MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Hillard Hathaway,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 21, 2023

Court of Appeals Case No. 23A-CR-358

Appeal from the Lake Superior Court

The Honorable Samuel L. Cappas, Judge

Trial Court Cause No. 45G04-2204-F5-185

Memorandum Decision by Judge Crone
Judges Brown and Felix concur.

Crone, Judge.

Case Summary

[1] Hillard Hathaway appeals his conviction, following a jury trial, for level 3 felony aggravated battery. He contends that the State presented insufficient evidence to support his conviction, and that the trial court abused its discretion in allowing the State to play a video of the victim's police interview for the jury. He further asserts that remand is necessary to cure a double jeopardy violation. Finding the evidence sufficient and no abuse of discretion, we affirm Hathaway's aggravated battery conviction. However, we agree with Hathaway that remand is appropriate to address a potential double jeopardy violation.

Facts and Procedural History

[2] On the evening of April 5, 2022, Hathaway and his on-and-off-again girlfriend, A.L., went on "like a double date" to have drinks at a bar in Merrillville with two of A.L.'s friends, including Britanie Buggs. Tr. Vol. 3 at 48. The foursome left the bar around 2:00 a.m. They were each "pretty drunk." *Id*. at 49.

[3] Shortly thereafter, off-duty Merrillville Police Department (MPD) Patrolman Jesus Solis encountered a disabled vehicle in a private parking lot. He approached the driver, later identified as A.L., who reported that she had tried to do a U-turn and got stuck on an embankment. Solis radioed for on-duty officers to assist. MPD Officer Ian Davidson arrived at the scene and noted that A.L. exhibited some signs of intoxication. Because A.L. was extremely cooperative with officers and there was no property damage, "a discretionary decision was made to provide her with a ride" because "where she was trying to

ultimately end up that night was very close by." Tr. Vol. 2 at 216. Accordingly, Officer Davidson drove A.L. to a motel. As he was transporting A.L., she received a phone call during which Officer Davidson could hear her having a "[l]oud, belligerent, [and] very insulting" argument with a male. *Id*. at 220. Officer Davidson told A.L. that he did not want to take her to the motel if that male was present, and A.L. told the officer that he was not. Officer Davidson dropped A.L. off at the motel.

[4] At approximately 3:00 or 3:30 a.m., a motel employee called 911 to report that a motel customer was "fighting with a woman … maybe a girlfriend or wife" and "that guy is beating her badly." State's Ex. 5. The employee gave dispatch a detailed description of the couple. Around that same time, A.L. began repeatedly calling her cousin Tiana Chabes. When Chabes finally answered, A.L. was "screaming and terrified." Tr. Vol. 3 at 16. A.L. told Chabes, "He's going to kill me." *Id*. at 18. Chabes hurriedly drove to the motel, which was nearby, and parked outside. After she parked, Hathaway approached the car and told Chabes, "[Y]ou need to go get her[.]" *Id*. at 19. Because Hathaway is a "big man" and her cousin had called her screaming, Chabes was scared for her own safety, so she refused to exit her car. *Id*. at 24. Chabes stated to Hathaway, "You tell her to come downstairs. Tell her to come out." *Id*. at 25. Hathaway went up the stairs and into a second-floor room, and after five minutes, he came out with A.L., who was barefoot, "[b]loody," and "messed up like very bad." *Id*. at 27. Hathaway pulled A.L. down the steps and over to Chabes's car. A.L. was screaming and crying and her "face was disfigured." *Id*. at 28. Both of her

eyes were swollen, and she was bleeding from her eyes and nose. Hathaway told Chabes that he and A.L. "got into it" and he "slapped her" because they had gone to a bar, and she had left him at the bar. *Id.* at 37. Hathaway instructed Chabes, "[Y]ou better get out of here before the police come." *Id.* at 28.

[5] Moments later, police and paramedics arrived at the scene, responding to the motel's report of a "domestic battery in progress." *Id.* at 80. Hobart Police Department Officer Robert Medwetz spoke with A.L., who was crying and "fairly upset." *Id.* at 81. Officer Medwetz observed that A.L. had severe swelling to both sides of her face and that "both of her eyes appeared swollen shut." *Id.* A.L. told Officer Medwetz that she had been involved in a physical altercation with Hathaway. She stated that they got in an argument after being out at a bar earlier and that "Hathaway attacked her." *Id.* at 83. Other officers at the scene spoke to Hathaway because he matched the description given by the motel employee of the male involved in the domestic altercation. Officer Medwetz spoke to Hathaway, who claimed that "he had no idea what happened to [A.L.]" *Id.* at 87. Hathaway was taken into custody, and police discovered a bloody rag in one of his pockets. A.L. was transported to a hospital.

