

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Justin Robert Brewer,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

August 30, 2022

Court of Appeals Case No.  
21A-CR-1497

Appeal from the Vanderburgh  
Circuit Court

The Honorable David D. Kiely,  
Judge

The Honorable Celia M. Pauli,  
Magistrate

Trial Court Cause No.  
82C01-1911-MR-8087

**Weissmann, Judge.**

[1] Justin Brewer appeals his conviction for murdering Delvin Mitchell during a drug deal. Brewer claims the jury should not have heard cell phone location evidence placing him near the scene of the murder, as well as other evidence showing he possessed a handgun like the murder weapon. We affirm, finding that Brewer was not harmed by the cell phone evidence. We also conclude that the evidence of his handgun possession was relevant and admissible because it showed his opportunity to commit the murder along with his knowledge of and access to a firearm similar to the murder weapon.

## Facts

[2] Brewer arranged to buy marijuana from Delvin Mitchell. Brewer and his wife, Amber Brewer (Amber), joined Mitchell in his car to complete the transaction. Brewer pointed a gun at Mitchell, prompting Amber to flee the car. She heard shots and ran to the cab in which she had driven Brewer to the meeting with Mitchell. Brewer was right behind her. They left together, and Amber disposed of parts of the gun in Pigeon Creek in Evansville. After receiving a 911 report of shots fired around midnight, police found Mitchell dead in his vehicle. He had been shot multiple times, including twice in the right side of his head.

[3] Brewer and Amber fled to Georgia, where both eventually were arrested. Police recovered parts of the gun that Amber had thrown in Pigeon Creek and matched them to the casings found in Mitchell's car. The State charged Brewer and Amber with murder and alleged Brewer was a habitual offender. Amber testified against Brewer under an immunity agreement with the State. After a

five-day trial, the jury found Brewer guilty as alleged, and the trial court sentenced Brewer to 85 years imprisonment. Brewer appeals, challenging only the trial court's evidentiary rulings.

## Discussion and Decision

- [4] Brewer raises two issues on appeal. In a two-pronged argument, he first challenges the trial court's handling of evidence arising from Brewer's cell phone. Brewer argues that the trial court erroneously admitted evidence retrieved from the cell phone because it was obtained through a warrantless search. *See Carpenter v. United States*, 585 U.S. \_\_\_, 138 S. Ct. 2206, 2211, 2217, 201 L.Ed.2d 507 (2018) (limiting under the Fourth Amendment the State's ability to seize cell phone location information without a warrant). Brewer also claims that a witness who testified about that cell phone data offered expert testimony that she was unqualified to give.
- [5] In his second issue, Brewer asserts that the trial court erroneously admitted testimony describing a photograph depicting him with a gun much like the murder weapon. Brewer argues that the testimony was prior misconduct evidence that the State was prohibited from presenting to the jury.
- [6] We conclude that the admission of the cell phone evidence and interpretative testimony was cumulative and thus harmless. We also find no error in the trial court's admission of the evidence of Brewer's prior misconduct because it was offered to show Brewer had the opportunity to shoot Mitchell and knowledge of a gun like that used in the murder.

## I. Standard of Review

- [7] A trial court has broad discretion in determining the admissibility of evidence, and we will reverse only for an abuse of that discretion. *Hines v. State*, 981 N.E.2d 150, 153 (Ind. Ct. App. 2013). An abuse of discretion occurs when the trial court’s ruling is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

## II. Cell Phone Evidence

- [8] Brewer contends the State illegally seized the data from Brewer’s cell phones without a warrant and thus that evidence was inadmissible under the Fourth Amendment. Even if no Fourth Amendment violation occurred, Brewer contends the trial court erroneously allowed a prosecutor’s employee to testify as an expert witness about the cell phone data, although the trial court found she only qualified as a skilled witness.<sup>1</sup>
- [9] We need not determine the admissibility of the cell phone evidence or the testimony interpreting it. Even if the trial court erroneously admitted that evidence, that error would be harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967) (“[B]efore a constitutional error may be

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<sup>1</sup> Expert witnesses must be qualified, their testimony must be based on reliable scientific principles, and they may offer opinions based “on facts or data in the case.” Ind. Evidence Rules 702, 703. By contrast, skilled witnesses may only offer opinions that are rationally based on their own perceptions and that are helpful to a clear understanding of their testimony or to a determination of fact in a case. Ind. Evidence Rule 701; *Satterfield v. State*, 33 N.E.3d 344, 352 (Ind. 2015) (finding that Indiana Evidence Rule 701 applies to skilled witness testimony).

held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”) The cell phone evidence, collectively offered to prove that Brewer was at the murder scene at the time of the shooting, was cumulative to other evidence, including Brewer’s own statements, placing him there. “It is well established that any error in admitting evidence”—including constitutional error—“will be found harmless where the evidence is merely cumulative.” *Fuller v. State*, 674 N.E.2d 576, 578 (Ind. Ct. App. 1996).

