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**IN THE  
COURT OF APPEALS OF INDIANA**

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SCOTT ALLEN EARLYWINE, )

Appellant-Defendant, )

vs. )

No. 29A02-0612-CR-1096

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE HAMILTON SUPERIOR COURT  
The Honorable Daniel J. Pfleging, Judge  
Cause No. 29D02-0505-FB-83 and 29D02-0108-CF-74

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**August 24, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Following a jury trial, Scott Earlywine challenges his convictions for Auto Theft<sup>1</sup> as a class D felony, Theft<sup>2</sup> as a class D felony, Operating While Intoxicated<sup>3</sup> as a class A misdemeanor, and Failure to Stop Following an accident<sup>4</sup> as a class B misdemeanor. Upon appeal, Earlywine presents three issues for our review, which we consolidate and restate as follows:

1. Did the State present sufficient evidence to support Earlywine's convictions?
2. Did the trial court abuse its discretion by revoking Earlywine's probation under Cause No. 29D02-0108-CF-74 and by ordering that he serve the six-year suspended portion of his sentence?

We affirm.

The facts most favorable to the convictions reveal that on the evening of April 29, 2005, Christopher and Janelle Cass, and their two children, returned to their home on Logan Street in Noblesville after having dinner out. Christopher parked his green Chevy pickup truck on Logan Street in front of his house. Upon entering the house, Christopher placed his green, plaid shirt-jacket on the banister just inside the front door. Janelle placed her purse on either the bench by the banister or on the couch in the home office.

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<sup>1</sup> Ind. Code Ann. § 35-43-4-2.5(b)(1) (West, PREMISE through the 2007 Public Laws approved and effective through April 8, 2007).

<sup>2</sup> I.C. § 35-43-4-2(a) (West, PREMISE through the 2007 Pubic Laws approved and effective through April 8, 2007).

<sup>3</sup> Ind. Code Ann. § 9-30-5-2 (West, PREMISE through the 2007 Public Laws approved and effective through April 8, 2007).

<sup>4</sup> Ind. Code Ann. § 9-26-1-4(A)(2) (West, PREMISE through the 2007 Public Laws approved and effective through April 8, 2007); I.C. § 9-26-1-8(b) (West, PREMISE through the 2007 Public Laws approved and effective through April 8, 2007).

After putting the children to bed around 9:30 p.m., Janelle went to bed. Christopher went to bed around 12:30 a.m.

The following morning, Christopher received a phone call from the Hamilton County Sheriff's Department informing him that his truck had been involved in an accident. Shocked by the call, Christopher immediately looked out the window and discovered that his truck was indeed missing. The Casses later discovered that Christopher's shirt-jacket and Janelle's purse were also missing.

Charles Spartz, who lived on Summer Road in Noblesville, went outside around 7:00 a.m. on April 30 to mow his grass. As Spartz was mowing near the road, he observed a truck overturned in the middle of the road with its wheels spinning. Spartz ran to see if he could help the occupant. As he approached the truck, Spartz saw an individual, who he later identified as Earlywine, crawling out of the truck window. Spartz asked Earlywine if he was "all right" and Earlywine responded that he was "fine." *Transcript* at 105. Earlywine also confirmed that he was the only one in the truck. Spartz used his cell phone to call 911. While Spartz was on the phone with the dispatcher, Earlywine stated, "Don't call the cops. I'm going to get in big trouble if you call the cops." *Id.* at 107. Earlywine then told Spartz that he knew some people down the road, and he walked away from the crash scene at a really fast pace.

A short time later, Deputy Scott Hazel arrived at the crash scene, at which time Spartz provided him with a description of Earlywine. Although Spartz could not describe what Earlywine was wearing, he was able to give the police a general description, specifically pointing out that Earlywine's teeth were "really brown." *Id.* at 114. The

officers also learned that the truck was owned by Christopher Cass and discovered Janelle Cass's purse inside the truck.

About two hours later, Officer James Alvis of the Fishers Police Department contacted Spartz and requested that he come to a particular location where an individual had been stopped alongside the road. Spartz went to the specified location and identified Earlywine as the person he had seen crawl out of the truck earlier that morning. Spartz was positive with his identification despite the fact that he was not able to see Earlywine's most distinguishing feature—his brown teeth.

