MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Demarco Wayne Roach,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 19, 2022

Court of Appeals Case No. 22A-CR-1105

Appeal from the Vanderburgh Circuit Court

The Honorable Ryan C. Reed, Magistrate

Trial Court Cause No. 82C01-2105-F4-2345

Brown, Judge.

[1] Demarco Wayne Roach appeals his convictions for dealing in methamphetamine as a level 4 felony, operating a vehicle as an habitual traffic violator as a level 6 felony, and possession of a narcotic drug as a level 6 felony and challenges the admission of certain evidence. We affirm.

Facts and Procedural History

[2] On May 4, 2021, Vanderburgh County Sergeant Jeff South initiated a traffic stop of Roach, and Detectives John Montgomery and Brian Watson responded to the scene. Roach was in the driver's seat, there were no other occupants in the vehicle, and Roach was shaking and appeared to be nervous. The officers previously learned through the Bureau of Motor Vehicles that Roach was an habitual traffic violator, and Sergeant South asked Roach to step out of the vehicle. As Roach exited the vehicle, the officers saw two baggies between the driver's door and seat which appeared to contain methamphetamine or narcotics and shards of what looked like methamphetamine on the floor in front of the seat. Detective Montgomery collected the two baggies as well as a digital scale, numerous small unused baggies, and a cell phone from the vehicle. Sergeant South found a glass pipe in Roach's pocket. Later testing revealed one of the baggies was found to contain methamphetamine and had a net weight of 2.48 grams and the other baggie was found to contain fentanyl and heroin.

[3] On May 6, 2021, the State charged Roach with Count I, dealing in methamphetamine as a level 4 felony; Count II, operating a vehicle as an habitual traffic violator as a level 6 felony; Count III, possession of a narcotic

drug, fentanyl, as a level 6 felony; and Count IV, possession of a narcotic drug, heroin, as a level 6 felony. It also alleged Roach was an habitual offender.

[4] In January 2022, the court held a bench trial. Detective Montgomery identified the phone which he discovered in Roach's vehicle and how he collected the phone, drugs, and other items. When asked to review what was marked as State's Exhibit 8, he stated that it was "a black track phone" which he had collected during his search of Roach's vehicle. Transcript Volume II at 31. The State moved to admit the phone into evidence, Roach's counsel stated "[n]o objection," and the court admitted the exhibit. *Id*. at 32. The State elicited testimony from Gage Shots, who testified that he was a criminal investigator for the Vanderburgh County Prosecutor's Office, his duties included cell phone extraction, he had nearly 400 hours of digital forensics training, he had "the major certifications from both vendors of cellphone analysis, Cellebrite and Magnet," and he had "the Cellebrite Certified Operator Certification as well as a Physical Analyst Certification." *Id*. at 71. Shots testified that the vendors, including Cellebrite, provide tools to obtain forensic copies of cell phone and computer data. He testified that extraction is a forensic method to view data on a phone and that the amount of data which can be extracted depends on the security class of the phone. He testified he had performed approximately 350 extractions. He explained that any applications, photos, text messages, videos, call logs, and voicemails can be extracted from a cell phone. He described how he used the Cellebrite program and testified that the software would analyze that data, divide the data into categories such as text messages, videos, photos,

and then generate a report. Shots further testified that he completed an extraction related to the phone admitted as State's Exhibit 8, he used a Cellebrite program to perform the extraction, and a report was generated.

[5] Detective Watson testified that he was familiar with the way drug users and dealers speak and the terminology they use. He testified it was more consistent for drug dealers to have scales and that users will sometimes have scales. He testified that having unused baggies like those discovered in this case is more consistent with what a dealer would have, and there would be no reason for a user to have that amount of packaging. The State moved to admit five exhibits consisting of messages extracted from the cell phone, Roach's counsel stated "[n]o objection" with respect to each of the five exhibits, and the court admitted them. *Id*. at 85, 88, 93, 96, 100. Detective Watson testified "[t]he majority of the conversation is drug pertinent" and pointed to messages which were addressed to "Marco" and which he stated were persons discussing obtaining heroin, fentanyl, or methamphetamine from Roach. *Id*. at 86. He also testified that Roach provided a price for a quantity of methamphetamine which was consistent with the current price range. On cross-examination, Detective Watson testified "[i]t is uncommon that users buy more than a gram but I have seen it in the past but any time we get up near an 8 ball or 3.5 grams it's going to be pretty much exclusively dealers." *Id*. at 104.

[6] The court found Roach guilty on Counts I through IV and later found that he was an habitual offender. The court sentenced Roach to four years on Count I, enhanced the sentence by six years for being an habitual offender, ordered three

years to be served on work release, sentenced him to two years each for Counts II and III to be served concurrently, and merged Count IV into Count III.

Discussion

[7] Roach asserts the State failed to establish the authenticity of the messages extracted from the phone and their admission was fundamental error. The State maintains that Roach affirmatively agreed to the admission of the messages and thus cannot now claim fundamental error and that the court did not err in admitting the messages.

[8] In *Halliburton v. State*, the Indiana Supreme Court observed that Halliburton conceded that he did not object to the admission of twenty-two photographs at trial but asserted that their admission constituted fundamental error. 1 N.E.3d 670, 678 (Ind. 2013). The Court noted that the fundamental error doctrine is an exception to the general rule that the failure to object at trial constitutes procedural default precluding consideration of the issue on appeal, the fundamental error exception is extremely narrow, the error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process, and the exception is available only in egregious circumstances. *Id*. The Court then held:

> Concerning the twenty-two photographs at issue, we make the following observations. First, at trial Halliburton did not simply "fail" to object to the exhibits. Instead, on eight separate occasions over the course of a five-day trial during which the State offered the exhibits for admission into evidence, and after inquiry by the trial court, Halliburton expressly said "no objection" or "I have no objection."

