MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Romeo Minga,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 15, 2022

Court of Appeals Case No. 21A-CR-2177

Appeal from the Allen Circuit Court

The Honorable Wendy W. Davis, Judge

Trial Court Cause No. 02C01-2011-F6-1381

Bradford, Chief Judge.

Case Summary

[1] On October 31, 2020, Romeo Minga was found asleep in the driver's seat of a running vehicle in the parking lot of a bar in Fort Wayne. Blood tests subsequently revealed that his blood alcohol concentration ("BAC") was 0.185 milliliters of alcohol per 100 milliliters of blood. After the State charged Minga with operating a vehicle while intoxicated ("OWI"), Minga filed a motion in which he requested that all evidence obtained during what he classified as an illegal search and seizure be suppressed and the case be dismissed. The trial court denied Minga's motion, and the jury found him guilty of Level 6 felony OWI with a BAC of 0.08 or higher. Upon entering a judgment of conviction, the trial court sentenced Minga to a two-and-one-half-year term, with two years executed in the Department of Correction ("DOC") and six months suspended to probation. We affirm.

Facts and Procedural History

[2] On the evening of October 31, 2020, Fort Wayne Police Officers Stephanie Souther and Dexter Fillers were on patrol when a silver Mercedes drew their attention. Officer Souther watched as the Mercedes drove into the parking lot of Showgirl One, a bar, and parked. Officer Souther ran the license plate through dispatch and the license plate came back as being registered to an individual named Asllan Minga. After running the plate, Officers Souther and Fillers "left [the vehicle] alone" because "it was obviously at its destination." Tr. Vol. II p. 147.

[3] A short time later, Steven Fetzer, who was working as the bouncer at Showgirl One, was informed by "some people coming in from outside" that "there was somebody passed out in their car with the music blaring and the car was running." Tr. Vol. II p. 121. After receiving a second complaint about the vehicle, Fetzer and his manager walked out into the parking lot and observed a silver Mercedes running, with its windows down and music playing. Fetzer walked over to the driver, later identified as Minga, shook him, and tried to wake him up, but was unsuccessful. Fetzer then "turned off the car, took the keys out of the ignition, and threw them in the passenger side seat." Tr. Vol. II pp. 121–22. Fetzer then again tried to wake Minga. When Fetzer shook Minga for a second time, Minga's "eyes kinda opened up a little bit and rolled back." Tr. Vol. II p. 122. At that point, fearing that Minga "was overdosing," Fetzer decided to call 911. Tr. Vol. II p. 122. Fetzer provided dispatch with his name, address, occupation, telephone number, and a synopsis of what he had seen.

[4] About twenty minutes after they first observed Minga's silver Mercedes, Officers Souther and Fillers were dispatched to the bar. When they arrived, Officers Souther and Fillers spoke to Fetzer, who was standing in front of the silver Mercedes that they had seen twenty minutes earlier that evening. After briefly speaking to Fetzer, Officer Souther turned her attention to the vehicle, observing that Minga was "passed out in the driver's seat of the vehicle, unresponsive." Tr. Vol. II p. 151. Officer Souther walked over to the car, reached inside, and tried to wake Minga up by saying, "[h]ey, wake up." Tr. Vol. II p. 131. She shook his shoulders and repeated "[h]ey, wake up, police."

Tr. Vol. II p. 131. When that failed to rouse Minga, Officer Souther rubbed Minga's sternum[1] and he woke up.

[5] Minga was "kinda out of it" when he woke up and appeared to be annoyed at the interruption and was "not being very cooperative." Tr. Vol. II p. 132. Minga

> was very unsteady on his feet. He was very difficult to understand when he spoke because his speech was very thick and slurred. He had a very strong odor of alcoholic beverages on his breath. [Officer Souther] had to hold onto him a lot when he was walking because [she] was afraid [that] he was going to fall down. Um, and he had watery, bloodshot eyes. All of the signs that are indictive of alcohol intoxication.

Tr. Vol. II p. 153. A subsequent search of the car revealed "some open bottles" of Heineken beer, one of which was empty. Tr. Vol. II p. 168.

[6] Minga was ultimately taken into custody for suspicion of operating a vehicle while intoxicated and transported to the Allen County Jail. He subsequently refused to submit to a chemical test, after which Officer Souther contacted the Prosecutor's Office and applied for a search warrant to collect a sample of Minga's blood. The search warrant affidavit provided that Minga "was found

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[1] In administering what is referred to as a sternum rub, Officer Souther took "the knuckles of [her] hand and scrape[d] it firmly against [Minga's] sternum." Tr. Vol. II p. 151. A sternum rub "doesn't injure anybody but it's not comfortable. So, a lot of times people who are unconscious will wake up when you do that." Tr. Vol. II p. 151.

asleep behind the wheel of a running vehicle," his breath smelled of alcohol and his eyes were bloodshot, he was unsteady on his feet, it "took multiple sternum rubs" to wake him, and Heineken bottles were found in the rear of the vehicle, one of which was empty. Appellant's App. Vol. II p. 104. The warrant was approved, and a sample of Minga's blood was taken by a nurse at the jail. Subsequent testing performed by the Indiana State Department of Toxicology revealed that Minga's BAC was 0.185 milliliters of alcohol per 100 milliliters of blood at the time the sample was taken.

