

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Matthew J. McGovern
Fishers, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Megan M. Smith
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Fabian Lavell Bennett,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 16, 2023

Court of Appeals Case No.
22A-CR-2274

Appeal from the Vanderburgh
Superior Court

The Honorable Wayne S.
Trockman, Judge

Trial Court Cause No.
82D02-2112-MR-6954

Memorandum Decision by Judge Kenworthy
Judges Crone and Felix concur.

Kenworthy, Judge.

Case Summary

[1] Following a jury trial, Fabian Bennett was convicted of murder¹ and then pleaded guilty to sentence enhancements for use of a firearm and being a habitual offender. Bennett now appeals, raising two issues:

(1) Did the trial court abuse its discretion by admitting a surveillance video of the shooting?

(2) Was there prosecutorial misconduct in the closing arguments, resulting in fundamental error?

[2] Concluding any error in the trial court's admission of the video was harmless and there was no prosecutorial misconduct or fundamental error, we affirm.

Facts and Procedural History

[3] Carlis Falls sometimes hired Michael Williams and Justin Altheide (Williams' nephew) to work on home improvement projects with him. Around the time of the incident underlying this case, Williams, Altheide, and Falls were finishing hanging drywall and painting in Bennett's house. On December 28, 2021, Williams and Altheide went to Bennett's house to clean debris off the porch and haul the debris away. Falls arrived when Williams and Altheide were nearly finished.

¹ Ind. Code § 35-42-1-1(1) (2018).

- [4] Once the three men cleared off the debris, Bennett came out of the house, looked at Altheide and asked him, “Why did you run?” *Tr. Vol. 3* at 39. Bennett then told the three men “nobody is leaving.” *Id.* Williams and Altheide got into the company truck and began driving to the corner of the block. Altheide “yell[ed] at [Falls] telling him to come on[.]” *Id.* at 41. Falls tried to make his way to his vehicle. Williams “turned back and looked” and saw Falls “raise his hands up” as Bennett walked from the porch to the sidewalk where Falls stood. *Tr. Vol. 2* at 154. Bennett shot Falls multiple times. Falls fell to the ground. Falls was taken to the hospital, and he died from multiple gunshot wounds. After shooting Falls, Bennett went back into his house.
- [5] A neighbor, Kimberly Givens, lived a few houses away from Bennett’s house. From a second-floor room in her home, Givens saw Bennett shoot Falls. Givens had seen Bennett around the neighborhood and knew he lived in the house where the shooting occurred.
- [6] The police were dispatched to Bennett’s house and arrived within two minutes. They obtained a search warrant for Bennett’s residence. The police officers did not find Bennett in the house or garage, but they did find a surveillance system inside the house.
- [7] The State charged Bennett with murder, alleged Bennett was a habitual offender, and sought an enhancement for Bennett’s use of a firearm during the commission of the murder. Police arrested Bennett on December 30, 2021.

[8] At trial, Officer Mark Decamps testified about searching Bennett's residence. Officer Decamps disconnected the wiring from the surveillance system, which he described as a D.V.R. system. He brought the D.V.R. back to the crime scene office and placed it in his secured locker "for Detective [Todd] Lincoln to take a look at." *Id.* at 237. Detective Lincoln testified that he turned on the D.V.R. but could not access the video footage without the system password. After his attempt, Detective Lincoln returned the D.V.R. to evidence storage. Officer Aaron McCormick took the D.V.R. to the Indianapolis Field Office of the F.B.I. and returned one week later to retrieve the D.V.R. and a "single D-V-D containing data" extracted from the surveillance system. *Id.* at 245. Officer McCormick returned the D.V.R. to evidence storage and gave the D.V.D. containing the video footage to Detective Arnold Juncker with the Evansville Police Department. The video recording shows the incident from the perspective of the camera on Bennett's porch, facing the road.

[9] The jury found Bennett guilty of murder, and Bennett pleaded guilty to the firearm and habitual offender sentence enhancements. The trial court sentenced Bennett to sixty years for murder with another ten years for the firearm enhancement and six years for the habitual offender enhancement. Bennett now appeals. Additional facts are provided as necessary.

