MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joshua Bargerhuff,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 6, 2021

Court of Appeals Case No. 20A-CR-2328

Appeal from the Cass Superior Court

The Honorable James Muehlhausen, Judge

Trial Court Cause No. 09D01-1805-F6-194

May, Judge.

[1] Joshua Bargerhuff challenges his conviction of Level 6 felony operating a vehicle while intoxicated.[1] Bargerhuff argues the State failed to provide evidence that he operated his vehicle while in a state of intoxication. We affirm.

Facts and Procedural History

[2] On May 1, 2018, Officer Scott Turney of the Cass County Sheriff's Department received a dispatch regarding a suspicious person located in the back parking lot of a church in Young America, Indiana. Upon arriving at the scene, Officer Turney found one lone car with Bargerhuff sitting in the driver's seat. Bargerhuff was asleep and slumped over the center console of the vehicle. The car was still running, the radio was turned on, and the automatic transmission was in drive.

[3] Officer Turney attempted to get Bargerhuff's attention by tapping on the window. When that was unsuccessful, Officer Turney nudged Bargerhuff through the partially open driver's side window. Bargerhuff woke up disoriented and with bloodshot and glassy eyes. Officer Turney noticed that Bargerhuff had a handgun sitting on the passenger seat, so he ordered Bargerhuff to keep his hands on the steering wheel as he moved to retrieve the

[1] Ind. Code § 9-30-5-3(a)(1). The State initially charged Bargerhuff with a misdemeanor offense under Indiana Code section 9-30-5-2(a); the State elevated that charge to a Level 6 felony based on to Bargerhuff's prior conviction of operating while intoxicated within the past five years.

firearm. While doing so, Officer Turney smelled an alcoholic odor, but he did not see any open containers in the car.

[4] Officer Chad Jones arrived on the scene and questioned Bargerhuff. As Bargerhuff explained that he was simply in the car because he was waiting for his brother, Officer Jones noted that Bargerhuff exemplified slow and slurred speech consistent with intoxication, misidentified the date when asked, and had unsteady balance. Bargerhuff blew into a portable-breath-test machine, which indicated the presence of alcohol. When instructed to perform three field sobriety tests, Bargerhuff failed two and could not complete the third. A certified breath test revealed Bargerhuff's alcohol concentration equivalence to be 0.108.

[5] On May 2, 2018, the State charged Bargerhuff with Level 6 felony operating while intoxicated. The State later alleged that Bargerhuff was a habitual vehicle substance offender under Indiana Code section 35-50-2-8 based on two prior unrelated vehicle substance offense convictions within the previous ten years. During a jury trial on October 20, 2020, Bargerhuff twice moved for a directed verdict – once following the State's case-in-chief and a second time following the State's closing. The trial court denied both motions. The jury found Bargerhuff guilty of the felony count, and Bargerhuff admitted he was a habitual vehicle substance offender. On November 19, 2020, the trial court imposed a two-year executed sentence and then added a six-year enhancement due to Bargerhuff's status as a habitual vehicle substance offender.

Discussion and Decision

[6] When reviewing the sufficiency of the evidence to support a conviction, we consider only the probative evidence and reasonable inferences supporting the trial court's decision. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). Such evidence need not exclude "every reasonable hypothesis of innocence." *Id*. at 147. It is solely the initial fact-finder's role to evaluate witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction; thus, we will not reweigh evidence but only consider conflicting evidence in the light most favorable to the trial court's ruling. *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003). We will affirm a conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt, *id.*, and we reverse only "when the record contains no facts to support [it] either directly or by inference." *Quillen v. Quillen,* 671 N.E.2d 98, 102 (Ind. 1996).

[7] In order to convict Bargerhuff, the State had to present evidence to prove beyond a reasonable doubt that Bargerhuff "operate[d] a vehicle while intoxicated." Ind. Code § 9-30-5-2(a). Specifically at issue is whether Bargerhuff "operated" his vehicle under the intended meaning of the statute. Indiana Code section 9-13-2-117.5 explains that to operate means to "navigate or otherwise be in actual physical control of a vehicle[.]" To further assist in determining whether a person operated a vehicle, *Crawley v. State* outlined four factors for consideration: "(1) the location of the vehicle when it is discovered; (2) whether the car was moving when discovered; (3) any additional evidence indicating that the defendant was observed operating the vehicle before he or

