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IN THE
COURT OF APPEALS OF INDIANA

GREGORY A. HARPENAU,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 62A01-1002-CR-52
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PERRY CIRCUIT COURT
The Honorable Lucy Goffinet, Judge
Cause No. 62C01-0808-FD-759

July 1, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Gregory Harpenau was convicted of Operating a Vehicle While Intoxicated With a Prior Conviction,[1] a class D felony. On appeal, Harpenau argues that the evidence is insufficient to sustain his conviction.

We affirm.

The facts most favorable to the conviction reveal that just before 8:00 p.m. on August 8, 2008, Indiana State Police Squad Sergeant Jon Deer was southbound on State Road 37 toward Tell City when he passed Harpenau driving a truck northbound. Sergeant Deer observed in his rearview mirror that there were two occupants in the bed of Harpenau's truck, which Sergeant Deer knew to be a violation of Indiana's seat belt law. Sergeant Deer immediately turned around and pursued the truck. Based upon the speed and distance it took to catch up to the truck, Sergeant Deer thought it possible that Harpenau was trying to elude him.[2] As he neared the truck, Sergeant Deer observed that the individuals in the bed of the truck had slumped down.

Sergeant Deer caught up with Harpenau as Harpenau waited for traffic to pass so that he could turn left on State Road 145. Once he turned onto S.R. 145, Harpenau pulled his truck to the side of the road. Sergeant Deer approached the truck and made contact with the two individuals in the bed of the truck. He then approached the driver's side window to speak with Harpenau. Sergeant Deer immediately detected a strong odor of alcoholic

[1] Ind. Code Ann. § 9-30-5-2 (West, Westlaw through 2009 1st Special Sess.); I.C. 9-30-5-3(a)(1) (West, Westlaw through 2009 1st Special Sess.).

[2] Sergeant Deer testified that he reach speeds up to 110 m.p.h. in his effort to initiate a traffic stop of Harpenau.

beverage coming from the passenger compartment of the truck. Sergeant Deer also noted that Harpenau had bloodshot eyes and that his speech was slurred. While Harpenau was trying to find his registration, Sergeant Deer noted that Harpenau's dexterity was poor and that he fumbled with the documents. After two to three minutes of waiting for Harpenau to produce his registration, Sergeant Deer told him that he did not need to produce the document.

A second trooper, Heath Carkuff, was called to assist Sergeant Deer. Trooper Carkuff approached Harpenau and also observed that Harpenau had bloodshot eyes and a strong odor of alcoholic beverage on his breath. When asked, Harpenau denied having consumed alcohol. Trooper Carkuff then asked Harpenau to exit the truck. As Harpenau, who is paralyzed, exited the truck into his wheelchair, he lost his balance and fell into the door jamb of the truck. The officers had to manually lift Harpenau and put him in his wheelchair. The officers then placed Harpenau in Trooper Carkuff's vehicle, at which time, Trooper Carkuff then administered the horizontal gaze nystagmus (HGN) test to determine if Harpenau was intoxicated. Trooper Carkuff determined that Harpenau failed the HGN test in that he exhibited all six indicators of intoxication the test is designed to evaluate. Trooper Carkuff was of the opinion Harpenau was intoxicated.

On August 18, 2008, the State charged Harpenau with operating a vehicle while intoxicated as a class D felony. A jury trial was held on December 9, 2009. At the conclusion of the evidence, the jury found Harpenau guilty as charged. On January 19, 2010, the trial court sentenced Harpenau to three years, all suspended to home detention.

Harpenau argues that the evidence is insufficient to support his conviction. I.C. § 9-30-5-2 provides that a person who operates a vehicle while intoxicated in a manner that endangers a person commits a class A misdemeanor. The offense is elevated to a class D felony if the person has been convicted of operating while intoxicated in the five years preceding the commission of the current offense. I.C. § 9-30-5-3. On appeal, Harpenau challenges only the evidence that he was intoxicated.

When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder'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 (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)).

"Intoxicated" is defined by Ind. Code Ann. § 9-13-2-86 (West, Westlaw through 2009 1st Special Sess.) as "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." Proof of intoxication may be established by showing impairment, and it does not require proof of a blood alcohol content level. *Ballinger v. State*, 717 N.E.2d 939 (Ind. Ct. App. 1999). Evidence of the following can establish impairment: (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; and (7)

slurred speech. *Id*. (citing *Jellison v. State*, 656 N.E.2d 532 (Ind. Ct. App. 1995); *Staley v. State*, 633 N.E.2d 314 (Ind. Ct. App. 1994)).

Here, Harpenau exhibited several signs of intoxication and both Sergeant Deer and Trooper Carkuff believed he was intoxicated. Sergeant Deer detected a strong odor of alcoholic beverage when he first approached the passenger compartment of the vehicle. He also observed that Harpenau had bloodshot eyes, poor dexterity, and that he was slow in looking for his vehicle registration. Trooper Carkuff also observed that Harpenau's eyes were bloodshot and he too detected a "very strong" odor of alcoholic beverage on Harpenau's breath. *Transcript* at 57. Both officers observed Harpenau lose his grip and fall as he tried to exit his vehicle into his wheelchair, which both officers believed to be a sign of intoxication. When assisting Harpenau into his wheelchair, both officers again noted a strong, stale odor of alcoholic beverage coming from Harpenau's person and on his breath. Finally, Harpenau failed the HGN test as he exhibited all six indicators of intoxication the test is designed to evaluate. From this evidence, the jury could have reasonably concluded that Harpenau was in an impaired condition of thought and action and had lost normal control of his faculties. Harpenau's attempts to cast some of the signs of intoxication as effects of his physical disability are simply requests that we reweigh the evidence and judge the credibility of the witnesses. This we will not do. *See McHenry v. State*, 820 N.E.2d 124. We therefore conclude that the State's evidence is sufficient to prove beyond a reasonable doubt that Harpenau was intoxicated.

Judgment affirmed.

KIRSCH, J., concurs.

ROBB, J., concurs in result.