



Gregory Barkdull (“Barkdull”) was convicted in Madison Circuit Court of Class D felony operating a vehicle while intoxicated (“OWI”), Class C infraction speeding, and determined to be an habitual substance offender. Barkdull appeals and presents four issues, which we renumber and restate as the following three:

- I. Whether the trial court abused its discretion in denying Barkdull’s motion for mistrial;
- II. Whether the trial court denied Barkdull’s right to compulsory process when it refused to allow one of Barkdull’s witnesses to testify; and
- III. Whether the trial court erred in sentencing Barkdull to an aggregate of nine years.

We affirm.

### **Facts and Procedural History**

In the early morning hours of June 15, 2008, Officer Brett Wright (“Officer Wright”) of the Madison County Sheriff’s Department observed Barkdull operating his motorcycle at a high rate of speed. Officer Wright’s radar system indicated that Barkdull was travelling at sixty-five miles per hour, whereas the posted speed limit was forty-five miles per hour. Officer Wright therefore activated his emergency lights and attempted to pull Barkdull over. Barkdull drove to his driveway, and Officer Wright pulled in behind him. When Officer Wright asked for Barkdull’s license and registration, he noticed that Barkdull had alcohol on his breath and that his speech was slurred. Barkdull then failed two field sobriety tests. Officer Wright instructed Barkdull to push his motorcycle into the garage, and read him the implied consent law. Barkdull agreed to the alcohol test, which revealed that his blood alcohol concentration (“BAC”) was 0.11.

On June 20, 2008, the State charged Barkdull with Class C misdemeanor OWI and Class C infraction speeding. The State also alleged that Barkdull had a prior conviction for OWI, which enhanced the Class C misdemeanor count to a Class D felony, and further alleged that Barkdull was an habitual substance offender. A jury trial was held on September 9, 2009. During voir dire, one of the prospective jurors stated, "I'm familiar with Barkdull's past history and . . . . I know I don't want to say too much. I read the paper, I mean I saw the article this morning and . . . ." Tr. p. 57-58. At that point, Barkdull moved for a mistrial. The trial court excused the jury panel and the parties presented their arguments. The trial court denied the motion for mistrial, but did dismiss the potential juror for cause and permitted Barkdull to submit supplemental jury questionnaires to the remaining members of the panel. The potential jurors were then given the supplemental questionnaires and instructed not to discuss their answers with anyone.

The results of the supplemental questionnaires revealed that some of the potential jurors had read a local newspaper article regarding Barkdull's upcoming trial, which mentioned that Barkdull had prior convictions for OWI causing death. Another potential juror indicated that she had heard the dismissed juror discussing the details of Barkdull's prior convictions. And another potential juror mentioned that some of the panel members had passed the newspaper article around. The trial court dismissed the panel members who indicated that they had read the article, and allowed the parties to further voir dire the venire.

After the jury was selected, the State presented the testimony of its sole witness, Officer Wright. Barkdull then called a witness who had not previously been disclosed to the State. The trial court sustained the State's objection to the testimony of this witness. During the subsequent offer of proof, the witness testified that he was Barkdull's neighbor and had witnessed some of the events that occurred in Barkdull's driveway on the night he was arrested. At the conclusion of the trial, the jury found Barkdull guilty of Class C misdemeanor OWI and Class C infraction speeding. Barkdull then pleaded guilty to the enhancement to Class D felony OWI and admitted to being an habitual substance offender.<sup>1</sup>

At the sentencing hearing, Barkdull testified that he was employed by his brother's sheet metal business, had been attending AA meetings, and had completed a substance abuse program. Barkdull also claimed to be remorseful. Barkdull's brother testified that Barkdull was a good employee who had passed all random drug and alcohol tests. The trial court also heard testimony from the father and brother of one of the victims of Barkdull's previous convictions for OWI resulting in death. At the conclusion of the hearing, the trial court found as aggravating factors that Barkdull was speeding while he drove while intoxicated and that he had a criminal history which included OWI resulting in the death of two people. The trial court recognized that Barkdull had pleaded guilty to the Class D felony enhancement and admitted being an habitual substance offender, but the court gave little weight to these factors because Barkdull had not pleaded guilty to the

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<sup>1</sup> The same prior OWI conviction can both elevate a subsequent OWI conviction to a Class D felony and act as a predicate offense to support an habitual substance offender enhancement. See Beldon v. State, 926 N.E.2d 480, 483-84 (Ind. 2010).

underlying offense of Class C misdemeanor OWI. The court then sentenced Barkdull to three years for Class D felony OWI and enhanced this sentence by six years for being an habitual substance offender. Barkdull now appeals.

