ATTORNEYS FOR APPELLANT

Valerie K. Boots
Christopher Taylor-Price
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ellen H. Meilaender
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Antwon A. Stott,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 13, 2021

Court of Appeals Case No. 20A-CR-1924

Appeal from the Marion Superior Court

The Honorable Jennifer P. Harrison, Judge

Trial Court Cause No. 49G20-1810-F4-34973

Mathias, Judge.

[1] Antwon Stott was convicted in Marion Superior Court of two counts of resisting law enforcement, one as a Level 6 felony and one as a Class A misdemeanor, and he was found to be a habitual offender. Stott appeals, arguing that his two resisting-law-enforcement convictions violate the prohibition against double jeopardy and that the trial court erred in admitting

certain evidence at trial. The State agrees with Stott that the two convictions constitute a substantive double-jeopardy violation. And we agree with Stott that admitting the challenged evidence was reversible error.

[2] We reverse and remand for proceedings consistent with this opinion.

Facts and Procedural History

[3] On October 3, 2018, law enforcement was conducting surveillance and patrolling—in both unmarked and marked vehicles—an area located on the northeast side of Indianapolis due to a "recent uptick in violence." Supp. Tr. p. 23. Officer Sojka, who was undercover, surveilled a Marathon gas station located at an intersection where there had been a homicide the previous night. Parked across the street in an unmarked vehicle, Officer Sojka observed the gas station through binoculars. Tr. Vol. II, p. 239. He was looking for "general criminal activity" or "suspicious activity," which he then relayed by radio to law enforcement in the area. *Id.* at 200.

[4] Sometime "around one o'clock" that afternoon, Officer Sojka noticed eight people standing near the front of the gas-station entrance "just hanging out talking, coming in and out intermittently." *Id.* at 201, 239. The group congregated close to a Dodge Ram truck, and the officer watched as a Chevrolet Suburban pulled into the lot and parked by the truck. The driver of the Suburban, a Black male wearing a gray jumpsuit, exited the vehicle and greeted the others "as if he knew them." *Id*. at 203. He then got back into the driver's seat of the Suburban where he was joined in the front-passenger seat by

a Black male wearing "an all denim outfit." *Id.* at 204. At that point, a third Black male, who Officer Sojka had earlier observed enter and exit the driver's side of the Dodge Ram, approached the passenger-side of the Suburban. Officer Sojka saw this third man hand a silver revolver "into the open passenger side door." *Id.* at 224. Soon after the exchange, the Suburban pulled out of the gas-station lot.

[5] About ten minutes later, the Suburban returned to the Marathon, parked at a pump, and the man in the gray jumpsuit—the driver—and the man wearing all-denim—the passenger—exited the vehicle. Within a few minutes, both the Suburban and the Dodge Ram left the gas-station. This time, however, the only occupant of the Suburban was "the male in the all gray jumpsuit." *Id.* at 211. Officer Sojka followed the Suburban in his vehicle, and a second undercover officer, Officer McDonald, followed the Dodge Ram.

[6] Officer McDonald followed the Dodge Ram to a nearby apartment complex where the truck backed into a parking spot. There, he could see two occupants inside the vehicle. The officer "could only see the driver's side door" from where he was parked, and he watched as a third man exited an apartment and walked "to the passenger side." Tr. Vol. III, p. 9. During this time, "[t]he driver's door opened," *id.*, and Officer McDonald noticed that "[t]he driver had the denim outfit on," *id.* at 32. As the Dodge Ram and its three occupants left the apartment complex, Officer McDonald—and other law enforcement in the area—kept track of the truck's whereabouts.

