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IN THE
COURT OF APPEALS OF INDIANA

MANUEL HOPSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0909-CR-869
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Linda E. Brown, Judge
The Honorable Steven J. Rubick, Commissioner
Cause No. 49F10-0903-CM-28844

April 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Manuel Hopson ("Hopson") appeals his convictions for Operating While Intoxicated, as a Class A misdemeanor,[1] Operating While Intoxicated with a BAC of at least .15,[2] a Class A misdemeanor, and Public Intoxication, a Class B misdemeanor,[3] claiming that none of the convictions are supported by sufficient evidence.[4] We reverse the convictions for Operating While Intoxicated and affirm the conviction for Public Intoxication.[5]

Facts and Procedural History

At about 10:00 to 10:30 p.m. on the evening of February 28, 2009, Hopson drove to an Indianapolis apartment complex where his girlfriend lived. He visited with her "about 45 minutes" and drank some alcohol. (Tr. 33.) Around 11:00 p.m., Hopson left the apartment and started his vehicle, but he never moved his vehicle from where he had parked it. Later, Speedway Police Officer Robert Fekkes ("Officer Fekkes") encountered Hopson in his

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[1] Ind. Code § 9-30-5-2(b).

[2] Ind. Code § 9-30-5-1(b)(2).

[3] Ind. Code § 7.1-5-1-3.

[4] He also argues that the same evidence was used to support each of his convictions, in violation of the Double Jeopardy prohibition of the Indiana Constitution. The State concedes that the same evidentiary facts were used by the fact-finder to convict Hopson of each of the three offenses. Nonetheless, any Double Jeopardy concerns are obviated by our reversal of the convictions for operating while intoxicated.

[5] We held oral argument in this case on April 9, 2010, at Oakland City University in Oakland City, Indiana. We thank counsel for their advocacy and extend our appreciation to Oakland City University for hosting the event.

vehicle asleep.[6] An open bottle of gin was on the seat. Officer Fekkes awoke Hopson and administered field sobriety tests, which Hopson failed. Hopson submitted to a breathalyzer, and the test showed that Hopson's alcohol concentration was equivalent to 0.15 gram of alcohol per 210 liters of breath.

On August 14, 2009, Hopson was tried in a bench trial on charges of Operating While Intoxicated, Operating While Intoxicated with a BAC of at least 0.15, and Public Intoxication. He was convicted as charged and given concurrent sentences aggregating to 365 days, with 363 days suspended. He now appeals.

I. 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.

II. Analysis – Operating Offenses

To convict Hopson of operating a vehicle while intoxicated, as a Class A misdemeanor, the State had to show that he "operate[d] a vehicle in a manner that endanger[ed] a person." Ind. Code § 9-30-5-2(b). To convict Hopson of operating a vehicle

[6] Officer Fekkes's testimony did not specify the time of the encounter; Hopson testified that it was "around 11 something." (Tr. 31.)

while intoxicated, with a BAC of .15, the State was required to show that he operated a vehicle with an alcohol concentration "equivalent to at least fifteen-hundredths (0.15) gram of alcohol per two hundred ten (210) liters of the person's breath." Ind. Code § 9-30-5-1(b)(2).

Hopson 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 "to operate" contemplates effort. Johnson v. State, 518 N.E.2d 1127, 1128 (Ind. Ct. App. 1988). Where the defendant has been found asleep inside a car parked in a parking lot with the engine running, this Court has held that the evidence is not sufficient to show the defendant has operated the vehicle. See Mordacq v. State, 585 N.E.2d 22, 24 (Ind. Ct. App. 1992).

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).

Recently, in Dorsett v. State, 921 N.E.2d 529, 530 (Ind. Ct. App. 2010), we found sufficient evidence to support a conviction of Operating While Intoxicated, as a Class C misdemeanor, where the defendant had been found intoxicated inside his vehicle parked in a CVS parking lot.[7] Although we observed "merely starting the engine of the vehicle is not sufficient evidence to sustain a conviction for operating a vehicle while intoxicated," we found that the State had presented circumstantial evidence that Dorsett had operated his vehicle while intoxicated. Id. at 531. Specifically, Dorsett had advised the officer that he had driven to a nearby McDonald's for food and the time-stamp on his receipt indicated a time after which only the drive-up service was available for food purchases. See id.