### **I. Mistrial**

Barkdull first claims that the trial court abused its discretion in denying his motion for a mistrial after the potential juror mentioned that she was “familiar with Barkdull’s past history” and had read an article in the local newspaper. Tr. p. 57-58. “A mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation.” Henson v. State, 790 N.E.2d 524, 535 (Ind. Ct. App. 2003) (quoting Kirby v. State, 774 N.E.2d 523, 533-34 (Ind. Ct. App. 2002)). The decision to grant a mistrial is within the trial court’s discretion, and we will reverse only for an abuse of that discretion. Id. An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the trial court. Id. We accord the trial court’s decision great deference, as it is in the best position to gauge the circumstances and the probable impact on the jury. Id. When determining whether a mistrial is warranted, we consider whether the defendant was placed in a position of “grave peril” to which he should not have been subjected. Id. The gravity of the peril is determined by the probable persuasive effect of the matter complained of on the jury’s decision. Id.

Here, Barkdull claims he was placed in a position of grave peril when the potential juror referred to his “past history” in front of the other potential jurors. We disagree. The potential juror did not explain what she meant by Barkdull’s “past history,” and did not specifically mention any prior criminal behavior by Barkdull, much less prior OWI

convictions. We therefore reject Barkdull's claim that the entire jury panel was tainted by evidence of his past convictions.

Further, the trial court allowed the parties to submit supplemental questionnaires to the venire, and any jurors who indicated that they had read the article in the newspaper regarding Barkdull's trial were excused. The remaining members of the jury panel indicated that they had not read the article. Thus, the trial court took reasonable measures to ensure that any potential juror who read the newspaper article was excused. Under these facts and circumstances, we cannot say that the trial court abused its discretion in denying Barkdull's motion for mistrial.

## **II. Compulsory Process**

Barkdull next claims that the trial court denied him the constitutional right to compulsory process when it excluded the testimony of his witness, who had not been disclosed to the State during discovery. "[T]he right of a criminal defendant to compulsory process for obtaining witnesses in his behalf is guaranteed by both the federal and Indiana constitutions." Ferguson v. State, 670 N.E.2d 371, 375 (Ind. Ct. App. 1996) (citing U.S. Const. amend. VI; Ind. Const. art. 1 § 13; Klagiss v. State, 585 N.E.2d 674, 681 (Ind. Ct. App. 1992)). When a defendant claims that his right to compulsory process has been unconstitutionally limited, two inquiries must be made: (1) whether the trial court arbitrarily denied the Sixth Amendment rights of the person calling the witness, and (2) whether the witness was competent to testify and his testimony would have been relevant and material to the defense. Id. (citing Washington v. Texas, 388 U.S. 14, 23 (1967)). The defendant must show how the witness's testimony would have been

both material and favorable to his defense. Id. (citing Davis v. State, 529 N.E.2d 112, 115 (Ind. Ct. App. 1988)).

Applying this standard to the case before us, we cannot say that Barkdull was denied the right to compulsory process. First, there is no indication that the trial court “arbitrarily” denied Barkdull’s right to present his witness. Instead, the trial court excluded Barkdull’s witness because Barkdull had failed to disclose this witness during discovery. But even if it could be said that the trial court did act arbitrarily, we agree with the State that Barkdull has not shown that his neighbor’s testimony was “material.” The State notes that, in this context, for a witness’s testimony to be “material,” it “must be sufficient to create a reasonable doubt about a verdict which, based on the entire record, is already of questionable validity.” Hunt v. State, 546 N.E.2d 1249, 1251 (Ind. Ct. App. 1989) (quoting Davis v. State, 529 N.E.2d 112, 115 (Ind. Ct. App. 1988)).

Here, Barkdull’s neighbor would have testified as follows: that he saw Barkdull and Officer Wright in Barkdull’s driveway on the night Barkdull was arrested; that Barkdull’s truck was in the driveway; that Barkdull performed the heel-to-toe field sobriety test parallel to his driveway; and that he heard Barkdull’s motorcycle engine being “revved up” then turned off. Barkdull contrasts this with Officer Wright’s testimony, in which he stated that there were no other vehicles in the driveway, that Barkdull performed the heel-to-toe test perpendicular to the driveway, and that Barkdull pushed his motorcycle into the garage without starting the engine. At most, Barkdull’s neighbor’s testimony, if credited, would have been inconsistent with Officer Wright’s testimony, but only as to collateral matters. Barkdull’s neighbor would not have

contradicted Officer Wright regarding Barkdull's speeding, his intoxicated behavior, his failure of the field sobriety test, or the accuracy of the test which indicated that Barkdull's BAC was 0.11. Under these facts and circumstances, we cannot say that Barkdull's neighbor's testimony was "material" in that it would have created a reasonable doubt about an already-questionable verdict. See Hunt, 546 N.E.2d at 1251 (quoting Davis, 529 N.E.2d at 115).

