



## STATEMENT OF THE CASE

Bryan J. Fields appeals his conviction for operating a vehicle while intoxicated, as a Class D felony, following a jury trial. Fields raises five issues for our review, which we restate as the following three issues:

1. Whether the trial court abused its discretion in the admission and exclusion of certain evidence.
2. Whether the trial court abused its discretion when it instructed the jury.
3. Whether the State presented sufficient evidence to support Fields' conviction.

We affirm.

## FACTS AND PROCEDURAL HISTORY

On January 7, 2010, Elkhart County Sheriff's Department Corporal Casey Lehman initiated a traffic stop of a vehicle driven by Fields after Corporal Lehman observed the vehicle cross railroad tracks while the crossing gates were down. Corporal Lehman is trained to recognize the signs of intoxication and to administer field sobriety tests. He has also been trained to recognize the smell of burnt marijuana. He has been involved in about 400 arrests for operating while intoxicated and about 200 marijuana cases.

As he approached the driver's side of Fields' window, Corporal Lehman smelled "a strong odor of burning marijuana coming from inside the vehicle." Transcript at 75. Corporal Lehman also noticed that Fields' speech was slurred and that Fields had "blood[-]shot and glassy eyes." *Id.* at 77. Corporal Lehman asked Fields to exit the vehicle. After Fields did so, Corporal Lehman noticed the smell of alcohol on Fields'

breath. Fields admitted that he had had a few beers to drink. Fields also stated that friends had smoked marijuana in his car, but he had not done so.

During the course of the stop, a canine unit was called to the scene. The canine alerted officers to the possible presence of drugs in the console area of Fields' vehicle. During an ensuing search of that area of the vehicle, Corporal Lehman found small amounts of a loose-leaf, green material. Corporal Lehman recognized the material as marijuana. He did not collect the material, however, because he believed the amount too small to weigh.

Corporal Lehman administered three field sobriety tests to Fields. Fields failed each test. Corporal Lehman then read Fields the implied consent law and asked Fields to take a chemical test, which Fields refused to do. Corporal Lehman then arrested Fields for operating a vehicle while intoxicated.

On January 8, 2010, the State charged Fields with operating a vehicle while intoxicated, as a Class D felony, due to a prior conviction within the last five years for operation of a vehicle while intoxicated. See Ind. Code § 9-30-5-3(a)(1). The jury found him guilty of that charge and the trial court entered its judgment of conviction and sentence accordingly. This appeal ensued.

## **DISCUSSION AND DECISION**

### **Issue One: Admission of Evidence**

Fields first contends that the trial court erred in the admission and exclusion of certain evidence. Our standard of review of a trial court's admission of evidence is an abuse of discretion. Speybroeck v. State, 875 N.E.2d 813, 818 (Ind. Ct. App. 2007). A

trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before the court. Id. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. Dawson v. State, 786 N.E.2d 742, 745 (Ind. Ct. App. 2003), trans. denied.

Fields contends that the trial court abused its discretion for three reasons. First, Fields asserts that Corporal Lehman "should not have been permitted to testify that he found . . . marijuana in the car." Appellant's Br. at 4. Although unclear, it appears that Fields' challenge is to the foundation for Corporal Lehman's testimony.<sup>1</sup> But Corporal Lehman's testimony demonstrated that he had extensive experience in identifying marijuana. We will not reweigh that evidence on appeal.

Second, Fields argues that the State should not have been permitted to show portions of the video recording of the traffic stop made from Corporal Lehman's video camera in his patrol car. Specifically, Fields contends that the jury should have not been permitted to see him

arguing with Cpl. Lehman and making certain statements[,] which included that he had allowed someone to smoke pot in this car, that you could wipe down the seats of his car and get remnants of cocaine, that he had a friend who was a Notre Dame law student who would love this case, and that Cpl. Lehman was being ridiculous in arresting [Fields].

Id. at 5-6.

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<sup>1</sup> Any other attempted argument under this section of Fields' brief is not supported by cogent reasoning and is, therefore, waived. See Ind. Appellate Rule 46(A)(8)(a).

Fields contends that the above evidence was irrelevant, and, therefore, inadmissible, because the State had already shown that he failed his field sobriety tests.<sup>2</sup> We cannot agree. Relevant evidence means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” Ind. Evidence Rule 401. The State’s evidence of Fields’ demeanor and contentious behavior towards Corporal Lehman was relevant to show that Fields was intoxicated. Further, that evidence was not merely cumulative of other evidence that Fields failed the three sobriety tests. Rather, the video evidence corroborated Corporal Lehman’s conclusion at the scene that Fields was intoxicated.

Third, Fields asserts that he should have been permitted to admit into the record the results of his portable breath test (“PBT”), which would have shown that he had a blood alcohol level of .05. Fields acknowledges that “existing Indiana law prevents the admission of PBT results,” but states that “those case[s] should be re-examined in light of Crawford v. Washington, 541 U.S. 36 [2004].” We decline Fields’ invitation to reconsider this court’s precedent on this issue.<sup>3</sup>

As this court stated more than a decade ago:

Machine breath test results are hearsay. For the results of a breath test to be admissible, the test operator, test equipment, chemicals used in the test, and the techniques used in the test must have been approved by the Department

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<sup>2</sup> Fields’ passing suggestion that his behavior at the time of the crime for which he was charged was evidence of a “prior bad act” is not supported by cogent reasoning and is waived. App. R. 46(A)(8)(a); see Appellant’s Br. at 6.

