

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Eric D. Tate,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 19, 2022
Court of Appeals Case No.
21A-CR-2691
Appeal from the
Allen Superior Court
The Honorable
David M. Zent, Judge
Trial Court Cause No.
02D06-2010-MR-30

Vaidik, Judge.

Case Summary

- [1] Eric D. Tate was convicted of murder and a firearm enhancement for shooting a man in Fort Wayne and sentenced to eighty-five years. He now appeals, arguing the trial court erred in admitting into evidence a video of the shooting because it was not properly authenticated and that the prosecutor committed misconduct during closing argument. We affirm.

Facts and Procedural History

- [2] Around 11:20 p.m. on September 22, 2020, Therese Anderson went to Cap ‘n Cork liquor store on Lewis Street in Fort Wayne. The liquor store is attached to a Sunoco gas station. As Anderson walked into the liquor store, she noticed some men arguing in the street. When Anderson exited the store a couple of minutes later, she saw one of the men lying in the street and called 911 at 11:21 p.m. Fort Wayne Police Department officers responded and found James Hines unresponsive. Hines, who had been shot in the back of the head with a .22 caliber bullet, was taken to the hospital, where he later died.
- [3] On September 24, a man showed up at the Fort Wayne Police Department and said he had information about the shooting. Detective Scott Studebaker met with him. The man, who wanted to remain anonymous, showed Detective Studebaker a video on his phone. The man didn’t have the original video but said his girlfriend, who also wanted to remain anonymous, did. Detective Studebaker asked the man to have his girlfriend stop by so he could download

the original from her phone. The woman stopped by later that day, and Detective Studebaker downloaded the video from her phone using police computers. The video, which is twelve seconds long, shows four men arguing in the middle of a street when a bald black man wearing a black jacket and blue jeans shoots Hines in the back of the head.

- [4] The police first arrested Tommy Lyles for Hines’s murder. Lyles, however, denied shooting Hines and told the police that Tate did it. Tate lived at East Central Towers, which was near the scene of the shooting, with his nephew Derrickal McBride, Derrickal’s wife April, and their two-year-old child. The investigation turned to Tate, and Lyles was eventually released from custody. The police obtained surveillance footage from East Central Towers and Sunoco. According to the East Central Towers footage (Exhibit 23), Tate—a bald black man wearing a black jacket, blue jeans, and red shoes—was in the hallway of the apartment building with his bicycle at 10:43 p.m., about forty minutes before the shooting. At one point in the footage, Tate took a silver handgun out of his jacket pocket and then put it back in. Tate walked out of the apartment building with his bicycle at 10:47 p.m. According to the Sunoco footage (Exhibit 15), Tate was riding his bicycle near the gas pumps and talking to people minutes (or less) after the shooting.¹

¹ The timestamp is 11:16 p.m., but it is undisputed the timestamp is about five minutes slow. *See* Tr. Vol. II pp. 101, 124.

[5] On September 30, the police searched the apartment at East Central Towers. April was home, but not Tate. During the search, the police found Tate's backpack, which contained "22-caliber cartridge cases." Tr. Vol. II p. 178. While the police were at the apartment, Tate texted April and expressed concern that the police were there. At the request of an officer, April told Tate that it was just a DCS caseworker (there was an open case involving April and Derrickal's child at the time). Tate texted April to tell the caseworker:

I live downtown or the New Haven that's it do not tell her that I have clothes there or shoes just tell her the caseworker that I come by to check on you and Junior SVG to make sure that nobody bothers you or jump on you in front of the baby that's it explain to her that I'm your uncle I'm Juniors uncle nothing else or you will put all of us In Harm's Way calm cool and be nice

Ex. p. 87. Tate also texted April, "I promise you I will be out of that house today once I get home from work . . . just don't tell them that I'm living there" and "[d]on't talk to nobody about me." *Id.* at 88.

[6] Later that day, the police interviewed Tate. He admitted he was in the surveillance videos from East Central Towers and Sunoco but denied shooting Hines. The police took Tate's cell phone. Tr. Vol. II p. 107. A later search of the phone revealed the following text message sent to "Derek" at 12:07 a.m. on September 23—about forty-five minutes after the shooting:

Derek get in touch with me as soon as possible do not talk to your girl or Raymond or anybody in the building I smoked a ni**a tonight call me ASAP or text me

Ex. p. 100.

- [7] The State charged Tate with murder and a firearm enhancement. A jury trial was held in October 2021. At trial, the State introduced the video of the shooting (Exhibit 9) through Anderson. Anderson didn't film or witness the shooting but testified the video was "a fair and accurate representation of the incident that [she] saw across the street from the liquor store on September 22nd of 2020[.]" Tr. Vol. II pp. 82-83. Defense counsel objected, arguing the State hadn't laid a proper foundation for the video. The trial court admitted the video over defense counsel's objection. *Id.* at 85.
- [8] April testified that at the time of the shooting, Tate had been living with her and her husband for a couple of months. April said that she and Derrickal saw a news story about the shooting, and Derrickal asked Tate about it. Tate "started freaking out" and said he "kn[ew] something about it." *Id.* at 149, 150. Tate was "scared" and said he was "going to be in trouble." *Id.*
- [9] The jury found Tate guilty as charged, and the trial court sentenced him to sixty-five years enhanced by twenty years for using a gun.
- [10] Tate now appeals.