### III. Sentencing

Lastly, Barkdull claims that the trial court erred in sentencing him to three years with a six year habitual substance offender enhancement. He first argues that the trial court erred by permitting the father and brother of one of the victims of his prior crime of OWI resulting in death to testify at the sentencing hearing. Barkdull acknowledges that, pursuant to Indiana Code section 35-40-5-5 (2004), "[a] victim has the right to be heard at any proceeding involving sentencing[.]" But he argues that a "victim" is defined as "a person that has suffered harm as a result of a crime that was perpetrated directly against the person." Ind. Code § 35-40-4-8 (2004). Barkdull therefore argues that the father and brother of the victim of Barkdull's prior crimes are not "victims" of the instant crime and should not have been allowed to testify at his sentencing hearing. We disagree. Although Indiana Code section 35-40-5-5 provides that a "victim" has a right to be heard at a sentencing hearing, it does not say that someone who is *not* a victim *cannot* testify at a sentencing hearing.

Furthermore, as noted by the State, the trial court not only sentenced Barkdull to three years for the instant OWI offense but also imposed an habitual substance offender

enhancement. The length of the habitual substance offender enhancement imposed is left to the trial court's sound discretion. See Merritt v. State, 663 N.E.2d 1215, 1216 (Ind. Ct. App. 1996).<sup>2</sup> And one of the prior convictions underlying the habitual substance offender determination was Barkdull's prior conviction for OWI causing death. We therefore see no reason why the trial court could not hear evidence regarding the prior convictions which supported Barkdull's habitual substance offender adjudication.<sup>3</sup>

Barkdull also claims that the sentence imposed by the trial court was inappropriate. Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence otherwise authorized by statute if, "after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Although we have the power to review and revise sentences, "[t]he principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). As explained in

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<sup>2</sup> Merritt involved a sentence enhancement under the general habitual offender statute, Indiana Code section 35-50-2-8 (2004). "Because the language of [the habitual substance offender] statute mirrors the language contained in . . . the general habitual offender statute, decisions interpreting the habitual offender statute are applicable to issues raised under I.C. 35-50-2-10." Roell v. State, 655 N.E.2d 599, 601 (Ind. Ct. App. 1995), trans. denied.

<sup>3</sup> Even if we agreed with Barkdull that these witnesses should not have been allowed to testify at the sentencing hearing, the error would be harmless in that his sentence, as discussed below, is not inappropriate. See Mendoza v. State, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007) (noting that even if trial court abuses its discretion in the process used to sentence the defendant, we will not remand for resentencing if the sentence imposed is not inappropriate), trans. denied (citing Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007) (noting that when trial court errs in sentencing defendant, court on appeal may exercise authority to review and revise sentence, instead of remanding for resentencing)).

Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), it is on the basis of Appellate Rule 7(B) alone that a criminal defendant may now challenge his sentence “where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue.” On appeal, it is the defendant’s burden to persuade us that the sentence imposed by the trial court is inappropriate. Id. at 494.

Barkdull claims that his “underlying” offense is not of a nature that would support a maximum sentence, “as evidenced by the fact that it is only a C misdemeanor.” Appellant’s Br. p. 18. But this ignores the fact that Barkdull’s OWI conviction was enhanced to a Class D felony based upon his previous convictions. It also ignores that he was speeding at the time he drove his motorcycle with a BAC of 0.11.

Moreover, Barkdull’s character supports the sentence imposed by the trial court. Barkdull has prior misdemeanor convictions for resisting law enforcement and invasion of privacy. Significantly, he was also convicted for two counts of Class C felony OWI resulting in death in 1990. Instead of altering his behavior after this tragic event, Barkdull was again convicted of Class D felony OWI in 2003. Even after this, Barkdull failed to change his behavior and was caught yet again operating a motor vehicle while intoxicated.

Although Barkdull may not have the worst criminal history, the significance of a defendant’s criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the current offense. Bryant v. State, 841 N.E.2d 1154, 1156-57

(Ind. 2006). Barkdull is a recidivist, lethal drunk driver whose behavior has been undeterred even after it resulted in the death of two other people. His prior convictions, as they relate to the current offense, reflect very poorly on his character. See Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999) (noting that a prior conviction for OWI would be a significant aggravator in a subsequent alcohol-related offense). After due consideration of the trial court's sentencing decision, we cannot say that Barkdull's aggregate nine-year sentence is inappropriate in light of the nature of his offense or his character.

### **Conclusion**

The trial court did not abuse its discretion in denying Barkdull's motion for a mistrial, nor did the trial court deny Barkdull's right to compulsory process when it excluded the testimony of a witness Barkdull did not disclose prior to trial. Lastly, the trial court did not err in sentencing Barkdull to an aggregate term of nine years.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.