MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Rolland G. Shoup II,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

June 28, 2024

Court of Appeals Case No.
23A-IF-1350

Appeal from the Marion Superior Court

The Honorable Marcel A. Pratt, Jr., Judge

Trial Court Cause No.
49D22-2202-IF-5239

Memorandum Decision by Judge Tavitas
Judges Crone and Bradford concur.

Tavitas, Judge.

Case Summary

[1] Rolland Shoup II was cited for speeding and distracted driving, both Class C infractions. He challenged the citations at a bench trial and moved for judgment on the evidence at the conclusion of the State's case-in-chief. The trial court summarily denied this motion and later entered judgment against Shoup on both infractions. Shoup appeals and argues: (1) the trial court abused its discretion by admitting testimony regarding the speed of Shoup's vehicle; and (2) the trial court erred by denying his motion for judgment on the evidence. We are not persuaded by Shoup's arguments. Accordingly, we affirm.

Issues

[2] Shoup raises several issues, which we consolidate and restate as:

I. Whether the trial court abused its discretion by admitting testimony regarding the speed of Shoup's vehicle.

II. Whether the trial court erred by denying Shoup's motion for judgment on the evidence.

Facts

[3] On the morning of February 11, 2022, Shoup was driving a red pickup truck westbound on Fall Creek Road in Indianapolis. Indianapolis Metropolitan Police Department Officer Madeline Green observed that, as Shoup turned

westbound onto 38th Street, he turned into the far-left lane, but as Shoup reached the stoplight at Woodlawn Avenue, he "abruptly" changed to the center lane while another vehicle was already heading toward the light in that lane. Tr. Vol. II p. 12. When the light turned green, Shoup "took off at an accelerated rate of speed," and Officer Green decided to follow Shoup. *Id*. at 13.

[4] The vehicles proceeded to the intersection of Coliseum Avenue and 38th Street. When that light turned green, Shoup again "took off quickly," and Officer Green decided to "pace" Shoup's vehicle. *Id*. "Pacing" is a method law enforcement officers use to gauge a vehicle's speed by following the vehicle from behind while "maintain[ing] a certain distance" between the vehicles. *Id*. The officer gauges the other vehicle's speed by referencing the speedometer in the officer's own vehicle. When Shoup took off from the Coliseum Avenue intersection, Officer Green initially had to accelerate to 55 miles per hour to "catch up to him", and she then "let up" to maintain an approximately fifteen-foot distance between the vehicles. *Id*. at 33, 14. Officer Green paced Shoup until they reached the Central Avenue intersection, and she had to maintain a speed of 50 miles per hour to maintain the same distance between the vehicles along the way. The posted speed on 38th Street was 35 miles per hour.

[5] At the Central Avenue intersection, Officer Green moved to the right lane next to Shoup. Officer Green looked over and saw that Shoup was holding a cell phone up to his left ear using his left hand. The vehicles then proceeded to a red light at the next intersection, Washington Boulevard, where Officer Green

instructed Shoup to roll down his window. Shoup did so, and Officer Green "explained to him [that] Indiana is hands-free" and that Shoup was speeding. *Id*. Shoup told Officer Green, "F**k you. Don't you have anything better to do?" *Id*. at 19. Describing Shoup, Officer Green testified: "He still ha[d] the phone to his left ear, and he then look[ed] forward and kind of continued the conversation or ended it, I'm not sure." *Id*.

[6] Officer Green instructed Shoup to pull over. As the light turned green, Shoup again accelerated "pretty quick[ly]," and Officer Green activated her police lights. *Id*. at 20. At this point, Shoup "cut over to the left lane and then again into the turn lane, [and] went southbound on Delaware, cutting off eastbound traffic." *Id*. He eventually pulled over near the intersection of 37th Street and Pennsylvania Street. Shoup was angry and accused Officer Green of stopping him because, according to him, she was "racist" and "black." *Id*. at 21. Officer Green explained that she stopped Shoup because he was "speeding and talking on his cell phone" while driving. *Id*. Officer Green cited Shoup for: (1) speeding at 50 miles per hour in a 35 miles-per-hour zone, a Class C infraction; and (2) distracted driving, a Class C infraction.

