fees as sanctions for his contempt. At the hearing, an affidavit of Angela's attorney setting forth her attorney fees in this matter was admitted without objection. Having determined that Russell willfully failed to abide by the parties' Agreement, thereby causing Angela to file a motion for rule to show cause and incur attorney fees, we find the trial court did not abuse its discretion in ordering Russell to pay $3,000.00 of Angela's attorney fees.

[16] [21] For the reasons stated, we conclude the action of reinstating Angela as beneficiary of Russell's SBP as ordered by the trial court cannot be accomplished under the applicable federal law; therefore, we reverse and remand with instructions for the trial court to fashion an appropriate remedy to compensate Angela for the loss of her portion of Russell's SBP. In addition, we affirm the trial court's finding of contempt against Russell and its imposition of sanctions for such.

[22] Judgment reversed and remanded in part and affirmed in part.

May, J., and Altice, J., concur.

Kevin Shawn CARTER, Appellant–Defendant,

v.

STATE of Indiana, Appellee–Plaintiff.

Court of Appeals Case No. 17A–CR–3024

Court of Appeals of Indiana.

Filed June 28, 2018

Background: Defendant was convicted in the Circuit Court, Vanderburgh County, Kelli E. Fink, Magistrate, of dealing in a narcotic drug, and dealing in methamphetamine. Defendant appealed.

Holdings: The Court of Appeals, Bailey, J., held that:

(1) affidavit provided a substantial basis for determining that probable cause existed to support search warrant of defendant's cell phone;

(2) warrant allowing law enforcement to search defendant's cell phone for any information relating to calls and messages was tailored to its justifications;

(3) law enforcement's use of an extraction device that created an auto generated report of the file architecture on defendant's cell phone did not render the search warrant defectively unparticularized;

(4) challenged text messages were properly seized under the search warrant; and

(5) the search of defendant's cell phone for evidence of drug dealing activities was reasonable under the totality of the circumstances.

Affirmed.

1. Criminal Law ⚿661

The trial court has broad discretion to rule on the admissibility of evidence.

2. Criminal Law ⚿1153.1

Ordinarily, an appellate court reviews evidentiary rulings for an abuse of discretion, evaluating whether the court's ruling was clearly against the logic and effect of the facts and circumstances.

3. Criminal Law ⚿1139

When a challenge of an evidentiary ruling is predicated on the constitutionality of the search or seizure of evidence, it raises a question of law that an appellate court reviews de novo.

4. Searches and Seizures ⚿24

Under the Fourth Amendment, reasonableness generally requires the obtain-

ing of a judicial warrant. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

5. Arrest ⚿71.1(1, 4.1)

Among the exceptions to the warrant requirement is a search incident to a lawful arrest, whereby the Fourth Amendment permits a warrantless search of the arrestee's person and the area within his immediate control. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

6. Arrest ⚿71.1(5)

Under the search incident to a lawful arrest exception to the warrant requirement, officers generally may search the containers they encounter. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

7. Searches and Seizures ⚿40.1

Probable cause is a fluid concept incapable of precise definition and is to be decided based on the facts of each case. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

8. Searches and Seizures ⚿113.1

In determining whether a police affidavit sets forth probable cause to issue a search warrant, the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit there is a fair probability that contraband or evidence of a crime will be found in a particular place. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11; Ind. Code Ann. § 35-33-5-2.

9. Searches and Seizures ⚿113.1

The central question in a probable cause determination is whether the affidavit presents facts, together with reasonable inferences, demonstrating a sufficient nexus between the suspected criminal activity and the specific place to be searched. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11; Ind. Code Ann. § 35-33-5-2.

10. Searches and Seizures ⚿200

Upon a challenge to whether probable cause supported the issuance of a search warrant, the duty of the reviewing court is to determine whether the magistrate had a substantial basis for concluding that probable cause existed. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11; Ind. Code Ann. § 35-33-5-2.

11. Searches and Seizures ⚿200

On a challenge to whether probable cause supported the issuance of a search warrant, there is a "substantial basis" when reasonable inferences drawn from the totality of the evidence support the determination of probable cause. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11; Ind. Code Ann. § 35-33-5-2.

See publication Words and Phrases for other judicial constructions and definitions.

12. Criminal Law ⚿1134.35, 1139

Appellate courts review de novo whether a substantial basis supported the determination of probable cause, while affording deference to the magistrate's decision to issue the warrant. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11; Ind. Code Ann. § 35-33-5-2.

