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IN THE COURT OF APPEALS OF INDIANA

JAMES E. JENNINGS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 87A01-1002-CR-34
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Keith A. Meier, Judge
Cause No. 87D01-0901-CM-22

July 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

James E. Jennings ("Jennings") appeals his conviction for Operating a Vehicle While Intoxicated, as a Class C misdemeanor.[1] We affirm.

Issues

Jennings presents three issues for review:

I. Whether a fatal variance existed between the charging information and the evidence;
II. Whether the trial court abused its discretion in the admission of evidence; and
III. Whether there is sufficient evidence to support the conviction.

Facts and Procedural History

In January of 2009, Warrick County Sheriff's Deputy Richard Barnett was dispatched to Beaver Creek Apartments to locate an individual having a particular license plate. At the apartment parking lot, Deputy Barnett observed Jennings back up his vehicle about fifteen feet into a parking space. Deputy Barnett exited his vehicle, and approached Jennings' vehicle. When Jennings rolled down his window, Deputy Barnett immediately detected a strong odor of alcohol. Deputy Barnett questioned Jennings as to his residence and his recent whereabouts. Jennings responded that he had been in a bar and apologized for "drinking and driving." (Tr. 57.) Deputy Barnett administered a series of field sobriety tests, each of which Jennings failed. Jennings was also given a breathalyzer, revealing a blood alcohol content of 0.19.

Jennings was charged with Operating a Vehicle While Intoxicated, as a Class A

[1] Ind. Code § 9-30-5-2(a).

misdemeanor,[2] Operating a Vehicle with a BAC of 0.15 or greater, a Class A misdemeanor,[3] and Operating a Vehicle While Intoxicated, as a Class C misdemeanor. At the conclusion of a bench trial conducted on October 23, 2009, Jennings was acquitted of the first two charges and convicted of the latter.[4] He was sentenced to sixty days at the Warrick County Security Center, suspended to probation. He now appeals.

Discussion and Decision

I. Variance

Jennings contends that his conviction must be reversed because the charging information alleged that he committed his offense "on or about January 21, 2009" yet the record indicates that Deputy Barnett testified that the relevant events occurred on "January 12, 2009." (App. 10, Tr. 36.) Jennings argues that the variance is fatal, while the State responds that the discrepancy is likely a transcription error transposing the two numbers corresponding with the day of the month.

A variance is an essential difference between proof and pleading. Reinhardt v. State, 881 N.E.2d 15, 17 (Ind. Ct. App. 2008). In order for a variance to be fatal, it must mislead the defendant in preparing and maintaining his defense or likely place him in second jeopardy for the same offense. Johnson v. State, 734 N.E.2d 530, 531 (Ind. 2000). A failure to prove a material allegation descriptive of the offense is fatal. Mitchem v. State, 685 N.E.2d 671,

[2] Ind. Code § 9-30-5-2(b).
[3] Ind. Code § 9-30-5-1(b).
[4] Ultimately, the trial court did not consider the breathalyzer results to be probative of Jennings' intoxication when he was encountered by Deputy Barnett, because there was no showing by the State that the test had been performed within three hours.

676 (Ind. 1997).

As a general rule, failure to make a specific objection at trial waives any material variance issue. Reinhardt, 881 N.E.2d at 17. Here, Jennings made no objection, possibly because there was no variance in the testimony, but merely a transcription error. Regardless of the reason for the omission, Jennings' failure to lodge an objection has waived his appellate argument regarding a fatal variance.

Waiver notwithstanding, we observe that the claimed variance as to the day of the month was not a variance in a material allegation which the State was required to prove. When time is not an element of the crime, or of the essence of the offense, the State is only required to prove that the offense was committed during the statutory period of limitations; as such, the State is not required to prove the offense occurred on the particular date alleged. Poe v. State, 775 N.E.2d 681, 686 (Ind. Ct. App. 2002), trans. denied.

Here, time is not an element of the crime of driving while intoxicated, and the State alleged that Jennings' crime occurred "on or about" January 21, 2009. (App. 11.) Accordingly, the State was not limited to presenting evidence of events occurring on that particular date. See Neff v. State, 915 N.E.2d 1026, 1032 (Ind. Ct. App. 2009) (observing that time is not "of the essence of the offense" where the State has alleged that an offense occurred "on or about" a given date), trans. denied. There was no fatal variance between the charging information and proof at trial regarding the precise date of Jennings' driving while intoxicated.

II. Admission of Evidence

Jennings claims that the trial court improperly admitted Deputy Barnett's testimony regarding his encounter with Jennings. The admission of evidence is within the sound discretion of the trial court, and we will reverse only upon an abuse of that discretion. Manigault v. State, 881 N.E.2d 679, 684 (Ind. Ct. App. 2008).

Jennings argues that the evidence against him resulted from a detention that violated the Fourth Amendment to the United States Constitution. More specifically, Jennings claims that Deputy Barnett initially lacked reasonable suspicion to conduct an investigatory stop. The State responds that the encounter was initially a consensual encounter and that it evolved into an investigatory stop only after Deputy Barnett had reasonable suspicion that Jennings had committed a crime.

