

STATEMENT OF THE CASE

Sergio Hernandez appeals his convictions for Resisting Law Enforcement, as a Class D felony, Operating a Vehicle While Intoxicated, as a Class A misdemeanor, and False Informing, as a Class B misdemeanor, following a jury trial. He presents the following issues for our review:

1. Whether the trial court abused its discretion when it denied, in part, his motion for mistrial.
2. Whether the State presented sufficient evidence to support his convictions for resisting law enforcement and false informing.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On June 1, 2005, at approximately 9:00 p.m., Martinsville Police Officers Anthony Hollis and Matthew Long were dispatched to 740 South Grant Street in Martinsville to investigate a disturbance. When they arrived, the officers encountered Hernandez, who was intoxicated and orally identified himself as “Sergio Hernandez.” When no one at the residence wanted to press charges, the officers left. Upon his departure, Officer Long noted that a black Sebring convertible parked in the driveway was registered to Hernandez.

Approximately two hours later, Officer Long received a dispatch informing him that Hernandez had left the Grant Street residence and was driving his black Sebring convertible while intoxicated. Officer Long then saw Hernandez driving the Sebring on State Road 37 and followed him after Hernandez turned onto Ohio Street. After Officer Long saw Hernandez cross the center line of the road twice, he activated the overhead

lights on his patrol car. At that point, Hernandez accelerated, and Officer Long activated his siren. Even after hearing the siren, Hernandez continued driving and drove through two stop signs without stopping before he finally pulled over.

Once stopped, Hernandez did not comply with any of Officer Long's commands. Officer Hollis arrived to assist Officer Long, and the two officers forcibly removed Hernandez from his car and arrested him. Officer Long observed that Hernandez smelled of alcohol, had slurred speech, and had bloodshot eyes. Hernandez refused to undergo field sobriety tests and refused to take a breathalyzer test.

The State charged Hernandez with two counts of operating a vehicle while intoxicated, as Class D felonies; resisting law enforcement, as a Class D felony; and driving with a suspended license, as a Class A infraction. During a pre-trial conference, Hernandez indicated that he would plead guilty to the felony charges, so the trial court ordered him to undergo a pre-plea investigation report. During an interview with a probation officer, Hernandez stated that his name was "Miguel Lomeli Hernandez." Transcript at 82. Subsequently, after no plea agreement was reached, the trial court scheduled a trial.

The State thereafter filed amended charges, namely, resisting law enforcement, as a Class D felony; operating a vehicle while intoxicated, as a Class A misdemeanor; operating a vehicle while intoxicated, as a Class C misdemeanor; and false informing, as a Class B misdemeanor. A jury found him guilty as charged, and the trial court entered judgment on all but the Class C misdemeanor operating a vehicle while intoxicated charge. Prior to sentencing, Hernandez filed a motion for mistrial alleging juror

misconduct. The trial court granted that motion only with respect to the resisting law enforcement conviction, but Hernandez was subsequently retried on that charge and found guilty. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Juror Misconduct

Hernandez contends that the trial court abused its discretion when it denied his motion for mistrial with respect to his conviction for operating a vehicle while intoxicated.¹ Hernandez alleged that a mistrial was warranted because the alternate juror participated in deliberations. In particular, at a hearing on the motion, the alternate testified regarding her participation as follows:

I did not vote in any of it. There was a question asked, did anybody know where Grant Street was? I said, yes, it's in the area. Then later there was a question [about] getting [a] driver's license, don't you have to have a birth certificate to get an Indiana driver's license? And I said, no, when I moved from Illinois to Indiana all I needed was my Illinois driver's license. Then the other thing that I commented on was when there was a question of the Ohio Street, the businesses that were on there, what all was on that street and how long that street was.

* * *

And then I gave a comparison to a street in Mooresville as the same distance.

Transcript at 208-09. And the alternate orally assisted the regular jurors in creating a map of the area where Hernandez was driving leading up to his arrest. The alternate did not otherwise participate in the deliberations.

