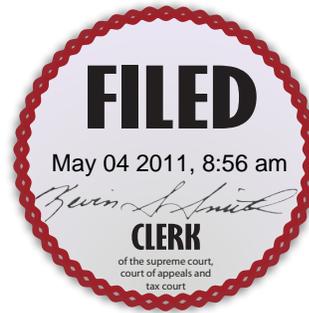


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**IN THE
COURT OF APPEALS OF INDIANA**

THOMAS D. ECKEL,)
)
Appellant-Defendant,)
)
vs.) No. 30A01-1010-CR-522
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE HANCOCK SUPERIOR COURT
The Honorable Dan E. Marshall, Judge
Cause No. 30D02-0901-FD-92

MAY 4, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Thomas D. Eckel appeals his convictions for operating a vehicle while intoxicated in a manner endangering a person while having a prior conviction within the past five years, a Class D felony, Indiana Code sections 9-30-5-2 (2001) and 9-30-5-3 (2008), and operating a vehicle with a schedule I or II controlled substance or its metabolite in the body, a Class C misdemeanor, Indiana Code section 9-30-5-1(c) (2001). We affirm.

ISSUES

Eckel raises three issues, which we restate as:

- I. Whether the trial court abused its discretion in admitting into evidence a report on tests performed on urine and blood samples taken from Eckel.
- II. Whether the admission of the report violated Eckel's right to confront witnesses under the federal and state constitutions as a matter of fundamental error.
- III. Whether the evidence is sufficient to support Eckel's convictions.

FACTS AND PROCEDURAL HISTORY

On January 19, 2009, at 2:40 a.m., Deputy Scott Roeger of the Hancock County Sheriff's Department was in Mt. Comfort, Indiana. Deputy Roeger was watching traffic with a radar monitor, and he saw a car pass by going fifty-three miles per hour in a thirty-five-mile per hour zone. Deputy Roeger followed the car and stopped it by using his emergency lights.

Eckel was driving the car, and Cory Dickerson was a passenger in the car. Deputy Roeger approached the car, and Eckel opened his door to talk to the deputy because his

window was not working. Deputy Roeger immediately smelled an odor of burnt marijuana coming from the car. Eckel had glassy eyes and exhibited poor manual dexterity while producing his driver's license. Deputy Roeger obtained Eckel's driver's license and registration, and Dickerson's identification, and he placed those documents in his car. Next, Deputy Roeger returned to Eckel's car and had Eckel and Dickerson get out and go to the back of Eckel's car. Deputy Roeger asked Eckel about the marijuana smell, and Eckel said that they had been to a party where marijuana had been smoked, but he denied smoking marijuana himself. Deputy Roeger saw rolling papers on the car's console, and Eckel said the papers were for tobacco cigarettes.

Deputy Roeger returned to his car and sent Eckel and Dickerson's information to dispatch. He learned that Eckel's driver's license was suspended, and he requested assistance from additional officers. Deputy Ronald L. Durbin, Jr., and Deputy Mark C. Galbraith responded to his request. Deputy Durbin put Dickerson in his vehicle while Deputy Galbraith searched Eckel's car. Deputy Galbraith did not find any contraband in the car but smelled a strong odor of burnt marijuana in the car. Meanwhile, Deputy Roeger administered field sobriety tests to Eckel. Deputy Roeger had Eckel perform a gaze nystagmus test, a walk and turn test, and a one leg stand test. Eckel failed the gaze nystagmus test and the walk and turn test, but he passed the one leg stand test.

Next, Deputy Roeger read Eckel an implied consent advisement, offering Eckel the opportunity to take a chemical test. Eckel consented, so Deputy Roeger took him to Hancock Regional Hospital to have blood and urine samples taken.

