NO.:_____

IN THE

SUPREME COURT OF THE UNITED STATES

Nikolas Jordan - Petitioner;

v.

Theodore Rokita - Respondent(s);

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES SUPREME COURT

APPENDIX OF PETITIONER

Attorney for Petitioner:

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Petitioner / *pro se*

MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Nikolas Malachie Jordan,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

July 15, 2024

Court of Appeals Case No.
23A-CR-1798

Appeal from the Vanderburgh Superior Court

The Honorable Robert John Pigman, Judge

Trial Court Cause Nos.
82D03-2210-F5-5890
82D03-2212-F4-7455

Memorandum Decision by Judge Foley
Judges Riley and Brown concur.

Foley, Judge.

[1] A jury found Nikolas Malachie Jordan ("Jordan") guilty of Level 4 felony arson[1] and Level 5 felony stalking,[2] and Jordan admitted to being a habitual offender. Jordan appeals, presenting challenges to the admission of (1) a victim's recorded statements to an investigating officer and (2) testimony about the proximity of Jordan's cellphone to the scene of the arson. Concluding that the recorded statements were admissible under a hearsay exception and that Jordan waived his challenge to the testimony about the cellphone, we affirm.

Facts and Procedural History

[2] In late 2022, the State filed charges against Jordan in separate cases, alleging in one case that Jordan committed Level 4 felony arson and, in the other, that Jordan committed Level 5 felony stalking[3] and had the status of a habitual offender. The allegations involved victims who lived next door to one another. Upon Jordan's motion, the trial court scheduled a consolidated jury trial.

[3] One of the State's objectives was to prove the location of Jordan's phone around the time a vehicle was found on fire outside a residence. Before trial, the State moved for a preliminary ruling regarding whether Evansville Police

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[1] Ind. Code § 35-43-1-1(a)(3).

[2] I.C. § 35-45-10-5(b).

[3] There was a second count of stalking that was later dismissed.

Department Sergeant Trendon Amuzie ("Sergeant Amuzie")[4]—who investigated the vehicle fire—was qualified to testify as a skilled witness "in the topic area of GPS location data," i.e., "latitude/longitude position and plotting based on cellular phone records data." Appellant's App. Vol. 2 p. 93. The trial court held a hearing and denied the State's motion for the preliminary ruling.

[4] At the consolidated jury trial, which was held in July 2023, there was evidence that David and Donna Williams ("Donna") (collectively, "the Williams") lived next door to Angela Smiley ("Smiley"). The Williams' vehicle was parked on the street outside their residence in the early hours of September 27, 2022. Around 1:00 a.m., Donna noticed that the front of the vehicle was on fire. She went outside and attempted to put out the fire. When Donna believed the fire was extinguished, she went back inside the residence. However, about one hour later, Donna noticed that the rear of the vehicle appeared to be engulfed in flames. Donna called 911. The Evansville Fire Department ("EFD") extinguished the fire and conducted an investigation, finding two gas cans in the area. One gas can was just a few feet from the vehicle; the other was on Smiley's porch, about thirty feet from the vehicle. An investigator testified that the burn patterns were consistent with a flammable liquid being poured onto the vehicle. The patterns were also indicative of two ignition points—one at the front and one at the rear. EFD determined the fire was consistent with arson.

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[4] Portions of the record refer to Sergeant Amuzie as a detective, which was his rank prior to a promotion.

[5] Smiley did not attend the jury trial. Before trial, the State subpoenaed Smiley for a pre-trial deposition, but Smiley did not attend the scheduled deposition. The State sought to reschedule the deposition and "tried again" to subpoena Smiley, but service was unsuccessful. Tr. Vol. 2 p. 167; *id.* at 168 ("[B]y then, I guess . . . she'd been evicted."). At trial, the State sought to introduce an audio recording of statements Smiley made to Sergeant Amuzie during his investigation. The State informed the trial court: "Smiley has not appeared for [c]ourt. She was not subpoenaed. We don't know where she is." *Id.* at 152. The State asserted that, although Smiley was not available for cross-examination, her statements were admissible under the hearsay exception for forfeiture by wrongdoing based on evidence that Jordan had threatened Smiley. Jordan objected, challenging the foundation for admitting Smiley's statements under the hearsay exception.

