MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Paul J. Podlejski
Anderson, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Megan M. Smith
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Tamarius Teontez Jennings,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

October 6, 2023

Court of Appeals Case No. 23A-CR-94

Appeal from the Madison Circuit Court

The Honorable Mark Dudley, Judge

Trial Court Cause No. 48C06-2007-F4-1570

Memorandum Decision by Judge Vaidik
Judges Bradford and Brown concur.

Vaidik, Judge.

Case Summary

[1] Tamarius Teontez Jennings was convicted of several offenses related to driving and guns and found to be a habitual offender. He now appeals, arguing the trial court committed fundamental error in admitting certain evidence. We disagree and affirm.

Facts and Procedural History

[2] Around 8:00 a.m. on July 3, 2020, Chesterfield Police Department Captain Mike Milbourn received a dispatch about a speeding SUV. Captain Milbourn located the SUV in a neighborhood backed into a house's driveway with the front wheels still sitting in the road. The SUV, a white Isuzu Rodeo, had considerable damage. Deputy Chris Burkhardt from the Madison County Sheriff's Department responded to assist Captain Milbourn. Deputy Burkhardt walked around the SUV, looked in the windows, and ran the license-plate number. A Black male—identified at trial by both Captain Milbourn and Deputy Burkhardt as Jennings—was sitting in the driver's seat with his eyes closed while the SUV was running. The SUV was not registered to Jennings. Captain Milbourn knocked on the driver's side window and told Jennings to wake up. Jennings sat up, slapped the steering wheel several times, put the SUV into gear, and drove off at a high speed as Captain Milbourn yelled at him to

stop. Captain Milbourn and Deputy Burkhardt rushed back to their patrol cars and attempted to pursue Jennings, but they lost sight of him.

[3] About ten minutes later, Captain Milbourn and Deputy Burkhardt responded to a dispatch regarding a car hitting a house in the same neighborhood. Upon arrival, Captain Milbourn and Deputy Burkhardt observed that the SUV they had just encountered had been driven into a house. The SUV was still running, but there was no driver. Before the SUV was towed, Captain Milbourn conducted an inventory search and found a cell phone on the front floorboard, a handgun with a silencer and an extended magazine on the front seat, and a rifle with a scratched-off serial number on the back seat.

[4] A K-9 officer, Sergeant Paul Kollros with the Madison County Sheriff's Department, responded to the scene with his dog. They searched the area for about an hour but did not locate the driver. Around 2:00 p.m., officers were directed to yet another house in the same neighborhood. Captain Milbourn and another officer heard a crash inside the house and suspected that someone was trying to escape. While walking around to the back of the house, Captain Milbourn noticed a curtain moving inside. Officers called the homeowner, who was not home, and he allowed them to enter and search. Officers announced themselves and ordered the person to exit the house, but they did not get a response. Meanwhile, Sergeant Kollros arrived with his dog. When officers announced that the dog would be released into the house, Jennings emerged.

[5] The State charged Jennings with Level 4 felony unlawful possession of a firearm by a serious violent felon, Level 6 felony resisting law enforcement, Class A misdemeanor carrying a handgun without a license, Class B misdemeanor leaving the scene of an accident, Class C misdemeanor operating a motor vehicle without ever receiving a driver's license, and Class C misdemeanor reckless driving.[1] The State also alleged that Jennings is a habitual offender.

[6] At trial, the defense theory was that Jennings was not the driver of the SUV and that the cell phone and guns found in the SUV were not his. *See, e.g.*, Tr. Vol. II p. 57 ("That SUV was crashed by someone else."; "Folks this case is not a case where the police have a positive identification[,] this is a rush to judgement."); Tr. Vol. III pp. 58 ("Tamarius Jennings was not driving the Rodeo on July 3rd folks[.]"), 59 ("Tamarius never possessed any firearms[.]"), 62 (arguing there was no "registered owner" of the phone and that the State was "speculating" that the phone belonged to Jennings). Captain Milbourn testified that they obtained a search warrant for the phone and that he looked for identifying information on the phone. He found a video depicting a "sex act" between two people, Jennings and a female, D.S. Tr. Vol. II p. 192. Captain Milbourn

[1] The State also charged Jennings with Level 6 felony residential entry and Level 5 felony possession of an altered firearm. The State dismissed the residential-entry count before trial, and the jury did not reach a decision on the altered-firearm count, which the State then dismissed.

testified that after he searched the phone, he sent it to the Madison County High Tech Crime Unit for further analysis.

[7] Ben Jaqua, Director of the High Tech Crime Unit, testified about his examination of the phone. Jaqua said the phone didn't contain information, such as the "device owner name" or an email address, to link the phone to a certain user, so he checked the text messages and videos for identifying information. *Id.* at 210. Jaqua said he found a video showing a male and female having sexual intercourse in front of a mirror in what looked like a hotel bathroom. The date on the video was July 1, 2020, which was two days before the events in this case.[2] The State did not move to admit the video itself but moved to admit two screenshots taken from the video, Exhibits 15 and 16. As Jennings acknowledges, the "photos themselves do not reveal any sexually explicit content." Appellant's Br. p. 8. Jennings objected on foundational grounds only, and the trial court admitted the screenshots over his objection.