> "The appellant cannot on the one hand state at trial that he has no objection to the admission of evidence and thereafter in this Court claim such admission to be erroneous." *Harrison v. State*, 258 Ind. 359, 281 N.E.2d 98, 100 (1972). Further, the doctrine of fundamental error is inapplicable to the circumstances presented here. The doctrine presupposes the trial judge erred in performing some duty that the law had charged the judge with performing *sua sponte*. Presumably a trial judge is aware of her own *sua sponte* duties. But upon an express declaration of "no objection" a trial judge has no duty to determine which exhibits a party decides, for whatever strategic reasons, to allow into evidence. "[O]nly the interested party himself can really know whether the introduction or exclusion of a particular piece of evidence is in his own best interests." *Winston v. State*, 165 Ind. App. 369, 332 N.E.2d 229, 233 (1975).

Id. at 678-679 (citation to record omitted).

[9] Here, the record reveals that, each time the State offered an exhibit containing messages extracted from the phone for admission into evidence, Roach's counsel said "[n]o objection." Transcript Volume II at 85, 88, 93, 96, 100. In light of this express declaration, the trial judge was under no duty to determine which exhibits Roach decided, for whatever strategic reasons, to allow into evidence. We find the doctrine of fundamental error is inapplicable to the circumstances presented here. *See Halliburton*, 1 N.E.3d at 679; *see also Woodward v. State*, 187 N.E.3d 311, 317 (Ind. Ct. App. 2022) ("No fundamental error exception is available here, however, because Woodward explicitly stated that he had '[n]o objection' to the report."), *reh'g denied*; *Rolston v. State*, 81 N.E.3d 1097, 1103 (Ind. Ct. App. 2017) ("Rolston's claim of fundamental error is not available to her. She did not merely fail to object to the admission of the

now-challenged autopsy photographs; rather, she affirmatively declared that she had 'no objection' to them."), *trans. denied*.

[10] Further, even if we were to consider Roach's assertion of fundamental error, we would find that reversal is not required. We afford an evidentiary decision great deference upon appeal and reverse only when a manifest abuse of discretion denies the defendant a fair trial. *Smith v. State*, 179 N.E.3d 1074, 1077 (Ind. Ct. App. 2022). This Court has held:

> Indiana Rules of Evidence Rule 901(a) provides that "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." "Once this reasonable probability is shown, any inconclusiveness regarding the exhibit's connection with the events at issue goes to the exhibit's weight, not its admissibility. Additionally, authentication of an exhibit can be established by either direct or circumstantial evidence." *Pavlovich v. State*, 6 N.E.3d 969 (Ind. Ct. App. 2014), *trans. denied* []. Letters and words set down by electronic recording and other forms of data compilation are included within Rule 901(a). *Hape v. State*, 903 N.E.2d 977, 989 (Ind. Ct. App. 2009)[, *trans. denied*]. "Absolute proof of authenticity is not required." *Fry* [*v. State*], 885 N.E.2d [742,] 748 [(Ind. Ct. App. 2008), *trans. denied*].
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> Rule 901(b) provides examples of evidence that satisfies the authentication requirement, including "(1) *Testimony of a Witness with Knowledge.* Testimony that an item is what it is claimed to be, by a witness with knowledge," and "(4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." We have previously acknowledged that federal courts have recognized Federal Rule of Evidence 901(b)(4) as one of the most frequently used means to authenticate electronic data, including text

> messages and emails. *Hape*, 903 N.E.2d at 990 (citing *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546 (D. Md. 2007)).[1]

Wilson v. State, 30 N.E.3d 1264, 1268 (Ind. Ct. App. 2015), *trans. denied*.

[11] The record reveals that Sergeant South initiated the traffic stop of the vehicle operated by Roach, Roach was the only person in the vehicle, and the officers discovered the cell phone as well as methamphetamine, heroin and fentanyl, a digital scale, and numerous unused baggies in the vehicle. Detective Montgomery testified regarding his collection of the phone, drugs, and other items. Shots testified in some detail regarding his forensic training, the Cellebrite software which he used to perform his examination of the phone, and the extent to which he was able to extract data from the phone. The record also shows that several messages sent to the phone were addressed to "Marco." State's Exhibit Nos. 11, 13. Detective Watson testified regarding the messages as well as the extent to which Roach having the digital scale, the baggies, and 2.48 grams of methamphetamine was consistent with dealing rather than mere use. Taken together, the testimony describing how the phone was collected, the Cellebrite extraction, and the text messages was sufficient to authenticate the challenged evidence. Moreover, the evidence of Roach's dealing offense included the scale, numerous small unused baggies, and 2.48 grams of methamphetamine. Even if we were to consider Roach's claim of fundamental

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[1] "The language of Federal Rule 901(b)(4) is identical to the language of Indiana's Rule 901(b)(4)." *Wilson*, 30 N.E.3d at 1268 n.2.

error, we would find that he has not sustained his burden of showing that the admission of the messages made a fair trial impossible or requires reversal. *See Smith*, 179 N.E.3d at 1079 (finding the testimony regarding the collection of the defendant's cell phone, the Cellebrite extraction, and the text messages were enough to authenticate the phone and the text messages and further finding the messages were merely cumulative of other evidence of the defendant's guilt in dealing methamphetamine).

[12] For the foregoing reasons, we affirm Roach's convictions.

[13] Affirmed.

Altice, J., and Tavitas, J., concur.