MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Kelly N. Bryan
Muncie, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Daylon L. Welliver
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

D'Ante N. Davis,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 13, 2023

Court of Appeals Case No. 23A-CR-640

Appeal from the Delaware Circuit Court

The Honorable Linda Ralu Wolf, Judge

Trial Court Cause No. 18C03-2112-MR-9

Memorandum Decision by Judge Bailey
Judges May and Felix concur.

Bailey, Judge.

Case Summary

[1] D'Ante Davis appeals his convictions for Murder, a felony;[1] Robbery, as a Level 3 felony;[2] and Conspiracy to Commit Robbery, as a Level 3 felony.[3] We affirm.

Issues

[2] Davis presents four issues for review:

I. Whether the trial court abused its discretion by admitting an officer's testimony repeating an out-of-court statement made by alleged co-conspirator Tayanelle Childress;

II. Whether the trial court abused its discretion by admitting into evidence a redacted police statement made by Davis after he had made a reference to requesting an attorney;

III. Whether the trial court abused its discretion by admitting expert witness testimony about DNA results over Davis's objection that the chain-of-custody evidence as to DNA samples was incomplete; and

IV. Whether cumulative error denied Davis a fair trial.

---

[1] Ind. Code § 35-42-1-1.

[2] I.C. § 35-42-5-1(a).

[3] I.C. §§ 35-41-5-2, 35-42-5-1(a).

Facts and Procedural History

[3] During the early afternoon of July 22, 2021, James Braden King, III arrived at the Muncie residence of Lionell Davis, Jr. ("Lionell") to deliver marijuana. Lionell gave King $8,000 in cash and King sat down on the sofa to count it. While King was counting, Jason Becraft arrived and purchased a small amount of marijuana from Lionell. Becraft posted a public Snapchat of himself and Lionell and then, without the others being aware, Becraft took a video of King counting his money.

[4] Becraft posted the video of King in a private Snapchat message to Davis. Davis replied: "On my momma, I need that." (Tr. Vol. II, pg. 243.) Davis then sent Becraft a message stating "on my way be there in five" and urging Becraft to "make sure no one leaves." (*Id* at 244.) Becraft responded that he "was about to leave" and he "didn't want to be around." (*Id.* at 245.) Davis sent a message to Becraft to say that he was "about to pull up" but Becraft responded that he "had left already" and "bye." (*Id.* at 247.)

[5] Becraft returned to his rented vehicle, where Taejanelle Childress was sitting in the driver's seat. Becraft told Childress "let's go," and she put the car in reverse. (*Id.* at 249.) Becraft took out rolling papers and began to divide up some marijuana for them to smoke when he saw a dark Pontiac go speeding past them. Minutes later, Childress and Becraft heard multiple gunshots.

[6] Three to five minutes after Becraft left the apartment, Lionell saw his front door swing open. A masked man, whom Lionell recognized as Davis, was carrying

an assault rifle.[4] Davis was accompanied by a shorter, stockier man. King jumped up from the sofa and drew a weapon from his waistband. Lionell dove under the sofa cushions and heard a hail of gunfire. When Lionell emerged, he made eye contact with Davis, but Davis did not attempt to shoot him. As soon as the intruders left, Lionell ushered the two children present to a neighbor's apartment and called 9-1-1. King lay dead from multiple gunshot wounds and the $8,000 was missing.

[7] Still holding his assault rifle, Davis jumped in the back seat of Becraft's vehicle and directed Childress to drive him to Anderson. The trio arrived at an apartment, where Davis took Becraft aside and asked if "[Childress] will say anything?" (Tr. Vol. IV., pg. 15.) Assured that Childress would not talk, Davis gave Becraft some of the cash. Becraft gave Childress $300.

[8] On the day of the murder, Muncie police interviewed Lionell and he immediately identified Davis as a shooter. Becraft was also interviewed but did not identify Davis. The next day, Muncie police officers asked Lionell to call Childress; their conversation took place over a speaker phone. Childress admitted to Lionell that she had been the "get-a-way driver" for Davis. (Tr. Vol. III, pg. 139.)

