

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Marshall C. Land,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 6, 2023

Court of Appeals Case No.
22A-CR-2863

Appeal from the Tippecanoe
Superior Court

The Honorable Randy J. Williams,
Judge

Trial Court Cause No.
79D01-2003-F2-000013

Memorandum Decision by Judge Felix
Judges Crone and Brown concur.

Felix, Judge.

Statement of the Case

[1] The State convicted Marshall Land of intimidation, possession of drugs, and unlawful possession of a gun. Land appeals and presents three issues, which we restate as follows:

1. Whether the State conducted an unconstitutional search when law enforcement retrieved Land's cell phone location data without a warrant;
2. Whether the trial court abused its discretion when it admitted evidence of Land's Facebook account; and
3. Whether the trial court abused its discretion when it denied Land's motion for a mistrial.

[2] We affirm.

Facts and Procedural History

[3] On March 21, 2020, Cammy Auxier and her daughter (the "Child") were shopping at Walmart when Land, the Child's father, approached them. Land knew that Auxier and Child would be at the Wal-Mart because Auxier had told him so earlier in the day. There, Land threatened Auxier with a gun, took the Child from Auxier, and attempted to leave the store. After a struggle with Auxier, which caused several customers to approach to help Auxier, Land let go of the Child and left Walmart.

[4] Walmart staff took Auxier and the Child to a secure room, and Auxier called law enforcement 45 minutes later. Once law enforcement officers arrived,

Auxier told them that Land had used a gun to try and take the Child, he had made threats against her family, and that he had threatened to commit suicide.

[5] Auxier indicated that Land was likely staying at an area hotel, therefore, law enforcement issued a “be on the lookout” (“BOLO”) notice for officers to check local hotels. Due to Land’s many threats, law enforcement believed that Land was a danger to himself and others. In addition to the BOLO notice, law enforcement officers then decided to retrieve Land’s real time cell phone location information (the “Ping Data”) from his cell phone provider. The Ping Data provided law enforcement officers with Land’s approximate location. Law enforcement officers obtained a retroactive search warrant for the Ping Data.

[6] Using the Ping Data, law enforcement located Land at a hotel. Law enforcement officers detained Land and obtained a search warrant for his vehicle. Law enforcement found guns, drugs, and drug paraphernalia in the vehicle. The State charged Land with multiple counts stemming from his conduct at Walmart and the search of his vehicle.

[7] Prior to trial, Land filed a motion to suppress evidence produced from the Ping Data search, arguing the search violated his state and federal constitutional

rights. After a hearing, the trial court denied Land's motion to suppress. Both parties filed motions to separate witnesses.¹

[8] At trial, the trial court admitted, over an objection, evidence from Land's Facebook account in support of the State's allegations related to the drug and gun charges. Auxier testified that she had communicated with Land through the account, and a law enforcement officer testified that the account was linked to an email address which included Land's name and birth year.

[9] The State questioned Lieutenant Flynn of the West Lafayette Police Department to establish that, when arrested, Land was in possession of a gun.² When questioned, Lieutenant Flynn could not remember whether Land had a valid license to carry a gun at the time of the arrest. Before the State finished its direct examination of Lieutenant Flynn, the trial court took a recess. While the trial court was in recess, the State asked Lieutenant Flynn to check the Indiana state record system to refresh his memory on the status of Land's gun permit at the time of the arrest.

[10] Following the recess, the State again questioned Lieutenant Flynn about Land's gun permit. When Land objected, the trial court conducted a sidebar with Land, the State, and Lieutenant Flynn outside the presence of the jury. In the

¹ From the record, it does not appear that the trial court ever issued an order on either of these motions. However, the parties argued as though an order to separate witnesses was in place when Land alleged there had been a violation. Tr. Vol. III 26–28.

² The events of this case occurred before the Indiana Legislature repealed the law requiring individuals to possess a license to carry a firearm. H.E.A. 1296 122nd Gen. Assemb., Reg. Sess. (Ind. 2022).

sidebar discussion, Lieutenant Flynn told the trial court that he was asked, presumably by the trial prosecutor, to recheck the records and that he had checked Land's permit status during the recess. Lieutenant Flynn also told the trial court that the permit check revealed Land did not have a gun permit at the time of the arrest.