[7] Shoup contested the citations in a bench trial, which was held on May 18, 2023. Officer Green was the only witness at the trial. The State asked Officer Green if the speedometer in her vehicle was "calibrated." Tr. Vol. II p. 14. Officer Green responded in the affirmative and stated that she received her police vehicle "brand new" in 2019 and "[f]rom the manufacturer it was calibrated is all I can say." *Id*. at 15. Shoup's counsel objected to Officer Green's testimony

regarding whether her speedometer was calibrated as lacking "[f[oundation" and received permission to "voir dire" Officer Green. *Id*. The following exchange then took place:

> Counsel: I think you answered that you knew the speedometer in your vehicle to be calibrated; is that correct?
>
> Off. Green: I understand it to be calibrated because it was a new vehicle. Correct.
>
> Counsel: Did you personally calibrate it?
>
> Off. Green: No, sir.
>
> Counsel: Do you know of any person that did calibrate it?
>
> Off. Green: The manufacturer.
>
> Counsel: Is that an assumption or something you know to be true is what I'm asking.
>
> Off. Green: Manufacturers are the ones to calibrate them, I believe. [I] don't know that to be true. I just know that the vehicle was issued to me, everything in working order and it says it's calibrated. Therefore, I believe it to be calibrated.
>
> Counsel: Okay. And just to be clear, you said you believe it to be. I am correct that you have no specific knowledge of how it was calibrated or who calibrated it, et cetera, et cetera. You -- this is

something you believe, but have no evidence of; is that accurate?

Off. Green: Yes, sir.

Id. at 15-16. The trial court overruled Shoup's objection.

[8] After the State concluded its case-in-chief, Shoup moved for "judgment on the evidence." *Id*. at 45. Shoup argued that the State presented insufficient evidence to support the speeding citation because Officer Green: (1) testified "that she believe[d] the speedometer to be calibrated" but "[s]he ha[d] no basis for that belief"; and (2) estimated that Shoup was going 50 miles per hour based only on her initial need to accelerate to 55 miles per hour to catch up to him. *Id*. at 45-46. As for the distracted driving citation, Shoup argued that the State presented insufficient evidence because "[t]he only testimony from the officer is that she observed the cell phone in a vehicle that was not moving, there was no additional testimony that the cell phone was in use while the vehicle was being operated in a moving condition, only stopped at the light." *Id*. at 47. The trial court denied Shoup's motion.

[9] After closing arguments, the trial court determined that the State had met its burden of proof on both the speeding and distracted driving citations. Regarding the distracted driving citation, the trial court found that the State presented evidence that Shoup used his cell phone while his vehicle was moving because "at least in [the trial court's] notes, [Shoup] continued -- he still had the phone in his hand up to his ear when he took off" from the Washington

Boulevard intersection. *Id*. at 52. Accordingly, the trial court entered judgment against Shoup on both citations. Shoup now appeals.

Discussion and Decision

I. Admission of Officer Green's Testimony

[10] Shoup first argues that the trial court abused its discretion by admitting Officer Green's testimony regarding the speed of Shoup's vehicle. We are not persuaded.

A. Standard of Review

[11] We afford a trial court broad discretion in ruling on the admissibility of evidence. *Sims v. Pappas*, 73 N.E.3d 700, 705 (Ind. 2017). We will disturb the trial court's ruling only where the trial court has abused its discretion. *Id.* "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id.*

B. Officer Green's Testimony

[12] Shoup argues that Officer Green's testimony was inadmissible because she lacked an adequate "foundation that the speedometer used to measure [Shoup's] speed was calibrated." Appellant's Br. p. 8. He also argues that the

State failed to present evidence that the speedometer was "properly set up and regularly tested[.]"[1] *Id*. at 12.

[13] We conclude that the trial court did not abuse its discretion by admitting Officer Green's testimony. "Foundational requirements to admissibility often require factual determinations by the trial court, and these findings are entitled to the same deference on appeal as any other factual finding, whether that is described as a clearly erroneous or an abuse of discretion standard." *J.L. v. State*, 789 N.E.2d 961, 963 (Ind. Ct. App. 2003) (citing *Stahl v. State,* 686 N.E.2d 89, 91 (Ind. 1997)).

[14] In *Denton v. State*, 398 N.E.2d 1288, 1289 (Ind. Ct. App. 1979), the defendants were convicted of operating vehicles in excess of statutory weight limits. Analogizing scales to the use of speed-measuring devices, a panel of this Court stated that, when law enforcement uses radar or speedometers to determine a vehicle's speed, the State must prove that the "devices used to determine speed are accurate. In order to establish a prima facie case of guilt, the State must show that the apparatus was properly set up and regularly tested." *Id*.[2]; *see also Robinson v. State*, 634 N.E.2d 1367, 1374 (Ind. Ct. App. 1994) (citing *Denton* and

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[1] At trial, Shoup did not ask Officer Green if her speedometer was "regularly" tested, only if it was "calibrated."