Discussion and Decision

Video Recording

- [10] “A trial court has discretion regarding the admission of evidence and its decisions are reviewed only for abuse of discretion.” *Hall v. State*, 177 N.E.3d 1183, 1193 (Ind. 2021). We reverse a trial court’s decision only if its ruling was “clearly against the logic and effect of the facts and circumstances before it and errors affect a party’s substantial rights.” *Id.*
- [11] “Generally, photographs and videotapes are treated as demonstrative evidence.” *Rogers v. State*, 902 N.E.2d 871, 876 (Ind. Ct. App. 2009).² That is, a photograph is not evidence itself but is merely used as “a nonverbal method of expressing a witness’ testimony and is admissible only when a witness can testify it is a true and accurate representation of a scene personally viewed by that witness.” *Bergner v. State*, 397 N.E.2d 1012, 1014 (Ind. Ct. App. 1979). Therefore, “[w]hen photographs are introduced as demonstrative aids to assist in the presentation and interpretation of evidence, the only requirement is testimony that the photographs accurately depict the scene or occurrence as it appeared at the time in question.” *Stott v. State*, 174 N.E.3d 236, 245 (Ind. Ct. App. 2021) (quoting *McCallister v. State*, 91 N.E.3d 554, 561 (Ind. 2018)). But when photographs are admitted for a substantive purpose as a “silent witness,” there must be a “strong showing of authenticity and competency, including

² “The standard applicable to the admissibility of photographs applies to videotapes.” *Timberlake v. State*, 679 N.E.2d 1337, 1340 (Ind. Ct. App. 1997).

proof that the evidence was not altered.” *Id.* Before admitting any relevant piece of evidence, the trial court applies the Indiana Evidence Rule 403 balancing test to decide whether the evidence’s “probative value is substantially outweighed by a danger of . . . unfair prejudice[.]”

[12] Throughout his trial, Bennett objected to the admission of the video. During two of his objections, Bennett cited *Stott*, arguing the State needed to provide a foundation to admit the video under the silent witness theory. On appeal, Bennett concedes the surveillance video was “admitted as a demonstrative exhibit rather than a substantive exhibit under the silent witness theory[.]” *Appellant’s Br.* at 14. To lay a proper foundation for a video, the proponent must authenticate the video by allowing the sponsoring witness to establish the video is a “true and accurate representation of the things that it is intended to portray.” *Timberlake*, 679 N.E.2d at 1341. Williams affirmed the depiction of the shooting portrayed in the video extracted from the D.V.R. “was exactly what [he saw]” on the day of the shooting. *Tr. Vol. 3* at 99. And the video is relevant because it depicts the scene Williams had described. *See Timberlake*, 679 N.E.2d at 1341.

[13] Also, the trial court was within its discretion to admit the video after applying the balancing test of Indiana Evidence Rule 403. The Indiana Supreme Court has explained “all relevant evidence is ‘inherently prejudicial’ in a criminal prosecution, so the inquiry boils down to a balance of probative value against the likely unfair prejudicial impact that the evidence may have on the jury.” *Richmond v. State*, 685 N.E.2d 54, 55–56 (Ind. 1997); *see Hall v. State*, 177

N.E.3d 1183, 1194 (Ind. 2021). Here, the probative value of the video is high because it allowed the jury to visualize Williams' testimony more clearly. Bennett does not identify unfair prejudice, and no unfair prejudice is apparent. The video was not introduced to exploit or inflame the jury. *See, e.g., Richmond*, 685 N.E.2d at 54–55; *Hall*, 177 N.E.3d at 1194. Three witnesses testified to seeing Bennett shoot Falls, which is what the video depicts.

[14] Rather than proceed under the silent witness theory, Bennett argues the State failed to provide an adequate chain of custody for the D.V.D. because no witness testified as to the origin of the D.V.D. But this argument is inapplicable because the court admitted the video as a demonstrative exhibit rather than as a substantive exhibit. Further, even if we assume the State should have provided a chain of custody for the D.V.D. and failed to sufficiently do so, any error would be harmless.

[15] For an error to be harmless, it must not prejudice the substantial rights of a party. *Hall*, 177 N.E.3d at 1197. To determine whether an evidentiary error prejudiced the rights of the defendant, we assess “the probable impact the evidence had upon the jury in light of all of the other evidence that was properly presented” and “the likelihood the challenged evidence contributed to the verdict.” *Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014). We also consider “the presence or absence of other, corroborating evidence on material points; whether the impermissibly admitted evidence was cumulative; the overall strength of the prosecution’s case; the importance of the impermissible evidence in the prosecution’s case; and the extent of cross-examination or questioning on

the impermissibly admitted evidence.” *Zanders v. State*, 118 N.E.3d 736, 745–46 (Ind. 2019).

[16] Here, the State presented substantial independent evidence of Bennett’s guilt. Three eyewitnesses testified to seeing Falls get shot. All three witnesses identified Bennett as the person who shot Falls: Williams and Altheide recognized Bennett from working on his home, and Givens recognized Bennett as the person living in the house where the shooting occurred. Bennett’s substantial rights were not prejudiced because the video provided corroborating and cumulative evidence proving Bennett shot Falls. Considering the substantial independent evidence the State presented, the admission of the video was unlikely to impact the jury in a way that contributed to the verdict. Any error the trial court may have committed in admitting the video was therefore harmless.

