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IN THE
COURT OF APPEALS OF INDIANA

RANDY K. MERRIMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 12A02-0610-CR-903
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLINTON SUPERIOR COURT
The Honorable Kathy R. Smith, Judge
Cause No. 12D01-0407-FD-097

July 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Randy K. Merriman appeals his conviction for Operating a Vehicle While Privileges Are Suspended,[1] a class D felony. In particular, Merriman raises the following arguments: (1) the trial court erroneously denied Merriman's motion for a mistrial following testimony that allegedly violated a pretrial motion in limine; (2) the trial court erroneously permitted Merriman's wife to testify even though she was allegedly under the influence of prescription medication and had been brought into court to testify pursuant to an allegedly improper search warrant; (3) the trial court erroneously denied Merriman's motion to bifurcate his trial; (4) the trial court erroneously instructed the jury and provided improper verdict forms; (5) the trial court erroneously permitted the State to reopen its case to establish the propriety of the venue; and (6) the State presented insufficient evidence to support his conviction. Finding no error, we affirm the judgment of the trial court.

FACTS

On January 27, 2003, Merriman was convicted of class A misdemeanor operating a vehicle as a habitual traffic violator (HTV) and his driver's license was suspended until January 26, 2005.

On July 11, 2004, Frankfort Police Officer Troy Bacon observed Merriman driving a motor vehicle. Officer Bacon was acquainted with Merriman based on previous police-related encounters. The officer proceeded to the Frankfort Police Station, where he requested the dispatcher to check the status of Merriman's driver's license. The Bureau of Motor Vehicles (BMV) records revealed that Merriman's driver's license was suspended at that

[1] Ind. Code § 9-30-10-16(a).

time because he had been adjudged to be an HTV. Thereafter, Officer Bacon applied for and received an arrest warrant for Merriman, executing the warrant at Merriman's home a few days later. When Merriman was arrested, his wife, Gail Merriman (Gail), told police officers that Merriman had driven his vehicle on July 11, 2004.

On July 13, 2004, the State charged Merriman with class D felony operating a vehicle after being adjudged an HTV. On June 5, 2006, Merriman filed a motion to bifurcate the trial and a motion in limine. The trial court denied the motion to bifurcate and partially granted the motion in limine, ruling that the State's witnesses could not testify about his prior crimes but could testify that they recognized Merriman "because of prior encounters or prior professional contacts . . . ." Tr. p. 21.

Merriman's jury trial began on June 5, 2006. Officer Bacon testified that he had recognized Merriman "through the uh several police encounters professional encounters." Id. at 28-29. Merriman objected that the testimony violated the motion in limine and the trial court sustained the objection, admonishing the jury to disregard the officer's statement. Merriman then moved for a mistrial and the trial court denied the motion.

The State called Gail to testify. She had been subpoenaed but went to the hospital on the morning of the trial and then returned home. The State obtained a search warrant to search her home to find her and bring her into court to testify. Merriman objected to Gail's testimony, citing marital privilege as the only basis for his objection. The trial court denied Merriman's objection because the State did not intend to elicit testimony from Gail about any

communications she had with Merriman. Gail testified that she had not told police officers at the time of Merriman's arrest that he had been driving a motor vehicle on the day in question.

After the State rested, Merriman moved for judgment on the evidence, arguing that the State had failed to prove venue. The trial court denied the motion and granted the State permission to reopen its case-in-chief to establish venue. Officer Bacon then testified that he had observed Merriman driving the vehicle in Clinton County.

After Merriman rested, the trial court held a conference on the jury instructions. Merriman did not object to the trial court's final instructions. After the trial court read the final instructions to the jury and the jury retired to deliberate, the court discovered that there was a minor mistake in the jury verdict forms and, without objection from Merriman, corrected the form. The jury found Merriman guilty as charged. On July 5, 2006, the trial court sentenced Merriman to two years of incarceration and ordered Merriman's driver's license suspended for life. Merriman now appeals.

DISCUSSION AND DECISION

I. Mistrial

Merriman first argues that the trial court improperly denied his motion for a mistrial after Officer Bacon testified that he had recognized Merriman because of prior professional encounters. The decision to grant or deny a motion for mistrial lies within the trial court's sound discretion and we will reverse the trial court only upon finding an abuse of that discretion. Agilera v. State, 862 N.E.2d 298, 307 (Ind. Ct. App. 2007). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the

facts and circumstances before the court. Evans v. State, 855 N.E.2d 378, 385-86 (Ind. Ct. App. 2006), trans. denied. We defer to the trial court on appeal because the trial court is in the best position to evaluate and gauge the impact of the conduct or action on the jury. Agilera, 852 N.E.2d at 307.

