MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brandon Allen Scott,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 29, 2023

Court of Appeals Case No. 22A-CR-1966

Appeal from the Clark Circuit Court

The Honorable Vicki L. Carmichael, Judge

Trial Court Cause No. 10C04-2111-F5-274

Memorandum Decision by Judge Bailey
Judges Brown and Weissmann concur.

Bailey, Judge.

Case Summary

[1] Brandon Scott appeals his conviction for domestic battery, as a Level 5 felony;[1] his adjudication as a habitual offender;[2] and his corresponding sentence. We affirm.

Issues

[2] Scott raises three issues for our review:

1. Whether the trial court abused its discretion when it admitted certain evidence.

2. Whether the trial court abused its discretion when it denied Scott's motion for a continuance.

3. Whether Scott's sentence is inappropriate in light of the nature of the offense and his character.

Facts and Procedural History

[3] At 5:43 p.m. on November 9, 2021, E.B.'s son called 9-1-1 to report a "physical disturbance" at E.B.'s home. Tr. Vol. 2 at 198. Officers with the Jeffersonville Police Department responded to the call. Corporal Alyssa Wright arrived at E.B.'s home at 5:47 p.m. When she arrived, Corporal Wright spoke with E.B.,

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[1] Ind. Code § 35-42-2-1.3(c)(1) (2022).

[2] I.C. § 35-50-2-8.

and she was able to observe that E.B. had "marks to the left side of her face," which were red and "swollen." *Id*. at 203. E.B. stated that Scott, who was her boyfriend, "had battered her." *Id*. at 208.

[4] In particular, E.B. informed Corporal Wright that she and Scott had "been in a verbal argument all day" and that she had attempted to call Scott's mother because she was "afraid that things would escalate[.]" *Id*. E.B. further reported that, while she was making the call, Scott tried to take the phone away and then "started to punch her with a closed fist to the left side of her face." *Id*. E.B. indicated to Corporal Wright that she was afraid her jaw was broken, so officers called an ambulance.

[5] E.B. presented to the hospital with an "anterior left neck hematoma after being punched by boyfriend." Ex. Vol. 4 at 15. Doctors determined that E.B.'s jaw was broken. As a result, E.B. had to have surgery to have a metal plate implanted in her jaw. Following the surgery, doctors "rubber-banded" E.B.'s mouth shut for seven days. Tr. Vol. 3 at 33. Thereafter, E.B. had "serious pain." *Id*. at 35.

[6] The State charged Scott with domestic battery, as a Level 5 felony, and domestic battery, as a Level 6 felony.[3] The State also alleged that Scott was a

[3] I.C. § 35-42-2-1.3(b).

habitual offender. The court then held a bifurcated jury trial.[4] On the first day of trial, the parties empaneled a jury and gave their opening statements but did not present any evidence. After the court had recessed for the night, the court received information that the parties had entered into a plea agreement. On the morning of the second day of trial, outside the presence of the jury, the court informed the parties that the Sheriff's Department had provided the court with 184 pages of text messages between Scott and E.B., which messages violated a no-contact order. As such, the court did not accept the plea agreement. The court then recessed in order to give the parties a chance to review the text messages.

[7] After the recess, Scott moved for a one-day continuance to have more time to review the new material. Because the jury was already present, the court allowed the State to present the testimony of two officers and delayed ruling on the motion for a continuance. The State then presented the testimony of Corporal Wright, who began to testify about the statements E.B. had made to her. Scott objected on the ground that E.B.'s statements were hearsay. The State responded that E.B.'s statements to Corporal Wright were admissible because they fell under the excited utterance exception to the rule against hearsay. The court agreed and overruled Scott's objection. Corporal Wright then testified about the statements E.B. had made to her.

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[4] Scott indicated to the court that he did not wish to be present for his trial. After waiving his right to be present, the court proceeded with the trial in his absence, but he remained represented by counsel.