she was discovered; and (4) the position of the automatic transmission." 920 N.E.2d 808, 812 (Ind. Ct. App. 2010), *trans. denied*. As the aforementioned factors are not exhaustive, any additional evidence that points to a reasonable inference of operation may also be considered. *Id.* Importantly, however, the State is not tasked with demonstrating the actual movement of the car itself, *Johnson v. State*, 518 N.E.2d 1127, 1128 (Ind. Ct. App. 1988), but may look toward circumstantial evidence to show that Bargerhuff operated his vehicle at some point while intoxicated. *Winters v. State,* 132 N.E.3d 46, 50 (Ind. Ct. App. 2019). Therefore, in a case such as this, "where a vehicle is discovered motionless with the engine running, whether a person sitting in the driver's seat 'operated' the vehicle is a question of fact, answered by examining the surrounding circumstances." *Mordacq v. State*, 585 N.E.2d 22, 24 (Ind. Ct. App. 1992).

[8] Bargerhuff was found behind the wheel of a vehicle that was turned on, running, and still in gear to drive. As noted *supra*, one of the factors indicating actual physical control of a vehicle is the position of the automatic transmission, which in Bargerhuff's vehicle was still set in drive with him behind the wheel at the time he was found. While we agree with Bargerhuff that "showing that the defendant merely started the engine of the vehicle is not sufficient evidence to sustain a conviction for operating a vehicle while intoxicated," *Hiegel v. State*, 538 N.E.2d 265, 268 (Ind. Ct. App. 1989), *trans. denied*, *Hiegel* also dictates that "there must be some direct or circumstantial evidence to show that defendant operated the vehicle." *Id*. On review of the

surrounding circumstances relied on by the officers, we conclude there is ample circumstantial evidence to demonstrate and bolster the logical conclusion that Bargerhuff physically operated his vehicle while in an intoxicated state to get to the parking lot where he was found.

[9] Bargerhuff was found in the parking lot of a church located in a small residential area with no shops nearby; the closest place to purchase alcohol was nine miles from the church. Given that upon a search of the vehicle officers could not find any open containers, it is logical to infer that Bargerhuff ingested alcohol elsewhere and then operated his vehicle to end up in an empty parking lot. This inference is also supported by the fact that Bargerhuff did not live near Young America, but rather in the town of Russiaville, which was a fifteen to twenty minute drive from where he was found. Our standard of review guides that the evidence presented by the State need not exclude every reasonable hypothesis of innocence, but only must be such that an inference of guilt may be reasonably drawn by the finder of fact. *Metzler v. State*, 540 N.E.2d 606, 609 (Ind. 1989). While there may be a plethora of explanations as to how or why Bargerhuff ended up intoxicated in an empty parking lot, both inculpatory and exculpatory in nature, we need only conclude that the hypothesis accepted by the finder of fact was reasonably derived from the evidence presented by the State and justified Bargerhuff's conviction. *See Corbin v. State*, 113 N.E.3d 755, 764 (Ind. Ct. App. 2018) (the intoxicated defendant was located on the side of a busy interstate and informed the deputies that she was in the process of coming

back to Indianapolis from a wedding, such that it was reasonable to infer that she must have recently driven her vehicle to that location), *trans. denied*.

[10] Bargerhuff emphasizes on appeal that Deputy Turney personally did not see his car move and that it remained in a stationary position, that the car was parked in a parking lot and not blocking traffic, that he was "not particularly intoxicated, testing just over the legal limit for driving in Indiana" (Br. of Appellant at 13), and that he did not make any furtive gestures to evade the police. However, Bargerhuff's contrary explanations, some of which are either in conflict with each other or with direct evidence – suggesting that he was merely resting in his vehicle before being found, that he was waiting for his brother, or that he "stopped for a nap *before* becoming intoxicated" (Reply Br. of Appellant at 9) – are invitations for us to reweigh the evidence, which we cannot do. Instead, we hold the evidence was sufficient to justify Bargerhuff's conviction. *See Corbin*, 113 N.E.3d at 764 (evidence was sufficient to support trial court's conclusion that defendant operated her vehicle while intoxicated), *trans. denied*.

Conclusion

[11] We hold the State met its burden of proving beyond a reasonable doubt that Bargerhuff operated his vehicle while under the influence of alcohol. Accordingly, we affirm his conviction of Level 6 felony operating a vehicle while intoxicated.

[12] Affirmed.

Bailey, J., and Robb, J., concur.