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IN THE COURT OF APPEALS OF INDIANA

CHARLES RIGDON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 49A02-0702-CR-182

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Evan Goodman, Judge
Cause No. 49F15-0606-FD-100212

November 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Charles Rigdon appeals his convictions for operating a vehicle while intoxicated as a class D felony[1] and public intoxication as a class B misdemeanor[2] and his status as an habitual substance offender.[3] Rigdon raises two issues, which we revise and restate as:

I. Whether Rigdon's convictions for operating a vehicle while intoxicated as a class D felony and public intoxication as a class B misdemeanor violate the prohibition against double jeopardy; and

II. Whether the evidence is sufficient to sustain the trial court's finding that Rigdon is an habitual substance offender.

We affirm.

The relevant facts follow. On June 1, 2006, Frederick Hartmann, Jr., was driving westbound on 62nd Street in Indianapolis. Hartmann stopped at Ralston Street and turned on his left turn signal. While Hartmann was waiting for traffic to clear, Rigdon's vehicle struck Hartmann's vehicle from the rear and pushed Hartmann's vehicle a few feet forward. After collecting his senses, Hartmann drove his vehicle to the curb to get out of any traffic, parked, and exited his vehicle. Hartmann observed that his vehicle had been "rear ended greatly" and gasoline was pouring out of the gas tank and all over the street. Transcript at 62. Keith Wilkins, III, witnessed the collision, called 911, and went to see if everyone was okay.

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[1] Ind. Code § 9-30-5-3 (Supp. 2004).

[2] Ind. Code § 7.1-5-1-3 (2004).

[3] Ind. Code § 35-50-2-10 (Supp. 2006).

Hartmann observed Rigdon get out of his vehicle. Rigdon "hopp[ed]" to the northwest corner of the intersection. Id. at 72. Hartmann walked across the street to talk to Rigdon, and Rigdon put his hands over his face. Hartmann asked Rigdon if he was hurt, and Rigdon said, "[M]y head hurts." Id. at 68. Hartmann told Rigdon that he could not see where he was injured with Rigdon's hands covering his face. Rigdon lowered his hand down to the bottom of his chin, and Hartmann did not see any injuries. Rigdon immediately put his hand back in front of his face. Witnesses came to give Hartmann their contact information, and when Hartmann turned to look at Rigdon, he was gone. One of the bystanders stated that Rigdon "took off." Id. at 70.

Wilkins observed Rigdon leave the scene on foot and followed him. Rigdon went "between houses and down alleys and down streets and proceeded to more or less weave his way in and out of Broad Ripple for . . . close to a half hour." Id. at 82. Wilkins called 911 to inform the police that he was following Rigdon. Rigdon took off his shirt and carried it or put it in his back pocket. Wilkins indicated to the police that Rigdon "displayed every classic sign of intoxication." Id. Wilkins noticed the smell of alcohol on Rigdon, and Rigdon displayed a loss of acute motor skills and had a dazed look in his eyes, "slightly slurred" speech and "weird mood swings." Id. at 85.

Rigdon eventually said, "if you're going to follow me, you might as well walk next to me." Id. at 83. Wilkins said, "I don't know who you are. I don't know anything about you. I'm just going to keep my distance." Id. At one point, the interaction

between Rigdon and Wilkins turned confrontational when Rigdon turned around and went to confront Wilkins in an aggressive posture.

Indianapolis Police Officer Jonathan Koers located Rigdon at 6220 Central Avenue in Indianapolis and observed Rigdon "stumbling" in the middle of the street. Id. at 138. Officer Koers observed that Rigdon's eyes were bloodshot, his speech was "very slurred," and his shirt was backwards and inside out. Id. at 139. Officer Koers smelled the alcohol on Rigdon from at least five feet away. Officer Koers arrested Rigdon and took him back to the scene of the collision.

At the scene of the collision, Indianapolis Police Officer David Moore spoke with Rigdon and immediately noticed the strong odor of an alcoholic beverage emitting from his breath and his body. Officer Moore also observed that Rigdon was extremely disheveled, had glassy, bloodshot eyes, was sweaty, and slurred and stuttered when he spoke.

Officer Koers transported Rigdon to the North District roll call site, followed by Officer Moore. Rigdon told Officer Koers that he had been drinking all day and that he had to go to a friend's house to pick up a lawnmower. Rigdon admitted to driving. When they arrived at the roll call site, Officer Moore observed that Rigdon did not have much manual dexterity and his balance was uneven.

