MEMORANDUM DECISION

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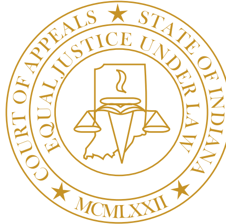

IN THE

Court of Appeals of Indiana

Anthony D. Cobb,

Appellant-Defendant

v.

State of Indiana,

Appellee-Plaintiff

November 4, 2024

Court of Appeals Case No.
23A-CR-2907

Appeal from the Lake Superior Court

The Honorable Salvador Vasquez, Judge

Trial Court Cause No.
45G01-2105-F4-105

Memorandum Decision by Judge Kenworthy
Judges Bailey and Felix concur.

Kenworthy, Judge.

Case Summary

[1] Anthony Cobb appeals his convictions for Level 4 felony attempted arson[1] and Level 4 felony burglary.[2] He presents several issues for our review, one of which we find dispositive: Did the trial court abuse its discretion in admitting five still photographs pulled from surveillance camera footage and witness testimony about the video? Because a video existed at the time of trial and the photos and witness testimony were not the best evidence of the video's contents, we reverse and remand for a new trial.

Facts and Procedural History

[2] Mokeiva Carter met Cobb in 2019, and they later started dating. During their relationship, Carter lived with her young daughter in a multi-unit apartment building on Hayes Street in Gary. Carter gave Cobb a spare key to her apartment, and Cobb lived there for a few months off and on. After the couple broke up in November 2020, Cobb did not return the key. Carter at first tried to remain friends with Cobb, even though his reaction to the breakup was "bad." *Tr. Vol. 4* at 128. But "it kind of got messy as far as like being obsessive," so

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[1] Ind. Code § 35-43-1-1(a)(1) (2014) (arson); I.C. § 35-41-5-1 (2014) (attempt).

[2] I.C. § 35-43-2-1(1) (2014). The State alleged the underlying felony supporting the burglary charge was arson or theft, although it later amended the charging information to "a felony or a theft." *Appellant's App. Vol. 2* at 67.

Carter tried to cut off contact. *Id.* at 41. At one point, she blocked calls from his cell phone, but he later contacted her from a different number.

[3] On March 21, 2021, Carter left her apartment at 2:30 p.m. and dropped her daughter off at a babysitter's house before going out for the night. Later that evening, Carter "randomly" received a text message from Cobb saying, "good night, I'm going to bed, I love you," which she thought was "strange" because she had not heard from him earlier that day. *Id.* at 51.

[4] In the early hours of March 22, the Gary Fire Department responded to a report of a fire in Carter's apartment. When Captain Chauncy Latham arrived at the building, he heard smoke alarms going off and smelled smoke. Several neighbors were milling around. The apartment door was locked, so firefighters used a pry bar to enter. In the kitchen, they discovered the remnants of a stove fire. The rear burner of the electric stove was still on and covered in ash. There was soot on the walls and stove back. An empty bottle of sauce was tipped over on the stovetop. Because the fire was already out, firefighters unplugged the oven and pulled it away from the wall. When checking the apartment for occupants, Captain Latham noticed "ketchup and a powdery substance all over the couch." *Id.* at 21. He reported the mess to his supervisor. Finding the apartment empty, the firefighters left the apartment and latched the front door, which had suffered minimal damage, if any, when it was pried open. Captain Latham's after-incident report described the fire as a kitchen fire that started on the stove top.

[5] Carter returned home sometime between 2:00 and 4:00 a.m. to find her apartment "destroyed." *Id.* at 45. She saw the stove was "burned up," living room items were strewn about, protein shake powder covered her furniture and clothes, and some type of sauce was dumped on her bed and couches. *Id*. Two TVs and a sound bar were missing. She later realized some packages by the front door were also gone.

[6] Carter left the apartment and spoke with some neighbors. Suspecting Cobb had been in her apartment, Carter drove directly to Cobb's mother's home to confront him, but his mother would not let her in. Carter called the police and returned to her apartment. When police responded, she told them she thought Cobb was responsible. The police saw no signs of forced entry. The police did not send out a crime scene unit and took no pictures.

[7] Detective Jervean Gates of the Gary Police Department was assigned to investigate Carter's case a few days later. After interviewing Carter and learning Cobb often drove his mother's or sister's maroon Chevy, Detective Gates drove to Cobb's mother's house and took a picture of a maroon Chevy Impala parked in front of the home. The detective also obtained the fire department's "run sheet" report made after it responded to the fire. *Id*. at 143. He did not obtain an arson investigation report and was not sure if any such investigation occurred.