[6] To lay a foundation for the hearsay exception, the State sought to prove that Jordan sent a handwritten letter to Smiley while he was incarcerated, in violation of a previously issued no-contact order. The unsigned letter, which addressed "Angela" in the heading, began by stating: "My mothers satan[.]" Ex. Vol. 4 p. 71.[5] The letter used the word "RATS" in all capital letters on multiple occasions. *See id.* at 74. The letter referred to individuals as "RATS" and stated: "The only option I have is 2 brutally murder her[.]" *Id.* The letter

[5] When quoting from this letter and from text messages sent to Smiley, we transcribe the writings verbatim.

also stated: "GODS with me cuz I get RATS 2 go away." *Id.* Outside the presence of the jury, the State elicited testimony from Sergeant Amuzie that Smiley reported the letter in February 2023. The exhibit containing the letter included a completed "case report" form with Smiley's name on it. *Id.* at 75. The completed form states: "In . . . 2022, I began getting text[s] threatening me and my kids from . . . Jordan. Even after his arrest and [a] no contact order[,] he continues to write me from county jail." *Id.* Sergeant Amuzie testified that the unsigned letter Smiley provided to the police appeared to be written by the same person who filed a handwritten motion in one of Jordan's criminal cases.

[7] Jordan objected, challenging the adequacy of the foundation for admitting Smiley's recorded statements under the hearsay exception for forfeiture by wrongdoing. Jordan argued that Sergeant Amuzie's testimony comparing the handwriting in the letter and the court filing could not be considered because Sergeant Amuzie was not an expert in handwriting analysis. The trial court disagreed, concluding that "a non-expert can make a [handwriting] comparison and say th[e] [writing] appear[s] to be the same based on the characteristics[.]" Tr. Vol. 2 p. 163. As for whether Smiley's out-of-court statements were admissible under the hearsay exception for forfeiture by wrongdoing, the trial court determined that the hearsay exception applied. The trial court noted that "the nature and intent of the letter [was] disturbing at best" and that the letter "came after there was a no contact order issued by this Court." *Id.* The trial court ultimately recognized a continuing objection to the challenged evidence.

[8] During a recorded interview with Sergeant Amuzie on September 29, 2022, Smiley said that she had connected with Jordan on social media earlier in the week, giving Jordan her phone number. She explained that, before long, Jordan started sending her text messages threatening her and her children.

[9] The State later sought to admit records containing data extracted from Jordan's phone. Before doing so, the State elicited testimony from Investigator Gage Shots of the Vanderburgh County Prosecutor's Office ("Investigator Shots"). Through his work with the Vanderburgh County Cyber Crimes Task Force, Investigator Shots "analyze[d] digital evidence . . . for law enforcement." *Id.* at 133. He explained that he worked with data from cellphones, computers, and other devices, and had "nearly six hundred hours in varying digital evidence procedures and trainings." *Id.* at 134. Moreover, he had conducted "[o]ver eight hundred" data extractions from cellphones. *Id.* at 146. Investigator Shots explained that, in this case, he used the Cellebrite system to extract data from Jordan's cellphone pursuant to a search warrant. Regarding data extraction, Investigator Shots had undergone "training with Cellebrite, their certified operators[,] as well as the Cellebrite Physical Analyst." *Id.* at 134.

