MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Victoria Cheyenne Dotson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 11, 2021

Court of Appeals Case No. 20A-CR-1725

Appeal from the Lake Superior Court

The Honorable Kathleen Lang, Senior Judge

Trial Court Cause No. 45G04-1709-F5-87

Weissmann, Judge.

[1] After hitting and killing a pedestrian with her car, Victoria Dotson was charged with four separate counts related to operating a vehicle while intoxicated. Though the evidence is sufficient to support all four convictions, punishing Dotson four times for the same offense clearly violates the statutory prohibition against substantive double jeopardy. Accordingly, we remand with instructions to vacate three of Dotson's four convictions and resentence her accordingly.

Facts

[2] Victoria Dotson sped her Buick LeSabre through an intersection in Hammond, Indiana, hitting and killing pedestrian James Gavina in the crosswalk. Police subjected Dotson to a battery of sobriety tests. She failed the field sobriety tests administered at the scene. Her breath tests, taken more than an hour after the crash, indicated inconclusive results and a result of .102 grams of alcohol per 210 liters of breath. And a blood sample taken more than four hours after the crash indicated an alcohol concentration equivalent (ACE) of .071 grams of alcohol per milliliters of blood.

[3] The State charged Dotson with the following:

- Count I: causing death when operating a motor vehicle while intoxicated, a Level 5 felony;
- Count II: causing death when operating a vehicle with an ACE of .08 or more, a Level 5 felony;
- Count III: operating a vehicle while intoxicated endangering a person, a Class A misdemeanor; and

- Count IV: operating a vehicle while intoxicated, a Class C misdemeanor.

[4] A jury found Dotson guilty as charged. The trial court entered convictions on all four counts and sentenced Dotson to concurrent three years on all counts with one year executed in Lake County Jail, one year in Lake County Community Corrections, and one year of probation.[1] Dotson now appeals.

Discussion and Decision

[5] Dotson appeals two issues. First, she argues that her convictions are based on insufficient evidence. Second, she argues that her conviction on all four counts violated substantive double jeopardy. She asks for reversal on all counts. Though we agree that Dotson's convictions violate double jeopardy, the evidence is sufficient to support them. Accordingly, three of Dotson's four convictions should be vacated.

I. Sufficiency of the Evidence

[6] Dotson argues that the evidence was insufficient to prove all counts beyond a reasonable doubt. When reviewing the sufficiency of evidence, we "must consider only the probative evidence and reasonable inferences supporting the verdict." *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We will not reweigh

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[1] The abstract of judgment indicates the court intended to sentence Dotson to concurrent three-year sentences on each of the four convictions, even though two of those convictions were misdemeanors. App. Vol. II p. 133. We remind the trial court that the maximum sentence for a Class A misdemeanor is one year imprisonment and the maximum sentence for a Class C misdemeanor is 60 days. Ind. Code §§ 35-50-3-2; 35-50-3-4. However, because we reverse on double jeopardy grounds, we need not concern ourselves with this illegal sentence.

evidence or reassess witness credibility. *Id.* Instead, we affirm unless no reasonable factfinder could determine that each element of the crime was proved beyond a reasonable doubt. *Id.*

[7] Dotson's argument focuses on the sufficiency of the evidence of her intoxication and her ACE. Intoxication is an element of counts I, III, and IV, while an ACE greater than .08 is an element of count II. Ind. Code §§ 9-30-5-2(a); 9-30-5-2(b); 9-30-5-5(a)(1); 9-30-5-5(a)(3) (2017).

A. Intoxication

[8] For purposes of counts I, III, and IV, a person is "intoxicated" when they are under the influence of alcohol "so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties." Ind. Code § 9-13-2-86. "Impairment can be established by evidence of: (1) the consumption of a significant amount of alcohol; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of alcohol on the breath; (5) unsteady balance; (6) failure of field sobriety tests; and (7) slurred speech." *Matlock v. State*, 944 N.E.2d 936 (Ind. Ct. App. 2011) (quoting *A.V. v. State*, 918 N.E.2d 642, 644 (Ind. Ct. App. 2009). Proof of a person's ACE is not required to show intoxication. *Id.* (citing *Ballinger v. State*, 717 N.E.2d 939, 943 (Ind. Ct. App. 1999).

[9] Considering only the evidence favorable to the verdict, the State presented sufficient evidence of Dotson's intoxication, even without the breath and blood tests. Witness testimony and video evidence support the conclusion that Dotson

hit Gavina with her car. One witness to the crash testified that she heard Dotson admit to drinking before driving. Dotson also told investigators she had been drinking. Additionally, one of the responding officers observed evidence consistent with intoxication. He testified that Dotson's breath smelled of alcohol. He also observed that Dotson had watery eyes and administered the field sobriety tests Dotson failed. Dotson argues these last two observations are better explained by her acute emotional distress than by intoxication, but that was for the jury to determine. There was sufficient evidence for a reasonable factfinder to conclude that Dotson was intoxicated.

