ATTORNEY FOR APPELLANT

Justin R. Wall
Wall Legal Services
Huntington, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ellen H. Meilaender
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Denver Lee Murray,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 11, 2022

Court of Appeals Case No. 21A-CR-1495

Appeal from the Wells Circuit Court

The Honorable Kenton W. Kiracofe, Judge

Trial Court Cause No. 90C01-2007-F2-1

May, Judge.

[1] Denver Lee Murray appeals following his conviction of Level 2 felony dealing in methamphetamine.[1] He raises two issues for our review, which we revise and restate as:

> 1. Whether the trial court's order directing Murray to show his teeth to the jury violated his Fifth Amendment right against compelled self-incrimination; and
>
> 2. Whether Murray's twenty-five-year sentence is inappropriate given the nature of his offense and his character.

We affirm.

Facts and Procedural History

[2] In exchange for a reduction in the length of his term of probation, Nathan Romine agreed to serve as a confidential informant and assist the Adams Co./Wells Co. Drug Task Force ("Drug Task Force") with controlled drug buys. Romine learned through a mutual friend that Murray was willing to sell drugs. Romine reached out to Murray over Facebook and gave Murray his phone number. The two then started communicating with each other via text message. Romine told the Drug Task Force about his contacts with Murray,

---

[1] Ind. Code § 35-48-4-1.1.

and under the supervision of the Drug Task Force, Romine arranged to purchase methamphetamine from Murray on February 10, 2020.

[3] Before buying the drugs from Murray, Romine met with Wells County Sheriff's Department Detective Jeremy Heckel and other detectives from the Decatur Police Department and the Bluffton Police Department for a pre-deal briefing. During the pre-deal briefing, Romine showed Detective Heckel the text message exchange he had with Murray. Romine also explained that he intended to meet Murray and purchase 14 grams of methamphetamine for $300. Detective Heckel showed Romine a photograph of Murray. The detectives searched Romine's person and vehicle to make sure he did not have any drugs in his possession before meeting Murray. The detectives also outfitted Romine with audio recording equipment and documented the cash they gave him to use in the controlled buy. Undercover officers then followed Romine and surveilled him as he performed the controlled buy.

[4] Murray initially asked Romine to meet him at a house on Hi-Lo Drive in Bluffton, but while Romine was waiting for Murray near the house, Murray changed the location of the buy to the Linger Inn. Romine was not familiar with Bluffton, but he was able to follow one of the undercover police vehicles to the Linger Inn. At the motel, Murray got into Romine's car. Romine gave Murray $300, and Murray gave Romine a Ziploc bag. Subsequent testing revealed the bag contained 13.86 grams of crystalline methamphetamine. Romine drove Murray to a location a few blocks from the motel and dropped him off. Romine then returned to the location of the pre-deal briefing. Romine

gave the Drug Task Force the drugs he purchased from Murray. The detectives again searched his body and vehicle, and they did not find any other drugs.

[5] Romine and Murray continued to communicate with each other by text, and they arranged a second transaction. Murray asked Romine to give him $300, which Murray would use to purchase methamphetamine for Romine from his supplier in Dayton, Ohio. Romine notified the Drug Task Force of this planned transaction. Before seeing Murray on February 17, 2020, Romine met with Bluffton Police Department Detective Marijean Tipton and other officers for a pre-deal briefing. Detective Tipton searched Romine's vehicle, and she installed audio and video equipment inside the vehicle to record the transaction. The detectives also searched Romine's body and documented the cash they gave Romine. Like with the first transaction, undercover officers surveilled Romine during the transaction.

[6] Romine met Murray in a gas station parking lot. Murray got into Romine's car, and Romine gave him $300. Murray left with the money, but he never delivered the promised methamphetamine to Romine. Murray also never returned the cash to Romine, and he eventually stopped responding to Romine's communications.

[7] On July 29, 2020, the State charged Murray with Level 2 felony dealing in methamphetamine and Level 6 felony theft.[2] The trial court conducted a three-

[2] Ind. Code § 35-43-4-2.

day jury trial from March 1, 2021, to March 3, 2021. As a precaution against the COVID-19 virus, the trial court required everyone in the courtroom to wear facemasks. During Romine's testimony, the trial court instructed Murray to remove his mask, and Romine identified Murray as the individual who sold him the methamphetamine. Romine also testified that, although Murray had a full beard at the time of trial, he did not have a beard when they met in February 2020. Detective Heckel and Detective Tipton similarly provided in-court identifications of Murray. Detective Heckel stated he had known Murray since they had played baseball together as teenagers, and Detective Tipton testified she knew Murray and was able to recognize him both with and without facial hair. The State entered the video of the second transaction into evidence. In that video, the person who entered Romine's car wore sunglasses, a hat, and a hood. He also had crooked teeth.

