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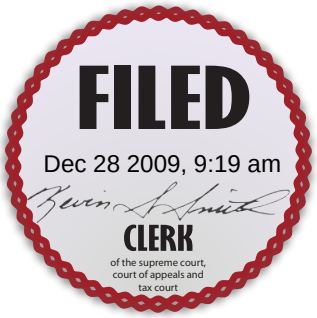

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IN THE
COURT OF APPEALS OF INDIANA

STUART M. MCALKICH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0906-CR-291
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Robert E. Ross, Judge
Cause No. 02D04-0810-CM-7044

DECEMBER 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Stuart Mcalkich appeals his conviction of operating a vehicle while intoxicated, a Class C misdemeanor. Ind. Code § 9-30-5-2(a).

We affirm.

Mcalkich presents three issues for our review, which we restate as:

I. Whether the trial court abused its discretion by excluding the testimony of Mcalkich's sole witness.

II. Whether the trial court erred by refusing Mcalkich's tendered jury instruction.

III. Whether there was sufficient evidence to support Mcalkich's conviction.

In October 2008, Mcalkich was stopped for operating a vehicle while intoxicated. Based upon this incident, Mcalkich was charged with operating a vehicle while intoxicated, a Class C misdemeanor. Although the charge was a misdemeanor, Mcalkich requested a jury trial. He was found guilty by the jury and was sentenced to sixty (60) days with all but twenty (20) days suspended and one year of probation. It is from this conviction that he now appeals.

Mcalkich's first contention of error is the trial court's exclusion of the testimony of the sole defense witness. Cheri Verhest was the passenger in Mcalkich's car the night he was stopped and the sole defense witness at trial. However, due to a violation of the court's separation of witnesses order, Verhest's testimony was excluded at trial.

The primary purpose of a separation of witnesses order is to prevent witnesses from gaining knowledge from the testimony of other witnesses and adjusting their testimony accordingly. *Myers v. State*, 887 N.E.2d 170, 190 (Ind. Ct. App. 2008), *reh'g*

denied, *trans. denied*, 898 N.E.2d 1228. The remedy for a violation of a witness separation order is wholly within the discretion of the trial court, and, absent a showing of a clear abuse of such discretion, we will not disturb the trial court's decision on such matters. *Id*. An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances. *Ray v. State*, 838 N.E.2d 480, 486 (Ind. Ct. App. 2005), *trans. denied*.

Here, at the beginning of the trial, the court granted the State's motion for separation of witnesses and specifically prohibited Verhest from discussing the proceedings with anyone. (*See* Tr. at 75). Subsequently, there was a trial recess due to technical difficulties. When the trial resumed following the recess, the judge, out of the presence of the jury, asked Mcalkich if he had a discussion with Verhest during the recess. Mcalkich responded in the affirmative and explained that he had told Verhest that the officer had testified he had observed Mcalkich in his vehicle the night of the stop. Mcalkich commented to Verhest that it would have been difficult for the officer to observe Mcalkich because the windows of his vehicle are tinted.

The court then called Verhest to the stand and asked her if, during the recess, she had a conversation with Mcalkich. To this question, Verhest responded affirmatively. The court then asked her if there was any discussion about the trial and if there was any discussion about the testimony that the officer had given. Verhest denied having any discussion with Mcalkich about the trial or the officer's testimony. The court confronted Verhest with Mcalkich's admission of discussing the officer's testimony, and Verhest

responded that although Mcalkich may have said something to that effect, she "wasn't really paying attention." (Tr. at 135). Concluding that "somebody's lying" and that the full extent of the conversation would never be known, the court granted the State's request to exclude Verhest's testimony. (Tr. at 135 and 137).

Mcalkich has not made a showing of a clear abuse of the trial court's discretion. Not only was the separation of witnesses order violated, but also it was Mcalkich, the defendant, who was responsible for the violation. Thus, the trial court did not abuse its discretion by excluding Verhest's testimony. *See Smiley v. State*, 649 N.E.2d 697, 699 (Ind. Ct. App. 1995) (stating that if party objecting to witness's testimony can show that party calling witness caused witness to violate court's separation order, disqualification of witness is appropriate).

For his second claim of error, Mcalkich asserts that the trial court erred by refusing the jury instruction he tendered concerning intoxication. Instructing the jury lies solely within the discretion of the trial court, and we will reverse only upon an abuse of that discretion. *Elliott v. State*, 786 N.E.2d 799, 801 (Ind. Ct. App. 2003). When determining whether a trial court erroneously refused to give a tendered instruction, we consider the following: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence presented at trial to support the giving of the instruction; and (3) whether the substance of the tendered instruction was covered by other instructions that were given. *Mayes v. State*, 744 N.E.2d 390, 394 (Ind. 2001). In order to conclude that the trial court abused its discretion, this Court must find that the instructions taken as

a whole misstate the law or otherwise mislead the jury. *Proffit v. State*, 817 N.E.2d 675, 683 (Ind. Ct. App. 2004). Moreover, before a defendant is entitled to a reversal, he must affirmatively demonstrate that the instructional error prejudiced his substantial rights. *Hero v. State*, 765 N.E.2d 599, 602 (Ind. Ct. App. 2002).

