MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael Whitaker,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 22, 2022

Court of Appeals Case No. 21A-CR-2268

Appeal from the Whitley Superior Court

The Honorable Douglas M. Fahl, Judge

Trial Court Cause No. 92D01-1806-F6-000482

May, Judge.

[1] Michael Whitaker appeals his convictions of Level 6 felony operating a vehicle while intoxicated endangering a person,[1] Level 6 felony operating a vehicle with an alcohol concentration equivalent over .15,[2] and Class B misdemeanor leaving the scene of an accident.[3] He presents multiple arguments[4] for our review, which we consolidate and restate as:

> 1. Whether the trial court abused its discretion when it admitted the inventory search of Whitaker's vehicle;
>
> 2. Whether the State presented sufficient evidence to prove Whitaker committed Level 6 felony operating a vehicle while intoxicated endangering a person and Level 6 felony operating a vehicle with an alcohol concentration equivalent over .15; and
>
> 3. Whether Whitaker's right against double jeopardy was violated when the trial court convicted him of both Level 6 felony operating a vehicle while intoxicated endangering a person and Level 6 felony operating a vehicle with an alcohol concentration equivalent over .15.

We affirm in part and vacate in part.

Facts and Procedural History

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[1] Ind. Code § 9-30-5-3(a)(1).

[2] Ind. Code § 9-30-5-1(b).

[3] Ind. Code § 9-26-1-1.1(b).

[4] The trial court also determined Whitaker was a habitual offender pursuant to Indiana Code section 35-50-2-8, but he does not challenge that adjudication.

[2] On June 2, 2018, "between 8 or 9" in the evening, Whitaker went to Dilly's, a bar in Akron, Indiana, with his friends. (Tr. Vol. II at 210.) While there, Whitaker "ha[d] drinks, you know, kind of just cut back, relax[ed], talk[ed] about things, whatnot." (*Id.*) Whitaker left the bar around midnight.

[3] At 3:00 a.m. on June 3, 2018, Robert and Charlotte Terhaar returned to their home in Whitley County, Indiana. They discovered a vehicle "[o]ver the embankment in [their] barn." (*Id*. at 45.) The Terhaars observed Whitaker in the driver's seat of the vehicle. Whitaker exited the vehicle, and "was stumbling" and "seemed disoriented[.]" (*Id*. at 53.) Whitaker told the Terhaars that he lived at their house. Whitaker was barefoot and struggled to put his shoes on his feet. He then grabbed beer, attempted to lock the car, and walked away. The Terhaars called the police.

[4] When police arrived on the scene, Whitaker was gone. Whitley County Sheriff's Deputy Kory Bailey arrived on the scene and observed Whitaker's vehicle "in a yard area over a concrete embankment towards a barn." (*Id*. at 93.) Whitaker had left the area, so the police brought in a K9 unit to find him.

[5] Deputy Bailey decided to tow the vehicle because "it was left abandoned on somebody's [sic] else's property." (*Id*. at 95.) He took pictures of the inside of the vehicle as part of a "vehicle impound inventory." (*Id.*) In plain view, Deputy Bailey observed a beer bottle, a cell phone, and an open case of beer. Deputy Bailey had the vehicle towed.

[6] Approximately five minutes after police towed the vehicle and left the premises, Whitaker knocked on the Terhaars' door and asked to use their telephone because his "car just got towed." (*Id*. at 57.) Charlotte closed the door and called the police. Deputy Bailey returned to the property and spoke with Whitaker, who gave Deputy Bailey various accounts of the night's events, including that he had "walked and then jogged from Akron, Indiana" to the scene of the crime. (*Id*. at 126.) Deputy Bailey noted Akron was located approximately twenty-two miles from the Terhaars' residence.

[7] Deputy Bailey testified he could "smell the strong odor of alcohol coming from" Whitaker, Whitaker's eyes were "bloodshot and glassy[,]" and Whitaker's speech was "slurred and slow." (*Id*.) Additionally, Deputy Bailey testified Whitaker's clothing was "disheveled . . . he had mud on his jeans [and] burrs on his shirt." (*Id*.) Whitaker's shoes were also on the incorrect feet. When asked if he had been drinking, Whitaker told Deputy Bailey that "he had a decent amount." (*Id*. at 130.) Whitaker testified at trial that he was "inebriated" but "not drunk at the time." (*Id*. at 222.)