13. Searches and Seizures ⚿114

Affidavit provided a substantial basis for determining that probable cause existed to support search warrant of defendant's cell phone for evidence of dealing methamphetamine, where the affiant stated that the police found a plastic bag inside defendant's co-owned vehicle that contained a substance field-tested to be methamphetamine, with a field weight of 207 grams, that based on training and experience, methamphetamine was typically purchased in one-gram quantities, that the quantity in the vehicle was consistent with dealing activity, that another plastic bag in the vehicle contained an amount of

heroin consistent with drug dealing, that the phone was recovered from the defendant, and that those involved in drug activity primarily used cell phones and electronic devices to communicate with one another through calls, text messages, and social media applications. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11; Ind. Code Ann. § 35-33-5-2.

14. Searches and Seizures ⚿124

The particularity requirement, that a warrant must contain a particular description of the place to be searched and the person or things to be seized, ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the framers intended to prohibit. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

15. Searches and Seizures ⚿125, 126

Although the warrant must describe with some specificity where officers are to search and what they are to seize, there is no requirement that there be an exact description. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

16. Searches and Seizures ⚿125, 126

The warrant must be specific enough so that officers can, with reasonable effort, ascertain the place to be searched and the items to be seized. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

17. Searches and Seizures ⚿125, 126

The requirement that a warrant must contain a particular description of the place to be searched and the persons or things to be seized prevents the seizure of one thing under a warrant describing another. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

18. Searches and Seizures ⚿125

As to what is to be taken during a search, nothing is left to the discretion of the officer executing the warrant. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

19. Searches and Seizures ⚿124

The description in a search warrant should be as particular as circumstances permit. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

20. Searches and Seizures ⚿125

To satisfy the particularity requirement of a search warrant, it is permissible if a warrant incorporates by reference certain supporting documents, such as the probable cause affidavit, that collectively serve to identify the scope of items that could properly be seized. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

21. Searches and Seizures ⚿125

Warrant allowing law enforcement to search defendant's cell phone for any information relating to calls and messages, including social media messages and accounts, was tailored to its justifications that defendant was a suspected drug dealer; drug dealers used cell phones to communicate with others involved in illicit drug activity. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

22. Searches and Seizures ⚿125

Law enforcement's use of an extraction device that created an auto generated report of the file architecture on defendant's cell phone did not render the search warrant for evidence of drug dealing activity on defendant's phone defectively unparticularized, although more than one thousand pages of information was extracted, where the law enforcement did not have the ability to determine that certain pages did not contain any information sought, and a great deal of other information likely had to be sifted through in order to find the relevant information. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

23. Criminal Law ⚿392.61

The infirmity in a search warrant for not being particularized requires only suppression of the evidence seized pursuant to that part of the warrant but not the suppression of the evidence obtained pursuant to the valid specific portions of the warrant. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

24. Searches and Seizures ⚿125

Challenged text messages were properly seized under the search warrant even if the portion of the search warrant allowing law enforcement to search phone for all indicia of ownership of the phone was insufficiently particular, where the search warrant also validly allowed law enforcement to search any text messages for evidence of drug activities. U.S. Const. Amend. 4; Ind. Const. art. 1, § 11.

25. Searches and Seizures ⚿23

Under the Indiana Constitution, the legality of a search turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances. Ind. Const. art. 1, § 11.

26. Searches and Seizures ⚿23

In evaluating the reasonableness of a search under the Indiana Constitution, an appellate court balances three factors: (1) the degree of suspicion of unlawful activity, (2) the degree of intrusion the method of the search imposes on the citizen's ordinary activities, and (3) the extent of law enforcement needs. Ind. Const. art. 1, § 11.

27. Searches and Seizures ⚿53.1

On balance, the search of defendant's cell phone for evidence of drug dealing activities was reasonable under the totality of the circumstances; search was intrusive in nature, as it involved searching a personal cell phone, but law enforcement had a high degree of suspicion of unlawful activity after locating contraband in defendant's vehicle, specifically, a quantity of methamphetamine with a street value around $20,000 and a quantity of heroin with a street value between $9,000 and $12,000, and searching the phone advanced law enforcement needs related to identifying drug-dealing activity and protecting the community from the hazards of methamphetamine and heroin. Ind. Const. art. 1, § 11.

28. Criminal Law ⚿1036.6, 1043(1)

Defendant failed to preserve for review the claim that the trial court abused its discretion by admitting testimony of detective who opined that the quantity of heroin seized was typical of a dealer, where the record indicated that no objection was made at the time the evidence was admitted, and it did not appear that the trial court entered a continuing objection that would have preserved the issue.