[10] The State later attempted to admit the extracted cellphone data through Sergeant Amuzie, who had reviewed the data as part of his investigation. Jordan objected and sought to "reincorporate [his] argument" from the pre-trial hearing. *Id.* at 233. Jordan claimed there was "not a proper foundation of any expert witness qualifications" and "[e]ven the skilled . . . witness exception" did not apply because "it is supposed to be based on [the witness's] perception," so

"there hasn't been a proper foundation laid." *Id.* In response, the State directed the trial court to the foundational testimony elicited from Investigator Shots. The trial court overruled the objection and admitted the evidence.

[11] The challenged evidence included text messages Jordan sent to Smiley on the evening of September 26, 2022, just a few hours before the vehicle fire. At 8:48 p.m. that evening, he wrote: "I'm doing everything I can to help you angela. Your child has 2 die if he's in the way of that girl[.]" Ex. Vol. 2 p. 104. Moments later, he said: "I have no option but to kill him[.]" *Id.* At 12:28 a.m.— about thirty minutes before Donna responded to the first fire—Jordan wrote: "I got nothing better to do but come kill you people[.]" *Id.* at 106. Around 4:00 a.m., which was after EFD extinguished the second fire, Jordan said: "Yall are gonna die with that girl there." *Id.* at 113. Jordan added: "I'm gonna set it on fire while they sleeping keep . . . playing[.]" *Id.* at 114. The next day, he wrote: "You switched on me angela at the worst time you ever could[.]" *Id.* at 116. He added: "Point n squeeze done it a million times[.]" *Id.*

[12] Independent of the text messages extracted from Jordan's physical phone, the State sought to introduce the cellphone records provided by T-Mobile, which were part of the records discussed at the pre-trial hearing. Sergeant Amuzie identified State's Exhibit 34 as a letter from T-Mobile that certified the cellphone records contained in State's Exhibits 35 and 36A. State's Exhibit 35 contained "call detailed records," which Sergeant Amuzie explained were "all [the] text messages and calls that happen[ed] to or from [Jordan's] phone number." Tr. Vol. 2 p. 226. State's Exhibit 36A contained "timing advanced

data," which Sergeant Amuzie explained was "location information that T-Mobile stores for their purposes." *Id.* Sergeant Amuzie noted that the timing-related data contained GPS coordinates, i.e., "latitude and longitude [information regarding] where the phone was." *Id.* at 226–27. The State moved to admit the records, at which point Jordan said: "I think they would normally [be] hearsay[.] . . . [T]hey are certified as a business record, I understand that's an exception to the . . . [h]earsay doctrine. If the [trial court] admits them, I think they should speak for themselves." *Id.* at 227. The trial court then admitted State's Exhibits 34, 35, and 36A. Shortly thereafter, the State sought to admit its Exhibit 36B, which consisted of one page from Exhibit 36A containing GPS coordinates for Jordan's cellphone on September 27, 2022. Jordan objected, stating: "Nothing more than our prior objection, Your Honor." *Id.* at 229. The trial court then admitted State's Exhibit 36B, noting that the page of cellphone data was "actually already in part of 36A, but we'll show that's admitted." *Id.*

[13] The State then began questioning Sergeant Amuzie about his investigation of certain GPS coordinates. Sergeant Amuzie explained that he traveled to the address where "th[e] car was lit on fire" and used his cellphone to "drop a pin" and take a screenshot. Tr. Vol. 2 p. 230. When the State sought to admit the screenshot, Jordan objected and said: "Our objection is foundation[.]" *Id.* at 231. The trial court overruled the objection and admitted the screenshot, which was State's Exhibit 30. The State later turned to the T-Mobile records, focusing on State's Exhibit 36B—the page with location data around the time Donna