A mistrial is an extreme remedy that is warranted only when no other curative measure will rectify the situation. Id. at 308. To prevail on appeal following the denial of a motion for a mistrial, a defendant must establish that the questioned conduct or action was so prejudicial and inflammatory that it placed him in a position of grave peril. Shouse v. State, 849 N.E.2d 650, 655 (Ind. Ct. App. 2006), trans. denied. The gravity of the peril is determined based on the probable persuasive effect of the misconduct on the jury's verdict rather than upon the degree of impropriety of the misconduct. Agilera, 862 N.E.2d at 307-08.

Merriman argues—with no elaboration or citation to authority whatsoever—that Officer Bacon's testimony "prejudiced [Merriman's] right to due process as guaranteed by the 5th and 14th Amendments to the United States Constitution and Article 1 Section 12 of the Indiana Constitution." Appellant's Br. p. 7. Merriman's failure to cite to supporting authority and omission of cogent argument in support of this contention has waived the argument on appeal. Barrett v. State, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005), trans. denied; Davis v. State, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005), trans. denied.

Waiver notwithstanding, we observe briefly that it is not immediately apparent how Officer Bacon's testimony violated the trial court's ruling in limine, inasmuch as the trial

court authorized testimony that witnesses recognized Merriman "because of prior encounters or prior professional contact . . . ." Tr. p. 21. Officer Bacon testified that he recognized Merriman "through the uh several police encounters professional encounters." Id. at 28-29. Thus, the trial court need not have sustained Merriman's objection to the testimony.

Having done so, however, the trial court admonished the jury to disregard that testimony. Merriman has not established that the trial court's admonishment was insufficient. See Agilera, 862 N.E.2d at 308 (holding that where the trial court timely and accurately admonishes the jury to disregard an answer, the admonishment is presumed to cure any error and mistrial is not warranted). Consequently, the trial court did not abuse its discretion by denying Merriman's motion for a mistrial.

II. Gail's Testimony

Merriman next argues that the trial court improperly permitted Gail to testify, contending that she was incompetent because she had ingested medication on the day of his trial and that she was brought to court pursuant to an improper search warrant.

Initially, we note that Merriman's only objection to Gail's testimony at the time of his trial was based on privileged marital communications. At no time did he suggest to the trial court that Gail was incompetent to testify. Consequently, he has waived this argument. See Frye v. State, 850 N.E.2d 951, 956 (Ind. Ct. App. 2006) (holding that a defendant may not raise one ground for an objection at trial and a different ground on appeal), trans. denied.

Waiver notwithstanding, we note that a witness is presumed to be competent to testify. Bellmore v. State, 602 N.E.2d 111, 117 (Ind. 1992). A witness is competent to testify where

she has sufficient mental capacity to perceive, remember, and relate the incident that she observed and to appreciate the nature and obligation of an oath. Id. Unsoundness of mind, alone, is insufficient to render a witness incompetent to testify. Pettiford v. State, 619 N.E.2d 925, 927 (Ind. 1993).

Here, Gail had been to the hospital on the morning of the trial but had been released and was at home when police officers found her and brought her to court. Although she had taken some medications for anxiety and panic attacks, she testified that these are medications that she takes all of the time. Tr. p. 71. There is simply no indication in the record that she was unable to perceive, remember, or relate the incident or that she was unable to appreciate the nature and obligation of an oath. Thus, we find that Merriman has not established that Gail was incompetent to testify.

Merriman also argues that the search warrant executed by the police officers to find and retrieve Gail violated the Fourth Amendment to the United States Constitution and Article I, section 11 of the Indiana Constitution. Merriman cannot challenge the search warrant on his wife's behalf on Fourth Amendment grounds, inasmuch as that right is personal to her and may only be invoked by her. See Smith v. State, 744 N.E.2d 437, 439 (Ind. 2001) (holding that Fourth Amendment rights are personal and a defendant may not vicariously assert the rights of another person). Similarly, Merriman cannot challenge the search warrant under the Indiana Constitution because that right is personal to Gail and he has no standing to assert it on her behalf. Moran v. State, 644 N.E.2d 536, 540 (Ind. 1994);

Sisk v. State, 785 N.E.2d 271, 274 (Ind. Ct. App. 2003). Consequently, we conclude that the trial court did not abuse its discretion by permitting Gail to testify.