[2] The *Denton* court relied on cases from other jurisdictions; however, those cases all involved only the use of radar to determine the defendant's speed.

stating that "[i]n order to establish the accuracy of radar and speedometers, the State must prove the apparatus was properly set up and properly tested").

[15] Our courts have since used the *Denton* standard when determining the admissibility of testimony based upon the results of radar testing of a vehicle's speed. *See, e.g.*, *Dawley v. State*, 580 N.E.2d 366, 367 (Ind. Ct. App. 1991). We are aware of no Indiana cases, however, applying this testing standard regarding a speedometer installed in an officer's vehicle as it relates to pacing. *See also* 8 AM. JUR. 2D Automobiles § 946 (May 2024) ("In a prosecution for violation of the speed laws, it has been determined that evidence of the speed indicated on an officer's untested speedometer may be introduced, though authority to the contrary also exists.").

[16] Here, Officer Green did not use radar technology to determine the speed of Shoup's vehicle. Rather, Officer Green determined this speed by referencing the speedometer in her vehicle while pacing Shoup's vehicle. Additionally, Officer Green testified that her speedometer was calibrated by "the manufacturer" and that "[m]anufacturers are the ones [who] calibrate" law enforcement vehicles' speedometers. Tr. Vol. II p. 15-16. Shoup argues that Officer Green lacked sufficient knowledge that the speedometer was properly calibrated.

[17] Pacing has been upheld as a valid law enforcement method for determining another vehicle's speed. *See State v. Voit*, 679 N.E.2d 1360, 1362 (Ind. Ct. App. 1997) (affirming traffic stop based on law enforcement officers' use of pacing to

determine that defendant was speeding). Whether Officer Green's speedometer was properly calibrated in this case was an issue of fact for the trial court to resolve. Mindful that this was a bench trial for civil infractions, not a criminal prosecution, we are not persuaded that we must second-guess the trial court's ruling to admit Officer Green's testimony here. *Cf. McKnight v. State*, 1 N.E.3d 193, 203 (Ind. Ct. App. 2013) (holding that, although the defense may attempt to rebut the State's evidence regarding the accuracy of a device, "the question of accuracy is ultimately a question for the trier of fact" and concerns only "the weight of the evidence, not [] its admissibility").

II. Denial of Motion for Judgment on the Evidence

[18] Shoup next argues that the trial court erred by denying his motion for judgment on the evidence on both the speeding and the distracted driving citations. Because these citations were for civil infractions, the State's burden of proof was a preponderance of the evidence. *See Rosenbaum v. State*, 930 N.E.2d 72, 74 (Ind. Ct. App. 2010), *trans. denied*.

[19] We first explain that, because this case was tried before the bench, a motion for involuntary dismissal pursuant to Trial Rule 41(B), rather than judgment on the evidence pursuant to Trial Rule 50, was the proper motion. We further conclude that, notwithstanding this error, the trial court did not err by declining to dismiss the speeding citation or the distracted driving citation.

A. Background Law and Standard of Review

[20] Motions for judgment on the evidence are governed by Indiana Trial Rule 50,[3] but are only available "in a case tried before a jury or an advisory jury . . . ." T.R. 50(A). Shoup moved for judgment on the evidence after the State's case-in-chief, and the trial court treated this motion as such. Because this case was tried before the bench, however, a motion for judgment on the evidence was not the proper motion. *See Michael v. Wolfe*, 737 N.E.2d 820, 822 (Ind. Ct. App. 2000) (quoting *Plesha Edmonds ex. rel. Edmonds*, 717 N.E.2d 981, 985 (Ind. Ct. App. 1999), *trans. denied*). The proper motion, rather, was one for involuntary dismissal pursuant to Trial Rule 41(B). *Id*. (citing *Edmonds*, 717 N.E.2d at 985).

[21] Trial Rule 41(B) provides:

> After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been

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[3] Trial Rule 50 provides, in relevant part:

> **(A) Judgment on the Evidence—How Raised—Effect.** Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict. A party may move for such judgment on the evidence.
>
> (1) after another party carrying the burden of proof or of going forward with the evidence upon any one or more issues has completed presentation of his evidence thereon[.]
>
> * * * * *

> shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. . . .

In reviewing a motion for involuntary dismissal pursuant Trial Rule 41(B),

> we do not reweigh the evidence or judge the credibility of the witnesses; rather, we only consider the evidence most favorable to the judgment and the reasonable inferences to be drawn therefrom. *Chem. Waste Mgmt. of Ind., L.L.C. v. City of New Haven*, 755 N.E.2d 624, 635 (Ind. Ct. App. 2001). We will reverse the trial court only if the trial court's judgment is clearly erroneous. *TMC Transp., Inc. v. Maslanka*, 744 N.E.2d 1052, 1054 (Ind. Ct. App. 2001), *trans. denied*. "A judgment is clearly erroneous when it is unsupported by the findings of fact and the conclusions relying on those findings." *Id.* at 1055. . . . "In order to determine that a finding or conclusion is clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made." *Id.*

McLean v. Trisler, 161 N.E.3d 1259, 1269-70 (Ind. Ct. App. 2020), *trans. denied*.

