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IN THE COURT OF APPEALS OF INDIANA

TODD LUTTENEGGER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A01-0910-CR-516
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable Jonathan N. Cleary, Judge
Cause No. 15D01-0903-CM-79

April 14, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Todd Luttenegger appeals his conviction for Operating a Vehicle While Intoxicated,[1] a class A misdemeanor, claiming that the charging information did not adequately apprise him of the nature of the charges against him because the probable cause affidavit contained erroneous information about the blood test results. Luttenegger also argues that the trial court erred in admitting the results of his blood alcohol test into evidence because the State failed to establish a proper foundation for its admission, and that the evidence was insufficient to support the conviction.

Concluding that the evidence was sufficient to support Luttenegger's conviction and finding no other reversible error, we affirm the judgment of the trial court.

FACTS

On October 11, 2007, at approximately 11:20 p.m., Indiana State Trooper Nate Adams observed Luttenegger driving his Toyota SUV on U.S. 50 in Dearborn County without any headlights turned on. Trooper Adams initiated a traffic stop and Luttenegger pulled into a nearby parking lot. As Trooper Adams approached, he noticed that Luttenegger and three other individuals were in the vehicle. Luttenegger told Trooper Adams that he had consumed "two beers." Tr. p. 47. Trooper Adams detected the odor of alcohol and observed that Luttenegger's eyes were "red and watery." Id.

Thereafter, Trooper Adams administered several field sobriety tests to Luttenegger, including the horizontal gaze nystagmus (HGN), the "one-leg stand," and the "walk-and-turn." Id. Although Luttenegger passed the one-leg stand test, the results

[1] Ind. Code § 9-30-5-2.

of the HGN revealed a lack of smooth pursuit, maximum deviation, and "onset prior to 45 degrees." Id. at 45. Trooper Adams also observed that Luttenegger: (1) broke his balance during the walk-and-turn test; (2) raised his arms more than six inches during the walk; (3) walked ten steps instead of nine; and (4) made an improper turn during the test.

As a result, Trooper Adams determined that he had probable cause to believe that Luttenegger was intoxicated. Trooper Adams then read Luttenegger the implied consent law. Although Luttenegger initially agreed to take a breathalyzer test, he subsequently refused. Trooper Adams then obtained a warrant and Luttenegger was transported to the Dearborn County Hospital (DCH), where phlebotomist Barbara Gurley drew Luttenegger's blood at 1:45 a.m.

Gurley was trained by DCH as a phlebotomist and was certified under DCH's training program. Gurley has performed thousands of "venipunctures," and although DCH's written protocol required phlebotomists to use sterile water and soap for OWI blood draws, Gurley used ordinary tap water to prepare the site. Id. at 119, 121. However, Dr. Steven Eliason, the physician who was responsible for overseeing the laboratory procedures and protocol at DCH, intended for phlebotomists to use "clean" water and agreed that ordinary tap water is medically acceptable. Id. at 121, 153. Gurley had used tap water for years in numerous cases and she believed that she followed Dr. Eliason's established protocol.

Laboratory technician Susan LaGreca conducted the testing and concluded that Luttenegger had 105 milligrams of alcohol in his blood serum per deciliter. It was determined that Luttenegger's blood content, after adjusting for the differences between

whole blood and serum blood, was .084. Trooper Adams's affidavit for probable cause that was file marked on March 12, 2009,[2] alleged that the result of Luttenegger's blood draw revealed "105 mg/dl which is equivalent to .10 grams of alcohol per 210 liters of breath." Appellant's App. p. 146. Trooper Adams asserted in the original probable cause affidavit dated October 12, 2007, that he "was told by . . . LaGreca the result of the chemical test was an alcohol concentration equivalent to 0.10 gram of alcohol per 100 milliliters of blood. Such test was administered by drawing or taking a sample of whole blood at 1:45 a.m." Id. at 148.

The State charged Luttenegger with Count I, operating a vehicle while intoxicated while endangering a person, a class A misdemeanor, and Count II, operating a vehicle with a blood alcohol equivalent of .08, a class C misdemeanor. The information in Count II alleged that Luttenegger had "an alcohol concentration equivalent to at least . . . .08 grams of alcohol but less than . . . .15 grams of alcohol, in . . . 100 milliliters of . . . blood; or . . . 210 liters of breath." Id. at 144.

