MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

David A. Fabela,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 22, 2021

Court of Appeals Case No. 21A-CR-256

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D06-1805-MR-10

Najam, Judge.

Statement of the Case

[1] David Fabela appeals his conviction for murder, a felony, following a jury trial. Fabela presents two issues for our review:

1. Whether a State's witness' reference to Fabela's post-*Miranda* silence on cross-examination constitutes fundamental error.

2. Whether the State's failure to preserve allegedly exculpatory evidence violated Fabela's right to due process.

[2] We affirm.

Facts and Procedural History

[3] In early May 2018, Fabela was staying with his girlfriend, Michelle Funk-Pike, at a hotel in Ft. Wayne. On May 12 or 13, during an argument, Fabela brutally attacked Michelle and killed her. Fabela stayed in the hotel room with the corpse for a few days. At one point, a friend of Michelle's also staying at the hotel, Latoya Walker, asked Fabela where Michelle was, and Fabela replied that she was dead. Fabela told another hotel guest that he had killed Michelle and that her body was in his room "wrapped up in a blanket." Tr. Vol. 1 at 227. And Fabela told a group of hotel guests, "I just killed my wife. She's laying up on my bed." *Id.* at 245-46. When a couple of the guests expressed their disbelief, Fabela told them to go to his room, which they did. The door was open, and the guests saw Michelle's dead body on Fabela's bed. At that point, one of the guests called 9-1-1 to report the suspected murder.

[4] At approximately 10:15 p.m. on May 15, Fort Wayne Police Department Officer Stephanie Souther and other officers arrived at the hotel to investigate. The 9-1-1 dispatch had provided a description of the suspect as a six-foot-tall Hispanic male wearing a black shirt and pajama pants. The officers approached a group of people standing outside the hotel, and someone asked if the officers were there about "the guy saying he killed his girlfriend[.]" *Id.* at 184. When the officers said yes, someone directed them to Room 217. When the officers knocked on the door to Room 217, Fabela answered the door, but he did not fit the description of the suspect, so the officers left and continued their search around the hotel.

[5] At some point, a man approached the officers and said, "Hey, the guy you're looking for ran out the back," and he told the officers that the suspect was headed east on foot. *Id.* at 187. Officers eventually caught up to the suspect, Fabela, and arrested him. Fabela had a fresh cut on his wrist at that time. Officer Souther asked Fabela if he had tried to kill himself, and he responded that he had. Officer Souther asked Fabela whether he had a girlfriend, and he said that he had not had a girlfriend for two years. Officer Souther then ordered a protective sweep of Fabela's hotel room, and officers discovered Michelle's body. Officers then obtained a search warrant for the hotel room. As part of the investigation, a detective took photographs of Fabela in the hospital, where he was being treated for the cut to his wrist.

[6] The State charged Fabela with murder. Prior to trial, the State informed Fabela that the photographs the detective had taken of him in the hospital were not

available due to a technical issue with the camera's SD card. And during the jury trial, Fabela asked Detective Brian Martin whether he had had a conversation with Fabela on May 15 or 16 after he was arrested. In response, Detective Martin stated, "I attempted to go over the advice of rights form with him, and he quickly acknowledged that he did not want to speak to me." Tr. Vol. 2 at 133. Fabela did not object or request an admonishment, but continued the cross-examination. At the conclusion of the trial, the jury found Fabela guilty of murder. The trial court entered judgment of conviction accordingly and sentenced Fabela to sixty-three years executed. This appeal ensued.

Discussion and Decision

*Issue One: Post-*Miranda *Silence*

[7] Fabela first contends that Detective Martin's reference to Fabela's post-*Miranda* silence on cross-examination constitutes fundamental error. As our Supreme Court has explained:

> The fundamental error exception is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process. This exception is available only in egregious circumstances.

Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010) (quotation marks and citations omitted). To prove fundamental error, the appellant must show "that the trial

court should have raised the issue *sua sponte*. . . ." *Taylor v. State*, 86 N.E.3d 157, 162 (Ind. 2017).

[8] On appeal, Fabela makes no contention that the trial court should have *sua sponte* addressed the remark by Detective Martin on cross-examination that Fabela did not want to speak to him. Rather, Fabela asserts that the remark by Detective Martin constituted reversible error and that

> the error was egregious enough to constitute fundamental error because the State's lead detective has tremendous experience [a police officer for going on twenty-six (26) years and homicide detective for approximately eight (8) years] (Tr. Vol. II, p. 123), and made the comment where it was not required in response to Fabela's attorney's cross examination. Fabela argues that a simple "no" would have sufficed rather than presenting the topic of Fabela's rights and his decision to exercise them.

Appellant's Br. at 10. Fabela's argument misses the mark.

