



## STATEMENT OF THE CASE

Roger D. Gamble appeals his conviction for Operating While Intoxicated (“OWI”), as a Class A Misdemeanor, and his adjudication and sentencing as an Habitual Substance Offender. Gamble raises three issues for our review, which we restate as:

1. Whether the trial court abused its discretion when it admitted evidence that Gamble was operating his vehicle while his license was suspended.
2. Whether the trial court abused its discretion when it denied Gamble’s motion for mistrial.
3. Whether the trial court abused its discretion when it denied Gamble’s motion to exclude certified copies of his prior judgments of conviction.

We affirm.

## FACTS AND PROCEDURAL HISTORY

On August 1, 2004, Kendallville Police Department Officer John Dixon was traveling east on Dowling Street when he observed a red Chevy Lumina come to a stop at the intersection with U.S. 6. The car remained at the stop sign for an unusually long time before making a wide looping turn onto U.S. 6, crossing the center line. Officer Dixon began to follow the vehicle, and he observed it “drifting from the center portion of the road to the fog line.” Appellant’s App. at 16. When the vehicle crossed the fog line, “jerked[,] and came back over to the center portion of the road,” Officer Dixon activated his emergency lights. *Id.* Gamble, the driver of the vehicle, traveled about a quarter of a mile before pulling over.

During the traffic stop, Officer Dixon noticed that Gamble slurred his speech, smelled of alcohol, and moved in a staggering manner. Also, after asking Gamble some

questions, Officer Dixon learned that Gamble's driver's license was suspended. Officer Joe Handshoe subsequently arrived at the scene to assist Officer Dixon. Officer Handshoe observed that Gamble slurred his speech, had bloodshot eyes, walked unsteadily, and smelled of alcohol. In addition, Officer Handshoe observed a female passenger in the vehicle and arrested her for public intoxication. After Gamble refused to submit to field sobriety tests, a portable breath test, or a certified chemical test, the officers arrested him.

The State charged Gamble with OWI, as a Class A misdemeanor, and with being an habitual substance offender. Prior to trial, he filed a motion in limine to exclude any testimony regarding the female passenger's intoxication, as well as all evidence of his prior offenses. The trial court granted that motion. During trial, however, Officer Dixon testified about the passenger's intoxication. Gamble objected and moved for a mistrial, which the trial court denied.

Also during the trial, the State questioned Officer Dixon as to whether Gamble was driving with a suspended license at the time of the offense. Gamble objected to that question based on relevance, and the trial court overruled the objection. At the conclusion of the trial, the jury found Gamble guilty as charged. The trial court entered judgment and imposed sentence accordingly. This appeal ensued.

## **DISCUSSION AND DECISION**

### **Issue One: Admissibility of Gamble's Driving Status**

Gamble contends that the trial court abused its discretion by admitting evidence that he was driving while his license was suspended. Specifically, he argues that,

because he was charged with OWI under Indiana Code Section 9-30-5-2, the status of his driver's license was not relevant. Further, he maintains that the evidence suggested an impermissible inference that because he was driving with a suspended license, he must have been intoxicated at the time of the offense. Hence, Gamble alleges that the admission of the challenged evidence violated Indiana Evidence Rule 404(b).

A trial court has broad discretion in ruling on the admissibility of evidence. Fentress v. State, 863 N.E.2d 420, 422-23 (Ind. Ct. App. 2007). Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abuses its discretion. Id. at 423. An abuse of discretion occurs when the trial court's ruling is clearly against the logic and effect of the facts and circumstances. Vandivier v. State, 822 N.E.2d 1047, 1052-53 (Ind. Ct. App. 2005), trans. denied. When reviewing a trial court's decision under an abuse of discretion standard, we will affirm if there is any evidence supporting the trial court's decision. Id. at 1053.

Indiana Code Section 9-30-5-2 provides, in part, that "a person who operates a vehicle while intoxicated commits . . . a Class A misdemeanor if the person operates a vehicle in a manner that endangers a person." Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Evid. R. 404(b). In considering a challenge under Rule 404(b), Indiana courts are required to take the following two steps:

(1) decide if the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and

(2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403.

