## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Edwin Lee Bland, Jr.,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

July 15, 2022

Court of Appeals Case No. 21A-CR-1631

Appeal from the Owen Circuit Court

The Honorable Lori Thatcher Quillen, Judge

Trial Court Cause No. 60C01-2010-MR-587

**Molter, Judge.**

[1] In the fall of 2020, Edwin Lee Bland, Jr. murdered Leroy Sherfield. After fleeing to Kentucky, the Kentucky State Police eventually detained him.

During their investigation, Bland was Mirandized, and one of the officers noticed that Bland was wearing bloody jeans. The officer asked Bland for his consent to take the jeans, and Bland gave it. The blood from the jeans later tested positive for Sherfield's DNA.

[2] Ultimately, a jury found Bland guilty of murdering Sherfield, and Bland admitted to being a habitual offender. At sentencing, the prosecutor asked Bland questions that normally would have been addressed in his presentence investigation report because Bland had refused to cooperate with the preparation of that report. When Bland became irritated at what he perceived to be irrelevant questions by the prosecutor, the trial court encouraged him to answer the questions.

[3] On appeal, Bland argues the trial court abused its discretion by admitting evidence of the bloody jeans because their seizure violated his rights under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. He also argues he was compelled to testify at sentencing contrary to his Fifth Amendment right against self-incrimination. Finding no error, we affirm.

## Facts and Procedural History

[4] In October 2020, Bland reconnected with Sherfield, who was an acquaintance and the brother of his friend, Glen Raber. One evening, while the two were alone in Sherfield's residence, Bland and Sherfield began talking about Raber, who had passed away from cancer. Sherfield allegedly made an offensive

comment about the circumstances of Raber's death, and the two men subsequently engaged in a physical altercation. Ultimately, Bland stabbed and slashed Sherfield multiple times with a knife, and Sherfield died of his injuries.

[5] After killing Sherfield, Bland fled to his cousin's house in Kentucky. He told his cousin that "he killed a man," recounting that he "went to work" on the man after the man "[said] some stuff that he didn't like." Tr. Vol. 4 at 200, 205. The Kentucky State Police subsequently detained Bland after receiving a report from his cousin, and the officers conducted a pat-down search. They found a pocketknife and cell phone on Bland's person, and they noticed that Bland was wearing bloody jeans. After advising Bland of his *Miranda* rights, the officers asked if they could take his jeans. Also, they asked Bland if they could photograph his vehicle, including its interior. The officers then found a droplet of blood in the vehicle and asked if they could take a sample of that blood. Bland allegedly consented to all three requests, and the blood from the jeans later tested positive for Sherfield's DNA.

[6] Because the Kentucky State Police could not initially associate Bland with any crime, they released him. But, soon after, the Indiana State Police identified Bland as a suspect in Sherfield's murder and investigated the crime. The State eventually charged Bland with murder and alleged that he was a habitual offender.

[7] Before trial, Bland moved to suppress the evidence obtained by the Kentucky officers, but the trial court denied his motion. Particularly, Bland challenged

the seizure of his jeans. The trial court reaffirmed its decision to deny Bland's motion to suppress the evidence after he renewed the issue at trial. Later, the jury found Bland guilty of Sherfield's murder, and Bland admitted to being a habitual offender.

[8] Shortly after, the probation department attempted to prepare Bland's presentence investigation report ("PSI"), but Bland refused to answer their questions. At the sentencing hearing, without objection from defense counsel, the prosecutor called Bland as a witness to ask questions that would have been addressed in the PSI. When Bland became irritated at what he perceived to be irrelevant questions by the prosecutor, the trial court encouraged him to answer the questions because they were "to his benefit" and relevant to his sentencing. Tr. Vol. 5 at 173.

[9] In June 2021, the trial court sentenced Bland to sixty-four years for his murder conviction, which was increased by eighteen years for the habitual offender enhancement. In sentencing Bland, the trial court identified several aggravating factors and stated that Bland's refusal to cooperate with the probation department and at sentencing showed that he lacked a willingness to rehabilitate, which deserved "some weight." Appellant's App. Vol. 2 at 81–82. Bland now appeals.

