MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ricardo Perez,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 27, 2023

Court of Appeals Case No. 22A-CR-2852

Appeal from the Marion Superior Court

The Honorable Matthew E. Symons, Magistrate

Trial Court Cause No. 49D29-2103-F2-7096

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Ricardo Perez appeals his convictions for Level 2 felony dealing in cocaine and Level 3 felony possession of cocaine following a jury trial. Perez raises three issues for our review, which we restate as follows:

> 1. Whether the trial court abused its discretion when it permitted the State to introduce into evidence, over Perez's stated objection, a video-recorded interview of Perez.
>
> 2. Whether the trial court committed fundamental error when it admitted the recorded interview into evidence.
>
> 3. Whether the prosecutor's emphasis on Perez's post-*Miranda* silence in the recorded interview during the prosecutor's closing rebuttal made a fair trial impossible.

[2] We affirm.

Facts and Procedural History

[3] On March 2, 2021, agents for United States Customs and Border Protection intercepted a package being delivered from Mexico City to Felix Prado at 1316 North Gladstone Avenue in Indianapolis. Inside the package was a suitcase, and inside the open area of the suitcase were numerous religious items. However, in the lining of the suitcase, agents discovered approximately 350 grams of cocaine.

[4] The federal border agents contacted officers with the Indiana State Police. The agents and officers then agreed to re-secure the package with a wire that would notify the Indiana officers when the package was opened. The officers also

obtained a warrant for the location of the delivery address in anticipation of the delivery. Meanwhile, the officers searched official databases for the name Felix Prado, but they "did not see that name or a name like that associated [with] that address." Tr. Vol. 2, p. 141.

[5] On March 4, undercover officers delivered the package to 1316 North Gladstone Avenue. That address is one-half of a duplex. Jose Perez owns the duplex, and his brother, Ricardo, lived in the other half, which had the common address of 1314 North Gladstone Avenue. Although Jose would later testify that he rented the unit at 1316 North Gladstone Avenue to four undocumented persons—none of whom he identified as Felix Prado—officers did not observe "any movement" at that address over the course of several days, including the day of delivery, when no one answered the door at the officer's request. *Id.* at 152.

[6] Undercover agents placed the package on the front porch of 1316 North Gladstone Avenue around 9:00 a.m. About two hours later, Ricardo Perez exited 1314 North Gladstone Avenue, went to the neighboring unit, picked up the package, and returned to his unit with it. When that happened, officers initiated a request for a new search warrant for Perez's residence. At about 12:30 p.m., around the same time the officers received that warrant, the parcel wire informed the officers that Perez had opened the package. Officers then entered Perez's residence.

[7] Perez's residence was a single-family residence, and he was the only occupant. Inside, officers found and seized thirty-three grams of cocaine; digital scales; a large amount of cash; and various pieces of mail that had Perez's name and both the 1314 and the 1316 North Gladstone Avenue addresses on them.[1] Although the suitcase had been removed from the delivery package, the cocaine inside its lining had not been accessed at the time of the officers' search.

[8] Indiana State Police Sergeant Taylor Shafer then interviewed Perez outside the residence and recorded the interview. In that three-minute-and-twenty-five-second interview, Perez is sitting in the front passenger seat of an unidentified vehicle, and not obviously a police vehicle, with a uniformed police officer in the seat behind him. Perez is not handcuffed. Sergeant Shafer is in the driver's seat, and he begins the interview by discerning Perez's identity and reading him his *Miranda* rights.

[9] About ninety seconds into the interview, Perez acknowledged that he lived at 1314 North Gladstone Avenue and had lived there for seven years. About one minute later, Sergeant Shafer asked Perez to "tell me about that box. What do you know about it?" State's Ex. 42 at 2:32.[2] Perez was silent for the ensuing thirteen seconds. Sergeant Shafer then asked Perez if the box was in his name.

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[1] Officers also found a black-powdered six-shooter, but they did not consider it to be a "firearm . . . [of a] serious nature" and left it. Tr. Vol. 2, pp. 158-59.

[2] This recording was played for the jury in open court, but it is not transcribed in the record. We note that our Appellate Rules require that "the Transcript must contain all words and other verbal expressions uttered during the course of the proceeding" unless a stated exception applies. Ind. Appellate Rule App. A(8). Recorded evidence played for the jury is not a stated exception.

Perez responded, "what?" and Sergeant Shafer said, "the box." *Id.* at 2:51. Perez stated that "no" it was not in his name. *Id.* at 2:52. Sergeant Shafer followed up by asking, "then why do you have it?" *Id.* at 2:54. Perez responded that he "picked it up." *Id.* at 2:56. When then asked why he opened a package that was not in his name, Perez stated he wanted to talk to a lawyer, and Sergeant Shafer ended the interview.

