

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Carl Douglas Graf,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

March 28, 2024

Court of Appeals Case No.
22A-CR-2855

Appeal from the Hamilton Superior Court
The Honorable J. Richard Campbell, Judge

Trial Court Cause No.
29D04-2110-CM-6511

Memorandum Decision by Judge Foley
Judges Riley and Brown concur.

Foley, Judge.

[1] Carl Douglas Graf (“Graf”) was convicted after a jury trial of operating a vehicle while intoxicated endangering a person¹ as a Class A misdemeanor. He appeals his conviction and raises the following restated issues for our review:

- I. Whether the trial court abused its discretion when it excluded Graf’s witness;
- II. Whether the trial court abused its discretion when it prevented Graf from using unpublished material from the exhibits in his closing argument and did not allow the jury to view the entirety of the videos in Exhibit 5 and Exhibit 6 when only excerpts were published to the jury; and
- III. Whether sufficient evidence was presented to support Graf’s conviction.

[2] We affirm.

Facts and Procedural History

[3] Around 1:00 a.m. on October 28, 2021, Carmel Police Department Officer Chris Wolak (“Officer Wolak”) was patrolling northbound on US 31 north of Main Street in Carmel, Indiana in his marked police vehicle, when he saw a car merging onto US 31 northbound from the ramp at 136th Street. Officer Wolak observed the car, that was later identified as being driven by Graf, driving at a

¹ Ind. Code § 9-30-5-2(a), (b).

“high rate of speed” with “an aggressive acceleration” onto US 31. Tr. Vol. 2 p. 92. Based on his experience observing traffic and, specifically traffic in this area, Officer Wolak believed Graf’s car was traveling around 90 to 100 miles per hour in an area where the posted speed limit is 55 miles per hour. Officer Wolak began pursuing Graf’s car and tried to catch up to it, but he had issues doing so due to the “aggressive acceleration” of the car. *Id.* at 94. Officer Wolak’s vehicle eventually reached a speed of 98 miles an hour in an attempt to catch Graf’s car, which Officer Wolak clocked at a speed of 101 miles per hour. During this pursuit, Officer Wolak alerted dispatch to summon assisting officers.

[4] When Officer Wolak was still at least 300 to 400 feet behind Graf’s car, he “realized [he] probably was not going to catch up” with it “based upon the aggressive speed,” so he activated his vehicle’s emergency lights. *Id.* at 95. Graf’s car was in the right-hand lane of US 31 at the time. After Officer Wolak activated his emergency lights, Graf’s car continued for a time until its brake lights activated. Graf’s car then signaled a left-hand turn and moved into the center lane, but then signaled a right-hand turn and crossed the right-hand lane to pull over on the side of the road.

[5] When Graf’s car came to a stop about a half-mile north of the 146th Street exit, Officer Wolak approached it from the passenger side and spoke to the driver, who was identified as Graf. Officer Wolak explained that he had stopped Graf for speeding and that the officer’s radar had measured Graf’s speed at 101 miles per hour. Graf told Officer Wolak that his car’s speedometer had read “about

70” miles per hour. *Id.* at 96. When Officer Wolak asked Graf where he was traveling, Graf said that a friend had been taken to Riverview Hospital and that he was traveling there from IU hospitals on 86th Street and 136th Street.

Officer Wolak knew that the hospitals on 86th Street and on 136th Street were St. Vincent’s hospitals. Graf also mentioned an IU North hospital in Carmel, but that hospital was located south of where Graf was observed merging onto US 31, which was at 136th Street nearest to St. Vincent Carmel hospital.

[6] When Officer Wolak initially approached Graf’s car, he could smell the odor of an alcoholic beverage from the inside of the vehicle and noticed that Graf’s eyes were glassy and dilated. After asking about Graf’s course of travel, Officer Wolak asked Graf for his license and registration and observed Graf fumble through paperwork inside the car. Officer Wolak asked Graf if he had had anything to drink, and Graf replied, “a cider.” *Id.* at 97. Officer Wolak then returned to his vehicle and ran Graf’s information for any possible warrants. Dispatch advised that there were no warrants for Graf, and Officer Wolak returned to speak with Graf again.

