

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Gary Matthew Carnicom,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 17, 2023

Court of Appeals Case No.
22A-CR-1156

Appeal from the St. Joseph
Superior Court

The Honorable John M.
Marnocha, Judge

Trial Court Cause No.
71D02-1912-F4-78

Altice, Chief Judge.

Case Summary

- [1] Gary Matthew Carnicom appeals his convictions for Level 4 felony causing death while operating a vehicle with a schedule I or II controlled substance in the blood and Class A misdemeanor reckless operation of a vehicle in a highway work zone. Specifically, he challenges (1) the admission of certain evidence and (2) the sufficiency of the evidence supporting his misdemeanor conviction.
- [2] We affirm.

Facts & Procedural History

- [3] On the morning of December 10, 2019, Jason Kelly and Ernest Lewis set up a construction work zone on northbound IN-931 immediately north of Osborne Road in St. Joseph County. In this area, IN-931 is a four-lane highway with two northbound and two southbound lanes. Within the construction zone the right-side northbound lane was closed to vehicular traffic so that utility workers could install new poles.
- [4] Kelly and Lewis wore high visibility clothing in the work zone, and they placed five signs approximately 500 feet apart trailing from the beginning of the lane closure and heading southbound to alert northbound traffic. The first sign drivers would encounter, a large diamond-shaped orange sign, read “ROAD WORK AHEAD.” *Exhibits* Vol. IV at 3. The next warned, “INJURE/KILL A worker \$7500+ 15 YEARS.” *Id.* at 4. The next two indicated, one in writing and the second pictorially, that the right lane was closed ahead. Finally, there

was a sign with a lighted arrow directing traffic to the left lane at which point orange construction cones were arranged to close off the right lane for the utility crew to work.

[5] Sometime after 9:00 a.m., as Kelly and Lewis were standing inside the work zone, Carnicom drove his van through the cones at a speed of at least fifty miles per hour. Kelly heard a vehicle striking the cones and was able to leap out of the way, but Lewis was violently struck and killed by the van. Carnicom's van then veered off the roadway and nearly hit a house.

[6] Michael Starkey and his daughter Ashley witnessed the accident. Michael, who was also driving northbound, moved into the left lane upon seeing the construction signs and eventually slowed down. Carnicom then passed Michael on the right and continued traveling in the right lane. According to Ashley, Carnicom failed to merge into the left lane despite having "plenty enough time to get over." *Transcript Vol. II* at 85-86. Michael explained, "it's like [Carnicom] didn't see nothing or signal." *Id.* at 90.

[7] Several members of the Fatal Alcohol Crash Team (FACT) responded to the scene. Officer Bryan Fox, a drug recognition expert with FACT, advised Carnicom of his Miranda and Pirtle rights. Carnicom waived his rights and then told Officer Fox that he had been travelling in the passing lane when a gust of wind caused his van to swerve into the right lane just before striking a person. Carnicom agreed to be transported to an indoor location, out of the cold, for field sobriety tests. On the way, Carnicom drifted in and out of sleep.

Upon administering the field sobriety tests, Officer Fox formed an opinion, based on his training and experience, that Carnicom was under the influence of a stimulant and unable to safely operate a vehicle. Carnicom acknowledged that he had “smoked meth the night prior” and consented to a blood draw. *Id.* at 173. The drug screen came back positive for methamphetamine. According to forensic toxicologist Jolene Bierly, the level of methamphetamine in Carnicom’s blood “would absolutely have the capability to cause impairment” while operating a vehicle. *Id.* at 229.

[8] Timothy Spencer, an accident reconstructionist with FACT, testified that there was sufficient signage in both quality and quantity leading up to the construction zone, as well as a large number of construction cones at the beginning of the zone starting at Osborne Road. Spencer determined that Carnicom’s van struck Lewis within the work zone approximately 300 feet north of Osborne Road and that there was “no indications of any kind of panic breaking (sic).” *Id.* at 125. Lewis was struck by the front driver side of the van, while the passenger side was off the shoulder of the road by about two feet. Spencer estimated that Carnicom was travelling at least 50 miles per hour when he drove into the construction zone and opined that Carnicom would have had sufficient time to stop after hitting the cones at Osborne Road and before striking Lewis.

[9] Following a jury trial, at which Carnicom represented himself, Carnicom was convicted Level 4 felony causing death while operating a vehicle with a schedule I or II controlled substance in the blood and Class A misdemeanor

reckless operation of a vehicle in a highway work zone. Thereafter, on April 20, 2022, the trial court sentenced him to ten years executed on the felony conviction and a concurrent, one-year term on the misdemeanor conviction. Carnicom now appeals.