Prosecutor’s Statements

[17] “In reviewing a claim of prosecutorial misconduct properly raised in the trial court, we determine (1) whether misconduct occurred, and if so, (2) ‘whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected’ otherwise.” *Ryan v. State*, 9 N.E.3d 663, 667 (Ind. 2014) (quoting *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006)). To preserve a claim of prosecutorial misconduct, the defendant must, at the time the misconduct occurs, ask the trial court “to admonish the jury or move for a mistrial if admonishment is inadequate.” *Castillo v. State*, 974 N.E.2d 458, 468 (Ind. 2012). The defendant’s

failure to request an admonishment or a mistrial waives the claim. *Id.* If the defendant waives the claim for prosecutorial misconduct, then on appeal “[t]he defendant must establish not only the grounds for prosecutorial misconduct but must *also* establish that the prosecutorial misconduct constituted fundamental error.” *Ryan*, 9 N.E.3d at 667–68 (emphasis added). Proving fundamental error requires the defendant to establish the misconduct made a fair trial impossible or constituted clearly blatant violations of basic and elementary principles of due process. *Castillo*, 974 N.E.2d at 468.

[18] Bennett argues two statements made by the prosecutor constituted misconduct. First, Bennett claims the prosecutor attempted to shift the burden of proof to him during the State’s rebuttal closing argument. The prosecutor said, “You have testimony from three witnesses that I-D him; three people that came in and said that’s him. You have a video of him doing it! There is no evidence that he didn’t do it!” *Tr. Vol. 3* at 165. Bennett waived his prosecutorial misconduct argument because he did not object to this statement at trial, did not request the court to admonish the jury, and did not move for a mistrial.

[19] Bennett has also waived his claim for fundamental error because he does not adequately raise it in his brief. Indiana Rule of Appellate Procedure 46(A)(8)(a) instructs the appellant to include his contentions “on the issues presented, supported by cogent reasoning.” And “[e]ach contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on[.]” Ind. Appellate Rule 46(A)(8)(a). In his reply brief, Bennett asserts he raised a fundamental error claim in his initial brief when he

argued to prevail on his claim, he must establish the misconduct “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Appellant’s Reply Br.* at 7 (quoting *Appellant’s Br.* at 22 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974))). Bennett claims this statement lays out the standard for fundamental error. But in his brief, Bennett only applies the standard to prosecutorial misconduct. He does not establish the grounds for prosecutorial misconduct *and* fundamental error. *See Ryan*, 9 N.E.3d at 667–68.

[20] Even so, we cannot agree the prosecutor’s statement constituted misconduct. The prosecutor directly and briefly responded to Bennett’s statement in his closing argument that “there is no proof that Fabian Bennett shot Carlis Falls.” *Tr. Vol. 3* at 159. The prosecutor’s statement did not place Bennett in grave peril because the trial court instructed the jury on the burden of proof: “To overcome the presumption of innocence, the State must prove the Defendant guilty of each element of the crime charged, beyond a reasonable doubt. The Defendant is not required to present any evidence to prove his innocence or to prove or explain anything.” *Id.* at 167. Therefore, the prosecutor’s statement is neither prosecutorial misconduct nor fundamental error.

[21] Second, Bennett argues the prosecutor committed misconduct because the prosecutor referenced facts not in the evidence. During closing arguments, Bennett claimed the State tried to convince the jury “[t]hat [Bennett] somehow went and shot this gentleman and . . . fled.” *Id.* at 159. Bennett continued, “There is no evidence of that; there is no evidence of anything other than what

they want you to believe[,] and there is no proof that [Bennett] shot [Falls].” *Id.* In the State’s rebuttal argument, the prosecutor responded, “Bennett wasn’t in the house when the Police got there. So, I would submit to you that . . . he either fled or he disappeared or teleported somewhere. I would say that he fled because he wasn’t in that house[.] ” *Id.* at 163. Bennett objected, arguing “in regards to him fleeing, there is no evidence of that and so the Jury has to be admonished[.] . . . I am requesting the opportunity to close.” *Id.* at 164. The trial court did not admonish the jury and did not allow Bennett to offer surrebuttal.

[22] Although Bennett objected and asked for a jury admonishment, he did not request a mistrial when his objection and request for admonishment failed, thereby waiving his prosecutorial misconduct claim. And again, Bennett does not make a fundamental error argument on appeal and has waived the claim. Waiver notwithstanding, we discern no prosecutorial misconduct. The prosecutor’s response was a fair interpretation of the evidence because Bennett was not present when the police arrived at his house within two minutes of being dispatched. Bennett was not placed in grave peril because of the comment, and there was no prosecutorial misconduct, let alone fundamental error.

Conclusion

[23] We conclude any error in the admission of the video was harmless and the prosecutor’s statements during closing argument did not constitute prosecutorial misconduct or fundamental error.

[24] **Affirmed.**

Crone, J., and Felix, J., concur.