[8] Detective Gates then contacted Brian Biggs, the security supervisor at Methodist Hospital Northlake Campus. The hospital property is adjacent to

Carter's apartment building, and an alley separates the back of the building from one of the hospital's parking lots. Detective Gates asked Biggs if any of the hospital's five hundred security cameras had captured images of an apartment fire on March 22. The detective did not give a specific time. Biggs reviewed the video footage taken that night from a stationary security camera in one of the hospital's parking lots pointed toward the south side of Carter's building. The video showed the building, including Carter's apartment windows, in the distance beyond the lot. He found footage of "a light of some sort" in Carter's window, which he believed was the fire, and then went "in reverse with the cameras" to "see how the fire started." *Tr. Vol. 3* at 207, 214. In total, he selected about twelve minutes of footage to provide to the police, beginning with when a vehicle pulled into the alley and ending with the fire.

[9] At the time, Biggs was just learning to use the hospital's new security system. Biggs thought he downloaded the video to a flash drive for Detective Gates; but when the detective returned to his office to view the video, he realized Biggs had instead downloaded the video as 9,006 still images. Detective Gates returned to the hospital's security office, where he reviewed the video on a large monitor and recorded the footage as a video using his work cell phone. Detective Gates later showed the cell phone video of the security camera footage (the "re-recorded video") to Carter at the police station. Carter identified Cobb in the video.

[10] The State charged Cobb with Level 4 felony attempted arson and Level 4 felony burglary. The case proceeded to a two-day jury trial beginning September 25,

2023. A week before trial, the State filed a supplemental discovery response providing Cobb with the 9,006 still images from the security camera footage.

[11] During Biggs' testimony on trial day one, the State sought to introduce five of the 9,006 still photos Biggs provided to Detective Gates. *See Ex. Vol. 1* at 28–32. On *voir dire* before the photos' admission, Cobb elicited testimony from Biggs that the original video was no longer available in the hospital's security system since over two years had elapsed between the events and trial. Cobb then objected to the admission of the still photos as not being the best evidence because Detective Gates and Carter had both viewed video of the incident (whether the original or the re-recording) and the State had not provided either video. The trial court then sought clarification as to whether video still existed:

> [DEFENSE]: . . . we have never seen video.
>
> THE COURT: It's missing, right?
>
> [DEFENSE]: I think . . . this is how it came out.
>
> [THE STATE]: I don't think it works. This is how it came out. . . . Detective Gates has been working to fix it. He hasn't been able to fix it. So this is what we have. This is our best evidence.
>
> THE COURT: So it exists? It exists, but –
>
> [THE STATE]: It did at a time but not right now.

Tr. Vol. 3 at 199–200. The parties also discussed whether a proper foundation had been established to introduce the photos, after which Cobb renewed his best evidence argument. The following colloquy occurred:

> [THE STATE]: Your Honor, this is the State's best evidence. There is no video in existence.
>
> THE COURT: All right. Overruled on best evidence also.
>
> [DEFENSE]: I think there's a video in evidence [sic]. Ms. Carter has seen it. Detective Gates has seen it, but I don't know if it exists right now. There is part of the record that suggests it may still exist, so can you admit those without Detective Gates coming in here and establishing that these are the best evidence as opposed to the video?
>
> THE COURT: You think someone's going to come in with a workable video?
>
> [DEFENSE]: I don't know. He's testifying tomorrow.
>
> THE COURT: Do you believe so?
>
> [THE STATE]: No. If he did, we would have had it before trial started.

Id. at 202–03. The trial court overruled the best evidence objection.

[12] Biggs testified the images were still shots from the video he reviewed, and they were in chronological order, though not sequential. As Biggs testified about the

photos, he also testified about his recollection of the activities depicted in the original video, thus "filling in the gaps" between the photos. In his narrative, the video shows a car drive up and park in the alley. A person gets out of the car and walks around the side of the building shortly before a light comes on in Carter's apartment. The light then goes out, the car drives away, and a different light appears in the same window. On cross-examination, Biggs testified he could not remember how much time elapsed between the person leaving the car and returning. Regarding the video download process, he could not explain why the video "[came] out as pictures . . . instead of a video." *Id*. at 198. In his opinion, the quality of the pictures and the video was the same.

[13] When Carter testified, she stated she watched the video at the police station. She also gave a narrative description of what she saw in the video, aided by the photos. She described a scene in the video—not depicted in the five still photos—in which a second car drove through the alley and illuminated Cobb's car. She could not see Cobb's face in the video, but she was certain it was Cobb because of his "jacket, the vehicle, his height." *Tr. Vol. 4* at 79. In her opinion, the video quality was "clearer" than the still photos shown at trial. *Id*. On cross-examination, she recalled reviewing the video on a laptop and estimated it lasted fifteen to twenty minutes.

