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IN THE COURT OF APPEALS OF INDIANA

Christian Toledo Rojo,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 22, 2022

Court of Appeals Case No. 22A-CR-652

Appeal from the Hendricks Superior Court

The Honorable Stephenie LeMay-Luken, Judge

Trial Court Cause No. 32D05-2009-CM-803

Crone, Judge.

Case Summary

[1] Christian Toledo Rojo appeals his convictions, following a bench trial, for class A misdemeanor operating a vehicle while intoxicated and class B misdemeanor possession of marijuana. He argues that the trial court abused its discretion in admitting certain evidence. He further challenges the sufficiency of the evidence

to support his conviction for possession of marijuana. Finding no abuse of discretion but finding insufficient evidence to support the possession conviction, we affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[2] In the early morning hours on August 15, 2020, Plainfield Police Department Officers Joshua Koch and Jacob Clark were dispatched to the intersection of Ronald Reagan Parkway and Stout Heritage Parkway in Hendricks County. When they arrived, they observed that a single vehicle had apparently slid off the road into the grassy median. The car had three flat tires, and Toledo Rojo was sitting outside the vehicle looking "disoriented." Tr. Vol. 2 at 15. Toledo Rojo had "glossy eyes," "poor balance," and "slurred speech." *Id*. at 20. He told the officers that he "had a couple drinks and smoked marijuana" a "couple hours" before driving. *Id.* at 15-16. The officers observed something bulging out of a "sock" in Toledo Rojo's pocket. *Id*. at 11. He told them that it was just some lighters. The officers recovered a "little bag" from the sock that contained a substance they believed to be marijuana due to "smell and sight." *Id*. at 21. The substance was never tested.

[3] The officers did not perform any field sobriety tests on Toledo Rojo and instead transported him for a blood draw at Hendricks Regional Health. Phlebotomist Mae Long performed the blood draw. The blood draw revealed that Toledo Rojo's blood contained THC and had an alcohol concentration equivalent of 0.132 gram per 100 milliliters of blood.

[4] The State charged Toledo Rojo with class A misdemeanor operating a vehicle while intoxicated and class B misdemeanor possession of marijuana. A bench trial was held on February 24, 2022. The trial court found Toledo Rojo guilty as charged and sentenced him to a two-day executed sentence in the Hendricks County Jail.[1] This appeal ensued.

Discussion and Decision

Section 1 – The trial court did not abuse its discretion in admitting certain evidence.

[5] Toledo Rojo first challenges the trial court's admission of the lab results from his blood draw. The appellate standard of review for the admissibility of evidence is well established. *Housand v. State*, 162 N.E.3d 508, 513 (Ind. Ct. App. 2020), *trans. denied* (2021). "The admission or exclusion of evidence lies within the sound discretion of the trial court and is afforded great deference on appeal." *Id*. "We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion." *Id*. "An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id*.

[1] Both the judgment of conviction and the chronological case summary indicate that Toledo Rojo's possession of marijuana conviction was entered as a class A misdemeanor. The State notes that Toledo Rojo was charged with class B misdemeanor possession of marijuana and thus "[i]t appears that the trial court made a scrivener's error when it entered the conviction as a Class A misdemeanor." Appellee's Br. at 5 n.1. While we would ordinarily remand for correction of that error, because we reverse that conviction and remand with instructions for the trial court to vacate it, correction is unnecessary.

[6] Toledo Rojo argues that the trial court abused its discretion in admitting the blood draw results because the evidence lacked a proper foundation for admission. Indiana Code Section 9-30-6-6(a) requires that blood samples be collected by:

> A physician, a person trained in retrieving contraband or obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician, or a licensed health care professional acting within the professional's scope of practice and under the direction of or under a protocol prepared by a physician[.]

Our supreme court has stated that "[t]he foundation for admission of laboratory blood drawing and testing results, by statute, involves technical adherence to a physician's directions or to a protocol prepared by a physician*." Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991). "This is not a requirement that may be ignored." *Combs v. State*, 895 N.E.2d 1252, 1256 (Ind. Ct. App. 2008), *trans. denied* (2009).

[7] Here, to lay the foundation for the admission of Toledo Rojo's blood draw results, the State presented the testimony of the phlebotomist who performed the blood draw. Phlebotomist Long testified that she had been a phlebotomist for thirty years and had worked at Hendricks Regional Health for twenty years. She explained that Hendricks Regional Health has a protocol for conducting blood draws and that she was trained in that protocol. She explained the specifics of the protocol and how she followed it. She further agreed that the

protocol she followed was "developed" and "approved" by a physician who was "head of the lab" at the hospital. Tr. Vol. 2 at 27, 29.