Mcalkich's tendered instruction provided as follows:

> The mere fact that a person may have consumed alcoholic beverages does not necessarily render him "intoxicated."
>
> The circumstances and the effect of such consumption of alcohol as to that person must be considered by you when reaching your verdict as to the charge of "Operating a Vehicle While Intoxicated" in Count 1.
>
> Whether the Defendant was intoxicated at the time he allegedly operated the motor vehicle is a question of fact for you to determine from the evidence. The State has the burden of proving, beyond a reasonable doubt, that the Defendant was operating a motor vehicle and that during such operation of the motor vehicle, he was intoxicated.

Appellant's Appendix at 22.

The substance of this instruction was contained in the final instructions of the court concerning the jury's determination of the facts from a consideration of all the evidence, proof beyond a reasonable doubt of the elements of the offense, and the definition of the term "intoxicated." *See* Appellant's App. at 25, 27, 29, and 32. Although more specific in certain areas than the court's final instructions, this instruction tendered by Mcalkich was adequately covered by the court's instructions. The refusal of a more specific tendered instruction does not necessarily equate to an abuse of the trial court's discretion or a violation of the defendant's substantial rights, and, in this case, we find neither.

Finally, Mcalkich argues that the evidence was not sufficient to sustain his conviction. Our standard of review with regard to sufficiency claims is well settled. We neither weigh the evidence nor judge the credibility of the witnesses, and we consider only the evidence favorable to the verdict and all reasonable inferences which can be drawn therefrom. *Newman v. State*, 677 N.E.2d 590, 593 (Ind. Ct. App. 1997). If there is substantial evidence of probative value from which a trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. *Id*.

In order to obtain a conviction for operating a vehicle while intoxicated in this case, the State must have proved beyond a reasonable doubt that (1) Mcalkich (2) operated a vehicle (3) while intoxicated. *See* Ind. Code § 9-30-5-2(a). Mcalkich challenges the State's evidence only as to his intoxication. Intoxication is statutorily defined, in part, as: under the influence of alcohol so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties. *See* Ind. Code § 9-13-2-86. Impairment may be established by evidence of the following: (1) the consumption of significant amounts of alcohol; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of alcohol on the breath; (5) unsteady balance; (6) failure of field sobriety tests; and (7) slurred speech. *Fields v. State*, 888 N.E.2d 304, 307 (Ind. Ct. App. 2008).

Here, the evidence at trial came from just one witness. Officer Clement of the City of Fort Wayne Police Department was the State's sole witness at Mcalkich's trial. He testified that Mcalkich's vehicle caught his eye because it made a very wide,

sweeping turn for no apparent reason. As he followed the vehicle, it swerved several times into the other lane, and the officer testified he saw nothing in the roadway that would necessitate swerving into the other lane of traffic. In addition, Officer Clement witnessed another vehicle apply its brakes in order to avoid being side-swiped by Mcalkich's vehicle. Officer Clement testified that when he turned on his squad car lights, Mcalkich did not slow his vehicle or pull off to the right, even when Officer Clement used the siren. Several blocks down the street, Mcalkich pulled into the left travel lane at a stop light and then, after Officer Clement sounded his siren again, Mcalkich pulled into the parking lot of a gas station.

Upon approaching Mcalkich's vehicle, Officer Clement noticed a strong odor of an alcoholic beverage and noticed that Mcalkich's eyes were red and watery. He testified that he asked Mcalkich if there was a reason for his swerving, and Mcalkich replied that that he had forgotten his credit card and was going back to get it. The officer explained that Mcalkich's inappropriate response (i.e., explaining where he was going when asked why he swerved), in addition to the strong odor of alcohol, led him to further investigate the situation. Officer Clement further testified that upon exiting his vehicle, Mcalkich's balance was unsteady, and he did not follow instructions. In addition, Mcalkich failed three different field sobriety tests.

We note that in his brief to this Court, Mcalkich attacks Officer Clement's testimony based upon his alleged inability to focus and observe Mcalkich as he performed the field sobriety tests. Mcalkich's criticism arises out of the officer's

admission at trial that he was busy and distracted. (Tr. at 154). However, it is clear from the transcript that Officer Clement's acknowledgment on cross-examination referred to his focus on the paperwork *after* Mcalkich's arrest and booking at the jail and not at the time he was administering the field sobriety tests to Mcalkich. He explained that, on one citation he issued to Mcalkich, he mistakenly wrote West instead of East. In addition, he wrote the location as the 500 block of State Street instead of the 600 block of State Street. Officer Clement again explained that he was finishing the paperwork at the jail and wrote 500 but later learned, after checking a map, that it was the 600 block of State Street. We will not reweigh the evidence. *See Newman*, 677 N.E.2d at 593. The foregoing facts were sufficient to prove Mcalkich was intoxicated.

Based upon the foregoing discussion and authorities, we conclude that the trial court did not abuse its discretion by excluding Verhest's testimony, that the trial court did not abuse its discretion by refusing to give the instruction tendered by Mcalkich because the substance of the instruction was contained in the instructions given to the jury, and there was sufficient evidence of Mcalkich's intoxication so as to sustain his conviction.

Affirmed.

VAIDIK, J., and CRONE, J., concur.