Discussion and Decision

I. Authentication of Video

- [11] Tate first contends the trial court erred in admitting into evidence the video of the shooting because the State “failed to properly authenticate [it] by either a witness with knowledge of the event or under the silent witness theory.” Appellant’s Br. p. 9. Trial courts have broad discretion in ruling on the admissibility of evidence. *Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014).
- [12] Indiana Evidence Rule 901(a) provides that “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Photographs and videos can be authenticated through either a witness’s testimony or, when no witness observed what a photograph or video portrays, the silent-witness theory. *McFall v. State*, 71 N.E.3d 383, 388 (Ind. Ct. App. 2017) (citing 13 Robert L. Miller, Jr., *Indiana Practice, Indiana Evidence* § 901.209 (4th ed. Aug. 2022 Update)).
- [13] Here, the State introduced the video through Anderson. But Anderson didn’t see the shooting and therefore couldn’t authenticate the video. Although the silent-witness theory wasn’t discussed during trial, the State acknowledges on appeal that it had to satisfy this theory. *See* Appellee’s Br. p. 15.
- [14] To authenticate videos or photographs under the silent-witness theory, “there must be a strong showing of authenticity and competency, including

proof that the evidence was not altered.” *McCallister v. State*, 91 N.E.3d 554, 561-62 (Ind. 2018); *see also Stott v. State*, 174 N.E.3d 236, 245 (Ind. Ct. App. 2021); *McFall*, 71 N.E.3d at 388 (explaining that there must be evidence describing the process or system that produced the videos or photographs and showing that the process or system produced an accurate result). These requirements are “rather strict.” 13 Miller § 901.209. If a foundational requirement is missing, then the surrounding circumstances can be used. *Id.*

[15] Here, the State didn’t present any evidence that the video wasn’t altered before it was brought to Detective Studebaker on September 24, nearly forty-eight hours after the shooting. The man and woman who provided the video didn’t give their names, much less testify at trial. “It is no secret that it is increasingly easier in today’s digital age to manipulate or distort images.” *Stott*, 174 N.E.3d at 247. It is therefore the proponent’s burden to establish a strong showing of authenticity and competency for the admissibility of photographs and videos under the silent-witness theory. *Id.* The State failed to do so here. Thus, the trial court erred in admitting into evidence the video of the shooting.

[16] But the erroneous admission of evidence doesn’t require reversal “unless it prejudices the defendant’s substantial rights.” *Blount*, 22 N.E.3d 564. “To determine whether an evidentiary error was prejudicial, we assess the probable impact the evidence had upon the jury in light of all of the other evidence that was properly presented.” *Id.* “If we are satisfied the conviction is supported by independent evidence of guilt such that there is little likelihood the challenged evidence contributed to the verdict, the error is harmless.” *Id.*

[17] Here, the State presented substantial independent evidence of Tate’s guilt: (1) Tate had a gun in his possession about forty minutes before the shooting; (2) Tate was near the liquor store and gas station when the shooting occurred; (3) forty-five minutes after the shooting, Tate texted someone, “I smoked a ni**a tonight call me ASAP or text me”; (4) when Derrickal asked Tate about news coverage of the shooting, Tate “started freaking out” and said he was “going to be in trouble”; (5) when the police searched the apartment, they found .22 caliber ammunition in Tate’s backpack, the same type of ammunition that killed Hines; and (6) during the search, Tate texted April not to talk about him and to say he lived elsewhere. Although we acknowledge the video of the shooting was an important part of the State’s case, we are confident Tate would have been convicted even without it. Tate’s substantial rights weren’t prejudiced.

II. Prosecutorial Misconduct

[18] Tate next contends the prosecutor committed misconduct during closing argument because he made comments “that can only be construed as a request to convict [him] for a reason other than guilt.” Appellant’s Br. p. 14. Tate highlights the following comments by the prosecutor:

He’s almost bragging about it by doing it the way he did. I’m the kind of guy that can just smoke somebody in the middle of the street in front of everybody. That’s who I am. I want you people to know that. I’m a badass, or whatever he’s thinking. . . . And we ask you . . . to hold the defendant accountable . . . by

returning a guilty verdict It's almost what he wants you to do. He's daring you to do it.

Tr. Vol. III p. 17.

[19] As Tate notes, it is misconduct for a prosecutor to ask the jury to convict the defendant for any reason other than his guilt. *Cooper v. State*, 854 N.E.2d 831, 837 (Ind. 2006). But because Tate didn't object to the prosecutor's comments, he must establish not only the grounds for prosecutorial misconduct but also that the prosecutorial misconduct constituted fundamental error. *Ryan v. State*, 9 N.E.3d 663, 667-68 (Ind. 2014), *reh'g denied*. "Fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to make a fair trial impossible." *Id.* at 668. To establish fundamental error, the defendant must show that, under the circumstances, the trial judge erred in not sua sponte raising the issue because the alleged error constituted a clearly blatant violation of basic and elementary principles of due process and presented an undeniable and substantial potential for harm. *Id.* In evaluating whether fundamental error occurred, we look at the alleged misconduct in the context of everything that happened—including the evidence admitted at trial, closing arguments, and jury instructions. *Id.* A defendant is "highly unlikely" to prevail on a claim of fundamental error relating to prosecutorial misconduct. *Id.*

[20] Here, even assuming there was misconduct, Tate hasn't demonstrated that the prosecutor's comments were so prejudicial as to make a fair trial impossible. As

detailed above, even without the video, there is substantial evidence of Tate's guilt. And the jury was instructed that comments by counsel weren't evidence. Tr. Vol. III p. 26. We therefore affirm Tate's conviction for murder.

[21] Affirmed.

Crone, J., and Altice, J., concur.