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IN THE COURT OF APPEALS OF INDIANA

Jeffrey L. Awbrey,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 6, 2022

Court of Appeals Case No. 21A-CR-2867

Appeal from the Morgan Superior Court

The Honorable Sara A. Dungan, Judge

Trial Court Cause No. 55D03-1812-F6-2011

Tavitas, Judge.

Case Summary

[1] Jeffrey Awbrey appeals his conviction for operating a motor vehicle while intoxicated, a Level 6 felony. He contends that the State failed to present sufficient evidence that he was intoxicated to the point that he was impaired.

The State argues that general testimony from a toxicologist about levels of methamphetamine consistent with those in Awbrey's blood supports the inference that Awbrey was impaired. We disagree with the State, find that the State failed to present sufficient evidence of the statutorily required impaired condition of thought and action and the loss of normal control of a person's faculties, and accordingly, reverse Awbrey's conviction.

Issue

[2] Awbrey raises a single issue: whether sufficient evidence was presented to sustain his conviction for operating a vehicle while intoxicated.

Facts

[3] On December 14, 2018, Indiana State Trooper Wyatt Phillips was conducting a traffic stop at a gas station when Awbrey drove past and waved at him in the parking lot. Trooper Phillips ran Awbrey's license plate number and discovered that Awbrey's driver's license had been suspended. Trooper Phillips then initiated a traffic stop. When Trooper Philips approached Awbrey's vehicle, Awbrey asked that Trooper Phillips "not take [Awbrey] to jail." Tr. Vol. II p. 185. Awbrey granted consent for a search of the vehicle, which revealed a glass pipe with crystalline residue and a small digital scale. The pipe was not warm, and no smoke was in the vehicle.

[4] Awbrey admitted to Trooper Phillips that he had smoked methamphetamine earlier in the day prior to work. Trooper Phillips interpreted Awbrey to be communicating that he had smoked "early in the morning," and the traffic stop

was conducted at "nearly 5 o'clock" in the afternoon. *Id*. at 189-90. Awbrey was transported to the hospital after he consented to have his blood drawn.

[5] As amended on November 29, 2021,[1] the State charged Awbrey with: Count I, possession of methamphetamine, a Level 6 felony; Count II, operating a vehicle while intoxicated, a Class C misdemeanor[2]; Count III, possession of paraphernalia, a Class C misdemeanor; and Count IV, driving while suspended, a Class A infraction.[3]

[6] Awbrey's jury trial—during which he represented himself—occurred on December 1, 2021. During Awbrey's cross-examination of Trooper Phillips, the following colloquy ensued:

> Q. I'm just asking, sir, if you would, all I was asking you is pretty much an additional question. I didn't seem impaired, did I?

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[1] The original charging information included two counts wherein the State alleged that Awbrey operated a vehicle while intoxicated "endangering a person" but the State subsequently dropped those charges. Appellant's App. Vol. II pp. 15-18.

[2] The State only charged Awbrey under Indiana Code Section 9-30-5-2. The State never charged Awbrey with operating a vehicle with a controlled substance or metabolite in his blood under Indiana Code Section 9-30-5-1.

[3] Two other counts duplicated Counts II and IV. Count V charged operating a vehicle while intoxicated as a Level 6 felony, and Count VI charged driving while suspended as a Class A misdemeanor. The lesser charges, Counts II and IV, are subject to enhancement if the defendant is proven to have committed the same offense previously and recently (within the last five years on Count II and within the last ten years on Count IV). Because the evidence of those prior convictions would be prejudicial at trial, however, Awbrey's trial was bifurcated. He eventually pleaded guilty to the enhanced charges under Counts V and VI after the jury trial.

A. On what? I'm not qualified [ ]

Q. It's a yes or no question.

A. I'm not qualified to say that.

* * * * *

A. I am trained to develop probable cause for alcohol impairment. I'm not trained to develop probable cause for any other kind of impairment. But I am trained to recognize impairment. But I cannot say whether or not somebody's impaired at any time. That's why there always has to [sic] lead to a blood draw or a breath test.