29. Criminal Law ⚿1137(5)

Defendant waived any fundamental-error argument for trial court's admission of testimony of detective who opined that the quantity of heroin seized was typical of a dealer amount, where defendant declined to argue fundamental error, despite having the opportunity to do so.

30. Criminal Law ⚿1139

An appellate court interprets statutes de novo.

31. Controlled Substances ⚿69

Statute providing that a person can be convicted of dealing heroin if the amount possessed is at least 28 grams or there is evidence in addition to the weight of the drug that the person intended to deliver the drug does not operate to bar admission of probative evidence related to a defendant's intent to deal the drug. Ind. Code Ann. §§ 35-48-4-1(a)(2), 35-48-4-1(b).

Appeal from the Vanderburgh Circuit Court, The Honorable Kelli E. Fink, Magistrate, Trial Court Cause No. 82C01–1612–F2–7290

ATTORNEY FOR APPELLANT: Yvette M. LaPlante, KEATING & LAPLANTE, LLP, Evansville, Indiana

ATTORNEYS FOR APPELLEE: Curtis T. Hill, Jr., Attorney General of Indiana, Michael Gene Worden, Deputy Attorney General, Indianapolis, Indiana

Bailey, Judge.

Case Summary

[1] A jury convicted Kevin Shawn Carter ("Carter") of Dealing in a Narcotic Drug, as a Level 2 felony,[1] and Dealing in Methamphetamine, as a Level 2 felony.[2] Thereafter, Carter admitted to being a habitual offender.[3] Carter now appeals.

[2] We affirm.

Issues

[3] Carter presents the following two restated issues:

I. Whether the trial court abused its discretion by admitting evidence obtained from a search of a cell phone because the underlying warrant was impermissibly general, allowing an exploratory search; and

II. Whether the trial court committed fundamental error by admitting testimony from an officer who opined that the amount of heroin seized was a dealer-level quantity.

Facts and Procedural History[4]

[4] After seeing a Ford Mustang cross the center line several times, Deputy Brandon Mattingly ("Deputy Mattingly") of the Vanderburgh County Sheriff's Department conducted a traffic stop. Deputy Mattingly approached the vehicle and observed the front passenger—Carter—making furtive movements and appearing to place an item under his seat. Deputy Mattingly then spoke with the driver, Tiffani Colschen ("Colschen"). At some point, Carter stated that he co-owned the vehicle, and both Colschen and Carter consented to a vehicle search. During the ensuing search, Deputy Mattingly found a bag between the front seats. Inside, there was a container holding a syringe and a spoon. Below the container there were several plastic bags that appeared to contain drugs; subsequent lab testing revealed that the bags contained, in the aggregate, approximately 205 grams of methamphetamine and approximately 27.5 grams of heroin. Carter and Colschen were arrested and their cell phones were confiscated. The police later obtained a warrant to search the cell phones.

[5] Carter was brought to trial on charges of Dealing in a Narcotic Drug and Dealing in Methamphetamine, both as Level 2 felonies. The State also alleged that Carter was a habitual offender. Before the trial began, Carter moved to suppress evidence obtained from the search of his cell phone; the trial court denied Carter's motion. At trial, Carter objected to the admission of cell phone evidence, and the court held a conference outside the presence of the jury. At the conference, the State tendered an exhibit containing several pages of text messages. The court determined that eight messages were admissible, and that, among the eight, any messages from third parties were admissi-

1. Ind. Code § 35–48–4–1(a)(2), –1(e)(1).

2. I.C. § 35–48–4–1.1(a)(2), –1.1(e)(1).

3. I.C. § 35–50–2–8.

4. We heard oral argument on this case on June 7, 2018, at Ivy Tech Community College in Sellersburg, Indiana. We thank Ivy Tech and its guests from the Sherman Minton American Inn of Court for their hospitality, and we thank counsel for their advocacy.

ble only to give context to Carter's messages. The State prepared a redacted exhibit containing the eight admissible text messages. *See* State's Ex. 23–1. Those messages—later admitted with a limiting instruction—indicated that Carter met with three individuals in the hours preceding the traffic stop, and had instructed one individual to pull around to the back, behind his Mustang, to avoid being seen.

[6] The State's evidence also included testimony from Detective James Budde ("Detective Budde"), who was assigned to the local drug task force and had encountered heroin and methamphetamine hundreds of times as a police officer. Detective Budde opined that the quantity of heroin seized was "typical of a dealer amount," to which Carter did not object. Tr. Vol. IV at 224.

[7] The jury found Carter guilty of the dealing counts, and Carter admitted to being a habitual offender. Following a sentencing hearing, the trial court imposed an aggregate sentence of thirty-six years in the Indiana Department of Correction.

