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IN THE
COURT OF APPEALS OF INDIANA

ALFREDO TORRES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0901-CR-42
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Evan D. Goodman, Senior Judge
Cause No. 49F10-0809-CM-213149

July 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Alfredo Torres was convicted after a bench trial of operating a vehicle while intoxicated[1] as a Class A misdemeanor and public intoxication[2] as a Class B misdemeanor and was sentenced to 365 days and 180 days, respectively. The trial court ordered the sentences to be served concurrently with all time suspended except for time served. Torres appeals, raising the following restated issues:

I. Whether sufficient evidence was presented to support his convictions for operating a vehicle while intoxicated and public intoxication; and

II. Whether his convictions for both operating a vehicle while intoxicated and public intoxication constituted a violation of Article 1, Section 14 of the Indiana Constitution, which is the prohibition against Double Jeopardy.

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

FACTS AND PROCEDURAL HISTORY

In the early afternoon hours of September 12, 2008, Teresa Veatch was driving her vehicle on Rockville Road in Indianapolis, Indiana. As she was waiting in the turn lane to go left onto Country Club Road, another car, which was traveling straight in the lane to the right of her, suddenly turned left in front of her, almost hitting her vehicle. Veatch then turned onto Country Club Road and followed the other car, the driver of which was later identified as Torres. While following Torres, Veatch observed him swerve, stop in the middle of the road, swerve almost off of the road and nearly hit a bridge, and then swerve back onto the road, causing other drivers to almost hit him. Torres's car traveled at speeds ranging between five and twenty miles per hour and occasionally stopped for no

[1] *See* Ind. Code § 9-30-5-2(b).

[2] *See* Ind. Code § 7.1-5-1-3.

reason. Torres's erratic driving scared Veatch, and she called 911 to report it. She followed Torres until he was stopped by the police, and she gave the police the license plate number she had written down of the car she had seen driving erratically. Veatch observed the police remove Torres from his car and was able to identify him at trial.

Indianapolis Metropolitan Police Officer Kevin Brown heard the dispatches regarding the erratic driving of Torres's car, and when Torres's car approached Officer Brown's location, he observed another police vehicle attempting to stop Torres. Officer Brown activated his lights and siren when he observed Torres's car turn left through a red light. Torres then stopped, and the officers approached the car. The officers observed Torres sitting in the driver's seat, holding the steering wheel, and staring straight ahead, which Officer Brown considered unusual behavior. The officers ordered Torres to exit the vehicle first in English, and when Torres did not comply, Officer Brown, who only knew limited Spanish, told Torres, "abre la puerta," meaning that Torres should open his car door. *Tr*. at 20. When Torres failed to exit the car, the officers physically removed him. Once out of the car, Torres had difficulty standing on his own, so the officers had to hold him up alongside the car in order to handcuff him. Torres was also slurring his words as he spoke in Spanish, so that the officers could not understand him when he stated his name. He had bloodshot eyes, and his clothes were "very messy." *Id*. at 22. Based on these observations, Officer Brown believed that Torres was impaired. The officers administered a portable breath test on Torres, which showed a .00 blood alcohol level. However, based on the officers' observations of Torres, he was arrested at the scene.

The State charged Torres with operating a vehicle while intoxicated as a Class A misdemeanor and public intoxication as a Class B misdemeanor. A bench trial was held, and at the conclusion, the trial court found Torres guilty of both charges. Torres was sentenced to 365 days for his operating a vehicle while intoxicated conviction and 180 days for his public intoxication conviction. The sentences were ordered to run concurrently with all time suspended except for the time previously served. Torres now appeals.

DISCUSSION AND DECISION

I. Sufficient Evidence

Our standard of review for sufficiency claims is well settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Williams v. State*, 873 N.E.2d 144, 147 (Ind. Ct. App. 2007). We will consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. *Id*.; *Robinson v. State*, 835 N.E.2d 518, 523 (Ind. Ct. App. 2005). We will affirm the conviction if sufficient probative evidence exists from which the fact finder could find the defendant guilty beyond a reasonable doubt. *Williams*, 873 N.E.2d at 147; *Robinson*, 835 N.E.2d at 523. When a conviction is based on circumstantial evidence, we will not disturb the verdict if the trier of fact could reasonably infer that the defendant is guilty beyond a reasonable doubt from the evidence presented. *Pickens v. State*, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001). The circumstantial evidence need not overcome every reasonable hypothesis of innocence; the evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id*.

Torres argues that the State failed to present sufficient evidence to support his convictions for operating a vehicle while intoxicated and public intoxication. He specifically contends that the evidence presented was not sufficient to prove that he was intoxicated because the evidence did not establish that Torres had consumed any alcohol or any substance whatsoever that would lead to his impairment. He also claims that the only evidence presented to support his convictions was the testimony of Officer Brown and that no evidence indicated that the officer was qualified to make an opinion as to Torres's intoxication.

In order to convict Torres of operating a vehicle while intoxicated as a Class A misdemeanor, the State was required to prove that he operated a vehicle while intoxicated in a manner that endangered a person. Ind. Code § 9-30-5-2. In order to convict Torres of public intoxication as a Class B misdemeanor, the State was required to prove that he was in a public place or place of public resort in a state of intoxication caused by his use of alcohol or a controlled substance. Ind. Code § 7.1-5-1-3.