B. Alcohol Concentration of at least .08

[10] Dotson argues that because her breath tests resulted in an "insufficient sample" reading and her blood test showed a result of .071, the State failed to prove beyond a reasonable doubt that Dotson's ACE was greater than or equal to .08. But Dotson fails to acknowledge that her blood was drawn more than four hours after the crash. The State submitted evidence indicating that the passage of time lowers ACE and that Dotson's ACE at the time of the crash would have been between .117 and .187. This entire range exceeds the statutory threshold and is consistent with Dotson's .102 breath test taken about an hour after the crash. A jury reasonably could infer from this evidence that Dotson's ACE exceeded .08 at the time of the crash. *Cf. Artigas v. State*, 122 N.E.3d 1003 (Ind. Ct. App. 2019) (holding evidence that defendant's ACE was somewhere between .07 to .084, most of which is below the statutory threshold, was insufficient to prove beyond a reasonable doubt that defendant's ACE was at

least .08). Accordingly, there was sufficient evidence to support all of Dotson's convictions.

II. Double Jeopardy

[11] Multiple convictions or punishments for the same offense in a single trial violate the statutory prohibition on substantive double jeopardy. *Wadle v. State*, 151 N.E.3d 227, 235 (Ind. 2020). Dotson argues that this prohibition was flouted when the trial court entered convictions on all four counts. The State concedes this point, and we agree. Because our double jeopardy doctrine has recently changed, however, we find it necessary to analyze why Dotson's four charges violate substantive double jeopardy.

[12] Our Supreme Court's decisions in *Wadle* and *Powell v. State*, 151 N.E.3d 256 (Ind. 2020), ushered in a new framework for evaluating substantive double jeopardy claims. When a defendant's single act or transaction is charged under multiple statutes, we first look to the statutes themselves to see if they allow multiple punishment. *Wadle*, 151 N.E.3d at 253. None of the statutes under which Dotson was charged clearly allow for multiple punishment. I.C. §§ 9-30-5-2(a); 9-30-5-2(b); 9-30-5-5(a)(1); 9-30-5-5(a)(3) (2017).

[13] Next, we apply our included-offense statutes. *Wadle*, 151 N.E.3d at 253. Pursuant to Indiana Code § 35-31.5-2-168, Counts II, III and IV are all lesser-included offenses of Count I because they are established by proof of the same material elements or less, as illustrated by this chart:

Count I: Level 5 Felony Causing Death When Operating a Motor Vehicle While Intoxicated	Count II: Level 5 Felony Causing Death When Operating a Motor Vehicle with an ACE Of .08 or More	Count III: Class A Misdemeanor Operating a Vehicle While Intoxicated Endangering a Person	Count IV: Class C Misdemeanor Operating a Vehicle While Intoxicated
A person who • causes the death of another person • while operating a vehicle • while intoxicated commits a Level 5 felony.	A person who • causes the death of another person • while operating a vehicle • with an alcohol concentration equivalent to .08 gram of alcohol per 100 milliliters of the person's blood or 210 liters of the person's breath commits a Level 5 felony.	A person who • operates a vehicle • while intoxicated • in a manner that endangers a person commits a Class A misdemeanor.	A person who • operates a vehicle • while intoxicated commits a Class C misdemeanor.

Each successive count requires less than the count preceding it. Counts III and IV are identical, except count III requires an additional element of endangerment. Counts I and III are identical, except count I requires death rather than mere endangerment.

[14] That count II is included in count I is perhaps less obvious. Count II requires proof of a high ACE, whereas a high ACE is but one way to prove intoxication, a required element of Count I. *See, e.g.*, *Rembusch v. State*, 836 N.E.2d 979, 984-85 (Ind. Ct. App. 2005) (holding that evidence of defendant's intoxication, including an ACE of .18%, was sufficient to show defendant was intoxicated); *Hornback v. State*, 693 N.E.2d 81, 85 (Ind. Ct. App. 1998) ("Evidence that a driver of a motor vehicle . . . has a blood alcohol content of .10% or more, will sustain a conviction for operating a motor vehicle while intoxicated."). This court has previously concluded that operating a vehicle with an ACE above a certain threshold is a lesser-included offense of operating a vehicle while intoxicated. *Hornback*, 693 N.E.2d at 85.

[15] Finally, Dotson's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Wadle*, 151 N.E.3d at 253. Dotson was charged with four crimes because she killed Gavina while driving drunk. No additional acts justify the additional charges. Counts II, III and IV therefore should be vacated to rectify the violation of double jeopardy.

[16] Accordingly, we remand with instructions to vacate counts II, III and IV and resentence Dotson in keeping with this opinion.

Mathias, J., and Altice, J., concur.