

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.



ATTORNEY FOR APPELLANT:

CARA SCHAEFER WIENEKE
Wieneke Law Office, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ERIC W. LAMPKIN,)

Appellant-Defendant,)

vs.)

No. 62A01-0907-CR-345)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE PERRY CIRCUIT COURT
The Honorable Lucy Goffinet, Judge
Cause No. 62C01-0807-FD-650

December 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Eric Lampkin appeals his conviction for operating a vehicle while intoxicated endangering a person as a class D felony.¹ Lampkin raises one issue, which we revise and restate as whether the evidence is sufficient to sustain Lampkin's conviction for operating a vehicle while intoxicated as a class D felony. We affirm.

The facts most favorable to the conviction follow. On June 22, 2008, Indiana Conservation Officer Jeffrey Milner was traveling north on State Road 37, which consisted of one northbound lane, one southbound lane, and a full emergency lane. The traffic on State Road 37 was heavy. Officer Milner looked in his rearview mirror and saw a car that was driven by Lampkin on the shoulder. Lampkin passed the two cars behind Officer Milner, Officer Milner's vehicle, and the five cars in front of Officer Milner before reentering the highway. Officer Milner estimated that the vehicle driven by Lampkin was traveling between eighty and ninety miles per hour. Officer Milner activated his emergency lights and siren.

Lampkin turned onto State Road 62 and eventually stopped in the middle of the road. Lampkin then went another 100 feet and turned into a residence. Officer Milner blocked the driveway with his vehicle and exited his vehicle. Two passengers immediately jumped out of the vehicle driven by Lampkin "as if they were going to take off running." *Id.* at 21. Officer Milner told them to stop and ordered them to put their hands in the air. Both passengers eventually complied.

¹ Ind. Code §§ 9-30-5-2 (2004); 9-30-5-3 (2004) (subsequently amended by Pub. L. No. 126-2008, § 9 (eff. July 1, 2008)).

Officer Milner ordered Lampkin to exit the vehicle. Lampkin had trouble exiting the vehicle. “Once [Lampkin] got out, he kind of threw a leg out, grabbed a hold of the door, pulled himself from the car, and then started walking back towards [Officer Milner’s] vehicle.” Id. at 107. Lampkin took “probably five-six seconds” to exit the vehicle. Id. at 108. Lampkin then “began charging at a decent speed” toward Officer Milner. Id. at 23. Officer Milner ordered Lampkin to stop, and Lampkin eventually complied and stopped at the rear of his vehicle where the other two subjects were located. Lampkin was “kind of stumbling around and actually leaned on the car.” Id.

Officer Milner asked Lampkin “generic questions, name, date of birth, social security number and stuff.” Id. at 25. Lampkin “mumbled a lot,” and his “speech was slurred” and “was hard to understand.” Id. Officer Milner noticed that there was an odor of alcohol coming from the vehicle and there were empty beer cans on the rear floorboard of the car.

Lampkin asked Officer Milner if he could turn off his vehicle’s lights which were still on, and Officer Milner said that would be fine. Lampkin went back to the vehicle, sat down, and tried for “several minutes” to turn the lights off, but he finally exited the vehicle and returned to the rear of the car without turning off the lights. Id. at 29.

Lampkin then stated that he was on private property and “[t]herefore, he could not be operating while intoxicated.” Id. at 30. Officer Milner said, “okay, you’re on private property here now. How many beers have you drank in the five to 10 seconds you’ve been here?” Id. Lampkin said, “Well, obviously none.” Id. Based upon his training and

experience, Officer Milner believed that Lampkin was intoxicated. Officer Milner completed an Affidavit of Probable Cause and testified that it indicated that Lampkin's eyes were bloodshot, Lampkin's balance was displaced and unsteady, and he had a strong odor of an alcoholic beverage.

The State charged Lampkin with: Count I, operating a vehicle while intoxicated endangering a person as a class D felony,² and Count II, driving while suspended as a class A misdemeanor. During the jury trial, the court granted the State's motion to dismiss Count II, driving while suspended. The jury found Lampkin guilty of operating a vehicle while intoxicated endangering a person as a class D felony. The trial court sentenced Lampkin to two years in the Indiana Department of Correction.

The sole issue is whether the evidence is sufficient to sustain Lampkin's conviction for operating a vehicle while intoxicated as a class D felony. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable

² The State filed a notice of intent to seek an enhanced penalty for the offense of operating a vehicle while intoxicated based upon a prior conviction which raised the offense to a class D felony.

hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

The offense of operating a vehicle while intoxicated is governed by Ind. Code § 9-30-5-2, which provides that “a person who operates a vehicle while intoxicated commits a Class C misdemeanor,” but “[a]n offense . . . is a Class A misdemeanor if the person operates a vehicle in a manner that endangers a person.” Ind. Code § 9-30-5-3 provides that “a person who violates section 1 or 2 of this chapter commits a Class D felony if . . . the person has a previous conviction of operating while intoxicated that occurred within the five (5) years immediately preceding the occurrence of the violation of section 1 or 2 of this chapter” Thus, the State was required to prove beyond a reasonable doubt that Lampkin operated a vehicle while intoxicated in a manner that endangered a person and that he had a previous conviction of operating while intoxicated that occurred within the previous five years.

