

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

JOHN PINNOW
Special Assistant to the State Public
Defender
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

SEAN A. KUBIAK,)
)
Appellant-Defendant,)
)
vs.) No. 71A03-0603-CR-127
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable R.W. Chamblee, Jr., Judge
Cause No. 71D01-0507-FD-757

November 9, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Sean A. Kubiak appeals his convictions for Operating a Motor Vehicle While Suspended as a Habitual Traffic Violator,¹ a class D felony, Leaving the Scene of an Accident with an Unattended Vehicle,² a class B misdemeanor, and Operating a Motor Vehicle While Intoxicated with a Prior Conviction of Operating While Intoxicated,³ a class D felony. Kubiak presents the following restated issue for review: Did the State present sufficient evidence that he was the driver of the vehicle in question?

We affirm.

The facts most favorable to the verdict reveal that on the afternoon of July 22, 2005, a white Dodge van registered to Kubiak's mother crashed into a parked car. The parked car was then pushed into a motorcycle parked in front of it. Jill Vandewalle observed the crash from inside a nearby business, and she immediately went outside. She saw only one individual in the van, the driver, whom she later identified as Kubiak.⁴ Kubiak exited the van from the driver's side door. The passenger side of the van was "smashed up against the parked car", making it impossible for anyone to exit from that side. *Transcript* at 88.

Jim Nash, the owner of the motorcycle, similarly ran outside upon seeing his motorcycle in the process of falling. As he exited the pub, Nash observed Kubiak closing

¹ Ind. Code Ann. § 9-30-10-16 (West 2004).

² Ind. Code Ann. § 9-26-1-8 (West 2004); I.C. § 9-26-1-3 (West 2004).

³ I.C. § 9-30-5-3(1) (West, PREMISE through 2006 2nd Regular Sess.).

⁴ Kubiak did not have permission to drive the van and his license was suspended at the time for being a habitual traffic violator.

the driver's side door of the van. Nash did not see anyone else in the vicinity of the van.⁵ He approached Kubiak and told him, "I hope you have some good insurance." *Id.* at 96. Kubiak responded that this was his mother's van and she has insurance. Kubiak asked if anyone had called the police yet, and Nash said no. Kubiak said he would go into the pub and call. Nash then went to look at his motorcycle. Instead of going into the pub, however, Kubiak fled down an alley.

When South Bend Police Officer Edward Koczan responded to the scene, the van was still running. Inside the van, he found an almost empty bottle of vodka. Soon thereafter, Kubiak was located at a nearby auto repair shop, where he had asked to use the facilities. Kubiak fit the description given by the witnesses at the scene. Officer Koczan further observed that Kubiak was sweating profusely and was short of breath. Upon speaking with Kubiak, Officer Koczan detected a strong odor of alcoholic beverage on Kubiak's breath and noted that Kubiak's speech was "very noticeably slurred." *Id.* at 112. Kubiak admitted that he ran from the scene but claimed that he was only a passenger in the van. He claimed a Ken Schaffer was the driver, but he did not provide the officer with any further identifying information, such as an address or phone number for Schaffer. Kubiak refused a portable chemical breath test.

⁵ In fact, Nash testified that there would have been "no time for anybody else to get out of the van because if [Kubiak] had been sitting on the passenger side he had no time to slide across the street (sic) and get out in the time it took me to get from where I was sitting out the door." *Id.* at 101.

Following a jury trial, Kubiak was convicted as set forth above.⁶ He now appeals, claiming that the State presented insufficient evidence that he was the driver of his mother's van.

Our standard of review for claims challenging the sufficiency of the evidence is well settled. We will not reweigh the evidence or judge the credibility of the witnesses, and we will respect the jury's exclusive province to weigh conflicting evidence. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). Considering only the evidence and the reasonable inferences supporting the verdict, our task is to decide whether there is substantial evidence of probative value from which a reasonable jury could find the defendant guilty beyond a reasonable doubt. *Id.*

Kubiak argues Vandewalle's testimony that she saw him get out the driver's side of the van is incredibly dubious. The incredible dubiousity rule, however, has absolutely no application here. The rule is limited to cases where a *sole* witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence. *Newson v. State*, 721 N.E.2d 237 (Ind. 1999). Vandewalle's testimony was not equivocal or the result of coercion. She clearly identified Kubiak at trial as the driver and only occupant of the van. Moreover, Vandewalle was not the sole witness, and her testimony was corroborated in large part by Nash's testimony.

⁶ Kubiak was also charged with auto theft, a class D felony, but the jury acquitted him of that count.

Therefore, we reject Kubiak's invitation to reweigh the evidence and judge witness credibility. In light of the evidence presented at trial, the jury could reasonably conclude that Kubiak was the driver of the van.

Judgment affirmed.

NAJAM, J., and DARDEN, J., concur.