[8] Carter now appeals.

Discussion and Decision

Cell Phone Records

[1–3] [9] Carter frames his argument as a challenge to the denial of his motion to suppress evidence, but Carter did not seek interlocutory review of that denial. We therefore treat Carter's argument as a challenge to the admission of the evidence. *See Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014). "The trial court has broad discretion to rule on the admissibility of evidence." *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017). Ordinarily, we review evidentiary rulings for an abuse of discretion, evaluating whether the court's ruling was "clearly against the logic and effect of the facts and circumstances." *Id.* "However, when a challenge ... is predicated on the constitutionality of the search or seizure of evidence, it raises a question of law that we review *de novo*." *Id.*

[4] [10] Both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution proscribe unreasonable searches of "persons, houses, papers, and effects." [5] Moreover, under the Fourth Amendment, "reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).

[5, 6] [11] There are a few "specifically established and well-delineated exceptions" to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Among those exceptions "is a search incident to a lawful arrest," *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), whereby the Fourth Amendment permits "a warrantless search of the arrestee's person and the area 'within his immediate control,' " *Davis v. United States*, 564 U.S. 229, 232, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (quoting *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d

5. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Using nearly identical language, Article 1, Section 11 of the Indiana Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

685 (1969)). Under this exception, officers generally may search the containers they encounter. *See United States v. Robinson*, 414 U.S. 218, 236, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (determining that the Fourth Amendment permitted a search of a package of cigarettes that was found during a search incident to arrest); *cf. Garcia v. State*, 47 N.E.3d 1196, 1205 (Ind. 2016) ("Under Article 1, Section 11, opening a container found on the person of an arrestee in the course of a search incident to [a]valid arrest will not automatically be deemed unreasonable.").

[12] However, as the United States Supreme Court noted in *Riley v. California*, "[a] search of the information on a cell phone bears little resemblance to the . . . brief physical search" of a container found on an arrestee's person. —— U.S. ——, 134 S.Ct. 2473, 2485, 189 L.Ed.2d 430 (2014). Namely, modern cell phones—as a "particular category of effects" subject to Fourth Amendment protection, *id.* at 2485—"implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id.* at 2488–89. "Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house." *Id.* at 2491 (emphasis removed). In view of these privacy concerns, the *Riley* Court concluded that "officers must generally secure a warrant" before searching a cell phone. *Id.* at 2485.

[13] Recently, the United States Supreme Court addressed similar privacy concerns in deciding *Carpenter v. United States*, No. 16-402, 585 U.S. ——, 138 S.Ct. 2206, 201 L.Ed.2d 507, 2018 WL 3073916 (June 22, 2018). There, law enforcement had obtained, without a warrant, location-related data from an individual's wireless carrier's cell-site record that the cell phone had logged "by dint of its operation." *Id.* at *12, ——, 138 S.Ct. 2206. The Court rejected arguments that the information was rendered less private because it was part of business records or because, by using the phone, the individual had technically disclosed the location information to the wireless carrier. *Id.* at *11–12, ——–——, 138 S.Ct. 2206. The Court reflected on the "unique nature of cell phone location records," *id.* at *9, ——, 138 S.Ct. 2206, and ultimately concluded "that the Government must generally obtain a warrant supported by probable cause before acquiring such records," *id.* at * 13, ——, 138 S.Ct. 2206.

[14] Here, unlike in *Riley* and *Carpenter*, the police secured a warrant before searching the cell phone data. Thus, we must look beyond these cases to resolve the issue Carter presents—which is whether the warrant was defective, rendering the evidence unconstitutionally obtained and, thereby, inadmissible.

Probable Cause

[7–12] [15] As an initial matter, for a valid warrant to issue, the police must first set forth probable cause to conduct the search.[6] U.S. Const. amend. IV; Ind. Const. art. 1, § 11; I.C. §§ 35–33–5–2, –8 (codifying constitutional principles and establishing requirements for affidavits or other testimony in support of search warrants). Probable cause is a "fluid concept incapable of precise definition . . . [and] is to be decided based on the facts of each case." *Figert v. State*, 686 N.E.2d 827, 830 (Ind. 1997). In determining whether a police affidavit sets forth probable cause "to issue a search warrant, '[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that

6. At oral argument, Carter conceded that there was probable cause to issue a search warrant. However, we must engage in some discussion of probable cause, as the topic informs other aspects of our analysis.

contraband or evidence of a crime will be found in a particular place.' " *State v. Spillers*, 847 N.E.2d 949, 952–53 (Ind. 2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).[7] Put differently, the central question in a probable cause determination is whether the affidavit presents facts, together with reasonable inferences, demonstrating a sufficient nexus between the suspected criminal activity and the specific place to be searched. *See Eaton v. State*, 889 N.E.2d 297, 300 (Ind. 2008); *Figert*, 686 N.E.2d at 830 (determining that a warrant to search a residence was not supported by probable cause where the underlying affidavit indicated that drug sales occurred in two residences that were merely nearby the residence to be searched, and that unidentified individuals had frequented all three residences).