[22] Here, although Shoup moved for judgment on the evidence, we will review this motion as one for involuntary dismissal of the citations. *See Michael*, 737 N.E.2d at 822 (reviewing motion for judgment on the evidence granted in a bench trial as a motion for involuntary dismissal). We conclude that the trial court did not err by declining to dismiss the citations here.

B. Speeding Citation

[23] The State presented sufficient evidence to avoid involuntary dismissal of the speeding citation. At trial, Officer Green testified that Shoup accelerated quickly several times at traffic lights and was speeding. She testified that, while driving on 38th street at the Coliseum Avenue intersection, she had to accelerate to 55 miles per hour to catch up to Shoup's vehicle and thereafter paced Shoup's vehicle at 50 miles per hour until the vehicles reached Central Avenue. The posted speed in the area, however, was 35 miles per hour. She further testified that she based Shoup's speed on her own vehicle's speedometer, which was calibrated by the manufacturer. This evidence sufficiently demonstrated, for the purpose of avoiding dismissal, that Shoup was speeding.

C. Distracted Driving Citation

[24] The State also presented sufficient evidence to avoid dismissal of the distracted driving citation. At the time of this citation, Indiana Code Section 9-21-8-59 provided, in relevant part:[4]

> (a) Except as provided in subsections (b) and (c), a person may not hold or use a telecommunications device while operating a **moving** motor vehicle.
>
> (b) A telecommunications device may be used in conjunction with hands free or voice operated technology.

[4] The statute has since been amended, but the amendments to not affect our analysis.

> (c) A telecommunications device may be used or held to call 911 to report a bona fide emergency.
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> * * * * *

(Emphasis added).

[25] Shoup argues that the State only presented evidence that Shoup used the phone at the red lights, not that he used the phone while driving. Officer Green testified that, while the vehicles were at a red light at the Central Avenue intersection, she saw that Shoup was holding a cell phone up to his left ear using his left hand. Officer Green further testified that, one block later at a red light at the Washington Boulevard intersection, Shoup "**still** ha[d] the phone to his left ear, and he then look[ed] forward and kind of continued the conversation or ended it." Tr. Vol. II p. 19 (emphasis added). Based on the evidence that Shoup was holding his cell phone to his left ear and engaged in a telephonic conversation at both consecutive lights, the trial court could reasonably infer that Shoup also used the cell phone while driving.

[26] Shoup points out that the trial court determined that Shoup "still had the phone in his hand up to his ear when he took off" from the Washington Boulevard intersection. *Id*. at 51. Shoup argues that this statement is clearly erroneous because Officer Green did not testify regarding the location of Shoup's cell phone after the Washington Boulevard intersection.

[27] We are not persuaded by this argument. Whether or not the trial court's statement is clearly erroneous, the trial court did not make this statement when

denying Shoup's motion for judgment on the evidence; the trial court summarily denied that motion. Because the trial court made no findings in denying the motion for judgment on the evidence, we apply the general judgment standard, and we may affirm on any legal theory supported by the evidence adduced at trial. *In re Estate of Ropp*, 231 N.E.3d 894, 898 (Ind. Ct. App. 2024) (citing *Samples v. Wilson*, 12 N.E.3d 946, 949-50 (Ind. Ct. App. 2014)). The trial court's statement, which was made at the end of the bench trial, thus, does not affect our conclusion that the State presented sufficient evidence to avoid dismissal of the distracted driving citation.

[28] The trial court's statement was made later in the trial when entering final judgment after the parties offered closing arguments. Shoup, however, only challenges the denial of the motion for judgment on the evidence. Shoup does not appeal the final judgment against him, so we will not address this ruling. *See Miller v. Patel*, 212 N.E.3d 639, 657 (Ind. 2023) (noting that appellate courts will not "step in the shoes of the advocate and fashion arguments on his behalf"). The trial court, accordingly, did not err by denying the motion for judgment on the evidence.

Conclusion

[29] The trial court did not abuse its discretion by admitting testimony regarding the speed of Shoup's vehicle, nor did it err by denying Shoup's motion for judgment on the evidence. Accordingly, we affirm.

[30] Affirmed.

Crone, J., and Bradford, J., concur.

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