

Kulwinder Singh (“Singh”) appeals from his conviction after a jury trial of public intoxication¹ as a Class B misdemeanor and sexual battery² as a Class D felony. Singh raises the following restated issues for our review:

- I. Whether the trial court erred by admitting improper vouching testimony;
- II. Whether the trial court erred by admitting evidence of a portable breath test; and
- III. Whether the trial court erred by admitting evidence of Singh’s subsequent bad acts.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

On December 10, 2007, C.G., a high school junior, and Singh were waiting for a bus at a bus stop in Lafayette, Indiana. Having just met, the two exchanged names and engaged in small talk. Singh was the first to board the bus and chose a seat in the back. Singh invited C.G. to sit beside him, and she did so. While riding on the bus, Singh attempted to grab C.G.’s hand and touched her arm and her leg. Singh grabbed C.G.’s hand and placed it underneath his shirt and his pants in the groin area and told C.G. that he would pay her for sex. C.G. tried to pull her hand away and moved to the seat in front of her when Singh’s behavior persisted. C.G. sat next to a college student, Josie Elzey, and told her about Singh’s behavior. Elzey told the bus driver what had transpired, and the bus driver stopped the bus and contacted dispatch. Singh attempted to exit the bus from the back, but the bus driver had locked down the bus.

¹ See Ind. Code § 7.1-5-1-3.

² See Ind. Code § 35-42-4-8.

Lafayette Police Officers Daniel Long and Ryan Sanders responded to the dispatch and questioned C.G., Elzey, and Singh. Officer Sanders ordered Singh off the bus and detected the odor of an alcoholic beverage on Singh's breath, noticed that Singh's eyes were bloodshot, that Singh's speech was slurred, that he had trouble standing, and appeared to be highly intoxicated. Singh denied touching C.G. and instead claimed that she placed her hands on his leg and asked him for money for her children.

The State charged Singh with sexual battery as a Class D felony and public intoxication as a Class B misdemeanor. At the conclusion of Singh's jury trial, the jury found Singh guilty as charged. The trial court sentenced Singh to one and one-half years executed for the Class D felony conviction and to a concurrent term of six months executed for the Class B misdemeanor conviction. Singh now appeals.

DISCUSSION AND DECISION

Singh claims that the trial court made three errors in the admission of evidence. First, he claims that the trial court erred by admitting improper vouching testimony. Next, Singh asserts that the trial court erred by admitting evidence of a portable breath test. Finally, Singh argues that the trial court erred by admitting evidence of subsequent bad acts.

A trial court has broad discretion in ruling on the admissibility of evidence. *Scott v. State*, 855 N.E.2d 1068, 1071 (Ind. Ct. App. 2006). "Because we are considering the issue after a completed trial, we review the admission of evidence for an abuse of discretion." *Taylor v. State*, 891 N.E.2d 155, 158 (Ind. Ct. App. 2008), *trans. denied, cert. denied* (2009). We will consider the conflicting evidence most favorable to the trial

court's ruling and any uncontested evidence favorable to the defendant. *Id.* An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Id.*

I. Improper Vouching Testimony

During direct examination, Elzey testified without objection that because C.G. was "sincere" in her report of Singh's behavior, Elzey decided to take action on C.G.'s behalf. *Tr.* at 48. On cross-examination, Singh's counsel asked Elzey about her decision to take action based upon C.G.'s statements as opposed to her own observations. *Id.* at 50. On re-direct examination the State asked Elzey if she had any reason to believe that C.G. had not been sincere. *Id.* at 51. Over Singh's objection, Elzey testified that there was no reason to believe that C.G. was not being sincere. *Id.*

Indiana Evidence Rule 704(b) provides that a witness "may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." Such testimony is an invasion of the province of the jurors in determining what weight they should place upon a witness's testimony. *Rose v. State*, 846 N.E.2d 363, 367 (Ind. Ct. App. 2006).

The trial court erred by admitting the vouching testimony. Elzey testified on re-direct examination that she had no reason to believe that C.G. was not sincere. Although Elzey was commenting on the lack of evidence to disbelieve C.G., and not that C.G. was worthy of belief, the clear inference from the evidence is to vouch for C.G.

II. Portable Breath Test Evidence

Singh next claims that the trial court erred by admitting evidence of the results of a portable breath test (“PBT”) administered to Singh after his arrest for public intoxication. Officer Sanders noticed that Singh’s eyes were bloodshot, his breath smelled of an alcoholic beverage, his speech was slurred, he had trouble standing, and he appeared highly intoxicated. Officer Sanders testified that the jail does not accept persons whose intoxication level is over .25, and Officer Sanders wanted to determine if Singh was eligible to be transported to the jail. Over Singh’s objection based on relevance and admissibility, Officer Sanders was allowed to testify that Singh’s PBT result was .206. The State elicited Officer Sanders’ testimony that Singh would not have been allowed to drive with that level of intoxication.