Here, the State presented a sole witness, Speedway Police Officer Robert Fekkes. Officer Fekkes testified that he "found [Hopson's] vehicle parked in the East side of the intersection on the concrete lot with the defendant behind the wheel asleep with the car in

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[7] However, we held that there was insufficient evidence of endangerment to support the elevation of the offense to a Class A misdemeanor. Dorsett, 921 N.E.2d at 532. In 2001, the Indiana Legislature substantially altered the OWI statutes by redefining intoxication and establishing two separate misdemeanor classes for operating a vehicle while intoxicated. Ind. Code § 9-13-2-86, Ind. Code § 9-30-5-2. The effect was to remove the "endangerment" requirement from the general definition of intoxication and create the new offense of Class C misdemeanor OWI without an endangerment requirement. Vanderlinden v. State, 918 N.E.2d 642, 646 (Ind. Ct. App. 2009), trans. denied. The statutes retained the Class A misdemeanor OWI offense, which requires a showing of endangerment. Id.

Outlaw v. State, 918 N.E.2d 379 (Ind. Ct. App. 2009), trans. pending, involved an intoxicated motorist who was stopped for an improperly illuminated license plate. Reviewing his evidentiary sufficiency challenge to his conviction for OWI as a Class A misdemeanor, we stated, "[b]y definition, the current statute requires more than intoxication to prove endangerment." Id. at 382. In Dorsett, a separate panel of this Court, specifically following Outlaw, held that "the State is required to submit proof of 'endangerment' that goes beyond mere intoxication to obtain a conviction for Class A misdemeanor OWI." 921 N.E.2d at 533. In the absence of such proof, Dorsett's conviction of a Class A misdemeanor was reversed and he stood convicted of the lesser-included offense of OWI as a Class C misdemeanor. See id.

gear and running." (Tr. 7.) (emphasis added.) Officer Fekkes clarified that the actual parking spot was on a concrete part of the sidewalk where vehicles do not "normally" park or drive. (Tr. 12.) He additionally testified that he woke Hopson and directed him to "put the vehicle in gear" and turn it off. (Tr. 8.) (emphasis added.) Officer Fekkes stated that Hopson's vehicle did not move, and further explained: "his foot was on the brake; it was in gear his foot was on the brake." (Tr. 13.)

The testimony indicated that the position of Hopson's vehicle was on a sidewalk (which was not intended for normal parking) within a concrete parking lot that was "not part of the roadway." (Tr. 31.) Hopson was asleep with his vehicle running. The exact position of the transmission is not ascertainable from Officer Fekkes's testimony.[8] His testimony could indicate either that Hopson's non-moving vehicle was parked and incapable of moving or that the transmission was in a gear where movement was possible but for Hopson's foot on the brake while he slept. Officer Fekkes was the sole witness whose testimony was offered to establish the element of "operating." Nonetheless, his testimony is equivocal and internally inconsistent. In such circumstances, we cannot say that a reasonable fact-finder could find the element of operating established beyond a reasonable doubt. See Drane, 867 N.E.2d at 146.

The State argues that, even if the record discloses insufficient evidence to show that

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[8] At oral argument, the State suggested that Officer Fekkes merely "mis-spoke" during his testimony regarding the position of the transmission. Assuming that Officer Fekkes mis-spoke, it was incumbent upon the State, as the party having the burden of proving the alleged criminal offenses, to elicit testimony such that Officer Fekkes could correct or clarify his testimony as necessary.