III. Motion to Bifurcate

Merriman next argues that the trial court improperly denied his motion to bifurcate the trial. Merriman argues that, although he was charged with only one count of one crime, the jury should have first considered whether he was actually driving on the day in question and then, only after making that determination, should it have considered whether he knew that he was driving while suspended as an HTV. Essentially, Merriman contends that evidence of his past crimes was unduly prejudicial to the jury's determination of whether he was driving the vehicle on the day in question. We review the trial court's denial of a motion to bifurcate for an abuse of discretion. Dugan v. State, 860 N.E.2d 1288, 1290 (Ind. Ct. App. 2007).

A panel of this court has considered whether a defendant who is charged only with unlawful possession of a firearm by a serious violent felon was entitled to bifurcation of his trial—first, to consider whether he had possessed a firearm, and second, whether he was a serious violent felon. Spearman v. State, 744 N.E.2d 545, 546 (Ind. Ct. App. 2001). Noting that evidence of prior crimes in generally inadmissible, the Spearman court nonetheless found that "the rationale for inadmissibility of prior convictions breaks down when the evidence of the prior conviction not only has the 'tendency' to establish guilt or innocence but also is essential to such determination." Id. at 547. The legal status of one who has been convicted of a serious violent felony and who knowingly or intentionally possesses a firearm is "an essential element of the crime, and the act—the possession—is illegal only if

performed by one occupying that status." Id. at 548. Ultimately, the court concluded that bifurcation was "not practical, or even possible," where the defendant was charged only with being a serious violent felon in possession of a firearm. Id.

Here, similarly, Merriman's legal status as an HTV with suspended driving privileges is an essential element of the crime, and the act—the driving—is illegal only if performed by one occupying that status. Consequently, it was impractical, if not impossible, to bifurcate Merriman's trial on this lone charge and the trial court did not abuse its discretion by denying the request to do so.

IV. Jury Instructions and Verdict Forms

Merriman next contends that the trial court improperly instructed the jury on reasonable doubt and that it used improper verdict forms. Merriman has waived his argument regarding jury instructions, inasmuch as he failed to raise a timely and specific objection at trial. Patton v. State, 837 N.E.2d 576, 579 (Ind. Ct. App. 2005). Waiver notwithstanding, we observe that the manner of instructing the jury lies within the sound discretion of the trial court and we will not reverse absent an abuse of that discretion. Id.

The trial court included the following jury instruction on reasonable doubt:

> The State has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it was only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's burden must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world we know with absolute certainty and in criminal cases, the law does not require proof that overcomes every possible doubt. If based on your consideration of the evidence, you are firmly

> convinced the defendant is guilty of the crime charged, you should find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you should give him the benefit of the doubt and find him not guilty.

Tr. p. 147 (emphases added). Merriman argues that the trial court's use of the word "should" was improper. This argument, however, has been rejected by our Supreme Court. Morgan v. State, 755 N.E.2d 1070, 1073 (Ind. 2001). Merriman does not argue that the instruction is improper in any other way. Consequently, we find that the trial court did not abuse its discretion in instructing the jury on reasonable doubt.

As to the verdict forms, the jury was given the following two forms: "We, the jury, find the Defendant, Randy Merriman, guilty of operating a motor vehicle after being adjudged HTV, a Class D Felony," appellant's app. p. 107, and "We, the jury, find the Defendant, Randy Merriman, not guilty of operating a motor vehicle after being adjudged HTV, a Class D Felony," id. at 108. Merriman argues, with no elaboration or citation to supporting authority, that these forms "only contained findings on the facts of the case and not the law." Appellant's Br. p. 14. Merriman failed to object to the forms at trial and again failed to object after the trial court discovered a minor error in the forms and made a minor correction after the jury had already begun deliberating. Thus, he has waived this claim. Bruno v. State, 774 N.E.2d 880, 883 (Ind. 2002). Moreover, Merriman has failed to provide cogent argument or citations to authority in support of his bald claim. Consequently, he has waived the argument in this way as well. Cooper v. State, 854 N.E.2d 831, 835 n.1 (Ind. 2006).

V. Venue

Merriman next contends that the trial court erroneously permitted the State to reopen its case-in-chief to establish the propriety of the venue in Clinton County. Whether a party should be permitted to reopen its case after it has rested has long been a determination within the trial court's sound discretion. Dixon v. State, 621 N.E.2d 1152, 1154 (Ind. Ct. App. 1993). We will reverse only for a clear abuse of that discretion. Anthony v. State, 274 Ind. 206, 211, 409 N.E.2d 632, 635 (1980).