[7] Officer McDonald caught up with the vehicle at a nearby McDonald's restaurant, where the truck was parked. Noticing it was empty, the officer parked about fifty yards away to continue surveillance. "Within about a minute," Officer McDonald "observed three occupants exit the McDonald's and walk towards the Dodge Ram." *Id.* at 16. The driver wore "an all denim jean outfit," the front-seat passenger wore "basketball shorts and a black tee shirt," and the back-seat passenger wore "ripped blue jeans and [a] blue sweatshirt." *Id.* at 17; *see also* Ex. Vol. at 18. Officer McDonald followed behind the truck as it prepared to exit. Meanwhile, Officer Augustinovicz, in a marked police vehicle, observed the Dodge Ram from a parking lot located across the street from the McDonald's. Both officers watched as the truck turned left even though it "had its right-hand turn signal on." Tr. Vol. III, p. 185. At that point, Officer Augustinovicz decided to conduct a traffic stop, and Officer McDonald followed close behind.

[8] After exiting the McDonald's, the Dodge Ram turned right onto a side street and Officer Augustinovicz activated his emergency lights to initiate the stop. Officer McDonald "stopped approximately one to two houses behind [Officer Augustinovicz] and observed the traffic stop until another officer could get there." *Id.* at 25. "The truck stopped fairly immediately," and Officer Augustinovicz exited his vehicle and walked towards the Dodge Ram. *Id.* at 188. "[B]ecause the windows were so tinted," Officer Augustinovicz could not tell how many people were inside the vehicle, what anyone was wearing, or what they looked like. *Id.* at 210–211, 219. During this time, Officer Reetz, who

was also driving a marked police vehicle, arrived to assist. But before he could come to a complete stop, the driver of the Dodge Ram revved the engine and sped off.

[9] As Officer Reetz pursued the truck, it sped around a sharp curve, drove through a stop sign while turning left onto a busy street, and made a quick right turn onto a side street. When the officer made the same right turn, he saw "an explosion of a tree." *Id.* at 66; *see* Ex. Vol. at 30–32. The truck had struck the tree on the west side of the street and ended up in the front yard of a home on the east side of the street. Officer Reetz came upon the vehicle while branches from the tree continued to fall, and he noticed that the driver's door and both passenger-side doors were opened. Tr. Vol. III, p. 73. Though the officer did not see anyone exit the driver's door, he saw "two black males run from the passenger side of the truck." *Id.* at 71. Officer Reetz briefly gave chase, but soon returned "to get a perimeter set up" and "to make sure nobody else was inside [the truck] that could have been hurt." *Id.* at 73. Several responding officers arrived, and though law enforcement scoured the area and spoke with several witnesses, only one of the three men—Brandon Woodfork, the back-seat passenger—was apprehended that day. *Id.* at 90–91.

[10] From inside the truck, officers recovered two firearms, body armor, three cellphones, an Indiana identification card for Kameron Means, and a utility bill in Means's name. Law enforcement subsequently learned that Kameron Means—the man wearing basketball shorts and a black tee shirt—was the front-seat passenger. After securing the crash site, Officers McDonald and

Augustinovicz went to the McDonald's restaurant to see "if they had any video that would help in the investigation." *Id.* at 195. The officers were unable to view the surveillance footage that evening because none of the employees working at the time had "access to the video system." *Id.* at 197. So, Officer Augustinovicz returned the following morning and viewed the surveillance footage, taking several pictures of the video on his cellphone. The officer "believed" that a man depicted in the footage, who appeared to be wearing an all-denim outfit, was Antwon Stott. Officer Augustinovicz based this belief on a picture of Stott that the officer had previously received via "an e-mail communication." *Id.* at 201.

[11] Officers subsequently secured an arrest warrant for Stott and, three weeks after the incident, executed that warrant. While placing him under arrest, law enforcement collected Stott's cellphone which had the same phone number as one of the three phones recovered from the crashed truck weeks earlier. The State charged Stott with one count of felony unlawful possession of a firearm by a serious violent felon, one count of felony resisting law enforcement, one count of misdemeanor resisting law enforcement, and with being a habitual offender.