[8] Toledo Rojo asserts that the State's reliance on this testimony to establish "technical adherence" to "a protocol prepared by a physician" was insufficient, and that the State was instead required to introduce "a copy of the relevant blood draw protocol as an exhibit at trial" to establish the necessary foundation for admissibility. Appellant's Br. at 7. However, this Court has held the opposite. Indeed, in *Martin v. State*, 154 N.E.3d 850, 853 (Ind. Ct. App. 2020), *trans. denied*, we concluded that the trial court did not abuse its discretion in determining that the State laid a sufficient foundation for blood draw evidence relying solely on the testimony of the nurse who conducted the blood draw. The nurse testified that she was trained in legal blood draws, that her hospital had a protocol for legal blood draws, that a physician approved that protocol, and that she followed that protocol. *Id*.

[9] As in *Martin*, we agree with the trial court here that Long's testimony was sufficient to provide the proper foundation for admission of the blood draw results. Toledo Rojo has not shown that the trial court abused its discretion in admitting the evidence and we affirm the operating while intoxicated conviction.[2]

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[2] Having found no abuse of discretion in the admission of the blood draw results, we need not address Toledo Rojo's related claim that, without those results, the State presented insufficient evidence to support his operating while intoxicated conviction.

Section 2 – The State presented insufficient evidence to support the possession of marijuana conviction.

[10] Toledo Rojo next claims that the State presented insufficient evidence to support his possession of marijuana conviction. To convict Toledo Rojo of class B misdemeanor possession of marijuana as charged, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally possessed "(pure or adulterated) marijuana[.]" Ind. Code § 35-48-4-11(a)(1). Toledo Rojo challenges whether the State's evidence was sufficient to demonstrate beyond a reasonable doubt that the substance he possessed was "marijuana" as defined by statute.

[11] "Marijuana" is defined under Indiana law as follows:

> (a) "Marijuana" means any part of the plant genus Cannabis whether growing or not; the seeds thereof; the resin extracted from any part of the plant, including hashish and hash oil; any compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin.
>
> (b) *The term does not include*:
>
> (1) the mature stalks of the plant;
>
> (2) fiber produced from the stalks;
>
> (3) oil or cake made from the seeds of the plant;

> (4) any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom);
>
> (5) the sterilized seed of the plant which is incapable of germination;
>
> (6) *hemp (as defined by IC 15-15-13-6)*;
>
> (7) low THC hemp extract; or
>
> (8) smokable hemp.

Ind. Code § 35-48-1-19 (emphases added).

[12] And "hemp" is defined under Indiana law as follows:

> As used in this chapter, "hemp" means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, *with a delta-9-tetrahydrocannabinol [THC] concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis*, for any part of the Cannabis sativa L. plant.

Ind. Code § 15-15-13-6 (emphases added). Accordingly, in Indiana, the difference between a legal substance, such as hemp, and illegal marijuana is determined by the concentration of delta-9-THC in a particular substance: to be illegal, the concentration of delta-9-THC must be more than 0.3%.

[13] Toledo Rojo correctly asserts that the State presented no chemical analysis evidence that the substance seized from his sock was actually marijuana, i.e., that it had a concentration of delta-9-THC that was more than 0.3%. Rather, the only evidence presented regarding the identity of the substance was the extremely limited testimony of one of the police officers simply indicating that he "knew" the substance was marijuana "through [his] training experience" due to "markers regarding sight and smell." Tr. Vol. 2 at 21. The State asserts that this opinion testimony was sufficient to prove beyond a reasonable doubt that the substance Toledo Rojo possessed was marijuana. *See* Appellee's Br. at 12 (citing *Clark v. State*, 6 N.E.3d 992, 999 (Ind. Ct. App. 2014) (acknowledging supreme court precedent holding generally that opinion of someone sufficiently experienced with drug may be sufficient to establish identity, but expressing concern regarding State's practice of not performing chemical analysis on substances simply due to police department policy on chemical analysis quantities)).

[14] In considering this same issue, another panel of this Court recently held that such opinion evidence, without more, was insufficient to sustain a conviction for possession of marijuana. *Fedij v. State*, 186 N.E.3d 696, 708 (Ind. Ct. App. 2022). The panel emphasized that "the State cannot premise a conviction 'upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility.'" *Id*. Specifically, in *Fedij*, to prove the illegal identity of certain seized substances, the State relied on police officer testimony that "she had been trained to recognize the smell of marijuana and she identified the substances to

be consistent with her training." *Id*. at 708. The State also relied on testimony of a police laboratory examiner "that she was trained in identifying marijuana" and that "the plant material was consistent with marijuana." *Id*.[3] However, both of those key witnesses admitted during their testimony that "they had no way to distinguish any of the substances" between legal hemp and illegal marijuana "absent a test for the percent concentration of THC." *Id*. at 708-9. Accordingly, the *Fedij* panel concluded that because it was undisputed that "the only way to determine if any of the seized substances was a legal substance or an illegal one was to test the percent concentration of THC in the substance, which the State did not do," "the State had no evidentiary basis from which a reasonable fact-finder could conclude that the seized substances were in fact marijuana[.]" *Id*. at 709.[4] The same is true here, as the State presented no evidence from which a reasonable factfinder could conclude that the substance seized from Toledo Rojo was in fact marijuana and not a similar-smelling or

