MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

John Shelton,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

April 28, 2021

Court of Appeals Case No. 20A-CR-1680

Appeal from the Hendricks Superior Court

The Honorable Stephenie LeMay-Luken, Judge

Trial Court Cause No. 32D05-1903-F2-9

Robb, Judge.

Case Summary and Issues

[1] Following a jury trial, John Shelton was convicted of dealing in methamphetamine, a Level 2 felony; theft of a firearm, a Level 6 felony; and was found to be an habitual offender.[1] The trial court sentenced Shelton to an aggregate of twenty-six years in the Indiana Department of Correction ("DOC"). Shelton now appeals, raising two issues for our review, which we restate as: (1) whether the trial court erred by admitting evidence of methamphetamine found in Shelton's home; and (2) whether the trial court erred by admitting a video recorded statement. Concluding the trial court did not abuse its discretion in its admission of evidence, we affirm.

Facts and Procedural History

[2] On March 7, 2019, the Indianapolis Metropolitan Police Department in conjunction with the Plainfield Police Department ("PPD") executed a search warrant on Shelton's home. Shelton was suspected of being in possession of property stolen from Edgar Pate. The search warrant purported to authorize law enforcement to search and seize the following:

> Brown Fadora [sic]; Small Chest; Small jewelry box; Small handgun; Throwing knives; any and all articles with Edgar Pate's

[1] The jury also found Shelton guilty of being in possession of at least ten grams of methamphetamine, a Level 3 felony. Corrected Appellant's Appendix, Volume II at 186. However, this was vacated by the trial court. *See* Transcript of Evidence, Volume 3 at 85.

> information on it; Any and all additional items that officers deem to be contraband, I.E. Narcotics.

Exhibits, Volume 4 at 8.

[3] During the search, Detective Brian Stewart of the PPD found a baggie sitting atop the trash in an open trashcan. The baggie had indentations, or divots, in it, leading Detective Stewart to believe that it had been used for narcotics.[2] While searching the bedroom, Detective Stewart observed a small round mirror sitting on a piece of furniture which appeared to have methamphetamine on it. Detective Stewart also observed an open make-up bag on the bed that contained a glass pipe of the kind commonly used for smoking methamphetamine, several clear baggies, a scoop, and a digital scale. There was also a glass jar in the open make-up bag which contained rocks of methamphetamine. In total, there was over eleven grams of methamphetamine recovered from Shelton's home.[3]

[4] At some point during the search, Mistie Shelton was detained by police and transported to the PPD.[4] Later that day at the PPD, Mistie was interviewed by Detective Stewart and the interview was video recorded. During the interview,

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[2] Detective Stewart testified that the indentations or divots in the bag are indicative of the bag having been used for narcotics "because with methamphetamine, it is a rock-like substance. So sometimes you get very big pieces and sometimes you get very small . . . almost to the point of powder-type pieces as well, and those small chunks have rough edges as well, and so as the bag's being handled, as it's being stored, put in your pocket, moved around, that causes the indentations into the bags." Tr., Vol. 2 at 195-96.

[3] Police also found all the specific items listed on the search warrant. *Id.* at 26.

[4] Mistie and Shelton were married at the time of the search but have since gotten divorced. *See id.* at 236.

Mistie provided details about Shelton obtaining methamphetamine and its use in their home.

[5] The State charged Shelton with dealing in methamphetamine, a Level 2 felony; theft of a firearm, a Level 6 felony; possession of paraphernalia, a Class C misdemeanor; possession of methamphetamine, a Level 3 felony, and alleged Shelton was an habitual offender. Shelton filed a motion to suppress evidence of the methamphetamine seized during the execution of the search warrant. Subsequently, the trial court held a hearing on the motion to suppress evidence. At the hearing, Detective Stewart testified that the items found in the make-up bag were in plain view and that he did not have to move any items to see the methamphetamine rocks in the jar. Following the hearing, the trial court denied Shelton's motion.

[6] At Shelton's jury trial, Mistie testified that she did not remember speaking to Detective Stewart. Mistie stated that due to continued Xanax and alcohol use, she has little memory of the time period in which the search and her interview with Detective Stewart took place.[5] When asked if it was true Shelton was selling drugs, she responded with both, "I'm not sure[,] I was on a lot of pills" and "Yeah. . . . It's the truth." Tr., Vol. 2 at 243. Detective Stewart then testified that Mistie's testimony was not entirely consistent with what she had

[5] Mistie pleaded guilty to possession of methamphetamine, a Level 4 felony, in her own case and was sentenced to eight years. Tr., Vol. 2 at 237-38. During her testimony in Shelton's trial, she admitted that at the time of her guilty plea, she claimed Shelton was selling drugs. *See id.* at 240-42.

originally told him. Over Shelton's objection, the video recording of Mistie's interview with Detective Stewart was played for the jury.