[8] During Corporal Wright's testimony, the court recessed and held a hearing outside the presence of the jury during which the parties discussed the admissibility of Corporal Wright's body camera footage. After watching the video, the court allowed the State to present it as evidence. Also during that hearing, Scott again asked about the one-day continuance. The State responded that Scott had "placed himself in this situation" by violating the no-contact order, and the State agreed to limit its evidence to eight pages of text messages and one phone call. Tr. Vol. 2 at 222. The court then noted that one of the State's remaining witnesses, Chief Deputy Scott Maples, was only available to testify that day. The court then stated that it understood Scott's "predicament," but agreed that Scott had placed himself in that position. *Id*. at 223. Accordingly, the court denied Scott's motion. After the court reconvened, Corporal Wright resumed her testimony, and the State had admitted as evidence her body camera footage over Scott's objection.

[9] The State then presented the testimony of Deputy Maples, who maintains the records for the Clark County Sheriff's Department. Deputy Maples testified about the text messaging system that inmates can use to communicate with individuals outside of the jail. During his testimony, the State moved to admit six pages of text messages between Scott and E.B., which the court admitted over Scott's objection. In one outgoing message from Scott to E.B., Scott stated: "Just keep saying u dont remember[.]" Ex. Vol. 4 at 123 (errors in original). And in another message to E.B., Scott texted: "Let[']s just try to stick to our story[.] *Id.*

[10] The State also called E.B. as a witness. E.B. testified that she did not remember what had happened to her jaw, but she acknowledged that it had been broken. She also testified that, as of the date of the trial, she continued to "have issues" with her jaw. *Id*. at 34. And she testified that Scott was her boyfriend on the day her jaw was broken and that he continued to be her boyfriend.

[11] Following the first phase of the trial, the jury found Scott guilty of domestic battery, as a Level 5 felony, but not guilty of domestic battery, as a Level 6 felony. And, following the second phase, the jury found that Scott was a habitual offender. At an ensuing sentencing hearing, the court identified as aggravating factors Scott's criminal history, his past probation violation, and that he had violated a protective order. The court identified as a mitigator Scott's family support. The court determined that the aggravators outweighed the mitigator and sentenced Scott to six years imprisonment on the Level 5 felony, with two years suspended, which the court enhanced by four years for the habitual offender adjudication. This appeal ensued.

Discussion and Decision

Issue One: Admission of Evidence

[12] Scott first contends that the trial court abused its discretion when it admitted Corporal Wright's testimony and body camera footage as evidence. As our Supreme Court has stated:

> Generally, a trial court's ruling on the admission of evidence is accorded "a great deal of deference" on appeal. *Tynes v. State*,

> 650 N.E.2d 685, 687 (Ind. 1995). "Because the trial court is best able to weigh the evidence and assess witness credibility, we review its rulings on admissibility for abuse of discretion" and only reverse "if a ruling is 'clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights.'" *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014) (quoting *Clark v. State*, 994 N.E.2d 252, 260 (Ind. 2013)).

Hall v. State, 36 N.E.3d 459, 466 (Ind. 2015).

[13] On appeal, Scott specifically contends that the trial court abused its discretion when it admitted that evidence because both Corporal Wright and the body camera footage contained hearsay. "Hearsay is an out-of-court statement used to prove the truth of the matter asserted." *Hurt v. State*, 151 N.E.3d 809, 813 (Ind. Ct. App. 2020) (citing Ind. Evid. R. 801(c)). "Hearsay is inadmissible unless it falls under a hearsay exception." *Id*. (citing *Teague v. State*, 978 N.E.2d 1183, 1187 (Ind. Ct. App. 2012); Ind. Evid. R. 802).

