

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Devante Lavon King,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 28, 2023

Court of Appeals Case No.
23A-CR-920

Appeal from the LaPorte Superior
Court

The Honorable Jaime M. Oss,
Judge

Trial Court Cause No.
46D01-2004-F1-485

Memorandum Decision by Judge Mathias
Judges Riley and Crone concur.

Mathias, Judge.

[1] Devante Lavon King appeals his convictions for Level 1 felony dealing in a controlled substance resulting in death and Level 4 felony dealing in cocaine or a narcotic drug. King raises the following two issues for our review:

1. Whether the trial court abused its discretion in the admission of certain text messages.

2. Whether the State presented sufficient evidence to support King's convictions.

[2] We affirm.

Facts and Procedural History

[3] In late 2019 or early 2020, Anthony Comeno moved in with his grandparents in LaPorte County. Comeno worked at a fast food restaurant in New Buffalo, Michigan, and used heroin. On several occasions, Comeno used heroin with Ronald Mashburn. Mashburn eventually asked Comeno for the contact information for Comeno's heroin provider, and Comeno provided Mashburn with a cell phone number for King. That cell phone number ended in the digits 9487.

[4] Comeno had King's number stored in his own cell phone under King's last name. Around 3:30 p.m. on March 6, 2020, Comeno engaged King in a series of text messages at that number in which Comeno sought to purchase twenty dollars' worth of heroin from King. King responded for Comeno to meet him at a nearby Speedway gas station, and Comeno agreed.

- [5] Comeno's grandfather picked Comeno up from work around that same time, and Comeno told his grandfather that he needed to meet someone at the Speedway. Comeno's grandfather drove to that Speedway and waited while Comeno engaged with an occupant of an SUV for about ten minutes. Comeno's grandfather then drove them back to their home. There, Comeno got out of the car and immediately went into the bathroom. Comeno's grandparents then went out for dinner together.
- [6] Sabrina Emerick also lived at the home. Her bedroom shared a wall with the bathroom into which Comeno had gone as soon as he had returned home. After the grandparents left, Sabrina heard Comeno go into the bathroom, but, after two hours, he had not come back out. When the grandparents returned, Sabrina told them that Comeno was still in the bathroom. The grandfather knocked on the bathroom door and did not receive an answer. He then forced the bathroom door open and observed Comeno "slumped over the toilet" and "blue." Tr. Vol. 3, p. 239. Sabrina called 9-1-1, and, after arriving on the scene, emergency responders unsuccessfully attempted to revive Comeno. His cause of death was later determined to be due to an overdose of heroin and fentanyl.
- [7] Investigating officers seized and searched Comeno's cell phone and discovered the text messages between Comeno and King on the day of Comeno's death. However, officers were unaware of who King was, and they reached out to Mashburn to be a confidential informant for them in a controlled drug buy with King. Mashburn agreed to do so. On March 10, Mashburn communicated with King via text messages using the 9487 phone number, and Mashburn agreed to

buy \$120 worth of heroin from King at a Dairy Queen. At the scheduled time and location, Mashburn then made the exchange with King.

[8] In April, officers obtained an arrest warrant for King, which they executed after initiating a traffic stop of a vehicle being operated by King. Upon arresting King, the officers seized two cell phones from the car. One of those phones had the same phone number as the phone number used by Comeno and Mashburn to arrange their heroin purchases. The passcode for that phone was King's date of birth. Upon searching the phone, the officers identified a text exchange with Comeno that matched Comeno's text exchange with King on March 6. The officers also obtained the phone's location information, which matched the March 6 arrangement to sell heroin to Comeno at the Speedway and the March 10 arrangement to sell heroin to Mashburn at the Dairy Queen. And, after he was arrested, King called his mother from the jail and said, "They got both my phones." Tr. Vol. 5, p. 63.

[9] The State charged King with Level 1 felony dealing in a controlled substance resulting in death and Level 4 felony dealing in cocaine or a narcotic drug. At his ensuing jury trial, the trial court admitted into evidence the text exchanges between King and Comeno on March 6, the text exchanges between King and Mashburn on March 10, and the cell-site location information for King's phone on both of those dates. Over King's objection, the trial court also admitted State's Exhibit 64, which consisted of a text exchange between King and an unknown third party the morning of March 6, 2020. In that text exchange, the third party told King that the heroin King had sold the third party the night

before had “som[ething] wrong in it” and would “gel[] up.” Ex. Vol. 1, p. 137. The jury found King guilty as charged. The court then entered its judgment of conviction and sentenced King accordingly. This appeal ensued.

