

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Frederick Vaiana
Voyles Vaiana Lukemeyer Baldwin &
Webb
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Courtney Staton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Keith Bryant,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

July 8, 2022

Court of Appeals Case No.
21A-CR-2585

Appeal from the Marion Superior
Court

The Honorable Cynthia Oetjen,
Judge

Trial Court Cause No.
49D30-2106-F4-18367

Robb, Judge.

Case Summary and Issues

- [1] Keith Bryant was convicted of unlawful possession of a firearm by a serious violent felon, a Level 4 felony. Bryant now appeals, raising multiple issues for our review which we restate as: (1) whether the trial court erred by granting the State’s motion to amend the charging information; and (2) whether the trial court abused its discretion by admitting certain evidence. Concluding the trial court did not err by allowing the amendment and did not abuse its discretion by admitting certain evidence, we affirm.

Facts and Procedural History

- [2] On June 7, 2021, Detective Erika Jones of the Indianapolis Metropolitan Police Department was on Facebook when she came across Bryant’s Facebook page. Detective Jones saw a Facebook live video of Bryant, posted on May 28, at Indy Arms Company, Inc. (“Indy Arms Co.”), an indoor gun range. Neal Elijah Curd was tagged by Bryant in the Facebook live video. Bryant has a prior felony conviction under Cause Number 49G04-1703-F3-009036, Exhibits, Volume 1 at 20, and is therefore unable to legally possess a firearm. Detective Jones watched the Facebook live video, took notes of what she heard, and took still photographs of the Facebook live video (“Photographs”) with her cellphone. Detective Jones submitted a preservation request to Facebook attempting to “freeze [Bryant’s] account from anything being removed or deleted from the account.” Transcript of Evidence, Volume 2 at 118. However,

due to Bryant's Facebook account settings, his account did not store Facebook live videos so it could not be preserved.

[3] On June 15, 2021, the State charged Bryant with unlawful possession of a firearm by a serious violent felon, a Level 4 felony. The charging information alleged Bryant had previously been convicted of "Armed Robbery and/or Criminal Confinement in Marion County Superior Court Criminal Division Room 30 under cause 49D30-1703-F3-003036[.]" Appellant's Appendix, Volume II at 22. On September 26, 2021, the State moved to amend the charging information to change the cause number of Bryant's prior felony conviction from 49D30-1703-F3-003036 to 49G04-1703-F3-009036. The trial court granted the State's motion over Bryant's objection.

[4] Subsequently, Bryant filed a motion in limine seeking, in part, to preclude Detective Jones from testifying regarding the Facebook live video of Bryant at Indy Arms Co. and to preclude the State from admitting the Photographs. The trial court denied Bryant's motion in limine.

[5] At trial, Detective Jones testified that in the Facebook live video Bryant was speaking into the camera while holding a revolver and stated:

[W]e didn't rent nothing[.] We come with our own demo[.] We ain't rent sh*t[.] none of that[,] this is how we rock. Y'all ain't never seen one of those. Yeah, that's that miser.

Tr., Vol. 2 at 128. Bryant then grabbed two semi-automatic firearms, one in each hand, and stated again, "[W]e ain't rent sh*t, we don't rent sh*t, you feel

me, this how we comin'." *Id.* The Photographs were entered into evidence. *See* Ex., Vol. 1 at 7-13.

[6] The State also called Richard Cass, the owner of Indy Arms Co., to testify. Cass testified that when someone comes into the facility to shoot, they first must fill out a liability waiver. Cass also testified that upon completion of a firing session, customers receive an invoice and pay before leaving. Indy Arms Co. had a liability waiver from Bryant and an invoice for Curd both dated May 28.¹ The State then admitted surveillance footage from Indy Arms Co. showing Bryant's gun range session.

[7] Following a jury trial, Bryant was found guilty, and the trial court sentenced him to seven years to be executed in the Indiana Department of Correction. Bryant now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Amendment of the Charging Information

[8] Bryant argues the trial court erred in allowing the State to amend the charging information. However, Bryant has waived this argument. If a defendant believes that an amendment to the charging information is prejudicial, he must request a continuance to further evaluate and prepare his case in light of the

¹ The invoice indicates there was a second shooter with Curd.

amendment. *Wright v. State*, 690 N.E.2d 1098, 1104 (Ind. 1997). Failing to request a continuance results in waiver of the issue on appeal. *Haymaker v. State*, 667 N.E.2d 1113, 1114 (Ind. 1996).

