

Thomas Battista was convicted after a bench trial of operating while intoxicated¹ as a Class A misdemeanor. He appeals his conviction, raising the following restated issue: whether the trial court acted within its discretion when it denied Battista's motion to correct error in which he contended that the trial court violated his right to remain silent by improperly commenting on his failure to testify at trial.

We affirm.

FACTS AND PROCEDURAL HISTORY

On July 17, 2009, Kelli Graham ("Kelli") was sleeping in her house in Chesterton, Indiana. She awoke in the middle of the night and saw headlights moving through her side yard and behind a shed. She went outside with her family to see the headlights and heard an engine revving and "popping." *Tr.* at 7. Kelli called 911 to report the incident, and Chesterton Police Department Officer Antonio Alfaro arrived several minutes later. When Officer Alfaro arrived, he observed fresh tire marks in the grass that led straight from the dead end road and then turned left. He walked around the side of the house and saw brake lights reflecting off of the trees. The brake lights flashed several times as if being repeatedly applied. Officer Alfaro approached the vehicle parked in the grass, which was still running, and observed a man wearing a blue t-shirt, who was later identified as Battista, sitting in the driver's seat. The vehicle's windows were open, and Officer Alfaro could smell alcohol coming from inside. Battista was attempting to climb over the center console into the passenger's seat.

¹ See Ind. Code § 9-30-5-2.

Officer Alfaro asked Battista to exit the vehicle, but Battista could not open the door. When Battista was able to exit the vehicle, he stumbled and fell down out of the vehicle. As Officer Alfaro spoke with Battista, he noticed that Battista slurred his speech, had bloodshot, watery eyes, and was unsteady on his feet to the point that he fell over several times. Battista was placed in handcuffs and taken to the Chesterton Police Department. At the police station, Battista failed three field sobriety tests and was given a chemical test, which showed his blood alcohol content (“BAC”) to be .19. Battista also urinated himself two or three times during this process. He was placed under arrest and charged with operating while intoxicated as a Class A misdemeanor, operating a vehicle with a BAC of .15 or above as a Class A misdemeanor, operating a vehicle with a BAC of .08 or above as a Class C misdemeanor, and operating while intoxicated as a Class C misdemeanor. A bench trial was held, and the trial court found Battista guilty of operating while intoxicated as a Class A misdemeanor and dismissed the remaining counts. Battista was sentenced to 365 days, all suspended except for time served and twenty days of community service, with the suspended time to be served on probation. Battista now appeals. Additional facts will be added as necessary.

DISCUSSION AND DECISION

The decision to grant or deny a motion to correct error lies within the trial court’s discretion. *James v. State*, 872 N.E.2d 669, 671 (Ind. Ct. App. 2007). As such, we review the trial court’s decision for an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court’s decision is against the logic and effect of the facts and circumstances before it or if the trial court has misinterpreted the law. *Id.*

Battista argues that the trial court abused its discretion when it denied his motion to correct error. He specifically contends that the denial of his motion was in error because the trial court violated his Fifth Amendment right to remain silent by commenting on his failure to offer evidence that was solely within his exclusive possession. Battista claims that the trial court improperly considered his silence and failure to testify when it found him guilty.

The Fifth Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, provides that no person shall be compelled in any criminal case to be a witness against himself. *Cox v. State*, 854 N.E.2d 1187, 1193 (Ind. Ct. App. 2006). The trial court and the prosecutor are prohibited under the Fifth Amendment from commenting at trial on the defendant's refusal to testify. *Ziebell v. State*, 788 N.E.2d 902, 913 (Ind. Ct. App. 2003). Such a comment violates a defendant's privilege against compulsory self-incrimination if the statement is subject to reasonable interpretation as an invitation to draw an adverse inference from a defendant's silence. *Id.*

Here, Battista takes issue with the trial court's explanation of its bench verdict. In explaining its verdict, the trial court made the following statement:

Where I come down here is that [sic] do I have enough evidence to show operation and I do have [Battista] in the seat, I do have also the brake lights being shown and I do have the engine on, I've heard that evidence and that has been proven. I am not going to speculate about others because Ms. Graham saw or did not see anyone else, I am not going to put that burden on either side to prove someone else, I certainly don't put it on the defense to prove someone else drove the car or to answer the questions of why the police did not look for someone else either in the woods behind Ms. Graham's house or see footprints or whatever. I do note that it does cut

both ways though by saying that there is no one around or that the defense found no one else around, it hasn't been shown to the Court by either side, including the defense, that there was somebody else in the vicinity that could have been driving the car. All I know is I've heard evidence that [Battista] was in the seat with the engine running and the law compels me then to find that he did operate the motor vehicle.

Tr. Vol. II at 32-33. In this explanation, the trial court was merely reasoning that it did not matter whether either party presented evidence regarding if a third party was driving and may have fled the scene. This was because the State had proven that Battista was operating the vehicle through the evidence of Officer Alfaro's observations of Battista in the driver's seat with the car running and brake lights repeatedly being applied. In its denial of Battista's motion to correct error, the trial court stated: "The Court did not consider [Battista's] silence. The [Court] considered that the police found [Battista], intoxicated, in the front seat, with the engine on." *Appellant's App.* at 30. We therefore conclude that the trial court did not improperly comment on Battista's failure to testify at trial and did not abuse its discretion when it denied his motion to correct error.

We further conclude that sufficient evidence was presented to support Battista's conviction for operating while intoxicated as a Class A misdemeanor. In order to convict Battista of the crime, the State was required to prove that he operated a vehicle while intoxicated in a manner that endangered a person. Ind. Code § 9-30-5-2. The element of endangerment is proved by evidence that the defendant's condition or manner of operating the vehicle could have endangered any person, including the public, the police, or the defendant. *Ashba v. State*, 816 N.E.2d 862, 866-67 (Ind. Ct. App. 2004).

The evidence presented at trial showed that Kelli observed the headlights of a vehicle move through her side yard and behind her shed. When Officer Alfaro arrived at the scene, he observed fresh tire marks in the grass that led straight from the dead end road and then turned left, stopping near some trees. Officer Alfaro observed Battista in the driver's seat of a running vehicle, parked in the grass to the side of Kelli's house and saw the brake lights going on and off several times. The windows were down, and the officer could smell the odor of alcohol coming from the vehicle. Battista was in the driver's seat, attempting to climb over the center console into the passenger's seat. He had trouble exiting the vehicle and stumbled out of the door. Once outside, Battista had unsteady balance, slurred speech, and bloodshot, watery eyes. He fell over repeatedly and had urinated himself. He failed several field sobriety tests and had a BAC .19. The evidence presented was sufficient to prove that Battista operated a vehicle while intoxicated in a manner that endangered a person.

Affirmed.

MATHIAS, J. and VAIDIK, J., concur.