Discussion & Decision

Admission of Evidence

[10] Carnicom argues that the trial court improperly admitted evidence of his statements to Officer Fox and of the blood draw results. While acknowledging that witnesses testified that he waived his rights and signed consents, Carnicom argues that the State “failed to provide any written evidence of [his] consent to waive his rights and failed to make an electronic recording of the statements that was preserved and available at trial in violation of Indiana Rule of Evidence 617.” *Appellant’s Brief* at 14.

[11] We agree with the State that Carnicom waived his claims of error regarding the admission of this evidence because he did not assert such objections at trial. *See Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) (“A contemporaneous objection at the time the evidence is introduced at trial is required to preserve the issue for appeal, whether or not the appellant has filed a pretrial motion to suppress.”). Further, it is well established that a party may not raise one ground below and seek reversal on a different one on appeal. *See Warren v. State*, 182 N.E.3d 925,933 (Ind. Ct. App. 2022).

[12] Here, Carnicom neither filed a motion to suppress nor did he object to the now-challenged evidence at trial on constitutional grounds or allege a violation of Evid. R. 617.¹ He asserted no objection to the blood draw evidence and objected to the evidence of his pretrial statements only on hearsay grounds. That is, he argued below that Officer Fox could not testify regarding Carnicom’s admission that he smoked methamphetamine the night before the crash because such constituted hearsay. The trial court correctly overruled this objection because the statement was that of a party opponent and, thus, not hearsay. *See* Indiana Evid. Rule 801(d)(2)(A). Carnicom’s new and different evidentiary arguments on appeal are waived.

Sufficiency of the Evidence

[13] Carnicom also contends that the evidence supporting his conviction for Class A misdemeanor reckless operation of a vehicle in a highway work zone was insufficient. When reviewing the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor assess the credibility of witnesses. *Fix v. State*, 186 N.E.3d 1134, 1138 (Ind. 2022). “When there are

¹ This rule “heightens the requirements for admissibility of statements in certain circumstances by specifically providing that, “[i]n a felony prosecution, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial” *Fansler v. State*, 100 N.E.3d 250, 253 (Ind. 2018) (quoting Evid. R. 617(a)). In determining whether a space is operated by police as a place of detention, outside the ordinary context of a jail or station house, our Supreme Court has identified three factors to consider: “1) the control that law enforcement has over the premises, 2) the frequency of use to conduct custodial interrogations, and 3) the purpose for which law enforcement uses the space.” *Id.* at 254. Carnicom does not set out these factors on appeal, and the trial record is not developed in this regard because the issue was not raised below.

conflicts in the evidence, the jury must resolve them.” *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022). Thus, on appeal, we consider only the probative evidence and the reasonable inferences supporting the conviction and will affirm “unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Fix*, 186 N.E.3d at 1138 (quoting *Jackson v. State*, 50 N.E.3d 767, 770 (Ind. 2016)). Further, it is not necessary for the evidence to “overcome every reasonable hypothesis of innocence.” *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007).

[14] A person commits Class A misdemeanor reckless operation in a highway work zone when the person “recklessly operates a vehicle in the immediate vicinity of a highway work zone when workers are present.” Ind. Code § 9-21-8-56(b). Carnicom does not dispute that he operated his van within a highway work zone when workers were present. He argues only that the State failed to prove that he operated his van recklessly as opposed to accidentally due to a gust of wind or sudden lane change.

[15] “A person engages in conduct ‘recklessly’ if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.” Ind. Code § 35-41-2-2(c).

[16] The State presented substantial evidence that Carnicom recklessly operated his van in the work zone. The signage alerting drivers of the upcoming construction zone began 2000 feet before the lane closure. Carnicom had

ample warning, as he passed four construction signs, each spaced 500 feet apart, before reaching the final sign and the construction cones that closed off the right lane of traffic. Despite the warning signs and having “plenty enough time to get over,” Carnicom sped past the Starkeys’ vehicle, which was in the left lane, and did not merge. *Transcript Vol. II* at 85-86. Instead, he drove through the construction cones at a speed of at least 50 miles per hour and continued another approximately 300 feet in the work zone without braking before striking Lewis. Based on this evidence, a reasonable jury could conclude that Carnicom operated his van recklessly.

[17] Judgment affirmed.

Brown, J. Tavitas, J., concur.