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[3] The examiner had done limited chemical testing on the seized plant material, and while she was able to identify the presence of THC in the material, she did not determine its concentration. *Fedij*, 186 N.E.3d at 701.

[4] We note that a defendant's admission that a seized substance was marijuana, along with an officer's opinion based on sight and smell, has been found sufficient to establish identity. *See Doolin v. State*, 970 N.E.2d 785, 790 (Ind. Ct. App. 2012) (finding sufficient circumstantial evidence that plant material was marijuana; defendant admitted that "the marijuana was his," and law enforcement identified it based on odor and appearance), *trans. denied*; *see also Boggs v. State*, 928 N.E.2d 855, 867 (Ind. Ct. App. 2010) (officers testified that substance was consistent with marijuana and defendant admitted that cigarette tubes in his possession were used to smoke marijuana and that he had only a small amount of marijuana because it was getting "old"), *trans. denied*. The State emphasizes that Toledo Rojo admitted to smoking "marijuana" sometime before driving on the night in question. Still, there is no evidence that Toledo Rojo admitted that the substance found in his sock was marijuana. And, as correctly observed by the trial court, "just because you smoke[d] it, doesn't mean you currently possess it." Tr. Vol. 2 at 57.

-looking substance that is not illegal in Indiana.[5]

[15] The State appears to concede that due to "new developments in the commercialization of the cannabis plant[,]" Appellee's Br. at 14, mere opinion evidence of sight and smell may not suffice to identify the illegality of a substance beyond a reasonable doubt. Thus, the State urges that rather than requiring it to prove identity as a material element of the possession offense, perhaps it should be the defendant's burden to raise and prove as an affirmative defense that a substance he possesses is not marijuana but is one of the legal substances specifically excluded from the definition.[6] We cannot subscribe to such a tortured reading of any criminal statute defining the material elements of a crime as straightforward as the possession of marijuana statute, Indiana Code Section 35-48-4-11.[7] As the *Fedij* court aptly observed,

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[5] Granted, unlike in *Fedij*, the evidentiary portion of the bench trial here was extremely brief and defense counsel did not solicit testimony from the testifying police officers regarding their admitted inability to distinguish between certain legal substances, such as hemp, and illegal marijuana based simply on sight and smell. However, as in *Fedij*, the questionable identity of the untested seized substance was an issue squarely before the trial court as factfinder. During closing argument, defense counsel argued, "[T]hey didn't field test anything […] they didn't test it in a lab anywhere […] we don't know what he actually had was marijuana or […] even Delta-8 which is legal here in the State of Indiana. So, we have no idea what the actual substance is other than perhaps maybe a smell […], appears to look like marijuana. …Delta-8 and, and marijuana THC would appear exactly the same[.]" Tr. Vol. 2 at 55.

[6] The statutory definition of marijuana was revised in 2014 to provide a list of legal cannabis substances "not include[d]" within the definition. *See* Ind. Code § 35-48-1-19. That list was expanded in 2018 and again in 2019.

[7] The State waxes poetic that the substances listed in Indiana Code 35-48-1-19(b) that are excluded from the definition of marijuana are "exceptions" and "Indiana's long-standing position" is that "the State is not required to negate exceptions." Appellee's Br. at 15. We agree. But the State's argument misses the mark. The State was not required to prove that the substance seized *was not* one of the legal substances listed. The State was simply required to prove that the substance *was* marijuana.

> [t]he statute proscribes possession of a specific substance, and if the State seeks to obtain a conviction under that statute, it is entirely the State's burden to prove that the proscribed substance was in fact in the defendant's possession. Leaving the fact-finder to simply guess whether a substance is legal or illegal from equivocal evidence is not a sufficient basis to sustain a criminal conviction.

Id. at 709.

[16] The State presented insufficient evidence from which a reasonable factfinder could conclude beyond a reasonable doubt that the substance seized from Toledo Rojo was in fact marijuana. Therefore, we reverse his possession of marijuana conviction and remand with instructions for the trial court to vacate that conviction.

[17] Affirmed in part, reversed in part, and remanded.

Vaidik, J., and Altice, J., concur.