



Appellant-defendant Edward D. Roberts appeals his conviction for Operating a Vehicle with Alcohol Content Greater than .15 Grams of Alcohol per 210 Liters of Breath,<sup>1</sup> a class A misdemeanor, challenging the sufficiency of the evidence. Roberts argues that his conviction must be set aside because the State failed to prove beyond a reasonable doubt that he was the driver or “operator” of the vehicle. Appellant’s Br. p. 6. Finding the evidence sufficient, we affirm the judgment of the trial court.

### FACTS

On March 21, 2008, Roberts and several of his co-workers stopped at a Sunoco gas station in Greenfield. At some point, a gas station attendant contacted the Greenfield Police Department and reported a possible impaired driver who was pumping gas into a van. When the officers arrived at the scene, they noticed that Roberts was operating the gas pump. When the officers approached Roberts, they noticed that his speech was slurred and his eyes were bloodshot and glassy. Roberts also had a circular “sway” while standing. Tr. p. 6. On two occasions, the officers asked Roberts if he was the driver of the vehicle. Both times, Roberts admitted that he was. These admissions were recorded on the police “docucam.” Id. at 17-18.

Roberts was arrested and transported to the Greenfield Police Department. Roberts was administered a breath test that revealed a blood alcohol content of .15. After the test, Roberts contradicted his earlier admissions and told the officers that he had not been drinking. Roberts also denied that he was driver of the van.

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<sup>1</sup> Ind. Code § 9-30-5-1(b).

The State filed a two-part information charging Roberts with Count I, operating a vehicle while intoxicated in a manner that endangers a person in violation of Indiana Code section 9-30-5-2, and Count II, operating with .15 grams or more of alcohol per 210 liters of breath in violation of Indiana Code section 9-30-5-1.

At a bench trial that commenced on January 7, 2009, Roberts's co-worker, Bounthack Khamphasy, testified that he had driven the van to the Sunoco station. Tr. p. 22-26. Khamphasy acknowledged that he was Roberts's friend, that Roberts was his "team leader" at work, and he did not want Roberts to "get into trouble." *Id.* at 26. When Khamphasy was asked on cross-examination why he did not tell the arresting officers that he was the driver, Khamphasy responded that no one had asked him. Roberts stipulated at trial that he was intoxicated when the officers arrested him on March 21, 2008, and that the Datamaster breathalyzer results indicated that he had a .15 BAC.

Following the presentation of the evidence, Roberts was found not guilty on Count I, but guilty of the offense charged in Count II. Thereafter, the trial court sentenced Roberts to 365 days of incarceration in the Hendricks County Jail. Roberts now appeals.

#### DISCUSSION AND DECISION

Our standard of review for sufficiency of the evidence claims is well settled. We neither reweigh the evidence nor judge the credibility of witnesses. *Hand v. State*, 863 N.E.2d 386, 391 (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.* We will affirm the conviction if there is substantial evidence of probative value from which a

reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id. It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. Jones v. State, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998). And fact-finder is free to believe or disbelieve witnesses as it sees fit. McClendon v. State, 671 N.E.2d 486, 488 (Ind. Ct. App. 1996). Finally, we note that circumstantial evidence is sufficient for a conviction if inferences may reasonably be drawn that allowed the fact-finder to find the defendant guilty beyond a reasonable doubt. Pierce v. State, 761 N.E.2d 821, 826 (Ind. 2002).

To sustain a conviction under Indiana Code section 9-30-5-1(b), the State must prove that the defendant (1) operated a motor vehicle; (2) with an alcohol concentration equivalent to at least .15 grams of alcohol; (3) per 210 liters of the person's breath.

As noted above, Roberts argues that the State failed to prove beyond a reasonable doubt that he was the operator of the vehicle when the police officers approached him at the Sunoco. Although there is no statutory definition of "operate," Indiana Code section 9-13-2-118 defines an operator of a vehicle as a "person, other than a chauffeur or a public passenger chauffeur, who: (1) drives or is in actual physical control of a motor vehicle upon a highway; or (2) is exercising control over or steering a motor vehicle being towed by a motor vehicle."

At trial, the State established that Roberts was standing next to his company van and pumping gasoline into it. The keys were in the vehicle's ignition and Roberts twice admitted to the police officers that he was the driver. Tr. p. 5-9. This evidence was sufficient to establish that Roberts was the operator of the vehicle. See Regan v. State,

590 N.E.2d 640, 645 (Ind. Ct. App. 1992) (upholding the defendant's conviction for operating a vehicle while intoxicated when the defendant, whose blood alcohol content was .15, admitted that he was operating the vehicle, drove it off the road, and empty beer cans were found in the vehicle).

Although Roberts contradicted his earlier admission to the police officers that he had been driving the van, he did so after the police officers had administered the breathalyzer test to him and had informed him of his Miranda rights. Tr. p. 11. Although Roberts also told the police officers at that time that he had not been drinking alcohol, he stipulated at trial that he had been drinking and was intoxicated. Id. at 708. And while Khamphasy testified at trial that he was the driver, he did not convey that information to the police officers at the scene. Tr. p. 26.

When considering this evidence, it is apparent that the trial court determined that Khamphasy's testimony and Roberts's contradictory statements were not credible. Hence, the trial court was entitled to believe Roberts's statements to the police officers at the scene that he was the driver. Because it is the function of the fact finder to resolve conflicts in the testimony, Jones, 701 N.E.2d at 867, we decline to disturb the trial court's determination. In essence, Roberts's argument is merely a request for this court to reweigh the evidence, which we will not do. See Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003).

Notwithstanding the above, Roberts maintains that his conviction must be reversed in light of the trial court's decision to acquit him on Count I, which involved the operation of a motor vehicle that endangered a person. As a result of that acquittal,

Roberts argues that the trial court necessarily believed that Roberts was “simply a passenger” and that he was not operating the vehicle because of Khamphasy’s testimony that he was the driver. Appellant’s Br. p. 10-12. However, even though the trial court found Roberts not guilty on Count I, it may very well have determined that Roberts was not operating the vehicle in a manner that “endangered a person” as is required under Indiana Code section 9-30-5-2. As a result, Roberts’s claim fails, and we conclude that the evidence was sufficient to support his conviction for operating a vehicle with alcohol content greater than .15 grams of alcohol per 210 liters of breath.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and RILEY, J., concur.