Earlywine v. State, 847 N.E.2d 1011, 1012 (Ind. Ct. App. 2006) (citing Hicks v. State, 690 N.E.2d 215, 219 (Ind. 1997)).

As a threshold matter, the State contends that Gamble has waived any claim under Rule 404(b). It is well settled that a party may not object on one ground at trial and rely on a different ground on appeal. Gregory & Appel Ins. Agency v. Philadelphia Indem. Ins. Co., 835 N.E.2d 1053, 1067-68 (Ind. Ct. App. 2005) (citing Lasater v. Lasater, 809 N.E.2d 380, 396 (Ind. Ct. App. 2004)), trans. denied. At trial, Gamble objected to the admission of the evidence regarding his license status on the ground that it was irrelevant to the charge against him under Indiana Evidence Rule 401. However, he did not raise the issue of impermissible inference under Rules 403<sup>1</sup> and 404(b). Thus, we review his claim based upon relevance.

"Intoxicated" is an essential element of OWI and is defined as "under the influence of (1) alcohol . . . so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties to an extent that endangers a person." Ind. Code § 9-13-2-86 (West 2004). The State argued that Officer Dixon's testimony was relevant because it was offered to prove Gamble's intoxication-induced "impaired condition," an element of OWI. In other words, the State contends that

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<sup>1</sup> Indiana Evidence Rule 403 provides "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."

Gamble must have been intoxicated or he would not have been driving with a suspended license.<sup>2</sup>

Regardless whether the trial court erred in admitting that testimony, any error was harmless in light of the overwhelming evidence that Gamble was intoxicated. See Bassett v. State, 795 N.E.2d 1050, 1054 (Ind. 2003) (“A trial error may not require reversal where its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect a party’s substantial rights.”). Specifically, both officers testified that Gamble had bloodshot eyes, slurred his speech, smelled of alcohol, and walked in a staggering manner. We are not persuaded that the evidence of his suspended driver’s license affected his substantial rights. Any error in admitting that evidence was harmless.

### **Issue Two: Mistrial**

Gamble next contends that the trial court abused its discretion when it denied his motion for mistrial. In particular, he contends that Officer Dixon’s testimony regarding the female passenger violated the court’s order on the motion in limine, placing Gamble in a position of grave peril. We cannot agree.

Whether to grant or deny a motion for mistrial is a decision left to the sound discretion of the trial court. Alvies v. State, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003), trans. denied. We will reverse the trial court’s ruling only upon an abuse of that discretion. Id. We afford the trial court such deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on

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<sup>2</sup> We agree with Gamble that the State’s argument on this point is tenuous, at best.

the jury. Id. To prevail on appeal from the denial of a motion for mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. Id. We determine the gravity of the peril based upon the probable persuasive effect of the misconduct on the jury's decision rather than upon the degree of impropriety of the conduct. Id.

A mistrial is an extreme sanction warranted only when no other cure can be expected to rectify the situation. Id. Reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement. Id.

Here, the trial court granted Gamble's motion in limine to prohibit witnesses from testifying about the female passenger. However, Officer Dixon, the State's witness, violated the order in limine when the following exchange occurred:

Prosecutor: And then what did you do?

Officer Dixon: At that time we focused our attention to the female passenger, officer Handshoe was already having [a] conversation with the female passenger.

Prosecutor: After you took care of that matter what did you do then?

Officer Dixon: The female passenger was later arrested for Public Intox[ication] . . . oh, I'm sorry.

Appellant's App. at 23-24.

