IN THE
SUPREME COURT OF THE UNITED STATES

JAMES COMBS,
Petitioner,
v.
STATE OF INDIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

IN THE

Indiana Supreme Court

Supreme Court Case No. 20S-CR-616

James Combs,
Appellant (Defendant below),

–v–

State of Indiana,
Appellee (Plaintiff below).

Argued: December 10, 2020 | Decided: June 3, 2021

Appeal from the Boone Superior Court
No. 06D02-1702-F3-134
The Honorable Bruce E. Petit, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 19A-CR-1991

Opinion by Justice Massa

Chief Justice Rush and Justice David concur.
Justice Slaughter concurs in the judgment with separate opinion.
Justice Goff dissents with separate opinion.

Massa, Justice.

James Combs was driving his company van when he swerved off the road and demolished a utility box. He then drove to his nearby home. The responding officer found Combs just as he parked in his front driveway. The officer ultimately took Combs to the hospital for a blood test. After they left, other officers towed the van as evidence of leaving the scene of an accident. Before the tow, they conducted an inventory search, which revealed pills in a bag under the driver's seat.

Combs was charged with several offenses, including four based on the pills. After he unsuccessfully moved to suppress the pills, a jury convicted him of all but one charge. On appeal, a panel concluded the pills should have been suppressed. Finding the van's seizure and search lawful, we affirm the trial court.

Facts and Procedural History

In the late afternoon of February 11, 2017, Combs was driving north on Lafayette Avenue in Lebanon, Indiana. He was in a yellow Ford van that prominently advertised the company he ran with his wife—Combs Gold & Stuff, a pawn shop and gold-buying business. In addition to the name, the van included the company's phone number, address, and slogans, making it "a mobile billboard." Tr. Vol. II, p.62.

While speeding, Combs came upon stopped traffic near the Lebanon Street Department. He swerved to his right to avoid hitting the vehicle in front of him, driving off the road and demolishing a utility box. Witnesses called 911 to report the crash. Combs exited the van, viewed the scene, took pictures, and rummaged around under the driver's seat. He then drove away, over the objections of witnesses, to his home in Clear Vista Estates, a nearby neighborhood.

Officer James Koontz of the Lebanon Police Department quickly arrived at the crash scene. He spoke with a witness, who described the van as "yellow" with "Combs on the side" and pointed him toward Clear Vista. Tr. Vol. III, p.21. As he drove through the neighborhood, a family

who saw the van pointed Officer Koontz in its direction. The van had also left a "a fluid trail" that helped guide Officer Koontz. Tr. Vol. II, p.9. Officer Koontz spotted a van that matched the witness' description in a driveway and pulled in behind it as Combs was stepping out of it. After exiting his vehicle, Officer Koontz "could see the side of the van." *Id.*, p.10. He observed "[t]he front driver's side tire was flat and [there was] a clear fluid trail from the roadway, up the driveway, to the van." *Id.* The grill and bumper were also damaged.

Officer Koontz began speaking with Combs, who quickly admitted to the crash and leaving the scene. By then, witnesses to the crash had arrived. One witness informed Officer Koontz that Combs may have been trying to hide something in the van. Officer Koontz asked Combs if he could look inside the van, and Combs initially consented. But after Officer Koontz refused to allow Combs to hand him items from the van, Combs withdrew his consent, and there was no search. Based on witness statements and his interactions with Combs, Officer Koontz believed Combs was intoxicated. He administered three field sobriety tests, and Combs failed two of them (although his breathalyzer test was negative for alcohol).

By this point, other Lebanon officers had arrived at Combs' home, including Lieutenant Rich Mount. He asked Combs for permission to look inside the van, and Combs consented to a search under the seats. Officer Koontz found a bag under the driver's seat, but Combs did not consent to him opening it, so the search stopped. Combs agreed to a blood test, so Officer Koontz took him to a hospital. The remaining officers decided to tow the van as evidence of Combs leaving the crash, so they inventoried it. Under the driver's seat, they found a black bag that contained, among other things, various pills that were later determined to be alprazolam, hydrocodone, and oxycodone (both 7.5- and 10-milligram doses). The officers seized the pills but turned over the bag and its other contents to Combs' wife before the van was towed.

The State ultimately charged Combs with nine counts, the first four based on the pills. Counts I through III—possession of a narcotic drug as a Level 3 felony in violation of Indiana Code sections 35-48-4-6(a) and

(d)(2)—were based on the hydrocodone, 10-milligram oxycodone, and 7.5-milligram oxycodone pills, respectively. Count IV—possession of a controlled substance as a Level 6 felony in violation of Indiana Code section 35-48-4-7(a)—was based on the alprazolam. Count VIII was leaving the scene of an accident as a Class B misdemeanor in violation of Indiana Code sections 9-26-1-1.1(a)(4) and (b).[1]

Combs unsuccessfully moved to suppress the pills under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution.[2] The case proceeded to trial, where a jury found Combs guilty of all counts except Count IV. Combs appealed, arguing, among other things, that the trial court erroneously admitted the pills.

Our Court of Appeals found that Combs' federal constitutional rights were violated. *Combs v. State*, 150 N.E.3d 266 (Ind. Ct. App. 2020), *trans. granted*, 157 N.E.3d 527. It concluded "the towing and impound search . . . were merely pretextual means by which officers could search the [van] to find incriminating evidence." *Id.* at 275. Because "Combs admitted that he was going to contact law enforcement regarding the accident . . . it [was] not clear why the officers needed the van to solve the crime." *Id.* at 276. The "indicia of pretext" meant "the search . . . was unreasonable" and "impermissible under the open view and plain view doctrines and the Fourth Amendment." *Id.* Because the pills should have been suppressed, the panel reversed Combs' convictions for Counts I, II, and III. *Id.* at 277. It declined to address his state constitutional argument, *id.* at 274 n.5, and rejected his other arguments, *id.* at 281–82.

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[1] The other counts were: Count V, operating a vehicle while intoxicated endangering a person as a Class A misdemeanor in violation of Indiana Code section 9-30-5-2(b); Count VI, operating a vehicle while intoxicated as a Class C misdemeanor in violation of Indiana Code section 9-30-5-2(a); Count VII, operating a vehicle with a schedule I or II controlled substance or its metabolite in the body as a Class C misdemeanor in violation of Indiana Code section 9-30-5-1(c); and Count IX, public intoxication as a Class B misdemeanor in violation of Indiana Code section 7.1-5-1-3(a)(1).

[2] Although the trial court certified its order denying Combs' suppression motion for interlocutory appeal, the Court of Appeals declined to accept jurisdiction.

The State petitioned for transfer, which we granted.[3] *See* Ind. Appellate Rule 58(A).

Standard of Review

Generally, "[t]rial courts have broad discretion to admit or exclude evidence," and we review for abuse of that discretion. *Satterfield v. State*, 33 N.E.3d 344, 352 (Ind. 2015). However, "when a challenge to an evidentiary ruling is based 'on the constitutionality of the search or seizure of evidence, it raises a question of law that we review *de novo*.'" *Johnson v. State*, 157 N.E.3d 1199, 1203 (Ind. 2020) (quoting *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017)), *cert. denied*, --- S. Ct. ---- (2021), No. 20-7612, 2021 WL 2044617 (U.S. May 24, 2021).

Discussion and Decision

Combs asserts that the police violated his Fourth Amendment rights by seizing and searching his van without a warrant. The Fourth Amendment—incorporated against the states through the Fourteenth Amendment—protects people against unreasonable searches and seizures. U.S. Const. amend. IV; *Berry v. State*, 704 N.E.2d 462, 464–65 (Ind. 1998). Because it "generally requires warrants for searches and seizures," *Johnson*, 157 N.E.3d at 1203, "a warrantless search or seizure is per se unreasonable, and the State bears the burden to show that one of the 'well-delineated exceptions' to the warrant requirement applies," *Osborne*

[3] Because we only address whether the pills should have been suppressed, we summarily affirm the panel's disposition of Combs' other arguments. *See* Ind. Appellate Rule 58(A)(2). We agree with the panel that Combs waived his state constitutional argument, *see* App. R. 46(A)(8)(a), so we only address his federal constitutional argument. Combs' briefing on this argument largely lacked the "cogent reasoning" required by Appellate Rule 46(A)(8)(a). But his noncompliance with that rule was not "sufficiently substantial to impede our consideration" of his argument, *Davis v. State*, 265 Ind. 476, 478, 355 N.E.2d 836, 838 (1976), largely because of his pretrial suppression motion. And because we prefer to resolve cases on their merits, we address the substance of his argument. *See Pierce v. State*, 29 N.E.3d 1258, 1268 (Ind. 2015).

v. State, 63 N.E.3d 329, 331 (Ind. 2016) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

When police seize and then search a vehicle, "both measures must be reasonable—that is, executed under a valid warrant or a recognized exception to the warrant requirement." *Wilford v. State*, 50 N.E.3d 371, 374 (Ind. 2016). One exception to the warrant requirement arises when an incriminating object is in plain view. Another arises when police inventory a seized object. Because both exceptions apply here, Combs' Fourth Amendment rights were not violated.

I. The police lawfully seized Combs' van as evidence under the Fourth Amendment's plain view exception.

Police, acting under a valid warrant or Fourth Amendment exception, can seize a vehicle as evidence of a crime.[4] *See Trent v. Wade*, 776 F.3d 368, 387 (5th Cir. 2015) ("[V]ehicles also may be seized if . . . they are contraband in plain view of an officer."); *People v. Zamora*, 695 P.2d 292, 296–97 (Colo. 1985) (car lawfully seized as instrumentality of a crime); *State v. Mitchell*, 266 S.E.2d 605, 608 (N.C. 1980) ("A car reasonably believed to be the fruit, instrumentality or evidence of a crime can be seized whenever found in plain view."); *State v. Lewis*, 258 N.E.2d 445, 447–49 (Ohio 1970) (car lawfully seized as instrumentality of a crime). When this occurs, the seizure must be reviewed like any other. *See, e.g.*,

[4] Police often impound vehicles pursuant to their community caretaking function, a broad label for actions that are not rooted in criminal investigation but still "enhance and maintain the safety of communities." *Fair v. State*, 627 N.E.2d 427, 431 (Ind. 1993). This Court has established a two-prong test to determine whether an impound pursuant to this function is reasonable. *Id.* at 433; *Wilford v. State*, 50 N.E.3d 371, 375–76 (Ind. 2016). But because "the community caretaking function is 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute,'" *Fair*, 627 N.E.2d at 433 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)), the test is inapplicable here.

