MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Aaron W. Egger,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 7, 2021

Court of Appeals Case No. 21A-CR-781

Appeal from the Marshall Superior Court

The Honorable Robert O. Bowen, Judge

Trial Court Cause No. 50D01-1810-F4-79

Altice, Judge.

Case Summary

[1] Aaron W. Egger appeals his convictions for two counts of dealing in methamphetamine, both Level 4 felonies, claiming that the trial court erred in denying his request to sever those counts. Egger asserts that he was entitled to a severance of the charges because the State failed to establish that the offenses were connected in any way or were part of the same episode of criminal conduct. Egger also contends that the trial court abused its discretion in admitting an alleged Facebook message exchange between him and a confidential informant (CI) because the State failed to establish an adequate foundation for the admission of that evidence.

[2] We affirm.

Facts and Procedural History

[3] In September 2018, Marshall County Police Officer Derek Workman was working with the county's drug task force. On September 12, 2018, Officer Workman received information from two CIs that they had been in contact with Egger and could buy drugs from him. Officer Workman and three other officers involved in the task force planned to conduct a controlled buy with the CIs later that day.

[4] Prior to the transaction, police officers searched the CIs and provided them with money and cameras. The drug sale occurred at a Pilot Truck Stop in Plymouth, Indiana. Although the officers anticipated that Egger would approach the CIs' vehicle so the transaction could be videotaped, Egger summoned them to his vehicle. While the CIs did not carry cameras to Egger's

car, the police officers separately filmed the transaction from vehicles parked nearby.

[5] Egger handed one of the CI's a substance in exchange for cash. Following the buy, the police officers spoke with the CIs and recovered the suspected drugs. Subsequent lab testing showed that the substance contained 1.37 grams of methamphetamine.

[6] A second drug purchase from Egger with a different CI occurred on September 27, 2018. At some point prior to the transaction, Egger and the CI communicated via Facebook messenger and arranged for the drug buy to occur at a bar in LaPaz, Indiana. During those exchanges, Egger agreed to sell the CI an "eight ball" of methamphetamine for $135. Prior to the transaction, the CI met with Officer Workman and other officers who searched her and supplied her with money, a camera, and an audio recording device.

[7] Upon arriving at the bar, Egger motioned the CI to his vehicle. The CI recorded the transaction on an audio device. Officer Workman observed the drug buy and identified Egger as the seller. Following the purchase, the CI handed the suspected drugs to the police officers. The CI was then transported to the Marshall County Jail where she identified Egger as the seller from a photo array. Police lab testing showed that the substance Egger sold to the CI contained 3.38 grams of methamphetamine.

[8] On October 2, 2018, the State charged Egger with two counts of dealing in methamphetamine and with being a habitual offender. Egger subsequently

sought to sever the charges as a matter of right in accordance with Ind. Code § 35-34-1-11, claiming that the State joined the transactions for trial "solely on the ground that they [were] of the same or similar character." *Appendix Vol. II* at 229. Egger maintained that the alleged methamphetamine transactions were separate and distinct episodes of criminal conduct and that joining the two causes into a single trial would "effectively act as a violation of Ind. Rule of Evidence 404(b)." *Id.*

[9] In response, the State asserted that Egger was not entitled to severance of the charges as a matter of right because the two drug buys were tied together as "part of a series of acts connected together or constituting part of a single scheme or plan." *Id.* at 236. The State also claimed that Egger would not be unduly prejudiced by a denial of his severance request because the evidence was not complex, and the jury could "distinguish the evidence and apply the law intelligently as to both counts." *Id.*

[10] At a hearing on the motion to sever, Egger acknowledged that the crimes were "extremely similar," but claimed the causes should still be severed because "there's two weeks separating these incidents . . . they are two separate episodes of criminal conduct," and they involved different confidential informants *Supplemental Transcript* at 6. The trial court took the severance request under advisement and subsequently denied it.

[11] At a jury trial that commenced on March 2, 2021, Egger renewed his severance request, which the trial court again denied. At some point during the trial, the

State sought to admit the Facebook messages that Egger and the CI from the second buy had exchanged. The CI testified that she received Egger's Facebook messages prior to the transaction, and she knew it was Egger because his photo was on the account page. The CI also testified, "that's how I would get in contact with him." *Transcript* at 90-94. The CI then confirmed that the messages represented "an accurate copy of the messages that were exchanged between [her] and Egger on September 27th, 2018." *Id.* at 91. Police officers also corroborated Egger's phone number with information gathered from another investigation. The trial court admitted the messages into evidence over Egger's objection that the State failed to lay an adequate foundation for their admission.