[8] Jaqua also testified about text messages found on the phone. Although there were many text messages, on appeal Jennings highlights messages exchanged between the phone user and D.S. The messages, which were also dated July 1 and referenced meeting up in a hotel room, provide:

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[2] Jaqua said the video's timestamp was July 1 at 4:47 p.m. but that wasn't necessarily when the video was made. Rather, it could have been the date that the video was last "modified," which most often means the last time it was "open[ed]." Tr. Vol. II p. 229.

> Ooh wee have you ever been wit a black man
>
> One time
>
> Ooh baby well this should be exciting

Ex. 17A. Finally, Jaqua testified that the phone contained photos, taken on July 2, of the two firearms that were found in the SUV on July 3. Exs. 19, 20. Jennings objected to the text messages and photos on foundational grounds only, and the trial court admitted them over his objection.

[9] During closing argument, the State argued to the jury how to connect the dots:

> First the communication, the lengthy communication with [D.S.], now you may have heard about [D.S.] and been like who's this [D.S.] girl and what does she have to do with the guns, right? What she does is she connects Tamarius Jennings to the phone, that's the first step. We know from the phone that he was having sex in the hotel restroom with [D.S.]. We know that for a fact, we know that whoever was using this phone was sending an awful lot of text messages to [D.S.] about meeting up at a hotel. Not just meeting up at a hotel but meeting up for sex at a hotel. . . . Those are just some of the text messages between the two (2) about meeting up at the hotel, those are just some of the text messages between the (2) about meeting up at the hotel for sex. We know that whoever was using this phone, was going to meet up with [D.S.] for sex. And who met up with [D.S.] for sex? We didn't admit the video because none of you want to see the video, we admitted the screen shots not to make him look like a bad guy because he was having sex with [D.S.], not to embarrass him, but because they were important evidence. They showed that he is the one who did with [D.S.] exactly what he planned to do with [D.S.]. He is the guy in the picture and he's

> the guy who was sending those text [messages] and he is the guy that was using the phone.

Tr. Vol. III pp. 65-66. Jennings was convicted, and the trial court sentenced him to an aggregate term of twenty-six-and-a-half years in prison.

[10] Jennings now appeals.

Discussion and Decision

[11] Jennings contends the trial court erred in admitting "evidence and testimony regarding 'sex acts'" under Indiana Evidence Rule 403. Appellant's Br. p. 9. As Jennings acknowledges, he did not object on this ground at trial and therefore must establish fundamental error on appeal.

[12] Failure to object to the admission of evidence at trial "normally results in waiver and precludes appellate review unless its admission constitutes fundamental error." *Konopasek v. State*, 946 N.E.2d 23, 27 (Ind. 2011). "Fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to make a fair trial impossible." *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014), *reh'g denied.* To establish fundamental error, the defendant must show that, under the circumstances, the trial court erred in not sua sponte raising the issue because the alleged error constituted a clearly blatant violation of basic and elementary principles of due process and presented an undeniable and substantial potential for harm. *Id.*

[13] Evidence Rule 403 provides:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

All relevant evidence is inherently prejudicial to a defendant. *Schnitzmeyer v. State*, 168 N.E.3d 1041, 1045 (Ind. Ct. App. 2021). Because the bar for unfair prejudice, rather than mere prejudice, is high, courts err on the side of admissibility and consider whether there is risk that a jury will "substantially overestimate the value of the evidence or that the evidence will arouse or inflame the passions or sympathies of the jury." *Id.*

[14] Jennings acknowledges that the sex-act evidence had some relevance to prove his identity but argues that any relevance it had was substantially outweighed by the danger of "prejudicing the jury against Jennings, a black man, having hotel sex with a white woman, who were both unmarried." Appellant's Br. p. 13. Contrary to Jennings's argument, the sex-act evidence had significant relevance. Jennings's defense at trial was that this was a case of mistaken identity: he was not the driver of the SUV and did not own or possess the cell phone or guns found in the SUV. As the State argued during closing argument, the fact that the text messages with D.S. referenced sex at a hotel and the video showed Jennings engaged in a sex act with D.S. at a hotel connected Jennings to the phone because it "showed that he is the one who did with [D.S.] exactly what he planned to do with [D.S.]. He is the guy in the picture and he's the guy

who was sending those text [messages] and he is the guy that was using the phone." The phone then linked Jennings to the SUV and guns and corroborated Captain Milbourn's and Deputy Burkhardt's identification of him as the driver of the SUV.

[15] Although the references to the sex act might have been prejudicial, they were not unfairly so. First, the sex act between Jennings and D.S. was consensual. Second, although the sex act was described as sexual intercourse, the video was not played for the jury, and the screenshots are not sexually explicit. Finally, perhaps the most prejudicial part about the sex act was elicited by defense counsel. On cross-examination, defense counsel asked Jaqua if he knew that Jennings was "involved in [the] porno industry, does porno films?" and whether he checked "OnlyFans.com to see if that video was posted there?" Tr. Vol. II p. 238. Jaqua said no. Jennings has not convinced us that the danger of unfair prejudice substantially outweighed the significant probative value of the sex-act evidence. Accordingly, we cannot say the trial court committed fundamental error by allowing the evidence.

[16] Affirmed.

Bradford, J., and Brown, J., concur.