[10] The State charged Perez with Level 2 felony dealing in cocaine and Level 3 felony possession of cocaine. The dealing charge required the State to show that Perez possessed, with the intent to deliver, at least ten grams of cocaine. The possession charge required the State to show that Perez possessed at least twenty-eight additional[3] grams of cocaine.

[11] During his ensuing jury trial, Perez's opening statement to the jury focused on the suitcase. In particular, Perez argued that the State's evidence would show only that Perez was a "porch pirate" with respect to the suitcase, not that he knew of the cocaine in the lining of the suitcase, and without "the amounts that were found in the suitcase" the State would not be able to support both charges. Tr. Vol. 2, pp. 128-29. During its case-in-chief, the State presented officer testimony regarding the discovery of the package; the re-sealing of the package with the parcel wire; the delivery of the package; the inability to identify any

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[3] Our Supreme Court has held that, as a matter of statutory construction, possession of cocaine is a lesser included offense of dealing in the same cocaine. *Hardister v. State*, 849 N.E.2d 563, 574-76 (Ind. 2006). Perez does not argue on appeal that his two convictions are contrary to that rule given this record.

person by the name of Felix Prado or other occupants at 1316 North Gladstone Avenue; the observation of Perez taking the package; the ensuing alert from the parcel wire and search of Perez's residence; and the items seized from his residence.

[12] During his testimony for the State, Indiana State Police Officer Matthew Wilson stated that it is common for narcotics traffickers to include religious items in shipments because "they believe that the blessing of the load will help it get . . . where it is coming from to where it's going to." *Id.* at 139. He also testified that it is common for narcotics shipments to use "made-up names . . . to take away from who it's really going to and [to] deceive law enforcement . . . ." *Id.* at 141.

[13] The State also sought to have admitted into evidence Sergeant Shafer's recorded interview with Perez. Perez objected to the recording on the ground that showing a video of him "while he's in custody by the police" was "highly prejudicial." *Id.* at 30, 173. Perez added that the recording was "more prejudicial than . . . relevant." *Id.* at 106, 173. The State responded that the probative value of the recording would be to have the jury hear from the defendant, via the recording, regarding how long he had lived at his residence. The State added that Perez's "non-statements" during the interview were also "indicative of guilt." *Id.* at 107, 173. Perez responded that he would stipulate to the time he had lived at the residence. The trial court overruled Perez's objection and concluded that the recording was not "overly prejudicial" because "the jury understands that he was arrested at the time." *Id.* at 108, 173.

[14] During his closing argument to the jury, Perez again asserted that the State had not presented "any evidence that he knew what was inside the suitcase." *Id.* at 221. In its rebuttal, the State responded:

> So he's a porch pirate. I would love to believe that story and I bet you guys would to; however, there was one thing. When . . . Sergeant Shafer asked [Perez in the interview] point blank why he had the box, what did [Perez] say? Nothing. The silence was deafening. It was like ten, [fifteen] seconds of silence. He had nothing to say for why he took the package. If he was just taking a package off his neighbor's porch because he's a thief, then why not say that? If you had a whole freaking ISP [SWAT] Team breathing down your neck, if you're innocent and all you did was t[ake] a package because you're a porch pirate, say that.

Id. at 226. Perez did not object to the State's rebuttal. Thereafter, the jury found Perez guilty as charged, and the trial court sentenced Perez accordingly. This appeal ensued.

1. The trial court did not abuse its discretion when it admitted the recorded interview over Perez's stated objection.

[15] Perez's arguments on appeal are focused on the admission and use of his recorded interview with Sergeant Shafer. We first consider Perez's argument that the trial court abused its discretion when it admitted that interview over Perez's stated objection. A trial court has broad discretion in the admission of evidence, and we will review its decisions only for abuse of that discretion. *See, e.g.*, *Hall v. State*, 177 N.E.3d 1183, 1193 (Ind. 2021). We will reverse the trial court's judgment only if its ruling was clearly against the logic and effect of the

facts and circumstances before it and any error affected a party's substantial rights. *Id.*

[16] At trial, Perez objected to the admission of the recorded interview on the ground that its prejudicial value, which Perez identified as the showing of him in custody, substantially outweighed the video's probative value, namely, that he had lived at 1314 North Gladstone Avenue for seven years. That is, Perez objected to the admission of the evidence under Indiana Evidence Rule 403. Under that Rule, a trial court may exclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence."