United States v. Sanchez, 612 F.3d 1, 2 (1st Cir. 2010) (applying plain view exception to seized motorcycle).

The plain view exception to the Fourth Amendment's warrant requirement allows police to warrantlessly seize an object if they "are lawfully in a position from which to view the object, if its incriminating character is immediately apparent, and if [police] have a lawful right of access to the object." *Warner v. State*, 773 N.E.2d 239, 245 (Ind. 2002) (citing *Horton v. California*, 496 U.S. 128, 135–37 (1990)). It "stands for the premise that objects which are in plain view of an officer who rightfully occupies a particular location can be seized without a warrant and are admissible as evidence." *Sloane v. State*, 686 N.E.2d 1287, 1291 (Ind. Ct. App. 1997), *trans. denied*, 690 N.E.2d 1189. Seizures under this exception are "scrupulously subjected to Fourth Amendment inquiry." *Soldal v. Cook County*, 506 U.S. 56, 66 (1992). Here, the exception's three requirements were satisfied, so police lawfully seized Combs' van.

A. The police lawfully viewed Combs' van.

Under the plain view exception, police must have lawfully viewed the object. *Warner*, 773 N.E.2d at 245. In other words, they must not have engaged in an "unlawful trespass" to discover it. *Soldal*, 506 U.S. at 66. Here, Officer Koontz was on Combs' front driveway when he fully saw the van and realized it had crashed into the utility box and then left the scene.

"[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). This special status extends beyond the home's physical frame to the curtilage, "the area 'immediately surrounding and associated'" with it. *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). However, the curtilage is not impenetrable. *See id.* at 8. So long as police "do no more than any private citizen," their presence generally does not run afoul of the Fourth Amendment. *Kentucky v. King*, 563 U.S. 452, 469–70 (2011); *Caniglia v. Strom*, 141 S. Ct. 1596, 1599 (2021). They must "limit their entry to places visitors would be expected to go, such as walkways, driveways, and porches." *Trimble v. State*, 842 N.E.2d 798, 802 (Ind. 2006); *see also United States v. Contreras*, 820 F.3d 255,

261 (7th Cir. 2016) ("[Police] may walk up to any part of private property that is otherwise open to visitors or delivery people."). And "there is no Fourth Amendment protection for activities or items that, even if within the curtilage, are knowingly exposed to the public." *Trimble*, 842 N.E.2d at 802; *see also California v. Ciraolo*, 476 U.S. 207, 213 (1986) ("That the area is within the curtilage does not itself bar all police observation.").

Assuming Combs' front driveway was curtilage, Officer Koontz's presence was lawful.[5] When he arrived, Officer Koontz pulled into Combs' driveway and stepped out of his car, which allowed him to fully view the van. He then began speaking with Combs, who had just exited the van. Officer Koontz, like anyone seeking to speak with the van's driver, pulled into the front driveway. And when he saw Combs in the driveway, he reasonably spoke with Combs there. Officer Koontz used "the ordinary means of access" to view the van. *Trimble*, 842 N.E.2d at 802.

Officer Koontz's "legitimate investigatory purpose," *id.*, for being on the driveway did not make his presence unlawful. He was not unreasonably conducting a search by looking for evidence in a manner that exceeded his "implied license" to enter the driveway like a private citizen. *Jardines*, 569 U.S. at 9–10; *cf. Collins v. Virginia*, 138 S. Ct. 1663, 1668, 1670–71 (2018) (officer went off the main route to the front door to examine a partially enclosed portion of the driveway, where he pulled a tarp off a motorcycle). Because he confined his actions to those of a private

[5] It is not a foregone conclusion that Combs' front driveway was curtilage, even though it was—at least physically—"intimately linked to the home." *California v. Ciraolo*, 476 U.S. 207, 213 (1986). The Supreme Court of the United States has provided four non-exclusive factors to help determine whether an area is curtilage: its proximity to the home, its location in an enclosure surrounding the home, its uses, and steps taken to protect it from public view. *United States v. Dunn*, 480 U.S. 294, 301 (1987); *see also Holder v. State*, 847 N.E.2d 930, 936 (Ind. 2006) (acknowledging and applying the *Dunn* factors). The first heavily weighs in favor of curtilage, as the front driveway is attached to the home. The remaining weigh against. The driveway is not within an enclosure surrounding the home, its uses are open, and Combs took no steps to protect it from public view. But because "these factors are useful analytical tools," not a rigid test, *Dunn*, 480 U.S. at 301, we err on the side of caution and assume it was curtilage for our analysis.

citizen, Officer Koontz was lawfully on Combs' driveway when he viewed the van.

B. The van's incriminating character was immediately apparent.

When police lawfully view the object, its "incriminating character" must be "immediately apparent," *Warner*, 773 N.E.2d at 245, so there is no uncertainty about its "probative value," *Horton*, 496 U.S. at 137. Police must have probable cause to believe the object is contraband or evidence of a crime without conducting a further search of the object. *Arizona v. Hicks*, 480 U.S. 321, 323, 326 (1987); *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

Probable cause exists "when the totality of the circumstances establishes 'a fair probability' . . . of criminal activity, contraband, or evidence of a crime." *Hodges v. State*, 125 N.E.3d 578, 581–82 (Ind. 2019) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). We view the totality of the circumstances "from the standpoint of an objectively reasonable police officer." *Id.* at 582. And when "a seizure of items in plain view is supported by probable cause, an inquiring court will not look behind that justification." *Sanchez*, 612 F.3d at 6. Subjective intentions are irrelevant when analyzing probable cause. *Whren v. United States*, 517 U.S. 806, 813 (1996). Because probable cause must exist when the seizure occurs, the object's ultimate admission as evidence at trial does not impact this analysis.[6] *See Hodges*, 125 N.E.3d at 582.

The van's incriminating character was immediately apparent. As soon as Officer Koontz exited his vehicle, he saw the van's damaged front and

[6] The dissent goes beyond considering whether the van would be useful in prosecuting Combs to considering whether it ended up being strictly necessary. A reasonable officer, of course, would consider the instrument used to commit a crime—here, the van—to be useful at the time of the seizure. But a reasonable officer could not predict what would be strictly necessary. *See United States v. Belt*, 854 F.2d 1054, 1055–56 (7th Cir. 1988) (upholding impoundment of car as evidence despite the existence of witness testimony because the defendant could deny the allegations at trial).

confirmed it had left the fluid trail, objective signs of a recent head-on collision. The fact that Officer Koontz had to exit his vehicle to fully see the van and its damage is inconsequential. While he could not have moved or otherwise manipulated it, *Hicks*, 480 U.S. at 324–25, he could lawfully change his position to better view it, *United States v. Sanchez*, 955 F.3d 669, 676–77 (8th Cir. 2020) ("[O]fficers may . . . change position when conducting an exterior examination."), *cert. denied*, 141 S. Ct. 930.

He also realized the van matched the witness' description, which included the van's color and "Combs" marking. The witness was "a disinterested third-party," *Johnson*, 157 N.E.3d at 1204, who saw the collision and remained at the scene to speak with the responding officer. Officer Koontz had little reason to doubt the veracity of the description. *See id.*; *Duran v. State*, 930 N.E.2d 10, 17 (Ind. 2010).

Given the totality of the circumstances—the obvious damage, the fluid trail, the disinterested witness' description, and the van's distinct design—we have little trouble concluding any reasonable officer would have immediately developed probable cause that the van crashed into the utility box and left the scene, a criminal offense.[7] As such, it was evidence of that offense.[8]

C. The police had a lawful right of access to the van.

Police must "have a lawful right of access to the object." *Warner*, 773 N.E.2d at 245. This requirement "asks, in effect, whether the police had to

[7] We understand that leaving the scene of an accident as a Class B misdemeanor is not the most serious offense in the Indiana Code. Certainly, there are times when the seriousness of the offense matters. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) (noting the Sixth Amendment's right to a jury trial is not implicated for "petty crimes or offenses"). But it does not matter here. *See United States v. Sanchez*, 612 F.3d 1, 6 (1st Cir. 2010) (applying plain view exception to seized motorcycle that was evidence of criminal licensing violations).

[8] We emphasize the need for probable cause of a crime. *See Horton v. California*, 496 U.S. 128, 130 (1990). Not every prohibited act involving a vehicle satisfies this requirement. For example, probable cause that a vehicle was used to commit a traffic violation codified as a civil infraction would not suffice.

commit a trespass" to access the object. *Sanchez*, 612 F.3d at 6; *see also United States v. Wells*, 98 F.3d 808, 810 (4th Cir. 1996) (finding requirement satisfied because agents "were lawfully searching" an apartment when they found a firearm); *United States v. Naugle*, 997 F.2d 819, 823 (10th Cir. 1993) (finding requirement satisfied because "the gun was in the closet where the officer was permitted to be, and he did nothing more than reach out to the box containing the gun"). As previously discussed, Officer Koontz was lawfully present on Combs' driveway. He did not have to trespass or take any other prohibited action to access the van.

The incriminating nature of Combs' van was immediately apparent, and Officer Koontz lawfully viewed and could lawfully access the van. It is inconsequential that Officer Koontz did not order the tow. Although he could have towed the van, he was also investigating Combs' possible intoxication and was not required to put this investigation on hold. It was permissible for him to continue it and allow the other officers on the scene to handle the van.[9]

II. Once seized, the police lawfully inventoried Combs' van.

The search of a vehicle—like its seizure—must be lawful. *Wilford*, 50 N.E.3d at 374; *Fair v. State*, 627 N.E.2d 427, 435 (Ind. 1993). Inventory searches, as the name suggests, occur when police inventory the contents of a seized object, often a vehicle, and are "a well-recognized exception to the warrant requirement." *Taylor v. State*, 842 N.E.2d 327, 330 (Ind. 2006). They protect the vehicle's owner and the police by providing a record of the vehicle's contents. *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976); *Wilford*, 50 N.E.3d at 374.

[9] Of course, the outcome may have been different had Officer Koontz been the only officer on the scene, he left, and then other officers arrived to tow the van without a warrant. *See Middleton v. State*, 714 N.E.2d 1099, 1103 (Ind. 1999).