[12] Following the presentation of evidence, Egger was found guilty as charged. Egger then pleaded guilty to being a habitual offender. The trial court sentenced Egger to concurrent twelve-year sentences with a thirteen-year enhancement on the habitual offender count. Egger now appeals.

Discussion and Decision

I. Motion to Sever

[13] Egger argues that his convictions must be reversed because the trial court erred in denying his motion to sever the charges. I.C. § 35-34-1-11(a) provides that "[w]henever two . . . or more offenses have been joined for trial in the same indictment or information *solely* on the ground that they are of the same or

similar character, the defendant shall have a right to a severance of the offenses." (Emphasis added). On the other hand, I.C. § 35-34-1-9 states that "offenses *may* be joined . . . when the offenses (1) are of the same or similar character, even if not part of a single scheme or plan; or (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan."

[14] As a trial court has no discretion to sever charges that were joined solely on the ground that they were of the same or similar character, we review the trial court's decision to deny severance under a *de novo* standard. *Booker v. State*, 790 N.E.2d 491, 494 (Ind. Ct. App. 2003), *trans. denied*. In all other cases, severance is left to the trial court's discretion, and we will reverse the trial court's decision only for an abuse of discretion. *Blanchard v. State*, 802 N.E.2d 14, 25 (Ind. Ct. App. 2004).

[15] This court has determined that "[i]f the operative facts establish a pattern of activity beyond mere satisfaction of the statutory elements, such as that multiple crimes have been committed with a common victim, modus operandi, and motive, a defendant is not entitled to severance of charges as of right." *Robinson v. State*, 56 N.E.3d 652, 656 (Ind. Ct. App. 2016), *trans. denied*; *see also Craig v. State*, 730 N.E.2d 1262, 1265 (Ind. 2000) (finding that charges may be sufficiently connected as a single scheme or plan if the State can establish that a common modus operandi linked the crimes and that the same motive induced that criminal behavior).

[16] Transactions that are part of an ongoing drug dealing operation may constitute a single scheme or plan that are connected by a common modus operandi and motive, that is, an ongoing effort to deal drugs. *See*, *e.g., Richter v. State*, 598 N.E.2d 1060, 1063 (Ind. 1992) (offenses involving two controlled buys conducted a week apart were part of an "ongoing investigation over a relatively short period of time" and were not entitled to severance as of right); *Sweet v. State*, 439 N.E.2d 1144, 1147 (Ind. 1982) (the trial court's denial of a motion for severance was proper where all eight charges against the defendant arose from controlled buys that were conducted over a two-month period and involved many ongoing and continuous transactions with the same undercover police officers and the same informant).

[17] In this case, the evidence established that the State did not join Egger's two dealing charges "solely on the ground that they are of the same or similar character." *See* I.C § 35-34-1-11(a). It was shown that Egger: (a) was engaged in an ongoing drug delivery service where he used the same vehicle to meet the CIs; (b) directed the CIs to approach his vehicle; (c) sold methamphetamine for profit in both transactions; and (d) committed the offenses only two weeks apart.

[18] Both transactions also involved overlapping police investigations, circumstances, and evidence. For instance, Officer Workman was the lead officer on both controlled buys and other members of the Marshall County drug task force assisted in both transactions and investigations. The drugs that

Egger sold were sent to the State laboratory together for testing, were examined by the same forensic scientist, and were subsequently picked up together.

[19] We also cannot agree with Egger's contention that the State's use of different CIs rendered the two transactions separate schemes or plans. While most cases affirming the denial of severance of drug charges have involved only one CI, it was the ongoing enterprise and the continuing police investigation that made the denial of severance proper. *See, e.g., Richter*, 598 N.E.2d at 1063 (multiple drug sales over a relatively short period of time during an ongoing investigation of the defendant's activity as a narcotics dealer); *Sweet*, 439 N.E.2d at 1147 (observing that crimes were ongoing and continuous transactions with the same undercover police officers and the same informant). We also note that both this court and our Supreme Court have determined that crimes committed against different victims at different times can be part of a single scheme or plan that will defeat a defendant's motion for severance. *See*, *e.g., Craig*, 730 N.E.2d at 1265 (two counts of molestation); *Ben-Yisrayl v. State*, 690 N.E.2d 1141, 1146 (Ind. 1997) (robbery and murder); *Waldon v. State*, 829 N.E.2d 168, 172, 174-75 (Ind. Ct. App. 2005) (two counts of burglary), *trans. denied*. For all these reasons, we conclude that the trial court properly denied Egger's request for severance of the charges as a matter of right pursuant to I.C. § 35-34-1-11(a).[1]

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[1] As an aside, we note that Egger makes no argument that the trial court would have abused its discretion had it denied a discretionary motion to sever. Even had Egger advanced such a claim, he would not prevail because our Supreme Court has determined that there is no abuse of discretion when the evidence establishes—as it does here—that the charges are connected by motive, interconnected investigations, and

II. Admission of the Facebook Messages

[20] Egger argues that the trial court erred in admitting into evidence the Facebook message exchange that he had with the CI prior to the second drug transaction. Egger contends that the messages should have been excluded because the State failed to establish an adequate foundation for their admission.