[9] First, to the extent Fabela alleges a *Doyle* violation, he does not direct us to any evidence that the State used his post-*Miranda* silence in an effort to impeach him. As this court has observed, "[e]ven '*Doyle* does not impose a prima facie bar against any mention whatsoever of a defendant's right to request counsel, but instead guards against the *exploitation of that constitutional right by the prosecutor*.'" *Trice v. State*, 766 N.E.2d 1180, 1183 (Ind. 2002) (quoting *Willsey v. State*, 698 N.E.2d 784, 793 (Ind. 1998); emphasis added). Second, and moreover, the typical remedy for a *Doyle* violation is an admonishment and/or

a mistrial. *See, e.g.*, *Barton v. State*, 936 N.E.2d 842, 851 (Ind. Ct. App. 2010), *trans. denied*. But as our Supreme Court has held,

> [d]eciding whether to request that the jury be admonished will draw undue attention to the very remarks, the effect of which is sought to be eradicated, is one of trial strategy. It is the function of defense counsel to determine if such strategy is desirable. It is the trial court's function to rule on the request, if made, and not to, *sua sponte*, initiate the admonishment of the jury. *Williams v. State* (1981) Ind., 426 N.E.2d 662; *Watts v. State*, (1982) Ind. App., 434 N.E.2d 891.

Brewer v. State, 455 N.E.2d 324, 327 (Ind. 1983). Thus, here, the trial court did not have a duty to *sua sponte* admonish the jury after Detective Martin's remark. And Fabela does not contend that the court should have *sua sponte* declared a mistrial.

[10] Fabela has not satisfied his burden on appeal to show fundamental error. *See Taylor*, 86 N.E.3d at 162. The State did not "exploit" the isolated reference to Fabela's post-*Miranda* silence during defense counsel's cross-examination of Detective Martin. *See Trice*, 766 N.E.2d at 1183. And, in any event, the trial court did not have a duty to address this issue *sua sponte*. *See Brewer*, 455 N.E.2d at 327.

Issue Two: Due Process

[11] Fabela next contends that the State failed to preserve evidence that "could have assisted" Fabela in proving his self-defense claim, which violated his right to due process. Appellant's Br. at 12. In particular, Fabela asserts that

photographs Detective Jason Palm took of him after his arrest "would have corroborated [Fabela's] testimony" that Michelle had stabbed his arm and he killed her in self-defense. *Id.* Fabela maintains that the State's failure to preserve those photographs violated his right to due process.

[12] The State asserts that Fabela has waived this issue for our review. The State points out that Fabela was notified prior to trial that the photographs were unavailable, and Fabela did not raise the issue to the trial court either before, during, or after trial. In failing to specifically raise due process below, Fabela did not provide the trial court with "a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal." *Endres v. Ind. State Police*, 809 N.E.2d 320, 322 (Ind. 2004) (holding alleged constitutional violations raised for first time on appeal waived); *see also Terpstra v. State*, 138 N.E.3d 278, 285-86 (Ind. Ct. App. 2019) (holding due process rights waived if raised for first time on appeal), *trans. denied*. Thus, we agree that Fabela has waived this issue for our consideration. And Fabela makes no contention that the alleged due process violation constitutes fundamental error.

[13] Waiver notwithstanding,

> [t]o determine whether a defendant's due process rights have been violated by the State's failure to preserve evidence, we first decide whether the evidence in question was "potentially useful evidence" or "materially exculpatory evidence." *Samek v. State*, 688 N.E.2d 1286, 1288 (Ind. Ct. App. 1997) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988)), *trans. denied*. The United States Supreme Court has defined potentially useful evidence as "evidentiary material of

> which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Youngblood*, 488 U.S. at 57, 109 S. Ct. at 337, 102 L. Ed. 2d at 289. The State's failure to preserve potentially useful evidence does not constitute a denial of due process of law "unless a criminal defendant can show bad faith on the part of the police." *Id.* at 58, 109 S. Ct. at 337, 102 L. Ed. 2d at 289; *Bivins v. State*, 642 N.E.2d 928, 943 (Ind. 1994), *cert. denied*, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734 (1996).
>
> On the other hand, materially exculpatory evidence is that evidence which "possesses an exculpatory value that was apparent before the evidence was destroyed" and must "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489, 104 S. Ct. 2528, 2534, 81 L. Ed. 2d 413, 422 (1984). Unlike potentially useful evidence, the State's good or bad faith in failing to preserve materially exculpatory evidence is irrelevant. *Samek*, 688 N.E.2d at 1288.

Chissell v. State, 705 N.E.2d 501, 504 (Ind. Ct. App. 1999), *trans. denied*.

[14] At Fabela's trial, Detective Palm testified that he could not recall any details about the photographs he had taken of Fabela after his arrest, including whether he had photographed any cuts on Fabela's arm. And Detective Palm testified that he did not note in his written report any significant injuries to Fabela. Thus, to the extent Fabela contends for the first time on appeal that the State failed to preserve materially exculpatory evidence, that contention is pure speculation. Fabela does not direct us to evidence that the photographs possessed an exculpatory value that was apparent before the SD card was corrupted. *See id.* Thus, the photographs were, at best, "potentially useful

evidence." *See id.* And without any evidence that the State failed to preserve them in bad faith, Fabela cannot show that he was denied his right to due process. *See id.*

[15] Affirmed.

Vaidik, J., and Weissmann, J., concur.