[17] Our Supreme Court has emphasized our trial courts' "wide" discretion under Rule 403:

> "Trial judges are called trial judges for a reason. The reason is that they conduct trials. Admitting or excluding evidence is what they do." *United States v. Hall*, 858 F.3d 254, 288 (4th Cir. 2017) (Wilkinson, J., dissenting). That's why trial judges have discretion in making evidentiary decisions. This discretion means that, in many cases, trial judges have options. They can admit or exclude evidence, and we won't meddle with that decision on appeal. *See Smoote v. State*, 708 N.E.2d 1, 3 (Ind. 1999). There are good reasons for this. "Our instincts are less practiced than those of the trial bench and our sense for the rhythms of a trial less sure." *Hall*, 858 F.3d at 289. And trial courts are far better at weighing evidence and assessing witness credibility. *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014). In sum, our vantage

> point—in a "far corner of the upper deck"—does not provide as clear a view. *State v. Keck*, 4 N.E.3d 1180, 1185 (Ind. 2014).

Snow v. State, 77 N.E.3d 173, 177 (Ind. 2017) (emphasis omitted).

[18] Here, Perez's admission in the recorded interview to the length of time he had lived at 1314 North Gladstone Avenue was certainly relevant to his possession of the contraband found inside that residence. And we cannot say the trial court erred when it minimized Perez's stated prejudice from that recording, namely, that it showed him in custody. As the trial court concluded, the jury likely had that part figured out already. Thus, whether to admit or exclude the interview under Rule 403 was within the trial court's wide discretion, and we cannot say it abused that discretion based on the reasons argued to it.

2. The trial court did not commit fundamental error when it admitted the recorded interview into evidence.

[19] Perez also argues on appeal that the trial court committed fundamental error when it admitted the recorded interview into evidence.[4] That is, Perez argues that the real reason the State wanted the interview admitted into evidence was for the jury to see Perez's thirteen seconds of silence, after Sergeant Shafer had

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[4] The State asserts that Perez did not preserve a fundamental-error argument in the trial court's admission of evidence for our review because Perez's argument is framed around preserved error rather than fundamental error. While we agree that Perez's argument should have been better framed and articulated, we exercise our discretion to review this issue.

asked Perez to "tell me about that box. What do you know about it?" *See* State's Ex. 42 at 2:32.

[20] As this reason for excluding the evidence was not argued in the trial court, to prevail on appeal Perez must show fundamental error. As our Supreme Court has explained:

> [a]n error is fundamental, and thus reviewable on appeal, if it "made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm." These errors create an exception to the general rule that a party's failure to object at trial results in a waiver of the issue on appeal. This exception, however, is "extremely narrow" and *encompasses only errors so blatant that the trial judge should have acted independently to correct the situation*. At the same time, "if the judge could recognize a viable reason why an effective attorney might not object, the error is not blatant enough to constitute fundamental error."

Durden v. State, 99 N.E.3d 645, 652 (Ind. 2018) (emphasis added, citations omitted).

[21] "[F]undamental error in the evidentiary decisions of our trial courts is especially rare." *Nix v. State*, 158 N.E.3d 795, 801 (Ind. Ct. App. 2020) (quoting *Merritt v. State*, 99 N.E.3d 706, 709-10 (Ind. Ct. App. 2018), *trans. denied*), *trans. denied*. This is because:

> [a]n attorney's decision not to object to certain evidence or lines of questioning is often a tactical decision, and our trial courts can readily imagine any number of viable reasons why attorneys

> might not object. *Cf. Merritt*, 99 N.E.3d at 710 ("The risk calculus inherent in a request for an admonishment is an assessment that is nearly always best made by the parties and their attorneys and not *sua sponte* by our trial courts."). Fundamental error in the erroneous admission of evidence might include a claim that there has been a "fabrication of evidence," "willful malfeasance on the part of the investigating officers," or otherwise that "the evidence is not what it appears to be." *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010). But absent an argument along those lines, "the claimed error does not rise to the level of fundamental error." *Id.*

Id.

[22] Perez does not argue on appeal that the recorded interview "is not what it appears to be." *Id.* (quoting *Brown*, 929 N.E.2d at 207). Further, at the time the State sought to have the interview admitted into evidence, the thirteen seconds of silence had ambiguous meaning. As Perez himself states in his brief on appeal, his post-arrest silence may have been "nothing more" than his exercise of his right to remain silent. Appellant's Br. at 20 (quotation marks omitted). Likewise, absent emphasis to the contrary by one of the parties, a reasonable juror could have viewed that silence simply as Perez considering viable options, such as whether to talk to the police or to talk to an attorney first. In light of the ambiguous nature of the silence on its own, we cannot say that the trial court had a duty to sua sponte interject itself to exclude the evidence. We therefore affirm the trial court's admission of the recorded interview.