[7] On his return to Graf’s car, Officer Wolak approached on the driver’s side and again smelled the odor of alcohol, noticing that the odor seemed to come from Graf’s person. Officer Wolak had Graf exit the car and go to the rear area of the car for field sobriety tests. Graf was wearing an unbuttoned, printed shirt over a t-shirt. Officer Wolak noticed that “there was liquid, possibly saliva on his [t-]shirt” that was “up towards the top” of the t-shirt. *Id.* at 99, 150. Once behind the car, Officer Wolak explained that he was going to administer field

sobriety tests and asked Graf if he had any problems with his back, knees, ankles, head, or eyes. Graf replied that he had no such problems.

[8] Officer Wolak first performed the horizontal gaze nystagmus test, which looks for involuntary, “jittering” eye movements as a clue to intoxication. *Id.* at 102. The test can produce a total of six clues to intoxication, three per eye, with four or more clues suggesting intoxication. Graf disregarded Officer Wolak’s instructions to keep his head still several times during the test, but despite this, the movement of Graf’s eyes still exhibited all six intoxication clues. Officer Wolak also noticed that Graf swayed back and forth while this test was being administered.

[9] Due to traffic and safety concerns, Officer Wolak decided to administer the rest of the field sobriety tests in a large garage area of the Carmel Police Department that was a “controlled atmosphere where it’s warm, there’s no wind, there’s . . . no water on the ground, no uneven [pavement].” *Id.* at 105. Such an environment would allow Graf to “fairly do the rest of the standardized field sobriety tests.” *Id.* Officer Wolak transported Graf to the department in his police vehicle. Once at the department, Officer Wolak explained the walk-and-turn sobriety test. At that time, Graf told the officer that he had an injured ankle and ankle brace, which the officer found inconsistent with Graf’s previous statements that he had no physical issues with his ankles. During the test, Graf had to be repeatedly reminded of the instruction and to comply with the test requirements because he stopped while in the middle of the test. Graf had trouble maintaining his balance and stepped off a straight-line path and did not

step heel-to-toe as required. The walk-and-turn test can exhibit up to eight clues of intoxication, and Graf displayed five of those clues. Officer Wolak next administered the one-leg-stand test, and in performing that test, Graf did not display any of the four clues for intoxication.

[10] After considering the totality of the circumstances of Graf's driving, his responses to questions, and the outcomes of the field sobriety tests, Officer Wolak offered Graf a chemical test by reading Indiana's implied consent form to him. Graf consented to the test, and Officer Wolak began the protocol to administer a breath test on certified test equipment located at the department. While waiting for the test to be administered, Graf became "kind of . . . argumentative" and "started almost demanding another test such as a blood draw." *Id.* at 112. After Officer Wolak explained that the manner of chemical testing was in his discretion and that Graf's failure to take the chosen chemical test would constitute a refusal, Graf consented to take to the breath test at the department. The instrument measured Graf's breath alcohol-concentration equivalent to be .072, and Graf was arrested.

[11] The State charged Graf with Class A misdemeanor operating while intoxicated endangering a person and Class C misdemeanor reckless driving. Graf requested a jury trial, and while the charges were pending, Graf moved to continue his trial date several times, citing his need to depose Officer Wolak and ongoing negotiations with the State. Four days after one of the continuances was denied in July 2022, Graf filed an emergency motion to continue his trial because he had discharged prior counsel and retained new

counsel who needed time to obtain and review discovery. The trial court granted Graf's emergency motion on the same day and set Graf's jury trial for September 29, 2022.