[14] Here, during Scott's trial, the State questioned Corporal Wright about the statements E.B. had made to her at the scene. In particular, the State asked Corporal Wright about what had occurred, and Corporal Wright testified that E.B. stated that Scott had punched her in the jaw. And the State had admitted as evidence the body camera footage that also included the statements E.B. had made to Corporal Wright. Scott asserts that those statements were hearsay, which the State does not dispute. However, the State contends that the trial court properly admitted those statements because they fall into an exception to the rule against hearsay. We must agree with the State.

[15] One exception to the rule against hearsay is an excited utterance. Ind. Evid. Rule 803(2). As our Court has stated:

> "A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused" is not excluded by the hearsay rule, even if the declarant is available as a witness. Ind. Evidence Rule 803(2). A hearsay statement may be admitted as an excited utterance where: (1) a startling event has occurred; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event. *Boatner v. State*, 934 N.E.2d 184, 186-87 (Ind. Ct. App. 2010). "This is not a mechanical test, and the admissibility of an allegedly excited utterance turns on whether the statement was inherently reliable because the witness was under the stress of the event and unlikely to make deliberate falsifications." *Id*. at 186. "The heart of the inquiry is whether the declarant was incapable of thoughtful reflection." *Id*. While the amount of time that has passed is not dispositive, "a statement that is made long after the startling event is usually less likely to be an excited utterance." *Id*.

Hurt v. State, 151 N.E.3d 809, 813-14 (Ind. Ct. App. 2020).

[16] Scott does not dispute that there was a startling event or that E.B.'s statements related to the startling event. But Scott contends that "there was no basis for the court to find that [E.B.'s] statements were made while under the stress of excitement caused by the events at issue[.]" Appellant's Br. at 15. In particular, Scott contends that, while there was "some testimony about the *time* of the 911 call," there was "absolutely no evidence to establish *what time* [E.B.] was injured on the day in question." *Id*. (emphases in original). As such, Scott

maintains that "there was no evidence that [E.B.] was under the stress of excitement when she made her statement to Corporal Wright." *Id.* at 18.

[17] We acknowledge that the evidence does not demonstrate the exact time that E.B. was battered. However, E.B.'s son called 9-1-1 at 5:43 p.m., and Corporal Wright arrived at E.B.'s house only four minutes later. Corporal Wright was able to observe that E.B. had "red marks" on her face, which were "swollen." Tr. Vol. 2 at 203. And E.B. informed Corporal Wright that she believed that her jaw was broken. Then, at the hospital, E.B. reported that the pain in her jaw was a "10." Ex. Vol. 4 at 49. In other words, the evidence demonstrates that E.B.'s son called 9-1-1, Corporal Wright responded within four minutes and observed E.B. with redness and swelling on her face, and E.B. went to the hospital where she reported extreme pain.

[18] It is reasonable to conclude that E.B.'s son would not have delayed calling 9-1-1 after his mother was punched in the jaw and that E.B. would not have delayed seeking treatment for a broken jaw and the extreme pain associated with that. Thus, the trial court could reasonably infer that the battery had occurred shortly before Corporal Wright arrived at E.B.'s house, at which point E.B. informed Corporal Wright that Scott had battered her. And while E.B. might not have displayed any erratic behavior, she indicated to Corporal Wright that she did not feel "safe" in her home that night. Tr. Vol. 2 at 214. It was therefore reasonable for the court to conclude that E.B. was under the stress of having her jaw broken by her boyfriend when she made the statements to Corporal Wright. Accordingly, we hold that E.B.'s statements to Corporal Wright fall into the

excited utterance exception to the rule against hearsay and, therefore, that the court did not abuse its discretion when it admitted Corporal Wright's testimony or body camera footage as evidence.