[6] Buggs woke up the following morning and noticed that she had several missed calls from A.L. She also found that she had received several Facebook messages from Hathaway between 2:00 and 3:00 a.m. In one of the messages, Hathaway told Buggs that A.L. had left him at the bar and that he was "going to beat her

up." *Id.* at 53. Buggs called A.L. at 8:00 a.m., and A.L was "crying and belligerent." *Id.* at 51. Buggs went and picked A.L. up from her aunt's house, observing that A.L. was "barely recognizable […] her face was like really, really beat up." *Id.* at 52. Buggs drove A.L. to another hospital.

[7] A.L. informed the emergency room physician that someone she knew came to her motel room, "opened the door[,] and struck her in the face multiple times" and strangled her. *Id.* at 162. The physician observed that A.L had bruising to her face and swollen eyes, which was consistent with being assaulted. He ordered a CT scan that showed that A.L. suffered an "inferior orbital blowout fracture" in her left eye. Ex. Vol. 1 at 28. A.L. was put on an antibiotic, and a follow-up was scheduled with an eye doctor. The physician also referred A.L. to see a plastic surgeon within a week.

[8] Five days after A.L. was attacked and beaten by Hathaway, she came to the Hobart police station for a recorded interview. During the interview, A.L. gave a detailed account of how Hathaway attacked, beat, and threatened to kill her. She further described her serious injuries, including the broken orbital bone, and stated that she had blurred vision.

[9] On April 13, 2022, the State charged Hathaway with two counts of level 5 felony domestic battery, one count of level 6 felony domestic battery, and level 6 felony strangulation. The State subsequently added a charge of level 3 felony aggravated battery. Hathaway failed to appear at his jury trial, and thus he was tried in absentia in December 2022. During trial, the State presented numerous

witnesses, including several who testified that A.L. told them that Hathaway was the individual who beat her and caused her injuries. However, when A.L. took the witness stand, she claimed to have no memory of the battery, stating that she was intoxicated at the time. She further testified that although she remembered giving a statement to police five days after the incident, she did not recall what she said because she was intoxicated at the time of the interview. Over Hathaway's hearsay objection, the trial court permitted the State to play the recorded interview for the jury. The State also presented evidence that A.L. made 220 calls to Hathaway while he was in jail. In one of the recorded calls, Hathaway pretended to talk about another case and yelled at A.L., "[T]hey cannot do nothing if you don't remember[.]" State's Ex. 26.

[10] At the close of evidence, Hathaway moved for a directed verdict on the aggravated battery charge, which the trial court denied. The jury subsequently found Hathaway guilty of three counts: one count of level 5 felony domestic battery, level 6 felony domestic battery, and aggravated battery. The jury found him not guilty of the remaining counts. The trial court merged the domestic battery verdicts with the aggravated battery conviction and sentenced Hathaway to fifteen years. This appeal ensued.

Discussion and Decision

Section 1 – The State presented sufficient evidence to support the aggravated battery conviction.

[11] Hathaway first challenges the sufficiency of the evidence to support his aggravated battery conviction. In reviewing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of witnesses, and we consider only the evidence that supports the conviction and the reasonable inferences arising therefrom. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). It is "not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)). "We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt." *Bailey*, 907 N.E.2d at 1005.

[12] To convict Hathaway of aggravated battery, the State was required to prove that Hathaway "knowingly or intentionally inflict[ed] injury on a person that create[d] a substantial risk of death or cause[d]: (1) serious permanent disfigurement; [or] (2) protracted loss or impairment of the function of a bodily member or organ[.]" Ind. Code § 35-42-2-1.5. Hathaway's sole argument is that A.L.'s eye injury does not rise to the level of serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ. Regarding "serious permanent disfigurement," although the legislature has never supplied a definition of the term, this Court has long defined it as an

injury that "continu[es] or endur[es]" so that it "mar[s] or deface[s] the appearance or physical characteristics of a person." *James v. State*, 755 N.E.2d 226, 230 (Ind. Ct. App. 2001), *trans. denied*. "The degree of injury is a question of fact for the jury." *Gebhart v. State*, 525 N.E.2d 603, 604 (Ind. 1988).

[13] Here, the evidence most favorable to the jury's verdict indicates that, as a result of her beating at the hands of Hathaway, A.L. suffered an "inferior orbital blowout fracture" in her left eye. Ex. Vol. 1 at 28. This was a "markedly displaced fracture" where the "bone is out of place" and is positioned "downward." *Id*. at 27; Tr. Vol. 3 at 166. The symptoms of this condition include the "injured eye looking sunken compared to the other eye." Ex. Vol. 1 at 44. Due to the severity of the injury, the emergency room physician who evaluated A.L. consulted a trauma plastic surgeon, who determined that A.L. would "likely" require future surgery to help correct the severe damage. Tr. Vol. 3 at 165-66. A.L. admitted during her testimony that she never followed up with a plastic surgeon. During closing argument, the deputy prosecutor highlighted the lasting disfigurement suffered by A.L. by directing the jury to reflect on her appearance at trial, which was nine months after the battery, noting that A.L.'s "left eye droops, sits just a little lower than the right." Tr. Vol. 4 at 89.