Lampkin argues only that the State failed to prove that he was intoxicated.³ “‘Intoxicated’ means under the influence of . . . alcohol . . . 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 (Supp. 2006). “Intoxication may . . . be established through evidence of consumption of significant amounts of alcohol, impaired attention and

³ During the trial and following Officer Milner’s testimony, the State called Indiana Conservation Officer Ryan Jahn who testified as to his interactions with Lampkin. Following his testimony and outside the presence of the jury, Officer Jahn testified that he had had lunch with other officers who were witnesses for the State. Lampkin moved to strike the testimony of Officer Jahn and to prevent the State from calling its remaining witnesses because Officer Jahn and the other officers had violated the trial court’s order that the witnesses be separated. The trial court granted Lampkin’s motion.

reflexes, watery or bloodshot eyes, an odor of alcohol on the breath, unsteady balance, failed field sobriety tests and slurred speech.” Dunkley v. State, 787 N.E.2d 962, 965 (Ind. Ct. App. 2003) (quoting Mann v. State, 754 N.E.2d 544, 547 (Ind. Ct. App. 2001), trans. denied). Proof of intoxication may be established by showing impairment and it does not require proof of a Blood Alcohol Content (“BAC”) level. Ballinger v. State, 717 N.E.2d 939, 943 (Ind. Ct. App. 1999); Jellison v. State, 656 N.E.2d 532, 535 (Ind. Ct. App. 1995).

Lampkin argues that Officer Milner did not testify that he smelled an odor of alcoholic beverages on Lampkin’s person. Lampkin argues that “because the vehicle did not belong to Lampkin, he was not familiar with the vehicle’s controls and did not know how to turn off the lights.” Appellant’s Brief at 8. Lampkin also argues that Officer Milner “acknowledged that he knew Lampkin worked at a sawmill at that time, and that sawdust can cause red, bloodshot eyes.” Id. Lastly, Lampkin acknowledges that Officer Milner testified that Lampkin slurred his speech but argues that “[i]t seems logical that Officer Milner had a hard time understanding what Lampkin was saying due to the 10 to 12 feet that separated them.” Id. at 9. Lampkin’s arguments are merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Drane, 867 N.E.2d at 146.

Here, the record reveals that Lampkin passed eight vehicles while traveling between eighty and ninety miles per hour on the shoulder in heavy traffic. Lampkin stopped in the middle of the road before traveling another 100 feet and turning into a

residence. Lampkin had trouble exiting the vehicle and, after exiting the vehicle, charged toward Officer Milner. Lampkin stumbled, leaned on the car, and exhibited slurred speech. Officer Milner noticed that there was an odor of alcohol coming from the vehicle and there were empty beer cans on the rear floorboard of the car. Lampkin attempted to turn of the vehicle's lights for "several minutes" but was unable to do so. Transcript at 29. Lampkin stated that he was on private property and "[t]herefore, he could not be operating while intoxicated." Id. at 30. Based upon his training and experience, Officer Milner believed that Lampkin was intoxicated. Officer Milner also completed an Affidavit of Probable Cause, which indicated that Lampkin's eyes were bloodshot, his balance was displaced and unsteady, and he had a strong odor of an alcoholic beverage.

Based upon the record, we cannot say that the inferences made by the jury here were unreasonable. Thus, we conclude that evidence of probative value exists from which the jury could have found Lampkin guilty beyond a reasonable doubt of operating a vehicle while intoxicated as a class D felony. See, e.g., Hall v. State, 174 Ind. App. 334, 336-337, 367 N.E.2d 1103, 1106-1107 (1977) (holding that the evidence was sufficient to sustain the defendant's conviction for driving while under the influence of liquor where witnesses who saw the defendant immediately following the accident believed that she was intoxicated, the defendant's car smelled of alcohol, and her vehicle was "driving very fast" and "out of control"); Broderick v. State, 249 Ind. 476, 479-480, 231 N.E.2d 526, 527-528 (1967) (holding that the jury was warranted in finding that the defendant was intoxicated where two witnesses testified that in their opinion the

defendant was intoxicated, defendant's car smelled of alcohol, defendant weaved from side to side of the road, and defendant's speech was "thick"), cert. denied, 393 U.S. 872, 89 S. Ct. 161 (1968); see also Fought v. State, 898 N.E.2d 447, 451 (Ind. Ct. App. 2008) (holding that the evidence was sufficient to sustain the defendant's conviction for public intoxication where police officers smelled a strong odor of alcohol emanating from the interior of the vehicle and from the defendant's breath, the defendant was uncooperative, unsteady, slurred his speech, and his eyes were red, watery, and bloodshot).

For the foregoing reasons, we affirm Lampkin's conviction for operating a vehicle while intoxicated as a class D felony.

Affirmed.

MATHIAS, J., and BARNES, J., concur.