[13] [16] Here, law enforcement sought a warrant to search the cell phone for evidence of the crime of dealing methamphetamine. As to suspected criminal activity, the affiant stated that the police found a baggie inside Carter's co-owned vehicle that contained a substance field-tested to be methamphetamine, with a field weight of 207 grams. The affiant also stated that, based on training and experience, methamphetamine is typically purchased in one-gram quantities, and that the quantity in the vehicle was consistent with dealing activity. The affiant further stated that another baggie in the vehicle contained an amount of heroin consistent with drug dealing. As to the cell phone, the affidavit stated that the phone was recovered from Carter, and that those involved in drug activity primarily use cell phones and electronic devices to communicate with one another through calls, text messages, and applications such as Facebook.

[17] In *Eaton*, law enforcement had obtained evidence that the defendant was involved in drug-trafficking activity taking place at a muffler shop. 889 N.E.2d at 299. In the affidavit in support of a search warrant for the defendant's home, the affiant set forth factual background regarding the defendant's connection to the drug trafficking. *Id.* The affiant also "stated that drug traffickers commonly keep U.S. currency within quick access and maintain records in a variety of forms including ledgers, computers, cell phones, pagers, phone bills, and wire transfer receipts." *Id.* at 300 (internal quotation marks omitted). It does not appear that the affiant specifically stated that drug traffickers typically kept such records at their residences. *See id.* Nonetheless, in resolving *Eaton*, our supreme court upheld the underlying probable cause determination, concluding that the affidavit presented "facts showing that the defendant was involved in drug trafficking" along with "facts and reasonable inferences establishing a fair probability that records and equipment related to such drug trafficking were likely to be found in the defendant's home." *Id.* In so concluding, the Court observed that "other courts ha[d] recognized that it is reasonable to believe that drug dealers keep evidence of their activities in their residences." *Id.*

7. Upon a challenge to whether probable cause supported the issuance of a search warrant, "[t]he duty of the reviewing court is to determine whether the magistrate had a 'substantial basis' for concluding that probable cause existed." *Id.* at 953 (quoting *Gates*, 462 U.S. at 238–39, 103 S.Ct. 2317). There is a substantial basis when "reasonable inferences drawn from the totality of the evidence support the determination of probable cause." *Jackson v. State*, 908 N.E.2d 1140, 1142 (Ind. 2009). Appellate courts review *de novo* whether a substantial basis supported the determination of probable cause, *Spillers*, 847 N.E.2d at 953, while affording deference to the magistrate's decision to issue the warrant. *McGrath v. State*, 95 N.E.3d 522, 527 (Ind. 2018).

[18] Examining the instant case in light of *Eaton*, here, the supporting affidavit even more directly set forth the nexus between the asserted criminal activity—dealing methamphetamine—and the place to be searched—the cell phone, through which dealers typically communicate concerning their illegal activity. Thus, the affidavit provided a substantial basis for determining that probable cause existed to support the issuance of a warrant to search the phone. Yet, underlying probable cause is not the only facet of a constitutional warrant.

Particularity

[14] [19] In addition to requiring probable cause, both the United States Constitution and the Indiana Constitution provide that a warrant must contain a particular description of the place to be searched and the persons or things to be seized. U.S. Const. amend. IV; Ind. Const. art. 1, § 11. This particularity requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987). Indeed, the requirement aims to prevent "a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

[15–20] [20] Although the warrant must describe "with some specificity" where officers are to search and what they are to seize, "there is no requirement that there be an exact description." *Overstreet v. State*, 783 N.E.2d 1140, 1158 (Ind. 2003). Nonetheless, the warrant must be specific enough so that officers can, "with reasonable effort," ascertain the place to be searched and the items to be seized. *Steele v. United States*, 267 U.S. 498, 503, 45 S.Ct. 414, 69 L.Ed. 757 (1925). This requirement "prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 198, 48 S.Ct. 74, 72 L.Ed. 231 (1927); *see also Griffith v. State*, 59 N.E.3d 947, 958 (Ind. 2016) (observing that a sufficient description avoids giving the police unbridled discretion). Ultimately, the description in a search warrant should " 'be as particular as circumstances permit.' " *State v. Foy*, 862 N.E.2d 1219, 1227 (Ind. Ct. App. 2007) (quoting *United States v. Lievertz*, 247 F.Supp.2d 1052, 1062 (S.D. Ind. 2002)). Moreover, to satisfy the particularity requirement, it is permissible if a warrant incorporates by reference certain supporting documents—such as the probable cause affidavit—that collectively "serv[e] to identify the scope of . . . items that could properly be seized." *Membres v. State*, 889 N.E.2d 265, 276 (Ind. 2008).