When police lawfully seize a vehicle—through either their community caretaking or criminal investigatory function—the ensuing inventory search "must be conducted pursuant to standard police procedures." *Fair*, 627 N.E.2d at 435. These "procedures must be rationally designed to meet the objectives that justify the search in the first place" while sufficiently limiting officer discretion. *Id.* (internal citation omitted). This ensures "the inventory is not a pretext 'for a general rummaging in order to discover incriminating evidence.'" *Id.* (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)). However, an "expectation of finding criminal evidence" does not invalidate an otherwise "lawful inventory search." *United States v. Lopez*, 547 F.3d 364, 372 (2d Cir. 2008); *see also United States v. Arrocha*, 713 F.3d 1159, 1164 (8th Cir. 2013); *United States v. Lumpkin*, 159 F.3d 983, 987 (6th Cir. 1998).

At the time of the seizure, the Lebanon Police Department's written, three-page tow policy allowed officers to impound vehicles "needed for evidence." Ex. Vol. VI, p.5.[10] When this occurred, officers were required to complete "a vehicle impound and inventory form" with "a complete inventory" before "releasing the vehicle to the towing service." *Id.*, p.6. And officers were required to open and inventory unlocked containers. This policy sufficiently regulated the towing and search of Combs' van. Its plain language made clear that the officers had to provide thorough information about impounded vehicles and all their contents, including unlocked containers like bags. And it did not leave their discretion unchecked. For example, it specifically prohibited opening and inventorying locked containers without consent or a warrant.

The officers followed the written policy. They conducted a thorough inventory and detailed their discoveries, including the pills, on the necessary form before towing the van. *Cf. Fair*, 627 N.E.2d at 436 (noting inventory was conducted by investigating officer who only focused on contraband, there was no evidence of completed formal inventory sheets,

[10] Although the policy was not admitted at trial, it was admitted at the suppression hearing, and the trial court granted Combs' request for an ongoing objection to the admission of evidence from the search of the van.

it was unclear the vehicle was actually impounded, and the policy was not sufficiently established). While the inventory was conducted on Combs' driveway, *see id.* (search conducted at crime scene was one indicia of pretext), the policy required an inventory before the van was released to the towing service, and it was reasonable for it to occur there.

The need to "guard against claims of theft, vandalism, or negligence," *Colorado v. Bertine*, 479 U.S. 367, 372–73 (1987), was heightened, as the van prominently advertised its use by a gold-buying business, indicating it might have contained valuables. And Combs had even informed the officers there was "a substantial amount of gold" in it. Tr. Vol. II, p.16. It is inconsequential that the officers turned over the black bag and its other contents—including gold jewelry—to Combs' wife. Their policy did not prevent them from ensuring these smaller, valuable items did not remain in the van. Their decision to take extra precautions was reasonable.

Although the officers anticipated finding contraband in the van, they did not search "in bad faith or for the **sole** purpose of investigation." *Bertine*, 479 U.S. at 372 (emphasis added). Their decision to impound the van as evidence, as explained above, was lawful, and their policy required an inventory. And they recognized the need to ensure the van's contents were documented, especially given the presence of valuables. Their inevitable partial investigatory motive did not invalidate an otherwise reasonable and lawful inventory search.[11] *See Lopez*, 547 F.3d at 372.

The police properly inventoried Combs' van pursuant to their department's thorough and reasonable policy, so the search was lawful.

[11] There was unfortunate testimony by Lieutenant Mount acknowledging he could have obtained a search warrant, but that doing so was "a pain in the ass." Tr. Vol. III, p.169. The coarseness of the assertion notwithstanding, the constitutional analysis remains unaffected. The question we answer today is not "Could police have secured a warrant?" but, rather, "Did they have to?" Indeed, the plain view exception is "justified by the realization that resort to a neutral magistrate under such circumstances would often be impracticable and would do little to promote the objectives of the Fourth Amendment." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

Conclusion

The seizure and search of Combs' van fell under recognized exceptions to the Fourth Amendment's warrant requirement. Thus, the police lawfully discovered the pills. The judgment of the trial court is affirmed.

Rush, C.J., and David, J., concur.
Slaughter, J., concurs in the judgment with separate opinion.
Goff, J., dissents with separate opinion.

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Slaughter, J., concurring in the judgment.

I agree that the trial court's judgment for the State should be affirmed. But I do so for different reasons than the Court. Rather than reach the merits of Combs's constitutional claims, I would hold that he waived those claims and thus did not satisfy his burden on appeal of establishing that the inventory search of his vehicle was illegal.

The Court holds, rightly, that Combs waived his state constitutional claim. *Ante*, at 5 n.3. I would go further and hold that he waived his Fourth Amendment claim, too. The entirety of his federal constitutional argument consisted of the following sentence: "This Court should reverse the trial court's order denying Defendant's Motion to Suppress based on the law and factual circumstances in this case, notwithstanding Lieutenant Mount's rationale that requesting a warrant is 'a pain in the ass.'"

By no plausible yardstick does this bare assertion amount to the "cogent reasoning" our rules require. Ind. Appellate Rule 46(A)(8)(a). Combs's undeveloped "argument", such as it is, neither identifies the governing legal standard nor explains how the factual record in this case satisfies that standard and entitles him to relief. Thus, I agree with the Court that the State is entitled to judgment. Though I do not quarrel with how the Court resolved the merits, I would not treat Combs's federal claim as preserved and worthy of merits review.

Applying waiver doctrine to parties' arguments is not a judicial "gotcha" aimed at unfairly trapping unwary litigants. Insisting that litigants develop their arguments serves two valuable purposes: fairness to opposing counsel and efficiency in judicial decision-making. Developed arguments allow adversaries to respond meaningfully to each other and allow courts to fully address issues without undue commitment of judicial resources. There are only so many hours in the day, and the time we spend on undeveloped arguments necessarily means less time for deciding claims by parties who followed the rules. We disserve opposing parties and our system of appellate review when we indulge litigants whose claims were barely raised or not raised at all.

Goff, J.

I respectfully dissent.

In this case, the Court finds that police may seize and inventory a van as an instrumentality of a class-B misdemeanor leaving the scene of an accident. But what need is there to seize the entire van when the driver admitted to the offense and when police thoroughly documented the structural damage to the van with photographs? In my opinion, there is none. Because the State failed to show that the van itself would prove useful in solving a crime, and because the Court's decision today will unnecessarily extend the government's reach into our private lives, I respectfully dissent.

I. The plain-view doctrine doesn't justify the police's seizure of the van.

The touchstone of the Fourth Amendment is reasonableness. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). And there's "no ready test for determining reasonableness other than by balancing the need to search or seize against the invasion which the search or seizure entails." *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (cleaned up). "The scheme of the Fourth Amendment becomes meaningful only when . . . the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in **light of the particular circumstances**." *Id*. (emphasis added).

Ordinarily, a seizure "carried out on a suspect's premises without a warrant is *per se* unreasonable." *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971). However, there are several "narrow and well-delineated exceptions" to this warrant requirement. *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (per curiam). Because Lieutenant Mount determined that it would be a "pain in the ass" to obtain a warrant to seize Combs's van, Tr. Vol. 3, p. 169, this Court can only affirm the admission of the evidence

obtained from the seizure if it fits within one of these narrow exceptions to the warrant requirement.

The Court finds that the seizure of the van was proper under the plain-view doctrine. As one of the narrow and well-delineated exceptions, the plain-view doctrine allows police to seize property without a warrant where (1) the police are lawfully present, (2) the "incriminating character" of the evidence is "immediately apparent," and (3) the police have a "lawful right of access to the object itself." *Horton v. California*, 496 U.S. 128, 136–37 (1990) (citations omitted).

I agree with the Court that the first and third elements of the plain-view exception are met in this case, but I cannot agree with its holding as to the "immediately apparent" prong. This prong requires police officers to "have probable cause to believe the evidence will prove useful in solving a crime." *Taylor v. State*, 659 N.E.2d 535, 538 (Ind. 1995). Of course, "this does not mean that the officer must 'know' that the item is evidence of criminal behavior." *Id.* at 539. Rather, it "requires only that the information available to the officer would lead a person of reasonable caution to believe the items could be useful as evidence of a crime." *Id.* In the end, "a practical, nontechnical probability that incriminating evidence is involved is all that is required." *Id.* (citation and quotation marks omitted). Given the particular circumstances at hand, including the government's need for the entire van and the degree of invasion the seizure entailed, I would not find the seizure reasonable.[1]

In this case, the officers were investigating the crime of leaving the scene of an accident, a class-B misdemeanor. *See* Ind. Code § 9-26-1-1.1(b) (2017). The officers could plainly see the damage (the evidence of the crime) on the exterior of the van and took photographs of that damage. No one testified that any aspect of the van aside from its exterior

[1] My goal in writing separately is not to hamstring police investigations, but rather to protect an important constitutional right. Our nation has a "strong preference" for warrants and the use of warrants "greatly reduces the perception of unlawful or intrusive police conduct." *Illinois v. Gates*, 462 U.S. 213, 236 (1983).

condition would be useful as evidence of the crime of leaving the scene of an accident.[2] What's more, Combs had already admitted to the accident and to leaving the scene. When police have sufficient photographic evidence of the crime, and where the suspect himself admitted to the offense, I question whether a person of reasonable caution would find seizure of the van itself as useful in proving the crime.[3] *Cf. Cardwell v. Lewis*, 417 U.S. 583, 591 (1974) (concluding that the prior impoundment of an automobile didn't render the examination of the exterior of the car, which could have been done on the spot, unreasonable).[4] As such, the need to seize the entire van was low. The degree of invasion, on the other hand, was high. Not only did the seizure lead the officers to rifle through the entire van while it was parked in Combs's driveway, it also deprived Combs and his family of a company car that was important to their livelihood. Considering these circumstances, I don't find the seizure reasonable.

Since the police didn't need the entire van as evidence, what explains the officers' decision to seize it? The testimony of Lieutenant Mount sheds some light on the decision. "It just so happened in this situation that **we started working another suspicion of whatever**," he stated, "we had leaving the scene." Tr. Vol. 2, p. 68 (emphasis added). Similarly, Officer Koontz testified that he decided to search the van "based on [the]

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[2] To be sure, Lieutenant Mount did testify that the police **could** seize the van because it was evidence of a crime. But when questioned as to what evidence the police hoped to obtain from the car, Lieutenant Mount merely referenced the pieces of the van that had been left at the scene of the accident.