Based upon Spartz's positive identification of Earlywine as the driver of the crashed truck and the fact that Earlywine had automobile glass fragments in his hair, Earlywine was taken into custody. Earlywine was then returned to the crash scene, where he was turned over to Officer Hazel. Having smelled alcohol coming from Earlywine's person and noting that Earlywine had glassy eyes, impaired manual dexterity, that he appeared disheveled, and that he was abusive, Officer Hazel transported Earlywine to the Hamilton County Jail for field sobriety tests. Officer Hazel administered the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg-stand test. Earlywine failed all six points of the horizontal gaze nystagmus test and the walk-and-turn test, but passed the one-leg-stand test. Officer Hazel then asked Earlywine to submit to a chemical breath test. The test result showed a .08 BAC, obtained at 9:57 a.m., approximately two hours after Officer Hazel was dispatched to the scene of the accident.

On May 2, 2005, the State charged Earlywine with burglary as a class B felony, auto theft and theft and class D felonies, operating while intoxicated endangering a

person (OWI) as a class A misdemeanor, operating a vehicle with a BAC of .08 or more, a class B misdemeanor, and failure to stop after a property damage accident, a class B misdemeanor. As a result of Earlywine's arrest, the State also filed a notice of probation violation under Cause No. 29D02-0108-CF-74 (Cause No. CF-74).

At the conclusion of the evidence, the jury found Earlywine not guilty of the burglary charge, but guilty of the remaining charges. Following a sentencing hearing, the trial court sentenced Earlywine to three years on each of the auto theft and theft convictions and ordered the sentences to be served concurrently. The court found that the operating a vehicle with a BAC of .08 or more offense merged with the OWI conviction and then sentenced Earlywine to one year in the Hamilton County Jail. For the failure to stop after a property damage accident conviction, the trial court sentenced Earlywine to 180 days, to be served concurrently with the OWI conviction. The latter two sentences were ordered consecutive to the sentences for auto theft and theft, thereby resulting in an aggregate sentence of four years.

1.

Earlywine makes several challenges to the sufficiency of the evidence supporting each of his convictions. Upon review of sufficiency of the evidence claims, we will neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We will consider only the probative evidence and reasonable inferences supporting the verdict and “must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” *Id.* at 126 (quoting *Tobar v. State*, 740

N.E.2d 109, 111-12 (Ind. 2000)). In other words, we will not substitute our judgment for that of the trier of fact, and the claim of insufficient evidence will prevail only if no reasonable trier of fact could have found Earlywine guilty beyond a reasonable doubt. *See Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004).

Earlywine first argues that there was insufficient evidence to identify him as the individual who committed the instant offenses. Earlywine argues that Spartz's identification of him as the person Spartz saw crawl out of the overturned truck and walk away from the scene of the accident was "questionable." *Appellant's Brief* at 11. Specifically, Earlywine contends that the drive-by procedure used was impermissibly suggestive, thereby rendering Spartz's testimony and in-court identification inadmissible.

Both the United States Supreme Court and the Indiana Supreme Court have criticized the practice of one-on-one show-ups because of their inherent suggestiveness. *Mitchell v. State*, 690 N.E.2d 1200 (Ind. Ct. App. 1998). Such identifications, however, are not subject to a *per se* rule of exclusion. *Id.* Rather, the admissibility of the evidence turns on an evaluation of the totality of the circumstances. *Id.* Our Supreme Court has identified eight factors to be considered in determining whether a show-up identification was conducted in such a manner that it would likely lead to a misidentification: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the length of initial observation of the criminal, (3) lighting conditions, (4) distance between the witness and the criminal, (5) the witness's degree of attention, (6) the accuracy of the witness's prior description of the criminal, (7) the level of certainty demonstrated by the witness, and (8) any identifications of another person. *Id.* The length of time between

the commission of the crime and the show-up procedure is also to be considered. *Id.* Show-up procedures are viewed more favorably when conducted close in time to the commission of the crime. *Id.*