At a jury trial that commenced on July 17, 2009, Dr. Eliason testified that Luttenegger's blood alcohol, when adjusting for the differences between whole blood and serum blood, was .084. Following the presentation of the evidence, Luttenegger was found guilty as charged. On September 4, 2009, the trial court entered a judgment of

[2] Luttenegger was originally charged with these offenses on October 12, 2007. The State dismissed the charges on August 13, 2008, but refiled them on March 12, 2009. Appellant's App. p. 106, 131-32, 196-97.

conviction only on Count I and sentenced Luttenegger to 365 days of incarceration with 363 days suspended and credit for two days. Luttenegger now appeals.

DISCUSSION AND DECISION

I. Charging Information—Variance

Luttenegger argues that his conviction must be reversed because he was misled by the charging information and was prevented from preparing an adequate defense. More specifically, Luttenegger contends that the probable cause affidavit incorrectly referenced the blood test results, and a fatal variance existed between the allegations in the charge and the evidence produced at trial because he was never informed that the results of the blood test contained in the probable cause affidavit "was actually the serum sample test result rather than the whole blood result." Appellant's Br. p. 26.

Notwithstanding Luttenegger's claim, we note that the trial court did not enter a judgment of conviction or sentence with regard to the offense of operating a vehicle with a blood alcohol content of .08 or higher as alleged in Count II. Therefore, this issue is moot and we need not address it. See Mays v. State, 907 N.E.2d 128, 133 (Ind. Ct. App. 2009) (observing that we generally do not "engage in discussions of moot questions"), trans. denied.

II. Admission of Blood Test Evidence

Luttenegger argues that his conviction must be set aside because Gurley—the phlebotomist who drew his blood—was not a properly certified technician in accordance with Indiana Code section 9-30-6-6(j). Hence, because Gurley was not properly certified and did not follow proper DCH protocol when she used ordinary tap water rather than

rather than sterile water and soap for blood draws, Luttenegger maintains that the results of his blood test were erroneously admitted into evidence.

We initially observe that a trial court's ruling on the admissibility of evidence is generally reviewed for an abuse of discretion. Combs v. State, 895 N.E.2d 1252, 1255 (Ind. Ct. App. 2008), trans. denied. We will reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Id. Even if the trial court's decision was an abuse of discretion, we will not reverse if the admission of evidence constituted harmless error. Id.

Indiana Code section 9-30-6-6(a) provides that blood samples collected at the request of a law enforcement officer as part of a criminal investigation must be obtained by "[a] physician or a person trained in obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician." Also, in accordance with Indiana Code section 9-30-6-6(j), the blood sample "may be obtained by any of the following persons who are trained in obtaining bodily substance samples and who have been engaged to obtain samples under this section: . . . (7) a certified phlebotomist." In light of these provisions, Luttenegger maintains that his conviction must be reversed because Gurley admitted at trial that she was not a "certified" phlebotomist and did not follow proper DCH protocol. Tr. p. 117.

We note that in Brown v. State, 911 N.E.2d 668 (Ind. Ct. App. 2009), a different panel of this court was called upon to decide whether a certified lab technician was a person "trained in obtaining bodily substance samples" for the purposes of Indiana Code

section 9-30-6-6. In concluding that the technician—who was not a "certified phlebotomist"—did not satisfy the requirements of the statute, we determined that

> If the General Assembly intended subsection (j) to include certified lab technicians instead of, or in addition to, certified phlebotomists, it easily could have done so. It did not do so, however, and therefore we must conclude that the trial court abused its discretion in admitting the results of Brown's blood test [into evidence].

Id. at 673. We also observed that the blood test results were erroneously admitted into evidence because the lab technician failed to follow the protocol that the hospital had adopted. Id.[3]

Regardless of the noncompliance with Indiana Code section 9-30-6-6, it was also determined in Brown that the erroneous admission of the blood test into evidence constituted harmless error in light of the other "overwhelming evidence" of intoxication. That evidence included Brown's failure of the HGN test, the odor of alcohol, his admission to consuming several beers, glassy and blood shot eyes, unsteady balance, and the failure of the walk-and-turn test. Id. at 673-74.