The State charged Rigdon with: operating a vehicle while intoxicated as a class A misdemeanor,[4] operating a vehicle while intoxicated as a class D felony, failure to stop after an accident resulting in personal injury as a class A misdemeanor;[5] and public intoxication as a class B misdemeanor. Specifically, with respect to the public intoxication charge, the State charged that "[o]n or about 6/1/06, in Marion County, State of Indiana, at 6220 Central Ave. location, a public place or place of public resort . . . [Rigdon] was in a state of intoxication caused by the person's use of alcohol . . . ." Appellant's Appendix at 22. The State also alleged that Rigdon was an habitual substance offender due to prior convictions of operating a vehicle while intoxicated in 1988 and 2006.

The jury found Rigdon guilty of operating a vehicle while intoxicated as a class A misdemeanor, failure to stop after an accident resulting in injury as a class A misdemeanor, and public intoxication as a class B misdemeanor. Rigdon waived his right to a jury on the "felony charge and the Habitual Substance Offender charge." Transcript at 214. The trial court enhanced the operating a vehicle while intoxicated to a class D felony.

During the habitual substance offender phase of the trial, Rigdon stipulated to the 2006 conviction. The State introduced the officer's arrest report from 1988, a certified

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[4] Ind. Code § 9-30-5-2 (2004).

[5] Ind. Code § 9-26-1-1 (Supp. 2005).

copy of the case chronology for the 1988 case, and a certified copy of Rigdon's driving record, all of which the trial court admitted without objection. The trial court found Rigdon guilty of being an habitual substance offender. The trial court sentenced Rigdon only on the operating a vehicle while intoxicated charge to two years, enhanced by three years for Rigdon's status as an habitual substance offender.

I.

The first issue is whether Rigdon's convictions for operating a vehicle while intoxicated as a class D felony and public intoxication as a class B misdemeanor violate the prohibition against double jeopardy. The Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." IND. CONST. art. 1, § 14. The Indiana Supreme Court has held that "two or more offenses are the 'same offense' in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). Rigdon argues that his convictions violate the "actual evidence" test, not the "statutory elements" test.

"An offense is the same as another under the actual evidence test when there is a reasonable possibility that the evidence used by the fact-finder to establish the essential elements of one offense may have been used to establish the essential elements of a second challenged offense." Id. at 53. However, the Indiana Supreme Court clarified

this test in Spivey v. State, where it held that "[t]he test is not whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish one of the essential elements of a second challenged offense; rather, the test is whether the evidentiary facts establishing the essential elements of one offense also establish all of the elements of a second offense." Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). If the evidentiary facts establishing one offense establish only one or several, but not all, of the essential elements of the second offense, there is no double jeopardy violation. Id.

Rigdon appears to argue that the State relies on the same evidence to show that Rigdon was intoxicated for both convictions. Specifically, Rigdon cites the police officers' testimony and the testimony of Wilkins. Rigdon also points out the following portions of the prosecutor's closing argument:

> This case is about operating while intoxicated. That's one of the charges here today.
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> * * * * *
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> The third [element] is intoxication. . . . Well, we had testimony from Keith Wilkins who followed him, who followed [Rigdon], that he was staggering. We had testimony from the police officers that he was not sure on his feet. So, we have that evidence for you. We have slurred speech. Testimony from the officers that he had slurred speech. Odor of alcohol: when [Wilkins] first encountered him, he said he smelled alcohol. When he had a little dispute with him later on during the chase, he smelled alcohol. The officer smelled alcohol. Officer Koers immediately upon encountering [Rigdon] on the street smelled alcohol. He smelled alcohol again in the car. Officer Moore smelled alcohol on him when he was back at the roll call. Glassy, bloodshot eyes, we have that too. We have descriptions that his eyes being [sic] in that manner. Mr. [Wilkins] testified that he was pretty

> much the poster boy of someone who was intoxicated in his opinion and he's someone who says he goes to the bars quite a bit. He's seen people who were drunk. The officers, same thing, glassy, bloodshot eyes.
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> * * * * *
>
> [Another] charge we have here today is public intoxication. Officer Koers testified that he found [Rigdon] on the street at 6220 Central Avenue in the middle of the street, a public place and the same analysis applies in intoxication as we just talked about before, I won't go through it again but he was intoxicated in a public place and that satisfies the public intoxication charge as well.