[8] Near the end of its case-in-chief, the State asked the trial court to direct Murray to show the jury his uncovered face and to show them his teeth to demonstrate for the jury Murray had the same distinctive set of teeth as the person in the video. Murray objected to having to show the jury his teeth on the basis that being compelled to do so would constitute a violation of his Fifth Amendment right against self-incrimination. He argued "[a] smile is testimonial in nature and, in the reverse of that, baring your teeth or looking angry or something is also testimonial in nature; both of them are a facial expression." (Tr. Vol. III at 168.) The trial court initially ruled Murray would have to take off his facemask and face the jury, but the court would not require Murray to show his teeth to

the jury. Following a brief recess, the State approached the bench and stated Murray had "somethin' in his mouth" that was "gonna change his facial appearance. He's got some kinda fake teeth or somethin'." (*Id*. at 182.) Murray explained he had a "homemade" retainer in his mouth that he wore because he was embarrassed by the look of his teeth. (*Id*. at 186.) The State renewed its motion for Murray to show the jury his teeth, and the court ruled Murray would be required to take the appliance out and smile for the jury. When the jury entered the courtroom, the trial court directed:

> THE COURT: Mr. Murray, if you would—uh—take your mask off.
>
> (Defendant takes off mask)
>
> And smile to the jurors, please.
>
> (Defendant smiles)
>
> Now, Mr. Murray, if you would—uh—please take your dental implant out.
>
> (Defendant removes dental implant)
>
> Smile.
>
> (Defendant smiles)
>
> Thank you.

(*Id*. at 192.)

[9] Murray absconded during the jury deliberations, and he was not present when the jury's verdict was read. The jury returned a verdict of guilty on the dealing methamphetamine count and a verdict of not guilty on the theft count. The trial court issued a bench warrant after the verdict was read. In April 2021, Murray was arrested in Huntington County and charged with twelve crimes, including Level 2 felony dealing in methamphetamine, Level 5 felony dealing in cocaine,[3] and Level 5 felony battery on an officer.[4] He was then transferred to Wells County pursuant to the bench warrant in the instant case.

[10] The trial court held a sentencing hearing on June 23, 2021. Murray testified he is a drug addict, and he apologized "to the Court, to society, and to [his] family for not being a better member of our community." (Tr. Vol. IV at 18.) He also asked the trial court to recommend his placement in the Indiana Department of Correction's Purposeful Incarceration program. The State argued Murray was more than a mere addict. The State commented on the large quantity of drugs Murray sold Romine and characterized their relationship as that of "business associates" rather than friends. (*Id*. at 30.) The State also argued Murray "has been supporting himself through dealing income[.]" (*Id*. at 31.) The State noted Murray's father testified at sentencing that Murray did not require much

---

[3] Ind. Code § 35-48-4-1.

[4] Ind. Code § 35-42-2-1.

assistance from his family, but Murray testified he had held only one job for a period of three weeks since 2015. The State put forth evidence of Murray's numerous prior encounters with law enforcement, including the charges filed against him after he absconded in the instant case. Further, the State asserted Murray "tried to perpetrate a fraud on the Court by putting false teeth in the last day of trial." (*Id.*)

[11] The trial court sentenced Murray to a fully executed term of twenty-five years in the Indiana Department of Correction. The trial court found aggravating factors in Murray's criminal history, his prior violations of probation, his failure to appear for reading of the verdict, the charges pending against him at the time of sentencing, the homemade retainer episode, and his failure to seek treatment for his drug addiction. The trial court did not find any mitigating factors. The trial court recommended Murray receive substance abuse counseling while incarcerated, but the court did not recommend Murray for the Purposeful Incarceration program.

Discussion and Decision

I. Fifth Amendment

[12] Murray challenges the trial court's order granting the State's motion to require him to show his face and teeth to the jury. Our standard of review regarding challenges to the admission of evidence at trial is well-settled:

> The general admission of evidence at trial is a matter we leave to the discretion of the trial court. We review these determinations

> for abuse of that discretion and reverse only when admission is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights. However, when a constitutional violation is alleged, the proper standard of appellate review is de novo.

Crabtree v. State, 152 N.E.3d 687, 696 (Ind. Ct. App. 2020) (internal quotation marks and citations excluded), *trans. denied*.