[14] Although we agree with Hathaway that the deputy prosecutor's personal observation of A.L.'s appearance at trial is not evidence, the jury also personally observed A.L. during her testimony and was able to assess her appearance. It was each juror's prerogative to consider the medical testimony

coupled with his or her personal observation to determine whether the displaced bone fracture to A.L.'s eye caused serious permanent disfigurement. Hathaway's claim that the injury did not rise to that level is simply a request to reweigh the evidence and invade the province of the jury, which we will not do. We agree with the State that there was sufficient evidence to support Hathaway's conviction for aggravated battery.[1]

Section 2 – The trial court did not abuse its discretion in playing the video of A.L.'s recorded police statement for the jury, but to the extent error may have occurred, such error was harmless.

[15] Hathaway next contends that the trial court erred in playing the video of A.L.'s recorded statement to police for the jury over his hearsay objection. In general, a trial court has broad discretion in making evidentiary rulings. *Scott v. State*, 139 N.E.3d 1148, 1153 (Ind. Ct. App. 2020), *trans. denied*. We typically review such rulings for an abuse of discretion. *Baumholser v. State*, 62 N.E.3d 411, 414 (Ind. Ct. App. 2016), *trans. denied* (2017). "An abuse of discretion occurred if the trial court misinterpreted the law or if its decision was clearly against the logic and effect of the facts and circumstances before it." *Id*. "Erroneous evidentiary rulings are considered harmless unless they affect the substantial rights of a party." *Robey v. State*, 168 N.E.3d 288, 290 (Ind. Ct. App. 2021).

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[1] Having found sufficient evidence to support a finding of serious permanent disfigurement, we need not address Hathaway's alternative argument that the State failed to prove that the injury to A.L.'s eye caused protracted loss or impairment of the function of that organ.

"When there is substantial independent evidence of guilt such that it is unlikely that the erroneously admitted evidence played a role in the conviction, or where the offending evidence is merely cumulative of other properly admitted evidence, the substantial rights of the party have not been affected, and we deem the error harmless." *Id.* (citation omitted).

[16] There is no dispute that A.L.'s recorded statement to police was hearsay, which is defined as "a statement that: (1) is not made by the declarant while testifying at the trial or hearing; and (2) is offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Hearsay is generally inadmissible. Ind. Evidence Rule 802.

[17] Here, however, the trial court played the video of A.L.'s interview to the jury under the "recorded recollection" exception to the hearsay rule, Evidence Rule 803(5). This rule provides that certain evidence is not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness, including a recorded recollection that is "[a] record that: (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge." Ind. Evidence Rule 803(5). Evidence Rule 803(5) further provides, "If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party." The trial court here permitted the video to be published and played the video for the jury, but the video was not admitted as an exhibit.

[18] Hathaway does not dispute that the first and second elements were satisfied and challenges only the third. That element requires "some acknowledgment [by the witness] that the statement was accurate when it was made." *Ballard v. State*, 877 N.E.2d 860, 862 (Ind. Ct. App. 2007) (citation omitted). In other words, "[a] trial court should not admit a witness's statement into evidence when the witness cannot vouch for the accuracy of the statement nor remember having made the statement." *Id.*

[19] During her limited testimony before the trial court, A.L. admitted that she "vaguely" remembered giving a police interview five days after the "incident" when she suffered injuries. Tr. Vol. 3 at 215. She stated that she recalled speaking with the police detective but did not remember what she said to him because she was intoxicated. A.L acknowledged that, when speaking to the police, she would never intend to lie "on purpose" and that she would have answered any questions to the best of her abilities. *Id*. at 218. A.L. further acknowledged that, although she currently could not recall what she said to police about the incident, her memory of the incident would have been better five days after the incident than during trial.