[21] Here, the warrant authorized searching the phone for:

> fruits, instrumentalities and evidence pertaining to the crime(s) of DEALING, POSSESSION and/or CONSPIRACY TO COMMIT DEALING OR POSSESSION OF METHAMPHETAMINE, as more particularly described as follows: [ ] Permission to search the above described phone for any information relating to calls, messages, including Facebook messages and accounts**, and all information** including but not limited to photographs, images, emails, letters, applications, and folders as well as any messages that may be stored on the phone **that would indicate the identity of the phone's owner/user** and permission to view and copy said information if deemed necessary for preservation.

Pre-trial Hearing Exhibit 1 (emphasis added).

[22] Carter asserts that the warrant authorized a broad search of his device for

all information that might supply indicia of ownership, rendering the warrant an impermissible general warrant. Carter points out that the police extracted "all the information on the cell phone," thereby generating "a document of roughly a thousand pages, which was then analyzed for criminal activity." Appellant's Br. at 16–17. Directing our attention to the privacy concerns articulated in *Riley*, Carter essentially argues that a warrant is unconstitutionally general where it permits law enforcement to review all the information on a cell phone to look for indicia of identity of the phone's owner.[8]

[21] [23] However, the warrant specifically described the place law enforcement could search—the phone recovered from Carter—and specifically described what law enforcement could search for—(1) "any information relating to calls, messages, including Facebook messages and accounts," and (2) "all information ... that would indicate the identity of the phone's owner/user." Pre-trial Hearing Exhibit 1. Moreover, the first clause permitting the search for calls and messages enjoys a close nexus to the probable cause that justified issuing the search warrant—which is that Carter was a suspected drug dealer, and drug dealers use cell phones to communicate with others involved in illicit drug activity. *See Eaton*, 889 N.E.2d at 300. Thus, this aspect of the search warrant was "tailored to its justifications." *Maryland*, 480 U.S. at 84, 107 S.Ct. 1013.

[22] [24] In carrying out the search, law enforcement did extract more than one thousand pages of information using a "logical extraction" device that created an "auto generated" report of the file architecture on the phone. Tr. Vol. IV at 142–43. Although Carter draws our attention to the quantity of data extracted, he has not demonstrated that there was any other way to practically conduct the permitted search. As the State observes, "[a] great deal of other information will likely have to be sifted through in order to find the relevant information—similar to looking through drawers in a home or office file cabinet for specific files or letters that are relevant to the investigation." Appellee's Br. at 15. Ultimately, we discern no indication that law enforcement had the ability to determine, *ex ante*, that certain pages could not have contained any of the information sought. *See United States v. Stabile*, 633 F.3d 219, 238 (3d Cir. 2011) (" '[A] computer search may be as extensive as reasonably required to locate the items described in the warrant' based on probable cause." (quoting *United States v. Grimmett*, 439 F.3d 1263, 1270 (10th Cir. 2006)); *Wheeler v. State*, 135 A.3d 282, 301 (Del. 2016) ("Some irrelevant files may have to be at least cursorily perused to determine whether they are within the authorized search ambit.").

[23, 24] [25] With respect to Carter's assertion that the second clause was impermissibly general—that is, the clause permitting a search for all indicia of ownership of the phone—the challenged evidence consisted only of text messages. Assuming *arguendo* that the second clause was insufficiently particular, even where a

8. Carter also relies on *Ogburn v. State,* 53 N.E.3d 464 (Ind. Ct. App. 2016), *trans. denied,* but that case did not involve an insufficiently particular search warrant. Rather, in *Ogburn,* this Court determined that a warrant was not supported by probable cause and that, in the alternative, the ensuing search "clearly exceeded the scope of the warrant." 53 N.E.3d at 474. To the extent *Ogburn* comments on particularity, we regard its statements as dicta. *See Koske v. Townsend Eng'g Co.,* 551 N.E.2d 437, 443 (Ind. 1990) ("[S]tatements not necessary in the determination of the issues presented ... are not binding and do not become the law.").

