



### Case Summary and Issue

Following a jury trial, Jonathan Towell appeals his conviction for conspiracy to commit dealing in methamphetamine, a Class B felony. On appeal, Towell raises one issue, which we restate as whether the trial court abused its discretion when it provided the jury with a transcript of an audio recording where the recording was admitted into evidence, but the transcript was not. Concluding the trial court did not abuse its discretion, we affirm.

### Facts and Procedural History

On May 16, 2008, a confidential informant (the “CI”) working with Detective Josh Goodman and Officer Debbie McDonald, both of the Linton Police Department, arranged a controlled delivery of pseudoephedrine pills with Nichole Schubla at Schubla’s mobile home in Greene County. Schubla and Towell were at the mobile home when the CI arrived. After a brief discussion, the three agreed that Towell would use the pills to manufacture methamphetamine that evening, with the CI to receive half and Schubla and Towell to receive the other half. The CI had been equipped with an audio recording device that documented the three’s discussion and agreement, and Detective Goodman and Officer McDonald used the recording and other information from the controlled delivery to obtain a search warrant for the mobile home. Execution of the warrant resulted in the seizure of chemicals and equipment used to manufacture methamphetamine.

On May 19, 2008, the State charged Towell with Count I, conspiracy to commit dealing in methamphetamine,<sup>1</sup> a Class A felony, and Count II, possession of drug precursors, a Class C felony.<sup>2</sup> On July 16, 2008, the State amended Count I by charging the offense as a Class B felony, apparently because there was no evidence Towell actually manufactured the drug within 1,000 feet of a public park, see Ind. Code § 35-48-4-1.1(b)(3)(B)(ii); instead, the evidence indicated he merely conspired to do so, see Ind. Code § 35-41-5-2. From July 28 to 31, 2008, the trial court presided over a jury trial, at which the CI, Detective Goodman, Officer McDonald, and Schubla, among others, testified. The trial court also admitted the audio recording of the CI's discussion with Towell and Schubla into evidence and permitted the jury to review a transcript while it listened to the recording. Based on this evidence, the jury found Towell guilty on both counts. After merging Count II into Count I, the trial court entered a judgment of conviction on Count I and sentenced Towell to fifteen years with the Indiana Department of Correction. Towell now appeals.

### Discussion and Decision

Towell argues the trial court improperly provided the jury a transcript while it was listening to the audio recording of the CI's discussions with Schubla and Towell. This court reviews such decisions by the trial court for an abuse of discretion. See Sharp v. State, 534 N.E.2d 708, 712 (Ind. 1989), cert. denied, 494 U.S. 1031 (1990). An abuse of

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<sup>1</sup> Although the statute under which Towell was charged is ostensibly labeled "dealing in methamphetamine," a variety of conduct, such as manufacturing or delivery of methamphetamine, satisfies the actus reus element of the offense. See Ind. Code § 35-48-4-1.1(a).

<sup>2</sup> Count I was charged as a Class A felony because the State alleged Towell committed the offense within 1,000 feet of a public park. See Ind. Code § 35-48-4-1.1(b)(3)(B)(ii). Count II was charged as a Class C felony because the State alleged Towell possessed more than ten grams of pseudoephedrine and committed the offense within 1,000 feet of a public park. See Ind. Code § 35-48-4-14.5(b)(2)(B).

discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Groves v. State, 823 N.E.2d 1229, 1231 (Ind. Ct. App. 2005).

We note initially that the audio recording was admitted into evidence, but the transcript was not, which means that the latter is accurately described as a demonstrative aid for the former.<sup>3</sup> See Grimes v. State, 633 N.E.2d 262, 264 (Ind. Ct. App. 1994). Our supreme court has adopted the following guidelines for use of transcripts of audio recordings in situations like this one:

The best evidence of the conversation is the tape itself; the transcript should normally be used only after the defendant has had an opportunity to verify its accuracy and then only to assist the jury as it listens to the tape. If accuracy remains an issue, a foundation may first be laid by having the person who prepared the transcripts testify he has listened to the recordings and accurately transcribed their contents. Because the need for transcripts is generally caused by two circumstances, inaudibility of portions of the tape under the circumstances under which it will be replayed or the need to identify the speakers, it may be appropriate, in the sound discretion of the trial judge, to furnish the jurors with copies of a transcript to assist them in listening to the tapes. In the ordinary case this will not be prejudicially cumulative. Transcripts should ordinarily not be read to the jury or given independent weight. The trial judge should carefully instruct the jury that differences in meaning may be caused by such factors as the inflection in a speaker's voice or inaccuracies in the transcript and that they should, therefore, rely on what they hear rather than on what they read when there is a difference.

Bryan v. State, 450 N.E.2d 53, 59 (Ind. 1983) (quoting United States v. McMillan, 508 F.2d 101, 105-06 (8th Cir. 1974)) (citations omitted).

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<sup>3</sup> Because the audio recording and transcript were used in this manner, we forego discussion of a line of case standing for the general proposition that it is error, albeit not necessarily reversible error, for a trial court to admit a transcript into evidence absent the parties' stipulation that the transcript is accurate. See Roby v. State, 742 N.E.2d 505, 507-08 (Ind. 2001); Tobar v. State, 740 N.E.2d 106, 107-08 (Ind. 2000); Small v. State, 736 N.E.2d 742, 748-49 (Ind. 2000).

Turning to the facts in this case, the record indicates the transcript was provided in two instances, first when the recording was played to the jury following its admission into evidence, and later when the recording was replayed in response to a request by the jury during deliberations. The parties initially dispute whether Towell made a timely objection in the first instance. If Towell failed in this regard, he would carry the added burden of having to demonstrate fundamental error to obtain a reversal. Ind. Evidence Rule 103(d); Cowan v. State, 783 N.E.2d 1270, 1277 (Ind. Ct. App. 2003), trans. denied. However, we need not resolve this dispute because even if Towell made a timely objection, the record indicates the trial court followed the Bryan guidelines.

The record indicates Officer McDonald and the CI testified that they prepared the transcript by reviewing the recording and that the former was an accurate transcription of the latter.<sup>4</sup> See Tr. at 143-45, 194-203. Moreover, in each instance the transcript was provided, the trial court instructed the jury beforehand that the recording was evidence, that the transcript was designed to aid the jury in its evaluation of the recording, and that any inconsistencies between the two should be resolved by disregarding the transcript. See id. at 203-04, 385. A similar admonition was also given to the jury as a final instruction. See id. at 372. The record thus demonstrates the trial court operated squarely within the Bryan guidelines, and absent deviation from those guidelines, Towell cannot demonstrate the trial court abused its discretion. See Sharp, 534 N.E.2d at 712-13; Grimes, 633 N.E.2d at 264.

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<sup>4</sup> Detective Goodman testified the transcript was accurate to the extent it documented the recording, but he was unable to attribute the statements in the recording to any particular individual. See Transcript at 124-26.

We also note in closing that even if Towell carried his burden on appeal, he still would have been required to demonstrate prejudice to receive a new trial. See Ind. Evid. Rule 103(a); Kubsch v. State, 784 N.E.2d 905, 923 (Ind. 2003). In that regard, Towell makes several references to inaccuracies in the transcript, but fails to describe those inaccuracies in any detail or, more to the point, explain how they unfairly undermined his theory that although he was at the mobile home with the CI and Schubla, he did not agree to participate in their conspiracy. Accordingly, we conclude that even an assumed error by the trial court would have been harmless.

#### Conclusion

The trial court did not abuse its discretion when it provided the jury with a transcript while it was listening to the recording.

Affirmed.

DARDEN, J., and BAILEY, J., concur.