[12] In pretrial motions and hearings on those motions, Stott objected to two pieces of evidence that the State sought to introduce at trial: (1) an audio recording of police-officer radio traffic from the time after the truck fled the traffic stop; and (2) Officer Augustinovicz's cellphone photographs of the McDonald's surveillance footage. *See* Supp. Tr. pp. 32–36, 65–67; Tr. Vol. II, pp. 181–82; Appellant's Conf. App. Vol. II, pp. 11, 189. Stott argued that the radio-traffic

recording constituted inadmissible hearsay to which no exception applied, and that the photographs lacked sufficient authentication. The court ultimately ruled that both were admissible.

[13] Stott's two-day jury trial began on September 14, 2020. During the trial, counsel renewed the objections to the evidence mentioned above. The jury found Stott not guilty of the unlawful possession of a firearm count and guilty of both resisting-law-enforcement counts. Stott subsequently waived his right to trial by jury for the habitual-offender enhancement, and the court found Stott to be a habitual offender. The court entered convictions accordingly and imposed an aggregate six-year sentence. Stott now appeals.

Standard of Review

[14] Stott argues that the trial court committed reversible error by admitting certain evidence over objection at trial. It is well settled that trial courts have broad discretion in ruling on the admissibility of evidence, and we review evidentiary rulings for an abuse of that discretion. *See, e.g.*, *Hurt v. State*, 151 N.E.3d 809, 813 (Ind. Ct. App. 2020) (citing *Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014)). An abuse of discretion occurs if the court's decision clearly contravenes the logic and effect of the facts and circumstances before it, or if the court misinterprets the law. *Id.*

[15] Yet, even when a trial court abuses its discretion in admitting evidence, reversal is required only if the error prejudices the defendant's substantial rights. Ind. Trial Rule 61. To make this determination, we assess the probable impact the

erroneously admitted evidence had upon the jury in reaching its verdict. *Wiggins v. State*, 817 N.E.2d 652, 660 (Ind. Ct. App. 2004). If there is independent, overwhelming evidence of guilt, we may conclude that the jury did not rely on the improper evidence and any error was therefore harmless. *Id.*

Discussion and Decision

[16] The identity of the all-denim-wearing driver of the Dodge Ram was, as Stott aptly observes, "the critical issue in this case." Appellant's Br. at 19. Indeed, no witness testified either to seeing Stott dressed in denim on the day of the incident or to seeing Stott drive the truck that day. To tie Stott to the charged offenses, the State instead relied on the following: (1) police-radio traffic from after the traffic stop, in which anonymous witnesses relayed information to law enforcement; (2) Officer Augustinovicz's cellphone photographs of McDonald's surveillance footage; and (3) a cellphone, which officers found in the truck, that had the same phone number as a cellphone later recovered from Stott's person.

[17] Stott challenges the admission of the first two pieces of evidence. Specifically, he argues that the police-radio traffic—the only direct evidence that a man wearing denim ran from the crash scene—is inadmissible hearsay to which no exception applied. And he argues that the surveillance-footage photographs—the only direct evidence used to identify Stott as the man in the all-denim outfit—lacked sufficient authentication.

[18] We address Stott's claims in turn and determine whether admitting the challenged evidence was an abuse of the trial court's discretion. Deciding that it

was, we then apply harmless-error analysis to the erroneously admitted evidence. And because we conclude that its admission was not harmless error, we reverse and remand.[1]

I. The trial court erred when it admitted into evidence an audio recording of police-radio traffic.

[19] Before trial, Stott's counsel and the State argued over the admissibility of an audio recording of police-radio traffic that began after the truck fled the traffic stop.[2] The recording includes statements by responding officers and their recitation of information from unidentified civilian witnesses. *See* Ex. Vol. at 58, 60–65.[3] The trial court determined that the State could use this evidence in part for identification purposes. *See* Supp. Tr. pp. 68, 70.[4] And then, at trial, the court admitted the recording into evidence over Stott's objection. Stott maintains this decision was an abuse of the court's discretion, arguing that the "statements by officers relaying information provided by unidentified

---

[1] As noted in the introduction, Stott and the State agree that the two resisting-law-enforcement convictions violate the prohibition against double jeopardy. Appellant's Br. at 47–48; Appellee's Br. at 32–35. While we too agree with both parties—though the State's analysis is more accurate—we need not remand for the trial court to vacate the misdemeanor conviction because we reverse and remand on all counts.