portion of a search warrant is too general, the Indiana Supreme Court has explained that "[t]he infirmity . . . does not doom the entire warrant." *Warren v. State*, 760 N.E.2d 608, 610 (Ind. 2002). Rather, the infirmity requires "only . . . suppression of the evidence seized pursuant to that part of the warrant but not the suppression of the evidence obtained pursuant to the valid specific portions of the warrant." *Id.* (citing *United States v. Greene*, 250 F.3d 471, 477 (6th Cir. 2001) and *United States v. Reed*, 726 F.2d 339, 342 (7th Cir. 1984)); *see also United States v. Galpin*, 720 F.3d 436, 448–50 (2d Cir. 2013). Here, the challenged text messages were seized pursuant to the other, specific portion of the warrant that authorized searching the phone for messages.[9]

[26] Based on the foregoing, we conclude that the challenged text messages were not seized pursuant to an impermissible general warrant. Therefore, the court did not abuse its discretion by admitting the text messages over Carter's objection.

Reasonableness

[25, 26] [27] Carter briefly argues that the search was unreasonable under Article 1, Section 11 of the Indiana Constitution. Under the Indiana Constitution, the legality of a search "turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances." *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005). In evaluating the reasonableness of a search, we balance three factors: (1) the degree of suspicion of unlawful activity; (2) the degree of intrusion the method of the search imposes on the citizen's ordinary activities; and (3) the extent of law enforcement needs. *Id.* at 361.

[27] [28] Here, the search did not greatly intrude upon Carter's activities. Nonetheless, the search was intrusive in nature, as it involved searching a personal cell phone—a device that often contains highly personal information. However, law enforcement had located contraband in Carter's vehicle—specifically, a quantity of methamphetamine with a street value around $20,000 and a quantity of heroin with a street value between $9,000 and $12,000. Thus, law enforcement had a high degree of suspicion of unlawful activity. Furthermore, searching the phone advanced law enforcement needs related to identifying drug-dealing activity and protecting the community from the hazards of methamphetamine and heroin. On balance, we conclude that the search was reasonable under the totality of the circumstances.

Opinion Testimony

[28–30] [29] Carter argues that the trial court abused its discretion by admitting testimony from Detective Budde, who opined that the quantity of heroin seized was "typical of a dealer amount." Tr. Vol. IV at 224. Because Carter failed to raise a contemporaneous objection, Carter's only available argument with respect to admission of the testimony is that the admission constituted fundamental error.[10] *See, e.g.*,

9. At oral argument, there was some discussion about the possibility of officers coming across evidence of a different crime while combing through electronic files pursuant to a warrant. Because the case before us does not present such facts, our opinion does not extend to that hypothetical situation. *See Snyder v. King*, 958 N.E.2d 764, 786 (Ind. 2011) (observing that courts should decide cases "only on the specific facts of the particular case and not on hypothetical situations"). Nonetheless, we expect that existing caselaw provides ample analogues should this issue arise in the electronic context. *See, e.g., Overstreet*, 783 N.E.2d at 1160 (determining that the plain view doctrine permitted the seizure of evidence that officers came across while carrying out a valid search warrant).

10. In his Appellant's Brief, Carter states that the evidence was admitted over his objection. However, the record indicates that no objec-

Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010). Yet, Carter declined to argue fundamental error, despite the opportunity to do so.[11] Thus, Carter has waived any fundamental-error argument. *See Ferguson v. State*, 40 N.E.3d 954, 957 (Ind. Ct. App. 2015), *trans. denied*. Waiver notwithstanding, Carter argues that Detective Budde's testimony was inadmissible because it was inaccurate and contrary to law.[12] To the extent Carter's argument involves statutory interpretation, we interpret statutes *de novo*. *Johnson v. State*, 87 N.E.3d 471, 472 (Ind. 2017).

[30] Carter directs us to Indiana Code Section 35–48–4–1(a)(2), which criminalizes the possession of heroin with the intent to deliver the drug. Under the statutory framework, an individual can be convicted of dealing under either of two circumstances: (1) if the amount possessed is at least twenty-eight grams or (2) "there is evidence in addition to the weight of the drug that the person intended to . . . deliver . . . the drug." I.C. § 35–48–4–1(b). Here, the amount of heroin was less than twenty-eight grams, and so a conviction required additional evidence of Carter's intent to deliver the heroin. *See id.*