[7] The State subsequently charged Minga, *inter alia*, with Level 6 felony operating a vehicle with a BAC of 0.08 or higher. On July 13, 2021, Minga filed a motion to suppress "all evidence obtained during an illegal search and seizure conducted on October 31, 2020," and to dismiss all charges (the "Motion"). Minga's jury trial began on July 14, 2021. Prior to the selection of the jury, the trial court conducted a hearing on Minga's Motion. At the conclusion of the hearing, the trial court took the Motion "under advisement until [it] hear[d] more testimony coming out throughout the trial." Tr. Vol. II p. 14. At the conclusion of the State's case-in-chief, the trial court denied Minga's Motion.

[8] The jury subsequently found Minga guilty of Level 6 felony operating a vehicle with a BAC of 0.08 or higher. On September 7, 2021, the trial court sentenced Minga to a two-and-one-half year term, with two years executed in the DOC and six months suspended to probation.

Discussion and Decision

I. Admission of Evidence

[9] Minga contends that the trial court abused its discretion in admitting evidence of his intoxication that was obtained in connection with what he claims was an illegal search and seizure, *i.e.*, an illegal blood draw.

> Trial courts have broad discretion to admit or exclude evidence, and our review is limited to whether the trial court abused that discretion. *Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014). We consider all the facts and circumstances surrounding the trial court's decision to determine whether it is "clearly against the logic and effect" of what those facts and circumstances dictate. *Id*. And we "may affirm a trial court's judgment on any theory supported by the evidence." *Clark v. State*, 808 N.E.2d 1183, 1188 (Ind. 2004).

Satterfield v. State, 33 N.E.3d 344, 352 (Ind. 2015).

[10] "'Protection against unreasonable searches and seizures is one of the most essential constitutional rights' under both the Fourth Amendment and Article 1, Section 11 of the Indiana Constitution." *McIlquham v. State*, 10 N.E.3d 506, 511 (Ind. 2014) (quoting *Brown v. State*, 653 N.E.2d 77, 79 (Ind. 1995)). "The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution both require probable cause for the issuance of a search warrant." *Darring v. State*, 101 N.E.3d 263, 268 (Ind. Ct. App. 2018). "The determination of probable cause is based on the facts of each case and requires the issuing magistrate to 'make a practical, common-sense decision

whether, given all the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place.'" *Id.* (quoting *Keeylen v. State*, 14 N.E.3d 865, 871 (Ind. Ct. App. 2014), *clarified on reh'g*, 21 N.E.3d 840 (Ind. Ct. App. 2014)). "'Probable cause is only a probability or substantial chance of criminal activity, not a certainty that a crime was committed.'" *Keeylen*, 14 N.E.3d at 871 (quoting *Suarez v. Town of Ogden Dunes, Ind.*, 581 F.3d 591, 596 (7th Cir. 2009)).

[11] In filing the Motion, Minga argued that search was illegal because the State lacked probable cause to believe that criminal activity was afoot. Minga renews this argument on appeal, asserting both that the State lacked probable cause to believe that criminal activity was afoot and that the warrant was illegal because it was obtained with "false and misleading information." Appellant's Br. p. 9. We disagree with both assertions.

[12] The Indiana Supreme Court has held that "[a] warrant is not invalid simply because it contains slightly inaccurate material that is immaterial to the warrant's validity." *Jones v. State*, 783 N.E.2d 1132, 1136 (Ind. 2003). In *Franks v. Delaware*, 438 U.S. 154, 171–72 (1978), "the U.S. Supreme Court held that a warrant is invalid where the defendant can show by a preponderance of the evidence that the affidavits used to obtain the warrant contain perjury by the affiant, or a reckless disregard for the truth by him, *and the rest of the affidavit does not contain materials sufficient to constitute probable cause*." *Id.* (emphasis added). When, as is alleged to have happened here, "the State omits information from a probable cause affidavit, in order for the warrant to be invalid, the defendant

must show: '(1) that the police omitted facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading, ... and (2) that the affidavit if supplemented by the omitted information would not have been sufficient to support a finding of probable cause.'" *Ware v. State*, 859 N.E.2d 708, 718 (Ind. Ct. App. 2007) (quoting *U.S. v. Lakoskey*, 462 F.3d 965, 978 (8th Cir. 2006)). "A showing of reckless disregard requires more than a showing of negligence and may be proved from circumstances showing obvious reasons for the affiant to doubt the truth of the allegations." *U.S. v. Williams*, 718 F.3d 644, 650 (7th Cir. 2013). In reviewing for error, our task is to determine whether, based on the totality of the circumstances, it was reasonable for the trial court "to conclude that law enforcement did not doubt the truth of the affidavit." *Id.*