1. The trial court did not abuse its discretion in the admission of the text messages between King and the third party.

[10] On appeal, King first asserts that the trial court abused its discretion when it admitted State’s Exhibit 64 into evidence. A trial court has broad discretion regarding the admission of evidence, and its decisions are reviewed only for abuse of that discretion. *E.g.*, [Hall v. State](#), 177 N.E.3d 1183, 1193 (Ind. 2021). We will reverse only if the trial court’s ruling was clearly against the logic and effect of the facts and circumstances before it and the error affects a party’s substantial rights. *Id.*

[11] King contends that State’s Exhibit 64 was inadmissible under [Indiana Evidence Rule 404\(b\)](#). As our Supreme Court has explained:

[Rule 404\(b\)](#) provides, “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,” but may “be admissible for other purposes, such as proof of motive.” The law governing the admissibility of specific acts evidence for “other purposes” requires a trial court to make three findings. First, the court must “determine that 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.” [Wilson v. State](#), 765 N.E.2d 1265, 1270 (Ind. 2002) (internal citation omitted). Second, the court must determine that the proponent has sufficient proof that the person who allegedly committed the act did, in fact, commit the act. [Clemens v. State](#), 610 N.E.2d 236, 242 (Ind. 1993). And third,

the court must “balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403.” *Wilson*, 765 N.E.2d at 1270. . . .

D.R.C. v. State, 908 N.E.2d 215, 223 (Ind. 2009). King does not challenge the relevance of the text messages under the first step of that analysis.¹ Instead, he contends that the State did not have sufficient proof that King was one of the two involved in that text exchange and also that the risk of unfair prejudice from those text messages substantially outweighed their probative value.

[12] We first address King’s argument that the State did not sufficiently demonstrate that King was involved in the text exchange with the unknown third party. King and the State initially dispute the proper test to apply here, but we need not consider that question. Our Supreme Court has already explained what the test here is: “There must be sufficient proof from which a reasonable jury could find the uncharged conduct proven by a preponderance of the evidence.” *Id.* at 224 (citing *Clemens v. State*, 610 N.E.2d 236, 242 (Ind. 1993)). “[D]irect evidence that the defendant perpetrated the prior bad act is not required.” *Clemons*, 610 N.E.2d at 242. Rather, “[s]ubstantial circumstantial evidence of probative value is sufficient” *Id.* And, “[i]f the trial court finds this threshold showing met (or likely to be met), it properly admits the offered items

¹ As discussed below, the State offered the exhibit to show that King could have foreseen Comeno’s death resulting from the sale of King’s heroin.

and leaves to the jury the task of assessing their persuasive value.” *D.R.C. 908 N.E.2d at 224.*

[13] The State presented sufficient proof from which the jury could have concluded by a preponderance of the evidence that King was involved in the text exchange with the third party. Those text messages were extracted from the cell phone ending in 9487. Comeno had saved that phone number on his phone under the last name “King.” A cell phone with a number ending with 9487 was one of the two phones seized from King’s vehicle when he was arrested in April 2020. The passcode for the phone was King’s date of birth. And, at the jail following his arrest, King told his mother in a jailhouse phone call that the officers had seized his phones. A reasonable jury could have readily concluded that the State had shown by a preponderance of the evidence that the 9487 cell phone was King’s and, therefore, that the communications from that phone were from King.

[14] We thus turn to the Rule 403 balancing test. Under *Indiana Evidence Rule 403*, “relevant evidence may be excluded if its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.” *Snow v. State*, 77 N.E.3d 173, 179 (Ind. 2017) (quotation marks omitted). As our Supreme Court has made clear:

“Trial judges are called trial judges for a reason. The reason is that they conduct trials. Admitting or excluding evidence is what they do.” *United States v. Hall*, 858 F.3d 254, 288 (4th Cir. 2017) (Wilkinson, J., dissenting). That’s why trial judges have discretion in making evidentiary decisions. This discretion means

that, in many cases, trial judges have options. They can admit or exclude evidence, and we won't meddle with that decision on appeal. See *Smoot v. State*, 708 N.E.2d 1, 3 (Ind. 1999). There are good reasons for this. "Our instincts are less practiced than those of the trial bench and our sense for the rhythms of a trial less sure." *Hall*, 858 F.3d at 289. And trial courts are far better at weighing evidence and assessing witness credibility. *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014). In sum, our vantage point—in a "far corner of the upper deck"—does not provide as clear a view. *State v. Keck*, 4 N.E.3d 1180, 1185 (Ind. 2014).