A defendant seeking a new trial because of juror misconduct must show that the misconduct (1) was gross and (2) probably harmed the defendant. Griffin v. State, 754

¹ Hernandez also asserts that the trial court should have granted his motion for mistrial regarding his false informing conviction, but because we hold that the evidence was insufficient to support that conviction, see Issue Two, we need not address that contention.

N.E.2d 899, 901 (Ind. 2001). We review the trial court's determination on these points only for abuse of discretion, with the burden on the appellant to show that the misconduct meets the prerequisites for a new trial. Id.

After Hernandez moved for a mistrial, the trial court granted his motion in part. In particular, the trial court found that because the alternate's comments related solely to the resisting law enforcement conviction, he was not prejudiced in regard to his operating while intoxicated conviction. Accordingly, the trial court granted the mistrial motion only with respect to the resisting law enforcement conviction.

But Hernandez contends that he was also prejudiced with respect to the operating while intoxicated conviction because, he maintains,

any and all observations of him relative to intoxication were crucial. As the alternative explained, after her input there was a lengthy discussion between the jurors as to whether Hernandez would have seen the officer's emergency lights, how far he had traveled after the officer said he had turn[ed] them on, and whether there was a safe place for Hernandez to have stopped after becoming aware of the officer. . . . His ability to accurately assess the "safety" of a location to pull over, his reaction time to the stimulus of observing the emergency lights, the longer distance that Hernandez drove after the officer started observing him, could all have impacted the jury's determination of Hernandez's level of intoxication.

Brief of Appellant at 12-13. We cannot agree.

Officer Long testified that Hernandez crossed the center line twice and failed to stop at two stop signs before he was able to complete a traffic stop. In addition, Officer Long observed that Hernandez smelled of alcohol, had slurred speech, and had bloodshot eyes. Finally, Hernandez refused to undergo field sobriety tests or take a breathalyzer. None of the alternate juror's comments bore any relevance to the evidence supporting Hernandez's operating while intoxicated conviction. Hernandez has not demonstrated

that her misconduct was gross and harmful in relation to that conviction. Thus, the trial court did not abuse its discretion when it denied Hernandez's motion for mistrial with respect to that conviction.

Issue Two: Sufficiency of the Evidence

Hernandez also contends that the State presented insufficient evidence to support his resisting law enforcement and false informing convictions. We address each in turn. In reviewing a sufficiency of the evidence claim, we do not reweigh the evidence or assess the credibility of witnesses. Ferrell v. State, 746 N.E.2d 48, 50 (Ind. 2001). Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict and will affirm the conviction if there is probative evidence from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Id.

Resisting Law Enforcement

To prove resisting law enforcement, as a Class D felony, the State was required to prove that Hernandez, while driving a vehicle, knowingly or intentionally fled from Officer Long after Officer Long had, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself and ordered Hernandez to stop. See Ind. Code § 35-44-3-3. The State presented evidence that after Officer Long activated his emergency lights and siren, Hernandez accelerated the speed of his car and drove through two stop signs without stopping. That evidence and the reasonable inferences to be drawn therefrom are sufficient to support his resisting law

enforcement conviction. Hernandez's contention on this issue amounts to a request that we reweigh the evidence, which we will not do.

False Informing

The State concedes that the evidence is insufficient to support Hernandez's false informing conviction. In particular, the State points out that the only evidence presented at trial in support of that conviction was Hernandez's admission to the probation officer that his "'true' name was 'Miguel Lomeli Hernandez.'" Brief of Appellee at 13. It is well settled that a crime may not be proved solely on the basis of a confession. Williams v. State, 837 N.E.2d 615, 617 (Ind. Ct. App. 2005), trans. denied. There must be some other proof of the crime in order to prevent convictions upon confessions to crimes that never occurred. Id. We agree with Hernandez and the State that the evidence is insufficient to support the false informing conviction and instruct the trial court to vacate that conviction.²

Affirmed in part, reversed in part, and remanded with instructions.

KIRSCH, C.J., and DARDEN, J., concur.

² Because the trial court imposed a 180-day sentence on that count, to run concurrent with the sentence for resisting law enforcement, resentencing is unnecessary.