MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

David Varble,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 9, 2021

Court of Appeals Case No.
20A-CR-1344

Appeal from the
Clark Circuit Court

The Honorable
Jeffrey K. Branstetter, Magistrate

Trial Court Cause No.
10C03-1908-CM-1292

Vaidik, Judge.

Case Summary

[1] David Varble appeals his conviction for Class C misdemeanor reckless driving, arguing the deputy prosecutor committed prosecutorial misconduct and the evidence is insufficient to support his conviction. We affirm.

Facts and Procedural History

[2] Around 10:30 a.m. on August 8, 2019, Indiana State Police Trooper Robert Caudill was patrolling State Road 362, a two-lane state highway, in rural Clark County when he saw Varble driving toward him. Varble's car was the only other car on the road at the time. As Varble "crested" a hill, Trooper Caudill saw his car "lift," which indicated Varble was driving at a high rate of speed. Tr. p. 43. Based on his training and experience, Trooper Caudill believed Varble was driving "well in excess of" the posted speed limit of fifty-five miles per hour. *Id.* at 111. He activated his radar, which showed Varble was driving ninety miles per hour. Trooper Caudill performed a "secondary clock," which showed Varble was driving eighty-eight miles per hour. *Id.* at 43. Trooper Caudill activated his emergency lights, made a three-point turn, and initiated a traffic stop. Trooper Caudill asked Varble why he was driving so fast, and Varble responded he was "just trying to get somewhere." *Id.* at 47-48. Trooper Caudill issued Varble a ticket for reckless driving.

[3] The State charged Varble with Class C misdemeanor reckless driving. The charging information alleges Varble operated a vehicle and "recklessly drove at

an unreasonably high rate of speed under the circumstances as to endanger the safety or property of others." Information, No. 10C03-1908-CM-1292 (Aug. 14, 2019); *see also* Ind. Code § 9-21-8-52(a)(1)(A). A bench trial was held in June 2020, and Varble represented himself. Before the State's presentation of evidence, the parties agreed Trooper Caudill would testify from his seat at counsel's table as opposed to the witness stand. On direct examination, Trooper Caudill testified the seven-mile stretch of State Road 362 where he pulled over Varble has fourteen hill crests and valleys, twelve intersecting roads, and "zero shoulders" on the roadway. Tr. p. 38. He explained a car leaving the pavement would go into "grass on a steep embankment, a ditch line, or a culvert." *Id.* at 41. Trooper Caudill also testified there are "numerous" houses sitting within 200 feet of the road and farm equipment is common in that area. *Id.* at 38.

[4] During his cross-examination of Trooper Caudill, Varble moved to dismiss the case on grounds Trooper Caudill "really [didn't] know where the location of this violation occurred." *Id.* at 78. As the trial court explained why it was denying Varble's motion, it noticed Trooper Caudill was speaking to the deputy prosecutor from his seat at counsel's table. The court immediately interrupted Trooper Caudill and the deputy prosecutor and admonished them it was inappropriate for Trooper Caudill to talk to the deputy prosecutor during Varble's cross-examination. The deputy prosecutor responded he "was just listening" to Trooper Caudill and "wasn't answering any questions." *Id.* at 80. The court said it didn't "infer[] anything" and instructed Varble to continue his cross-examination. *Id.* Varble did not request a mistrial.

[5] At the close of the evidence, the trial court found Varble guilty of reckless driving. The court said it was "firmly convinced" Varble committed reckless driving because (1) Trooper Caudill saw Varble's car "rise coming over the hill," which indicated Varble was driving at a high rate of speed; (2) Trooper Caudill clocked Varble at ninety and eighty-eight miles per hour; (3) State Road 362 is a two-lane rural state highway that has "no shoulders" and contains "numerous hills and valleys"; (4) "slow moving vehicles" are common in that area; and (5) cars would likely travel on the road at 10:30 in the morning. *Id.* at 195, 196.

[6] Varble, pro se, now appeals.