3. The prosecutor's emphasis on Perez's post-*Miranda* silence in the recorded interview during the prosecutor's rebuttal violated Perez's rights, but it did not make a fair trial impossible.

[23] Last, Perez argues that the State committed prosecutorial misconduct when it used his post-*Miranda* silence as an "evidentiary harpoon" during its closing rebuttal statement. Appellant's Br. at 21-23. For the same reasons, Perez asserts that the trial court committed fundamental error when it did not interject itself to correct the State's comment after Perez's defense counsel had failed to object to it. Again, fundamental error makes "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." *Durden*, 99 N.E.3d at 652.

[24] We agree that the prosecutor's emphasis during rebuttal on the thirteen seconds of silence as evidence of Perez's guilt violated Perez's rights. "When a person under arrest is informed, as *Miranda* requires, that he may remain silent, . . . it does not comport with due process to permit the prosecution during the trial to call attention to his silence" to establish "an unfavorable inference." *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (cleaned up). The State plainly violated Perez's *Doyle* rights. Perez's counsel should have objected, and, in the absence of an objection, the trial court should have acted independently to correct the situation.

[25] Nonetheless, even when properly preserved for appellate review, a *Doyle* violation may be harmless.[5] *See, e.g.*, *Kubsch v. State*, 784 N.E.2d 905, 914-15 (Ind. 2003). In *Kubsch*, our Supreme Court held a *Doyle* violation to be reversible error based on the "frequency and intensity" of the State's references to the defendant's silence, which included the defendant invoking his right to remain silent six times in a video that was twice played for the jury; a reference to the defendant's silence in the State's opening statement; and "at least three references" during the State's direct examination of witnesses. *Id.* at 915.

[26] Similarly, in *Robinette v. State*, 741 N.E.2d 1162 (Ind. 2001), our Supreme Court held:

> We cannot conclude that the State has proved beyond a reasonable doubt that the admission of [the defendant's] post-*Miranda* silence as evidence of her sanity was harmless. [The defendant] offered substantial testimony to the effect that she suffered from a condition rendering her unable to recall or appreciate the crimes she committed. Her two videotaped statements, in which she repeats, "I don't want to talk about it," dozens of times could have easily left jurors with the impression that [she] had enough of her wits about her to recognize that it was not to her benefit to speak with police. On these tapes she provided the police with general information such as her name, age, and address, yet declined to speak about the crimes with which she was charged. Jurors listened to her repeated refusals to answer for four hours, during which time she was badgered and

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[5] Had Perez properly preserved the issue, the burden would be on the State to establish that the *Doyle* violation was harmless beyond a reasonable doubt. *Robinette v. State*, 741 N.E.2d 1162, 1165 (Ind. 2001). But, as he did not preserve the issue, the burden remains with Perez to establish that the error made a fair trial impossible. *Isom v. State*, 170 N.E.3d 623, 651 (Ind. 2021).

> chastised by police for being uncooperative and occasionally responded belligerently.

Id. at 1165 (footnotes omitted). Based on those and other circumstances, our Supreme Court concluded that "the admission of the videotapes could have easily contributed to [the defendant's] conviction." *Id.* at 1166.

[27] But the question in the instant appeal is not whether the prosecutor's comment during rebuttal may have "contributed" to Perez's conviction; it is whether Perez can show that the comment made a fair trial impossible. *See Isom v. State*, 170 N.E.3d 623, 651 (Ind. 2021). And we cannot say that it did. Unlike in *Kubsch* and *Robinette*, here the State's reference to Perez's silence only happened one time, in the rebuttal portion of its closing statement. Further, that comment referred to a thirteen-second segment of a three-minute-and-twenty-five-second video, a far cry from the length of the recorded interrogations and numerous invocations of silence at issue in *Kubsch* and *Robinette*.

[28] Moreover, the jury had ample reason to doubt Perez's defense of simply being a porch pirate. He lived in one-half of a duplex owned by his brother, and officers failed to observe anyone living in the other half, to which the package was addressed. The package was addressed to a named person whom officers were unable to identify, and officers testified that fictitious names are frequently used when contraband is mailed. Further, Perez acquired the package within hours of its delivery, and mail inside his residence contained his name and both the 1314 and the 1316 North Gladstone Avenue addresses. Perez was also in possession of a significant quantity of additional cocaine and several scales for

measuring out cocaine as well, suggesting more than mere possession of cocaine on his part.

[29] Accordingly, we cannot say that the violation of Perez's *Doyle* rights made a fair trial impossible, and we affirm his convictions.

Conclusion

[30] For all of the above-stated reasons, we affirm Perez's convictions for Level 2 felony dealing in cocaine and Level 3 felony possession of cocaine.

[31] Affirmed.

Vaidik, J., and Pyle, J., concur.