noticed the vehicle on fire—which Sergeant Amuzie said contained GPS coordinates with an accompanying "level of confidence." *Id.* at 240. Sergeant Amuzie explained that a "medium degree of confidence is between one hundred and three hundred meters of location accuracy," and he agreed with the State that, "if it says a location, you draw a circle, [and] the phone could be anywhere in that circle." *Id.* Sergeant Amuzie also noted that the "confidence" ranges were explained in T-Mobile's certification letter. *See* Ex. Vol. 2 pp. 149–50. The State then asked Sergeant Amuzie to highlight GPS coordinates on a line in State's Exhibit 36B that corresponded to a "medium confidence" location for Jordan's phone at about 12:03 a.m. on September 27, 2022. Tr. Vol. 2 p. 241; Ex. Vol. 4 p. 69. Sergeant Amuzie did so. He then testified—without additional objection—that the geographic location where he dropped a pin was within T-Mobile's medium confidence range of where Jordan's cellphone was located 12:03 a.m. on September 27, 2022, around the time the Williams' vehicle was intentionally lit on fire outside their residence.[6]

[14] The jury found Jordan guilty of Level 4 felony arson and Level 5 felony stalking, and the trial court entered its judgments of conviction. Jordan then admitted to the allegations supporting the sentence enhancement, which the court determined could be used to enhance only the Level 5 felony count. The sentencing hearing was held in August 2023. The trial court imposed a ten-year

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[6] In this portion of the transcript, there appears to be a mistaken reference to State's Exhibit 3 rather than State's Exhibit 30. In any case, Jordan does not dispute that Sergeant Amuzie's testimony about the location of the phone was "the only piece of evidence that put[] Jordan at the scene of the fire." Appellant's Br. p. 23.

executed sentence for the count of arson. As for the count of stalking, the trial court imposed a consecutive sentence of four years executed, which the court enhanced by an additional term of four years executed. Jordan now appeals.

Discussion and Decision

[15] Jordan challenges the admission of (1) Smiley's out-of-court statements under the hearsay exception for forfeiture by wrongdoing and (2) Sergeant Amuzie's testimony about the location of the phone. We address each challenge in turn.

[16] "Trial courts have broad discretion to admit or exclude evidence[.]" *Satterfield v. State*, 33 N.E.3d 344, 352 (Ind. 2015). We review evidentiary rulings for an abuse of discretion, which occurs if the ruling is "clearly against the logic and effect of the facts and circumstances[.]" *McCoy v. State*, 193 N.E.3d 387, 390 (Ind. 2022). Moreover, we will reverse only if the error affected a party's substantial rights. Ind. Evidence Rule 103(a); *see McCoy*, 193 N.E.3d at 390.

Hearsay Exception

[17] Jordan argues that Smiley's out-of-court statements to Sergeant Amuzie constituted inadmissible hearsay. In general, "hearsay" refers to a statement that is "not made by the declarant while testifying at the trial or hearing" and is "offered in evidence to prove the truth of the matter asserted." Evid. R. 801(c). Although hearsay is generally inadmissible, *see* Evid. R. 802, certain statements "are not excluded by the hearsay rule if the declarant is unavailable as a witness," Evid. R. 804(b). One such exception applies if the opposing party wrongfully caused the declarant to be unavailable. *See* Evid R. 804(b)(5). To be

admissible under this hearsay exception, the evidence must consist of "[a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying." *Id.* This type of evidence is admissible if the declarant is unavailable, which means (1) the declarant "is absent from the trial" and (2) "the statement's proponent has not been able, by process or other reasonable means, to procure . . . the declarant's attendance[.]" Evid. R. 804(a)(5).

[18] In determining whether Smiley's statements were admissible due to forfeiture by wrongdoing, the trial court was asked to decide whether Jordan wrote Smiley a letter that was designed to, and did, procure Smiley's unavailability for the purpose of preventing her from testifying at his trial. Evidence Rule 104(a) provides that "[t]he court must decide any preliminary question about whether . . . evidence is admissible." Moreover, "[w]hen deciding whether to admit evidence, the court must decide any question of fact by a preponderance of the evidence." Evid. R. 103(f). This is a standard of "more likely than not[.]" *Fry v. State*, 990 N.E.2d 429, 448 (Ind. 2013). Furthermore, in assessing whether evidence is admissible, "the court is not bound by evidence rules, except those on privilege." Evid. R. 104(a); *see also* Evid. R. 101(d) (noting that our evidence rules do not apply to a court's "determination of a question of fact preliminary to the admission of evidence, where the court determines admissibility").