[12] Eight days before trial, on September 21, 2022, Graf filed a witness list naming Frank Bowling ("Bowling") as a witness. Graf provided the State with Bowling's telephone number the same day and provided Bowling's address on the next day. On September 23, 2022, Graf provided the State with Bowling's resumé. The State filed a motion to exclude Bowling's testimony on September 27, 2022, which the trial court denied.

[13] On the morning of trial, the State renewed its motion to exclude Bowling's testimony, noting the timing of Graf's discovery and that when the State had contacted Bowling, he told the State that he had been "roped into" being a witness the week before trial. *Id.* at 15. The State also argued that the late disclosure did not allow sufficient time to prepare for trial and that Bowling's testimony was not based on personal knowledge of the scene but on MotorTrend magazine and Google Maps. Graf asserted that Bowling had been given and reviewed all the State's discovery, and that he was "an automobile mechanic by trade" with "personal knowledge with [Graf's] vehicle." *Id.* at 13. At the conclusion of the parties' argument, the trial court found that Bowling's testimony should be excluded due to the age of the case and Graf's late disclosure of a skilled or expert witness to the State. After the trial court excluded Bowling as a witness, Graf did not make any offer of proof.

[14] The trial proceeded, and during Officer Wolak's testimony, the State informed the trial court that "by agreement, the parties are asking leave to introduce State's Exhibit 5 and State's Exhibit 6," which were the videos from Officer Wolak's in-car dash camera and his body camera. *Id.* at 121. The trial court admitted the exhibits. Exhibit 5 was the recording from Officer Wolak's in-car dash camera, and Exhibit 6 was the recording of Officer Wolak's body camera. The State played one excerpt from Exhibit 5 that was one minute and seven seconds in duration and three excerpts from Exhibit 6 for the jury, asking Officer Wolak about those excerpts from the Exhibit 5 and Exhibit 6 videos. The State also admitted a still photograph taken from Exhibit 6 and asked Officer Wolak to testify about the image.

[15] After the State had rested, Graf testified. In his testimony, Graf said that he had been at a bar with friends when a woman in their party became sick and vomited on him. An ambulance arrived and took the woman to a hospital. Graf testified that he "was trying to figure out how to reach this lady's family and her daughter" but did not have their telephone numbers, so he decided to go to the hospital and wait there until the woman's family arrived. *Id.* at 195. Before Graf left, the bar staff gave him a t-shirt to wear, which was the shirt he was wearing when pulled over. Graf then went to several local hospitals before learning that the woman might have been taken to Riverview Hospital, which was where he was headed when Officer Wolak stopped him. Graf also testified that his car had mechanical problems that caused the car to start shaking after

reaching 55 miles per hour and made it physically impossible for the vehicle to attain the speeds measured by Officer Wolak's radar.

[16] After Graf's testimony, the defense rested. Before closing arguments began, Graf's counsel stated that, when making his closing argument, he wanted to refer to the entirety of the videos of Officer Wolak's in-car dash and body camera footage and not just the excerpts that had been played for the jury during the State's case-in-chief. The State objected because the entire videos had not been played for the jury during the trial. Graf's counsel replied that the State "published certain bits and pieces for it and obviously I had no problem with them publishing certain pieces, but the full video is admitted. It's in the jury's presence which means, in my opinion, the jury can watch the entire video if they wanted to." *Id.* at 219. The trial court ruled that the jury could only watch the excerpts shown to it in open court and that it assumed that only parts of the videos admitted were the ones shown to the jury. After the trial court ruled, Graf's counsel did not make any record on what particular information the jury was deprived of viewing because of not being able to view the entire videos or what arguments he was not able to make in closing argument due to the trial court's ruling.

[17] At the conclusion of the trial, the jury found Graf guilty as charged. At the sentencing hearing, the trial court did not enter judgment on the guilty verdict for Class C misdemeanor reckless driving based on double jeopardy concerns. The trial court sentenced Graf for his Class A misdemeanor conviction for

operating while intoxicated endangering a person to 365 days in jail with credit for time served, and the balance suspended to probation. Graf now appeals.