# Discussion and Decision

## I. Admission of Evidence[1]

[10] "The general admission of evidence at trial is a matter we leave to the discretion of the trial court." *See Clark v. State*, 994 N.E.2d 252, 259–60 (Ind. 2013). "However, when a challenge to an evidentiary ruling is predicated on the constitutionality of a search or seizure of evidence, it raises a question of law that is reviewed de novo." *Curry v. State*, 90 N.E.3d 677, 683 (Ind. Ct. App. 2017), *trans. denied*. "The State has the burden to demonstrate that the measures it used to seize information or evidence were constitutional." *Id.*

### *A. United States Constitution*

[11] Bland argues his Fourth Amendment rights were violated when the Kentucky officers seized his jeans without a warrant. Appellant's Br. at 16. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and

[1] Although Bland appears to challenge all the evidence discovered by the Kentucky officers, we note that in his Motion to Suppress Evidence he only challenged the admission of his bloody jeans. Appellant's App. Vol. 2 at 39–31. Bland neither challenged other evidence obtained as a result of his pat-down search nor any evidence discovered in his vehicle by the Kentucky officers. *Id.* Therefore, Bland has waived these claims by making them for the first time on appeal. *Ind. Bureau of Motor Vehicles v. Gurtner*, 27 N.E.3d 306, 311 (Ind. Ct. App. 2015) (explaining that an argument cannot be presented for the first time on appeal). Also, we note that Bland does not challenge the validity of his pat-down search.

> particularly describing the place to be searched, and the persons or things to be seized.

[12] This generally "requires police to obtain a search warrant from a neutral, detached magistrate prior to undertaking a search of either a person or private property. *Dycus v. State*, 108 N.E.3d 301, 304 (Ind. 2018). But "that requirement is subject to certain carefully drawn and well-delineated exceptions." *Id.* (quotations omitted). "One such exception occurs when a person consents to a search; in other words, a person's valid consent eliminates the need for a search warrant." *Id.* "The theory underlying the consent exception is that, when an individual gives the State permission to search either his person or property, the governmental intrusion is presumably reasonable." *Wahl v. State*, 148 N.E.3d 1071, 1082 (Ind. Ct. App. 2020), *trans. denied*.

[13] The voluntariness of the consent is a question of fact to be determined by the totality of the circumstances, which includes, but is not limited to:

> (1) whether the defendant was advised of his *Miranda* rights prior to the request to search; (2) the defendant's degree of education and intelligence; (3) whether the defendant was advised of his right not to consent; (4) whether the detainee has previous encounters with law enforcement; (5) whether the officer made any express or implied claims of authority to search without consent; (6) whether the officer was engaged in any illegal action prior to the request; (7) whether the defendant was cooperative previously; and (8) whether the officer was deceptive as to his true identity or the purpose of the search.

*Navarro v. State*, 855 N.E.2d 671, 675 (Ind. Ct. App. 2006).

[14] The only basis Bland provides for arguing his consent was involuntary under the Fourth Amendment is that he "was never advised that he had the right to refuse consent to search." Appellant's Br. at 16. This argument based on a single factor overlooks that we must apply a "totality of the circumstances" test. *Navarro*, 855 N.E.2d at 675. That is why we have consistently held that a defendant's consent to search may still be voluntary even if law enforcement failed to inform him of his right to refuse a search, given the totality of the circumstances. *See, e.g.*, *id.* at 675–80 (finding consent voluntary even though an officer retained the defendant's driver's license during the investigative stop and never said he had a right to refuse consent or advised him of his *Miranda* rights because the officer was not deceptive, never implied the authority to search without consent, the defendant was not in custody, and he assisted by opening the trunk for the officer); *Meyers v. State*, 790 N.E.2d 169, 172 (Ind. Ct. App. 2003) (finding valid consent where the defendant was not advised of his rights or told he could refuse consent, was not in custody, was a high school graduate and had prior encounters with law enforcement, and the officer did not threaten or deceive him).[2]

[15] In this case, the totality of the circumstances reveals the consent was voluntary. The atmosphere in which Bland consented to the search was "casual"—he was permitted to smoke and was provided pizza. Tr. Vol. 2 at 13, 25. He was

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[2] Similarly, to the extent that Bland argues he was in custody when the officers asked if they could take his jeans, "[v]oluntariness is not vitiated merely because the defendant [was] in custody." *Garcia-Torres v. State*, 949 N.E.2d 1229, 1237 (Ind. 2011).

Mirandized,[3] and there was no evidence that anyone suggested he could not or should not refuse consent. *Id.* at 10, 18, 20–21. There is no evidence the officers engaged in illegality, were ever deceptive about their true identities or the purpose of the search, or claimed authority to search without consent.

[16] Accordingly, the totality of the circumstances indicates that Bland's consent was knowing and voluntary. The trial court, therefore, did not abuse its discretion in admitting Bland's jeans into evidence because the warrantless seizure of his jeans did not violate his Fourth Amendment rights.

