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IN THE
COURT OF APPEALS OF INDIANA

Keith Smith,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 30, 2022

Court of Appeals Case No. 21A-CR-1834

Appeal from the Marion Superior Court

The Honorable Mark D. Stoner, Judge

Trial Court Cause No. 49D32-1902-MR-5702

May, Judge.

[1] Keith Smith appeals his conviction of murder.[1] He presents two issues for our review which we restate as:

1. Whether the trial court abused its discretion when it allowed the victim's statement to the victim's fiancée into evidence under the dying declaration exception to the rule against hearsay; and

2. Whether the trial court committed fundamental error when it admitted evidence of and testimony regarding Smith's cell phone records to rebut his alibi defense.

We affirm.

Facts and Procedural History

[2] In September 2018, Smith and Arnel Davis were rival drug dealers who had "issues" with each other. (Tr. Vol. II at 87.) Additionally, Smith and Davis were allegedly "both were messing with some girl named Sharonda." (*Id*. at 245.) Around the same time, Davis "got a hold of some bad heroin" (*id*.) and lost customers to Smith. Davis subsequently confronted Smith at a local bar regarding Davis's loss of revenue and Smith told Davis that Davis could come work with Smith. In response, Davis "cussed him out" and "got belligerent" with Smith. (*Id*. at 246.) After the initial confrontation, Smith brought an assault rifle into the bar and stood next to Davis. Davis asked if Smith intended

[1] Ind. Code § 35-42-1-1.

to use the gun to shoot him, and Smith responded, "[n]o, if it was for you, you would know it." (*Id*. at 247.) After the confrontation in the bar, Smith left the assault rifle at Sharonda's house, and she gave it to Davis. Smith put a $10,000 bounty on Davis, but no one accepted it. Smith then decided "he was going to have to do it himself." (Tr. Vol. III at 2.)

[1] On the morning of September 29, 2018, Davis left the residence of his fiancée, Daughana Curothers, and drove away in a white GMC Yukon to go to the barbershop. Smith learned Davis was going to the barbershop and followed Davis there in Smith's black Dodge Ram. Once Davis left the barbershop, he started to drive to the liquor store, and Smith continued to follow him. While on the way to the liquor store, Davis called Curothers. Smith pulled alongside Davis's vehicle and shot Davis at least eleven times. Curothers testified she heard a "tapping" sound and then Davis said, "Baby, Keith shot me." (Tr. Vol. II at 89, 91.)

[2] Indianapolis Metropolitan Police Department ("IMPD") Officer William Hornaday heard the gunshots and quickly arrived at a parking lot near where the shooting. He found Davis, who appeared deceased, in a white Yukon. An autopsy revealed Davis had been shot in the aorta, lungs, stomach, spine, liver, kidney, abdomen, pelvis, and the arm. The forensic pathologist testified at least four of the wounds were fatal and indicated the cause of death was "multiple gunshot wounds." (*Id*. at 217.)

[3] On February 13, 2019, the State charged Smith with murder and Level 4 felony unlawful possession of a firearm by a serious violent felon.[2] On December 7, 2020, Smith filed a notice of alibi defense that declared he was in Gary, Indiana, at the time of the crime. Smith waived his right to a jury trial on May 25, 2021. The trial court held a bench trial on July 29, 30, and August 2, 2021. The trial court found Smith guilty of murder and dismissed the firearm charge. On August 20, 2021, the trial court sentenced Smith to sixty years incarcerated.

Discussion and Decision

[4] We review evidentiary rulings for an abuse of discretion. *Pavlovich v. State*, 6 N.E.3d 969, 975 (Ind. Ct. App. 2014), *trans. denied*. An abuse of discretion occurs if the trial court misinterpreted the law or if its decision was clearly against the logic and effect of the facts and circumstances before it. *Id*.

1. Dying Declaration

Smith argues the trial court abused its discretion when it determined the dying declaration exception to the hearsay rule allowed Curothers to testify Davis told her, after being shot, "Baby, Keith shot me." (Tr. Vol. II at 91.) Smith contends Davis did not believe at the time of his statement that his death was imminent. Hearsay is a statement that "(1) is not made by the declarant while testifying at the trial or hearing; and (2) is offered in evidence to prove the truth

[2] Ind. Code § 35-47-4-5(c).

of the matter asserted." Ind. Evid. R. 801(c). Hearsay is generally not admissible unless it falls under certain exceptions. Ind. Evid. R. 802. One exception to the rule against hearsay, when the declarant is unavailable, is the dying declaration, which is a "statement that the declarant, while believing the declarant's death is imminent, made about its cause or circumstances." Ind. Evid. R. 804(b)(2). Typically, there are two reasons a dying declaration is admitted into evidence:

> (1) to bring to justice murderers who otherwise might escape the penalty of the law because the victims of their crimes are not available to testify; and (2) the dying declaration is reliable because of the belief that a person about to die is less likely to fabricate the guilt of an innocent person than one who would stand to derive some benefit from his falsehood.