Discussion and Decision

I. Prosecutorial Misconduct

[7] Varble first contends the deputy prosecutor "openly committed prosecutorial misconduct" when he and Trooper Caudill "conferr[ed]" during his cross-examination. Appellant's Br. p. 9. Because Varble did not object, he must establish not only the grounds for prosecutorial misconduct but also that the prosecutorial misconduct constituted fundamental error. *Ryan v. State*, 9 N.E.3d 663, 667-68 (Ind. 2014), *reh'g denied*. "Fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to make a fair trial impossible." *Id.* at 668. To establish fundamental error, the defendant must show that, under the

circumstances, the trial judge erred in not sua sponte raising the issue because the alleged error constituted a clearly blatant violation of basic and elementary principles of due process and presented an undeniable and substantial potential for harm. *Id.*

[8] For at least two reasons, Varble's argument fails. First, the record shows that although Trooper Caudill spoke to the deputy prosecutor, the deputy prosecutor did **not** speak to Trooper Caudill. *See* Tr. p. 80. Varble cites no authority this constitutes prosecutorial misconduct. Second, even assuming it constitutes prosecutorial misconduct, the trial court did not fail to sua sponte address it. Instead, the court immediately interrupted Trooper Caudill and the deputy prosecutor and admonished them it was inappropriate for Trooper Caudill to talk to the deputy prosecutor during Varble's cross examination. Given this brief incident occurred during a bench trial and the court promptly addressed the matter, Varble has failed to establish a fair trial was impossible.

II. Sufficiency of the Evidence

[9] Next, Varble contends the evidence is insufficient to support his conviction. When reviewing sufficiency-of-the-evidence claims, we neither reweigh the evidence nor judge the credibility of witnesses. *Willis v. State*, 27 N.E.3d 1065, 1066 (Ind. 2015). We only consider the evidence supporting the judgment and any reasonable inferences that can be drawn from the evidence. *Id.* A conviction will be affirmed if there is substantial evidence of probative value to

support each element of the offense such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

[10] To convict Varble of reckless driving as charged in this case, the State had to prove he operated a vehicle and recklessly drove at such an unreasonably high rate of speed under the circumstances as to endanger the safety or property of others. *See* I.C. § 9-21-8-52(a)(1)(A). Varble first argues the evidence is insufficient to prove he recklessly drove at an unreasonably high rate of speed. The evidence shows Varble drove ninety miles per hour, thirty-five miles per hour above the posted speed limit. Varble drove so fast that his car lifted from the road as it crested the hill. This evidence is sufficient to prove Varble recklessly drove his car at an unreasonably high rate of speed. *See Taylor v. State*, 457 N.E.2d 594, 598 (Ind. Ct. App. 1983) (holding "driving forty miles per hour in excess of the speed limit is unreasonable and reckless").

[11] Varble next argues the evidence is insufficient to prove he endangered the safety or property of others. A defendant's unreasonably high rate of speed is not the sole determining factor when analyzing whether the element of endangerment has been satisfied. *Crussel v. State*, 29 N.E.3d 746, 751 (Ind. Ct. App. 2015). Instead, a defendant's speed, in conjunction with the other attending circumstances surrounding a defendant's act of recklessly driving at an unreasonably high rate of speed, determines whether a defendant has endangered the safety or property of others. *Id.*

[12] There are plenty of other attending circumstances in this case. Varble drove ninety miles per hour on a two-lane state highway at 10:30 a.m., a time when other cars were expected to be on the road. In addition, the section of State Road 362 where Trooper Caudill pulled over Varble has fourteen hill crests and valleys, twelve intersecting roads, and no shoulders. Trooper Caudill explained a car leaving the pavement would go into "grass on a steep embankment, a ditch line, or a culvert." Finally, there are numerous houses sitting within 200 feet of the road, and farm equipment is common in that area. This evidence is sufficient to prove Varble endangered the safety or property of others. *See id.* at 752 (holding the defendant "endangered the safety or property of others because he drove his car 91 miles-per-hour in a 55 mile-per-hour zone, in the dark of the night, on a county road that had houses and cross streets").[1]

[13] As for Varble's argument he suffered from "Highway Hypnosis" and didn't realize how fast he was driving, Appellant's Br. p. 14, it is merely a request for us to reweigh the evidence. We therefore affirm Varble's reckless-driving conviction.

[14] Affirmed.

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[1] Varble says this case is more like *Jackson v. State*, 576 N.E.2d 607 (Ind. Ct. App. 1991), than *Crussel*. It is not. In *Jackson*, the defendant skidded his motorcycle in a semi-circle in the middle of a street at 1 a.m. and then drove forty-five miles per hour down an alley. The defendant was convicted of reckless driving. On appeal, this Court reversed the defendant's conviction in part because there was "no indication that any other motorist or pedestrian was in the vicinity at 1:00 [a.m.]" *Id.* at 610. The same cannot be said here, where Varble was driving ninety miles per hour on a state highway with crests and valleys at 10:30 a.m., a time when other cars were expected to be on the road.

Brown, J., and Pyle, J., concur.