[11] Land then made a motion for mistrial, arguing the conversation between the State and Lieutenant Flynn during recess violated a separation of witnesses order. Before the trial court ruled on the motion, the State offered to dismiss the count for carrying a gun without a license. The jury then returned to the courtroom, and the State dismissed the charge. Later in the proceedings, Land renewed his motion for a mistrial based on the alleged violation of the separation order. The trial court denied the motion for a mistrial.

[12] The trial court found Land guilty on multiple counts, including intimidation, unlawful possession of a gun by a felon, and drug charges. Land appeals.

Discussion and Decision

1. Ping Data Search

[13] Land argues that law enforcement's retrieval of Ping Data without a warrant violated his constitutional rights against unreasonable search and seizure, and he argues any evidence produced by this search is inadmissible. Land challenges this search under the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution.

[14] When the admissibility of evidence “turns on questions of constitutionality relating to the search and seizure of that evidence, our review is de novo.” *Jacobs v. State*, 76 N.E.3d 846, 849 (Ind. 2017) (citing *Guilmette v. State*, 14 N.E.3d 38, 40 (Ind. 2014)). However, “we defer to the trial court’s factual determinations unless they are clearly erroneous.” *Id.* at 849–50 (quoting *Meredith v. State*, 906 N.E.2d 867, 869 (Ind. 2009)). “The State has the burden to demonstrate that the measures it used to seize information or evidence were constitutional.” *McGhee v. State*, 192 N.E.3d 1009, 1014 (Ind. Ct. App. 2022) (quoting *Curry v. State*, 90 N.E.3d 677, 683 (Ind. Ct. App. 2017)).

A. Fourth Amendment Claim

[15] The Fourth Amendment 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 particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The purpose of this amendment “is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Camara v. Mun. Ct. of City and Cnty. of San Francisco*, 387 U.S. 523, 528 (1967)). This protection requires the government to obtain a warrant before searches that violate an individual’s reasonable expectation of privacy. *Id.*

[16] In *Carpenter v. United States*, the United States Supreme Court looked at the reasonable expectation of privacy for an individual’s cell site location information (“CSLI”). 138 S. Ct. at 2216–17. The Court held that a Fourth Amendment search occurred when the Government accessed seven days of cell phone location data. *Id.* at 2217 n.3; *Zanders v. State*, 118 N.E.3d 736, 742 (Ind. 2019) (holding that *Carpenter* applies the warrant requirement only to searches involving “seven days or more of CSLI” collection). In coming to this decision, the Court did “not decide whether there is a limited period for which the Government may obtain an individual’s historical CSLI free from Fourth Amendment scrutiny.” 138 S. Ct. at 2217 n.3.

[17] Since *Carpenter*, the Indiana Supreme Court has also addressed the issue of whether collection of historical CSLI was a Fourth Amendment search. *Zanders*, 118 N.E.3d at 742. In *Zanders*, law enforcement obtained 30 days of Zanders’ historical CSLI, and the Court concluded that obtaining the information from Zanders’ cell phone carrier was a “search” under the Fourth Amendment. *Id.* However, as the Court explained, simply concluding there was a “search” does not end the analysis. We still must determine whether exigent circumstances apply, whether the exclusionary rule needs to apply, or whether the admission of excludable evidence was harmless beyond a reasonable doubt. *Id.*

[18] Neither the United States Supreme Court nor the Indiana Supreme Court has determined whether a single retrieval of Ping Data over a short duration amounts to a Fourth Amendment search. For purposes of this opinion, we

assume Land “had a reasonable expectation of privacy in his real time cellular phone location data.” *Govan v. State*, 116 N.E.3d 1165, 1172 (Ind. Ct. App. 2019), *trans. denied*. Therefore, a warrant would be required before retrieving Land’s Ping Data.