[3] It bears noting that the basic leaving-the-scene-of-an-accident offense is a class-B misdemeanor. Ind. Code § 9-26-1-1.1(b) (2017). As such, the punishment cannot exceed a $1,000 fine and 180 days in jail. I.C. § 35-50-3-3.

[4] In *Cardwell v. Lewis*, the Supreme Court noted that "nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence." 417 U.S. 583, 591 (1974). "With the 'search' limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot," the high Court "fail[ed] to comprehend what expectation of privacy was infringed." *Id.*

information" provided by a witness that Combs had tried to hide something within the van. Tr. Vol. 3, p. 36. That something, of course, turned out to be the black bag containing drugs which elevated Combs's criminal activity from a minor traffic misdemeanor to a felony. And, because Combs rescinded his consent to search the vehicle when police asked to open the black bag, the officers either had to seize the van as evidence of leaving the scene or get a search warrant. Because the latter option, according to Lieutenant Mount, would have been a "pain in the ass," the officers pursued the former option.[5] Id. at 169. Indeed, the officers didn't decide to seize the van until after Combs had rescinded his consent to search the van.[6]

Beyond the consequences for Combs, the Court's decision today has larger implications for police search-and-seizure practices—practices which, in my opinion, will likely lead to further government intrusion into private lives. Under the Court's view, for example, a police officer could, without a warrant, seize an entire car after stopping an unlicensed eighteen-year-old who took his parent's car on a joy ride as evidence of violating our motor-vehicle laws. *See* I.C. § 9-24-18-1(a) (prohibiting driving a motor vehicle without a license). After all, police could recover evidence potentially useful in solving the crime, including fingerprints and DNA evidence on the driver's side seat, steering wheel, and gearshift. At least in that situation, the evidence would be located inside the car and would require an evidence technician to collect. Here, by contrast, all of

[5] Ordinarily, such a degree of law-enforcement candor is both laudable and appreciated by a court when reviewing a police investigation. Here, unfortunately, I must conclude that the officer simply allowed his personal convenience to trump the requirements of the Constitution. Had the officers taken the time to apply for a search warrant, it seems clear to me that it would have been granted. After all, Combs failed two field sobriety tests and his breathalyzer test was negative for alcohol. And, later that same day, tests performed at the hospital confirmed that Combs was positive for opiates.

[6] While several courts have held that when "a seizure of items in plain view is supported by probable cause, an inquiring court will not look behind that justification," *United States v. Sanchez*, 612 F.3d 1, 6 (1st Cir. 2010) (citing cases), I fail to see how a court can ignore a clear desire to obtain evidence unrelated to the crime at issue when it examines the reasonableness of a seizure in light of the particular circumstances of the case. The statements made by the officers in this case aren't dispositive of the issue, but where police have a clear ulterior motive, it does no service to the administration of justice to turn a blind eye.

the damage was clearly visible on the exterior of the car. And the photographs taken to document this damage were the **only** physical evidence admitted at trial. In fact, there's no evidence at all that police investigated the van any further after they had seized it and found the illegal drugs. And after only two days, they returned the van to Combs's father.

II. The evidence obtained from the inventory search was inadmissible.

Because I would find that the seizure of the van was unconstitutional, I would also find that the evidence obtained during the inventory search should have been excluded as fruit of the poisonous tree. The exclusionary rule excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights and any fruits of such evidence. *Alderman v. United States*, 394 U.S. 165, 171 (1969). "[W]hen an illegal search has come to light, [the State] has the burden of persuasion to show that its evidence is untainted." *Id.* at 183.

Here, the State didn't show that the discovery of the evidence fell under an exception to the exclusionary rule. And there is nothing to show that police derived the evidence from an independent source or that it was an inevitable discovery. *See Segura v. United States,* 468 U.S. 796, 805 (1984) (evidence obtained from an illegal search need not be excluded where it is also provided by an independent source); *Nix v. Williams,* 467 U.S. 431, 444 (1984) (evidence need not be excluded where its discovery was inevitable). Instead, the officers' discovery of the drugs and firearms was a direct result of the improper seizure of the van.

Finally, contrary to the Court's assertion, the inventory search was **not**, in fact, conducted in accordance with the Lebanon Police Department's Standard Operating Guidelines. Under those Guidelines, a vehicle may be towed if it "[i]s **needed** for evidence." Ex. Vol. 6, p. 5 (emphasis added). Even if the police had probable cause (which, admittedly, is a flexible concept) to believe the van would prove useful in solving the crime, any argument that it was "needed" for evidence strains credulity. In addition to photographic evidence of the van's damage, the police had multiple eyewitnesses who could identify the van by its distinctive markings. What's more, Combs himself admitted that he had an accident and left the scene. In my view, the van simply wasn't "needed" as evidence; rather,

the photographs and the admission from Combs were more than sufficient to convict him of leaving the scene of an accident.

Conclusion

The touchstone of the Fourth Amendment is reasonableness. Because I believe the seizure of Combs's van was unreasonable, and thus violated his Fourth Amendment rights, I would reverse his convictions for the three counts of possession of a narcotic drug and remand for further proceedings.

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IN THE
COURT OF APPEALS OF INDIANA

James W. Combs,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 9, 2020

Court of Appeals Case No. 19A-CR-1991

Appeal from the Boone Superior Court

The Honorable Bruce E. Petit, Judge

Trial Court Cause No. 06D02-1702-F3-134

Tavitas, Judge.

Case Summary

[1] James Combs appeals his convictions for Counts I, II, and III, possession of narcotic drugs, Level 3 felonies; Count V, operating a vehicle while intoxicated

endangering a person, a Class A misdemeanor; Count VI, operating a vehicle while intoxicated, a Class C misdemeanor; Count VII, operating a vehicle with a schedule I or II controlled substance or its metabolite in the body, a Class C misdemeanor; Count VIII, leaving the scene of an accident, a Class B misdemeanor; and Count IX, public intoxication, a Class B misdemeanor. We affirm in part, reverse in part, and remand.

Issues

[2] Combs raises six issues on appeal; however, we consolidate and restate the issues as follows:

I. Whether the trial court erred in admitting certain evidence.

II. Whether the trial court abused its discretion in failing to replace a juror with an alternate juror.

III. Whether the prosecutor committed misconduct.

IV. Whether the evidence is sufficient to sustain Combs' convictions.

Facts

[3] On February 11, 2017, Combs was driving his gold van when he swerved to avoid another vehicle and struck an electrical box in Lebanon. After the accident, Combs exited his vehicle and took photographs of the damage. Witnesses described Combs as "lethargic" and "quiet" at the scene of the accident. Tr. Vol. III p. 11. Witnesses also reported to law enforcement that

Combs looked for something under the driver's seat of the vehicle, was "rummaging around," and trying to "push things around." *Id.* at 13. Shortly thereafter, Combs left the scene.

[4] Officer James Koontz, a patrol officer with the Lebanon Police Department, responded to a dispatch call regarding the accident and arrived approximately two minutes later. Combs was not at the scene when Officer Koontz arrived. Witnesses directed Officer Koontz to a nearby neighborhood, to which Combs reportedly drove after the accident. Officer Koontz traveled to the neighborhood, where he observed a fluid trail and a damaged van.

[5] The van was parked in Combs' driveway and had a flat driver-side front tire; Officer Koontz observed that the fluid trail continued up the driveway to the van. Officer Koontz arrived as Combs stepped from the driver's seat of the van. Officer Koontz advised Combs to remove his hands from his pockets and asked if Combs had any weapons. Combs advised Officer Koontz he had three guns on his person, which Officer Koontz removed. Combs also stated that he intended to call the police about the accident.

[6] Officer Koontz requested Combs' identification. As Combs retrieved his identification from the van, Officer Koontz observed a knife in "the area between the two front seats." Tr. Vol. II p. 11. Officer Koontz asked Combs to step away from the van. As Officer Koontz questioned Combs about the accident, witnesses to the accident arrived at Combs' house. Officer Koontz

asked Combs for permission to search the van; however, Combs refused, unless Combs could hand Officer Koontz the items in the vehicle.

[7] During the conversation, Officer Koontz observed that Combs' eyes were glassy, Combs had pinpoint pupils, and Combs' speech was slowed. Officer Koontz did not detect any odors from Combs' breath; however, Officer Koontz became suspicious that Combs may be under the influence of medication or drugs. Accordingly, Officer Koontz proceeded with an investigation for operating while intoxicated. Several other officers arrived at the scene, including Lieutenant Rich Mount, with the Lebanon Police Department.

[8] Combs failed two of the field sobriety tests; however, a portable breath test was negative for alcohol. Officer Koontz asked if Combs took any prescription medication that day, and Combs advised that he took his prescribed Adderall medication. Officer Koontz read Combs the Indiana Implied Consent Law, and Combs agreed to submit to a chemical test.

[9] At some point after Combs was handcuffed to be transported for the chemical test,[1] but before Combs was taken to the hospital, Officer Koontz asked Combs if Officer Koontz could look under the front seat of his van. Combs initially consented to the officers looking under the front passenger seat of the van. The officers looked under the seat and found a black bag. Combs, however, told the

[1] At the hearing on the motion to suppress, Officer Koontz testified that he had detained Combs at this point; however, Combs was not under arrest.

officers that they could not look inside the bag. The officers then ended their search.

[10] As Officer Koontz transported Combs to the hospital for the chemical test, Lieutenant Mount telephoned the prosecutor's office from his vehicle. Lieutenant Mount remained with Combs' van to "figure out . . . what [officers] were gonna [sic] do with the [van]." *Id*. at 52. The officers learned that the van contained valuable items related to Combs' business.

[11] The officers called for the van to be towed, and an inventory search of the van was conducted while the van was still in the driveway. The inventory search yielded several personal items, including white pills in a clear bag,[2] and a prescription bottle belonging to Combs. The white pills were identified as Alprazolam, Hydrocodone, Oxycodone—all controlled substances. Some personal items collected from the van were turned over to Combs' wife at the scene. Two days later, Combs' van was also returned to his wife.

[12] Combs' urine drug screen revealed the presence of amphetamine, A-Hydroxyalprazolam, "which is a metabolite for Xanax," hydrocodone, oxycodone, and T.H.C. Tr. Vol. IV p. 66. The blood screen detected the presence of alprazolam and amphetamine.

