MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Charles E. Traylor
Kolb Roellgen & Traylor LLP
Vincennes, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Jodi Kathryn Stein
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Megan M. Smith,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 23, 2023

Court of Appeals Case No. 22A-CR-1166

Appeal from the Knox Superior Court

The Honorable Brian M. Johnson, Judge

Trial Court Cause No. 42D02-2108-CM-552

Mathias, Judge.

[1] Megan M. Smith appeals her convictions for Class A misdemeanor domestic battery and Class A misdemeanor invasion of privacy. Smith raises six issues for our review, which we restate as the following three issues:

> 1. Whether she preserved for appellate review her argument that the trial court erred when it took judicial notice of separate proceedings on an order for protection against Smith, or whether the court's notice of that record is fundamental error.
>
> 2. Whether the State presented sufficient evidence to support her conviction for Class A misdemeanor invasion of privacy.
>
> 3. Whether the State presented sufficient evidence to support her conviction for Class A misdemeanor domestic battery.

[2] We affirm.

Facts and Procedural History

[3] Smith and M.H. were married. In 2020, both Smith and M.H. were convicted of domestic battery against each other. Thereafter, they lived in separate residences, and their daughter, A.H. lived with M.H. The Knox Superior Court issued an order for protection on behalf of M.H. that prohibited Smith from contacting M.H. The order for protection provided an exception for visitation with A.H.

[4] After A.H.'s first day of school on August 10, 2021, Smith arrived at M.H.'s residence unannounced. Smith "was in a very foul mood" and "wanted to remove [A.H.] and take her." Tr. Vol. 2, p. 10. M.H. asked Smith to leave, but

Smith refused. M.H. then closed the front door on Smith, but Smith proceeded to "bang" on the door. *Id.* at 11. M.H. opened the door again, and Smith "struck" him "in the face and lip." *Id.* M.H. then "went to the back room and closed the door." *Id.* at 12. Smith entered the residence and began "[b]reaking things in the house, smashing items" and "trying to barge in the door." *Id.* A.H. "was crying," and eventually M.H. opened the door and Smith "grabbed [A.H.] and took her outside" to "her car." *Id.* at 12-13.

[5] M.H. followed Smith and opened the door to Smith's car to let A.H. out. Smith then "grabbed" M.H. and "pulled" him into the car, where she then started "choking [him] and hitting [him] in the face." *Id.* at 14. A.H. fled from the scene to a relative's house, which M.H. and A.H. had established as the location to go to under a "safety plan" developed with Child Protective Services.

[6] The State charged Smith with Class A misdemeanor domestic battery and Class A misdemeanor invasion of privacy. At the commencement of her bench trial, the State asked the court if it wanted the record of the proceedings on the order of protection submitted as an exhibit, or if the court instead wanted to take judicial notice of that record. The court asked Smith if she had any objection to that record being admitted, and Smith's counsel responded, "I assumed you'd take judicial notice." *Id.* at 5. The court recognized that response as "no objection" and took judicial notice of the record of the proceedings on the order of protection. *Id.* M.H. then testified, again without objection, as to the existence and contents of that order for protection. *Id.* at 7, 11-12. And, in her

testimony, Smith admitted to signing a receipt for service of process on the order for protection. *Id.* at 66.

[7] At the bench trial, M.H. testified to the events of August 10, 2021. Smith also testified that she was at M.H.'s residence to exercise visitation. She also testified that she never touched M.H., and, instead, M.H. had struck her during the events of that day. At the close of the bench trial, the court found Smith guilty as charged. The court then sentenced Smith to an aggregate term of one year suspended to probation. This appeal ensued.

1. Smith Did Not Preserve Her Argument that the Trial Court Could Not Consider the Record of Proceedings on the Order For Protection, Nor is There Any Fundamental Error on This Issue.

[8] On appeal, Smith first argues that the trial court abused its discretion when it took judicial notice of the record of the proceedings on the order for protection for two reasons. First, Smith asserts that the court could not take judicial notice of the facts underlying the order for protection, and it could only take notice of the existence of the order for protection. Second, Smith asserts that the court abused its discretion because the record of proceedings on orders for protection are not generally available to the public and, thus, are not subject to judicial notice.

[9] Smith's arguments are not properly before us. Smith had the opportunity to object to the trial court taking judicial notice of the record on the order for protection, and she affirmatively declined to do so. Further, she did not object

when M.H. then proceeded to testify as to the existence and contents of the order for protection. Accordingly, Smith has waived these purported issues for appellate review.

[10] Still, Smith asserts that the trial court committed fundamental error in admitting the record on the order for protection. As our case law makes clear, "[a]n error is fundamental, and thus reviewable on appeal, if it made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm." *Nix v. State*, 158 N.E.3d 795, 800 (Ind. Ct. App. 2020) (quoting *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018)), *trans. denied*. And "fundamental error in the evidentiary decisions of our trial courts is especially rare." *Id.* at 801 (quoting *Merritt v. State*, 99 N.E.3d 706, 709-10 (Ind. Ct. App. 2018), *trans. denied*). That is because fundamental error

> is extremely narrow and encompasses only errors so blatant that the trial judge should have acted independently to correct the situation. At the same time, *if the judge could recognize a viable reason why an effective attorney might not object, the error is not blatant enough to constitute fundamental error*.