[2] The State also admitted a recording of police-radio traffic from earlier in the incident, *see* Ex. Vol. at 9, 11–19, but Stott does not challenge the admissibility of that evidence.

[3] The court also admitted a transcript of the recording "for demonstrative purposes." Tr. Vol. III, p. 88.

[4] The trial court, however, cautioned the State that it could not use the police-radio traffic "for truth of the matter." Supp. Tr. p. 70. Yet, that is exactly how the State used this evidence—to show that a man wearing denim, who the State alleged was Stott, fled the crash scene. *See* Tr. Vol. III, pp. 249–50; Tr. Vol. IV, p. 20.

individuals . . . . is classic hearsay within hearsay for which no exception applies." Appellant's Br. at 23. On the unique facts of this case, we agree.[5]

[20] Hearsay is an out-of-court statement used to prove the truth of the matter asserted, Ind. Evidence Rule 801(c), and is generally not admissible at trial unless it falls under a hearsay exception, Evid. R. 802. The police-radio recording here involves two layers of hearsay: (1) statements from anonymous witnesses to police officers; and (2) the officers' recitation of those statements. Multiple levels of hearsay are admissible so long as "each part of the combined statements conforms with an exception." Evid. R. 805.

[21] The State, which bears the burden to establish the recording's admissibility, maintains that "[t]he statements on the radio traffic qualify under the 'present sense impression exception' to the hearsay rule." Appellee's Br. at 15. A present sense impression is a "statement describing or explaining an event, condition or transaction, made while or immediately after the declarant perceived it." Evid.

---

[5] Stott also asserts that admitting the police-radio traffic violates his constitutional right of confrontation, contending that the anonymous witnesses' statements were "testimonial," the witnesses "were not subject to cross-examination," and the witnesses "were not proven to be unavailable." Appellant's Br. at 34; *see also* Supp. Tr. pp. 66–67. Though Stott is correct on the latter two points, admission of this evidence did not violate his confrontation right because the witnesses' statements were not testimonial—their primary purpose was to assist police in addressing an ongoing emergency. *See Michigan v. Bryant*, 562 U.S. 344, 370 (2011). The statements were made sometime after the truck struck a tree and potentially armed suspects fled the wrecked vehicle. And notably, this incident occurred between the "day shift and middle shift transition period," so "there was actually very few officers out there at the time." Tr. Vol. III, p. 191. In arguing these circumstances did not present an "ongoing emergency," Stott notes that law enforcement decided not to lock down a nearby school. Appellant's Br. at 33. But Stott mischaracterizes the evidence. The reason officers did not "lockdown" the school was not due to the lack of an ongoing emergency, but because the school fell "outside of [their] perimeter." Ex. Vol. at 64. For these reasons, the heightened harmless-error standard does not apply to the admission of the police-radio traffic.

R. 803(1). This hearsay exception "is based on the assumption that the lack of time for deliberation provides reliability." *Hurt*, 151 N.E.3d at 814 (quoting *Mack v. State*, 23 N.E.3d 742, 755 (Ind. Ct. App. 2014), *trans. denied*). To qualify as present sense impressions, statements need to satisfy three requirements: (1) they must describe or explain an event, condition, or transaction; (2) they must be made during or immediately after the event, condition, or transaction; and (3) they must be based on the declarant's personal perception of the event, condition, or transaction. *See id.* Applying these requirements to the first layer of hearsay here, the statements to police must: describe or explain what the witness saw after the truck struck the tree; been made during or immediately after the event described; and be based on the witness's personal observation of that event. The State has failed to demonstrate that the second or third requirements are satisfied.