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[2] The white pills were found in the small black bag under the driver's seat.

[13] On February 13, 2017, the State charged Combs with Counts I, II, and III, possession of narcotic drugs,[3] Level 3 felonies; Count IV, possession of a controlled substance, a Level 6 felony; Count V, operating a vehicle while intoxicated endangering a person, a Class A misdemeanor; Count VI, operating a vehicle while intoxicated, a Class C misdemeanor; Count VII, operating a vehicle with a schedule I or II controlled substance or its metabolite in the body, a Class C misdemeanor; Count VIII, leaving the scene of an accident, a Class B misdemeanor; and Count IX, public intoxication, a Class B misdemeanor.

[14] On May 10, 2017, Combs filed a motion to suppress all evidence obtained from the search of Combs' van, which he claimed violated his rights pursuant to the Fourth and Fifth Amendments of the United States Constitution and Article 1, Section 11 of the Indiana Constitution. On July 7, 2017, the trial court held a hearing on Combs' motion to suppress.

[15] At the hearing on the motion to suppress, Lieutenant Mount testified that he "was leaning towards towing [the van] as evidence because it was involved in the leaving the scene of a property damage accident," and police department policy allows impoundment when the vehicle is evidence of a crime.[4] Tr. Vol.

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[3] These charges were based on the white pills found in Combs' van: Count I was for possession of hydrocodone; Count II was for possession of 10 milligrams of oxycodone pills; and Count III was for possession of 7.5 milligrams of oxycodone pills. Count IV was for possession of Alprazolam; however, Combs was found not guilty of Count IV.

[4] The Lebanon Police Department's written policy for impound and inventory of vehicles was admitted as an exhibit at the motion to suppress hearing.

II p. 53. Lieutenant Mount then testified that officers were "definitely" going to arrest Combs for leaving the scene of a property damage accident after his blood draw at the hospital; therefore, officers began the process of impounding and inventorying the van. *Id.* at 67. When he was asked whether a less intrusive method was available to obtain the needed evidence, Lieutenant Mount testified that this procedure was "just [the department's] policy." *Id.* at 70.

[16] In closing arguments at the hearing on the motion to suppress, the State argued that the decision to impound Combs' van was "discretionary." *Id.* at 85. On August 9, 2017, the trial court issued an order denying Combs' motion to suppress. The trial court found that the officers had probable cause to believe the van was connected to criminal activity, and thus, could seize the van without a warrant.

[17] Combs filed a motion to reconsider on August 27, 2018. The trial court entered an order again denying Combs' motion to suppress and found as follows:

> This Court finds that in this case under consideration, the State did not rely on the automobile exception to enter onto Defendant's property and seize evidence as was prohibited in *Collins v. Virginia*[, __ U.S. __, 138 S. Ct. 1663 (2018)]. The officer first to arrive at Defendant's residence was in fresh pursuit of the Defendant and his arrival at Defendant's residence occurred at the same time the alleged crime was unfolding. These exigent circumstances allowed the officer to enter onto Defendant's property. Additionally, the officer had probable cause to believe the Defendant had violated I.C. 9-26-1-1.1[ ] and further, had the authority to arrest the Defendant on his property

> as a result. The obvious nature of Defendant's van as evidence of Leaving the Scene of an Accident allowed its seizure pursuant to the plain view doctrine. . . .

Appellant's App. Vol. II p. 115. Combs moved to certify the order for interlocutory appeal on September 26, 2018, which the trial court granted on September 28, 2018. Our Court denied jurisdiction over Combs' interlocutory appeal.

[18] At Combs' jury trial from May 14 to May 16, 2019, witnesses testified to the foregoing facts. Combs lodged a continuing objection to the evidence recovered from the van. At the trial, Lieutenant Mount again testified that law enforcement towed Combs' van as evidence of a crime. Lieutenant Mount testified that he did not obtain a warrant to search the van because obtaining a search warrant was "a pain in the a**." Tr. Vol. III p. 169. Also during his testimony, Lieutenant Mount acknowledged that Combs admitted his involvement in the accident; however, when pressed about why the van would need to be seized given Combs' admission, Lieutenant Mount testified that he was unsure and that Combs may have initially denied any involvement in the accident. The jury found Combs not guilty of Count IV, but guilty of the remaining counts. Combs now appeals.

Analysis

I. Admission of Evidence

[19] "The general admission of evidence at trial is a matter we leave to the discretion of the trial court." *See Clark v. State*, 994 N.E.2d 252, 259-60 (Ind. 2013). "We

review these determinations 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.* at 260.

A. Search of Combs' Vehicle

[20] Combs argues that his Fourth Amendment rights were violated when police searched his vehicle without a warrant.[5] Because Combs appeals from a completed jury trial rather than the denial of his motion to suppress, the issue is more appropriately framed as whether the trial court properly admitted the evidence at trial. *See Clark v. State*, 994 N.E.2d 252, 259 (Ind. 2013). We review the trial court's conclusions on the admission of evidence for an abuse of discretion. *See id.* at 260. "However, when a challenge to an evidentiary ruling is predicated on the constitutionality of a search or seizure of evidence, it raises a question of law that is reviewed de novo." *Curry v. State, 90 N.E.3d 677, 683 (Ind. Ct. App. 2017), trans. denied* (citations omitted). "The State has the burden to demonstrate that the measures it used to seize information or evidence were constitutional." *Id.*

[21] The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures by prohibiting them without a

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[5] Combs also argued in his motion to suppress that the search was improper under Article 1, Section 11 of the Indiana Constitution. Combs, however, does not articulate an Indiana Constitution argument in his brief as required. *See Abel v. State,* 773 N.E.2d 276, 278 n.1 (Ind. 2002) ("Because Abel presents no authority or independent analysis supporting a separate standard under the state constitution, any state constitutional claim is waived."). Accordingly, we agree with the State that this argument is waived. *See* Ind. Appellate Rule 46(A).

warrant supported by probable cause. U.S. Const. amend. IV. "The fundamental purpose of the Fourth Amendment to the United States Constitution is to protect the legitimate expectations of privacy that citizens possess in their persons, their homes, and their belongings." *Taylor v. State*, 842 N.E.2d 327, 330 (Ind. 2006). This protection has been "extended to the states through the Fourteenth Amendment." *Bradley v. State*, 54 N.E.3d 996, 999 (Ind. 2016). "As a deterrent mechanism, evidence obtained in violation of this rule is generally not admissible in a prosecution against the victim of the unlawful search or seizure absent evidence of a recognized exception." *Clark*, 994 N.E.2d at 260.

[22] The State argues that the officers lawfully viewed Combs' van without conducting a search under the Fourth Amendment and, therefore, the seizure of Combs' van was valid under the open view doctrine as evidence of a crime.[6] This argument diverges from the trial court's order,[7] which allowed seizure of the vehicle under the *plain view* doctrine rather than the *open view* doctrine.

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[6] The State also argues that Combs waived this argument by failure to raise a cogent argument in his briefs. Combs' substantive analysis on this issue spans one sentence. We, however, will address the issue because, although appellant's brief was severely lacking, the arguments made at trial and in the motion to suppress on this issue are sufficient for us to conduct a meaningful review. Although we address this issue, we again instruct counsel to review Indiana Appellate Rule 46, specifically, the requirement for cogent arguments.

[7] We note that the State has advanced several theories for the search of the vehicle, and the trial court denied the suppression of the evidence on varying theories. Specifically, Lieutenant Mount initially testified that "he was leaning toward towing [the van] as evidence of a crime and that the subsequent inventory search was done pursuant to policy, tr. vol. II p. 53; however, Lieutenant Mount also testified that the officers decided what they were going to do with the vehicle once they arrested Combs, which implies that the search was incident to arrest. At the hearing on the motion to suppress, the State argued the seizure was a discretionary

> Often confused with the plain view doctrine is the concept of 'open view,' which is used in situations in which a law enforcement officer sees contraband from an area that is not constitutionally protected, but rather is in a place where the officer is lawfully entitled to be. In such situations, anything that is within 'open view' may be observed without having to obtain a search warrant because making such 'open view' observations does not constitute a search in the constitutional sense. Nonetheless, in order to lawfully seize items in 'open view,' it may be necessary to obtain a search warrant or be able to justify a warrantless seizure under an exception to the warrant requirement.

McAnalley v. State, 134 N.E.3d 488, 501 (Ind. Ct. App. 2019), *trans. denied*.

[23] In *Houser v. State,* 678 N.E.2d 95, 101 (Ind. 1997), our Supreme Court held that a warrant is not required to seize incriminating evidence under the plain view doctrine

> if the following conditions are met: (1) police have a legal right to be at the place from which the evidence can be plainly viewed; (2) the incriminating character of the evidence is immediately apparent; and (3) police have a lawful right of access to the object itself.

Houser, 678 N.E.2d at 101. "The immediately apparent prong of the doctrine requires that the officer have probable cause to believe the evidence will prove useful in solving a crime." *Wilkinson v. State*, 70 N.E.3d 392, 402 (Ind. Ct. App.

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impound. The trial court denied Combs' motion to suppress, then denied Combs' motion to reconsider and found the State did not rely on the automobile exception, but instead, the plain view doctrine. On appeal, the State argues only that the open view doctrine applies.

2017) (quotations omitted). "Probable cause requires only that the information available to the officer would lead a person of reasonable caution to believe the items could be useful as evidence of a crime. A practical, nontechnical probability that incriminating evidence is involved is all that is required."[8] *Taylor v. State*, 659 N.E.2d 535, 539 (Ind. 1995) (quotations and citations omitted).

[24] We do not find the open view or plain view doctrines to be operable here. It is clear from the record that the towing and impound search of the vehicle were merely pretextual means by which officers could search the vehicle to find incriminating evidence.

[25] Witnesses reported to officers that Combs looked for something under his seat, and Officer Koontz asked to search the vehicle early in his investigation. Combs declined to consent. The vehicle was parked in Combs' driveway, and officers had time to procure a warrant before searching the vehicle, but they declined to do so due to the inconvenience. At the hearing on the motion to suppress, Lieutenant Mount initially testified that the officers seized the vehicle as evidence of a crime. Photographs of the vehicle, however, were not admitted into evidence at trial, and the record reveals that the vehicle was returned to Combs' wife two days after it was towed from Combs' driveway.