Having reviewed the record, we conclude that the show-up procedure used was unlikely to produce a mistaken identification. Here, it was light outside as Spartz approached the accident scene between 7:00 and 8:00 in the morning. Spartz observed Earlywine crawl out of the truck window and spoke with Earlywine, asking him if he was injured and if there was anyone else in the truck. When Spartz called to report the accident, Earlywine asked that he not call the police. Spartz watched as Earlywine walked away from the crash scene and disappeared down the road. Although the encounter was short, Spartz and Earlywine were in close proximity, such that Spartz observed that Earlywine had “really brown” teeth. *Transcript* at 114. Spartz’s identification of Earlywine occurred a short time later, i.e., approximately two hours after their encounter at the crash scene. As Spartz drove by and viewed the individual who had been detained by police, he was absolutely certain it was the same person he had seen crawling out of the crashed truck and walking away from the scene of the accident. Throughout his testimony, Spartz was unequivocal in his identification of Earlywine as the individual he had encountered. Additionally, we note that Spartz’s identification was corroborated by circumstantial evidence—glass was found in Earlywine’s hair and Earlywine was wearing the shirt-jacket that belonged to the owner of the stolen, crashed truck.

We further reject Earlywine's claim that Spartz's identification of Earlywine was impermissibly tainted by police suggestions or by the fact that Earlywine was the only person stopped alongside the road when Spartz was asked to drive by. There is nothing in the record that suggests that the officer who requested Spartz to drive by the location where Earlywine had been stopped had in any way indicated to Spartz that he had to identify the individual stopped as the person he had encountered earlier that morning at the crash scene. More importantly, upon seeing Earlywine, and despite the fact that he did not observe Earlywine's most distinguishing feature (brown teeth), Spartz was certain the individual stopped was the same individual he observed crawling out of the crashed truck. Based upon the foregoing, we conclude that Spartz's identification of Earlywine was reliable and that his testimony and in-court identification were admissible and proper. We thus reject Earlywine's claim that the evidence was insufficient to establish his identity as the defendant in this case.

Earlywine also argues that the evidence is insufficient to support his auto theft, theft, OWI, and failure to stop after an accident convictions. First, with respect to his auto theft and theft convictions, to sustain such convictions the State was required to prove beyond a reasonable doubt that Earlywine knowingly or intentionally exerted unauthorized control over the vehicle/property of another person with intent to deprive the other person of the items value or use. *See* I.C. § 35-43-4-2.5 (auto theft); I.C. § 35-43-4-2 (theft). Earlywine maintains that there was insufficient evidence to prove beyond a reasonable doubt that he took Christopher Cass's truck and shirt-jacket and Janelle Cass's purse and that he was not merely in possession of the items. Earlywine points out



that the jury acquitted him of burglary, thus demonstrating the jury's finding that he did not enter the Casses' home and take the truck keys, Christopher's shirt-jacket, or Janelle's purse. Earlywine further points out that no one witnessed him taking the truck from the Casses' residence.

We begin by noting that theft convictions may be supported by circumstantial evidence. *See Ward v. State*, 439 N.E.2d 156 (Ind. 1982). Further, it is generally accepted that the exclusive, unexplained possession of recently stolen property is sufficient evidence from which the trier of fact may infer the actual theft. *Brown v. State*, 827 N.E.2d 149 (Ind. Ct. App. 2005), *trans. denied*; *Gibson v. State*, 533 N.E.2d 187 (Ind. Ct. App. 1989). Whether property is recently stolen is determined by a consideration of the length of time between the theft and the possession, the defendant's familiarity or proximity to the property at the time of the theft as well as the character of the goods. *Allen v. State*, 743 N.E.2d 1222 (Ind. Ct. App. 2001).

Here, the evidence showed that when notified by police during the morning hours on April 30, the Casses were surprised to learn that their truck was not where they had parked it the night before. The Casses were also shocked to discover that Christopher's shirt-jacket and Janelle's purse were missing from the usual places inside their home where they placed such items. Additionally, Spartz positively identified Earlywine as the individual he saw crawling out of the Casses' overturned truck, and Earlywine was the only person present in the truck at the time of the crash. When Earlywine was detained while walking alongside a road, police observed broken glass in his hair. At the time of Earlywine's arrest, he was wearing a shirt-jacket which Christopher Cass identified as

his. Janelle's purse was found inside the overturned truck. Finally, we note that the accident occurred only a matter of hours after the Casses' truck was likely taken from their home. Based upon this evidence, the jury could have reasonably concluded that Earlywine was guilty of auto theft and theft.