[19] As explained above, now that we assume a “search” under the Fourth Amendment has occurred, we now must determine whether (1) there were exigent circumstances applicable, (2) the exclusionary rule need apply, or (3) the admission of the Ping Data was harmless. “[T]he warrant requirement is subject to certain reasonable exceptions.” *Kentucky v. King*, 563 U.S. 452, 459 (2011) (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). “One exception allows police to dispense with the warrant requirement in the presence of exigent circumstances.” *Holder v. State*, 847 N.E.2d 930, 936 (Ind. 2006). The exigency exception can apply in a variety of scenarios. *See King*, 563 U.S. at 460; *Brigham City*, 547 U.S. at 403. “Among the exigencies that may properly excuse the warrant requirement are threats to the lives and safety of officers and others and the imminent destruction of evidence.” *Holder*, 847 N.E.2d at 937. This exception is available “as long as the State can prove that a delay to wait for a warrant would gravely endanger the lives of police officers and others.” *Id.* (citing *Warden v. Hayden*, 387 U.S. 294, 298–99 (1967)).

[20] Here, law enforcement officers determined that Land posed a danger to himself and others. The investigation began because Land had threatened Auxier and the Child with a gun inside Walmart. Earlier that day, Land had also made threats against members of Auxier’s family, and he had shared plans to commit

suicide while the Child watched. Therefore, law enforcement determined, and the trial court agreed, that a delay caused by seeking a warrant would have endangered lives.

[21] Land argues the threat was not significant enough for law enforcement to conduct the Ping Data search without a warrant. Primarily, Land points to the fact that Auxier and the Child “were in a secure room at Walmart” while the Ping Data search was conducted. Appellant’s Br. at 26. However, this argument fails to acknowledge that Land posed a danger to more than Auxier and the Child. Since “we defer to the trial court’s factual determinations,” we cannot say that the trial court erred in finding that exigent circumstances existed, *Jacobs*, 76 N.E.3d at 849–50 (quoting *Meredith*, 906 N.E.2d at 869), and therefore, an exception to the Fourth Amendment’s warrant requirement applied.

B. Article 1, Section 11 Claim

[22] “Although Indiana’s Section 11 and the Federal Fourth Amendment are textually identical, they are analytically distinct.” *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014) (citing *Austin v. State*, 997 N.E.2d 1027, 1034 (Ind. 2013)). “‘Instead of focusing on the defendant’s reasonable expectation of privacy, we focus on the actions of the police officer,’ and employ a totality-of-the-circumstances test to evaluate the reasonableness of the officer’s actions.” *Duran v. State*, 930 N.E.2d 10, 17 (Ind. 2010) (quoting *Trimble v. State*, 842 N.E.2d 798, 803 (Ind. 2006)).

[23] When we evaluate the reasonableness of the officers' actions, we consider: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs."

Carpenter, 18 N.E.3d at 1002 (quoting *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005)). We evaluate suspicion, concern, and knowledge of criminal conduct from the officer's perspective, and we evaluate the degree of intrusion from the defendant's point of view. *Duran*, 930 N.E.2d at 18.

[24] To avoid a constitutional violation, law enforcement's need to address criminal conduct must counter or outweigh the level of intrusion to individuals. *See Duran*, 930 N.E.2d at 19. Exigent circumstances are commonly recognized as a legitimate law enforcement need. *Id.* (quoting *Steagald v. U.S.*, 451 U.S. 204, 221–22 (1981)); *see* Ind. Code § 35-33-5-12(a)(2). Legitimate needs must still be balanced against the intrusion because "the degree of intrusion may render a search unreasonable, even where law enforcement needs are obviously present." *Duran*, 930 N.E.2d at 19 (quoting *Litchfield*, 824 N.E.2d at 360).

[25] Prior to the Ping Data search, Auxier informed law enforcement officers that Land had made threats to harm himself and others with a gun. She relayed that Land attempted to take Child away from her and had a gun in his possession. Therefore, law enforcement had a high degree of knowledge and concern regarding Land's criminal conduct.