Tr. Vol. III pp. 30-31. Notably, Trooper Phillips also testified that, as Awbrey was leaving the parking lot, he "wasn't driving reckless, or super-fast, or anything like that," Tr. Vol. II p. 181. Rather, Trooper Phillips pulled Awbrey over based on the suspended license, not because of "driving behavior." *Id.* at 184. Trooper Phillips also testified that he administered the horizontal gaze nystagmus ("HGN") field sobriety test and that Awbrey passed.

[7] The State also called the assistant director from the Indiana State Department of Technology, Dr. Christina Beymer. Dr. Beymer described, in general terms, what happens when methamphetamine is metabolized. She testified that the effects and duration of those effects vary from person to person, vary depending on the amount of methamphetamine ingested, and vary based upon the manner in which the drug is ingested. Dr. Beymer described generally how

methamphetamine can impair someone's operation of a vehicle. The State asked Dr. Beymer about the methamphetamine level in Awbrey's blood. In response, Dr. Beymer testified:

> There's not a way to know for certain if they are on the way up or on the way down based off of a single number. But the level that this is at is at [sic] a fairly high level, so I would expect there to be significant central nervous system stimulation occurring, and impacting the ability to perceive and make proper judgments.

Tr. Vol. III p. 17. Dr. Beymer concluded that she "would [ ] expect" to see impairment with the level of methamphetamine in Awbrey's blood, but she did not actually opine that Awbrey was impaired. *Id*. at 18. Finally, Dr. Beymer explained that the HGN test that Awbrey passed would not demonstrate intoxication via methamphetamine, because the test reveals the presence of a depressant, not a stimulant.

[8] The jury found Awbrey guilty as charged on all four counts. The State sought to enhance Count II to a Level 6 felony and Count IV to a Class A misdemeanor, and Awbrey pleaded guilty to both enhancements. The trial court sentenced him to an aggregate sentence of 700 days in the Morgan County Jail. Awbrey now appeals, contesting only his conviction on Count II for operating a vehicle while intoxicated.

Analysis

[9] Awbrey argues that the State failed to present sufficient evidence to sustain his conviction in Count II for operating a vehicle while intoxicated. Sufficiency of evidence claims "warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility." *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020) (citing *Perry v. State*, 638 N.E.2d 1236, 1242 (Ind. 1994)). We consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Id.* (citing *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). "We will affirm a conviction if there is *substantial* evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt." *Id.* (emphasis added). We affirm the conviction "unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Sutton v. State*, 167 N.E.3d 800, 801 (Ind. Ct. App. 2021) (quoting *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007)). "'A reasonable inference of guilt must be more than a mere suspicion, conjecture, conclusion, guess, opportunity, or scintilla.'" *Patel v. State*, 60 N.E.3d 1041, 1049 (Ind. Ct. App. 2016) (quoting *Willis v. State*, 27 N.E.3d 1065, 1068 (Ind. 2015)).

[10] While we emphasize our deference to a jury's conclusions, we must also underscore that, "[w]hile we seldom reverse for insufficient evidence, we have

an affirmative duty to ensure the proof at trial is sufficient to support the verdict beyond a reasonable doubt." *Young v. State*, 187 N.E.3d 969, 975 (Ind. Ct. App. 2022) (citing *Webb v. State*, 147 N.E.3d 378, 386 (Ind. Ct. App. 2020), *trans. denied*). Our duty requires that "[a]lthough the sufficiency-of-the-evidence standard of review is deferential, it is not impossible to overcome, nor should it be." *Id*. A standard of review that is so deferential—even to unreasonable fact-finder conclusions—as to be essentially impossible to overcome would raise grave constitutional concerns given the absolute right to an appeal, as both this Court and our Supreme Court have observed. *See Galloway v. State,* 938 N.E.2d 699, 709 (Ind. 2010), *reh'g denied*; *Young*, 187 N.E.3d at 975; *Patel*, 60 N.E.3d at 1049; *Milam v. State*, 14 N.E.3d 879, 881 (Ind. Ct. App. 2014).

