MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

James Bolen, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 9, 2021

Court of Appeals Case No. 20A-CR-2371

Appeal from the Noble Superior Court

The Honorable Robert E. Kirsch, Judge

Trial Court Cause No. 57D01-1806-F6-184

Bradford, Chief Judge.

Case Summary

[1] On June 5, 2018, James Bolen, Jr. was arrested for driving under the influence with his then-thirteen-year old daughter in the vehicle, after which he was charged with Level 6 felony operating a vehicle while intoxicated with a passenger under the age of eighteen. The jury subsequently found him guilty as charged. The trial court sentenced him to a one-year term, with 180 days executed in the Noble County Jail and the remainder suspended to probation. On appeal, Bolen contends that he suffered fundamental error and was denied due process because the State failed to adequately inform him of the charge against him. Concluding otherwise, we affirm.

Facts and Procedural History

[2] At approximately 10:00 p.m. on June 5, 2018, Lacretia Jeffers called 911 after she observed Bolen driving erratically, with his vehicle "just swerving and jerking around." Tr. Vol. II p. 109. Bolen's then-thirteen-year-old daughter was in the vehicle with him. Jeffers observed Bolen drive erratically through a gas station parking lot, almost striking several patrons, before he continued on down the road.

[3] Kendallville Police Sergeant Justin Beall was dispatched to the area, arriving in "less than a minute." Tr. Vol. II p. 120. Upon arriving in the area, Sergeant Beall observed Bolen's vehicle stopped in the grass next to a nearby apartment building. Sergeant Beall initially passed Bolen's vehicle. As he turned his

vehicle around, he observed Bolen's vehicle "accelerate[] at a high rate of speed out of the grass onto the roadway through the apartment complex." Tr. Vol. II p. 122. Bolen continued driving at a high rate of speed through the apartment complex until he pulled his vehicle "into two parking spots splitting right down the middle … and … struck the concrete barriers to come to a complete stop." Tr. Vol. II p. 124.

[4] Sergeant Beall approached Bolen's vehicle and spoke to Bolen. As he did so, Sergeant Beall "could smell a strong odor of alcohol coming from inside the vehicle." Tr. Vol. II p. 125. Sergeant Beall also observed that Bolen "had really focused slow speech, as if he had to think about every word that was coming out of his mouth. It was very slow." Tr. Vol. II p. 126. Sergeant Beall requested that Bolen get out of the vehicle and Bolen complied. Bolen, however, struggled to follow Sergeant Beall's command to produce his license. It took "several times of [Sergeant Beall] requesting it for him to get it. He couldn't follow the instructions of getting his license and then when he was retrieving his license he fumbled with the cards, his manual dexterity was very off and slow[.]" Tr. Vol. II p. 126. Bolen "wasn't able to control his fingers very well. They were all fumbling around. He wasn't able to hold onto one item and he was dropping items." Tr. Vol. II p. 127. Sergeant Beall noticed that Bolen's breath and clothing smelled of alcohol. In addition, Kendallville Officer Douglass Davis, who arrived at some point to assist Sergeant Beall, "smelled a strong odor of an alcohol[ic] beverage coming from [Bolen], um, as

he was standing outside of the car. His eyes appeared to be red and glassy and his balance was poor." Tr. Vol. II p. 153.

[5] At some point, Bolen attempted to walk away but was stopped by Sergeant Beall. He then became "very upset" and informed Sergeant Beall that "he would not cooperate." Tr. Vol. II p. 127. Bolen resisted and repeatedly pulled his arms away as Sergeant Beall attempted to place him in handcuffs. Sergeant Beall and Officer Davis were eventually successful in "securing [Bolen] in handcuffs." Tr. Vol. II p. 128. Sergeant Beall noticed an open bottle of Wild Turkey whiskey sitting on the passenger-side floorboard near Bolen's daughter's feet. Sergeant Beall did not administer any field sobriety tests after Bolen indicated that he would not cooperate and resisted his and Officer Davis's attempts to place him in restraints. Bolen also refused to submit to both a portable breath test and a chemical test.

[6] On June 6, 2018, the State charged Bolen with Level 6 felony operating a vehicle while intoxicated with a passenger under the age of eighteen. Bolen was found guilty following a jury trial. On December 4, 2020, the trial court sentenced him to a one-year term, with 180 days executed in the Noble County Jail and the remainder suspended to probation.

Discussion and Decision

[7] "Defendants have a Due Process right to fair notice of the charge or charges against them, and they are entitled to limit their defense to those matters."

Young v. State, 30 N.E.3d 719, 720 (Ind. 2015). "The question, then, is whether the defendant has 'clear notice of the charge or charges against which the State summons him to defend,' [*Wright v. State*, 658 N.E.2d 563, 565 (Ind. 1995)], in order to know what he does—and just as importantly, does not—need to defend against." *Id*. at 723.

[8] In challenging his conviction, Bolen contends that the charging information was insufficient to adequately inform him of the charge against him. "A charging instrument must set forth, among other things, the nature and elements of the offense charged in plain and concise language without unnecessary repetition." *State v. Laker*, 939 N.E.2d 1111, 1113 (Ind. Ct. App. 2010) (citing Ind. Code § 35-34-1-2(a)(4)), *trans. denied*. "The indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Ind. Code § 35-34-1-2(e). "The purpose of the charging information is to provide a defendant with notice of the crime of which he is charged so that he is able to prepare a defense." *Laker*, 939 N.E.2d at 1113. In charging the defendant, the State "'is not required to include detailed factual allegations in a charging information.'" *Gilliland v. State*, 979 N.E.2d 1049, 1061 (Ind. Ct. App. 2012) (quoting *Laney v. State*, 868 N.E.2d 561, 567 (Ind. Ct. App. 2007), *trans. denied*).