[20] Although this is a close call, we agree with the trial court that A.L.'s testimony was sufficient to vouch for the accuracy of her statement to police and satisfy the third element of Evidence Rule 803(5). We find our opinion in *Gorby v. State*, 152 N.E.3d 649 (Ind. Ct. App. 2020) instructive. In *Gorby*, a child molesting victim testified at trial that she remembered participating in a forensic interview but denied having talked about certain details of the molestation. *Id*.

at 653. However, this Court observed that at other points during her testimony, the victim testified that everything she told the interviewer was the truth, and this would have included details of the molestation. *Id.* We concluded that it was the trial court's task to weigh that testimony with the victim's denials. *Id.* at 653 (citing Ind. Evidence Rule 104(a)). In doing so, the trial court concluded that the victim had adequately vouched for the accuracy of the forensic interview statement, and we did not disturb that decision on appeal. *Id.*

[21] We come to the same conclusion here. We agree with the trial court that A.L.'s testimony that she remembered being interviewed and believed that she would have told the truth during that interview, coupled with her acknowledgement that her memory of the incident would have been accurate at the time of her statement to police, was sufficient to vouch for the statement's accuracy. Accordingly, we will not second-guess the trial court's decision to publish the video recording to the jury.

[22] Moreover, we agree with the State that any error by the trial court in this regard was harmless. As noted by the State, Hathaway's defense at trial was that he was not the perpetrator of the battery. However, in addition to A.L.'s identification of him as her attacker during her recorded police statement, Hathaway's identity as her attacker is supported by ample independent evidence. This included evidence of his behavior prior to the attack, his presence at the scene of the battery, his behavior and statements to police and others after the attack, Chabes's testimony identifying Hathaway as the perpetrator, and Officer Medwetz's testimony that A.L. specifically identified

Hathaway as her attacker. Hathaway's conviction is supported by substantial independent evidence of guilt such that we are satisfied that any error in the publication of A.L.'s recorded police statement was harmless.[2]

Section 3 – Remand for correction and/or clarification of the trial record is appropriate to address a potential double jeopardy violation.

[23] Finally, we address Hathaway's assertion that remand is necessary to cure a possible double jeopardy violation. Specifically, Hathaway contends that the trial court erred during sentencing in failing to vacate his domestic battery convictions that the trial court ordered merged with the aggravated battery conviction. He asserts that the appropriate remedy is for this Court to remand to the trial court with instructions to vacate the domestic battery convictions. The State responds that remand is not necessary because the trial court never actually entered convictions on the domestic battery guilty verdicts prior to merger. We find that the record is in need of clarification on this point.

[24] The State is correct that, "[i]f a trial court does not formally enter a judgment of conviction on a jury verdict of guilty, then there is no requirement that the trial court vacate the 'conviction,' and merger is appropriate." *Kovats v. State*, 982

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[2] We reject Hathaway's claim that, even assuming that there was ample independent evidence of his identity as A.L.'s attacker, the video recording provided the "sole evidence" offered by the State to fulfill the injury element of the aggravated battery charge. Appellant's Br. at 15. Specifically, Hathaway claims that A.L.'s statement is the only time she mentioned suffering blurred vision, which the State argues could support a finding that she suffered protracted loss or impairment of the function of a bodily member or organ. As already noted, we need not address this evidence because there was medical evidence as well as the jury's in-court observations to support the alternative finding that A.L. suffered serious permanent disfigurement.

N.E.2d 409, 414 (Ind. Ct. App. 2013). Indeed, "a merged offense for which a defendant is found guilty, but on which there is neither judgment nor a sentence, is 'unproblematic' as far as double jeopardy is concerned." *Green v. State*, 856 N.E.2d 703, 704 (Ind. 2006). However, "if the trial court does enter judgment of conviction on a jury's guilty verdict, then simply merging the offenses is insufficient and vacation of the offense is required." *Kovats*, 982 N.E.2d at 414-15.

[25] Contrary to the State's assertion, the record here is neither consistent nor clear. The CCS entry on the date of trial simply recites the tried offenses and the jury's verdicts as to each count before tersely stating "Judgment entered" with no specification as to which counts that statement applies. Appellant's App. Vol. 2 at 16. The court's order issued that same date states, "The parties move for judgment [on] their respective verdicts, which is granted." *Id.* at 186. Although the abstract of judgment refers only to domestic battery "verdict[s]" and not to any judgments of conviction on those counts, the trial court's sentencing order refers to all three offenses for which the jury found Hathaway guilty followed by the statement, "The Court had entered judgment of conviction against the defendant for those same offenses." Appealed Order at 1. Although the order later refers to the domestic battery counts as simply "verdict[s]," and then states that those verdicts are merged with the aggravated battery conviction, that does not clarify the trial court's prior indication that judgment of conviction had been entered on all three offenses prior to merger. *Id.* Under the circumstances, remand for correction and/or clarification is appropriate. Accordingly, we

remand to the trial court with instructions to vacate the convictions on the domestic battery counts to the extent that the record reflects that such convictions were entered prior to merger, and to clarify its orders to reflect the entry of judgment of conviction for aggravated battery alone.

[26] Affirmed and remanded.

Brown, J., and Felix, J., concur.