## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Kevin O. Michira,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff*

October 11, 2022

Court of Appeals Case No.
22A-CR-750

Appeal from the
Marion Superior Court

The Honorable
David Certo, Judge

The Honorable
Amy Barbar, Senior Judge

Trial Court Cause No.
49D19-1908-CM-33258

**Vaidik, Judge.**

# Case Summary

[1] Kevin O. Michira was convicted of Class A misdemeanor operating a vehicle while intoxicated. He now appeals, arguing the evidence is insufficient to support his conviction. We affirm.

# Facts and Procedural History

[2] On the morning of August 21, 2019, Indiana State Trooper Jacob Wildauer was getting gas at a gas station on the southside of Indianapolis. There, he encountered Michira trying to change a tire on his car at the edge of the parking lot. Michira had "jumped the curb," and his driver's side front tire was "in the grass and mulch" near a fence and was "flat due to going over the curb." Tr. p. 60. Trooper Wildauer spoke to Michira and observed that he exhibited signs of intoxication—"watering, bloodshot eyes, slurred speech, and the odor of alcoholic beverage coming from his person." *Id.* at 61. Trooper Wildauer looked around but didn't see any alcohol containers. Trooper Wildauer administered a field sobriety test, which Michira failed. Trooper Wildauer then read Michira his *Miranda* rights and Indiana's Implied Consent Law. Michira agreed to a chemical test, so Trooper Wildauer transported him to Eskenazi Hospital.

[3] On the way to the hospital, Trooper Wildauer asked Michira "if he was driving at the time of the incident," and Michira said yes. *Id.* at 68. Trooper Wildauer then asked Michira the last time he drank alcohol, and Michira said "two days

ago." *Id.* Finally, Trooper Wildauer asked Michira if he drank any alcohol **after** hitting the curb, and Michira said no. *Id.* at 68-69. Michira had his blood drawn at 11:19 a.m. The results—which Michira later stipulated to—show that his alcohol concentration equivalent (ACE) was 0.108. Exs. 1-2.

[4] The State charged Michira with Class A misdemeanor operating a vehicle while intoxicated. A bench trial was held in March 2022. Trooper Wildauer testified as detailed above. Michira testified that contrary to what he told Trooper Wildauer on the way to the hospital, he in fact drank alcohol after hitting the curb because he needed to "relax." Tr. p. 80. Michira said he didn't tell Trooper Wildauer that he drank alcohol after hitting the curb because of a prior incident with police. *Id.* at 82. When asked where he put the alcohol containers, Michira said he couldn't remember. The trial court found that Michira's testimony didn't make "any sense" and found him guilty. *Id.* at 89.

[5] Michira now appeals.

# Discussion and Decision

[6] Michira contends the evidence is insufficient to support his conviction. When reviewing sufficiency-of-the-evidence claims, we neither reweigh the evidence nor judge the credibility of witnesses. *Willis v. State*, 27 N.E.3d 1065, 1066 (Ind. 2015). We only consider the evidence supporting the judgment and any reasonable inferences that can be drawn from the evidence. *Id.* A conviction will be affirmed if there is substantial evidence of probative value to support

each element of the offense such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

[7] A person who operates a vehicle while intoxicated in a manner that endangers a person commits Class A misdemeanor operating while intoxicated. Ind. Code § 9-30-5-2. "Intoxicated" is defined 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." I.C. § 9-13-2-86. "Proof of intoxication does not require proof of [ACE]; it is sufficient to show that the defendant was impaired."[1] *Gatewood v. State*, 921 N.E.2d 45, 48 (Ind. Ct. App. 2010), *trans. denied*. Evidence of impairment may include: (1) the consumption of a significant amount of alcohol; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of alcohol on the breath; (5) unsteady balance; (6) the failure of field sobriety tests; and (6) slurred speech. *Id.*

[8] Michira admits that he drove the car over the curb and that he was intoxicated when Trooper Wildauer encountered him in the parking lot. He claims, however, that because the State didn't present any evidence of when he ran

[1] According to Indiana Code sections 9-30-6-15(b) and 9-30-6-2(c), a chemical test that is performed on a sample taken from a person "within three (3) hours after the law enforcement officer had probable cause to believe the person committed an offense under IC 9-30-5" and that has an ACE of at least 0.08 creates a rebuttable presumption that the person had an ACE of at least 0.08 "at the time the person operated the vehicle." Michira questions whether this presumption applies here since there is no evidence of exactly when he ran over the curb. But Michira wasn't convicted of operating a vehicle with an ACE of at least 0.08. Rather, he was convicted of operating while intoxicated, which doesn't require proof of ACE.

over the curb, the evidence is insufficient to prove he was "intoxicated at the time he was operating the vehicle." Appellant's Br. p. 9.

[9] In support of his argument, Michira relies on *Flanagan v. State*, 832 N.E.2d 1139 (Ind. Ct. App. 2005). There, a sheriff's deputy spotted Flanagan and his passenger outside Flanagan's disabled car on the side of a highway but didn't stop to help then because he was transporting a prisoner. The deputy later returned to the disabled car and found the two men walking toward a convenience store. He offered them a ride, and as they rode in his patrol car, he observed that Flanagan exhibited signs of intoxication. The deputy took Flanagan to the police station for a chemical test, which revealed that his ACE was 0.22. The deputy later returned to Flanagan's car and found empty beer cans inside. The State charged Flanagan with operating while intoxicated and operating with an ACE of at least 0.15. The jury found Flanagan guilty of operating while intoxicated only.

[10] In reversing Flanagan's conviction, we emphasized that the deputy didn't know how long the car had been sitting on the side of the highway when he encountered it. Even then, the deputy didn't stop immediately but returned after transporting the prisoner:

> [T]here was no evidence presented in this case as to when Flanagan consumed alcohol. This is a critical piece of evidence without which the State cannot sustain its burden. This is so because it could be that Flanagan consumed beer after the vehicle broke down, and when the beers were all gone, the men decided to venture to a nearby store to call for assistance.

*Id.* at 1141.

[11] *Flanagan* is distinguishable. In that case, no evidence was presented as to when Flanagan consumed alcohol. Here, however, Trooper Wildauer testified that he asked Michira if he drank any alcohol **after** hitting the curb, and Michira said no. In addition, Trooper Wildauer didn't find any alcohol containers, which would have supported recent alcohol consumption. Finally, Michira "jumped a curb" and drove into grass and mulch, which supports a finding of impaired driving. This evidence supports a reasonable inference that Michira drank alcohol before hitting the curb and was intoxicated when he did so. Although Michira testified at trial that he drank alcohol after hitting the curb, which contradicted what he told Trooper Wildauer, the trial court did not believe him. The evidence is sufficient to support Michira's conviction for Class A misdemeanor operating a vehicle while intoxicated.

[12] Affirmed.

Riley, J., and Bailey, J., concur.