Discussion and Decision

I. Exclusion of Witness

[18] Graf argues that the trial court abused its discretion when it excluded Bowling as a witness. The trial court is afforded wide discretion in ruling on the admissibility of evidence. *Shinnock v. State*, 76 N.E.3d 841, 842 (Ind. 2017) (citing *Nicholson v. State*, 963 N.E.2d 1096, 1099 (Ind. 2012)). On appeal, evidentiary decisions are reviewed for abuse of discretion and are reversed only when the decision is clearly against the logic and effect of the facts and circumstances. *Id.* at 842–43.

[19] Here, the trial court excluded Graf’s proposed witness, Bowling, because of Graf’s late disclosure of Bowling as a skilled or expert witness and due to the age of the case, which had been continued several times. “[W]hen a defendant seeks to call a previously undisclosed witness, he must make an offer of proof on the nature of the proffered testimony.” *Wiseheart v. State*, 491 N.E.2d 985, 991 (Ind. 1986). To reverse a trial court’s decision to exclude evidence, there must have been error by the court that affected the defendant’s substantial rights *and* the defendant must have made an offer of proof or the evidence must have been clear from the context. *Woods v. State*, 892 N.E.2d 637, 641 (Ind. 2008). Generally, when a defendant does not make an offer of proof, he has not adequately preserved the exclusion of a witness’s testimony as an issue for

appellate review. *Wiseheart*, 491 N.E.2d at 991. This offer of proof “is necessary to enable both the trial court and the appellate court to determine the admissibility of the testimony and the prejudice which might result if the evidence is excluded.” *Id.* The purpose of an offer of proof is to convey the point of the witness’s testimony and provide the trial judge the opportunity to reconsider the evidentiary ruling. *Woods*, 892 N.E.2d at 642.

[20] Here, Graf did not make an offer of proof at the time that the trial court excluded Bowling as a witness. He did not specify what the content of Bowling’s testimony would be and how it would be helpful to the jury in its determination. Graf did not introduce Bowling’s resumé or give Bowling’s current employment. He only stated that Bowling was “an automobile mechanic by trade” with “personal knowledge with this vehicle of my client’s.” Tr. Vol. 2 p. 13. In our review of the record, we find nothing that explicitly set out what Graf expected Bowling to testify to or how any proposed testimony was obtained. Due to Graf’s lack of clarity about Bowling’s testimony, the content and the point of Bowling’s testimony was not conveyed such that it enabled both the trial court and this court to determine the admissibility of the testimony and the prejudice which may have resulted from the exclusion of the evidence. We, therefore, conclude that Graf has not preserved this claimed error for review, and therefore, he has waived his claim.

II. Video Evidence

[21] Graf also argues that the trial court abused its discretion when it refused to allow him to use unpublished material from the exhibits in his closing argument

or to allow the jury to view the entirety of the videos in Exhibit 5 and Exhibit 6 when only excerpts were published to the jury. The trial court has broad discretion to rule on the admissibility of evidence. *Guilmette v. State*, 14 N.E.3d 38, 40 (Ind. 2014). We review the trial court's rulings for abuse of that discretion and reverse only when admission is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights. *Id.* Generally, errors in the exclusion of evidence are harmless unless they affect a party's substantial rights, and to determine that, we assess what the probable impact of that evidence would have been on the trier of fact. *Redding v. State*, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006).

[22] Graf contends that the trial court abused its discretion because it initially admitted the entirety of Exhibit 5 and Exhibit 6 when the State first introduced them during the testimony of Officer Wolak but then later ruled that only the published portions were in evidence. Graf asserts that the parties had agreed that the exhibits would be admitted in their entirety and that neither party indicated that their agreement excluded any part of the videos nor did the trial court exclude any part of the videos from evidence at the time they were admitted. He therefore claims that the trial court deprived him of the ability to address in closing argument any other portions of the videos that were favorable to him and deprived the jury of the ability to consider any of the admitted evidence other than the portions the State chose to play for them.