[13] The Fifth Amendment to the United States Constitution states: "No person . . . shall be compelled in any criminal case to be a witness against himself[.]" Thus, the State is required to "produce evidence against an individual through 'the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" *Seo v. State*, 148 N.E.3d 952, 954-55 (Ind. 2020) (quoting *Estelle v. Smith*, 451 U.S. 454, 462, 101 S. Ct. 1866 (1981)). However, "not all compelled, incriminating evidence falls under this constitutional protection: the evidence must also be testimonial." *Id*. at 955. "To be testimonial, 'an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.'" *Id*. (quoting *Doe v. United States*, 487 U.S. 201, 210, 108 S. Ct. 2341 (1988)). For example, a compulsory blood draw following a traffic stop for suspected driving while intoxicated is non-testimonial because "the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner." *Schmerber v. California*, 384 U.S. 757, 765, 86 S. Ct. 1826 (1966).

[14] In *United States v. Hubbell,* the United States Supreme Court further articulated upon this distinction:

> As Justice Holmes observed, there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating. Thus, even though the act may provide incriminating evidence, a criminal suspect may be compelled to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice. The act of exhibiting such physical characteristics is not the same as a sworn communication by a witness that relates either express or implied assertions of fact or belief.

530 U.S. 27, 34-35, 120 S. Ct. 2037, 2042-43 (2000) (internal footnotes omitted).

[15] Murray argues that, when the trial court ordered him to smile and show his teeth, the trial court compelled him to perform a testimonial act in violation of the Fifth Amendment. He likens his case to *Seo v. State*, in which our Indiana Supreme Court held the Fifth Amendment protection against compulsory self-incrimination prohibited the trial court from compelling Seo to unlock her smartphone. 148 N.E.3d at 958. The Court explained compelling Seo to unlock her smartphone would have allowed law enforcement to "scour the device for incriminating information" and "would provide the State with information that it does not already know." *Id*. "Giving law enforcement an unlocked smartphone communicates to the State, at a minimum, that (1) the suspect knows the password; (2) the files on the device exist; and (3) the suspect

possesses those files." *Id*. at 955. In contrast, Murray's act of showing his teeth did not implicitly convey any similar information. While smiles can convey messages in the ordinary course of life, any such emotional context is removed when the subject smiles because he is directed to do so.

[16] Instead, we find the facts herein more like other cases in which we have held no constitution violation occurred. For example, in *Springer v. State*, we held that it was not a violation of the defendant's right against compulsory self-incrimination to require him to hold up his hand to reveal he was missing a finger. 372 N.E.2d 466, 472 (Ind. Ct. App. 1978), *reh'g denied*. Similarly, in *Flynn v. State*, we held that it was constitutional to require a defendant to bare his forearm and display a tattoo to the jury. 412 N.E.2d 284, 288 (Ind. Ct. App. 1980). We therefore hold the trial court did not violate Murray's Fifth Amendment protection against compulsory self-incrimination when it required him to show his teeth to the jury. *See*, *e.g.*, *Sholler v. Commonwealth*, 969 S.W.2d 706, 711 (Ky. 1998) (holding defendant's right against compulsory self-incrimination was not violated when trial court ordered him to show his teeth to the jury); *State v. Gonzalez*, 856 N.W.2d 580, 588 (Wisc. 2014) (same).

[17] Moreover, even if requiring Murray to show his teeth to the jury amounted to a violation of the Fifth Amendment, any such error was harmless. "Harmless error is an error that does not affect the substantial rights of a party." *Littler v. State*, 871 N.E.2d 276, 278 (Ind. 2007) (internal quotation marks omitted). If an error implicates any of a party's federal constitutional rights, we will only say it is not reversible error if it is harmless beyond a reasonable doubt. *Zanders v.*

State, 118 N.E.3d 736, 741 (Ind. 2019). "Our analysis for such questions requires this court to assess 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Mack v. State*, 23 N.E.3d 742, 756 (Ind. Ct. App. 2014) (quoting *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824 (1967)), *trans. denied*. This requires us to determine whether the jury would have reached the same verdict without the improper evidence. *Id*.