[11] Indiana Code Section 9-30-5-2(a) provides that "a person who operates a vehicle while intoxicated commits a Class C misdemeanor." Under Indiana Code Section 9-30-5-3(a)(1), operating a vehicle while intoxicated is a Level 6 felony if: "the person has a previous conviction of operating while intoxicated that occurred within the seven (7) years immediately preceding the occurrence of the violation of section 1 or 2 of this chapter[.]"[4]

[12] Awbrey argues that the State failed to elicit sufficient evidence to establish that he was intoxicated. Indiana Code Section 9-13-2-86 provides:

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[4] Awbrey pleaded guilty to this enhancement, meaning that his operating a vehicle while intoxicated conviction was entered as a Level 6 felony.

> "Intoxicated" means under the influence of:
>
> (1) alcohol;
>
> (2) a controlled substance (as defined in IC 35-48-1);
>
> (3) a drug other than alcohol or a controlled substance;
>
> (4) a substance described in IC 35-46-6-2 or IC 35-46-6-3;
>
> (5) a combination of substances described in subdivisions (1) through (4); or
>
> (6) any other substance, not including food and food ingredients (as defined in IC 6-2.5-1-20), tobacco (as defined in IC 6-2.5-1-28), or a dietary supplement (as defined in IC 6-2.5-1-16);
>
> so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties.

Specifically, Indiana Code Section 9-13-2-86(2) includes being under the influence of "a controlled substance" and both amphetamine and methamphetamine are considered to be Schedule II controlled substances under Indiana Code Section 35-48-1-9 and Indiana Code Section 35-48-2-6(d).

[13] Thus, for purposes of Awbrey's operating while intoxicated conviction, the State was required to prove that Awbrey was "under the influence of [an intoxicant] such that there [was] an impaired condition of thought and action and the loss of normal control of a person's faculties . . . ." *Chissell v. State*, 705

N.E.2d 501, 505 (Ind. Ct. App. 1999) (citing *Hornback v. State*, 693 N.E.2d 81, 85 (Ind. Ct. App. 1998)). "Impairment can be established by evidence of the following: '(1) the consumption of a significant amount of [an intoxicant]; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of [an intoxicant] on the breath; (5) unsteady balance; and (6) slurred speech.'" *Wilkinson v. State*, 70 N.E.3d 392, 400 (Ind. Ct. App. 2017) (quoting *Outlaw v. State*, 918 N.E.2d 379, 381 (Ind. Ct. App. 2009), *opinion adopted*, 929 N.E.2d 196 (Ind. 2010)). We must conclude that the State failed to present sufficient evidence to establish impairment.

[14] The State makes no argument that it presented any evidence of the foregoing factors other than the first factor, which was uncontested. The State argues that: "Awbrey's prior use of methamphetamine earlier that day supported the inference that he was impaired." Appellee's Br. p. 10. We disagree. In the context of operating while intoxicated under Indiana Code Section 9-13-2-86(1), where alcohol is the intoxicant, we have held that "[t]he State is required to establish the defendant was impaired, regardless of his blood alcohol content." *Fields v. State*, 888 N.E.2d 304, 307 (Ind. Ct. App. 2008) (citing *Miller v. State*, 641 N.E.2d 64, 69 (Ind. Ct. App. 1994), *trans. denied*). In other words, we have held that the sheer amount of the intoxicant consumed, standing alone,

is insufficient to support a finding of impairment. We are aware of no case, and the State cites none, to the contrary.[5]

[15] The State next argues that "Awbrey's request not to be taken to jail was indicative of his impairment because, as Trooper Wyatt noted, asking not to be taken to jail is 'an indicator normally of something criminal going on[.]'" Appellee's Br. pp. 10-11. The State does not explain how, and we do not accept that, such evidence reasonably gives rise to an inference of impairment. Awbrey was driving on a suspended license. Any inferences of guilt from his statements could reasonably be related to driving with a suspended license.