Id. at 177. Our trial courts have "wide discretion" in applying Rule 403. *Id.*

- [15] The trial court did not abuse its discretion in applying Rule 403 here. The State's Level 1 felony charge required the State to show that King's sale of heroin to Comeno was the actual and the proximate cause of Comeno's death. *Yeary v. State*, 186 N.E.3d 662, 683 (Ind. Ct. App. 2022). The proximate cause analysis, in turn, "centers on the concept of foreseeability, whereby a defendant is only responsible for the foreseeable results of his actions." *Id.* at 672.
- [16] Again, King does not dispute that the text exchange demonstrated in State's Exhibit 64 was relevant to the State's burden to show that King's sale of heroin to Comeno could have foreseeably resulted in Comeno's death. Indeed, the evidence made clear that the text exchange at issue discussed King's involvement in a heroin buy and that the heroin King had recently sold had "som[ething] wrong in it" and would "gel[] up." Ex. Vol. 1, p. 137. Further, King's text exchange with the third party happened the morning of the same day King sold the fatal heroin to Comeno.

[17] The evidence at issue thus was highly probative to a material element of an offense. And King’s argument that the unfair prejudice from that evidence substantially outweighed its probative value simply seeks to have this Court rebalance the weight of the evidence under [Rule 403](#), which we will not do. We affirm the trial court’s admission of State’s Exhibit 64.

2. The State presented sufficient evidence to support King’s convictions.

[18] King next asserts that the State failed to present sufficient evidence to support his convictions. For sufficiency of the evidence challenges, we consider only probative evidence and reasonable inferences that support the judgment of the trier of fact. [Hall v. State, 177 N.E.3d 1183, 1191 \(Ind. 2021\)](#). We will neither reweigh the evidence nor judge witness credibility. *Id.* We will affirm a conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.*

[19] To support King’s Level 1 felony conviction, the State was required to show, in relevant part, that King “deliver[ed]” the fatal heroin to Comeno. [Ind. Code § 35-42-1-1.5 \(2019\)](#). Likewise, to support King’s Level 4 felony conviction, the State was required to show, again, in relevant part, that King “deliver[ed]” heroin to Mashburn. [I.C. § 35-48-4-1\(a\)\(1\), \(c\) \(2019\)](#). King does not challenge

the sufficiency of the evidence supporting any other elements of his two convictions.²

[20] The State presented sufficient evidence to show that King delivered heroin to Comeno. The evidence showed that Comeno and King used their respective cell phones to arrange for Comeno to purchase heroin from King at the Speedway gas station during the afternoon of March 6, 2020. Both Comeno's cell phone and King's cell phone contained that same text exchange. Comeno's grandfather testified that he drove Comeno to the Speedway around the same time as that text exchange. King's cell phone location data confirmed that King also was present at the Speedway at the same time. And, as described in Issue One, the State amply demonstrated that the cell phone ending in 9487 was King's cell phone. A reasonable jury could have readily concluded from the State's evidence that King delivered heroin to Comeno as charged.

[21] The State also presented sufficient evidence to show that King delivered heroin to Mashburn. The evidence showed that Mashburn and King used their respective cell phones to arrange for Mashburn to purchase heroin from King at a Dairy Queen on March 10, 2020. That purchase was pursuant to a controlled buy involving officers, and Mashburn testified at the trial that he purchased the

² King does assert that, because State's Exhibit 64 should not have been admitted, the State failed to show the required element of proximate causation for the Level 1 felony. As we conclude that that evidence was properly admitted, however, we need not consider this argument. And we also conclude that State's Exhibit 64 was sufficient evidence to establish the element of proximate causation.

heroin from King at that time.³ And King's cell phone location data confirmed that King was at the Dairy Queen at the same time. Again, a reasonable jury could have readily concluded from the State's evidence that King delivered heroin to Mashburn as charged.

[22] Accordingly, we affirm King's conviction for Level 1 felony dealing in a controlled substance resulting in death and his conviction for Level 4 felony dealing in cocaine or a narcotic drug.

Conclusion

[23] For all of the above-stated reasons, we affirm King's convictions.

[24] Affirmed.

Riley, J., and Crone, J., concur.

³ As the State's evidence on the Level 4 felony did not consist solely of Mashburn's testimony and included corroborating, circumstantial evidence, King's attempt to invoke the incredible-dubiosity rule on appeal is a nonstarter. *See, e.g., Moore v. State*, 27 N.E.3d 749, 756 (Ind. 2015).