[4] Although Davis was masked, Lionell knew Davis personally and was able to recognize him by his height, build, eyes, and his neck and hand tattoos.

[9] On December 15, 2021, the State charged Davis with Murder, Felony Murder, Robbery, and Conspiracy to Commit Robbery. The State also alleged that Davis had used a firearm in the commission of Murder, supporting a firearm enhancement pursuant to Indiana Code Section 35-50-2-11. Becraft and Childress were also charged with Murder, but each was given use immunity for their trial testimony.

[10] Davis was brought to trial before a jury and convicted on all counts. The jury found a firearm enhancement to be appropriate. Due to double jeopardy concerns, the trial court vacated the conviction for Felony Murder and reduced the Robbery conviction to a Level 5 felony. On February 24, 2023, the trial court imposed upon Davis an aggregate sentence of 107 years. This consisted of sixty-five years for Murder, enhanced by twenty years due to use of a firearm; a consecutive sentence of six years for Robbery; and a consecutive sentence of sixteen years for Conspiracy to Commit Robbery. Davis now appeals.

Discussion and Decision

Standard of Review – Evidentiary Rulings

[11] Davis's contentions on appeal stem from the trial court's decisions with regard to the admission or exclusion of evidence. A trial court's evidentiary ruling is within the discretion of the trial court and is thus "generally accorded a great deal of deference on appeal." *Hall v. State*, 36 N.E.3d 459, 466 (Ind. 2015). We will reverse "only when a manifest abuse of discretion denies the defendant a

fair trial." *Green v. State*, 63 N.E.3d 620, 630 (Ind. Ct. App. 2016). As a rule, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. *Coleman v. State*, 694 N.E.2d 269, 277 (Ind. 1998) (citing Ind. Trial Rule 61). In determining whether an evidentiary ruling affected a party's substantial rights, we assess the probable impact of the evidence on the trier of fact. *Id*.

Admission of Out-of-Court Statement by Childress

[12] Under a grant of use immunity, Childress testified to the following. She drove Becraft to Canterbury Apartments to buy marijuana and waited for approximately ten minutes in the vehicle. Becraft returned with marijuana, told her to leave, and began to "break down the weed." (Tr. Vol. II, pg. 90.) As Childress backed up, she heard gunshots. Davis appeared and got into Becraft's vehicle, carrying a bag and an assault rifle. Davis directed Childress to drive to Anderson and she did so. Childress received $300 in cash from Becraft.

[13] After Childress concluded her testimony, the State called Detective Andrew Sell as a witness. When the State began to inquire about the July 23 telephone call between Lionell and Childress, Davis objected that Detective Sell was being asked to provide hearsay testimony, and Davis would be deprived of his right of confrontation. The State responded that the anticipated testimony fell within an exception to the hearsay rule and pointed out that Davis could recall Childress – who was in custody and not released from her subpoena – to provide additional testimony. Davis argued that Childress was not incentivized

to cooperate with the defense because the defense "can't offer use immunity." (Tr. Vol. III, pg. 134.)

[14] The trial court permitted Detective Sell to testify that Childress had admitted, during the telephone call, to her role as the "get-a-way driver." (*Id.* at 139.) Davis contends that the admission of this testimony amounted to reversible error. The State responds that the challenged testimony was not hearsay because it met the requirements of Indiana Evidence Rule 801(d)(1)(B).

[15] Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *See* Ind. Evidence Rule 801(c). Generally, hearsay is inadmissible. *See* Evid. R. 802. But Evidence Rule 801(d)(1)(B) provides that a statement is not hearsay if:

> [t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement ... (B) is consistent with the declarant's testimony, and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying[.]

[16] Childress's trial testimony was consistent with her statement made during the phone call placed by Lionell at the behest of police investigators. Also, testimony regarding that telephonic statement was offered to rebut an implied charge of fabrication. That is, during Davis's cross-examination of Childress, he reviewed her pending criminal charges, asserted that she was not testifying "out of the goodness of her heart," and implied that she was lying because of her own legal jeopardy. (Tr. Vol. III, pg. 118.)