[14] The State's last witness on day two was Detective Gates. When the detective took the stand, he revealed he still had the re-recorded video on his work cell phone. He explained he had difficulty transferring the video from his cell phone to a flash drive because the video file was too big. He tried breaking it

into smaller clips and e-mailing them to himself, but they were still "too big to get off the phone." *Id*. at 141. When asked whether he sought assistance transferring the files, he said he "didn't think about using IT because . . . I had the video. The problem was just getting it small enough to send an E-mail so I could . . . download it to a flash drive." *Id*. Detective Gates also testified he showed the re-recorded video to Carter on his cell phone, not a laptop.

[15] At the conclusion of trial, the jury found Cobb guilty on both counts. The trial court sentenced Cobb to six years on each offense to run consecutively for an aggregate sentence of twelve years executed in the Indiana Department of Correction.

The trial court abused its discretion in admitting the five still photographs and witness testimony about the video in lieu of the re-recorded video.

[16] On appeal, Cobb argues the trial court abused its discretion in admitting the five still photographs and permitting witnesses to testify about what they saw in the video because the video was not introduced into evidence, never turned over to the defense, and neither Cobb nor his attorney viewed it. He contends the photos and testimony were not the best evidence because the re-recorded video Detective Gates took with his cell phone still existed at the time of trial.[3]

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[3] Cobb also argues the State did not establish a proper foundation to admit the photos and witness testimony. We instead focus on Cobb's best evidence argument.

[17] A trial court has broad discretion to rule on the admissibility of evidence, and we review the court's evidentiary rulings for an abuse of that discretion. *Guilmette v. State*, 14 N.E.3d 38, 40 (Ind. 2014). We reverse only when the admission is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights. *Id*. (quotation omitted).

[18] The Indiana Rules of Evidence govern the admissibility of originals and copies of certain documents and recorded evidence. The "best evidence rule" states an "original writing, recording, or photograph is required in order to prove its content unless [the Evidence Rules] or a statute provides otherwise." Evid. R. 1002. "A duplicate is admissible to the same extent as an original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." Evid. R. 1003. And Evidence Rule 1004 provides:

> An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:
>
> (a) all originals are lost or destroyed, and not by the proponent acting in bad faith;
>
> (b) an original cannot be obtained by any available judicial process;
>
> (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

Evid. R. 1004.

[19] The purpose of the best evidence rule is to secure the most reliable information about the contents of documents when their terms are disputed. *Sanders v. State*, 348 N.E.2d 642, 691 (Ind. 1976) (citation omitted). An effective objection on best evidence grounds must identify an actual dispute over the accuracy of the secondary evidence. *Lopez v. State*, 527 N.E.2d 1119, 1125 (Ind. 1988). To be entitled to reversal, the defendant must show there was error prejudicial to his substantial rights. *Id*.

[20] Here, the original video footage taken by the hospital security camera was no longer available because it had been deleted from the hospital's system. Over Cobb's best evidence objection, the State sought to introduce five of the 9,006 still photos and Biggs' testimony about the video's contents in lieu of the original video. The State insisted the secondary evidence it offered "is our best evidence." *Tr. Vol. 3* at 200. And when the trial court asked the parties whether they thought a "workable video" existed, the State, as proponent of the evidence, responded, "No. If [Detective Gates had it], we would have had it before trial started." *Id.* at 202–03. Three times *during the trial* the State represented to the trial court that no video existed.

[21] But a video *did* exist at the time of trial. In this case, the most reliable information about the video's contents would have been the re-recorded video,

not five still photographs pulled from the video and witness recollection of the video. When objecting to its admission, Cobb identified an actual dispute over the accuracy of the secondary evidence the State offered; namely, that cherry-picked photos spanning an unknown timeframe were potentially misleading or confusing to the jury. *See id.* at 201 ("We don't know what the times are from the video, but minutes transpire between these [photos]. . . . [T]here's no . . . information given to the jury . . . on this issue."). On *voir dire* and cross examination, Cobb also identified reliability concerns stemming from the photographs' production. Although an experienced security professional, Biggs could not explain how the hospital's security system produced 9,006 still frame images instead of a video. When asked if something went wrong when he downloaded the video, Biggs responded, "Something did go wrong because, like I said, we didn't have it. I didn't even know the still pictures were there." *Id.* at 209. Because the most reliable information about the video was still available and Cobb identified accuracy issues with the secondary evidence the State offered, the best evidence rule barred admission of the secondary evidence.

[22] Nevertheless, the State argues the still photos were admissible either as originals or duplicates. Under Evidence Rule 1003, a duplicate is admissible to the same extent as an original unless "the circumstances make it unfair to admit the duplicate." Evid. R. 1003. As our Supreme Court has observed, the introduction of "photos pulled from a video" raises interesting questions about the best evidence rule and whether such photos are duplicates within the

meaning of Evidence Rule 1003. *D.Z. v. State*, 100 N.E.3d 246, 249 n.1 (Ind. 2018) (leaving those questions for another case because the answers would not affect the outcome). We, too, need not determine whether still photographs pulled from a video would constitute an original or a duplicate of the video, because the State never sought to introduce all 9,006 photos comprising the video.[4] And regardless of classification, five photos and witness recollection of a video are an insufficient substitute for a video's contents, especially where a video *still exists*. Under these circumstances, it was unfair to admit five select photos in lieu of the video itself.