[22] The witnesses' statements to police officers in the recording are not present sense impressions because the State has not established contemporaneity between the events perceived and the declarations about those events. The recording begins when the truck fled the traffic stop and lasts approximately twelve minutes. Importantly, however, the relay of information did not occur within a twelve-minute timeframe. Officer Reetz confirmed that the radio traffic was not a "constant communication." Tr. Vol. III, p. 90; *see also* Tr. Vol. II, p. 217. And at one point an officer relays information from a witness but says "that was about twenty minutes ago." Ex. Vol. at 64.; *cf. State ex rel. J.A.*, 949 A.2d 790, 798 (N.J. 2008) (collecting cases in recognizing that "case law from

other jurisdictions suggests that a delay measured in minutes will take a statement outside of the present sense impression hearsay exception"). In short, we are unable to ascertain when the witnesses' statements were made and whether those declarations were made in temporal proximity to the events described. The State therefore has not established that the information was relayed "while or immediately after the declarant perceived" the event.

[23] The recording also reveals that enough time elapsed for reflective thought. *See United States v. Boyce*, 742 F.3d 792, 797–98 (7th Cir. 2014) (recognizing that a "statement must also be made without calculated narration to qualify under the present sense impression exception"). For example, early in the recording an officer relays information from a witness that one of the men fleeing the truck was "a white male." Ex. Vol. at 61. But that officer later says, "They're all saying black male now. The first person told me it was a white male, but not sure." *Id.* at 63.

[24] Aside from the issue of when the statements were made in relation to the events described, it is also not apparent whether the anonymous witnesses personally observed those events. *See Davis v. Garrett*, 887 N.E.2d 942, 947 (Ind. Ct. App. 2008) (observing that "assertions regarding events not contemporaneously perceived do not satisfy the exception"), *trans. denied*. As an example, in a statement relied on by the State to implicate Stott, an officer transmits, "Witness says a black male, jean jacket, black jeans ran Northbound on the (Inaudible)." Ex. Vol. at 61. Yet not only do we not know when this information was relayed, it is unclear whether the witness personally saw the

man flee, whether the witness received that information from another source, or whether the witness was making a conjecture. Simply put, the anonymous witnesses' statements alone do not establish firsthand knowledge.

[25] In short, the State has not established that the first layer of hearsay in the police-radio recording meets the requirements for the present sense impression exception to the rule against hearsay.[6] It is unclear whether the witnesses made the statements to police during or immediately after the events described or whether the witnesses personally perceived those events. And at least one anonymous declarant had time to deliberate. These circumstances distinguish the police-radio evidence here from the properly admitted hearsay evidence in the cases relied on by the State. *Cf.* *Amos v. State*, 896 N.E.2d 1163, 1169 (Ind. Ct. App. 2008) (declarant perceived the event and there was "proximity in time" between the event and its description), *trans. denied*; *Palacios v. State*, 926 N.E.2d 1026, 1032 (Ind. Ct. App. 2010) (contemporaneity and "little possibility" of inaccuracy); *Truax v. State*, 856 N.E.2d 116, 125 (Ind. Ct. App. 2006) (same). We therefore conclude that the audio recording of police-radio traffic from when the truck fled the traffic stop is not admissible under the present sense impression exception. And because the State has not established

[6] We thus need not examine the second layer of hearsay—the officers reiterating what the anonymous declarants said. At the same time, we acknowledge Stott's assertion that "a conversation is not an event" for present sense impression purposes. Reply Br. at 6. But we direct him to *Amos v. State* where a panel of this court found "that the event being described or explained was a cell phone conversation" between two people. 896 N.E.2d 1163, 1168 (Ind. Ct. App. 2008), *trans. denied*.

that the recording is admissible under a different hearsay exception,[7] the trial court erred when it admitted the recording into evidence. We now turn to Stott's other evidentiary challenge.

II. The trial court erred when it admitted into evidence cell-phone photographs of a restaurant's surveillance footage.

[26] As noted above, the only direct evidence identifying Stott as the all-denim-wearing driver of the Dodge Ram was testimony in direct reference to Officer Augustinovicz's cell-phone photographs of McDonald's security-camera footage from the day of the incident. Both before and at trial, the court overruled Stott's objections to admission of the photographs, finding the evidence admissible under the silent-witness theory, which we discuss below. Stott maintains the court's decision was an abuse of discretion, arguing "the State failed to present sufficient evidence to authenticate" the photos. Appellant's Br. at 38. The State's response is twofold. It first asserts that the photographs do "not fall under the silent witness theory." Appellee's Br. at 26. But the State then contends that "[e]ven if this evidence was governed by the silent witness theory," there was sufficient authentication. *Id.* at 27. We begin by addressing whether this is a "silent-witness" case and then determine whether the trial court erred in admitting the photographs.

