

# MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

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Dale L. Franks,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

December 20, 2023

Court of Appeals Case No.  
23A-CR-744

Appeal from the Adams Superior  
Court

The Honorable Samuel K. Conrad,  
Judge

Trial Court Cause No.  
01D01-2210-CM-318

**Memorandum Decision by Judge Kenworthy**  
Chief Judge Altice and Judge Weissmann concur.

**Kenworthy, Judge.**

## Case Summary

- [1] Following a jury trial, Dale Franks was convicted of Class C misdemeanor operating a vehicle while intoxicated.<sup>1</sup> Having served his entire sentence, Franks now appeals his conviction, arguing the State presented insufficient evidence to convict him. Determining there was sufficient evidence to support his conviction, we affirm.

## Facts and Procedural History

- [2] Around 12:55 a.m., Berne Police Department Officer Wesley Haight went to Franks' house after neighbors complained about a fight. Officer Haight tried to "ascertain what was going on," "solve the issue, and gather information until responding units arrived." *Tr. Vol. 2* at 54. He separated Franks and his brother, who were yelling at each other. Officer Haight spoke with Franks' wife, who explained she, Franks, and Franks' brother had been at a party. She had left early, receiving a ride home from someone. After she got home, she went straight to bed.
- [3] Officers from the Geneva Police Department, Peter Amstutz and Tyler Ritter-Butz, arrived and spoke with Franks. Franks told the officers he had been drinking "quite a bit," *State's Ex. 3* at 13:33, "off and on all night," *id.* at 12:42. He admitted he drank margaritas and "a good quarter" of a Mason jar full of "butter pecan moonshine." *Id.* at 14:38. Franks explained he drove home from

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<sup>1</sup> Ind. Code § 9-30-5-1(a) (2021).

the party, even though he and his brother were “both shit faced.” *State’s Ex. 2* at 6:08. Franks’ brother followed Franks in his truck to Franks’ home. Franks noticed his brother was swerving while driving. When they arrived at Franks’ house, Franks’ brother stated he planned to drive to his home several miles away. Franks argued loudly with his brother, trying to prevent him from driving in order to “save him and the other people he comes across.” *Id.* at 6:33.

[4] Franks and his brother said they had been at Franks’ home for about ten minutes. When asked if he had anything to drink once he got home, Franks responded, “Since I got home? No, sir.” *Id.* at 12:45. Franks clarified he only drank “at the party.” *Id.* As Officer Amstutz spoke with Franks, he said he could “really smell” the odor of alcohol coming from Franks. *State’s Ex. 3* at 14:30. As Franks was being arrested, he shouted to his wife, “I’m going to jail . . . because I drove drunk!” *State’s Ex. 1* at 23:50.

[5] The State charged Franks with Class C misdemeanor operating a vehicle while intoxicated. At trial, a jury heard testimony from all three officers and watched bodycam footage from Officer Haight and dashcam footage from Officers Amstutz and Ritter-Butz. Franks testified he did not drive himself home, but he did not remember who drove him home. Franks said his wife must have driven him home because the party was at an Amish friend’s house and “[t]he Amish don’t drive.” *Tr. Vol. 2* at 89. Franks’ wife testified she drove Franks home. The parties stipulated Franks’ blood alcohol concentration (“BAC”) was 0.11 at 2:14 a.m.

[6] The jury was not instructed about the statutory presumption<sup>2</sup> that a defendant operated a vehicle with a BAC of at least 0.08 where a blood test is taken within three hours of the defendant's operation of the vehicle and the test result shows the defendant had a BAC of at least 0.08. The jury found Franks guilty as charged. The trial court entered judgment of conviction and sentenced Franks.

### **Sufficient Evidence Supports Franks' Conviction**

[7] Franks argues the State did not present sufficient evidence to support his conviction. When reviewing a claim of insufficient evidence, we consider "only probative evidence and reasonable inferences that support the judgment of the trier of fact." *Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021). We neither reweigh evidence nor judge witness credibility, and will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.*

[8] To convict Franks of the charge, the State was required to prove beyond a reasonable doubt Franks operated a vehicle with an alcohol concentration equivalent to at least 0.08 grams of alcohol per one hundred milliliters of blood. *See* I.C. § 9-30-5-1(a). Franks claims the State failed to prove beyond a reasonable doubt that when he operated his vehicle his BAC was at least 0.08.<sup>3</sup>

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<sup>2</sup> I.C. §§ 9-30-6-2 & 9-30-6-15.

<sup>3</sup> Franks claims the State was required to prove his BAC was at least 0.08 *but not more than 0.15*. But Franks was only charged with operating a vehicle "with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol per 100 milliliters of said defendant's blood," *Appellant's App. Vol. 2* at 11, which is how the jury was instructed, *Tr. Vol. 2* at 43, 99.

He points out the jury was not instructed about the presumption that the defendant operated a vehicle with a BAC of at least 0.08 where, within three hours of his operation of the vehicle, a BAC test is taken and reveals his concentration to be at or above that limit. He speculates the jury was not instructed about the presumption because “neither party believed it could apply, given the uncertainty as to when Franks allegedly drove a vehicle.” *Appellant’s Br.* at 10. He claims the presumption should not apply here, and the State “failed to present any evidence that Franks’ blood alcohol concentration would have fallen within the range of .08 to .15 at the time he allegedly drove the vehicle, given there was no evidence as to when Franks consumed the alcohol and how much he consumed.” *Appellant’s Br.* at 12.

[9] As to Franks’ concerns about the jury being left uninstructed about the statutory presumption, this Court has evaluated “what evidence, if any, the State is required to present to prove a [given concentration of] blood alcohol when the statutory presumption is not relied upon.” *Allman v. State*, 728 N.E.2d 230, 232 (Ind. Ct. App. 2000). In *Sullivan v. State*, 517 N.E.2d 1251, 1252 (Ind. Ct. App. 1998), *trans. denied*, this Court determined a jury may reasonably infer from surrounding facts (rather than rely on the State’s evidence of extrapolation) whether the defendant’s BAC met or exceeded the legal limit at the time of the offense. *Sullivan* still applies when the State does not rely on the statutory presumption. *Allman*, 728 N.E.2d at 233.

[10] Here, the parties stipulated Franks’ BAC was 0.11 at 2:14 a.m. At 12:55 a.m., when officers asked Franks how long he had been home, he said it had been

about ten minutes. And the jury heard from the three officers who were at Franks' house that morning and who testified consistently with three videos showing their interactions with Franks, Franks' brother, and Franks' wife. Franks told the officers he did not have anything to drink once he got home. Officers smelled the odor of alcohol coming from Franks and noticed Franks' speech was slurred and he was unsteady on his feet. Franks also admitted to the officers several times he had driven home from a party ten minutes ago while he was intoxicated. He told the officers he drank margaritas and "a good quarter" of a Mason jar full of moonshine. *State's Ex. 3* at 14:38. Further, at trial, Franks, rather than claim his BAC was below 0.08, admitted he was "pretty smashed" and did not "recollect how [he] even got home." *Tr. Vol. 2* at 91, 89. There is therefore sufficient evidence for the jury to infer Franks' BAC was greater than 0.08 when Franks operated his vehicle.

## **Conclusion**

[11] Determining sufficient evidence supports Franks' conviction, we affirm.

[12] Affirmed.

Altice, C.J., and Weissmann, J., concur.