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[8] We observe that the State's argument and the cases the State cites discuss probable cause in the context of the open view doctrine and not the automobile exception. Accordingly, we will focus on this area of probable cause in our opinion as well.

[26] Combs admitted that he was going to contact law enforcement regarding the accident; therefore, it is not clear why the officers needed the van to solve the crime. The State presented no evidence that the van would "prove useful in solving" the investigations into the charges of leaving the scene of an accident or driving while intoxicated. *Wilkinson,* 70 N.E.3d at 402. The damage was on the outside of the vehicle and photographs of the vehicle could have preserved the evidence. Nothing in the record indicates that the officers had probable cause to believe the van contained evidence that was related to the offenses being investigated.

[27] The record supports the finding that the officers' inventory search was a pretext for searching Combs' van.[9] *See Fair,* 627 N.E.2d at 436 (finding the inventory search at issue "presents several indicia of pretext which raise a question about whether it was conducted in good faith"); *see also Sams v. State,* 71 N.E.3d 372, 382 (Ind. Ct. App. 2017) (finding that a search is "pretextual and therefore unreasonable" when "any administrative benefits of the officers' inventory search were incidental to the investigative benefits when the law required the opposite"); *see cf. Widduck v. State,* 861 N.E.2d 1267, 1271 (Ind. Ct. App. 2007) (finding that the inventory search was reasonable under the Fourth Amendment, in part, because "the record before [the court was] devoid of any indicia of pretext or subterfuge for general rummaging"). Here, we find indicia

[9] The fact that the State admitted as an exhibit at the motion to suppress hearing the police department policy regarding impoundment of vehicles and the subsequent inventory searches does not overcome the pretextual facts we observe in this record.

of pretext to search Combs' vehicle for incriminating evidence; accordingly, the search was unreasonable. We conclude that the search of Combs' vehicle was impermissible under the open view and plain view doctrines and the Fourth Amendment.

[28] In considering the admissibility of evidence obtained from an illegal search, we must consider the fruit of the poisonous tree doctrine.

> The fruit of the poisonous tree doctrine bars the admission of evidence "directly obtained by [an] illegal search or seizure as well as evidence derivatively gained as a result of information learned or leads obtained during that same search or seizure." To invoke the doctrine, a defendant must first prove a Fourth Amendment violation and then must show the evidence was a "fruit" of the illegal search. But the exclusion of evidence is not the result of a simple "but for" test. The doctrine has no application where (1) "evidence [is] initially discovered during, or as a consequence of, an unlawful search, but [is] later obtained independently from activities untainted by the initial illegality," . . . ; (2) "the information ultimately or inevitably would have been discovered by lawful means," . . . or (3) "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint,' . . . The burden is on the State to prove one of these exceptions applies.

Ogburn v. State, 53 N.E.3d 464, 475 (Ind. Ct. App. 2016) (quotations and citations omitted), *trans. denied.*

[29] Here, the discovery of the evidence obtained from the vehicle was a direct result of the pretextual and illegal search of Combs' van. There is also no indication that the evidence from the van could have been obtained in another way.

Moreover, the connection between the search and the evidence is not attenuated to such a point that we could conclude it is no longer tainted. *See also Wright v. State,* 108 N.E.3d 307, 315 (Ind. 2018) (holding that the Fourth Amendment requires that "the objected-to-evidence will be excluded as fruit of the poisonous tree if police obtained it by exploiting the primary illegality").[10]

[30] The officers violated Combs' Fourth Amendment rights by searching his vehicle without a warrant, and the evidence obtained from the search was fruit of the poisonous tree. Specifically, the pills found in Combs' vehicle should not have been admitted at trial. Those pills formed the basis for Combs' convictions for Counts I, II, and III. Accordingly, we reverse Combs' convictions for Counts I, II, and III, and we remand for proceedings consistent with our opinion.

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[10] For the reasons discussed above, we also conclude that impoundment of the vehicle would have been invalid. Law enforcement may have authority to impound a vehicle either through statute or law enforcement's community caretaking function. *Wilford v. State,* 50 N.E.3d 371, 375 (Ind. 2016). Our Supreme Court:

> [has] set forth a strict two-prong standard for proving that the decision to impound a person's vehicle without a warrant was reasonable:
>
> > (1) Consistent with objective standards of sound policing, an officer must believe the vehicle poses a threat of harm to the community or is itself imperiled; and
> >
> > (2) The officer's decision to impound adhered to established departmental routine or regulation.

Id. at 375-76 (quoting *Fair v. State,* 627 N.E.2d 427, 433 (Ind. 1993)). Combs' vehicle, parked in his driveway, would not have posed a threat of harm to the community; nor was the vehicle itself imperiled. *See Fair,* 627 N.E.2d at 435 (concluding that impounding the defendant's vehicle was improper even when the vehicle was not parked at the defendant's home, but "the permissibility of it remaining at the complex was in the hands of his acquaintances").

B. Chemical Test Results

[31] Next, Combs argues that the trial court abused its discretion in admitting the certified chemical results pursuant to Indiana Code Section 9-30-6-6(a) because the State was unable to prove that the person who drew blood from Combs acted under the direction of or under a protocol prepared by a physician. Indiana Code Section 9-30-6-6(a) states:

> (a) A physician, a person trained in retrieving contraband or obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician, or a licensed health care professional acting within the professional's scope of practice and under the direction of or under a protocol prepared by a physician, who:
>
> > (1) obtains a blood, urine, or other bodily substance sample from a person, regardless of whether the sample is taken for diagnostic purposes or at the request of a law enforcement officer under this section;
> >
> > (2) performs a chemical test on blood, urine, or other bodily substance obtained from a person; or
> >
> > (3) searches for or retrieves contraband from the body cavity of an individual;
>
> shall deliver the sample or contraband or disclose the results of the test to a law enforcement officer who requests the sample, contraband, or results as a part of a criminal investigation. Samples, contraband, and test results shall be provided to a law enforcement officer even if the person has not consented to or otherwise authorized their release.

[32] First, we agree with the State that Combs has waived this issue because he did not raise non-compliance with Indiana Code Section 9-30-6-6(a) below. *See Shorter v. State,* 144 N.E.3d 829, 841 (Ind. Ct. App. 2020) (quoting *Washington v. State,* 808 N.E.2d 617, 625 (Ind. 2004)) (concluding that failure to raise an argument in the trial court constituted waiver on appeal because "'a trial court cannot be found to have erred as to an issue or argument that it never had an opportunity to consider'"). Waiver notwithstanding, Tiffany Long, a lab phlebotomist at Witham Health Services, who conducted Combs' blood draw, testified that she followed a specific protocol required for blood draws, and that the procedure, therefore, was approved by a physician.[11] Long then testified in detail about the process, which included inverting the tubes of blood, labeling the samples, placing the samples in a biohazard bag, taping the bags shut, and placing them in a lock box. The trial court did not abuse its discretion in admitting the evidence of the chemical blood draw.

II. Request to replace juror

[33] Combs next argues the trial court erred in refusing his request to replace a juror after the juror disclosed, after the trial began, that he knew one of the State's witnesses. "Trial courts have broad discretion in deciding whether to remove and replace a juror *before* deliberations have begun and, in such circumstances,

[11] The name of the physician who approved the procedure was not given at trial.

we reverse only for an abuse of discretion." *Durden v. State,* 99 N.E.3d 645, 650 (Ind. 2018) (citations omitted).

[34] During the State's case-in-chief, the trial court was advised that a juror formerly worked at a pharmacy that Lieutenant Mount frequented. The juror did not initially recognize Lieutenant Mount's name on the witness list during voir dire. When questioned about the nature of the juror's relationship to Lieutenant Mount, the juror stated that: (1) he and Lieutenant Mount did not have a social relationship; (2) the juror was no longer in contact with Lieutenant Mount; but (3) the juror thought positively of Lieutenant Mount. The juror told the trial court that the juror could consider the "big picture" of all the evidence in reaching a result in the case. Tr. Vol. III p. 68. Combs requested that the juror be replaced by an alternate juror, which the trial court denied.

[35] We cannot say the trial court abused its discretion. The juror advised the trial court his familiarity with Lieutenant Mount would not prevent him from considering and weighing the evidence independently. Moreover, the juror knew Lieutenant Mount professionally, not socially, and the two were no longer in contact. Accordingly, the trial court did not abuse its discretion in declining to replace the juror with an alternate juror.

III. Prosecutorial Misconduct

[36] Combs argues the prosecutor committed misconduct by improperly shifting the State's burden of proof at trial to Combs regarding certain evidence.[12] During the defense's case-in-chief, Vicki Combs ("Vicki"), Combs' wife, testified that the pills belonged to Vicki's family members and that Vicki's family members had prescriptions for the pills. During Vicki's testimony, the following colloquy occurred on cross-examination:

> [DEPUTY PROSECUTOR]: And of course this happened about two and a half (2-1/2) years ago, right?
>
> [VICKI]: Correct.
>
> [DEPUTY PROSECUTOR]: Alright. And it is your testimony today that the pills found in the bag belonged to your, and I apologize, grandmother?
>
> [VICKI]: My mother, grandmother, father, they were a culmination of, of all that she [sic] was finding at the house.
>
> [DEPUTY PROSECUTOR]: So you [have] had two and a half (2-1/2) years to perhaps get some prescription records for your mother, grandmother, is that right?
>
> [COMBS' COUNSEL]: Objection Judge. May we approach?

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[12] We observe that this issue is likely a moot point on remand as we have decided that admission of items in the van, which includes the pills, was improper.

Tr. Vol. IV p. 174. Combs objected on the grounds that this question left the jury with the belief "that the defense had a duty to produce exculpatory evidence, instead of the true requirement that the jury must find that the State themselves produced sufficient evidence" to support Combs' convictions. Appellant's Br. p. 27. The trial court sustained Combs' objection insofar as how the State asked the question, i.e., why Vicki did or did not produce any documentation to support her claim that the pills belonged to her family members; however, the trial court allowed the State to ask Vicki whether she produced such documentation.