[10] The 911 call reporting the shooting was made a few minutes after midnight. Unchallenged evidence of text messages between Brewer and Mitchell obtained from Mitchell’s phone showed they arranged to meet for a drug deal at the Pollack Apartments that night. Two witnesses testified that Mitchell was at the Pollack Apartments, received a phone call from Brewer, and left to meet Brewer around midnight.

[11] Brewer texted Mitchell that Amber was driving him to the meeting. Other evidence showed that Brewer called the cab company where Amber worked to arrange a ride to the murder scene and specifically requested Amber as the driver. Brewer used a false name and called from a phone at the hotel where Brewer and Amber were living. GPS records from Amber’s cab showed that about 11:30 p.m., she drove the cab to the area of the hotel where Brewer and she lived. The GPS records also revealed Amber then drove the cab to the Pollack Apartments, arrived there about 11:50 p.m., remained there until a few minutes after midnight, and then returned to the area of the hotel. Brewer’s DNA was found in a blood stain on the interior of the passenger window of the

cab Amber drove that night. Brewer admitted to police that he had been at the murder scene; he simply denied seeing or shooting Mitchell there and claimed that Amber killed Mitchell.

[12] Nonetheless, Brewer contends that he was prejudiced by the cell phone evidence because the central issue was whether Amber or he committed the murder and the cell phone testimony enhanced Amber's credibility. But Brewer's arguments leave us unpersuaded that the cell phone testimony prejudiced him, given that it placed Brewer at a location where both Brewer and Amber reported he had been and where other evidence showed he had been.

### III. Gun Testimony

[13] Brewer also claims that the trial court abused its discretion in admitting an officer's testimony about photographs and videos in Amber's phone. One of the photographs depicted Brewer holding a handgun like the handgun used to kill Mitchell. After excluding the photograph, the trial court permitted the officer to describe the photo and recount the similarities between the gun in the photograph and the murder weapon. Tr. Vol. III, pp. 235-36. The officer also testified about other photographs and a video on Amber's phone depicting Brewer with other weapons, although Brewer focuses his argument on the photograph of the gun like the murder weapon. *Id.* at 236.

[14] Because the gun was not conclusively identified as the murder weapon, Brewer argues that the testimony about the photograph was irrelevant and inadmissible

evidence of his prior bad acts. Even if relevant, the testimony remained inadmissible because it was more prejudicial than probative, according to Brewer. *See* Ind. Evidence Rule 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence”). We find the evidence both relevant and not unduly prejudicial.

### i. Relevance

[15] Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” Ind. Evidence Rule 401. But evidence of a crime, wrong, or other act generally is not admissible to prove a person’s character when the purpose is “to show that on a particular occasion the person acted in accordance with the character.” Ind. Evidence Rule 404(b)(1).

[16] Exceptions to that rule exist in criminal prosecutions, and the State relies on two of them. *See* Evid. R. 404(b)(2)(A) (providing that in criminal prosecutions, character evidence offered to prove propensity “may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident”). The State argues that the testimony about the photograph was relevant to the issues of opportunity and knowledge and was therefore admissible. We agree.

- [17] The testimony was relevant even absent conclusive proof that the handgun depicted in the photograph was the murder weapon. *See Pickens v. State*, 764 N.E.2d 295, 299-300 (Ind. Ct. App. 2002) (upholding admissibility of evidence showing defendant two years earlier possessed a firearm similar to that used in charged murder). It was enough that the murder weapon was a firearm like that held by Brewer in the photograph. *Id.* at 300.
- [18] The testimony about the photograph tended to show that Brewer had access to and knowledge of a firearm similar to the murder weapon and thus the opportunity to shoot Mitchell. Contrary to Brewer's claim, Evidence Rule 404(b) did not preclude its admission. *See id.*

## ii. Probative Value

- [19] For similar reasons, we also reject Brewer's claim that the testimony about the handgun photograph was overly prejudicial and thus inadmissible under Evidence Rule 403. By showing that Brewer had previous access to firearms, including one similar to the weapon that killed Mitchell, the testimony tended to negate Brewer's claim that Amber must be the killer simply because she owned a similar gun. Given that the killer's identity was the major issue in this prosecution, the probative value of the evidence was not substantially outweighed by any prejudicial impact. *See Evid. R. 403; see also Snow v. State*, 77 N.E.3d 173, 177 (Ind. 2017) (affirming trial court's decision that evidence of gun found near defendant after struggle with police was more probative than prejudicial when defendant was not charged with firearm offense).



[20] We affirm the trial court's judgment.

Robb, J., and Pyle, J., concur.