Generally, a party should be allowed to reopen its case-in-chief after resting to offer evidence that could have been presented in its case-in-chief. Saunders v. State, 807 N.E.2d 122, 126 (Ind. Ct. App. 2004). Relevant factors in making this determination include the following: (1) whether there is any prejudice to the opposing party; (2) whether the party seeking to reopen its case appears to have rested inadvertently or purposefully; (3) the stage of the proceeding at which the request to reopen was made; and (4) whether any real confusion would result from permitting the party to reopen its case. Id.

Here, the trial court permitted the State to reopen its case-in-chief to present evidence regarding venue. Although a defendant has a constitutional right to be tried in the county in which the crime was alleged to have been committed, venue is not an element of the offense and the State need prove the propriety of the venue only by a preponderance of the evidence. Smith v. State, 835 N.E.2d 1072, 1074 (Ind. Ct. App. 2005). On appeal, we do not reweigh the evidence or judge the credibility of the witnesses, examining instead only the evidence and reasonable inferences that may be drawn therefrom that support the trial court's ruling.

Id. Venue may be established by circumstantial evidence. Eckstein v. State, 839 N.E.2d 232, 233 (Ind. Ct. App. 2005).

Here, in its case-in-chief, the State presented evidence that Officer Bacon was a Frankfort Police Officer and that on July 11, 2004, he was on patrol and observed Merriman driving a vehicle at the intersection of Columbia and Morrison Streets. Tr. p. 27-28. From this testimony, the jury could have inferred by a preponderance of the evidence that Officer Bacon observed Merriman in the town of Frankfort and that Frankfort is located in Clinton County. When the State reopened its case, it offered more specific testimony from Officer Bacon, who clarified that he had, in fact, observed Merriman driving the vehicle in Clinton County. Id. at 92-93.

Merriman has failed to establish that he was prejudiced by the trial court's decision to permit the State to reopen its case, that the State's failure to offer explicit testimony regarding venue during its case-in-chief was anything other than inadvertent, that the State made its request to reopen its case-in-chief at an improper stage in the proceedings, or that any confusion whatsoever resulted from the decision to permit the State to offer the evidence regarding venue. Under these circumstances, we find that the trial court did not abuse its discretion by permitting the State to reopen its case-in-chief to offer evidence regarding the propriety of the venue. See Dixon, 521 N.E.2d at 1154 (holding that the trial court did not abuse its discretion "when the reopening of the case-in-chief merely grants the State an opportunity to properly present proof of venue").

VI. Sufficiency of the Evidence

Finally, Merriman argues that there is insufficient evidence supporting his conviction.[2] In reviewing a claim of insufficient evidence, we neither reweigh the evidence nor judge the witnesses' credibility. Dickenson v. State, 835 N.E.2d 542, 551 (Ind. Ct. App. 2005), trans. denied. Instead, we will consider only the evidence and reasonable inferences that may be drawn therefrom that support the judgment and will affirm if there is sufficient probative evidence from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Id. at 551-52. A conviction may be sustained on circumstantial evidence alone. Blanchard v. State, 802 N.E.2d 14, 37-38 (Ind. Ct. App. 2004).

To convict Merriman, the State was required to prove beyond a reasonable doubt that he operated a motor vehicle while his driving privileges were validly suspended because he had been found to be an HTV and that Merriman knew that his driving privileges had been suspended. I.C. § 9-30-10-16(a). At trial, the State established that on April 9, 1998, Merriman was found to be an HTV and that his driving privileges were suspended until May 12, 2003. On January 27, 2003, Merriman was found guilty of misdemeanor operating after being adjudged an HTV and his driving privileges were suspended until January 26, 2005. Officer Bacon testified that on July 11, 2004, he observed Merriman driving a vehicle in Clinton County. This evidence sufficiently establishes that on July 11, 2004, Merriman's driving privileges were suspended because he had been found to be an HTV and that

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[2] Merriman also argues that the State should have charged him with operating a motor vehicle while license is suspended rather than operating a motor vehicle after having been adjudged an HTV. It is well established,

Merriman knew that his privileges had been suspended. Thus, we find sufficient evidence supporting Merriman's conviction.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., concurs.

CRONE, J., concurs in result.

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however, that it is the prosecutor's exclusive province to determine what charges will be filed. Lampitok v. State, 817 N.E.2d 630, 636 (Ind. Ct. App. 2004). Consequently, this argument must fail.