[8] While talking with Deputy Bailey, Whitaker consented to a blood draw to determine his blood alcohol content, which was later determined to be .18. After the blood draw, Deputy Bailey transported Whitaker to the Whitley County Jail for a certified breath test, which also returned a .18 blood alcohol content result. Deputy Bailey then arrested Whitaker. Deputy Bailey discovered Whitaker's car keys in his pocket when searching him incident to his arrest.

[9] On June 4, 2018, the State charged Whitaker with Level 6 felony operating a while intoxicated endangering a person, Level 6 felony operating a vehicle with an alcohol concentration equivalent over .15, and Class B misdemeanor leaving the scene of an accident. The State also alleged Whitaker was a habitual vehicular substance offender based on two prior convictions. The trial court held a jury trial on September 9-10, 2020. At the end of the trial, the jury returned a guilty verdict on all counts. Outside the presence of the jury, Whitaker admitted being a habitual offender.

[10] On February 1, 2021, the trial court sentenced Whitaker to two years for Level 6 felony operating a vehicle while intoxicated endangering a person, two years for Level 6 felony operating a vehicle with an alcohol concentration equivalent over .15, and 180 days for Class B misdemeanor leaving the scene of an accident. The trial court enhanced Whitaker's two-year sentence for Level 6 felony operating a vehicle while intoxicated endangering a person by four years because he was a habitual offender. The trial court ordered Whitaker's other two sentences to be served concurrent to his sentence for Level 6 felony operating a vehicle while intoxicated endangering a person, for an aggregate sentence of six years incarcerated.

Discussion and Decision

1. Admission of Evidence

[11] Whitaker argues the trial court abused its discretion when it admitted photographs of items found in his vehicle because the seizure of those items

violated his Fourth Amendment right to be free from unreasonable search and seizure. Admission of evidence at trial is left to the discretion of the trial court. *Clark v. State*, 994 N.E.2d 252, 259-60 (Ind. 2013). We review its determinations for an abuse of that discretion, which means we reverse only when admission is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights. *Id*. at 260. We will not reweigh evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Marcum v. State*, 843 N.E.2d 546, 547 (Ind. Ct. App. 2006). We also consider uncontested evidence favorable to the defendant. *Id*. The record must disclose substantial evidence of probative value that supports the trial court's decision. *Gonser v. State*, 843 N.E.2d 947, 949 (Ind. Ct. App. 2006). The trial court's ruling will be upheld if it is sustainable on any legal theory supported by the record, even if the trial court did not use that theory. *Id*.

[12] The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches or seizures shall not be violated." This is understood as a general prohibition against warrantless searches and seizures of personal property "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). "When a search is conducted without a warrant, the State has the burden of proving that the search falls into one of the exceptions to the warrant requirement." *Meister v. State*, 933 N.E.2d 875, 878 (Ind. 2010). The State contends it was not required to prove Deputy Bailey complied with

department procedures used when impounding a vehicle because the items seized were in plain view.

[13] Police may seize evidence without a warrant if that evidence is in the officer's plain view. *Jones v. State*, 783 N.E.2d 1132, 1137 (Ind. 2003). "The plain view doctrine allows a police officer to seize items when he inadvertently discovers items of readily apparent criminality while rightfully occupying a particular location." *Id*. To determine if the plain view exception to the warrant requirement exists, we must consider (1) whether the initial intrusion was authorized under the Fourth Amendment; (2) whether the items were in plain view; and (3) whether the incriminating nature of the evidence is immediately apparent. *Id*.

[14] Here, the initial intrusion was authorized under the Fourth Amendment. Deputy Bailey arrived at the Terhaars' house in response to the Terhaars' 911 call. He saw Whitaker's vehicle on their property, over an embankment and near the Terhaars' barn. The Terhaars reported the vehicle's driver had left the scene. This evidence satisfies the first factor under the plain view doctrine. *See Wilkinson v. State*, 70 N.E.3d 392, 403 (Ind. Ct. App. 2017) (first factor of plain view doctrine satisfied because officers were responding to a 911 call regarding a strange, wrecked vehicle on the caller's property).