Issue Two: Motion to Continue

[19] Scott next contends that the court abused its discretion when it denied his motion for a one-day continuance, which he requested to have more time to review the newly produced text messages and phone calls between Scott and E.B. "When, as here, a defendant moves for a continuance not required by statute, we review the court's decision to deny the request for an abuse of discretion." *Ramirez v. State*, 186 N.E.3d 89, 96 (Ind. 2022). Whether the court abused its discretion is a two-step inquiry. *See id*. We first determine whether the trial court properly evaluated and compared the parties' diverse interests that would be impacted by altering the schedule. *Id*. If not, we assess whether the court's denial resulted in prejudice. *Id*. Further, we "will not conclude that the trial court abused its discretion unless the defendant can demonstrate prejudice as a result of the trial court's denial of the motion for a continuance." *Washington v. State*, 902 N.E.2d 280, 286 (Ind. Ct. App. 2009). "A defendant can establish prejudice by making specific showings as to why additional time was necessary and how it would have benefitted the defense." *Ramirez*, 186 N.E.3d at 96.

[20] Here, Scott contends that the court abused its discretion when it denied his motion to continue because the court "did not properly evaluate and compare the parties' interests." Appellant's Br. at 12. Specifically, he asserts that, while

the State limited its evidence to eight pages of text messages, he did not have "enough time to review and evaluate the remaining messages to determine if some of them might benefit" him. *Id.* And he contends that his interests "heavily outweighed" the State's interest in having the trial that day to accommodate Deputy Maples' schedule. *Id.* In addition, Scott asserts that he was prejudiced by the denial of the continuance because the "messages and recordings undermined the whole theory of Scott's defense," which was that the State could not meet its burden of proof if E.B. did not remember the offense. *Id.* at 22.

[21] First, we note that the court heard argument from both parties regarding their interest in an altered scheduled and then balanced those respective arguments. In particular, after Scott argued to the court that he needed additional time to review the text messages, the court stated that it understood Scott's "predicament[.]" Tr. Vol. 2 at 223. But the court also noted that the jury had already been empaneled and present since 8:30 that morning and that Deputy Maples—the custodian of the text message records—was unavailable the next day because he was leaving for a work-related trip. In addition, the State agreed to limit its proposed evidence to eight pages. And the court recessed, albeit for an undisclosed amount of time, in order to give the parties time to review the texts. As such, the court considered the parties' competing interests, including the limited availability of the State's witness who could authenticate the text messages, and determined that the State's interests outweighed those of Scott.

[22] In any event, even if the court did not properly weigh the parties' respective interests, Scott has not shown that he was prejudiced by the court's denial of his motion. There is nothing in the six pages of text messages that the State had admitted that has any tendency to show that Scott was not guilty of having battered E.B. *See* Ex. Vol. 4 at 122-127. As for Scott's argument that the texts undermined his defense theory, we acknowledge that the texts appear to show that Scott attempted to convince E.B. not to talk. Indeed, Scott told E.B. to "stick to our story" and to just "keep saying u dont remember." *Id*. at 223 (errors in original).

[23] However, Scott thoroughly questioned E.B. about the content of those messages and elicited testimony from E.B. to explain why she could not remember the offense. Specifically, E.B. testified that she was in an accident twenty years ago during which she sustained a head injury and has lasting memory issues. And she testified that Scott "has not said anything" to her that would impact her testimony. Tr. Vol. 3 at 63. We further note that, to the extent Scott contends there could have been something in the remaining pages of text messages that the State did not admit as evidence that could have aided his defense, Scott has not provided any of those additional texts in his record on appeal, nor does he make any argument as to what those additional texts said or how they would have helped his defense.

[24] Here, the State presented the testimony and body camera footage of Corporal Wright, which both showed that E.B. reported that Scott had battered her. In addition, the State admitted E.B.'s medical records as evidence, which provide

no fewer than eight times that Scott had caused E.B.'s injuries. *See, e.g.,* Ex. Vol. 4 at 15 (stating that E.B. reported to the hospital with injuries to her neck "after being punched by boyfriend"); *see also id*. at 48 (stating that E.B. was "hit in left side of jaw by significant other"). And there is no dispute that Scott was E.B.'s boyfriend at the time of the offense.