Hopson was "operating" his vehicle when Officer Fekkes found him asleep, it discloses sufficient evidence to establish Hopson's earlier operation of the vehicle while intoxicated. The State maintains that Hopson must have driven to his girlfriend's apartment while intoxicated because he had a BAC of 0.15 less than two hours after, according to Hopson's own testimony, he arrived at the apartment. While we might speculate that this is so, there is no evidence in the record regarding the length of time or amount of alcohol consumption necessary to attain a BAC of 0.15 such as to permit the fact-finder to draw an inference of earlier intoxication. "Circumstantial evidence must do more than merely tend to arouse suspicion of guilt in order to support a conviction." Jones v. State, 881 N.E.2d 1095, 1097 (Ind. Ct. App. 2008).

In light of the foregoing, we reverse the Operating While Intoxicated convictions due to insufficient evidence on the element of "operating." Because we do so, we need not address Hopson's contention that, as to his conviction under Indiana Code Section 9-30-5-2(b), there was also insufficient evidence of the element of endangerment. We next consider whether the Public Intoxication conviction is supported by sufficient evidence.

III. Analysis – Public Intoxication

To convict Hopson of public intoxication, as charged, the State was required to show that he was in a public place or place of public resort in a state of intoxication caused by his use of alcohol. Ind. Code § 7.1-5-1-3. Hopson does not dispute that he was intoxicated but contends that he was not in a public place because the interior of a vehicle should be

considered a private area within the meaning of the public intoxication statute.[9] He argues that affirming his conviction would be inconsistent with the purpose of the public intoxication statute, which is "to protect the public from the annoyance and deleterious effects which may and do occur because of the presence of persons who are in an intoxicated condition." State v. Sevier, 117 Ind. 338, 340, 20 N.E. 245, 246-47 (1889).

Our statutes do not define "public place" or "place of public resort," but Indiana courts have nevertheless applied a consistent interpretation of the term "public place." Fought v. State, 898 N.E.2d 447, 450 (Ind. Ct. App. 2008). "A 'public place' does not mean a place devoted solely to the uses of the public; but it means a place which is in point of fact public, as distinguished from private, - a place that is visited by many persons, and usually accessible to the neighboring public." State v. Tincher, 21 Ind. App. 142, 144, 51 N.E. 943, 944 (1898).

We have upheld a conviction for Public Intoxication where the defendant was a passenger in a vehicle traveling on a public highway when it was stopped by police officers. Atkins v. State, 451 N.E.2d 55, 56 (Ind. Ct. App. 1983). Too, a defendant was properly convicted of Public Intoxication for being intoxicated inside a vehicle parked on the berm of a busy highway. Miles v. State, 247 Ind. 423, 425, 216 N.E.2d 847, 849 (1966). In contrast, we have refused to uphold a Public Intoxication conviction where the defendant only was observed inside a car parked on a private driveway, and we declined to infer that the

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[9] The requirement of a "public" location is not likewise embodied in operating offenses. "Indiana Code §§ 9-30-5-1(b) and 9-30-5-2 apply when a motorist is driving on public or private property, including property owned by the motorist." State v. Manuwal, 904 N.E.2d 657, 657 (Ind. 2009).

defendant must have traveled on a public road in an intoxicated state before arriving at the driveway. Moore v. State, 634 N.E.2d 825, 826-27 (Ind. Ct. App. 1994).

More recently, in Fought, we considered whether a person found asleep and intoxicated inside a vehicle located on the property of a private gas station had committed the offense of Public Intoxication. Observing that "the public is entitled to protection from the annoyances and deleterious effects of having intoxicated people park their car between gas pumps," we then concluded that "Fought's conduct falls within the purview of 'public place or place of public resort' of the public intoxication statute." 898 N.E.2d at 450-1.

Hopson's vehicle was likewise at a place of public resort. Hopson testified that he had parked "right outside" his girlfriend's apartment. (Tr. 31.) Officer Fekkes described the location where he found Hopson in his vehicle as "kind of a fancy side walk" that was "not part of the roadway." (Tr. 31.) Members of the public should be able to use a sidewalk in an apartment complex free from the annoyance of encountering an intoxicated person; we find the statutory protection of the public intoxication statute applicable in these circumstances.

As the State established that Hopson was intoxicated in a public place, his conviction for Public Intoxication is supported by sufficient evidence.

Affirmed in part, and reversed in part.

NAJAM, J., and MAY, J., concur.