> Intoxicated means under the influence of:
>
> (1) alcohol;
> (2) a controlled substance . . .;
> (3) a drug other than alcohol or a controlled substance;
> (4) a substance described in IC 35-46-6-2 or IC 35-46-6-3; 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. Proof of intoxication may be established by a showing of impairment, and there is no statutory requirement of proof of a particular blood alcohol

content above which a person is intoxicated. *Monjar v. State*, 876 N.E.2d 792, 798 (Ind. Ct. App. 2007), *trans. denied* (2008). Evidence of the following factors can establish impairment: (1) the consumption of significant quantities 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*.

Here, the evidence presented showed that Torres was observed driving in an erratic and dangerous fashion by Veatch. As Officer Brown responded to dispatches regarding Torres's driving, he observed Torres turn left on a red light in front of another officer's car. When the officers were able to stop Torres, he failed to respond to instructions in both English and Spanish to exit his car. The officers had to physically remove Torres from his car and had to support him against the car because he was unable to stand on his own. Torres was slurring his words in Spanish, his eyes were bloodshot, and his clothes were "very messy." *Tr*. at 22. We conclude that the evidence presented was sufficient to prove that Torres was intoxicated.

Torres also contends that the evidence was insufficient because the State failed to show that the officers offered him an opportunity to submit to a chemical test. We disagree. Torres was convicted of operating a vehicle while intoxicated and public intoxication and not of operating a vehicle with certain blood alcohol content. Therefore, his convictions did not require any proof of a specific blood alcohol content, and the opportunity to submit to a chemical test would not have any bearing on the evidence presented establishing his intoxication. Sufficient evidence was presented to support his convictions for operating a vehicle while intoxicated and public intoxication.

II. Double Jeopardy

Torres argues that his convictions and sentences for both operating a vehicle while intoxicated and public intoxication violate Indiana's prohibition against double jeopardy because there was a reasonable probability that the same evidence was used to prove both offenses. The State concedes that Torres may be entitled to a limited remand with instructions to vacate his public intoxication conviction and resulting sentence. We agree.

Article 1, section 14 of the Indiana Constitution states that "[n]o person shall be put in jeopardy twice for the same offense." "Two or more offenses are the 'same offense,' if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one charged offense also establish the essential elements of another charged offense." *Moore v. State*, 869 N.E.2d 489, 493 (Ind. Ct. App. 2007). Under the actual evidence test, we examine the actual evidence presented at trial to determine whether each challenged offense was established by separate and distinct facts. *Curry v. State*, 740 N.E.2d 162, 166 (Ind. Ct. App. 2000), *trans. denied* (2001). To prove a violation, a defendant must show "'a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.'" *Smith v. State*, 872 N.E.2d 169, 176 (Ind. Ct. App. 2007), *trans. denied* (quoting *Richardson v. State*, 717 N.E.2d 32, 53 (Ind. 1999)). Double jeopardy is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements

of a second offense. *Id*. (citing *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. Ct. App. 2002)).

Here, the evidence presented established that both Veatch and Officer Brown observed Torres operating his car on a public road in an erratic and dangerous manner. When Officer Brown removed Torres from the car, he found him to be in an intoxicated state. Therefore, there is a reasonable probability that the trial court used the evidence that Torres was operating a vehicle on a public road to establish Torres's convictions for operating a vehicle while intoxicated and public intoxication. *See Smith v. State*, 725 N.E.2d 160, 162 (Ind. Ct. App. 2000) (finding there was reasonable probability that trial court used same evidentiary facts to establish convictions for operating vehicle while intoxicated and public intoxication). We therefore remand to the trial court with instructions to vacate Torres's conviction and sentence for public intoxication.

Affirmed in part, reversed in part, and remanded.

MATHIAS, J., concurs.

RILEY, J., dissents with separate opinion.

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	)	
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

RILEY, Judge, dissenting with separate opinion.

I respectfully dissent from the majority's decision to affirm Torres's convictions for operating a vehicle while intoxicated as a Class A misdemeanor and public intoxication as a Class B misdemeanor.

As pointed out by the majority, evidence of impairment may be established by several factors: (1) the consumption of significant quantities 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. *Monjar v. State*, 876 N.E.2d 792, 798 (Ind. Ct. App. 2007), *trans. denied*. Where the impairment is due to the use of a controlled substance, the same tests are applicable. *Perkins v. State*, 812 N.E.2d 836, 841 (Ind. Ct. App. 2004). Here, however, hardly any of these factors is sustained by evidence.

Officer Brown testified that Torres's eyes were bloodshot and his clothes were messy. On the other hand, a portable breath test showed a .00 blood alcohol level and there is no evidence of an alcoholic odor on Torres's breath. While Officer Brown stated that the officers on the scene had to hold Torres up in order to handcuff him, the Officer admitted that he did not know whether Torres was unable to stand, unwilling to stand, or merely being passive. Moreover, there is no evidence before us that indicates that Torres was under the influence of a controlled substance or any other drug. *See* I.C. 9-13-2-86. In light of this evidence, I must conclude that the State failed to present sufficient evidence to support Torres's convictions for operating a vehicle while intoxicated and public intoxication beyond a reasonable doubt. Therefore, I would reverse the trial court.