Earlywine next challenges the sufficiency of the evidence with regard to his OWI conviction. In order to convict Earlywine of operating while intoxicated the State was required to prove beyond a reasonable doubt that Earlywine (1) operated a vehicle (2) while intoxicated (3) endangering a person. I.C. § 9-30-5-2.

Earlywine first challenges his OWI conviction by renewing his argument that the evidence presented by the State did not establish his identity as the driver of the overturned truck. As we concluded above, however, the evidence sufficiently established that Earlywine was the driver of the stolen, crashed truck. His argument in this regard therefore fails.

Earlywine also challenges his OWI conviction by arguing that the evidence does not establish that he was intoxicated at the time of the accident. A defendant is intoxicated if he is under the influence of alcohol such that there is an impaired condition of his thought and action and the loss of the defendant's normal control of his faculties. Ind. Code Ann. § 9-13-2-86 (West, PREMISE through the 2007 Public Laws approved and effective through April 8, 2007). Evidence of the following may establish impairment: (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. *Pickens v. State*, 751 N.E.2d 331 (Ind. Ct. App. 2001).

Here, Earlywine admitted to Officer Hazel that he had started drinking at 1:00 a.m. but claimed that he had stopped drinking at 3:00 a.m. on April 30, and there is nothing in the record which suggests that Earlywine consumed alcohol at any other time.<sup>5</sup> Shortly after 7:00 a.m., Earlywine was involved in a single-vehicle accident from which he fled the scene. Approximately two hours after the accident, Earlywine was detained as he walked along the side of the road. After he was positively identified as the individual involved in the early morning accident, he was transported back to the crash scene. At that time, Officer Hazel observed an odor of alcoholic beverages emanating from Earlywine's person, that Earlywine had glassy eyes, impaired manual dexterity, that his clothes were soiled and disorderly, and that he had an abusive attitude. Believing Earlywine to be intoxicated, Officer Hazel transported him to the Hamilton County Sheriff's Department where he administered three field sobriety tests, two of which Earlywine failed. The results of Earlywine's chemical breath test revealed that his BAC was .08. From this evidence, the jury could have reasonably inferred that Earlywine was

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<sup>5</sup> In his brief, Earlywine admits that there was no evidence to indicate that he had anything to drink after 3:00 a.m. Thus, Earlywine is clearly not arguing that his level of intoxication, as measured at approximately 10:00 a.m., was the result of his consuming alcohol after the accident. Rather, his level of intoxication at 10:00 a.m. was the result of his consumption of alcohol which he claims ended at 3:00 a.m.

under the influence of alcohol such that his faculties were impaired at the time he operated and crashed the truck.<sup>6</sup>

Earlywine argues that the evidence is insufficient to support his conviction for failure to stop after an accident involving property damage. Earlywine's challenge in this regard is based upon his argument that he was not sufficiently identified as the individual who had been driving the truck when it crashed and then fled from the scene after Spartz called 911. We have rejected this argument above. The evidence established that Earlywine was the individual who crawled out of the crashed truck, that Earlywine was the lone occupant, and that Earlywine fled the scene when Spartz called the police. In addition to crashing the stolen truck, the State presented evidence that a mailbox and 128 feet of fence were destroyed during the accident. This evidence is sufficient to prove that Earlywine was the driver of a vehicle that caused damage to the property of another

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<sup>6</sup> In arguing that the evidence is insufficient to support his OWI conviction, Earlywine argues that State's Exhibit 19, Breath Test for Intoxication Certification, and State's Exhibit 21, BAC Datamaster Evidence ticket, were improperly admitted because Officer Hazel, who administered the chemical breath test, could not recall in detail his training as it pertains to becoming a certified breath test operator. Earlywine thus argues that pursuant to Chapter 260 Indiana Administrative Code § 1.1-1-2, Officer Hazel's certification as a chemical breath test operator was not valid, and as a result, the chemical test result was not admissible. We begin by noting that Earlywine's argument falls under the issue delineated as sufficiency of the evidence and further, he fails to provide an appropriate standard of review. Although not squarely an issue before us, we explain Earlywine's argument in this regard and why it fails.