---

[7] Though the State on appeal only argues that the exhibits were admissible under the present sense impression exception, we agree with Stott—for the reasons provided in his briefs—that the recording neither falls under the exception for excited utterances, nor is it admissible as course-of-investigation evidence. *See* Appellant's Br. at 28–29; Reply Br. at 11.

A. The silent-witness theory governs the photographs' admissibility.

[27] The foundation necessary for admitting a photograph at trial depends on how it will be used. *Knapp v. State*, 9 N.E.3d 1274, 1282 (Ind. 2014). When photographs are introduced as demonstrative aids to assist in the presentation and interpretation of evidence, the only requirement is testimony that the photographs accurately depict the scene or occurrence as it appeared at the time in question. *Id.* But when photographs are admitted for substantive purposes as "silent witnesses" to the activity being depicted, the foundational requirements are "vastly different." *Id.* Under the silent-witness theory of admission, there must be "a strong showing of authenticity and competency, including proof that the evidence was not altered." *McCallister v. State*, 91 N.E.3d 554, 561–62 (Ind. 2018).

[28] The State maintains that it did not need "to satisfy the 'silent witness' authentication requirements" for Officer Augustinovicz's cell-phone photographs of the McDonald's surveillance footage, noting that neither the actual video recording nor images extracted from that recording were admitted into evidence. Appellee's Br. at 25–26. So, because the officer "personally watched the video and he personally took the photographs," the State argues that "this was not a 'silent witness' case." *Id.* at 26–27.

[29] Though we acknowledge the logic in the State's argument, accepting its position would require us to ignore the reality of what Officer Augustinovicz's photographs intend to portray: people inside a McDonald's restaurant at a specific time on a specific day. And the State used those photographs as

substantive evidence to identify Stott as the man wearing an all-denim outfit on the day of the incident. *See* Supp. Tr. p. 35, Vol. III, pp. 19, 198, 201–02, 242–43. What matters for foundational purposes is that no testifying witness was inside the McDonald's to observe the scene the photographs depict. The same is true of the actual surveillance footage; it captured a scene that no testifying witness was there to observe. Therefore, in this context, we see no practical difference between photographs of the footage and still-images extracted from the footage—both depict a scene that was not observed by any testifying witnesses. We refuse to elevate form over substance and in turn conclude that the silent-witness theory provides an adequate framework for evaluating the photographs' admissibility.[8]

[30] In reaching this conclusion, we find *Wise v. State*, 26 N.E.3d 137 (Ind. Ct. App. 2015), *trans. denied*, instructive. There, a wife used a handheld video camera to record playback of videos on her husband's cellphone. *Id.* at 142. In addressing the admissibility of the wife's recordings, a panel of this court acknowledged that the silent-witness theory was "not an especially neat fit" because the facts did "not present the kind of automated, unwitnessed video" contemplated by other Indiana decisions applying the theory. *Id.* Yet the court observed that the

---

[8] We disagree with the State's assertion that "this case is controlled by *Pritchard v. State*, 810 N.E.2d 758, 760–61 (Ind. Ct. App. 2004)." Appellee's Br. at 27. In that case, a panel of this court found the silent-witness theory inapplicable because "the video recording . . . was never admitted" and two witnesses who saw the video could "testify to things that are within their personal knowledge, such as what the video recording showed." *Pritchard*, 810 N.E.2d at 760 n.3. But here, unlike in *Pritchard*, the photographs of the footage were admitted into evidence. And, importantly, the two officers identified Stott as the man wearing all-denim only while also viewing those images. *See* Tr. Vol. III, pp. 19, 201–02.

foundational "aspects of the theory are largely on all-fours with the nature of the" wife's recordings. *Id.* Accordingly, the panel evaluated the admissibility of the wife's recordings under the silent-witness theory. *Id.* We conclude that the *Wise* panel's reasoning likewise applies to the photographs of the surveillance footage here. As a result, those photographs—used for substantive purposes to identify Stott—were properly admitted only if the State satisfied the requirements of the silent-witness theory.

a. The State did not satisfy the silent-witness theory's requirements.