The State charged Eckel with operating a vehicle while intoxicated in a manner endangering a person, operating a vehicle while intoxicated in a manner endangering a person while having a similar conviction within the past five years, operating a vehicle with a controlled substance in the body, speeding, and driving with a suspended license. The case went to trial on the first three charges, and Eckel was convicted of operating a vehicle while intoxicated in a manner endangering a person while having a similar conviction within the past five years and operating a vehicle with a controlled substance in the body. He now appeals.¹

DISCUSSION AND DECISION

I. ADMISSION OF LAB REPORT: CHAIN OF CUSTODY

Decisions to admit or exclude evidence are matters for the trial court's discretion. *Price v. State*, 765 N.E.2d 1245, 1248 (Ind. 2002). We afford these decisions great deference on appeal, reversing only when a manifest abuse of discretion denies the defendant a fair trial. *Id.* An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Lanham v. State*, 937 N.E.2d 419, 422 (Ind. Ct. App. 2010). We do not reweigh the evidence, and we consider conflicting evidence in the light most favorable to the trial court's ruling. *Id.*

Eckel argues that the trial court abused its discretion by admitting into evidence State's Exhibit 4, a report ("the toxicology report") from the Indiana State Department of

¹ We note that the majority of the Appellant's Appendix consists of the entire transcript of trial court proceedings, which caused the Appendix to be unwieldy and difficult to review. Pursuant to Indiana Appellate Rule 50(F), parties should not reproduce any portion of the transcript in the appendix because the transcript is transmitted separately to this Court. In other words, we do not need two full copies of the transcript.

Toxicology (“the Department”), which discusses the result of tests the State performed on the blood and urine samples that were collected from him. Specifically, Eckel asserts that the State failed to establish a proper chain of custody for the samples that the Department tested.

To establish a proper chain of custody, the State must give reasonable assurances that the evidence remained in an undisturbed condition. *Troxell v. State*, 778 N.E.2d 811, 814 (Ind. 2002). The State bears a higher burden to establish the chain of custody of “fungible” evidence, such as blood and hair samples, whose appearance is indistinguishable to the naked eye. *Id.* However, the State need not establish a perfect chain of custody, and once the State “strongly suggests” the exact whereabouts of the evidence, any gaps go to the weight of the evidence and not to admissibility. *Id.* To mount a successful challenge to the chain of custody, one must present evidence that does more than raise a mere possibility that the evidence may have been tampered with. *Id.*

In this case, Deputy Roeger personally observed the collection of urine and blood samples from Eckel at the hospital. Furthermore, Deputy Roeger used a State Police sampling kit, which was kept at the hospital, to organize and identify the samples. He filled out an evidence log in the kit, including “[his] information, the defendant’s information, and . . . the hospital’s information.” Tr. p. 164. He poured a portion of Eckel’s urine sample into a cup in the kit, sealed it, and put Eckel’s name, his name, and the time on the cup. Similarly, when the blood sample was collected, Deputy Roeger

took two vials of Eckel's blood and left one vial with the lab technician.² He wrote Eckel's name, his name, and the time on each vial. Once the samples were collected and the containers were marked, Deputy Roeger placed the containers in a plastic bag, which he sealed with evidence tape. He next placed the bag in the kit's box, which he also sealed with evidence tape. Deputy Roeger brought the sample kit containing Eckel's blood and urine samples to the Hancock County Jail's evidence locker. According to Deputy Roeger, samples are taken from the jail and hand-delivered to the laboratory by Major Smith or evidence technician Brian Frances.

According to the trial testimony of Christopher D. Rice, a laboratory technologist at the Department, on January 29, 2009, Brian Frances delivered the sample kit to the Department's laboratory, where it was received by then-employee Joseph McClarnon. Neither Frances nor McClarnon testified at Eckel's trial. Instead, Rice testified as to Frances and McClarnon's activities based on his review of the Department's case file. Rice further noted that according to the case file, the sample kit's seals were intact at the time of receipt, with Eckel's name, Deputy Roeger's name, Hancock County's name, and a Hancock County case number on the kit. At the time of intake, the Department assigned the samples an internal identification number, and Rice asserted that the samples should have been placed in the Department's secure walk-in refrigerator pursuant to the Department's protocols. Several months later, a Department employee named Grace Collantes, who did not testify at trial, performed preliminary tests on the blood and urine