## *B. Indiana Constitution*

*[17]* Although the Fourth Amendment and Article 1, Section 11 of the Indiana Constitution contain parallel language, each requires a separate, independent analysis. *Dycus*, 108 N.E.3d at 304. "In fact, Indiana's Constitution sometimes offers broader protections than those offered by the U.S. Constitution. Amongst those broader protections . . . is the requirement that, prior to obtaining consent to . . . search, police must explicitly advise a person in custody of [his] right to consult with counsel." *Id.* This requirement "is unique to Indiana and has no federal counterpart." *Id.*

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[3] Bland complains that while he was read his *Miranda* rights, "no explicit waiver of those rights was ever given" by him. Appellant's Br. at 14. That makes no difference because "[a]n express written or oral waiver of rights is not necessary to establish a waiver of *Miranda* rights." *Carter v. State*, 730 N.E.2d 155, 157 (Ind. 2000).

[18] Bland contends that the seizure of his jeans violated his rights under Article 1, Section 11 because the Kentucky officers did not advise him of his *Pirtle* rights prior to securing his consent to seize the jeans.[4] In *Pirtle v. State*, 323 N.E.2d 634, 640 (Ind. 1975), our Supreme Court held that, under Article 1, Section 11, "a person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision to give such consent." It is undisputed that Bland was in custody and the Kentucky officers did not advise him of his *Pirtle* rights, but Bland does not provide any authority for the proposition that an exclusionary rule applies to evidence seized by out-of-state officers acting independent of Indiana police officers based on the out-of-state officers' failure to comply with the Indiana Constitution. *Cf. Shotts v. State*, 925 N.E.2d 719, 726 (Ind. 2010) ("Exclusion by an Indiana court in a proceeding under Indiana law would not deter [an] Alabama officer who applie[s] for [an] Alabama warrant. Moreover, [an] Alabama officer cannot be expected to know of and comply with Indiana case law, any more than [an] Indiana officer[ ] should be required to be conversant with procedures in other states.").

[4] While Bland cites to Article 1, Section 13 of the Indiana Constitution in his appellant's brief, Appellant's Br. at 16, we note that, below, he only argued that the seizure of his jeans violated his rights under Article 1, Section 11. Appellant's App. Vol. 2 at 32–39. Thus, he has waived any claim as to Article 1, Section 13 by making it for the first time on appeal. *Gurtner*, 27 N.E.3d at 311 (explaining that an argument cannot be presented for the first time on appeal).

[19] Regardless, even if the admission of Bland's jeans was error—and we do not suggest it was[5]—it would have been harmless. While testifying at trial, Bland admitted to killing Sherfield and described doing so "[i]n a fit of rage." Tr. Vol. 5 at 58. Further, other evidence linked Bland to Sherfield's murder. Bland's DNA was discovered underneath Sherfield's fingernails and on a cup left at the crime scene, and Sherfield's blood was found on one of Bland's sweatshirts. Bland's cousin also testified that Bland told him that he had killed a man in Indiana. In short, the jury did not need the seized jeans to connect Bland to the killing because he admitted his role in the killing when he testified at trial, and plenty of other evidence corroborated that testimony. Thus, even if the trial court erred by admitting his jeans, Bland's substantial rights were not affected given his confession and the other evidence presented. *See* Ind. Trial Rule 61 ("No error in . . . the admission . . . of evidence is ground for . . . reversal on appeal[ ] unless refusal to take such action appears to the court inconsistent with substantial justice."); Ind. Appellate Rule 66(A) ("No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.").

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[5] For limited "searches . . . where the likelihood that police will come across inculpatory evidence beyond what they specifically seek is low . . . a *Pirtle* advisement is not necessary." *Dycus v. State*, 108 N.E.3d 301, 307 (Ind. 2018).

## II. Fundamental Error

[20] Bland argues his Fifth Amendment rights were violated when the State called him as a witness during his sentencing hearing, his lawyer advised him the State had a right to ask him questions, the Court told him answering the State's questions would help the Court determine the sentence, and the Court considered Bland's refusal to answer some of the State's questions as a factor supporting a higher sentence. We conclude Bland has failed to demonstrate reversible error.