[23] However, even assuming, arguendo, that the trial court erred in not allowing Graf to refer to the entirety of the videos in his closing argument or providing

the entirety of the videos to the jury, it was harmless error. Graf contends that the ruling denying the jury the ability to view the entire videos clearly affected his substantial rights, arguing that the jury was deprived the opportunity to view Graf's behavior, which showed he was not impaired. However, the evidence that Graf maintains that the jury was deprived of seeing was actually discussed during Officer Wolak's cross-examination when he was asked about whether Graf stumbled when he exited the car, whether he struggled to get out or to take off his seatbelt, or if his speech was slurred. Additionally, Officer Wolak was asked about whether Graf could be observed swaying in the videos, and the officer explained that, due to the quality of the body camera footage, it would be hard to see Graf swaying in the video. Further, there was significant evidence presented to prove that Graf was intoxicated, including his excessive speed, his confusing answers to Officer Wolak when asked where he was traveling from, the odor of alcohol coming from Graf, Graf's admission that he had consumed a cider, the officer's testimony that Graf swayed back and forth and had trouble maintaining his balance, his two failed field sobriety tests, and the presence of alcohol on his breath via the breath test, which showed breath alcohol-concentration equivalent to be .072. We conclude there was not a substantial likelihood that the exclusion of the entire videos from Exhibit 5 and Exhibit 6 affected the jury's verdict. We, therefore, conclude that any error in the exclusion of the videos was harmless.

III. Sufficiency of the Evidence

[24] Graf next argues that insufficient evidence was presented to support his conviction for Class A misdemeanor operating a vehicle while intoxicated endangering a person.² When there is a challenge to the sufficiency of the evidence, “[w]e neither reweigh evidence nor judge witness credibility.” *Gibson v. State*, 51 N.E.3d 204, 210 (Ind. 2016), *cert. denied*. Instead, we consider only that evidence most favorable to the judgment together with all reasonable inferences drawn therefrom. *Id.* “We will affirm the judgment if it is supported by substantial evidence of probative value even if there is some conflict in that evidence.” *Id.* Further, “[w]e will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Love v. State*, 73 N.E.3d 693, 696 (Ind. 2017).

[25] In order to convict Graf of operating a vehicle while intoxicated endangering a person as a Class A misdemeanor, the State was required to prove that Graf operated a vehicle while intoxicated in a manner that endangered a person. Ind. Code § 9-30-5-2(a), (b). Under Indiana Code, “intoxicated” means that a person is under the influence of alcohol, a controlled substance, or a

² We note that Graf also asserts that the evidence presented at trial was insufficient to support the jury’s finding of guilt on his charge of Class C misdemeanor reckless driving, arguing that, even though the trial court vacated the reckless driving conviction on double jeopardy grounds, he is addressing the sufficiency of the evidence for reckless driving in part because of uncertainty of whether it could be reinstated if his conviction for operating a vehicle while intoxicated endangering a person is overturned on appeal. However, because we find that sufficient evidence was presented to support Graf’s conviction for operating a vehicle while intoxicated endangering a person, we do not reach his argument concerning the finding of guilt for reckless driving.

combination of alcohol and a controlled substance “so that there is an impaired condition of thought and action and the loss of normal control of a person’s faculties.” I.C. § 9-13-2-86(1), (2), (5). Impairment may be proven by evidence establishing “(1) the consumption of a significant amount of [an intoxicant]; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of [an intoxicant] on the breath; (5) unsteady balance; and (6) slurred speech.” *Awbrey v. State*, 191 N.E.3d 925, 929 (Ind. Ct. App. 2022) (quotations omitted). The State is not required to show a particular blood alcohol content to prove that person is intoxicated under the statutory definition. *Miller v. State*, 641 N.E.2d. 64, 69 (Ind. Ct. App. 1994), *trans. denied*. “To prove endangerment, the State must prove that the defendant was operating the vehicle in a condition or manner that could have endangered any person, including the public, the police, or the defendant.” *Staten v. State*, 946 N.E.2d 80, 84 (Ind. Ct. App. 2011) (citing *Outlaw v. State*, 918 N.E.2d 379, 381 (Ind. Ct. App. 2009)), *trans. denied*.