[19] On appeal, Jordan argues that Smiley's statements should not have been admitted under the hearsay exception for forfeiture by wrongdoing because (1)

"the alleged wrongdoing was supported only by a [handwritten letter] that was not properly authenticated" and (2) the handwritten letter "does not show an attempt to prevent the witness from testifying." Appellant's Br. p. 2.

[20] As to the authentication of the handwritten letter, Jordan directs us to Indiana Evidence Rule 901(a), which provides as follows: "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." He also focuses on related caselaw, and a non-exhaustive list of evidence satisfying the foregoing standard, including evidence regarding "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Evid. R. 901(b)(4). We note, however, that when the trial court made a preliminary determination that Jordan wrote the letter to Smiley, it was "not bound by evidence rules, except those on privilege." Evid. R. 104(a); *see also* Evid. R. 101(d)(1). Thus, "strict compliance" with the evidentiary rule was not required. *Pavlovich v. State*, 6 N.E.3d 969, 979 (Ind. Ct. App. 2014), *trans. denied.* In any case, here, there was evidence indicating that Smiley reported the letter to law enforcement in "February of 2023," informing the police that Jordan contacted Smiley after he was incarcerated. Tr. Vol. 2 p. 154. Based on the timing of Smiley's report to law enforcement and the testimony comparing the writings—which were presented for the trial court to inspect—the trial court was within its discretion to conclude Jordan more likely than not wrote the letter to Smiley.

[21] Turning to the content of the letter, Jordan argues that the letter does not demonstrate the intent to keep Smiley from testifying. Characterizing the letter as "rambling," Jordan acknowledges that the letter "mentions murdering his mother," but argues that there was "no mention of the litigation." Appellant's Br. p. 20. He essentially asserts that the content of the letter was too indirect to support admission under the hearsay exception, arguing as follows: "It does not insinuate that bad things will happen in the event that Smiley does not [sic] appear to testify. It just says bad things will happen." *Id.* Jordan also questions the timing of the letter. Indeed, although Jordan acknowledges that Sergeant Amuzie "testified that he received the note after Jordan's incarceration," Jordan points out that "nothing in the [letter] indicates when it was written, when it was mailed, or when it was received by the alleged victim." *Id.* at 21. He also argues that the letter "would appear to be a continuation of prior behavior" directed toward Smiley "rather than a specific attempt to dissuade Smiley from testifying." *Id.* at 20–21. Jordan adds that the hearsay exception "would essentially dispense with the right to cross-examine witnesses in most stalking and harassment cases and many domestic violence cases." *Id.* at 21.[7]

[22] We disagree that the letter does not evince an intent to keep Smiley from testifying against Jordan. In the letter, Jordan referred to "RATS," a term

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[7] Jordan presents no challenge regarding the foundational requirement that the State "ha[d] not been able, by process or other reasonable means, to procure . . . the declarant's attendance[.]" Ind. Evidence R. 804(a)(5).

commonly understood to mean "a contemptible person: such as . . . one who betrays or deserts friends or associates[.]" *Rat*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/rat (last visited June 10, 2024) [https://perma.cc/2KBR-T3MU]. Jordan at one point referred to having to "brutally murder" a rat. Ex. Vol. 4 p. 74. Moreover, Jordan suggested he made rats "go away," writing: "GODS with me cuz I get RATS 2 go away." *Id.* With allusions to dangerous consequences for those who betray Jordan, and with sufficient evidence indicating Jordan wrote the letter to Smiley before trial, when a no-contact order was in place, we conclude that the content provides adequate support for the trial court's determination that Jordan intended to, and did, procure Smiley's absence. Furthermore, to the extent Jordan briefly refers to the right to cross-examine witnesses, we note that a defendant forfeits that right by engaging in the wrongdoing contemplated by Indiana Evidence Rule 804(b)(5). *See generally Crawford v. Washington*, 541 U.S. 36, 62 (2004)); *see also Doyle v. State*, 223 N.E.3d 1113, 1120–21 (Ind. Ct. App. 2023) (providing background on "[t]he doctrine of forfeiture by wrongdoing," which was "developed to protect the integrity of judicial proceedings").