[23] Next, the State argues Cobb did not object to the admission of Carter's testimony about the photos and the re-recorded video's contents and therefore waived this issue for appeal. After reviewing for ourselves the photos' poor quality, the distance from the camera to the apartment building, and the State's limited selection of five of 9,006 photos, we agree with Cobb's contention on appeal that discerning what the photos even purport to show required additional testimony from someone who viewed the video. And Carter's testimony flowed directly from the erroneous admission of the photos.

[24] Nevertheless, a party's failure to object to an alleged trial error results in waiver of that claim on appeal. *Batchelor v. State*, 119 N.E.3d 550, 556 (Ind. 2019). But

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[4] We could assume the 9,006 still frame images were the only frames captured by the security system. But to make such a determination may require evidence about the technical specifications of the hospital's security system, such as the security camera frame rates, which the State did not elicit from the sponsoring witness.

a party can raise an otherwise waived issue through a showing of fundamental error. *See Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). The "fundamental error" exception to waiver is "extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Id*. This "formidable standard . . . applies only where the error is so flagrant that the trial judge should have corrected the error on [their] own, without prompting by defense counsel." *Tate v. State*, 161 N.E.3d 1225, 1229 (Ind. 2021). The appellant "faces the heavy burden of showing that the alleged errors are so prejudicial to [their] rights as to 'make a fair trial impossible.'" *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014) (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)).

[25] Cobb's counsel *never* saw the video—before or during trial. This severely limited his ability to effectively cross-examine the witnesses. It also severely restricted his ability to lodge informed objections to the admission of secondary evidence. That the State provided the defense with a full set of photos in supplemental discovery makes no difference. Not only was there a dearth of evidence about how the system produced the photos, but the State provided the 9,006 photos only a week before trial, even though the case had been pending for over two years. Moreover, Carter's identification of Cobb as the person in the video was substantially harmful to Cobb, as this was the only direct evidence of Cobb's presence at the apartment building on the relevant evening. Because Cobb could not effectively cross-examine witnesses in his defense or

lodge informed evidentiary objections about a video he never saw, Cobb has met the formidable burden to show fundamental error occurred when Carter testified about the re-recorded video's contents.

[26] Finally, the State contends any error in the admission of the still photos and witness testimony was harmless.

> Errors in admitting evidence are harmless if the conviction is supported by independent evidence of guilt such that we are satisfied there is no substantial likelihood the erroneously admitted evidence contributed to the jury's verdict. On the other hand, evidentiary errors may not be harmless if the record discloses that the improperly admitted evidence likely had a prejudicial impact on the jury.

Stott v. State, 174 N.E.3d 236, 247 (Ind. Ct. App. 2021). As independent evidence of Cobb's guilt, the State points to Carter's testimony that Cobb had a key to her apartment, there were no signs of forced entry, and her stove was not on when she left her apartment. The State also points to (1) vaguely conciliatory text messages Cobb sent to Carter after the break-in, and (2) testimony that Cobb's sister logged into Carter's Roku TV account and signed up for paid services under the account after Carter's TVs were stolen.[5] Yet even in light of this circumstantial evidence, we cannot say Carter's positive identification of Cobb in the photos and testimony about the video content had

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[5] On appeal, Cobb also challenges the admission of both the text messages and Carter's testimony about the Roku TV. Because of our decision today, we need not reach the merits of those evidentiary issues.

no substantial likelihood of contributing to the jury's verdict. The photos and testimony about the video combined were the "smoking gun" that placed Cobb physically at the scene sometime on the night of the break-in. The erroneous admission of the evidence was not harmless error. And because this evidence was highly prejudicial to Cobb, we hold its erroneous admission constitutes reversible error.[6]

Conclusion

[27] The trial court abused its discretion in admitting the still photographs and witness testimony about the video, and the error was not harmless. Accordingly, we reverse and remand for a new trial.

[28] Reversed and remanded.

Bailey, J., and Felix, J., concur.

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[6] The State also argues on appeal that Cobb invited error by eliciting testimony about the photos and video. But Cobb only elicited such information on cross-examination, after the trial court erroneously admitted the photos and Biggs testified about the photos and video. Defense counsel did not open this line of questioning, and thus did not invite error. *See Batchelor*, 119 N.E.3d at 558 ("[W]hen there is no evidence of counsel's strategic maneuvering, we are reluctant to find invited error based on the appellant's neglect or mere acquiescence to an error introduced by the court or opposing counsel.").

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