[7] The jury found Shelton guilty of dealing in methamphetamine and theft of a firearm, and found he was an habitual offender. The trial court sentenced him to twenty-six years in the DOC. Shelton now appeals his conviction of dealing in methamphetamine.

Discussion and Decision

I. Standard of Review

[8] The trial court has broad discretion in ruling on the admissibility of evidence. *Small v. State*, 632 N.E.2d 779, 782 (Ind. Ct. App. 1994), *trans. denied*. We will disturb its ruling only upon a showing of abuse of that discretion. *Id.* An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Baxter v. State*, 734 N.E.2d 642, 645 (Ind. Ct. App. 2000). However, "[t]he ultimate determination of the constitutionality of a search or seizure is a question of law that we consider de novo." *Barker v. State*, 96 N.E.3d 638, 646 (Ind. Ct. App. 2018) (citation omitted), *trans. denied.*

[9] But even if a trial court abuses its discretion by admitting challenged evidence, we will not reverse the judgment if the admission of evidence constitutes harmless error. *Sugg v. State*, 991 N.E.2d 601, 607 (Ind. Ct. App. 2013), *trans. denied.* Error in the admission of evidence is harmless if it does not affect the

substantial rights of the defendant. *See McVey v. State*, 863 N.E.2d 434, 440 (Ind. Ct. App. 2007), *trans. denied.* In determining whether an evidentiary ruling has affected a defendant's substantial rights, we assess the probable impact of the evidence on the factfinder. *Mathis v. State*, 859 N.E.2d 1275, 1280 (Ind. Ct. App. 2007).

II. Admission of Methamphetamine

[10] Shelton argues that the "search for narcotics was neither supported by probable cause nor authorized with a sufficiently particular warrant[,]" and therefore the trial court erred by admitting evidence of the methamphetamine found in his home at trial; specifically, the methamphetamine found in the glass jar.[6] Appellant's Brief at 9. [7] The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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[6] The probable cause affidavit for the search warrant is not provided in the record. Therefore, we make no determination as to whether there was sufficient probable cause for the narcotics provision of the search warrant. Shelton does not challenge the probable cause for the remainder of the search warrant.

[7] Shelton does not argue that the methamphetamine found on the mirror in his bathroom was not in plain view.

U.S. Const. amend. IV.

[11] "[A] warrant must describe the place to be searched and the items to be searched for." *Overstreet v. State*, 783 N.E.2d 1140, 1158 (Ind. 2003) (citation omitted), *cert. denied*, 540 U.S. 1150 (2004). Although the warrant must describe "with some specificity" where officers are to search and what they are to seize, "there is no requirement that there be an exact description." *Id.*; *see also Carter v. State*, 105 N.E.3d 1121, 1129 (Ind. Ct. App. 2018) ("the warrant must be specific enough so that officers can, 'with reasonable effort', ascertain the place to be searched and the items to be seized"), *trans. denied*. "A warrant conferring upon the executing officer unbridled discretion regarding the items to be searched is invalid." *Cutter v. State,* 646 N.E.2d 704, 710 (Ind. Ct. App. 1995), *trans. denied.* Ultimately, the description in a search warrant should "be as particular as circumstances permit." *State v. Foy*, 862 N.E.2d 1219, 1227 (Ind. Ct. App. 2007) (citation omitted), *trans. denied.*

[12] In *Levenduski v. State*, we determined that the phrase "any other item of contraband which are [sic] evidence of a crime" in a warrant was an illegal catch all provision. 876 N.E.2d 798, 803 (Ind. Ct. App. 2007) (emphasis omitted); *see also Warren v. State*, 760 N.E.2d 608, 610 (Ind. 2002) (holding the phrase "any other indicia of criminal activity including but not limited to books, records, documents, or any other such items" was impermissible). Here, the search warrant at issue directs police to search and seize, in part, "[a]ny and all additional items that officers deem to be contraband, I.E. Narcotics[.]" Ex.,

Vol. 4 at 8. We conclude that this catchall phrase lacks particularity and therefore is impermissible.

