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IN THE
COURT OF APPEALS OF INDIANA

TROY R. ASHLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A05-0906-CR-347
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Geoffrey Yelton, Judge Pro Tempore
Cause No. 48E01-0812-FD-429

December 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Troy R. Ashley appeals his conviction for operating while intoxicated and his adjudication as a habitual substance offender, arguing that the evidence of intoxication is insufficient. We affirm.

The facts most favorable to the verdict indicate that on December 7, 2008, at approximately 2:20 a.m., Anderson Police Officer Matt Smith was traveling westbound on 25th Street in Anderson, when he observed a car ahead of him, driven by Ashley, traveling at a high rate of speed. Officer Smith observed the car cross the centerline and drift back across its lane, nearly striking the curb. As Officer Smith approached the vehicle, he determined that it was traveling fifty miles an hour in a thirty-five-mile-an-hour zone. Officer Smith watched the vehicle cross the centerline twice and then make a wide right turn, causing the car to cross the centerline again. Officer Smith activated his lights and stopped the vehicle.

Officer Smith approached the driver's side of the car. When Ashley rolled down the window, Officer Smith immediately noticed "the very strong odor of an alcoholic beverage coming from the vehicle and coming from [Ashley's] breath." Tr. at 180. On a scale of one to ten, with one being the lowest and ten being the highest, Officer Smith described the strength of the alcohol smell as a nine. Officer Smith asked Ashley for his driver's license. Ashley responded "in slurred speech" that he did not have one. *Id*. Officer Smith also noticed that Ashley's "eyes were very red and bloodshot, glassy." *Id*. at 181.

Officer Smith asked Ashley to step out of the vehicle. As he exited the vehicle, Ashley "staggered to the side and it appeared his balance was unsteady." *Id*. at 182. Officer Smith handcuffed Ashley and moved him to the back seat of the police vehicle. There,

Officer Smith conducted the horizontal gaze nystagmus field sobriety test. Ashley was seated with his feet outside the car, facing Officer Smith, who held a flashlight above Ashley's face and instructed him to follow Officer Smith's finger "with his eyes, and his eyes only, and to keep his head still." *Id*. at 183. As Officer Smith began to move his finger, Ashley moved his head. Officer Smith stopped the test and repeated the instructions. Officer Smith tried to perform the test again, but Ashley moved his head and stated, "I can't do it, I'm drunk." *Id*. at 185. Officer Smith asked him to try once more. On this third attempt, Ashley did not move his head, Officer Smith completed the test, and Ashley failed. Officer Marty Dulworth arrived to assist and spoke briefly to Ashley. Officer Dulworth perceived a strong odor of alcohol emanating from Ashley and noticed that "his speech was slow and sluggish." *Id*. at 226. Due to the cold weather, Officer Smith decided not to perform further field sobriety tests at the scene.

Officer Smith transported Ashley to the Madison County Jail. Officer Smith wanted to administer two additional field sobriety tests, but Ashley was uncooperative and refused. Officer Smith read Ashley the implied consent law, and Ashley again refused to take any tests. Ashley then urinated in his pants.

On December 11, 2008, the State charged Ashley with Count I, class D felony operating a vehicle as a habitual traffic violator; Count II, class C misdemeanor operating a vehicle while intoxicated; and Count III, class D felony operating a vehicle while intoxicated with a prior conviction. The State later filed an amended information adding Count IV, habitual substance offender. In a trifurcated proceeding, the jury found Ashley guilty as

charged. Because Count II was the predicate offense for Counts III and IV, the trial court entered judgment of conviction only on Counts I, III, and IV.

On appeal, Ashley argues that the evidence is insufficient to support the guilty verdict for class C misdemeanor operating a vehicle while intoxicated, the predicate offense for Counts III and IV.[1] Our standard of review is well settled:

> In reviewing the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. We look only to the probative evidence supporting the verdict and the reasonable inferences therefrom to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. The conviction will stand as long as there is substantial evidence of probative value to support it.

Chissell v. State, 705 N.E.2d 501, 505 (Ind. Ct. App. 1999) (citations omitted), *trans. denied*.

The State was required to prove beyond a reasonable doubt that Ashley operated a motor vehicle while intoxicated. Ind. Code § 9-30-5-2. Specifically, Ashley contends that the State failed to prove that he was intoxicated. "Intoxicated" means being under the influence of alcohol such 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 does not require proof of blood alcohol content; it is sufficient to show that the defendant was impaired. *Ballinger v. State*, 717 N.E.2d 939, 943 (Ind. Ct. App. 1999). Evidence of impairment may include: "(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; (7) slurred speech." *Id*.

[1] Ind. Code § 9-30-5-3; Ind. Code § 35-50-2-10(b).

Here, the evidence most favorable to the jury's verdict reveals that Ashley swerved over the centerline multiple times, was speeding, had bloodshot eyes, reeked of alcohol, exhibited unsteady balance, failed the horizontal gaze nystagmus test, and urinated in his pants. The foregoing facts were sufficient to prove that Ashley was intoxicated such that his ability to operate a vehicle safely was impaired. *See Fields v. State*, 888 N.E.2d 304, 307-08 (Ind. Ct. App. 2008) (concluding that evidence of intoxication was sufficient where defendant smelled of alcohol, his speech was slurred, his eyes were red and watery, he had a dazed look, and he failed three field sobriety tests). Ashley asserts that "the evidence, consisting of the officer's failure to provide field sobriety tests, acknowledgment of the severe weather conditions, having Ashley out of the vehicle exposed to those weather conditions and his failure to administer the portable breathalyzer test, establishes that there was not sufficient evidence[.]" Appellant's Br. at 6. We observe that Officer Smith did not perform additional field sobriety tests because Ashley refused to cooperate. In any event, Ashley's argument is merely an invitation to reweigh the evidence, which we must decline. Accordingly, we conclude that there was sufficient evidence to sustain Ashley's conviction for class C misdemeanor operating while intoxicated. Therefore, we affirm.

Affirmed.

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