[15] Next, the items were in plain view. Deputy Bailey testified he observed "a cell phone on the driver's side floorboard underneath the steering wheel in plain view[,]" "a Bud Light bottle in the cupholder[,]" and a "Bud Light case, a 20-

pack, that is opened in the back right passenger seat." (Tr. Vol. II at 102.) All items were in plain view from the window of the vehicle and Deputy Bailey testified he observed them as he was preparing to tow the vehicle off the Terhaars' property. Deputy Bailey's observation of the items through the window of the car satisfies the second factor of the plain view doctrine. *See Justice v. State*, 765 N.E.2d 161, 165 (Ind. Ct. App. 2002) (officer's observation of plastic container and compact discs though the window of a car satisfied the second factor of the plain view doctrine), *clarified on reh'g* 767 N.E.2d 995 (Ind. Ct. App. 2002).

[16] Finally, the criminality of the items was immediately apparent. In *Wilkinson*, we noted probable cause was required to satisfy the final prong of the plain view doctrine. 70 N.E.3d at 402. The officer must have probable cause to believe the items seized will assist in solving the relevant crime. *Id*. In that case, we held the final factor of the plain view doctrine was satisfied because "a partially filled bottle of rum" was relevant to the allegation that Wilkinson had been drinking alcohol while driving his car. *Id*. at 404. Thus, the final prong of the plain view test is satisfied because Deputy Bailey had probable cause to believe the beer bottle, case of beer, and cell phone were related to the Terhaars' report of an intoxicated person leaving the car and fleeing the area. Therefore, we conclude the plain view search of Whitaker's vehicle did not violate his Fourth Amendment rights and the trial court did not abuse its discretion when it admitted the photographs of items Deputy Bailey observed in Whitaker's vehicle. *See Combs v. State*, 168 N.E.3d 985, 993 (Ind. 2021) (trial court did not

abuse its discretion when it admitted items seized as part of a plain view search).

3. Sufficiency of the Evidence

[17] Whitaker argues the State did not prove he committed Level 6 felony operating a vehicle while intoxicated endangering a person because the State did not present evidence that he operated the vehicle found on the Terhaars' property. Claims of insufficient evidence

> warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility. Rather, we consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. 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.

Powell v. State, 151 N.E.3d 256, 262-63 (Ind. 2020) (internal citations omitted). Pursuant to statute, "operate" means to "navigate or otherwise be in physical control of a vehicle, motorboat, off-road vehicle, or snowmobile." Ind. Code § 9-13-2-117.5.

[18] When determining if someone has operated a vehicle, we consider "(1) the location of the vehicle when discovered; (2) whether the vehicle was in motion when discovered; and (3) additional evidence that [the] defendant was observed operating the vehicle before he or she was discovered." *West v. State*, 22 N.E.3d 872, 876 (Ind. Ct. App. 2014), *trans. denied*. However, "[t]his is not an exclusive list, because any evidence that leads to a reasonable inference should be

included." *Id*. We may look to circumstantial evidence to show that a defendant operated his vehicle at some point while intoxicated. *Winters v. State*, 132 N.E.3d 46, 50 (Ind. Ct. App. 2019).

[19] Here, Whitaker's vehicle was found on private property, over an embankment, and stopped near the Terhaars' barn. Whitaker was the sole occupant of the vehicle, and the Terhaars found him in the driver's seat of his vehicle. He testified he had been at a bar in Akron, some twenty-two minutes away from the scene, previously that evening. Despite being found in the driver's seat, when asked "how that car got there" Whitaker said, "he had no idea, he was nowhere near it." (Tr. Vol. II at 148.) Whitaker also told Deputy Bailey that he had walked or jogged from the bar in Akron. Based on the location of the vehicle, Whitaker's presence in the driver's seat while the sole occupant of the vehicle, and Whitaker's inability to provide a plausible explanation how the vehicle reached the location where it rested, we conclude the State presented sufficient evidence Whitaker operated his vehicle. *See Corbin v. State*, 113 N.E.3d 755, 764 (Ind. Ct. App. 2018) (sufficient evidence Corbin operated a vehicle when her vehicle found stalled on the side of the highway in a place reserved for emergencies, and she was found in Montgomery County and indicated she was driving back to Indianapolis from a wedding), *trans. denied*. *See also, e.g., Crawley v. State*, 920 N.E.2d 808, 810-12 (Ind. Ct. App. 2010) (evidence sufficient to infer Crawley operated the vehicle despite the fact she was not found in the vehicle when the vehicle was found submerged in a pool and Crawley was "soaking wet" when she approached a nearby house), *trans.*

