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IN THE COURT OF APPEALS OF INDIANA

Kevin Antwon Calvert,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 28, 2021

Court of Appeals Case No.
21A-CR-875

Appeal from the
Marion Superior Court

The Honorable
Sheila A. Carlisle, Judge

The Honorable
Stanley E. Kroh, Magistrate

Trial Court Cause No.
49D29-1905-F5-21434

Vaidik, Judge.

Case Summary

[1] Kevin Antwon Calvert appeals his conviction for Level 6 felony assisting a criminal for his role in a drive-by shooting. He contends the trial court erred in admitting a cell phone and related records because the State did not properly authenticate the phone under Indiana Evidence Rule 901. He also contends the trial court committed fundamental error in not giving a special jury-unanimity instruction. Concluding the State established a reasonable probability the phone belonged to Kevin and that the trial court did not commit fundamental error in instructing the jury, we affirm.

Facts and Procedural History

[2] Jada Duerson, Aubrieanna Duerson, and Rashade Duerson (collectively, "the Duersons") are siblings. Damon Jones and Kevin—also known as "K.J."—are cousins to each other and to the Duersons. In 2019, the Duersons were not getting along with Damon and Kevin.

[3] On May 28, 2019, Damon livestreamed a video on Facebook where he and his girlfriend, Jazmyne, talked negatively about the Duersons. During this video, Damon wore a pink scarf around his head. In retaliation for the video, Jada livestreamed a video where she talked negatively about Damon and his family. These videos resulted in a planned meeting where Jada and Jazmyne were supposed to fight each other at 28th and Dearborn Streets in Indianapolis.

[4] Shortly before the scheduled fight, Jada was on Dearborn Street livestreaming another video. Jada and Aubrieanna were standing on the east side of Dearborn Street, and Rashade was sitting in Aubrieanna's car on the west side of the street. Around 6:30 p.m., a Trailblazer drove by. According to Aubrieanna and Rashade, Kevin was driving the Trailblazer. *See* Tr. Vol. III pp. 4, 14, 20, 101-03. As the Trailblazer passed the Duersons, it stopped, and Damon—from the passenger seat—opened his door, yelled "I got you bit**es now," and fired a pink and black gun. Tr. Vol. II pp. 232, 241-42; Tr. Vol. III pp. 4-5, 20-22. Damon—still wearing the pink scarf around his head—fired eight to nine shots. Jada was shot in the arm, and a bullet grazed Aubrieanna's chest. Jada was transported to Eskenazi Hospital, where she was treated for her gunshot wound.

[5] The State charged Kevin with Level 6 felony assisting a criminal and being a habitual offender, and a warrant was issued for his arrest.[1] On June 5, the U.S. Marshals apprehended Kevin and seized a Samsung cell phone at a house in Indianapolis.[2] A U.S. Marshal then transported Kevin to the City-County Building, where he and the phone were turned over to Detective Stephen Smalley with the Indianapolis Metropolitan Police Department. Search

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[1] The State also charged Kevin with Level 5 felony battery by means of a deadly weapon and Level 5 felony criminal recklessness based on accomplice liability, but the jury acquitted him of these charges.

The State charged Damon with Level 4 felony unlawful possession of a firearm by a serious violent felon, Level 5 felony battery by means of a deadly weapon, and Level 5 felony criminal recklessness. *See* Cause No. 49D29-1905-F4-21419. Damon's jury trial is currently scheduled for October 21, 2021.

[2] It's not clear from the trial transcript whether the phone was on Kevin or just in the house with him.

warrants were obtained for the Samsung cell phone and Damon's cell phone. Based on data extracted from these phones and records obtained from the cell-phone companies, including cell-site locations, it was determined that (1) Damon's phone had a contact for a person named "K.J."—Kevin's nickname—with the same number as the Samsung cell phone; (2) both phones called each other several times before the shooting; and (3) both phones were near the scene of the shooting at the time of the shooting.

[6] A jury trial was held in April 2021. Defense counsel objected to the admission of the Samsung cell phone and related records on grounds the State presented no evidence the phone was "ever in [Kevin's] possession" because the U.S. Marshal who apprehended Kevin and seized the phone did not testify.[3] Tr. Vol. III p. 110. The trial court admitted the evidence, finding there was a "connection," albeit "pretty thin," between Kevin and the Samsung cell phone and that defense counsel's objection went to the weight of the evidence, not its admissibility. *Id.* at 111. The court told defense counsel to make that argument during closing argument. Defense counsel did so, arguing the phone was "meaningless":

> You haven't heard any evidence that that phone was taken from [Kevin]. You have not heard any evidence that that phone was ever in his possession. The State is basing this unfounded assertion on the fact that Damon Jones associated this number

[3] The U.S. Marshal who apprehended Damon testified. According to him, the "standard practice" for the U.S. Marshals is that when they apprehend a fugitive, they transport the fugitive and any property taken from the fugitive together. *See* Tr. Vol. III pp. 140-41.