[13] The State asserts that even if the catchall phrase in the warrant is too general, the discovery and seizure of the methamphetamine evidence was proper under the plain view doctrine and thus admissible. *See* Brief of Appellee at 14. The plain view doctrine is recognized as an exception to the search warrant requirement.[8] *McAnalley v. State*, 134 N.E.3d 488, 500 (Ind. Ct. App. 2019), *trans. denied.* Whether a particular warrantless seizure violates the guarantees of the Fourth Amendment depends upon the facts and circumstances of each case. *State v. Joe*, 693 N.E.2d 573, 575 (Ind. Ct. App. 1998), *trans. denied*. "The State bears the burden of proving that the warrantless seizure fell within an exception to the warrant requirement." *Id.*

[14] To justify a warrantless seizure under the plain view doctrine: (1) a law enforcement officer must not have violated the Fourth Amendment in arriving

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[8] The State also argues that even if the methamphetamine rocks were not visible through the jar, the contents would have been inevitably discovered. The inevitable discovery exception to the exclusionary rule "permits the introduction of evidence that eventually would have been located had there been no error, for [in] that instance 'there is no nexus sufficient to provide a taint.'" *Shultz v. State*, 742 N.E.2d 961, 965 (Ind. Ct. App. 2001) (citation omitted), *trans. denied*. However, Shelton cites both the Fourth Amendment and Article 1, section 11 of the Indiana Constitution in his argument that the search and seizure was unconstitutional, and the inevitable discovery exception has not been adopted as a matter of Indiana constitutional law. *Ammons v. State*, 770 N.E.2d 927, 935 (Ind. Ct. App. 2002), *trans. denied.* Our supreme court has previously held that our state constitution mandates that "the evidence found as a result of [an unconstitutional] search be suppressed." *Shultz*, 742 N.E.2d at 966 (quoting *Brown v. State*, 653 N.E.2d 77, 80 (Ind. 1995)). Despite the State's request, we are not inclined to adopt the inevitable discovery rule as part of Indiana constitutional law in light of our supreme court's firm language. *See Ammons*, 770 N.E.2d at 935. Accordingly, the inevitable discovery doctrine is not available to validate the admission of evidence obtained as a result of an illegal search.

at the place where items are in plain view; (2) the incriminating character of the items must be immediately apparent; and (3) the officer must have a lawful right of access to the items in plain view. *McAnalley*, 134 N.E.3d at 501.

[15] Here, police officers entered Shelton's home to execute a search warrant. Although we have concluded that the narcotics provision of the warrant was impermissible, our supreme court has stated that "[t]he infirmity of this catchall language does not doom the entire warrant[.]" *Warren*, 760 N.E.2d at 610. Therefore, the police were not in violation of the Fourth Amendment when entering Shelton's home and had a lawful right of access to items in plain view.

[16] Thus, the only prong at issue is whether the methamphetamine was immediately apparent. "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. 2017) (citation 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." *Taylor v. State*, 659 N.E.2d 535, 539 (Ind. 1995) (quotations and internal citation omitted).

[17] Shelton argues that the methamphetamine found in the glass jar was not immediately apparent because the "the photographic evidence does not clearly establish that the jar was transparent." Appellant's Br. at 6; *see also* Ex., Vol. 4 at

39-43. However, Detective Stewart testified that the items found in the make-up bag were in plain view and that he did not have to move any items to see the methamphetamine rocks in the jar. *See* Tr., Vol. 2 at 25-26. Given this testimony, we cannot conclude that the trial court abused its discretion in admitting the methamphetamine under the plain view exception.

III. Admission of Video Recording

[18] Shelton also contends that Mistie's video recorded statements to police were inadmissible hearsay that should not have been shown to the jury. There is no dispute that the statements at issue were hearsay, which is defined as "a statement that: (1) is not made by the declarant while testifying at the trial or hearing; and (2) is offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Hearsay is generally inadmissible, subject to a handful of specific and limited exceptions. *Cornell v. State*, 139 N.E.3d 1135, 1143 (Ind. Ct. App. 2020*)*, *trans. denied*; Evid. R. 802-804.

[19] Shelton argues that "because Mistie could not vouch for the accuracy of her prior statement, the recorded recollection exception [is] inapplicable." Appellant's Br. at 14. Indiana Evidence Rule 803(5) allows the admission of "[a] record that: (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge." The final element—the recording reflects the witness's knowledge correctly—is the one at issue.