denied. Whitaker's alternate version of events is an invitation for us to reweigh the evidence or judge the credibility of witnesses, which we cannot do. *See Powell*, 151 N.E.3d at 262 (appellate court cannot reweigh evidence or judge the credibility of witnesses).

2. Double Jeopardy

[20] Whitaker also argues his convictions of Level 6 felony operating a vehicle while intoxicated endangering a person and Level 6 felony operating a vehicle with an alcohol concentration equivalent of over .15 violate his right against double jeopardy because the State used the same evidence to prove the elements of both crimes. In *Wadle v. State*, our Indiana Supreme Court held we must conduct a two part-inquiry when "a defendant's single act or transaction implicates multiple criminal statutes." 151 N.E.3d 227, 235 (Ind. 2020).

> First, a court must determine, under our included-offense statutes, whether one charged offense encompasses another charged offense. Second, a court must look at the underlying facts - as alleged in the information and as adduced at trial - to determine whether the charged offenses are the "same." If the facts show two separate and distinct crimes, there's no violation of substantive double jeopardy, even if one offense is, by definition, "included" in the other. But if the facts show only a single continuous crime, and one statutory offense is included in the other, then the presumption is that the legislation intends for alternative (rather than cumulative) sanctions. The State can rebut this presumption only by showing that the statute - either in express terms or by unmistakable implication - clearly permits multiple punishment.

Id.

[21] In *Wadle*, the trial court entered convictions of, in relevant part, Level 6 felony operating a vehicle while intoxicated endangering a person and Level 6 felony operating a vehicle with an alcohol concentration equivalent to .08. *Id*. at 236. The State conceded those two convictions violated double jeopardy because "[n]either statute clearly permits cumulative punishment and the latter offense is an included offense of the former." *Id*. at 253. The same is true here. Whitaker's convictions are virtually identical to Wadle's relevant convictions – Whitaker was convicted of Level 6 felony operating a vehicle while intoxicated endangering a person and Level 6 felony operating a vehicle with an alcohol concentration equivalent to .15. Based thereon, the State concedes Whitaker's conviction of Level 6 felony operating a vehicle with an alcohol concentration equivalent to .15 should be vacated on double jeopardy grounds. We agree and vacate[5] that conviction.[6]

Conclusion

[22] The trial court did not abuse its discretion when it admitted photographs of items found in Whitaker's car because those items were found in plain view by

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[5] Although we vacate one of Whitaker's convictions, we need not remand for resentencing. The trial court attached Whitaker's habitual offender enhancement to his conviction of Level 6 operating a vehicle while intoxicated endangering a person and ordered the other two sentences served concurrent to that six-year sentence. The vacation of this conviction and sentence has not, therefore, impacted Whitaker's aggregate sentence.

[6] Because we reverse Whitaker's conviction of Level 6 felony operating a vehicle with an alcohol concentration equivalent over .15 on double jeopardy grounds, we need not address his argument regarding the sufficiency of the evidence supporting that conviction.

an officer who had been called to an accident scene and their connection to criminal activity was immediately apparent. Further, the State presented sufficient evidence that Whitaker operated his vehicle, satisfying that element of the driving while intoxicated endangering a person statute. However, Whitaker's convictions of Level 6 felony driving while intoxicated endangering a person and Level 6 felony driving with an alcohol concentration equivalent over .15 violated his right to be free from double jeopardy, and thus we vacate the latter conviction.

[23] Affirmed in part and vacated in part.

Riley, J., and Tavitas, J., concur