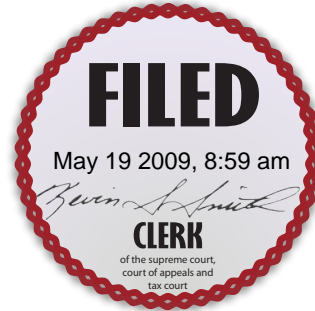


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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SHEILA WESTRA, )

Appellant-Defendant, )

vs. )

No. 84A04-0810-CR-590

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE VIGO SUPERIOR COURT  
The Honorable Barbara L. Brugnoux, Judge  
Cause No. 84D05-0708-CM-2763

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**May 19, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issue

Following a jury trial, Sheila Westra appeals her conviction for operating a vehicle with an alcohol concentration of at least .08 gram but less than .15 gram of alcohol per 210 liters of breath, a Class C misdemeanor. On appeal, Westra raises one issue, which we restate as whether the trial court committed fundamental error when it admitted the results of a breath alcohol test into evidence. Concluding the trial court's admission of the test result does not amount to fundamental error, we affirm.

### Facts and Procedural History

On August 30, 2007, Trooper Jason Kemp and Trooper Christopher Fitzgerald of the Indiana State Police responded to a domestic disturbance call at the home of Stanley and Melissa Gress in Vigo County. While the troopers were speaking with Melissa, Westra parked her vehicle in the driveway, exited, and began "yelling and screaming" upon learning of the troopers' decision to arrest Melissa. Transcript at 81. While Westra was standing next to the three, Trooper Kemp detected a "very strong" odor of alcohol on her breath, *id.* at 82, and also observed her eyes were "glassy," *id.* at 83. Trooper Kemp then administered three field sobriety tests; Westra failed each of them. As a result, Trooper Kemp read Westra the implied consent law advisement, and Westra agreed to submit to a chemical test to determine her breath alcohol content. Trooper Fitzgerald transported Westra to the Vigo County jail and administered an alcohol concentration equivalency breath test using a BAC DataMaster instrument. The test revealed that Westra's breath contained an alcohol concentration equivalent of .08 gram of alcohol per 210 liters of breath.

On August 31, 2007, the State charged Westra with operating a vehicle with an alcohol concentration of at least .08 gram but less than .15 gram of alcohol per 210 liters of breath, a Class C misdemeanor. On July 25, 2008, the trial court presided over a jury trial, at which the jury heard testimony from Trooper Kemp, Trooper Fitzgerald, and Westra, among others, and the trial court admitted Westra's breath test result into evidence. The jury found Westra guilty as charged, and the trial court entered a judgment of conviction based on the jury's finding. Westra now appeals.

### Discussion and Decision

Westra argues the trial court improperly admitted her breath test result into evidence. When a party timely objects to the admission of evidence, this court reviews the trial court's ruling for an abuse of discretion. Espinoza v. State, 859 N.E.2d 375, 381 (Ind. Ct. App. 2006). Abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id. In making this determination, we do not reweigh evidence and consider conflicting evidence in a light most favorable to the trial court's ruling, but also consider uncontroverted evidence in the defendant's favor. Cole v. State, 878 N.E.2d 882, 885 (Ind. Ct. App. 2007).

Compounding the foregoing standard of review is Westra's concession that she did not object to the admission of the breath test result at trial, which means she must establish fundamental error to obtain a new trial. Ind. Evidence Rule 103(d); Cowan v. State, 783 N.E.2d 1270, 1277 (Ind. Ct. App. 2003), trans. denied. This court has described the fundamental error doctrine as an "extremely narrow" exception to the

general rule that the failure to object to the admission of evidence at trial results in procedural default. McQueen v. State, 862 N.E.2d 1237, 1241 (Ind. Ct. App. 2007). The doctrine applies if the error “constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.” Id.; see also Carden v. State, 873 N.E.2d 160, 164 (Ind. Ct. App. 2007) (stating that for an error to rise to the level of fundamental, it “must be so prejudicial to the rights of the defendant as to make a fair trial impossible”).

Westra’s fundamental error claim concerns the procedures Trooper Fitzgerald employed prior to conducting the breath test. Indiana Code section 9-30-6-5(a)(3) requires the director of the department of toxicology at the Indiana School of Medicine to adopt rules concerning “[t]he certification of the proper technique for administering a breath test,” and subsection (d)(4) of the statute states that a breath test result is inadmissible if “the techniques used in the test . . . have not been approved in accordance with the rules adopted under subsection (a).” The applicable rule in this case is 260 Indiana Administrative Code section 1.1-4-8-1, which states in relevant part that a person whose breath is to be tested must not have put any foreign substance into her mouth or respiratory tract within twenty minutes before the time the breath sample is taken. Citing her own testimony that she was chewing gum during the twenty-minute period before Trooper Fitzgerald took the sample, Westra claims her breath test was not conducted in accordance with this rule, which in turn permits her to argue that her breath test result was inadmissible pursuant to Indiana Code section 9-30-6-5(a)(3).

Westra's argument is foreclosed both by Trooper Fitzgerald's testimony and our supreme court's holding in Guy v. State, 823 N.E.2d 274 (Ind. 2005). Trooper Fitzgerald testified that he observed Westra for twenty minutes prior to conducting the breath test and that he inspected her mouth prior to this twenty-minute period by "[h]aving her open her mouth, lift up her tongue, look around and make sure I can see, top, bottom, left and right, up and down." Tr. at 150. When asked if he could "see everywhere inside the mouth," Trooper Fitzgerald replied, "Yes." Id. When asked "[i]s there any question in your mind as to whether [Westra] might have had a piece of gum in her mouth?," Trooper Fitzgerald replied, "No question, she did not have any." Id. at 151. Had Westra objected to the admission of the breath test result on the ground that she was chewing gum during the twenty-minute period before the sample was taken, the trial court could have overruled the objection based on Trooper Fitzgerald's testimony. Our standard of review requires us to consider conflicting evidence in a light most favorable to the trial court's ruling, Cole, 878 N.E.2d at 885, and given the conflict between Westra's and Trooper Fitzgerald's testimony, we cannot say the trial court abused its discretion when it admitted the breath test result into evidence. And absent an improper ruling by the trial court, Westra cannot establish error, let alone fundamental error.

Even if we disregarded Trooper Fitzgerald's testimony, Westra's argument still fails under our supreme court's holding in Guy that a foreign object put in a person's mouth more than twenty minutes before a breath test is not inconsistent with the procedure prescribed by 260 Indiana Administrative Code section 1.1-4-8(1)(B). 823 N.E.2d at 275. Specifically, our supreme court stated that "put" within the meaning of

the rule means “that any foreign substance placed in a person’s mouth more than twenty minutes prior to a breath test poses no problem for the reliability of the results.” Id. at 276. The evidence establishes that Trooper Fitzgerald conducted the test at 9:53 p.m. on August 30, 2007, see state’s exhibit 2, and Westra testified she had been chewing gum since 8:30 p.m., see tr. at 180. Thus, Westra had been chewing gum more than twenty minutes before the test, which, under Guy, means the test was not inconsistent with 260 Indiana Administrative Code section 1.1-4-8(1)(B). Because the test was not conducted in a manner inconsistent with this rule, there was no error, let alone fundamental error, when the trial court admitted the test result into evidence.

#### Conclusion

The trial court did not commit fundamental error when it admitted Westra’s breath alcohol test into evidence.

Affirmed.

DARDEN, J., and BAILEY, J., concur.