[26] Due to the danger Land posed to himself and others, the extent of law enforcement needs was also high. Finally, the intrusion into Land's ordinary activities was minimal. There is no evidence that Land's ordinary activities were affected at all by law enforcement obtaining his Ping Data. Therefore, the degree of concern and knowledge of criminal conduct along with law enforcement needs far outweighed the intrusion to Land. Since Land threatened himself and others and fled the scene with a gun, we agree with the trial court's findings of Land's dangerousness to self and others and the trial court's conclusion that the retrieval of Ping Data did not violate Article 1, Section 11 of the Indiana Constitution.

2. Facebook Authentication

[27] Next, Land argues that the trial court abused its discretion by admitting evidence from his Facebook account. Land claims the account was not properly authenticated and the State failed to provide sufficient evidence linking the account to Land.

[28] We review a trial court's decision on the admission of evidence "only for abuse of discretion." *Hall v. State*, 177 N.E.3d 1183, 1193 (Ind. 2021) (citing *Lewis v. State*, 34 N.E.3d 240, 247 (Ind. 2015)). "We will reverse only if the trial court's ruling was clearly against the logic and effect of the facts and circumstances before it and errors affect a party's substantial rights." *Id.* (citing *Hall v. State*, 36 N.E.3d 459, 467 (Ind. 2015)).

[29] To properly authenticate a piece of evidence, the proponent is required to “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Ind. Evidence Rule 901(a). “Absolute proof of authenticity is not required. Rather, the proponent of the evidence must establish only a reasonable probability that the evidence is what it is claimed to be” *M.T.V. v. State*, 66 N.E.3d 960, 963 (Ind. Ct. App. 2016) (internal citation omitted) (citing *Pavolich v. State*, 6 N.E.3d 969, 976 (Ind. Ct. App. 2014), *trans. denied*), *trans. denied*. Further, there are many types of evidence that can be used to properly fulfill the authentication requirement. See Evid. R. 901(b) (providing an extensive but not exhaustive list of examples of evidence that fulfills the requirement).

[30] “Many cases involving social-media accounts hinge on evidence of the account’s owner.” *Wisdom v. State*, 162 N.E.3d 489, 494 (Ind. Ct. App. 2020), *trans. denied*. “Where the State is claiming the defendant made the statements through the social-media account, evidence of the account’s owner is often necessary to authenticate those statements.” *Id.* at 495.

[31] A proponent can verify a social media account’s owner by providing distinctive characteristics unique to the account and the alleged owner. See *Richardson v. State*, 79 N.E.3d 958, 963 (Ind. Ct. App. 2017), *trans. denied*; Evid. R. 901(b)(4). In *Wisdom v. State*, we found a Facebook account was properly authenticated as belonging to the defendant based on testimony showing: (1) the account was registered under the defendant’s name; (2) the defendant was in most account photos; and (3) the account referenced the defendant’s alleged gang. 162

N.E.3d at 495. Similarly, in *Wilson v. State*, we upheld the authentication of a Twitter account based on testimony showing: (1) the witness communicated with the defendant through the account; (2) the account’s name was tied to the defendant; and (3) photos on the account depicted the defendant with guns used in the crime. 30 N.E.3d 1264, 1268–69 (Ind. Ct. App. 2015), *trans. denied*.

[32] At trial, witnesses testified that the Facebook account belonged to Land. Auxier testified that she had communicated with Land through the Facebook account, the account bore his name, and he had sent her photos of himself through the account. Additionally, a law enforcement officer testified that the Facebook account was linked to an email address that used Land’s name and birth year.

[33] The State presented distinctive characteristics linking Land to the Facebook account used as evidence at trial. Therefore, the trial court’s decision to admit this Facebook evidence was not “clearly against the logic and effect of the facts and circumstances before it.” *See Hall*, 177 N.E.3d 1193 (citing *Hall*, 36 N.E.3d at 467).

3. *Mistrial*

[34] Land also argues that the trial court abused its discretion in denying his motion for a mistrial. Land claims there was a violation of the separation of witnesses order that warrants a mistrial.

