis failed the tests together with testimony that Willis smelled of alcohol and had unsteady balance is sufficient to determine that Willis was intoxicated. In view of the evidence presented and reasonable inferences drawn from the evidence, a reasonable jury, weighing the evidence the officers presented that Willis was intoxicated against Willis's evidence to the contrary, could have found beyond a reasonable doubt that Willis was impaired. Though we are presented with some conflicting evidence we cannot reweigh it. Joslyn, 942 N.E.2d at 811. We conclude the State presented sufficient evidence that Willis operated his vehicle

while intoxicated.

Conclusion

The evidence was sufficient to support Willis's conviction, which is accordingly affirmed.

Affirmed.

NAJAM, J., and CRONE, J., concur.