> "An information that enables an accused, the court, and the jury to determine the crime for which conviction is sought satisfies due process. Errors in the information are fatal only if they mislead the defendant or fail to give him notice of the charge filed against him." *Dickenson v. State*, 835 N.E.2d 542, 550 (Ind.

> Ct. App. 2005) (citations and quotation marks omitted), *trans. denied*. "[W]here a charging instrument may lack appropriate factual detail, additional materials such as the probable cause affidavit supporting the charging instrument may be taken into account in assessing whether a defendant has been apprised of the charges against him." *Laker*, 939 N.E.2d at 1113.

Id.

[9] In charging Bolen, the State alleged that he had violated Indiana Code section 9-30-5-3, which provides, in relevant part, that a person "commits a Level 6 felony if: … (2) the person: (A) is at least twenty-one (21) years of age; (B) violates section 1(b), 1(c), or 2(b) of this chapter; and (C) operated a vehicle in which at least one (1) passenger was less than eighteen (18) years of age." Indiana Code section 9-30-5-1[1] does not apply to the instant matter, meaning that in order to prove that Bolen had violated Indiana Code section 9-30-5-3, the State was required to prove that he had violated Indiana Code section 9-30-5-2(b), which provides that a person who operates a vehicle while intoxicated commits a Class A misdemeanor "if the person operates a vehicle in a manner that endangers a person."

[10] Bolen argues that the State failed to include any reference to the endangerment element in either the charging information or the probable cause affidavit. "Generally, a challenge to the sufficiency of an information must be made by a

[1] Indiana Code section 9-30-5-1 applies to cases where chemical or breath tests have been administered.

motion to dismiss prior to arraignment." *Dickenson*, 835 N.E.2d at 549 (citing *Townsend v. State*, 632 N.E.2d 727, 730 (Ind. 1994)). "Failure to assert error in an indictment or information results in waiver of that error." *Id.* Bolen did not challenge the sufficiency of the charging information prior to trial, but seeks to avoid waiver on appeal by asserting fundamental error. "The fundamental error doctrine is extremely narrow." *Rowe v. State*, 867 N.E.2d 262, 266 (Ind. Ct. App. 2007). "To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." *Id*. "Further, the error must constitute a blatant violation of basic principles, the harm, or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." *Id*. The fundamental error exception "is available only in egregious circumstances." *Brown v. State*, 799 N.E.2d 1064, 1068 (Ind. 2003).

A. Whether the Alleged Deficiencies in the Charging Information Amount to Fundamental Error

[11] "'An information that enables an accused, the court, and the jury to determine the crime for which conviction is sought satisfies due process.'" *Dickenson*, 835 N.E.2d at 550 (quoting *Lampitok v. State*, 817 N.E.2d 630, 636 (Ind. Ct. App. 2004), *trans. denied*). "A statement informing the defendant of the statutory offense with which he or she is charged, the time and the place of the commission of the offense, the identity of the victim of the crime (if any), and the weapon used (if any) generally is sufficient." *Laney*, 868 N.E.2d at 566–67. Again, "'[e]rrors in the information are fatal only if they mislead the defendant

or fail to give him notice of the charge filed against him.'" *Dickenson*, 835 N.E.2d at 550 (quoting *Gordon v. State*, 645 N.E.2d 25, 27 (Ind. Ct. App. 1995), *trans. denied*).

[12] In this case, the charging information informed Bolen (1) that he was being charged with violating Indiana Code section 9-30-5-3, (2) of the identity of the qualifying passenger, and (3) of the time and place of the commission of the offense. The charging information also informed Bolen that he was being charged with the enhanced Level 6 felony because he had violated Indiana Code section 9-30-5-2. Reading Indiana Code section 9-30-5-2 and Indiana Code section 9-30-5-3 together makes it clear that in order to prove that Bolen committed the charged offense, the State was required to prove that Bolen had operated the vehicle in a manner which endangered a person. As such, we agree with the State that Bolen "was on notice that the State would need to prove endangerment to obtain a conviction and he was not misled by the charging information." Appellee's Br. p. 11.

[13] Further, Bolen has failed to establish that he was prejudiced by the alleged lack of specificity in the charging information or that a fair trial was impossible. Both the preliminary jury instructions, which were read to the jury prior to the start of trial, and the final jury instructions, which were read to the jury following the conclusion of the evidence, made it clear that the State was required to prove endangerment. Bolen did not object to the inclusion of instructions relating to endangerment in the instructions to the jury. In addition, the State specifically addressed endangerment in its closing argument.

Bolen presented a defense at trial, arguing that the State had failed to prove intoxication. He does not assert on appeal that his defense would have been different had the State included the terms endanger or endangerment in the charging information. Given that a plain reading of the relevant statutes cited in the charging information made it clear that the State was required to prove endangerment coupled with both (1) the fact that the jury was instructed on the element of endangerment and (2) the lack of any indication that Bolen's defense would have been different had the term endangerment been included in the charging information, we conclude that Bolen has failed to establish fundamental error.

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

Vaidik, J., and Brown, J., concur.