

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

STATE OF MISSOURI

Respondent

v.

MARK A. ROYAL

Appellant

DOCKET NUMBER **WD69152**

DATE: March 3, 2009

Appeal From:

Circuit Court of Jackson County, MO
The Honorable James D. Williamson, Jr., Judge

Appellate Judges:

Division Four: Thomas H. Newton, C.J., Joseph M. Ellis and James Edward Welsh, JJ.

Attorneys:

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Counsel for Appellant

Attorneys:

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Counsel for Respondent

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

STATE OF MISSOURI, Respondent, v.
MARK A. ROYAL, Appellant

WD69152

Jackson County

Before Division Four Judges: Newton, C.J., Ellis and Welsh, JJ.

Mr. Mark Royal drove a vehicle while intoxicated and collided with another car, causing the driver's death and injuries to the passengers. Mr. Royal was charged with driving while his license was revoked and driving while intoxicated (DWI) as a persistent offender based on prior convictions, which enhanced the DWI from a misdemeanor to a felony. Based on the DWI being a felony, Mr. Royal was also charged with second-degree murder (felony murder). Finally, Mr. Royal was charged with two counts of second-degree assault for criminal negligence while driving intoxicated that injured the two passengers. After a bench trial, Mr. Royal was convicted and sentenced on all charges. He appeals, challenging the sufficiency of the evidence supporting the convictions and the validity of the DWI conviction.

REVERSED IN PART AND AFFIRMED IN PART.

Division Four holds:

Mr. Royal argues that the trial court erred in convicting him based on driving while intoxicated because there was not sufficient evidence from which a reasonable fact finder could determine that he was intoxicated at the time of the accident. Because Mr. Royal's convictions, except for driving while his license was revoked, rely on a finding that he was intoxicated at the time of the accident, the State had to prove Mr. Royal committed a DWI beyond a reasonable doubt. DWI is committed when a person operates a motor vehicle in an intoxicated condition. Intoxication may be proven with a chemical test result, a refusal to take a chemical test, and timely witness observations of the defendant's intoxicated behavior. That proof was present in this case. Mr. Royal argues that a significant time period passed, which invalidated the evidence. However, his argument is based on contrary evidence and inferences which we disregard under our standard of review.

Lastly, Mr. Royal argues that the trial court violated both his right to be free from double jeopardy and section 556.041 when it entered convictions for DWI and two counts of second-degree assault because in this case DWI is a lesser included offense of second-degree assault. The Double Jeopardy Clause and section 556.041 are violated when a defendant is convicted of an offense and a lesser included offense. An offense is included in another if the statutory elements are lesser or the same. Second-degree assault is committed when a person operates a motor vehicle in an intoxicated condition and through criminal negligence injures another

person. DWI is committed when a person operates a motor vehicle in an intoxicated condition. DWI is a lesser included offense of second-degree assault because a person cannot commit second-degree assault based on driving while intoxicated without also committing DWI. The enhancement of DWI from a misdemeanor to a felony does not separate the offenses because the prior convictions needed to enhance DWI to a felony do not serve as additional statutory elements. Thus, the trial court plainly erred in entering convictions for both offenses, which resulted in the manifest injustice of convicting Mr. Royal twice for the same offense.

We reverse the DWI conviction and vacate the sentence. The judgment is affirmed in all other respects.

Opinion by: Thomas H. Newton, C. J.

March 3, 2009

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