> with [Kevin] somehow, and in his own address book . . . he referred to the possessor of that phone as K.J. All you've heard about where the phone was located is that it was taken from a house where [Kevin] was arrested. You don't know whose house it was. You don't know whose house he was at. You don't know if that was his house or who he shared that house with. You don't know that because the people who actually went [there] and arrested [Kevin] and took that phone from wherever they took it didn't come here to tell you where they found it. [Kevin] and a phone simultaneously showed up at a police station, and the people who brought it there didn't come here to tell you where they got it.

Id. at 221-22.

[7] The jury found Kevin guilty of Level 6 felony assisting a criminal, and Kevin admitted to being a habitual offender. The trial court sentenced Kevin to two years, enhanced by three years for being a habitual offender, for a total sentence of five years.

[8] Kevin now appeals.

Discussion and Decision

I. Admission of Cell Phone and Related Records

[9] Kevin contends the trial court erred in admitting the Samsung cell phone and related records. Trial courts have broad discretion in ruling on the admissibility of evidence, and their rulings are reviewed only for an abuse of that discretion. *Johnson v. State*, 157 N.E.3d 1199, 1203 (Ind. 2020), *cert. denied*.

[10] Kevin argues "[t]he State failed to show, through a witness with personal knowledge, that the Samsung cell phone that was collected by the U.S. Marshals was ever in [his] possession at any time." Appellant's Br. p. 20. Kevin then asserts that "[b]ecause the cell phone itself lacked the required foundation for admission, it logically follows that any evidence taken from the phone would have lacked the necessary foundation as well." *Id.* at 21.

[11] Kevin relies on Indiana Evidence Rule 901, which provides that to 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." The evidence can be "[t]estimony that an item is what it is claimed to be, by a witness with knowledge." Ind. Evidence Rule 901(b)(1). Evidence may also be authenticated through "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Evid. R. 901(b)(4). "Absolute proof of authenticity is not required." *Rogers v. State*, 130 N.E.3d 626, 629 (Ind. Ct. App. 2019) (quotation omitted). Instead, the proponent need establish only a reasonable probability the evidence is what it is claimed to be. *Id.* Once a reasonable probability is shown, any inconclusiveness goes to the exhibit's weight, not its admissibility. *Id.* Authenticity can be established by direct or circumstantial evidence. *Id.* at 629-30.

[12] The State established a reasonable probability the Samsung cell phone belonged to Kevin. When the U.S. Marshals apprehended Kevin, they recovered the phone from either Kevin's person or the house where he was apprehended. *See*

Tr. Vol. III p. 142. The U.S. Marshals then transported Kevin and the phone to Detective Smalley at the City-County Building. Based on data extracted from the Samsung cell phone and Damon's cell phone as well as records obtained from the cell-phone companies, it was determined that Damon's phone had a contact for a person named "K.J."—Kevin's nickname—with the same number as the Samsung cell phone. Kevin points out the phone was "registered" to someone other than him, *see* Appellant's Br. p. 14, but such information goes only to the weight of the evidence, not its admissibility.[4] And defense counsel argued during closing argument the jury should give no weight to the phone. Nevertheless, the jury found Kevin guilty of assisting Damon. The court did not abuse its discretion in admitting the Samsung cell phone and related records.[5]

II. Jury Instruction

[13] Kevin next contends the trial court erred in not instructing the jury that its verdict had to be unanimous as required by the Indiana Supreme Court in *Baker v. State*, 948 N.E.2d 1169 (Ind. 2011), *reh'g denied*. Kevin acknowledges he did

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[4] According to Exhibit 48, the name on the account for the Samsung cell phone was "Mary Howeed." As a cell-phone analyst testified at trial, just because a person's "name is on the account" doesn't mean that person uses the phone. *See* Tr. Vol. III p. 155.