² The hospital tested its portions of Eckel's blood and urine samples for the presence of drugs and alcohol. At Eckel's trial, the State sought to admit the hospital's reports on the tests into evidence, and Eckel objected. The trial court sustained Eckel's objection. The hospital's reports are not at issue in this appeal.

samples and prepared a report of the test results. Collantes' report included Hancock County's case number and the Department's identification number. Several months after that, and approximately five months after the Department received the samples, Rice personally performed a confirmation test on Eckel's blood sample. Rice retrieved the blood sample from the secure walk-in refrigerator, which is accessible only to Department employees. After the test, Rice prepared an addendum to Collantes' report, in which Rice stated that his confirmation test revealed that Eckel had two metabolites of marijuana in his blood. Thus, the toxicology report consists of Collantes' report and Rice's addendum.

This evidence establishes that Eckel's blood and urine samples went from the hospital to the Hancock County Jail to the Department, where the samples were received in a sealed state and were stored until they were tested. We conclude that this evidence strongly suggests the whereabouts of Eckel's urine and blood samples at any given time and provides a reasonable assurance that the evidence remained in an undisturbed condition. *See Culver v. State*, 727 N.E.2d 1062, 1067, 1068 (Ind. 2000) (determining that the State established a chain of custody for the victim's blood sample before it was shipped to the FBI and while it was in the hands of FBI officials); *Filice v. State*, 886 N.E.2d 24, 35 (Ind. Ct. App. 2008), *trans. denied* (determining that the State established a chain of custody for the victim's urine sample from the time the sample was collected at a hospital through the delivery of the sample to a laboratory for testing).

Eckel argues that the absence of testimony by Frances, McClarnon and Collantes establishes gaps in the chain of custody, particularly with respect to Collantes' handling

of the samples when she tested them. However, based on the evidence discussed above, these gaps go to the weight to be given to the toxicology report, not to its admissibility. Eckel raises the possibility of tampering with the samples during these gaps, but the mere possibility of tampering is insufficient to successfully challenge the chain of custody. *See Filice*, 886 N.E.2d at 35 (noting that the State could have presented more specific evidence regarding a lab’s handling of the victim’s urine sample, but the defendant had raised, at most, a mere possibility of evidence tampering). We conclude that the trial court did not abuse its discretion by admitting the toxicology report.

II. ADMISSION OF LAB REPORT: CONFRONTATION OF WITNESSES

Eckel next contends that the admission of the toxicology report violated his rights under the federal and state constitutions to confront witnesses. Specifically, Eckel asserts that he was entitled to question Frances, McClarnon, and Collantes about the handling and preliminary testing of his blood and urine samples. The Sixth Amendment to the United States Constitution, which is made applicable to the states by the Fourteenth Amendment, provides, in relevant part, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” In addition, Article 1, Section 13(a) of the Constitution of the State of Indiana provides, in relevant part, “[i]n all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face”

Eckel did not present these constitutional claims to the trial court when the State moved to admit the toxicology report into evidence. A failure to object when the evidence is introduced waives the issue for appeal. *Delarosa v. State*, 938 N.E.2d 690,

694 (Ind. 2010).³ Eckel attempts to avoid waiver by arguing that the admission of the toxicology report constituted fundamental error. A claim that has been waived by a defendant's failure to raise a contemporaneous objection can be reviewed on appeal if the reviewing court determines that a fundamental error occurred. *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010). A fundamental error is an error that makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm. *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009). The doctrine of fundamental error is available only in egregious circumstances. *Brown v. State*, 799 N.E.2d 1064, 1068 (Ind. 2003).

