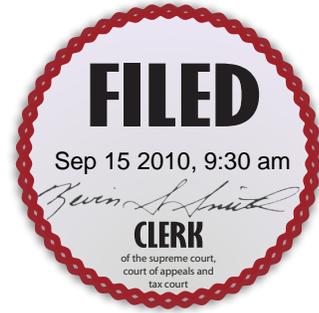


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LUSAKO G. MUSOPOLE,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 71A03-1002-CR-71

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0904-FD-337

September 15, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Lusako Musopole (“Musopole”) was convicted in St. Joseph Superior Court of Class D felony operating a vehicle while intoxicated. He appeals and argues that the evidence is insufficient to support his conviction.

We affirm.

Facts and Procedural History

On February 25, 2009, at approximately 2:15 p.m., St. Joseph County Police Officer Steven Shively was dispatched to a one-car accident at the intersection of Inwood and Ireland Roads in St. Joseph County. When he arrived on the scene, Officer Shively observed a blue Chevrolet Blazer with a flat tire parked on the side of the road. Musopole was the only individual present at the scene, and the officer noted that Musopole smelled of alcohol.

Musopole told Officer Shively that he had been driving the vehicle, but was not injured. Tr. p. 88. Officer Lonnie Foresman (“Officer Foresman”) arrived on the scene shortly thereafter and further questioned Musopole about the accident. Musopole became angry with the officer for questioning him about the accident. However, he agreed to take a chemical test. Tr. p. 111. Musopole was handcuffed for officer safety and placed in Officer Foresman’s squad car. Musopole’s wife, Joyce, then returned to the accident scene with a spare tire, and she was accompanied by her sister.

Musopole was taken to the St. Joseph County Jail, and a Datamaster breath test was administered to him. His “breath alcohol concentration was determined to be .30 grams of alcohol per 210 liters in his breath.” Tr. p. 113. Musopole was subsequently charged with Class C misdemeanor operating a vehicle while intoxicated and Class D

felony operating while intoxicated because he had a prior operating while intoxicated conviction.

A two-day jury trial commenced on November 5, 2009. At trial, Musopole testified that he is from Malawi and English is not his primary language. Both Musopole and Joyce Musopole testified that Joyce was driving the vehicle on the date of the accident. Tr. pp. 166, 186-87. Joyce explained that the accident occurred when the vehicle slid on the icy roadway, nearly hitting another vehicle, and then hit a tree. Tr. p. 151. She stated that Musopole pushed the vehicle out of the ditch and that she parked it on the side of the road. Joyce then testified that she called her sister for help and that her sister took her to get a spare tire. Officer Shively testified that the damage to the vehicle and the “yaw marks” on the roadway were not consistent with the Musopoles’ explanation of how the accident occurred. Tr. pp. 90, 92, 98-99. Further, the officer testified that the road conditions were dry on the date of the accident. Tr. p. 87.

The jury found Musopole guilty as charged. The sentencing hearing was held on December 8, 2009. For his Class D felony operating while intoxicated conviction, Musopole was ordered to serve eighteen months incarceration with sixteen months suspended, and Musopole was placed on probation for eighteen months. Musopole now appeals.

Discussion and Decision

Musopole argues that the evidence is insufficient to sustain his conviction for Class D felony operating while intoxicated. When we consider a challenge to the sufficiency of evidence to support a conviction, we respect the jury’s exclusive province

to weigh the evidence, and therefore, neither reweigh the evidence nor judge witness credibility. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the conviction, and “must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” Id. at 126 (quoting Tobar v. State, 740 N.E.2d 109, 111-12 (Ind. 2000)).

To convict Musopole of Class D felony operating a vehicle while intoxicated, the State was required to prove that Musopole operated a vehicle while intoxicated and had “a previous conviction of operating while intoxicated that occurred within the five (5) years immediately preceding” the current charged offense. See Ind. Code §§ 9-30-5-2(a), -3(a) (2004); Appellant’s App. pp. 4-5. Musopole does not dispute his prior 2007 operating while intoxicated conviction that elevated his offense to a Class D felony. However, he does argue that the evidence is insufficient to prove that he was the driver of the vehicle, that he was intoxicated, and/or that he operated the vehicle *while* intoxicated.

At trial, Officer Shively testified that when he arrived on the accident scene, he asked Musopole if he had been driving the vehicle, and Musopole replied that he had been driving. Tr. p. 88. Arguing that this evidence is insufficient to prove that he operated a vehicle, Musopole cites to his own testimony and his wife’s testimony that Joyce had been driving the vehicle. Further, Musopole claims that Officer Shively misunderstood his response to the inquiry because of a language barrier. However, it was within the province of the jury to weigh the credibility of these witnesses, and our court will not reweigh the evidence or the credibility of the witnesses on appeal.

Next, we consider Musopole's argument that the State failed to prove that he was intoxicated. Pursuant to Indiana Code section 9-13-2-86, "'intoxicated' means under the influence of: (1) alcohol; . . . so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties." As Musopole notes in his brief, neither officer testified that Musopole appeared to be intoxicated. Officer Foresman testified that Musopole's speech was not slurred, that he was cooperative at the hospital, and that there were no indications that Musopole was impaired at either the accident scene or the hospital. Tr. pp. 120, 127, 130.

However, both officers testified that they smelled the odor of alcohol on Musopole's breath. For that reason, Officer Foresman transported Musopole to the St. Joseph County Jail to take a certified breathalyzer test. The parties stipulated that Musopole's "breath alcohol concentration was determined to be .30 grams of alcohol per 210 liters in his breath."¹ Tr. p. 113. Both Musopole and his wife testified that he had been drinking alcoholic beverages the night prior to the accident. Tr. pp. 165, 184. Further, Musopole's wife stated that Musopole "seem[ed] a little intoxicated" on the date of the accident. Id.; see also tr. p. 170.

Also, the single-car accident occurred on a dry, clear day. While attempting to negotiate a left-hand turn at a T-intersection, Musopole drove the vehicle in a manner that caused it to skid sideways, which resulted in the vehicle going off the roadway. The vehicle then struck a tree and a large bush. From all of this evidence, the jury could reasonably infer that Musopole's thoughts and actions were impaired such that he was

¹ Curiously, Musopole was not charged under section 9-30-5-1, which provides that "[a] person who operates a vehicle with an alcohol concentration equivalent to at least fifteen-hundredths (0.15) gram of alcohol per: . . . (2) two hundred ten (210) liters of the person's breath; commits a Class A misdemeanor."

unable to negotiate the intersection where the accident occurred. Cf. Minix v. State, 726 N.E.2d 848, 851 (Ind. Ct. App. 2000), trans. denied. Under these facts and circumstances, we conclude that the State presented sufficient evidence to prove that Musopole was intoxicated.

Finally, Musopole claims that the State failed to prove that he operated a vehicle *while* intoxicated. However, the evidence presented at trial established that the accident occurred only ten to fifteen minutes before Officer Shively arrived on the scene. See tr. pp. 153, 193. Musopole's argument to the contrary is merely a request to reweigh the evidence and the credibility of the witnesses, which our court will not do.

For all of these reasons, we conclude that sufficient evidence supports Musopole's Class D felony operating while intoxicated conviction.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.