[5] Kevin also argues the Samsung cell phone is not relevant. But the basis of this argument is that the State failed to connect the phone to him. *See* Tr. Vol. III p. 110; Appellant's Br. pp. 24-25. Because we have determined the State established a reasonable probability the phone belonged to Kevin, Kevin's relevancy argument necessarily fails. Kevin also argues that even if the phone was relevant, its probative value was outweighed by the danger of "confusing the issues" and "misleading the jury" because "[a]ny person could have had the Samsung cell phone in his or her possession when the crime occurred." Appellant's Br. p. 26. But just as there is a reasonable probability the phone belonged to Kevin, there is a reasonable probability he had the phone with him at the time of the shooting, and that justifies the admission of the phone and related records.

not object or request such an instruction at trial and therefore must establish fundamental error on appeal. 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. *Kelly v. State*, 122 N.E.3d 803, 805 (Ind. 2019). "A fundamental error is one that make[s] a fair trial impossible or constitute[s] a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm." *Id.* (quotation omitted). "This exception is very narrow and includes only errors so blatant that the trial judge should have acted independently to correct the situation." *Id.*

[14] In Indiana, a verdict in a criminal case must be unanimous. *Fisher v. State*, 259 Ind. 633, 291 N.E.2d 76, 82 (1973). Although there must be jury unanimity "as to the defendant's guilt," jury unanimity "is not required as to the theory of the defendant's culpability." *Taylor v. State*, 840 N.E.2d 324, 333 (Ind. 2006); *see also Benson v. State*, 73 N.E.3d 198, 201 (Ind. Ct. App. 2017), *trans. denied*. Moreover, certain cases, like child-molesting cases, present problems with jury unanimity. In *Baker*, the defendant was charged with one count of child molesting for each of the three victims, but the jury heard evidence of multiple acts of molesting for each victim. 948 N.E.2d at 1177. In resolving *Baker*, our Supreme Court recognized that where "evidence is presented of a greater number of separate criminal offenses than the defendant is charged with," a basic unanimity instruction is insufficient. *Id.* at 1175. "This is because, absent a more particular instruction, the jury could unanimously agree that the defendant was guilty, yet, in doing so, rely on different acts in

evidence." *Benson*, 73 N.E.3d at 202. Stated differently, "the State could point to multiple, separate criminal acts and the jury could convict, despite it being divided about which acts occurred." *Id.* To remedy this issue, the Court held:

> [T]he State may in its discretion designate a specific act (or acts) on which it relies to prove a particular charge. However if the State decides not to so designate, then the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged.

Baker, 948 N.E.2d at 1177.

[15] Here, the jury was given the following instruction on Level 6 felony assisting a criminal:

> On or about May 28, 2019, Kevin [Antwon] Calvert did assi[s]t, by driving Damon Lamont Jones away from the scene of a shooting, Damon Lamont Jones, having committed the crime(s) of battery, as a Level 5 felony **and/or** criminal recklessness, as a Level 5 felony, with the intent to hinder the apprehension or punishment of Damon Lamont Jones, the said Kevin [Antwon] Calvert not standing in the relationship of parent, child or spouse to Damon Lamont Jones.

Appellant's App. Vol. II p. 171 (emphasis added); *see also* Ind. Code § 35-44.1-2-5(a)(1). In addition, the jury was instructed that its verdict had to be unanimous. *See* Appellant's App. Vol. II p. 204 ("To return a verdict, each of you must agree to it."). Kevin, however, argues the trial court should have given a *Baker*-type instruction because, based on the "and/or" language in the

assisting-a-criminal instruction, "it is entirely possible that some of the jury members decided [Kevin] was guilty of assisting [Damon] commit the battery while other jury members found him to be guilty of assisting [Damon] commit criminal recklessness." Appellant's Br. p. 31.

[16] "[T]he State is permitted to 'present[] the jury with alternative ways to find the defendant guilty as to **one element**.'" *Baker*, 948 N.E.2d at 1175 (quoting *Cliver v. State*, 666 N.E.2d 59, 67 (Ind. 1996), *reh'g denied*). When the State does so, the concerns identified in *Baker* are not present because jury unanimity is not required as to the theory of the defendant's culpability. *See id.* To convict Kevin of Level 6 felony assisting a criminal, the State had to prove Damon committed a Level 3, 4, 5, or 6 felony. *See* I.C. § 35-44.1-2-5(a)(1). Because the State was permitted to present the jury with alternative ways to find Kevin guilty as to this element, the jury did not have to unanimously decide whether Damon committed Level 5 felony battery or Level 5 felony criminal recklessness. Kevin has failed to prove the trial court committed fundamental error in not giving a *Baker*-type instruction.

[17] Affirmed.

Kirsch, J., and May, J., concur.