[37] When reviewing a claim of prosecutorial misconduct, we must determine whether the prosecutor: (1) engaged in misconduct that, (2) under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been otherwise subjected. *Ryan v. State,* 9 N.E.3d 663, 667 (Ind. 2014); *see also Nichols v. State,* 974 N.E.2d 531, 535 (Ind. Ct. App. 2012). "'Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct.'" *Nichols,* 974 N.E.2d at 535 (quoting *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006)). We measure the weight of the peril by the probable persuasive effect of the misconduct on the jury rather than the degree of impropriety of the conduct. *Id.*

[38] We are not persuaded that the State's question resulted in improper burden-shifting. As the State articulates in its brief, the deputy prosecutor's question was "aimed at illuminating the suspicious timing of [Vicki's] claims of

Defendant's innocence and was relevant to the jury's assessment of her credibility." Appellee's Br. p. 42. Moreover, as the State also argues, the final jury instructions explained the State's burden to prove each element of the crime beyond a reasonable doubt. Based on the record before us, Combs has failed to demonstrate that the deputy prosecutor committed misconduct.

IV. Insufficiency of Evidence

[39] Combs argues the evidence is insufficient to support his convictions for operating while intoxicated and leaving the scene of a property damage accident. When a challenge to the sufficiency of the evidence is raised, "[w]e neither reweigh evidence nor judge witness credibility." *Gibson v. State,* 51 N.E.3d 204, 210 (Ind. 2016) (citing *Bieghler v. State,* 481 N.E.2d 78, 84 (Ind. 1985), *cert. denied*), *cert. denied.* Instead, "we 'consider only that evidence most favorable to the judgment together with all reasonable inferences drawn therefrom.'" *Id.* (quoting *Bieghler,* 481 N.E.2d at 84). "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.*; *see also McCallister v. State,* 91 N.E.3d 554, 558 (Ind. 2018) (holding that, even though there was conflicting evidence, it was "beside the point" because that argument "misapprehend[s] our limited role as a reviewing court"). "We 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) (citing *Drane v. State,* 867 N.E.2d 144, 146 (Ind. 2007)).

A. Operating While Intoxicated

[40] Pursuant to Indiana Code Section 9-30-5-2(b), "a person who operates a vehicle while intoxicated," commits operating a vehicle while intoxicated. If the operation is done "in a manner that endangers a person," the offense is a Class A misdemeanor. Ind. Code § 9-30-5-2(b). Combs argues the evidence was insufficient that: (1) Combs was the driver of the vehicle; and (2) intoxication occurred contemporaneously with his operation of the vehicle.

[41] Regarding Combs' first argument, the State provided sufficient evidence that Combs operated the vehicle. One of the witnesses to the accident testified that the driver who left the scene of the accident was the same person she later observed speaking with the police in Combs' driveway. *See* Tr. Vol. III p. 12.[13] Moreover, moments after the accident was reported, Officer Koontz observed Combs exit the driver's side of the vehicle. According to the officers, Combs claimed he intended to call the police to report the accident, which supports the inference that Combs was the driver. The evidence was sufficient to prove that Combs operated the van.

[42] In addition, the evidence also supported the finding that Combs operated the van while intoxicated. Officer Koontz identified Combs' pinpoint pupils, slow speech, and glassy eyes. Combs failed two field sobriety tests. The blood and urine tests administered shortly after Combs drove the vehicle revealed positive

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[13] The witness did not identify Combs in the courtroom; however, the witness was clear that the person she saw at the scene of the accident was the same person she saw speaking with the police in Combs' driveway.

results for controlled substances. Dr. Sheila Arnold, a forensic toxicologist with the Indiana State Department of Toxicology, testified that the concentrations of substances found in Combs' system "were consistent with the impairment observed by the officer." Tr. Vol. IV p. 113. Specifically, Dr. Arnold testified that pinpoint pupils are a "classic indicator" of opioids in an individual's system. *Id.* at 120.

[43] Combs' arguments that: (1) we cannot determine the precise time of intoxication; and (2) Combs could not have been intoxicated because he was able to avoid an accident with another vehicle, are merely requests for us to reweigh evidence, which we cannot do. *See Gibson,* 51 N.E.3d at 210. The evidence was sufficient to find Combs guilty of operating while intoxicated.

B. Leaving the Scene of an Accident

[44] Combs next argues that the evidence was insufficient to support Combs' conviction for leaving the scene of an accident. Combs was charged under Indiana Code Sections 9-26-1-1.1(a)(4) and (b).

> (a) The operator of a motor vehicle involved in an accident shall do the following:
>
> > (1) Except as provided in section 1.2 of this chapter, the operator shall immediately stop the operator's motor vehicle:
> >
> > > (A) at the scene of the accident; or
> >
> > > (B) as close to the accident as possible;

in a manner that does not obstruct traffic more than is necessary.

(2) Remain at the scene of the accident until the operator does the following:

> (A) Gives the operator's name and address and the registration number of the motor vehicle the operator was driving to any person involved in the accident.
>
> (B) Exhibits the operator's driver's license to any person involved in the accident or occupant of or any person attending to any vehicle involved in the accident.

* * * * *

(4) If the accident involves a collision with an unattended vehicle or damage to property other than a vehicle, the operator shall, in addition to the requirements of subdivisions (1) and (2):

> (A) take reasonable steps to locate and notify the owner or person in charge of the damaged vehicle or property of the damage; and
>
> (B) if after reasonable inquiry the operator cannot find the owner or person in charge of the damaged vehicle or property, the operator must contact a law enforcement officer or agency and provide the information required by this section.

> (b) An operator of a motor vehicle who knowingly or intentionally fails to comply with subsection (a) commits leaving the scene of an accident, a Class B misdemeanor.

Ind. Code § 9-26-1-1.1. Combs argues that the statute did not require Combs to stay at the scene of the accident to determine the owner of the property and/or contact law enforcement.

[45] "When interpreting a statute, our primary goal is to fulfill the legislature's intent." *Day v. State,* 57 N.E.3d 809, 813 (Ind. 2016). The best evidence of the legislature's intent is the statute's language. *See id.* "If that language is clear and unambiguous, we simply apply its plain and ordinary meaning, heeding both what it does say and what it does not say." *Id.* (quotations omitted).

[46] Here, the statute contemplates what a person must do, under Indiana Code Section 9-26-1-1.1(a)(4), when a driver is in an accident that results in property damage. That subsection of the statute specifically states the requirements are *in addition to* the mandate of Indiana Code Section 9-26-1-1.1(a)(2), under which a driver must remain at the scene of an accident. The statute does not provide that, in the event of property damage, a person may drive away and call law enforcement at a later, more convenient time. Accordingly, the statute required Combs to determine the owner of the property or contact law enforcement at the scene of the accident.

[47] Sufficient evidence supports Combs' conviction for leaving the scene of an accident. Witness testimony revealed that Combs hit the electrical box, got out

of his vehicle, took photographs with his phone, drove away from the scene, and went home. Accordingly, the evidence was sufficient to convict Combs of leaving the scene of an accident, a Class B misdemeanor.

Conclusion

[48] The warrantless search of Combs' vehicle violated his Fourth Amendment rights; therefore, evidence found as a result of the illegal search should have been excluded. Accordingly, we reverse Combs' convictions for Counts I, II, and III, and remand for proceedings consistent with this opinion. The trial court, however, did not abuse its discretion in admitting the results of Combs' chemical blood test or in failing to replace a juror with the alternate juror. The deputy prosecutor did not commit misconduct, and the evidence was sufficient to convict Combs of leaving the scene of an accident and operating a vehicle while intoxicated. Accordingly, we affirm in part, reverse in part, and remand for proceedings consistent with our opinion.

[49] Affirmed in part, reversed in part, and remanded.

Riley, J., and Mathias, J., concur.

STATE OF INDIANA)
) SS:
COUNTY OF BOONE)

IN THE BOONE SUPERIOR COURT II

CAUSE NO. 06D02-1702-F3-134

STATE OF INDIANA,)
Plaintiff,)
)
vs)
)
JAMES W. COMBS JR.,)
Defendant.)

FILED

AUG 09 2017

Jessica J. Fouts

CLERK BOONE SUPERIOR COURT II

ORDER ON HEARING HELD JULY 7th, 2017

On July 7th, 2017, hearing was held on Defendant's Motion to Dismiss and Motion to Suppress. The State of Indiana appeared by Deputy Prosecutor Erica Dobbs. The Defendant, James W. Combs Jr., appeared in person and by counsel, M. Slaimon Ayoubi. An exhibit was admitted into evidence, sworn testimony and arguments heard. The Court having earlier taken this matter under advisement, now FINDS and ORDERS as follows:

FACTS

1. On February 11th, 2017, in the afternoon hours, Officer James Koontz, of the Lebanon Police Department, was on routine patrol in uniform and driving his marked police cruiser. Officer Koontz received a dispatch for an accident occurring the 1300th block of Lafayette Avenue, Lebanon, Boone County, Indiana. A few seconds later, there was a follow-up report that the individual involved in this accident was attempting to leave the scene.

2. Officer Koontz arrived at the scene of the accident several minutes later. The accident was at the city street department located at 1301 N. Lafayette Avenue. Upon his arrival, Officer Koontz observed a cable box with significant damage.

Witnesses that had gathered at the scene advised Officer Koontz that the person involved in this accident was driving a gold van and had left the scene heading towards the direction of the Clear Vista neighborhood. After turning into Clear Vista neighborhood, Officer Koontz encountered a family on the sidewalk pointing down the street indicating the course of the van. Officer Koontz was also able to follow a fluid trail from the accident scene to a gold van parked in the drive of a home, later identified as Defendant's house. This van matched the general description given by the witnesses at the accident scene and had significant damage to the front of the van, a flat tire and was leaking fluid.

3. Officer Koontz observed a male exiting the van who he identified in open court as the Defendant. The officer began his investigation of this accident and had discussion with Defendant. The Defendant went back to his van accompanied by the officer to retrieve his identification which was located in a leather bag. When Defendant was retrieving his identification, the officer observed two knives in the bag. Defendant also advised the officer that he had three (3) pistols, which the Defendant allowed the officer to secure during this investigation.

4. As the officer was discussing this incident with the Defendant, witnesses showed up at the Defendant's home and gave voluntary statements as to what they observed. Officer Koontz was speaking to the Defendant about the accident when he observed that the Defendant had glassy eyes and slow speech and believed the Defendant may be under the influence of some medication. The officer did not observe any odor of alcohol. Witnesses also advised the officer that Defendant's speech was slurred at the scene of the accident.