Durden, 99 N.E.3d at 652 (emphasis added; quotation marks and citations omitted).

[11] As we have repeatedly acknowledged, "[a]n attorney's decision not to object to certain evidence or lines of questioning is often a tactical decision, and our trial courts can readily imagine any number of viable reasons why attorneys might

not object." *Nix*, 158 N.E.3d at 801; *see also Merritt*, 99 N.E.3d at 710 ("The risk calculus inherent in a request for an admonishment is an assessment that is nearly always best made by the parties and their attorneys and not sua sponte by our trial courts."). Fundamental error in the erroneous admission of evidence might include a claim that there has been a "fabrication of evidence," "willful malfeasance on the part of the investigating officers," or otherwise that "the evidence is not what it appears to be." *Nix*, 158 N.E.3d at 801 (quoting *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010)). But absent an argument along those lines, "the claimed error does not rise to the level of fundamental error." *Id.* (quoting *Brown*, 929 N.E.2d at 207).

[12] Smith does not assert that M.H.'s testimony or the noticed record were not what they appeared to be. We therefore cannot say the trial court committed fundamental error in admitting that evidence. As we explained in *Nix*, "[t]here are often tactical reasons for an attorney to not object to the admission of evidence or the questioning of witnesses, and, however discerning our trial courts may be, they are not expected or required to divine the mind of counsel." *Id.* And, "if a defense counsel lacks a tactical reason for not objecting to prejudicial evidence that would not have been admitted with a proper objection, the defendant has the post-conviction process available to him to pursue relief." *Id.* Because Smith has failed to argue that the evidence regarding the order for protection was somehow not what it appeared to be, she has not shown fundamental error.

2. The State Presented Sufficient Evidence to Show Smith Committed Class A Misdemeanor Invasion of Privacy.

[13] Smith also argues that the State presented insufficient evidence to support her conviction for Class A misdemeanor invasion of privacy. As our Supreme Court has made clear:

> For sufficiency of the evidence challenges, we consider only probative evidence and reasonable inferences that support the judgment of the trier of fact. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). On sufficiency challenges, we will neither reweigh evidence nor judge witness credibility. *Love v. State*, 73 N.E.3d 693, 696 (Ind. 2017). We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.*

Hall v. State, 177 N.E.3d 1183, 1191 (Ind. 2021).

[14] Smith's argument against her invasion-of-privacy conviction is two-fold. First, she asserts that, because the record of the proceedings on the order for protection was improperly admitted, there is no evidentiary basis from which the trial court could have found that she violated the order for protection. As explained above, Smith's argument regarding the admissibility of the record of the proceedings on the order for protection is not well-taken, and her derivative argument on the sufficiency of the evidence necessarily fails.

[15] Second, Smith asserts that the evidence shows that she was exercising visitation over A.H., and, thus, her presence at M.H.'s residence was within the exception to the order for protection. The trial court heard Smith testify that she believed

she was within the scope of that exception, and the court, based on the totality of the evidence from Smith's behavior that day, rejected it. We cannot say that the facts and inferences most favorable to the trial court's judgment is erroneous as a matter of law. We therefore affirm Smith's conviction for Class A misdemeanor invasion of privacy.

3. The State Presented Sufficient Evidence to Show that Smith Committed Class A Misdemeanor Domestic Battery.

[16] Last, Smith argues that the State failed to present sufficient evidence to show that she committed Class A misdemeanor domestic battery. Specifically, she asserts that M.H.'s testimony is incredibly dubious. As our Supreme Court has explained:

> Under our "incredible dubiosity" rule, we will invade the [fact-finder's] province for judging witness credibility only in exceptionally rare circumstances. The evidence supporting the conviction must have been offered by a sole witness; the witness's testimony must have been coerced, equivocal, and wholly uncorroborated; it must have been "inherently improbable" or of dubious credibility; and there must have been no circumstantial evidence of the defendant's guilt.

McCallister v. State, 91 N.E.3d 554, 559 (Ind. 2018).

[17] We decline to apply the incredible-dubiosity rule to M.H.'s testimony. Among other reasons, nothing about his testimony was inherently improbable or of dubious credibility. Smith's argument to the contrary is not well-taken.

[18] Smith also asserts that the State failed to present sufficient evidence to show that she knowingly or intentionally touched M.H., as required to show Class A misdemeanor domestic battery. *See* Ind. Code § 35-42-2-1.3(a)(1) (2021). But M.H.'s testimony readily sufficed to show that Smith knowingly or intentionally touched him. Her argument to the contrary is merely a request for this Court to reweigh the evidence, which we will not do.

[19] Finally, Smith argues for the first time on appeal that her actions were in "defense of herself, her daughter, and her property." Appellant's Br. at 26; *see also id.* at 29. Smith did not argue in the trial court that her actions were in self-defense, defense of a third party, or defense of property. Instead, she explicitly testified that she never touched M.H. at all. Tr. Vol. 2, pp. 61-66. Her unraised arguments of self-defense, defense of a third party, and defense of property are therefore not properly before us. We affirm Smith's conviction for Class A misdemeanor domestic battery.

Conclusion

[20] For all of the above-stated reasons, we affirm Smith's convictions for Class A misdemeanor domestic battery and Class A misdemeanor invasion of privacy.

[21] Affirmed.

Robb, J., and Foley, J., concur.