For the results of a breath test to be admissible, the test operator, test equipment, chemicals used in the test, and the techniques used in the test must have been approved by the Department of Toxicology. Ind. Code §9-30-6-5(d). A PBT is “a hand held apparatus that measures the alcohol concentration in a breath sample delivered by a person into the mouthpiece of the apparatus.” Ind. Code § 9-30-7-1(1). As a general rule, PBT results are not admissible at trial because the test has not been approved by the Department of Toxicology. *Smith v. State*, 751 N.E.2d 280, 283 (Ind. Ct. App. 2001). Here, the PBT results were inadmissible for the additional reason that there was no evidence in the record to establish the reliability of the device or the operator.

This was a challenge to the admissibility of scientific evidence, the PBT, regarding the public intoxication offense. The Indiana Rules of Evidence provide: “If scientific,

technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Ind. Evidence Rule 702(a). “Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.” Evid. R. 702(b). The decision of the trial court as to the reliability of the scientific principles is reviewed for an abuse of discretion. *West v. State*, 755 N.E.2d 173, 180-81 (Ind. 2001).

There is no evidence in the record to establish the reliability of the PBT or Officer Sanders’ qualifications, knowledge, or expertise with PBTs. PBTs have not been approved by the Department of Toxicology. Moreover, the scientific evidence should assist the trier of fact to understand the evidence or determine a fact in issue. The propriety of the jail’s requirement that a person have less than a .25 intoxication level to be eligible for incarceration is not before us. Testimony that the PBT was conducted to determine Singh’s eligibility for incarceration was not relevant to the public intoxication offense and was not an issue for the finder of fact to determine. Although there was other evidence of Singh’s intoxication, we cannot say with confidence that the trier of fact would have reached the same conclusion in the absence of the purported scientific evidence. We find that the trial court abused its discretion in the admission of this evidence.

III. Evidence of Uncharged Misconduct

Finally, Singh challenges the admission of evidence of his subsequent bad acts.

Indiana Evidence Rule 404(b) provides in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]

“In determining the admissibility of evidence under Rule 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant’s propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403.” *Southern v. State*, 878 N.E.2d 315, 321 (Ind. Ct. App. 2007). We review the trial court’s decision for an abuse of discretion. *Id.*

Generally, challenges to the admission of this kind of evidence involve evidence of prior bad acts. However, the wording of Evidence Rule 404(b) does not suggest that the rule applies only to prior bad acts and not subsequent ones. The test under Evidence Rule 404(b) should be used when determining the admissibility of evidence of subsequent crimes or wrongs. *Southern*, 878 N.E.2d at 322.

Over Singh’s objection, Officer Sanders testified that he transported Singh to the hospital and Officer Lovett, a female officer, followed in case there was a problem. According to Officer Sanders, Singh refused to respond to the male officers, and instead chose to speak only to Officer Lovett. Officer Sanders testified that Singh asked Officer Lovett if she had a boyfriend or a husband. When she responded that she only had dogs,

Singh told her she should get rid of her dogs and replace them with him. As Officer Lovett was handcuffing Singh, he took her hands and caressed them saying that he liked it when she touched him. Immediately after that testimony, the State asked Officer Sanders if “[g]oing back to what he told you when you were there at the bus as [E]ighth and Ferry when he was telling you his story about what happened did that ever change your mind about your arrest?” *Tr.* at 76. Officer Sanders replied that it did not.

Singh first made an oral motion in limine regarding the subsequent bad acts arguing that the evidence was irrelevant and uncharged misconduct. The State argued that the evidence was “absolutely relevant.” *Id.* at 10. The trial court denied Singh’s motion and his objection to the testimony during the trial. The State argued, during closing argument, that the evidence was offered “to show what [Singh’s] intent was.” *Id.* at 81.

The intent exception to Evidence Rule 404(b) is available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent. *Wickizer v. State*, 626 N.E.2d 795, 799 (Ind. 1993). However, Singh made no claim of a contrary intent -- that the touching was accidental, inadvertent, or a mistake -- and did not put his intent in issue at trial. On appeal, the State concedes that Singh’s intent was not an issue at trial. *Appellee’s Br.* at 10. The trial court erred by admitting the evidence of Singh’s encounter with Officer Lovett at the hospital. We also conclude that the erroneous admission of the evidence was prejudicial to Singh.

IV. Conclusion

Because of the error in the admission of the vouching testimony, the erroneous admission of the PBT evidence and the erroneous admission of evidence of subsequent bad acts, we reverse Singh's sexual battery and public intoxication convictions and remand to the trial court for re-trial on these charges.

Reversed and remanded.

RILEY, J., and MATHIAS, J., concur.