5. Based upon these observations, Officer Koontz initiated an investigation for Operating a Vehicle While Intoxicated along with the investigation of the accident. Officer Koontz asked Defendant to perform standard filed sobriety tests and determined that the Defendant failed the horizontal gaze nystagmus test and walk and turn test, but passed the one leg stand test. It was brought out in cross examination that the Officer made a clerical error when filling out his probable cause affidavit and mistakenly indicated that the Defendant passed horizontal gaze nystagmus and walk and turn, but failed the one leg stand. The Officer reiterated the correct observations of those tests in Court. At one point during this investigation, the Defendant advised the officer that there was a substantial amount of gold in his van. The side of the van also indicated that it was used in the business of buying and selling gold. This further supported the possibility that there might have been valuable cargo in the van. Officer Koontz then testified that he wanted to search the van, but after having been given limited permission by the Defendant, the officer was told to stop any further search, with which he complied.

6. On cross examination, counsel for Defendant established that when the accident occurred, the Defendant did get out of his van and took pictures of the damaged cable box before leaving. However, this Court heard no other testimony as to what steps Defendant took to determine the owner of the damaged property or leave any identification with any persons present at that scene. Counsel also went into detail as to what may have been the cause of the accident, suggesting that the accident may have been a result of negligence by the driver directly in front of Defendant's van, which required the Defendant to take evasive maneuvers to avoid hitting that vehicle. The Court will not go into the details brought out regarding

causation of the accident because for purposes of this ruling, causation is not relevant.

7. After administering field sobriety tests, Officer Koontz determined that he had probable cause to read Defendant implied consent and then transported the Defendant for a chemical test. Officer Koontz did not have any further involvement with the on-scene investigation of the accident or Defendant's van. Lieutenant Rich Mount, Lebanon Police Department, arrived at the scene soon after Officer Koontz and supervised the remainder of Lebanon Police Department's investigation. Lieutenant Mount testified that it was his decision to tow the Defendant's van from the scene because the van was evidence involved in a possible crime and law enforcement would need to process the van in furtherance of their investigation. Lieutenant Mount also testified that he had several communications with the Deputy Prosecuting Attorney on call during this investigation to determine what their options were and was advised to follow standard Lebanon Police Department procedures.

8. State's Exhibit 1, a copy of Lebanon Police Department's standard operating guidelines reflecting vehicle towing policy was admitted into evidence over Defendant's objection. Lieutenant Mount testified that he and the other assisting officers complied with these guidelines in towing and inventorying the Defendant's vehicle. Specifically, Lieutenant Mount personally observed the officers as they inventoried the vehicle and confirmed that they followed department policy completely. Lieutenant Mount further testified that they were authorized to tow this vehicle under guideline 31.1A.6. authorized towing when the vehicle is needed for evidence. Officer Mount indicated that this was the authority he relied upon in authorizing the towing. Officer Mount also stated that an inventory search of this van

was necessary prior to towing to protect the Defendant's valuables and also, protect Lebanon Police Department from any liability for lost valuables. This was especially necessary in light of the nature of markings on the side of the van and the verbal indication from the Defendant that gold of a significant value was located in the van. All items discovered in the van were recorded on a paper and also documented as to their location in the van. This inventory occurred while the van remained in Defendant's driveway. The items sought to be suppressed by Defendant were discovered during this inventory.

9. On cross examination, Lieutenant Mount confirmed that he was impounding the vehicle as evidence consistent with the Lebanon Police Department's policies. This procedure would afford a crime scene technician the opportunity to process the van in connection with the Leaving the Scene of an Accident investigation. This could include matching pieces of the van found at the accident scene with this vehicle and also processing the interior for forensic evidence.

10. The Defendant's wife, Vickie Combs, testified that she arrived home while officers were there conducting their investigation. She heard the officers talking about obtaining a search warrant and assumed that they were getting one. She did observe the officers enter into the van and search it approximately two hours after she arrived home.

ANALYSIS

11. Officer Koontz's initial contact with the Defendant came as a result of his investigation of the report of Leaving the Scene of an Accident in violation of I.C. 9-26-1-1. Through information provided by eye witnesses and by physical evidence

from the accident scene, Officer Koontz came upon the Defendant as he was exiting his gold van parked in the driveway of his residence. The van had obvious damage to the front, a flat tire and was leaking fluid. These facts were consistent with the information provided to the officer by witnesses. Office Koontz had every right and authority to approach the Defendant and ask him questions about the accident, *State v. Hicks*, 822 NE 2d 238 (Ind. Ct. App. 2000). Officer Koontz also had reasonable suspicion that there may be criminal activity afoot based upon the totality of circumstances which also allowed him to conduct a brief investigation with the Defendant, *Terry v. Ohio*, 392 US 1 (1968); *Hardister v. State*, 849 NE 2d 563 (Ind. 2006). Through cross examination, Defense counsel attempted to interject information concerning the cause of the accident and also called into question whether law enforcement knew whether the Defendant intended to call the accident in at some future time. Those factors are irrelevant to the Court's analysis for purposed of this Motion to Suppress. The Court must look at what the officers knew at the time of this contact along with reasonable inferences arising from those facts, to determine if reasonable suspicion exists, *Baldwin v. Reagan,* 715 NE 2d 332 (Ind. 1999); *Campos v. State,* 885 NE 2d 590 (Ind. 2008). This Court finds that Officer Koontz had reasonable suspicion to conduct further investigation of the Defendant for leaving the scene of an accident.

12. When talking with the Defendant, Officer Koontz observed glassy eyes and slow speech, which indicated to him that the Defendant may be under the influence of some substance. This allowed the officer to continue his investigation by offering standard field sobriety tests to which the Defendant agreed to perform. The officer testified that in his opinion, the Defendant failed two out of three of those

tests performed. Implied consent was properly offered and the Defendant was legally taken into custody for a chemical test. This Court further finds that when to took the Defendant into custody the officer had probable cause to believe the Defendant committed Leaving the Scene of an Accident, a Class B Misdemeanor in violation of I.C. 9-26-1-1. Given the witnesses statements, the physical evidence of the van located in Defendant's driveway, the investigating officers had sufficient evidence to believe that the statute may have been violated. I.C. 9-26-1-1 requires that a person involved in an accident stop and remain at the scene until information delineated in that statute is provided. The statute goes on to require that "if the accident involves... damage to property other than a vehicle, the operator shall, in addition to the requirements of subdivision (1)" (emphasis added), notify county sheriff's department or the Indiana State Police. This Court heard no evidence that the Defendant made any attempt to locate the owner of this damaged property and leave the required information. Rather, the evidence showed that Defendant merely stopped and took pictures of the damaged property and left the scene. Given this information, Officer Koontz unquestionably had probable cause to arrest the Defendant for leaving the scene of an accident in violation of I.C. 9-26-1-1 and pursuant to I.C. 35-41-1-17.

13. The Court will now address the propriety of the inventory search conducted on Defendant's van. The first issue the Court must determine is whether the van was properly impounded. Defendant's van was located in his driveway in full view from the street and areas open to the public. This was an area that law enforcement had a right to be and, as such, observations of Defendant's van did not constitute a search pursuant to the "open view" doctrine. *Justice v. State*, 765 NE

2d 161 (Ind. 2002); *Danner v. State*, 931 NE 2d 421 (Ind. Ct. App. 2010); *Sayer v. State*, 471 NE 2d 702 (Ind. Ct. App. 1984). If the officers had probable cause to believe that the property (in this case, the van) was connected to criminal activity, then it may be seized without a warrant. *Clark v State*, 6 NE 3d 992 (Ind. Ct. App. 2014); *Cochran v. State*, 429 NE 2d 672 (Ind. Ct. App. 1981). Probable cause requires only that information available to the officer would lead a person of reasonable caution to believe items could be useful as evidence of a crime. *Taylor v. State*, 659 NE 2d 535 (Ind. 1995); *Edwards v. State*, 762 NE 2d 128 (Ind. Ct. App. 2002). There is no doubt in this Court's mind that the officers had probable cause to believe that the Defendant's van was evidence of the crime of Leaving the Scene of an Accident and its nature as evidence was readily apparent to the officers. Based upon all information available to law enforcement at the time of this investigation including witness's statements describing the van, witness's statements indicating direction the van traveled, the extensive damage to the van and the fluid trail Officer Koontz followed leading to Defendant's van, the Court can come to no other conclusion. Lieutenant Mount was correct in his belief that the van was evidence of a crime which gave rise to a valid reason to impound Defendant's van. Law enforcement had a legitimate right to seize Defendant's van for purposes of gathering further evidence to connect it with the accident and also to process it for forensic evident that might indicate that the Defendant had been the driver of the van at the time of the accident. This Court finds impoundment of Defendant's van was appropriate in this case.

14. The final issue to be determined by the Court is the propriety of the inventory search. When a vehicle is lawfully impounded, law enforcement must

perform an administrative inventory search to document the vehicle's contents to preserve them for the owner and protect law enforcement against claims of lost or stolen property. *Wilford v. State*, 15 NE 3d 371 (Ind. 2016); *Whitely v. State*, 47 NE 3d 640 (Ind. Ct. App. 215). However, the inventory must be pursuant to establish and routine department policy and consistent with the public policies of: (1) protection of private property in police custody; (2) protection of the police from claims over lost and stolen property; and (3) protection of police from potential danger. *South Dakota v. Opperman*, 428 US 364 (1976); *Foulks v. State*, 582 NE 2d 374 (Ind. 1991). After review of State's Exhibit 1, Lebanon Police Department's policy for inventories, this Court finds that that policy meets the criteria set forth above and does result in a reasonable inventory search. Lieutenant Mount testified that he personally observed and supervised the inventory search conducted by Lebanon Police Department and confirmed that it was in compliance with the department's written policy. The Court heard no evidence to the contrary. The Court finds that the inventory performed on Defendant's vehicle was in compliance with the established case law and proper.

15. For the reasons set out above, this Court finds no violation of the Defendant's 4th Amendment or Article 1, Section 11 rights under the facts presented. The Defendant's Motion to Suppress is hereby DENIED.

16. The Court heard no factual or legal basis for dismissal of charged filed in this case pursuant to I.C. 35-34-1-4 and Defendant's Motion to Dismiss is hereby DISMISSED.

ALL OF WHICH IS ORDERED THIS 9 DAY OF AUGUST, 2017.

BRUCE E. PETIT, JUDGE
BOONE SUPERIOR COURT II

Distribution:

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Defendant's Counsel M. Slaimon Ayoubi (e-notice)
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