[21] We review challenges to the admission of evidence for an abuse of the trial court's discretion. *Fansler v. State,* 100 N.E.3d 250, 253 (Ind. 2018). We will reverse the trial court only where its decision is clearly against the logic and effect of the facts and circumstances. *Id.*

[22] To lay a proper foundation for the admission of evidence, the proponent of the evidence must show that it has been authenticated. *Pavlovich v. State,* 6 N.E.3d 969, 976 (Ind. Ct. App. 2014), *trans. denied*. This authentication requirement applies to the substantive content of text messages purported to be sent by a party. *Id.* More particularly, letters and words set down by electronic recording and other forms of data compilation are included within the requirements of Indiana Evid. Rule 901(a), which provides that "the proponent must produce

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overlapping evidence. *See Smoote v. State,* 708 N.E.2d 1, 3 (Ind. 1999); *Barajas v. State*, 627 N.E.2d 437, 438 (Ind. 1994).

evidence sufficient to support a finding that the item is what the proponent claims it is."

[23] There are a variety of ways to authenticate or identify an item of evidence, including "testimony that an item is what it is claimed to be, by a witness with knowledge," Evid. R. 901(b)(1), along with the "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Evid. R. 901(b)(4). Absolute proof of authenticity is not required. *Wisdom v. State,* 162 N.E.3d 489, 494 (Ind. Ct. App. 2020), *trans. denied.* Rather, the proponent of the evidence must establish only a reasonable probability that the evidence is what it is claimed to be, and the proponent may use direct or circumstantial evidence to do so. *Richardson v. State,* 79 N.E.3d 958, 962 (Ind. Ct. App. 2017), *trans. denied.* Once this reasonable probability is shown, sufficient authentication or identification is established, and any inconclusiveness of an exhibit's connection with the events at issue goes to the weight of the evidence and not to admissibility. *Wisdom,* 162 N.E.3d at 494; *Richardson,* 79 N.E.3d at 962.

[24] In this case, the State introduced an exhibit relating to the September 28 transaction that the CI identified as "a message through messenger [of her] . . . messaging [Egger]." *Transcript* at 90. The CI testified that she knew it was Egger based on his photo on the Facebook account and explained that Facebook messenger was "how [she] would . . . contact . . . him." *Id.* at 91. The CI indicated that the exhibit was "an accurate copy of the messages that were exchanged between [her] and [Egger] on September 27, 2018." *Id.* at 91.

The CI further testified that she received the messages on September 27, 2018, that the "messages were on her phone," and that she met with Egger personally that same day "about the subject of those messages." *Id.* at 92-94. Following Egger's objection that the State failed to lay an adequate foundation for the admission of the message exchange, the trial court admitted the State's exhibit.

[25] Notwithstanding Egger's argument that the trial court abused its discretion in admitting the exhibit at trial, the evidence established that the CI was a "witness with knowledge" and she testified that Egger sent the messages. Evid. R. 901(b)(1). The CI was familiar with Egger, and the content of the messages was consistent with the drug transaction that occurred that same day. The messages appear to be from Egger, as they include his photo from his Facebook account. The content and substance of the messages when considered with the surrounding circumstances—including Egger's photo from his Facebook account—indicate that he sent them. Evid. R. 901(b)(4). Those messages discuss the proposed drug transaction that was observed by the police officers and fully documented through the controlled buy.

[26] Taken as a whole, the evidence established a reasonable probability that Egger sent the Facebook messages, and the CI sufficiently authenticated those messages. As a result, Egger has failed to show that the trial court abused its discretion in admitting the messages into evidence. *See Rogers v. State*, 130 N.E.3d 626, 630 (Ind. Ct. App. 2019) (holding that phone messages were properly admitted at trial when the witness testified that she was familiar with the defendant, that the defendant had sent the messages, and that the content of

the messages suggested that the defendant had sent them); *see also Pavlovich v. State*, 6 N.E.3d at 978 (concluding that the messages at issue were authenticated by the recipient's knowledge of the sender's phone number and the matters discussed in the messages).

[27] Judgment affirmed.

Bradford, C.J. and Robb, J., concur.