In support of his argument, Earlywine cites *Wray v. State*, 751 N.E.2d 679 (Ind. Ct. App. 2001), wherein this court held that the breath test certificate and breath test result ticket were inadmissible because the officer who administered the chemical breath test testified that he had not received training as required by 260 I.A.C. § 1.1-1-2. The present case is distinguishable from that presented to the court in *Wray* in that, here, Officer Hazel testified that he had received training in all of the areas required by the department of toxicology's regulations codified at 260 I.A.C. § 1.1-1-2. Although not able to provide specific details of his training, Officer Hazel testified as to the general nature of his training in each of the required areas and was able to recall that during his training, he used test fluids, not testing on humans. Further, contrary to Earlywine's claims, 260 I.A.C. § 1.1-1-2 does not require testing on humans, inasmuch as it provides that laboratory training must be performed using known ethanol-water/ethanol-gas solutions *and/or* on a human who has consumed a test dose of ethanol. 260 I.A.C. § 1.1-1-2. The record adequately demonstrates that Officer Hazel received the appropriate training and that he was a certified breath test operator.

person and that Earlywine did not remain at the scene of the accident. *See* I.C. § 9-26-1-4.

2.

Earlywine also argues that the trial court abused its discretion by ordering him to serve his entire six-year suspended sentence upon revocation of his probation under Cause No. CF-74. We begin by noting, “probation is a favor granted by the State, not a right to which a criminal defendant is entitled.” *Podluský v. State*, 839 N.E.2d 198, 199-200 (Ind. Ct. App. 2005) (*quoting Sanders v. State*, 825 N.E.2d 952, 954-55 (Ind. Ct. App. 2005)). Further, upon revoking a defendant’s probation, a trial court has discretion to impose less than the entire suspended sentence when appropriate. *See Stephens v. State*, 818 N.E.2d 936 (Ind. 2004) (holding that trial court has statutory authority to order a defendant to serve less than the length of the sentence originally suspended so long as a certain condition is met).

On August 24, 2001, Earlywine was charged under Cause No. CF-74 with two counts of class C felony burglary and two counts of class D felony theft. On August 29, 2002, Earlywine, pursuant to a written plea agreement, pleaded guilty to the two class C felony burglary charges and the State agreed to dismiss the two class D felony theft charges. Pursuant to the agreement, Earlywine was to be sentenced to a aggregate term of twelve years with six years executed and six years suspended.

On September 23, 2003, Earlywine was placed in a residential program at the Hamilton County Work Release Center. The State filed a notice of violation of probation

on February 24, 2004, after Earlywine admitted to violating certain rules of the work release program. Upon finding that Earlywine violated his probation, the trial court ordered that he complete the remainder of his executed sentence in the Department of Correction.

On April 27, 2005, the State filed a second notice of probation violation after Earlywine tested positive for marijuana use. On May 12, 2005, the State filed a third violation of probation against Earlywine alleging, in part, that Earlywine violated the conditions of probation when he was charged under the instant cause with burglary, auto theft, theft, OWI, and leaving the scene of a non-vehicle property damage accident. Following a fact-finding hearing on September 8, 2006 on both the second and third alleged violations, the trial court found that Earlywine violated a condition of his probation by being convicted of the charges (except burglary) in this case.

Earlywine argues that the trial court abused its discretion in ordering that he serve his entire suspended sentence under Cause No. FB-74 because he was not found in violation of all of the alleged violations pending against him, he was acquitted of the most serious charge (class B felony burglary), and he was sentenced to a lengthy period of time (i.e., four years) for his convictions.

While serving his sentence under Cause No. FB-74, Earlywine violated the rules of the work release program and was subsequently ordered to serve the remainder of his executed sentence in the Department of Correction. Shortly thereafter, the State filed a second notice of probation violation. Then, Earlywine committed the offenses for which he was ultimately convicted, which served as the basis for the third notice of probation

violation. Through his conduct, Earlywine has demonstrated that he is unwilling to submit to authority or abide by the rules imposed by the court. We cannot say that the trial court abused its discretion by ordering that he serve his entire six-year suspended sentence.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.