Generally, a defendant's refusal of a trial court's offer to admonish the jury constitutes a waiver of any error in the denial of the motion. Randolph v. State, 755

N.E.2d 572, 575 (Ind. 2001). Here, the trial court advised defense counsel that it would consider giving an admonishment if so requested. But defense counsel did not make a request for an admonishment, stating that Officer Dixon's testimony would be "worse [if] it would come from the Judge's lips . . . ." Appellant's App. at 28. Thus, Gamble "did not give the trial court an opportunity to strike the remarks and deflate any possible prejudicial effect." See Robinson v. State, 693 N.E.2d 548, 552 (Ind. 1998). The issue is waived.

Waiver notwithstanding, any violation did not place Gamble in a position of grave peril. The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). Here, the trial court stated:

I guess I still can't see that this rises to the level of calling for a mistrial. I mean it's really nothing as to the defendant[.] I mean if [it] was something as far as a prior conviction[,], which maybe we should go through with the witnesses again to advise as far as that Motion in Limine[.] [A]s far as the defendant . . . I mean I guess the jury could take it you know, use it against the defendant that the passenger had been drinking[.] On the other hand I guess they could take it to mean that that was the odor of the alcohol in the vehicle was coming from the passenger and not Mr. Gamble.

Transcript at 99. We agree with the trial court that the probable persuasive effect of the challenged testimony was negligible. Gamble has not demonstrated that the trial court abused its discretion when it denied his motion for mistrial.

### **Issue Three: Discovery Violation**

Finally, Gamble contends that the trial court abused its discretion when it admitted into evidence certified copies of his prior judgments to support the habitual substance offender enhancement. He maintains that the State intentionally failed to timely disclose



the certified copies through discovery and that he was prejudiced by the late disclosure. Again, we cannot agree.

The trial court has broad discretion in dealing with discovery violations and may be reversed only for an abuse of that discretion involving clear error and resulting prejudice. Young v. State, 746 N.E.2d 920, 924 (Ind. 2001). The purposes of a pretrial discovery order are to enhance the accuracy and efficiency of the fact-finding process and to prevent surprise by permitting the parties adequate time to prepare their cases. Beauchamp v. State, 788 N.E.2d 881, 892 (Ind. Ct. App. 2003). Where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated. Fosha v. State, 747 N.E.2d 549, 554 (Ind. 2001). Where remedial measures are warranted, a continuance is usually the proper remedy, but exclusion of evidence may be appropriate where the discovery non-compliance has been flagrant and deliberate, or so misleading or in such bad faith, as to impair the right of fair trial. Id.

As a general proposition, the proper remedy for a discovery violation is a continuance. Warren v. State, 725 N.E.2d 828, 832 (Ind. 2000). Failure to alternatively request a continuance upon moving to exclude evidence, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error pertaining to noncompliance with the court's discovery order. Id. Here, Gamble moved to exclude the exhibits, but he did not request a continuance. Accordingly, the issue is waived. Id.

Waiver notwithstanding, while the trial court indicated that it was “troubled” by the State’s failure to disclose the challenged documents in a timely manner, transcript at 238, the trial court found that Gamble had not shown willful misconduct on the part of the State. See id. (holding not abuse of discretion to permit evidence despite discovery violation where no showing that State’s conduct was deliberate or reprehensible; also, defendant knew of existence of photographs and “could have reviewed them in advance of trial.”). And Gamble has not demonstrated that he was unduly prejudiced by the late notice of the documents.<sup>3</sup> Gamble was not denied a fair trial as a result of the State’s discovery violation, and the trial court did not abuse its discretion when it admitted into evidence the certified copies of his prior convictions.

Affirmed.

RILEY, J., and BARNES, J., concur.

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<sup>3</sup> Gamble asserts that his trial strategy with regard to the habitual substance offender charge was to “wait until closing” and “simply point out the State’s failure to present evidence of prior convictions[.]” Brief of Appellant at 18. But given that Gamble was on notice of the underlying convictions the State intended to use to support the habitual substance offender charge, we cannot say that Gamble’s failure to prepare an alternative trial strategy on this issue was reasonable. And Gamble does not make any contention that with timely notice of the State’s intent to introduce into evidence the certified judgments, he would have successfully challenged that evidence.