[17] Davis does not dispute the consistency of the statements or the purpose for which the out-of-court statement was offered by the State. Rather, he claims that the State acted to "insulate Childress from further cross-examination" and that, had he re-called Childress, the use immunity agreement "did not require Childress to cooperate with Davis." Appellant's Brief at 10, 12. But Davis did not attempt to recall Childress.

[18] In *Goodner v. State*, 714 N.E.2d 638 (Ind. Ct. App. 1999), a panel of this Court considered whether the predicate requirements of Evidence Rule 801(d)(1) were met when a declarant testified; his prior consistent statement was admitted after he was excused as a witness; and the defendant did not request that the declarant be recalled. Observing that the declarant appeared to be "within the prosecutor's grasp" due to an agreement with the prosecutor, and "nothing in the record suggests he could not have been produced," the Court concluded that the declarant had been available for cross-examination about the prior statement. *Id.* at 644. "Although the predicate requirement set forth in Rule 801(d)(1) mandates that the declarant testify at trial and be 'subject to cross-examination concerning the statement,' if the declarant has not already been cross-examined on the statement, his availability to be recalled for cross-examination satisfies this requirement." *Id.* at 643.

[19] Here, Childress had signed an agreement requiring her to provide truthful testimony; she had not been formally released from her subpoena to appear at Davis's trial; and she was then in State custody. Davis had the opportunity to recall Childress as a witness for the purpose of cross-examining her on the prior

statement. Davis merely declined his opportunity. In these circumstances, the trial court did not abuse its discretion in admitting the challenged testimony as an exception to the hearsay rule.

Admission of Davis's Police Statement

[20] During the investigation into King's murder, and while he was in police custody on another matter, Davis received *Miranda* warnings,[5] signed a document indicating that he was waiving those rights and participated in a recorded interview relative to the King case. Davis did not directly incriminate himself, and he claimed to have an alibi for the day of King's death. A redacted version of the recorded interview was admitted into evidence at trial over Davis's objection that it was inadmissible because he had invoked his right to counsel at the outset of the interview. He now argues that the admission of the recorded statement violated his Fifth Amendment right to counsel.

> As established in *Miranda v. Arizona*, prior to any questioning of a person taken into custody, "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 706-07 (1966). If the accused requests counsel, "the interrogation must cease until an attorney is present." *Edwards v. Arizona,* 451 U.S. 477, 482, 101 S.Ct. 1880, 1883, 68 L.Ed.2d 378, 384 (1981) (quoting *Miranda*, 384 U.S. at 474, 86 S.Ct. at 1628, 16 L.Ed.2d at 723). An accused's request for counsel, however, must be

[5] *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

> unambiguous and unequivocal. *Berghuis v. Thompkins*, 560 U.S. – ––, ––––, 130 S.Ct. 2250, 2259, 176 L.Ed.2d 1098, 1110 (2010). The cessation of police questioning is not required "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel." *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362, 371 (1994).

Carr v. State, 934 N.E.2d 1096, 1102 (Ind. 2010). As such, we review the record to determine whether Davis rescinded his waiver of his right to counsel by making an unequivocal request for an attorney.

[21] As the police interview with Davis commenced, the interviewing officer asked Davis where he was staying, and Davis interjected that he wanted to know "what he was charged with." State's Exhibit 167. The officer responded that he needed to talk to Davis "about some stuff" and "would explain everything." (*Id*. at 2:19.) Davis continued:

> I just wanna know cause you know I'm gonna ask for my lawyer. I just wanna know what I'm charged with; am I here for questioning or under arrest?

(*Id.* at 2:27.) Using a future tense, Davis indicated that he was going to be requesting an attorney; he then continued to engage in conversation with the officer. These circumstances are akin to those considered by our Indiana Supreme Court in *Schuler v. State*, 112 N.E.3d 180 (2018).