Here, we cannot hold that the State's failure to call Frances or McClarnon to testify was a clearly blatant violation of Eckel's confrontation rights or amounted to a violation of basic and elementary principles of due process. Frances and McClarnon did not testify against Eckel in any form, including by affidavit or by some other statement. There is no evidence that those individuals played a role in the testing of Eckel's samples or the preparation of the toxicology report. Instead, Frances merely transported the kit containing the samples from the Hancock County Jail to the Department, and McClarnon received the kit for the Department. The United States Supreme Court has noted that its interpretation of the Confrontation Clause "does not mean that everyone who laid hands on the evidence must be called." *Melendez-Diaz v. Massachusetts*, 557 U.S. ____, 129 S.Ct. 2527, 2532 n.1, 174 L.Ed.2d 314 (2009).

³ The State argues that Eckel also waived appellate review of his constitutional claims because he did not submit an offer of proof as to the testimony of the witnesses he wished to confront at trial. We do not address this issue.

Next, Eckel asserts that Collantes should have been present at trial and subject to cross-examination because she prepared and signed the preliminary portion of the toxicology report, and the report is testimonial in nature. Even if we assume that the toxicology report is testimonial and implicates Eckel's constitutional rights to confront witnesses, we cannot say that the admission of the report without testimony from Collantes constituted a clearly blatant violation of basic and elementary principles of due process. Rice testified at trial about his portion of the report and the confirmation testing he had performed on Eckel's blood sample. Our Supreme Court has noted that when multiple analysts are involved in testing, the holding in *Melendez-Diaz* does not clearly state whether all of the analysts must testify at trial "or if fewer than all of them would be permissible." *Pendergrass v. State*, 913 N.E.2d 703, 707 (Ind. 2009).

In addition, Eckel had the benefit of cross-examination on a portion of the report because Rice had personal knowledge as to his work on Eckel's blood sample and as to the Department's procedures for storing and testing samples. *See id.* at 708 (determining that there was no Sixth Amendment violation despite an analyst's failure to testify about a report she had prepared because the analyst's supervisor, who was familiar with the lab's testing processes and had personally reviewed the report, testified and was available for cross-examination).

Finally, Rice performed his confirmation test upon Eckel's blood sample independently of Collantes' preliminary test, using different methods, and his results

were not dependent upon Collantes' testing.⁴ Consequently, Collantes' portion of the report was, at best, cumulative of Rice's portion of the report and Rice's testimony, and the erroneous admission of cumulative testimony does not rise to the level of fundamental error. *See Weis v. State*, 825 N.E.2d 896, 903 (Ind. Ct. App. 2005) (determining that the admission of a witness' out-of-court recorded statements did not rise to the level of fundamental error because the statements were cumulative of the witness' trial testimony). The admission of the toxicology report into evidence did not present an undeniable and substantial potential for harm or render a fair trial impossible, and the trial court did not commit fundamental error.⁵

Eckel cites *Jackson v. State*, 891 N.E.2d 657 (Ind. Ct. App. 2008), *trans. denied*, *abrogated in part on other grounds by Koenig v. State*, 933 N.E.2d 1271 (Ind. 2010), to support his claim, but that case is not controlling. In *Jackson*, the State charged the defendant with dealing in cocaine and sought to admit into evidence a Certificate of Analysis proving that the substance in question was cocaine. However, the lab technician who performed the testing and prepared the Certificate did not testify at trial. Instead, the State offered the testimony of the technician's supervisor, who "did not perform any tests himself" and merely testified that it appeared that the technician had performed the testing properly. *Jackson*, 891 N.E.2d at 661. A panel of this Court determined that the supervisor's testimony was inadequate to satisfy the defendant's right of confrontation.

Id. We note that *Jackson* was issued prior to our Supreme Court's holding in

⁴ Again, Eckel raises no more than a possibility that Collantes' preliminary testing of the blood sample may have tainted the sample in some way.

⁵ We express no opinion on how we would have ruled on the merits of Eckel's confrontation clause claims had they been preserved for appellate review.