[23] For the foregoing reasons, we conclude that the trial court did not abuse its discretion in determining that Smiley's out-of-court statements to Sergeant Amuzie satisfied the hearsay exception for forfeiture by wrongdoing.[8]

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[8] At times, the parties refer to other writings that Jordan may have sent Smiley. Having based our decision solely on the letter contained in State's Exhibit 80, we do not address those other referenced writings.

Cellphone Location Testimony

[24] Indiana Evidence Rule 103 governs the preservation of evidentiary error. In pertinent part, Evidence Rule 103 provides as follows: "A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and[,] . . . if the ruling admits evidence, a party, on the record . . . (A) timely objects or moves to strike; and (B) states the specific ground, unless it was apparent from the context." If a party fails to comply with this rule, the party generally waives any challenge to the admission of the evidence. *E.g.*, *Raess v. Doescher*, 883 N.E.2d 790, 797 (Ind. 2008). There is a narrow exception to waiver when the evidentiary ruling resulted in fundamental error. *E.g.*, *Harris v. State*, 76 N.E.3d 137, 139 (Ind. 2017). However, to preserve a claim of fundamental error, the appellant must "raise the issue of fundamental error in his initial appellate brief." *E.g.*, *Bowman v. State*, 51 N.E.3d 1174, 1179–80 (Ind. 2016) (declining to address a belated claim of fundamental error).

[25] Jordan challenges the admission of Sergeant Amuzie's testimony regarding the proximity of Jordan's cellphone to the scene of the arson. At trial, Jordan objected to the admission of the T-Mobile data contained in State's Exhibits 35, 36, and 36B, and the trial court recognized a continuing objection to the admission of those exhibits. Jordan also objected to the admission of State's Exhibit 30, which was the screenshot Sergeant Amuzie prepared. Yet, Jordan did not object to Sergeant Amuzie's testimony interpreting the information in these exhibits. *See* Tr. Vol. 2 pp. 226–41. Thus, Jordan did not preserve his challenge to the admission of testimony about the location of the cellphone.

Moreover, on appeal, Jordan does not argue that admitting Sergeant Amuzie's testimony amounted to fundamental error. Because there is no proper basis to review Jordan's evidentiary challenge, we do not further address this issue.

Conclusion

[26] The trial court did not abuse its discretion in admitting Smiley's out-of-court statements under the hearsay exception forfeiture by wrongdoing. Moreover, Jordan waived his challenge to testimony about the location of his cellphone.

[27] Affirmed.

Riley, J., and Brown, J., concur

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Appendix B

IN THE

COURT OF APPEALS OF INDIANA

Nikolas Malachie Jordan,

Appellant,

v.

State of Indiana,

Appellee.

Court of Appeals Cause No.
23A-CR-1798

Order

[1] Appellant has filed a Petition for Rehearing.

[2] Having reviewed the matter, the Court finds and orders as follows:

[3] Appellant's Petition for Rehearing is denied.

Ordered: 9/18/2024

Brown, Foley, JJ., Riley, Sr.J., concur.

For the Court,

Chief Judge

In the
Indiana Supreme Court

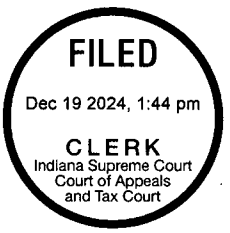
Nikolas Malachie Jordan,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
23A-CR-01798

Trial Court Case Nos.
82D03-2210-F5-5890
82D03-2212-F4-7455



Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 12/19/2024.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.