The Fourth Amendment protects citizens against "unreasonable searches and seizures" and this protection extends to a person's automobile, although to a lesser degree than it protects homes. Ammons v. State, 770 N.E.2d 927, 930 (Ind. Ct. App. 2002), trans. denied. There are three levels of police investigation, two of which – an investigatory stop and an arrest or detention – implicate the Fourth Amendment. Overstreet v. State, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), trans. denied. The third, a consensual encounter, does not implicate the protections of the Fourth Amendment. Id.

The Fourth Amendment requires probable cause to justify an arrest or a detention for more than a short period of time. State v. Lefevers, 844 N.E.2d 508, 512 (Ind. Ct. App. 2006) (citing Overstreet, 724 N.E.2d at 663), trans. denied. Probable cause to arrest exists

when the facts and circumstances within the knowledge of the officers are sufficient to warrant a reasonable belief that an offense has been committed and that the person to be arrested has committed it. Id. Second, police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based upon specific and articulable facts, the officer has a reasonable suspicion that criminal activity may be afoot. Id. Limited investigatory stops and seizures on the street can be justified by mere reasonable suspicion. Id. Finally, a casual and brief inquiry of a citizen which involves neither an arrest nor a stop is merely a consensual encounter. Id.

A consensual encounter may escalate into a seizure of a person, which happens only when, by means of physical force or a show of authority, his or her freedom of movement is restrained. Id. at 513 (citing United States v. Mendenhall, 446 U.S. 544, 553 (1980)). In Lefevers, we concluded that the officer who encountered Lefevers did not either "stop" or "seize" her when, of her own volition, Lefevers pulled into a convenience store parking lot and was approached and engaged in conversation by the officer. Id. The officer had not activated his emergency lights and had not summoned Lefevers; nor was there evidence that the officer had displayed a weapon, touched Lefevers, or used a threatening tone of voice. Id.

Likewise, Deputy Barnett did not initiate a traffic stop. Jennings pulled into a parking space of his own volition and Deputy Barnett approached him to speak. Deputy Barnett had not activated his emergency lights. Upon Deputy Barnett's approach, Jennings rolled down his window. At that time, Deputy Barnett detected the strong odor of alcohol, giving him

reasonable suspicion of criminal activity. The encounter up to that point consisted of an approach by Deputy Barnett toward a vehicle voluntarily parked in a public space. The approach and initial contact was consensual, did not implicate the Fourth Amendment, and did not require reasonable suspicion on the part of Deputy Barnett.

Accordingly, we find no violation of Jennings' rights under the Fourth Amendment. Jennings has demonstrated no abuse of discretion in the trial court's decision to admit Deputy Barnett's testimony.

III. Sufficiency of the Evidence

Standard of Review

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and the reasonable inferences supporting the judgment. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). In so doing, we do not assess witness credibility or reweigh the evidence. Id. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

Analysis

To convict Jennings of Driving While Intoxicated, as charged, the State was required to establish that he operated a vehicle while intoxicated. Ind. Code § 9-30-5-2. Jennings does not contest the fact that he was intoxicated. However, he argues that the evidence fails to establish that he "operated" a vehicle.

The word "operate" contemplates effort. Johnson v. State, 518 N.E.2d 1127, 1128

(Ind. Ct. App. 1988). In Hiegel v. State, 538 N.E.2d 265, 268 (Ind. Ct. App. 1989), trans. denied, we held that "[s]howing that the defendant merely started the engine of the vehicle is not sufficient evidence to sustain a conviction for operating a vehicle while intoxicated." Rather, the State must show that the defendant drove, or was in actual physical control of, a motor vehicle. Crawley v. State, 920 N.E.2d 808, 812 (Ind. Ct. App. 2010), trans. denied. Several factors may be examined to determine whether a defendant has "operated" a vehicle: (1) the location of the vehicle when it is discovered; (2) whether the vehicle was moving when it was discovered; (3) any additional evidence indicating that the defendant was observed operating the vehicle before discovery; and (4) the position of the automatic transmission. Id. Additionally, "[a]ny evidence that leads to a reasonable inference should be considered." Hampton v. State, 681 N.E.2d 250, 251 (Ind. Ct. App. 1997).

Here, the State presented a sole witness, Deputy Barnett. The deputy testified that he observed Jennings move his vehicle approximately fifteen feet, backing into a parking space. Deputy Barnett further testified that a strong odor of alcohol emanated from Jennings' vehicle, and Jennings exhibited signs of intoxication such as slurring his words and dropping items. Jennings failed three field sobriety tests and repeatedly apologized to Deputy Barnett for drinking and driving. There is sufficient evidence from which the factfinder could conclude that Jennings operated a vehicle while intoxicated.

Conclusion

There was no fatal variance between the charge asserted and the proof adduced at trial. The trial court did not abuse its discretion in the admission of evidence. Finally, there

is sufficient evidence to support Jennings' conviction of Driving While Intoxicated.

Affirmed.

MAY, J., and BARNES, J., concur.