[16] Finally, the State points to the testimony of the toxicologist: that she would expect impairment, given the levels of methamphetamine in Awbrey's blood. But the toxicologist did not actually opine that Awbrey was impaired. And testimony that someone *would theoretically* be impaired is not the same as testimony that somebody *is* impaired.

[17] The State cites no case in which the level of an intoxicant in the defendant's blood, standing alone, is sufficient to establish impairment, though that fact would be sufficient if the State had charged Awbrey under Indiana Code

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[5] We note that the list of factors that we have identified as potentially supporting a finding of impairment appears to trace back to *Jellison v. State*, 656 N.E.2d 532, 535 (Ind. Ct. App. 1995). There, Jellison was a Carmel police officer who became inebriated at a Hooters restaurant, a series of other establishments, and the apartment of another officer. Jellison then caused a car accident by striking another vehicle in an intersection with his squad car. Notably for purposes of the case at bar, Jellison's impairment was established by numerous factors **in addition** to the amount of alcohol consumed: evidence of impaired reflexes, watery and bloodshot eyes, the smell of alcohol, and the nature and location of the car accident.

Section 9-30-5-1. We have, on many occasions, found that evidence is sufficient for such a finding specifically when there is something more: direct evidence of impairment. *See, e.g.*, *Wilkinson*, 70 N.E.3d at 401 (Ind. Ct. App. 2017) (in addition to the toxicological evidence, witnesses told officers that Wilkinson was "slumped behind the wheel of the vehicle, and that he appeared unsteady and lethargic"); *Naas v. State*, 993 N.E.2d 1151, 1153 (Ind. Ct. App. 2013) (evidence of "red watery eyes, slurred speech, unsteady balance and had the odor of an alcoholic beverage upon his person."); *Outlaw*, 918 N.E.2d at 381 (evidence of bloodshot eyes, alcohol on breath, and slurred speech); *Fields*, 888 N.E.2d at 307 (evidence of, *inter alia*, Fields being unsteady on his feet, having slurred speech, and failing three field sobriety tests); *Chissell*, 705 N.E.2d at 505 (police officer testified that Chissell committed a traffic violation, smelled of alcohol, had slurred speech and bloodshot eyes).

[18] Here, Awbrey's admitted use of methamphetamine supports a finding of intoxication in a general sense, but the State's burden was to prove intoxication *to the degree that Awbrey was impaired at the time he was stopped*. A plain reading of the ordinary language of the statute demonstrates that it requires proof that Awbrey's condition of thought and condition of action were impaired, as well as proof that he had lost the normal control of his faculties. The State provided

no evidence that Awbrey's condition of thought or action was impaired or that he had lost the normal control of his faculties. I.C. § 9-13-2-86.[6]

[19] The State provided insufficient evidence to establish that Awbrey was impaired beyond a reasonable doubt. The evidence, therefore, is insufficient to support the requisite finding of intoxication, and we are duty-bound to reverse Awbrey's conviction for operating a vehicle while intoxicated.

Conclusion

[20] The evidence is insufficient to sustain Awbrey's conviction for operating a vehicle while intoxicated. We reverse.

[21] Reversed.

Riley, J., and May, J., concur.

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[6] The cases that the State cites on this point are distinguishable either because they relied on the fact that there was far more evidence of impairment than mere consumption of a controlled substance, *Woodson v. State*, 966 N.E.2d 135, 142 (Ind. Ct. App. 2012), or because they evaluate sufficiency of evidence under a completely different statute. *Radick v. State*, 863 N.E.2d 356, 357 (Ind. Ct. App. 2007).