Beverly v. State, 801 N.E.2d 1254, 1259 (Ind. Ct. App. 2004), *trans. denied*.

[5] Under the dying declaration exception to the hearsay rule, "the fact that the victim ultimately dies from her injuries does not make her statement admissible; rather the victim must have known that death was imminent and abandoned all hope for recovery." *Id*. In order to prove the victim knew his death was imminent and had abandoned all hope of recovery, we can consider "the general statements, conduct, manner, symptoms, and condition of the declarant, which flow as the reasonable and natural results from the extent and character of his wound, or state of his illness." *Williams v. State*, 168 Ind. 87, 90-91, 79 N.E. 1079, 1081 (1907), *superseded on other grounds by rule as stated in Jackson v. State*, 712 N.E.2d 986 (Ind. 1999). "[T]he character of the wound

may itself warrant the inference that the declarant was under a sense of certain and speedy death[.]" *Gipe v. State*, 164 Ind. 433, 436, 75 N.E.881, 882 (1905).

[6] Here, Curothers testified Davis told her "Baby, Keith shot me" (Tr. Vol. II at 91), after he had been shot at multiple times. It is hard to imagine that someone shot at least eleven times, with many of those bullets striking his chest or stomach, would NOT believe his death was imminent. Officer Hornaday testified he was located at "38th and High School Road" when he heard "gunshots[.]" (Tr. Vol. II at 77.) Officer Hornaday then made a u-turn so he could "head north on High School Road" in the direction of the gunshots. (*Id*.) He located Davis in his Yukon at 3902 High School Road, one block away. When he arrived at the scene, he observed Davis who "appeared to [him] to be deceased." (*Id*. at 78.) Thus, Davis succumbed to his injuries very shortly after he received those wounds. Therefore, we conclude the trial court did not abuse its discretion when it concluded Davis believed his death was imminent after Smith shot him at least eleven times and therefore, admitted Davis's statement to Curothers as a dying declaration. *See Bishop v. State*, 40 N.E.3d 935, 944-5 (Ind. Ct. App. 2015) (trial court did not abuse its discretion when it admitted victim's dying declaration into evidence based on the "reasonable and natural results from the extent and character of his extensive wounds"), *trans. denied*.

2. Cell Phone Location Data

[7] Prior to trial, Smith filed a notice of alibi with the trial court that indicated he was in Gary, Indiana, not Indianapolis, Indiana, at the time of the crime. At trial, the State presented evidence and testimony regarding Smith's location as

indicated by cell phone records and cell phone tower location data. First, the State called Melody Haynes, Smith's former girlfriend, who testified to Smith's cell phone numbers at the time of the crime. Haynes indicated she did not "know [Smith's] number from 2018" and the State refreshed her recollection of Smith's cell phone number at the time of the crime. (Tr. Vol. III at 38.) IMPD Communications Records Analyst Adam Franklin then testified he received "Call Detail" records for cell phone numbers identified as belonging to Smith and used a program called "Cell Hawk" to map the nearest cell phone tower to the location from which a call was made. (*Id*. at 47-48.) Based on those records, Franklin testified the cell phone numbers earlier identified as belonging to Smith were in Indianapolis, and not Gary, at the time of the crime.

[8] Smith argues the trial court erred when it allowed the State to refresh Haynes's recollection of Smith's cell phone numbers at the time of the crime. Smith also argues the trial court erred when it admitted evidence and testimony concerning cell phone records and cell tower mapping to rebut Smith's alibi that he was not in Indianapolis at the time of the shooting.

[9] Smith did not object at trial to the admission of any of the evidence he now challenges. Thus, his argument is waived. *See Jackson v. State*, 735 N.E.2d 1146, 1152 (Ind. 2000) (failure to make contemporaneous objection to the admission of evidence at trial waives issue on appeal). One way to escape such waiver is by claiming the error is fundamental. *Jewell v. State*, 887 N.E.2d 939, 940 n.1 (Ind. 2008). Fundamental errors are "clearly blatant violations of basic and elementary principles, and the harm or potential for harm could not be

denied." *Warriner v. State*, 435 N.E.2d 562, 563 (Ind. 1982). The fundamental error exception is "extremely narrow." *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002).