[26] Here, the evidence most favorable to the verdict reveals that, in the early morning hours of October 28, 2021, Officer Wolak observed a car, driven by Graf, that was traveling northbound on US 31 at a high rate of speed. As Officer Wolak followed Graf, his in-car radar measured Graf’s speed reaching 101 miles per hour at one point, well in excess of the posted speed limit of 55 miles per hour. As Officer Wolak began pursuing Graf’s car and tried to catch up to it, he had issues doing so due to the “aggressive acceleration” of the car. Tr. Vol. 2 p. 94. When Officer Wolak activated his emergency lights to conduct

a stop of Graf's car, Graf's car first signaled a left-hand turn and moved into the center lane, but then signaled a right-hand turn and crossed the right-hand lane to pull over on the side of the road.

[27] As Officer Wolak approached Graf's car, he could smell the odor of an alcoholic beverage from the inside of the vehicle and noticed that Graf's eyes were glassy and dilated. When Officer Wolak asked Graf where he was traveling, Graf told him that he was on his way to Riverview Hospital because a friend had been taken there after getting sick at a bar where they had been. He then gave confusing statements on where he was coming from in that he said he was traveling to Riverview Hospital from IU hospitals on 86th Street and 136th Street when those were St. Vincent's hospitals. When Officer Wolak asked Graf for his license and registration, the officer observed Graf fumble through paperwork inside the car while looking for the documents. Graf admitted to consuming a cider when asked if he had anything to drink. After determining that Graf had no warrants, Officer Wolak approached Graf's car on the driver's side and again smelled the odor of alcohol coming from Graf's person. Officer Wolak had Graf exit the car so that he could conduct field sobriety tests. Graf was wearing an unbuttoned, printed shirt over a t-shirt, and Officer Wolak noticed that there was liquid substance, possibly saliva, on his t-shirt.

[28] Before administering any of the field sobriety tests, Officer Wolak asked Graf if he had any problems with his back, knees, ankles, head, or eyes, to which Graf replied that he did not. When Officer Wolak administered the horizontal gaze nystagmus test, Graf disregarded the instructions to keep his head still several

times during the test, and the movement of Graf's eyes exhibited all six intoxication clues. Graf also swayed back and forth while this test was being administered. Right before Officer Wolak administered the walk-and-turn sobriety test, Graf told the officer that he had an injured ankle and ankle brace, although he had earlier stated he had no problems with his ankles. During the test, Graf had to be repeatedly reminded of the instructions and to comply with the test requirements. Graf had trouble maintaining his balance and stepped off a straight-line path, and he did not step heel-to-toe as required. Graf displayed five of eight intoxication clues in performing the test. After Graf consented to a chemical test, it was determined that he had a breath alcohol-concentration equivalent to be .072. The totality of this evidence supported the jury's reasonable conclusion that Graf was intoxicated when he operated his vehicle in a manner that could have endangered any person. We, therefore, conclude that sufficient evidence was presented to support Graf's conviction for operating a vehicle while intoxicated endangering a person.

Conclusion

[29] Graf has waived any contention that the trial court abused its discretion when it excluded his witness for failure to make an offer of proof. Any error in the trial court's ruling that prevented Graf from using unpublished material from the exhibits in his closing argument and the jury from viewing the entirety of the videos in Exhibit 5 and Exhibit 6 was harmless. Further, sufficient evidence was presented to support Graf's conviction for operating a vehicle while intoxicated endangering a person.

[30] Affirmed.

Riley, J., Brown, J., concur.

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