[13] Minga argues that the search warrant affidavit submitted by Officer Souther contained false and misleading information. In making this argument, Minga points to language suggesting that it was "within [Officer Souther's] personal knowledge, or [was] communicated to [her] by other officers" that Minga "was found asleep behind the wheel of a running vehicle." Appellant's App. Vol. II p. 104. Minga asserts that Officer Souther did not observe the vehicle with the engine turned on and the information that Minga was asleep behind the wheel of a running vehicle was not provided to Officer Souther by another officer, but rather by Fetzer, who was working as the bouncer at the bar.

[14] While it was inaccurate for Officer Souther to insinuate that she or another officer observed the engine running, Minga fails to prove that the State's

omission, *i.e.*, that it was Fetzer, and not a member of law enforcement, who had observed the engine running, was made intentionally or with reckless disregard. In reporting discovery of the vehicle to law enforcement, Fetzer provided dispatch with his name, address, occupation, telephone number, and a synopsis of what he had seen. He was also waiting by the vehicle when Officers Souther and Fillers arrived a few minutes later. Given that Fetzer could have been subjected to criminal penalties if it had been determined that he knowingly made a false report to law enforcement, *see Duran v. State*, 930 N.E.2d 10, 17 (Ind. 2010) (noting that an identified informant is exposed to potential civil or even criminal consequences for false information), it was reasonable for the trial court to conclude that law enforcement did not doubt the truth of the report. *Williams*, 718 F.3d at 650. Furthermore, as a practical matter, given that Minga's vehicle was parked in a parking lot of an open establishment, it does not seem unreasonable, for public safety reasons, that Fetzer turned the engine off upon finding Minga in a passed-out condition.

[15] Further still, the rest of the information in the probable cause affidavit, which was observed by Officer Souther, supported the issuance of the warrant as it was sufficient to establish probable cause to believe Minga was intoxicated. Specifically, Officer Souther had first-hand knowledge that Minga was asleep in the driver's seat when she arrived and it took her "multiple sternum rubs" to wake him; once awake, Minga's breath smelled of alcohol, his eyes were bloodshot, and he was unsteady on his feet; and Heineken bottles were found in the vehicle, one of which was empty. Appellant's App. Vol. II p. 104. These

facts are sufficient to constitute probable cause to believe that Minga was intoxicated. Because we conclude that Officer Souther's omission that it was actual Fetzer and not a member of law enforcement who observed the engine running is not fatal to the probable cause affidavit, we further conclude that the warrant allowing for the blood draw was therefore valid. As such, the trial court did not abuse its discretion by admitting the evidence relating to and stemming from the blood draw.

II. Sufficiency of the Evidence

[16] Minga also contends that the evidence was insufficient to prove that he was operating his vehicle.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts 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.

Drane v. State, 867 N.E.2d 144, 146–47 (Ind. 2007) (internal citations and quotations omitted). Stated differently, "'[w]e affirm the judgment unless no reasonable factfinder could find the defendant guilty.'" *Mardis v. State*, 72

N.E.3d 936, 938 (Ind. Ct. App. 2017) (quoting *Griffith v. State*, 59 N.E.3d 947, 958 (Ind. 2016)).

[17] In order to convict Minga of Level 6 felony OWI, the State was required to prove that Minga "operate[d] a vehicle with an alcohol concentration equivalent to at least fifteen-hundredths (0.15) gram of alcohol per: (1) one hundred (100) milliliters of the person's blood" and that Minga had "a previous conviction for operating while intoxicated that occurred within the seven (7) years immediately preceding" the instant offense. Ind. Code §§ 9-30-5-1(b) and 9-30-5-3. Minga does not challenge the sufficiency of the evidence to prove that he was intoxicated or that he had a prior OWI conviction. He only argues that the evidence is insufficient to prove that he was operating his vehicle.

[18] "To sustain a conviction for [OWI], it is not sufficient for the State to show that the defendant merely started the engine." *Clark v. State*, 611 N.E.2d 181, 181 (Ind. Ct. App. 1993). "There must be some evidence to show the defendant operated the vehicle." *Id.* "'In a case 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.'" *Winters v. State*, 132 N.E.3d 46, 50 (Ind. Ct. App. 2019) (quoting *Mordacq v. State*, 585 N.E.2d 22, 24 (Ind. Ct. App. 1992)).