[22] At issue there was a defendant's statement: "I want my attorney, but I'll answer, you can ask me questions however," followed by his explanation that he already had an attorney but would "go ahead and talk." *Id.* at 187. The Court observed that "[defendant]'s statements, at minimum, show that he was aware of his right to an attorney but chose to speak with the detective anyway." *Id.* The Court rejected the appellant's argument that he had made a "plain request for an attorney." *Id.* Likewise, Davis did not plainly request an attorney and he also continued to engage with his interviewer. Absent an unequivocal request for counsel, cessation of police questioning was not required. *See Carr*, 934 N.E.2d at 1102. The trial court did not abuse its discretion in admitting Davis's redacted statement to police.

Admission of DNA Test Results and Testimony.

[23] Muncie crime scene investigator Brandon Qualls collected a black plastic dust cover for a rifle optic sight outside Lionell's apartment. The item was placed in a sealed bag, assigned a case report number, and stored in the police property room. Crime scene investigator Damon Stoval collected a blue mask from the rear floorboard of a Chevrolet Spark that Becraft had rented. Again, the item was placed in a sealed bag, assigned a case report number, and stored in the police property room. Qualls transported those two items to the Indiana State Police laboratory for DNA testing. Indiana State Police forensic scientist Kenneth Eilert testified that he "came into possession" of those items from the Muncie Police Department, stored those items in a secure area, and assigned each a unique item number and bar code. (Tr. Vol. IV, pg. 97.) Over Davis's

objections that there was "not a sufficient chain of custody" of samples and "I do not believe it's been connected up," Eilert testified that DNA testing of samples from the two items revealed "strong support" for Davis's inclusion as a DNA contributor. (*Id.* at 98, 100, 118.)

[24] An exhibit is admissible if the evidence regarding its chain of custody strongly suggests the exact whereabouts of the evidence at all times. *Culver v. State*, 727 N.E.2d 1062, 1067 (Ind. 2000). In substantiating a chain of custody, the State must give reasonable assurances that the property passed through various hands in an undisturbed condition. *Id.* The State need not establish a perfect chain of custody, and gaps impact weight rather than admissibility of the evidence. *Id.* Moreover, there exists a presumption of regularity in the handling of exhibits by public officers, and a presumption that public officers discharge their duties with due care. *Id.* Merely raising the possibility of tampering is insufficient to make a successful challenge to the chain of custody. *Troxell v. State*, 778 N.E.2d 811, 814 (Ind. 2002).

[25] According to Davis,

> Off[icer] Qualls' testimony that there were "several items" of evidence and "DNA standards" taken to the ISP laboratory is simply not sufficient chain of custody evidence that would allow Eilert to testify about the results of his DNA testing of the bodily fluid located on the piece of plastic and Covid mask. *There must be some chain of custody evidence connecting Davis to the items tested.* In this case there was none introduced into evidence.

Appellant's Brief at 18 (emphasis added.) Davis does not point to a gap in the chain of custody after the items came into police possession. Rather, he appears to suggest that the State needed evidence connecting Davis to the items *before* they came into police custody. "Our Supreme Court has long held, however, that a chain-of-custody foundation is not required for the period before the evidence comes into the possession of the police." *Jones v. State*, 218 N.E.3d 3, 10 (Ind. Ct. App. 2023) (citing *Arnold v. State*, 436 N.E.2d 288, 291 (Ind. 1982)). Davis has pointed to no fatal gap in the chain of custody of the two items from which DNA was extracted. The trial court did not abuse its discretion in admitting Eilert's DNA testimony.

Cumulative Error

[26] Finally, Davis argues that erroneously admitted evidence affected the jury's verdict and denied him a fair trial. According to Davis, "it is improbable that the inconsistent statements of Lionell, Childress, and Becraft would have independently supported the conviction of Davis on any of his charged offenses." Appellant's Brief at 20. The State directs our attention to Indiana Appellate Rule 66(A), which provides:

> No error or defect in any ruling or order in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.

Here, one eyewitness and two occurrence witnesses directly implicated Davis in King's murder. Davis has shown no error or defect in the challenged evidentiary rulings, much less error affecting his substantial rights. Davis has not persuaded us that he was denied a fair trial.

Conclusion

[27] Davis has demonstrated no abuse of discretion in the evidentiary rulings made by the trial court.

[28] Affirmed.

May, J., and Felix, J., concur.