As were the circumstances in Brown, and assuming solely for argument's sake that the blood draw from Luttenegger did not comply with the requirements of Indiana Code section 9-30-6-6, we must conclude that the erroneous admission of Luttenegger's blood test into evidence amounted to harmless error.

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[3] Our Supreme Court has granted transfer in Brown, but an opinion has not yet been issued. Moreover, our General Assembly recently approved an amendment to Indiana Code section 9-30-6-6 on March 12, 2010, which deletes the requirement of a "certified phlebotomist" in subsection (j), and clarifies that the other requirements included in that subsection do not apply to a bodily substance sample that is "taken at a licensed hospital." P.L. 36-2010.

Indeed, the State presented evidence wholly apart from the blood tests establishing Luttenegger's intoxication. As noted above, Trooper Adams observed Luttenegger driving on a busy highway without headlights. Tr. p. 36-39. When Trooper Adams approached, he noticed that Luttenegger smelled of alcohol and his eyes were "red and watery." Id. at 47. Luttenegger admitted drinking alcohol, and he failed both the HGN test and the walk-and-turn field sobriety test. Id. at 52, 55-56. From this evidence, the jury could reasonably infer that Luttenegger was intoxicated while operating his vehicle. See Fought v. State, 898 N.E.2d 447, 451 (Ind. Ct. App. 2008) (observing that impairment can be established by evidence including the consumption of a significant amount of alcohol, impaired attention and reflexes, watery or bloodshot eyes, the odor of alcohol on the breath, unsteady balance, and slurred speech). Therefore, we cannot conclude that there was a substantial likelihood that the result of the trial would have been any different had Luttenegger's blood test results been excluded from the evidence. Thus, Luttenegger is not entitled to reversal on this basis.

III. Sufficiency of the Evidence

In a related issue, Luttenegger argues that the State failed to establish beyond a reasonable doubt that he operated a motor vehicle while intoxicated. Luttenegger attacks the validity of the blood alcohol test results and maintains that any alleged inferences that might have permitted the jury to find him guilty beyond a reasonable doubt, apart from the blood tests, "can be definitively explained and refuted." Appellant's Reply Br. p. 6.

In addressing Luttenegger's challenge to the sufficiency of the evidence, we will not reweigh the evidence or judge the credibility of the witnesses. Williams v. State, 873

N.E.2d 144, 147 (Ind. Ct. App. 2007). Rather, we consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. Robinson v. State, 835 N.E.2d 518, 523 (Ind. Ct. App. 2005). We will affirm the conviction if sufficient probative evidence exists from which the fact finder could find the defendant guilty beyond a reasonable doubt. Williams, 873 N.E.2d at 147. Moreover, it is not necessary that the evidence overcome every reasonable hypothesis of innocence. Fancher v. State, 918 N.E.2d 16, 22 (Ind. Ct. App. 2009). Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. Alvies v. State, 905 N.E.2d 57, 61 (Ind. Ct. App. 2009). Finally, a conviction for driving while intoxicated may be supported by circumstantial evidence. Ashba v. State, 816 N.E.2d 862, 866-67 (Ind. Ct. App. 2004).

As discussed above, the State presented overwhelming evidence apart from the blood test results establishing that Luttenegger was intoxicated, thus enabling the jury to reasonably infer that Luttenegger was guilty beyond a reasonable doubt of operating his vehicle while intoxicated. Although Luttenegger offered various explanations at trial for driving without his headlights and failing the field sobriety tests, the jury was free to disregard that self-serving testimony. Goodman v. State, 863 N.E.2d 898, 902 (Ind. Ct. App. 2007). Moreover, Luttenegger is, in essence, inviting us to reweigh the evidence, which we will not do. Therefore, when considering the evidence most favorable to the judgment, we conclude that the evidence was sufficient to support Luttenegger's conviction for driving while intoxicated.

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.