## MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

William Ballard,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

December 22, 2023

Court of Appeals Case No. 23A-CR-798

Appeal from the Marion County Superior Court

The Honorable Shatrese M. Flowers, Judge

Trial Court Cause No. 49D28-2101-MR-1776

**Memorandum Decision by Judge Mathias**
Judges Riley and Crone concur.

**Mathias, Judge.**

[1] William Ballard appeals his convictions for murder and Class A misdemeanor domestic battery. Ballard raises a single issue for our review, namely, whether the trial court committed fundamental error when it did not *sua sponte* exclude the deposition of a deceased witness when the deposition had been held by Ballard's counsel but without Ballard present. We affirm.

## Facts and Procedural History

[2] In January and February of 2021, the State charged Ballard with nine counts, including murder and Class A misdemeanor domestic battery. In April 2022, Ballard's trial counsel took a video-taped deposition of Audriana Elliot, a key witness for the State on those two charges. At the time, both Ballard and Elliot were in the State's custody, albeit in different facilities. Ballard's counsel did not seek to have his client present during Elliot's deposition. And, during her testimony, Elliot provided incriminating evidence against Ballard. Elliot died of a drug overdose in August.

[3] In February 2023, the trial court held Ballard's jury trial. During that trial, the State moved to have the court admit Elliot's pretrial deposition into evidence. The trial court admitted her testimony, and the jury found Ballard guilty of murder and Class A misdemeanor domestic battery. The court then entered its judgment of conviction and sentenced Ballard accordingly. This appeal ensued.

## Discussion and Decision

[4] On appeal, Ballard asserts that the trial court violated his right to face-to-face confrontation under Article 1, Section 13 of the Indiana Constitution when it

admitted Elliot's deposition into evidence. Ballard acknowledges that he did not object to the admission of Elliot's deposition on those grounds in the trial court. Thus, on appeal, Ballard must establish that the trial court committed fundamental error when it admitted Elliot's deposition into evidence.[1]

[5] "An 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." *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018). As we have explained:

> "fundamental error in the evidentiary decisions of our trial courts is especially rare." *Merritt v. State*, 99 N.E.3d 706, 709-10 (Ind. Ct. App. 2018), *trans. denied*. That is because fundamental error
>
> > 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*, 99 N.E.3d at 652 (emphasis added; quotation marks and citations omitted).
>
> An attorney's decision not to object to certain evidence or lines of questioning is often a tactical decision, and our trial courts can

[1] The State does not suggest on appeal that Ballard's argument should be precluded under the invited-error doctrine, and we therefore do not consider that possibility. *See, e.g.*, *Batchelor v. State*, 119 N.E.3d 550, 556 (Ind. 2019) (noting that invited error "forecloses appellate review altogether," even for claims of fundamental error).

> 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.*

*Nix v. State*, 158 N.E.3d 795, 801 (Ind. Ct. App. 2020) (emphasis added), *trans. denied*.

[6] Ballard does not assert that Elliot's deposition was not what it appeared to be. Rather, his argument is simply that her deposition was very prejudicial to him. That is not a fundamental-error argument and accepting it as one "would turn fundamental error from a rare exception to the general rule for appellate review," which we will not do. *Id.* at 802. Ballard has thus failed to meet his burden on appeal, and we affirm his convictions.

[7] Affirmed.

Riley, J., and Crone, J., concur.