<sup>3</sup> As with his other evidentiary arguments, Fields makes passing references in this part of his brief to other potential legal arguments without supporting those potential arguments with cogent reasoning. We do not consider them. App. R. 46(A)(8)(a).

of Toxicology. As the party offering the PBT results, [defendant] Smith bore the burden of laying the foundation for admitting those results into evidence. Because Smith offered no evidence to demonstrate that the PBT device has been approved by the Department of Toxicology, the results of that test were inadmissible at trial. The trial court did not abuse its discretion when it excluded the PBT results at Smith's trial.

Smith v. State, 751 N.E.2d 280, 283 (Ind. Ct. App. 2001) (citations omitted), trans. denied. Here, as in Smith, Fields did not offer a proper foundation to admit the PBT result. Accordingly, the court did not abuse its discretion in excluding it.

Neither is Crawford applicable here. In that case, the Supreme Court of the United States held that, “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” 541 U.S. 36, 68–69. Crawford does not mandate the admission of any evidence; it requires only that confrontation be permitted when testimonial evidence is admitted. Because the PBT evidence was not admitted into the record, if for no other reason, Crawford is inapposite.

In sum, the trial court did not abuse its discretion in the admission or exclusion of any evidence. Accordingly, we affirm the trial court on this issue.

### **Issue Two: Jury Instructions**

Fields next contends that the trial court abused its discretion when it instructed the jury. As we have discussed:

“The purpose of a jury instruction ‘is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict.’” Dill v. State, 741 N.E.2d 1230, 1232 (Ind. 2001) (quoting Chandler v. State, 581 N.E.2d 1233, 1236 (Ind. 1991)). Instruction of the jury is left to the sound judgment of the trial court and will not be disturbed absent an abuse of discretion. Schmidt v. State, 816 N.E.2d 925, 930 (Ind. Ct. App. 2004),

trans. denied. Jury instructions are not to be considered in isolation, but as a whole and in reference to each other. Id. The instructions must be a complete, accurate statement of the law which will not confuse or mislead the jury. Id. at 930-31. Still, errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise. Id. at 933 (citing Dill, 741 N.E.2d at 1233).

Williams v. State, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008). Further:

In reviewing a challenge to a jury instruction, we consider: (1) whether the instruction is a correct statement of the law; (2) whether there was evidence in the record to support giving the instruction; and (3) whether the substance of the instruction is covered by other instructions given by the court.

Simpson v. State, 915 N.E.2d 511, 519 (Ind. Ct. App. 2009) (quotation omitted), trans. denied.

Here, the trial court gave the jury preliminary and final instructions that: “‘Intoxicated’ means under the influence of alcohol, a controlled substance, any drug other than alcohol or a controlled substance, or any combination of alcohol, controlled substances, or drugs, so that there is an impaired condition of thought and action and the loss of normal control of a person’s faculties.” Appellant’s App. at 118 (capitalization removed). The court further gave the jury a final instruction that “marijuana is a controlled substance.” Id. at 119 (capitalization removed). Fields objected to those instructions on the grounds that there was no evidence in the record to support them.

Fields is mistaken. Corporal Lehman testified that, upon approaching Fields’ vehicle, he immediately smelled the odor of burnt marijuana. Later in the traffic stop, a trained canine alerted Corporal Lehman to the presence of drugs within Fields’ vehicle, and Corporal Lehman then observed small quantities of marijuana in the car. And

Corporal Lehman's testimony revealed that he is qualified to recognize marijuana by sight and smell. Further, the State expressly informed the jury, both during its opening and closing arguments, of its theory that Fields was under the influence of both marijuana and alcohol at the time of the traffic stop.

From the record, it is clear that there was evidence supporting the trial court's jury instructions. As such, the trial court did not abuse its discretion in tendering those instructions to the jury.

### **Issue Three: Sufficiency of the Evidence**

Finally, Fields contends that the State failed to present sufficient evidence to support his conviction. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside.

Fields argues that the State presented insufficient evidence of his intoxication because Corporal Lehman "testified he had no personal knowledge as to whether or not [Fields] had smoked any marijuana and that he was not qualified to give an opinion as to whether or not [Fields] was under the influence of marijuana." Transcript at 11. Fields' argument, however, ignores all of the evidence against him, which is discussed above,

and is merely a request for this court to weigh an isolated statement over all of the State's other evidence. We will not do so.

Additionally, much of Fields' argument on this issue is contingent on a favorable ruling on one of the above-stated issues. Because we do not reach a favorable decision on any of those issues, for the reasons stated above Fields' arguments on this issue must also fail.

### **Conclusion**

In sum, the trial court did not abuse its discretion in the admission or exclusion of evidence and it did not abuse its discretion in its instruction of the jury. Further, the State presented sufficient evidence to establish that Fields was intoxicated. As such, we affirm his conviction for operating while intoxicated, as a Class D felony.

Affirmed.

RILEY, J., and MAY, J., concur.