[20] The recorded recollection exception applies when a witness has insufficient memory of the event recorded, but the witness must be able to "vouch for the accuracy of the prior [statement]." *Gee v. State,* 271 Ind. 28, 36, 389 N.E.2d 303, 309 (1979); *see also Ballard v. State,* 877 N.E.2d 860, 862 (Ind. Ct. App. 2007) ("A trial court should not admit a witness's statement into evidence when the witness cannot vouch for the accuracy of the statement nor remember having made the statement.").

[21] Shelton contends that pursuant to this court's decision in *Ballard*, the recorded recollection exception is inapplicable to Mistie's hearsay statements. We disagree.

[22] In *Pelissier v. State*, a witness at trial "claimed he did not remember what he was doing on the day of the shooting, he did not remember what he said when he gave statements to the police . . . and he did not remember anything related to the shooting." 122 N.E.3d 983, 986 (Ind. Ct. App. 2019), *trans. denied*. Over the defendant's objections, the trial court admitted a video recording of the witness's statements to police. This court distinguished the facts in *Pelissier* from *Ballard* for two reasons. First, the inadmissible statement in *Ballard* was written and not recorded on video. Second, in *Ballard*, the witness asserted "that she probably said a lot of things . . . that were not true[,]" or that she might have given "an inaccurate account of the evening in question." *Id.* at 988 (quoting *Ballard*, 877 N.E.2d at 863). In *Pelissier*, the witness never indicated that what he said was not true and in fact "as part of his [recorded] statement . . . indicated he was telling the truth." *Pelissier*, 122 N.E.3d at 988.

[23] This case is analogous to *Pelissier*. Mistie's hearsay testimony is a video recording of her statements to police. Further, Mistie testified that she does not have any memory of speaking to Detective Stewart and because of her prolonged Xanax use she does not have a good recollection of the general time period when Shelton's arrest occurred. *See* Tr., Vol. 2 at 237-40. However, she made no assertion that her statements on the video recording were untruthful. When asked at trial if it was true Shelton was selling drugs, she responded with both "I'm not sure[,] I was on a lot of pills" and "Yeah. . . . It's the truth." *Id.* at 243. Therefore, we conclude that the facts in this case are in line with our holding in *Pelissier*, and the admission of Mistie's hearsay testimony was admissible pursuant to the recorded recollection exception.

[24] Even if the admission of Mistie's testimony was inadmissible pursuant to the recorded recollection exception, it was harmless error.[9] An error in admitting evidence does not require reversal unless it affects the substantial rights of a party. *See Stewart v. State*, 754 N.E.2d 492, 496 (Ind. 2001). "The improper admission of evidence is harmless error when the conviction is supported by such substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed

[9] The State claims that "[e]ven assuming Mistie's recorded statement was not properly admitted as a recorded recollection, the trial court did not abuse its discretion because it was used to impeach Mistie." Br. of Appellee at 21. Because we conclude that the admission of Mistie's hearsay testimony was either valid under the recorded recollection exception or was harmless error, we need not address this argument.

to the conviction." *Barker v. State*, 695 N.E.2d 925, 931 (Ind. 1998). Further, an error in the admission of evidence may also be harmless if the evidence is merely cumulative of other evidence in the record. *Pavey v. State,* 764 N.E.2d 692, 703 (Ind. Ct. App. 2002), *trans. denied.*

[25] Here, Mistie's testimony is merely cumulative of evidence found by police at Shelton's home. Police found over eleven grams of methamphetamine on the premises as well as a scoop, a scale, and baggies that Detective Stewart testified are generally used for the "packaging and distribution of [] narcotics."[10] Tr., Vol. 2 at 204. Further, when asked a second time whether it was true Shelton was selling drugs, Mistie responded, "Yeah. . . . It's the truth." *Id.* at 243. We conclude that any error in the admission of Mistie's recorded testimony was harmless because the evidence in question was cumulative of other properly admitted evidence.

Conclusion

[26] We conclude that the trial court did not abuse its discretion in its admission of evidence. Accordingly, we affirm Shelton's conviction for dealing in methamphetamine.

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[10] Under Indiana Code section 35-48-4-1.1, a person who "possesses, with intent to: (A) deliver; or (B) finance the delivery of; methamphetamine" commits dealing in methamphetamine. The offense is a Level 2 felony if the amount of the drug is at least ten grams. Ind. Code § 35-48-4-1.1(e).

[27] Affirmed.

Bailey, J., and May, J., concur.