Transcript at 195-199.

Rigdon appears to argue that Richardson requires reversal in this case. However, "Richardson does not bar multiple convictions when the facts establishing one crime also establish only one or even several, but not all, of the elements of a second offense." Robinson v. State, 775 N.E.2d 316, 320 (Ind. 2002). That is the case here. Rigdon's intoxication established one element of public intoxication but not all. Public intoxication also requires that the person be "in a public place or a place of public resort." Ind. Code § 7.1-5-1-3. Specifically, the State charged Rigdon with being in a state of intoxication "at 6220 Central Ave. location, a public place or place of public resort." Appellant's Appendix at 22. The jury instructions included the charge of public intoxication and the instruction that "[t]he burden rests upon the State of Indiana to prove to each juror, beyond a reasonable doubt, every material allegation of the INFORMATION." Appellant's Appendix at 64. Thus, the fact of Rigdon's intoxication does not establish all of the elements of public intoxication. Accordingly, conviction of

both offenses is consistent with Richardson. See, e.g., Robinson, 775 N.E.2d at 320 (holding that defendant's knowing killing of victim established one element of robbery (force) but not all and convictions for murder and robbery were consistent with Richardson).

II.

The next issue is whether the evidence is sufficient to sustain the trial court's finding that Rigdon is an habitual substance offender. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

To establish that Rigdon was an habitual substance offender, the State was required to prove beyond a reasonable doubt that Rigdon had been previously convicted of two prior unrelated substance offense convictions. Ind. Code § 35-50-2-10. During the habitual substance offender phase of the trial, Rigdon stipulated to the 2006 conviction.

Rigdon argues that the State failed to meet its burden of proof with regard to the alleged 1988 conviction. Rigdon does not contest that the chronological case summary and driving record "accurately reflect the information contained in the computer systems," but argues that "they do not prove the court entered an order convicting Rigdon

for OVWI in 1988 as alleged by the State." Appellant's Brief at 7. In regard to the use of documents to establish the existence of prior convictions the Indiana Supreme Court has stated:

> Certified copies of judgments or commitments containing a defendant's name or a similar name may be introduced to prove the commission of prior felonies. Schlomer v. State, 580 N.E.2d 950, 958 (Ind. 1991) (citing Andrews v. State, 536 N.E.2d 507 (Ind. 1989)). While there must be supporting evidence to identify the defendant as the person named in the documents, the evidence may be circumstantial. Id.; see also Coker v. State, 455 N.E.2d 319, 322 (Ind. 1983). If the evidence yields logical and reasonable inferences from which the finder of fact may determine beyond a reasonable doubt that it was a defendant who was convicted of the prior felony, then a sufficient connection has been shown. Pointer v. State, 499 N.E.2d 1087, 1089 (Ind. 1986).

Hernandez v. State, 716 N.E.2d 948, 953 (Ind. 1999), reh'g denied.

The State introduced the officer's arrest report from 1988, a certified copy of Rigdon's driving record that listed a conviction for "OWI" dated March 29, 1988, and a certified copy of the case chronology for the 1988 case that indicated that Rigdon was convicted of operating a vehicle while intoxicated as a class A misdemeanor on March 29, 1988, all of which the trial court admitted without objection. A chronological case summary is the "official record of the trial court." Ind. Trial Rule 77(B). While we acknowledge that it would be the best practice for the State to submit into evidence a certified copy of the judgment of conviction, we do not deem failure to do so reversible error when, as in this case, the State has submitted other documents that constitute evidence of probative value from which the trial court could have found Rigdon to be an habitual substance offender beyond a reasonable doubt. See, e.g., Kessler v. State, 171

Ind. App. 181, 188, 355 N.E.2d 262, 267 (1976) (holding that the docket sheet was sufficient to prove that defendant had been convicted of a felony); see also Tyson v. State, 766 N.E.2d 715, 718 (Ind. 2002) (holding that there was sufficient evidence of defendant's prior conviction where State presented the information, plea agreement, and the minutes of the court for the guilty plea).

For the foregoing reasons, we affirm Rigdon's convictions for operating a vehicle while intoxicated as a class D felony, public intoxication as a class B misdemeanor, and his status as an habitual offender.

Affirmed.

RILEY, J. and FRIEDLANDER, J. concur