[31] For the photographs to be admissible under the silent-witness theory, there must be adequate proof of the reliability of the process that produced what the photographs intend to depict, including proof that the evidence was not altered. *See McCallister*, 91 N.E.3d at 561–62; *McFall v. State*, 71 N.E.3d 383, 388 (Ind. Ct. App. 2017). While we acknowledge that the circumstances in this case are unique, a survey of Indiana caselaw applying the silent-witness theory demonstrates that the State failed to meet the theory's requirements here.

[32] The cases addressing surveillance footage or images derived from that footage under the silent-witness theory establish that the evidence may be admissible when there is testimony from someone with knowledge on the security system that produced the video or image, on the integrity of the system's process, and on whether video or image was altered. For example, in *McCallister v. State*, our supreme court found that testimony from a hotel manager authenticated "a DVD purporting to show surveillance video" of a hotel lobby by describing how

the security system operated, by verifying the accuracy of the time-and-date stamp on the footage, and by indicating that the video showed what it purported to show. 91 N.E.3d at 561–62. Similarly, in *Flowers v. State*, the security director for a company that owned an apartment complex authenticated surveillance footage from the complex as well as several images derived from that footage "in several important respects." 154 N.E.3d 854, 869–70 (Ind. Ct. App. 2020). The director's testimony established that he was intimately familiar with the type of system in place, including how it worked, where the cameras were placed, and how the cameras operated. *Id.* at 869–70. He also accessed the footage multiple times and signed and dated the DVD to which the video had been saved. *Id.* at 870. Likewise, in *Rogers v. State*, a CVS supervisor authenticated surveillance footage and images derived from that footage through extensive testimony "regarding CVS's security system and the procedure he used to view, copy, and edit the footage." 902 N.E.2d 871, 877 (Ind. Ct. App. 2009).

[33] Unlike the circumstances in *McCallister*, *Flowers*, or *Rogers*, the State here did not produce any evidence about the McDonald's security system or how it operated.[9] Officer Augustinovicz, the sponsoring witness, had no knowledge of

[9] Other silent-witness theory cases from both this court and our supreme court require similar evidence from someone with knowledge. *See, e.g.*, *McHenry v. State*, 820 N.E.2d 124, 128 (Ind. 2005); *Kindred v. State*, 524 N.E.2d 279, 298–99 (Ind. 1988); *Stark v. State*, 489 N.E.2d 43, 45, 47 (Ind. 1986); *Smith v. State*, 491 N.E.2d 193, 196 (Ind. 1986); *Groves v. State*, 456 N.E.2d 720, 722–23 (Ind. 1983); *Torres v. State*, 442 N.E.2d 1021, 1025 (Ind. 1982); *McFall*, 71 N.E.3d at 388, *Sheckles v. State*, 24 N.E.3d 978, 987 (Ind. Ct. App. 2015), *trans. denied*; *Mays v. State*, 907 N.E.2d 128, 131–32 (Ind. Ct. App. 2009), *trans. denied*.

McDonald's security system, exercised no control over the recording process, and could not attest to the accuracy of the footage. Tr. p. 212. Further, the State failed to produce any evidence that the surveillance footage had not been altered before it was reviewed by Officer Augustinovicz—the day after the incident.

[34] It is no secret that it is increasingly easier in today's digital age to manipulate or distort images. *See, e.g.*, 2 McCormick on Evid. § 215 n.17 (8th ed. 2020). Without suggesting any malfeasance in this case, we reiterate that it is the proponent's burden to establish the strong showing of authenticity and competency for the admissibility of photographs used as substantive evidence under the silent-witness theory. The State did not do so here. And thus, the trial court abused its discretion in admitting the cell-phone photographs of the surveillance-footage.