[31] [31] According to Carter, the very existence of the twenty-eight-gram presumption precludes the admission of testimony indicating that less heroin could constitute a "dealer quantity" of heroin. He argues that "[t]he legislature has made a decision about the quantity of drug which may be interpreted as presumptive of dealing, and the officer has rendered an opinion that is contrary to what the legislature found." Reply Br. at 6. However, we conclude that the statute does not operate to bar admission of probative evidence related to the defendant's intent to deal the drug. Rather, the statute eliminates the State's burden of presenting additional intent evidence when there is evidence that the drug weighed at least twenty-eight grams. Put another way, once the State has introduced evidence that the defendant possessed the statutory amount, there is sufficient evidence to establish the defendant's intent to deliver the drug. Yet, the State is not foreclosed from presenting additional evidence of intent, and the statutory framework does not otherwise affect the admissibility of evidence of intent where, as here, the quantity possessed is less than twenty-eight grams.[13]

[32] Thus, we conclude that the trial court did not err by admitting the challenged testimony.

Conclusion

[33] The court did not abuse its discretion by admitting text messages procured

tion was made at the time the evidence was admitted, and it does not appear that the trial court entered a continuing objection that would have preserved the issue. *See, e.g., Kindred v. State*, 524 N.E.2d 279, 292 (Ind. 1988).

11. In its brief, the State pointed out that Carter had failed to raise a contemporaneous objection and had not argued fundamental error on appeal. Thereafter, Carter did not argue fundamental error in his Reply Brief.

12. In a footnote, Carter briefly asserts that Detective Budde was not qualified to give opinion testimony as a skilled witness pursuant to Indiana Evidence Rule 701. At oral argument, however, Carter conceded that Detective Budde was qualified to give the opinion testimony, but maintained that the legislature preempted the particular type of opinion testimony due to the framework of the statute at issue.

13. Moreover, it is not as though the weight and weight-based opinion testimony constituted the only evidence indicative of Carter's intent to deliver the heroin. Rather, the evidence indicated that Carter possessed multiple types of drugs with a collective street value around $30,000, and that he had met with several individuals prior to the traffic stop, at one point instructing an individual to covertly pull behind his vehicle.

from the search of Carter's cell phone; the search was conducted pursuant to a valid search warrant and the search was reasonable under the totality of the circumstances. The court did not err in admitting Detective Budde's testimony.

[34] Affirmed.

Najam, J., and May, J., concur.

Alonzo R. WEEKLY, Appellant–Defendant,

v.

STATE of Indiana, Appellee–Plaintiff.

Court of Appeals Case No. 20A03–1712–CR–2922

Court of Appeals of Indiana.

Filed June 29, 2018

Background: Following denial of motion to suppress evidence, defendant was convicted a bifurcated trial in the Superior Court, Elkhart County, No. 20D04-1703-F6-392, Gretchen S. Lund, J., of operating a vehicle while intoxicated in a manner that endangers a person, and operating a vehicle with an alcohol concentration equivalent to at least 0.15, and pled guilty to operating a vehicle while intoxicated with a previous conviction and admitted to being a habitual vehicular substance offender (HVSO). Defendant appealed.

Holdings: The Court of Appeals, Najam, J., held that:

(1) trial court did not abuse its discretion in admitting results of chemical breath test and police officers' testimony related to traffic stop;

(2) imposition of five-year sentence was not inappropriate in light of the nature of offenses and defendant's character; and

(3) trial court impermissibly imposed a separate sentence based on HVSO finding.

Affirmed in part, reversed in part, and remanded.

1. Automobiles ⚿349(2.1), 411, 419

Trial court did not abuse its discretion in admitting results of chemical breath test and police officers' testimony, which included observations of defendant following traffic stop and results of field sobriety tests, in prosecution of crimes related to operating a vehicle while intoxicated; police officers' had probable cause to stop defendant, as they testified that they witnessed defendant fail to stop at two stop signs, they observed that defendant had slurred speech, bloodshot eyes, and that his breath smelled of alcohol, defendant failed field sobriety test and did not complete two others, and defendant consented to chemical breath test. U.S. Const. Amend. 4.

2. Arrest ⚿60.2(10)

When determining whether an officer had reasonable suspicion for a *Terry* stop, the reviewing court considers whether the totality of the circumstances presented a particularized and objective basis for the officer's belief that the subject was engaged in criminal activity. U.S. Const. Amend. 4.

3. Automobiles ⚿359.4
Sentencing and Punishment ⚿95, 111

Imposition of five-year sentence was not inappropriate in light of the nature of offenses and defendant's character, in prosecution for crimes related to operating a vehicle while intoxicated; although defendant's imprisonment placed hardship on his children for whom he had an outstanding child support obligation and fact that risk assessment score reflected a low risk to reoffend, defendant had a criminal his-