[25] Based on the strong evidence of Scott's guilt, the lack of exculpatory evidence in the six pages of text messages admitted by the State, and his failure to provide any of the remaining text messages, we cannot say that Scott was prejudiced by the court's denial of his motion for a continuance. Stated differently, Scott has not made a specific showing as to why additional time was necessary or how it would have benefited his defense. *Ramirez*, 186 N.E.3d at 96. We therefore hold that Scott has not demonstrated any prejudice in the court's denial of his motion for a continuance.

Issue Three: Appropriateness of Sentence

[26] Finally, Scott alleges that his sentence is inappropriate in light of the nature of the offense and his character. Indiana Appellate Rule 7(B) provides that "[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." This Court has recently held that "[t]he advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed." *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017). And the Indiana Supreme Court has recently explained that:

> The principal role of appellate review should be to attempt to leaven the outliers . . . but not achieve a perceived "correct" result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Defendant has the burden to persuade us that the sentence imposed by the trial court is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind.), as amended (July 10, 2007), *decision clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

Shoun v. State, 67 N.E.3d 635, 642 (Ind. 2017) (omission in original).

[27] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. Whether we regard a sentence as inappropriate at the end of the day turns on "our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case." *Id*. at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[28] The sentencing range for a Level 5 felony is one year to six years, with an advisory sentence of three years. *See* Ind. Code § 35-50-2-6(b). And Scott faced a possible additional fixed term of two years to six years for his habitual

offender adjudication. *See* I.C. § 35-50-2-8(i)(2). At sentencing, the court identified as aggravators Scott's criminal history, that he had previously violated his probation, and that he had violated a protective order. And the court identified as a mitigator that Scott has family support. The court then found that the aggravators outweighed the mitigator and sentenced Scott to six years with two years suspended on the Level 5 felony conviction, which the court enhanced by four years for the habitual offender adjudication.

[29] On appeal, Scott contends that his sentence is inappropriate in light of the nature of the offense because E.B. requested leniency for Scott and because her request is a "significant factor casting the nature of the offense in a significantly less negative light[.]" Appellant's Br. at 26. And he maintains that his sentence is inappropriate in light of his character because he "was born to a fifteen-year-old mother and did not have a father in his life," he "has little education," and he "has suffered the trauma of incarceration and had mental health needs that have not been met." *Id*. at 27.

[30] However, Scott has not met his burden on appeal to demonstrate that his sentence is inappropriate. With respect to the nature of the offense, Scott punched his girlfriend in the jaw hard enough to break it. As a result, E.B. had to undergo surgery to have a metal plate implanted, and her mouth was "rubber-banded" shut for approximately seven days. Tr. Vol. 3 at 33. E.B. had "pretty serious pain," and she still had "issues" with her jaw as of the date of Scott's trial. *Id*. at 34-35. While we acknowledge that E.B. asked for leniency, Scott has not presented any evidence to show any restraint or regard on his

part. Scott has not presented compelling evidence portraying the nature of the offense in a positive light. *See Stephenson*, 29 N.E.3d at 122.

[31] As for his character, Scott has four prior misdemeanor convictions and four prior felony convictions. In addition, he has had his placement on probation revoked on one prior occasion. And, at the time of sentencing for the instant offense, Scott had six pending cases against him. Further, Scott has not obtained either a high school diploma or a GED, which reflects poorly on his character. We therefore cannot say that Scott's sentence is inappropriate in light of his character. We affirm Scott's sentence.

Conclusion

[32] The trial court did not abuse its discretion when it admitted the testimony of Corporal Wright or her body camera footage, which contained E.B.'s out-of-court statements, because E.B.'s statements fell within the excited utterance exception to the rule against hearsay. In addition, Scott has not demonstrated that he was prejudiced by the court's denial of his motion for a continuance. And Scott's sentence is not inappropriate in light of the nature of the offense and his character. We therefore affirm the trial court.

[33] Affirmed.

Brown, J., and Weissmann, J., concur.