[19] Minga relies on *Hiegel v. State*, 538 N.E.2d 265 (Ind. Ct. App. 1989) and *Mordacq* in support of his claim that the evidence is insufficient to prove that he was operating his vehicle. In *Hiegel*,

> On April 1, 1988 at approximately 10:10 P.M., a police officer found Hiegel in his car which was parked in the parking lot of a tavern. The lights of the vehicle were on and the engine was running as was the vehicle's heater. The vehicle was in "park" and although Hiegel was found on the driver's side of the vehicle, he was asleep with the seat reclined to an almost supine position. Additionally, the defendant's trousers were down around his knees and the driver's door was open.

538 N.E.2d at 266. A subsequent "breathalizer test result was .14%." *Id*. Concluding that the evidence was insufficient to prove that Hiegel operated the vehicle, the court stated

> [s]howing that the defendant merely started the engine of the vehicle is not sufficient evidence to sustain a conviction for operating a vehicle while intoxicated. There must be some direct or circumstantial evidence to show that defendant operated the vehicle. There is no inference present in this case that Hiegel operated his vehicle while intoxicated.

Id. at 268.

[20] In *Mordacq*, an officer observed a vehicle parked with its engine running. 585 N.E.2d at 23. Approximately an hour later, the officer observed the same vehicle, in same spot, with the engine still running. *Id.* The officer "found Mordacq in the driver's seat, asleep. After wakening her, and smelling an odor of alcohol on her breath, [the officer] administered a portable breath test, then transported Mordacq to the county jail, where the Intoxilyzer 5000 recorded a blood alcohol content ("BAC") of .10%." *Id.* Upon waking up, Mordacq told the officer that she had been parked for "at least two hours." *Id.* at 26. Noting

that there was no evidence that Mordacq had operated her vehicle within the timeframe that would allow for a presumption that Mordacq was intoxicated when she last operated the vehicle under Indiana Code section 9-30-6-15(b), the court concluded that the evidence was insufficient to prove that Mordacq was intoxicated when she operated her vehicle. *Id.* at 26–27.

[21] Again, "[w]here a person is found sleeping in a motionless vehicle with the engine running, this court has required that there be some direct or circumstantial evidence to show that the defendant operated the vehicle." *Custer v. State*, 637 N.E.2d 187, 188 (Ind. Ct. App. 1994). Unlike in *Hiegel* and *Mordacq*, in this case, there is circumstantial evidence which tends to show that Minga operated the vehicle.

[22] Approximately twenty minutes before Officers Souther and Fillers found Minga passed out in the driver's seat of his vehicle, they had observed an individual driving the vehicle in question, turning into the Showgirl One parking lot, and parking. Within the twenty minutes that went by between this first observation and their re-arrival at the bar, Fetzer, in his position as bouncer for the bar, received multiple reports that someone was passed out behind the wheel of a parked vehicle and that the engine was running. While the Officers did not definitively identify Minga as the individual who they observed driving the vehicle, only one person was observed in the vehicle at the time and only Minga was found in the vehicle approximately twenty minutes later. Nothing in the evidence suggests that any other person entered or exited the vehicle during the intervening twenty minutes.

[23] Upon finding Minga and fearing he required medical assistance, Fetzer turned the engine off and called 911. It took multiple attempts to wake Minga, who then displayed numerous signs of intoxication. Multiple bottles of Heineken beer, one of which was empty, were subsequently recovered from the back of the passenger compartment. A short time later, Minga's BAC was determined to be 0.185 milliliters of alcohol per 100 milliliters of blood. Based on the evidence of Minga's BAC, which was more than twice the legal limit, coupled with the type and quantity of alcohol recovered from the vehicle, the jury could have reasonably inferred that Minga must have been intoxicated when he operated his vehicle twenty minutes previously, as it seems extremely unlikely that he could have consumed enough alcohol to reach a BAC of 0.185 between the Officers' initial observation of the vehicle and when they returned to the parking lot. *See generally* Ind. Code § 9-30-6-15(b) (providing that if the evidence establishes that a sample was taken from a person charged with OWI during the three hour timeframe allowed by Indiana Code section 9-30-6-2(c) and the sample shows an alcohol concentration equivalent of at least 0.08 grams of alcohol per one hundred milliliters of the person's blood, the trier of fact shall presume that the person charged with the offense had an alcohol concentration equivalent of at least 0.08 grams of alcohol per one hundred milliliters of the person's blood when they operated the vehicle). As such, based on the facts and circumstances of this case, the jury could have reasonably concluded that Minga was operating his vehicle on the night in question. Minga's claim to the contrary is merely a request for us to reweigh the evidence, which we will not do. *See Gibson v. State*, 51 N.E.3d 204, 210 (Ind. 2016).

[24] The judgment of the trial court is affirmed.

Najam, J., and Bailey, J., concur.