[10] Smith asserts the trial court committed fundamental error when it allowed Haynes's recollection to be refreshed regarding Smith's telephone number in 2018. Demonstration of Smith's number at that time was required to prove police tracked Smith's phone, and thus his location, on the day of the crime. Smith also contends the trial court erred when it admitted Franklin's testimony regarding the procedures and information gleaned from cell phone records and cell tower locations, which placed Smith in the area of the crime, because Franklin was not qualified as an expert witness and the State did not present evidence that Franklin's testimony rested upon reliable scientific principles.

However, to the extent admission of this evidence may have been error, it was harmless given the overwhelming evidence of Smith's guilt, and harmless error cannot be considered fundamental. *See Stewart v. State*, 754 N.E.2d 492, 496 (Ind. 2001) (error in admitting evidence does not require reversal unless it affects the substantial rights of a party), *contra Warriner*, 435 N.E.2d at 563 (Ind. 1982) (fundamental errors are "clearly blatant violations of basic and elementary principles, and the harm or potential for harm could not be denied"). "The improper admission of evidence is harmless error when the conviction is supported by such substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." *Barker v. State*, 695 N.E.2d

925, 931 (Ind. 1998), *reh'g denied.* The erroneous admission of evidence may also be harmless if that evidence is cumulative of other evidence admitted. *Donaldson v. Indianapolis Pub. Transp. Corp.*, 632 N.E.2d 1167, 1172 (Ind. Ct. App. 1994).

[11] Here, Smith's cell mate, Demetrius Thomas, testified Smith outlined the crime to him:

> [H]e came and found out that [Davis] was at a barber shop, and he said he followed him. He stayed outside the barber shop. And [Davis] left the barber shop, he followed him. He pulled up on his passenger side. And he shot him in traffic. And he drove the truck to this apartment complex of where one of his girlfriends stayed. He wiped the truck down. He jumped out. Said he was moving in such a rush that he forgot to check for the bullet casings.

(Tr. Vol. III at 3.) Detective Dustin Keedy testified that he was able to obtain surveillance video from "a Phillips 66 gas station, a Uhaul Storage facility, a Puertos Mexican Food store, an Alarm and Tint location, and an eyebrow facility, and a barber shop." (*Id*. at 20.) The videos showed a black truck follow the victim's vehicle out of the liquor store parking lot and pull beside it on High School Road. Detective Erika Jones testified she located a black truck at the apartment complex where Smith's girlfriend, Haynes, lived. Detective Jones testified she found "fired cartridge cases" and a "wadded up paper towel" in the black truck. (Tr. Vol. II at 176-77.) Finally, Curothers testified she was on the phone with Davis when he was shot and he indicated to her that Keith shot him.

[12] Thus, there existed sufficient, independent evidence to prove that Smith was in Indianapolis at the time of the crime based on Thomas's testimony, surveillance camera video, evidence of the items found in a black truck parked in Haynes's apartment complex, and the testimony of Detectives Jones and Keedy regarding the surveillance video and evidence found in the black truck. Therefore, any error in the admission of the Haynes' testimony regarding Smith's cell phone number at the time of the crime, Smith's cell phone records, and Franklin's analysis thereof, was harmless because the challenged evidence and testimony were cumulative of other independent testimony placing Smith in Indianapolis at the time of the crime.[3] *See Pelissier v. State*, 122 N.E.3d 983, 988 (Ind. Ct. App. 2019) (any error in the admission of videotaped statements was harmless error because the evidence was cumulative of other properly-admitted evidence), *trans. denied*.

Conclusion

[13] The trial court did not abuse its discretion when it admitted Davis's dying declaration. Additionally, the admission of cell phone data, testimony regarding that data, and testimony identifying Smith's cell phone number at the

[3] Further, we note Smith's trial was a bench trial and we presume "that in a proceeding tried to the bench a court renders its decisions solely on the basis of relevant and probative evidence." *Konopasek v. State*, 946 N.E.2d 23, 28 (Ind. 2011). This presumption exists because "[t]he risk of prejudice is quelled when the evidence is solely before the trial court." *Conley v. State*, 972 N.E.2d 864, 873 (Ind. 2012).

time of the crime was harmless and thus could not rise to the level of fundamental error. Therefore, we affirm.

[14] Affirmed.

Riley, J., and Tavitas, J., concur.