Pendergrass, where the Court held for the purposes of the Sixth Amendment that a supervisor could testify in place of an analyst about the analyst's work. *See Pendergrass*, 913 N.E.2d at 708. Furthermore, *Jackson* is factually distinguishable from this case. The supervisor in *Jackson* did not perform any of the tests. By contrast, in the current case Rice personally performed the confirmation test on Eckel's blood sample and could therefore testify about the toxicology report with personal knowledge. Rice was also knowledgeable about the Department's procedures for storing and testing samples. Therefore, *Jackson* does not compel us to conclude that the trial court in this case committed fundamental error.

III. SUFFICIENCY OF THE EVIDENCE

For his final claim of error, Eckel contends that the evidence is insufficient to sustain his convictions. Eckel's contention is premised on his argument that the toxicology report should not have been admitted into evidence. If the toxicology report is disregarded, Eckel argues, then the remaining evidence is insufficient to sustain his convictions. We have determined that the trial court neither abused its discretion nor committed fundamental error by admitting the report into evidence. Thus, the premise of Eckel's challenge to the sufficiency of the evidence is incorrect. Nevertheless, we will address the merits of his claim.

In reviewing a sufficiency of the evidence claim, we do not reweigh the evidence or assess the credibility of the witnesses. *Treadway v. State*, 924 N.E.2d 621, 639 (Ind. 2010). It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction.

Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict, and we will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Treadway*, 924 N.E.2d at 639.

In order to convict Eckel of operating a vehicle while intoxicated in a manner endangering a person while having a prior conviction within the past five years, the State was required to prove beyond a reasonable doubt that Eckel (1) operated (2) a vehicle (3) while intoxicated (4) in a manner that endangered a person (5) and had a previous conviction of operating while intoxicated within the last five (5) years. Ind. Code §§ 9-30-5-2 and 9-30-5-3. Eckel's sole challenge to this conviction is that there is insufficient evidence that he was intoxicated. For the purposes of Indiana Code section 9-30-5-2, "[i]ntoxicated" means, in relevant part, "under the influence of . . . a controlled substance . . . so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties." Ind. Code § 9-13-2-86 (2006).

In this case, the confirmation test results set forth in the toxicology report demonstrated that Eckel had two metabolites of marijuana in his bloodstream when Deputy Roeger pulled him over. Based on the test results, Rice testified that Eckel must have used marijuana within two hours prior to the blood draw. Furthermore, Deputy Roeger noted that Eckel's eyes were glassy. In addition, Eckel's car smelled of burnt marijuana and there were rolling papers in the car. Finally, Eckel displayed poor dexterity while retrieving his identification and failed two out of three sobriety tests. This is sufficient evidence of intoxication. *See Curtis v. State*, 937 N.E.2d 868, 874 (Ind.

Ct. App. 2010) (affirming a conviction for driving while intoxicated where the defendant's car had an odor of burnt marijuana, the defendant had bloodshot eyes, the defendant fumbled while retrieving his driver's license, and the defendant failed several sobriety tests). Eckel questions the manner in which Deputy Roeger executed the sobriety tests, but this is nothing more than a request to reweigh the evidence, which we cannot do.

Next, to convict Eckel of operating a vehicle with a schedule I or II controlled substance or its metabolite in the body, the State was required to show that Eckel (1) operated a vehicle (2) with a schedule I or II controlled substance or its metabolite in his body. Ind. Code § 9-30-5-1. Eckel contends that there is insufficient evidence that he had a controlled substance or its metabolite in his body. Here, the toxicology report and Rice's testimony demonstrate that Eckel had two metabolites of marijuana, a controlled substance, in his blood when Deputy Roeger pulled him over. Furthermore, Eckel's car emitted an odor of burnt marijuana. Finally, Deputy Roeger found rolling papers in Eckel's car. Therefore, the evidence is sufficient to sustain the conviction. *See Radick v. State*, 863 N.E.2d 356, 359 (Ind. Ct. App. 2007) (affirming a conviction for operating a vehicle with a controlled substance where lab tests revealed that the defendant had marijuana in his system).

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

ROBB, C.J., and VAIDIK, J., concur.