[21] The Fifth Amendment's Self-Incrimination Clause provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This protection extends to state cases by virtue of the Fourteenth Amendment, *see Withrow v. Williams*, 507 U.S. 680, 688–89 (1993), and it "not only permits a person to refuse to testify against himself at a criminal trial . . . but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quotation marks omitted); *see also Clifft v. Ind. Dep't of State Revenue*, 660 N.E.2d 310, 314 (Ind. 1995). Proceedings where the protection applies include criminal sentencings. *Mitchell v. United States*, 526 U.S. 314, 315 (1999) (stating that, before sentencing, a defendant may have a legitimate fear of adverse consequences from further testimony and any effort to compel that testimony at sentencing clearly would contravene the Fifth

Amendment); *see also Strack v. State*, 186 N.E.3d 99, 102 (Ind. 2022) (per curiam) ("A defendant is not required to testify at sentencing . . . .").

[22] However, "[t]he Fifth Amendment prohibits only *compelled* testimony that is *incriminating*." *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177, 190 (2004) (emphases added). If those two elements are present,

> a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. Absent such protection, if he is nevertheless compelled to answer[,] his answers are inadmissible against him in a later criminal prosecution.

*Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973).

[23] Bland acknowledges he did not raise a Fifth Amendment objection at trial and his claim is therefore subject only to review for fundamental error. "Fundamental error is an exception to the general rule that a party's failure to object at trial results in a waiver of the issue on appeal." *Strack*, 186 N.E.3d at 103 (Ind. 2022) (quotations omitted). The bar for proving fundamental error is extraordinarily high. *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010). The doctrine is meant to cure the most egregious and blatant trial errors, not to provide a second bite at the apple for defense counsel who ignorantly, carelessly, or strategically fails to preserve an error. *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014).

[24] Even an error that is prejudicial or that implicates a constitutional right is not itself sufficient to constitute fundamental error. *Hollingsworth v. State*, 987 N.E.2d 1096, 1099 (Ind. Ct. App. 2013), *trans. denied*. Rather, a fundamental error is such a gross error that it renders any possibility of a fair trial impossible. *Id.* at 1098. Such error only occurs when any competent trial court judge would be required to intervene to prevent the denial of a fair trial. *Whiting v. State*, 969 N.E.2d 24, 34 (Ind. 2012). And when the alleged error relates to unfavorable testimony at sentencing, the defendant must show "his sentence would have been different had he not testified." *Strack*, 186 N.E.3d at 104.

[25] Bland has failed to demonstrate fundamental error. At a minimum, that is because he does not explain how his sentence would have been different had he not testified. The prosecutor's questions addressed Bland's legal history, family and social background, personal background, and personal health, which largely affirmed information that was already included in the PSI. Some of the testimony that was not redundant of other evidence available to the trial court was even beneficial to Bland. For example, the prosecutor was under the misimpression that Bland had no G.E.D., and Bland corrected that misimpression through his testimony. Tr. Vol. 5 at 171–72.

[26] It is true that in the sentencing order the court noted Bland's refusal to answer some questions, but that was in the context of noting it reflected "the same lack of cooperation" as his refusal "to cooperate with a Pre-Sentence Investigation Report." Appellant's App. Vol. 2 at 81–82. Bland does not argue the PSI violated his Fifth Amendment rights, and our court has held that refusing to

cooperate with the PSI is a valid aggravating circumstance. *George v. State*, 141 N.E.3d 68, 72–73 (Ind. Ct. App. 2020) (concluding that the defendant's refusal to cooperate with the probation department for the PSI was a valid aggravator), *trans. denied*; *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019) (holding that the defendant's attitude was correctly considered as an aggravator). The trial court also noted several other significant aggravators that it considered when sentencing Bland, including the "heinous [and] disturbing" nature of Sherfield's murder. *See* Appellant's App. Vol. 2 at 81–82. Thus, Bland has not shown that his testimony or his refusal to answer some questions likely made any difference in his sentencing, and he has therefore failed to demonstrate any fundamental error.[6]

[27] In sum, Bland has failed to show that the trial court abused its discretion in admitting his jeans into evidence under the Fourth Amendment or Article 1, Section 11. Also, he has not demonstrated any fundamental error regarding his sentence.

[28] Affirmed.

Mathias, J., and Brown, J., concur.

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[6] Although Bland cites Article 1, Section 14 in his briefing, he makes no separate self-incrimination argument under the Indiana Constitution. *See* Ind. Const. art. 1, §14 ("No person, in any criminal prosecution, shall be compelled to testify against himself."). Because he failed to offer a "separate analysis based on the state constitution," this "state constitutional claim is waived." *Dye v. State*, 717 N.E.2d 5, 11 n.2 (Ind. 1999).