[18] Substantial evidence aside from the appearance of Murray's teeth indicates he was the individual who met with and sold methamphetamine to Romine. Initially, we note the perpetrator's teeth were visible only in the video of the second transaction, and the jury found Murray not guilty of the theft charge associated with that transaction. Nonetheless, Romine identified Murray in court as the individual he met during both transactions. Detective Heckel and Detective Tipton also provided in-court identifications of Murray, and the State put into evidence two photographs of Murray. The State also presented testimony from law enforcement that Murray was the only person to enter Romine's car during the controlled-buy operation on February 10, 2020. Further, the person Romine texted to arrange the transactions identified himself by Murray's initials, "D.M." (Tr. Vol. V at 3), and Romine communicated with the same phone number to set up both transactions. Thus, we can confidently say beyond a reasonable doubt the jury would have reached the same verdict had Murray not been ordered to show his teeth to the jury. *See Hendricks v. State*, 897 N.E.2d 1208, 1216 (Ind. Ct. App. 2008) (holding erroneous

admission of statement the defendant made after invoking his right to counsel was harmless beyond a reasonable doubt).

II. Appropriateness of Sentence

[19] Murray also argues his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B). We evaluate inappropriate sentence claims using a well-settled standard of review:

> Indiana Appellate Rule 7(B) gives us the authority to revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Our review is deferential to the trial court's decision, and our goal is to determine whether the appellant's sentence is inappropriate, not whether some other sentence would be more appropriate. We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. The appellant bears the burden of demonstrating his sentence [is] inappropriate.

George v. State, 141 N.E.3d 68, 73-74 (Ind. Ct. App. 2020) (internal citations omitted), *trans. denied*.

[20] "When considering the nature of the offense, we first look to the advisory sentence for the crime." *McHenry v. State*, 152 N.E.3d 41, 46 (Ind. Ct. App. 2020). Indiana Code section 35-50-2-4.5 states: "A person who commits a Level 2 felony shall be imprisoned for a fixed term of between ten (10) and thirty (30) years, with the advisory sentence being seventeen and one-half (17 ½) years." Murray's twenty-five-year term is therefore above the advisory sentence but below the maximum. When a sentence deviates from the advisory

sentence, "we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence." *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021).

[21] Indiana Code section 35-48-4-1.1(e) provides that dealing in methamphetamine becomes a Level 2 felony if the quantity being sold exceeds ten grams. Here, Murray exceeded that threshold by almost forty percent in selling approximately fourteen grams of methamphetamine to Romine. Detective Heckle testified this amount of methamphetamine was the most ever sold in the approximately one hundred controlled buys he had been involved in. Romine and Murray did not know each other before Romine attempted to purchase drugs from him, and yet, Murray readily sold drugs to Romine. This suggests the transaction was part of a larger business model rather than a one-off occurrence. Thus, the nature of Murray's offense was more egregious than a typical Level 2 felony dealing in methamphetamine offense. *See Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006) (holding defendant's aggregate forty-year sentence was not inappropriate given the nature of his offense when he "was involved in a large-scale drug operation that consisted of more than simply selling methamphetamine to an old friend").

[22] When assessing a defendant's character, one relevant fact we consider is the offender's criminal history. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). "The significance of criminal history varies based on the gravity, nature, and number of prior offenses in relation to the current offense." *Id.* While only

thirty years old at the time of his sentencing hearing, Murray had already accumulated a lengthy criminal record. Murray's Pre-Sentence Investigation ("PSI") report detailed his initial involvement with the criminal justice system as a juvenile and his numerous criminal convictions as an adult, including criminal mischief, battery, false informing, theft, possession of marijuana, possession of paraphernalia, unlawful possession of a syringe, and possession of methamphetamine. The PSI also listed Murray's repeated failures to abide by the terms of probation and home detention. Even after the verdict was rendered in the instant case, Murray was arrested and charged with dealing in methamphetamine and a slew of other offenses. Additional charges from a separate incident in Wells County were also pending against Murray at the time of his sentencing in the instant case. Moreover, his conduct during trial was less than becoming, as he inserted a homemade device into his mouth to alter his appearance and fled while the jury was deliberating. Thus, we cannot say Murray's sentence is inappropriate given his character. *See Shinkle v. State*, 129 N.E.3d 212, 217-18 (Ind. Ct. App. 2019) (holding defendant's sentence for dealing in methamphetamine was not inappropriate given his character, particularly considering the defendant's significant criminal history), *trans. denied*.

Conclusion

[23] The trial court did not violate Murray's Fifth Amendment right against self-incrimination when it ordered him to show the jury his teeth because doing so

was a non-testimonial physical demonstration. Further, even if the trial court erred in ordering the demonstration, any such error was harmless beyond a reasonable doubt given the overwhelming evidence of Murray's guilt. With respect to Murray's sentence, we do not find it to be inappropriate considering the large quantity of methamphetamine he sold, his criminal history, and his continued criminal activity following the verdict. Therefore, we affirm the trial court.

[24] Affirmed.

Brown, J., and Pyle, J., concur.