[35] Having determined that the trial court erred in admitting both the recording of police-radio traffic and the surveillance-footage photographs, we now determine whether those errors were harmless.

III. Admitting the improper evidence was not harmless error.

[36] Errors in admitting evidence are harmless if the conviction is supported by independent evidence of guilt such that we are satisfied there is no substantial likelihood the erroneously admitted evidence contributed to the jury's verdict. *See, e.g., Lafayette v. State*, 917 N.E.2d 660, 666 (Ind. 2009). On the other hand, evidentiary errors may not be harmless if the record discloses that the

improperly admitted evidence likely had a prejudicial impact on the jury. *See, e.g.*, *Chapman v. State*, 141 N.E.3d 881, 887 (Ind. Ct. App. 2020).

[37] On these unique facts, the erroneous admission of the audio recording and the surveillance-footage photographs was not harmless error. We acknowledge that the jury was presented with independent evidence from which it could reasonably infer that a man dressed in an all-denim outfit drove the Dodge Ram on the day of the incident. But without the erroneously admitted evidence, the only evidence identifying Stott as the man wearing the all-denim outfit is that the phone number associated with one of the cellphones recovered from the truck matched the phone number associated with the cellphone retrieved from Stott's person when he was arrested weeks later. While we agree with the State that this evidence leads to a "clear inference" that a cellphone found in the truck belonged to Stott, we cannot conclude that such an inference is "substantial evidence identifying [Stott] as the driver of the truck." Appellee's Br. at 31.[10]

[38] The State's reliance on the recording of police-radio traffic and the surveillance-footage photographs during closing arguments as well as actions by the jury further suggest that this erroneously admitted evidence contributed to the

---

[10] The State also relies on Officer Augustinovicz's testimony "that when he watched the video, he recognized the individual he saw in it as being Antwon Stott." Appellee's Br. at 30 (citing Tr. Vol. III, p. 201). It is true the officer testified that he received a picture in an email which he believed showed "the same person that [he] saw in . . . the video." Tr. Vol. III, p. 201. But each time Officer Augustinovicz identified Stott as the man wearing the denim outfit, the officer was presented with and specifically referring to the surveillance-footage photographs. *See id.* at 200–02. It is thus impractical to divorce his testimony from the photographs.

verdict. The State repeatedly referred to and relied on the recording and the photographs to identify Stott as the man in denim. *See* Tr. Vol. III, pp. 242–43, 245, Vol. IV 19–20. Then, during deliberations, a juror asked to see Stott's face, the jury informed the court that "it is difficult to identify [Stott] with his mask on versus the McDonald pictures," and the jury asked to review the photographs. Tr. Vol. IV, pp 27–28.

[39] For these reasons, we conclude that the erroneously admitted evidence likely had a prejudicial impact on the jury and contributed to its verdict. The errors were therefore not harmless, and Stott's convictions must be reversed.[11]

Conclusion

[40] The trial court erred in admitting a recording of police-radio traffic and in admitting an officer's cell-phone photographs of restaurant surveillance-footage. Because those errors were not harmless, we reverse and remand for proceedings consistent with this opinion.

[41] Reversed and remanded.

Crone, J., concurs.

---

[11] While the State can retry Stott, we note that the Indiana Department of Correction Offender Database indicates that Stott's earliest release date on these charges was July 21, 2021. So, whether the State decides to pursue a new trial, it appears that Stott may no longer be incarcerated when this opinion is handed down. We would like to remind Stott of his comments to the trial court at sentencing that he "turned over a new leaf" while incarcerated and that he desires "to be a positive member to society as soon as possible." Tr. Vol. IV, p. 70. We sincerely hope that Stott has indeed turned over a new leaf, and we encourage him to realize his expressed desire going forward.

Riley, J., concurs in result without opinion.