[35] “Whether to grant or deny a motion for a mistrial lies within the sound discretion of the trial court. We afford great deference to the trial court’s

decision and review the decision solely for abuse of that discretion.” *Isom v. State*, 31 N.E.3d 469, 480 (Ind. 2015) (internal citation omitted) (citing *Treadway v. State*, 924 N.E.2d 621, 628 (Ind. 2010)), *cert. denied*.

[36] “To prevail on appeal from the denial of a motion for mistrial, the appellant must establish that the questioned conduct ‘was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected.’” *Mickens v. State*, 742 N.E.2d 927, 929 (Ind. 2001) (quoting *Gregory v. State*, 540 N.E.2d 585, 589 (Ind. 1989)). This prejudice is weighed by the persuasive effect on the jury rather than the nature of the conduct itself. *Id.* (citing *Gregory*, 540 N.E.2d at 589). A mistrial is an “extreme remedy” that should only be used when “remedial measures are insufficient to rectify the situation.” *Id.* (citing *Szpyrka v. State*, 550 N.E.2d 316, 318 (Ind. 1990)).

[37] “The determination of the remedy for any violation of a separation order is within the discretion of the trial court.” *Spinks v. State*, 122 N.E.3d 950, 955 (Ind. Ct. App. 2019) (citing *Joyner v. State*, 736 N.E.2d 232, 244 (Ind. 2000)). A trial court’s remedy will be overturned only upon showing a clear abuse of discretion. *Id.*

[38] “Indiana Evidence Rule 615 allows litigants to move for separation of witnesses” *Griffith v. State*, 59 N.E.3d 947, 956 (Ind. 2016) (citing *Long v. State*, 743 N.E.2d 253, 256 (Ind. 2001)). “The primary purpose of a separation of witnesses order is to prevent witnesses from gaining knowledge from the

testimony of other witnesses and adjusting their testimony accordingly.”

Spinks, 122 N.E.3d at 955 (quoting *Morell v. State*, 933 N.E.2d 484, 489 (Ind. Ct. App. 2010)).

[39] When a separation of witnesses order is violated, the trial court has many tools to remedy the situation. *See Jiosa v. State*, 755 N.E.2d 605, 608 (Ind. 2001). For example, the trial court may exclude witnesses, issue contempt citations, use the violation as impeachment evidence against the witnesses, or allow cross examination based on the violating incident. *See id.*; *Spinks*, 122 N.E.3d at 955–56. “[T]he trial court may choose to allow the violating witness to testify.” *Spinks*, 122 N.E.3d at 955 (quoting *Heck v. State*, 552 N.E.2d 446, 452 (Ind. 1990)).

[40] Land argues that the State violated the separation order by “coaching” Lieutenant Flynn during a recess. Appellant’s Br. at 35–37. Prior to the recess, Lieutenant Flynn testified that he could not remember if Land had a gun permit at the time of the arrest. During the recess, the State asked Lieutenant Flynn to check the records to refresh his memory. After the recess, Lieutenant Flynn testified that he double checked the records that day and recalled information that he had forgotten earlier.

[41] We need not determine if the separation order was violated because, even if a violation occurred, no prejudice resulted from Lieutenant Flynn’s testimony.³ Outside of the presence of the jury, Lieutenant Flynn told the trial court that Land did not have a valid gun license. Further, the State dismissed the charge for carrying a handgun without a license. Therefore, the State’s request that Lieutenant Flynn review records during recess had no “persuasive effect on the jury’s decision.” *Mickens*, 742 N.E.2d at 929 (citing *Gregory*, 540 N.E.2d at 589). Since there was no prejudice resulting from the alleged violation of a separation order, the trial court did not abuse its discretion when it denied the motion for a mistrial.

Conclusion

[42] We conclude that law enforcement officers conducted a constitutional search when they retrieved Land’s Ping Data without a warrant and that the trial court did not abuse its discretion when it admitted evidence of Land’s Facebook account and denied Land’s motion for a mistrial.

[43] Affirmed.

Crone, J., and Brown, J., concur.

³ Because there is no separation order in the record, *see* n.1, it is also impossible for us to determine if the order was actually violated.