[9] Waiver notwithstanding, Bryant would not prevail. “A charging information may be amended at various stages of a prosecution, depending on whether the amendment is to the form or to the substance of the original information.” *Erkins v. State*, 13 N.E.3d 400, 405 (Ind. 2014) (citation omitted), *cert. denied*, 574 U.S. 1087 (2015). Whether an amendment to a charging information is a matter of substance or form is a question of law, which we review de novo. *Id.*

[10] Under Indiana Code section 35-34-1-5(c), a charging information may be amended at any time “in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.” A defendant’s substantial rights “include a right to sufficient notice and an opportunity to be heard regarding the charge; and, if the amendment does not affect any particular defense or change the positions of either of the parties, it does not violate these rights.” *Erkins*, 13 N.E.3d at 405 (citation omitted). Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges. *Id.* at 405-06. “An amendment is one of form and not substance if a defense under the original information would be equally available after the amendment and the accused’s evidence would apply equally to the information in either form.” *Bennett v. State*, 5 N.E.3d 498, 514 (Ind. Ct. App. 2014) (citation omitted), *trans. denied*.

[11] Here, the State charged Bryant with unlawful possession of a firearm by a serious violent felon. The charging information stated that Bryant had previously been convicted of a felony under Cause Number 49D30-1703-F3-003036. However, this cause number was incorrect. The State then moved to amend the charging information to reflect that Bryant had actually been convicted of a felony under 49G04-1703-F3-009036. This change did not surprise Bryant with “a new factual allegation that he was unprepared to counter[.]” *Haak v. State*, 695 N.E.2d 944, 952 (Ind. 1998). Nor did the amendment cause Bryant to “lose any defenses or affect the application of his evidence to the crimes charged[.]” *Id.* Bryant was always aware that he had a previous felony conviction for armed robbery and/or criminal confinement.

[12] Therefore, the amendment was not one of substance, and it could be made at any time. Ind. Code § 35-34-1-5(c). Accordingly, the trial court did not err in allowing the State to amend the charging information.

II. Admission of Evidence

A. Standard of Review

[13] Bryant argues the trial court abused its discretion by admitting Detective Jones’ testimony and the Photographs. The trial court has broad discretion in ruling on the admissibility of evidence. *Small v. State*, 632 N.E.2d 779, 782 (Ind. Ct. App. 1994), *trans. denied*. We will disturb its ruling only upon a showing of abuse of that discretion. *Id.* An abuse of discretion may occur if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the

court, or if the court has misinterpreted the law. *Baxter v. State*, 734 N.E.2d 642, 645 (Ind. Ct. App. 2000). But even if a trial court abuses its discretion by admitting challenged evidence, we will not reverse the judgment if the admission of evidence constituted harmless error. *Sugg v. State*, 991 N.E.2d 601, 607 (Ind. Ct. App. 2013), *trans. denied*.

[14] Error in the admission of evidence is harmless if it does not affect the substantial rights of the defendant. *See McVey v. State*, 863 N.E.2d 434, 440 (Ind. Ct. App. 2007), *trans. denied*. In determining whether an evidentiary ruling has affected a defendant’s substantial rights, we assess the probable impact of the evidence on the factfinder. *Mathis v. State*, 859 N.E.2d 1275, 1280 (Ind. Ct. App. 2007).

B. Detective’s Testimony

[15] Bryant argues the trial court abused its discretion by “permitting Detective Jones to testify about a Facebook live video she observed . . . that was not discovered or viewed by Bryant[.]”² Appellant’s Brief at 18. We addressed a similar question in *Pritchard v. State*, 810 N.E.2d 758 (Ind. Ct. App. 2004). In *Pritchard*, two witnesses viewed a video recording of an alleged battery that occurred in cell block E-5 of the Hamilton County Jail and were asked to recount at trial what they witnessed on the recording. This court stated that “[f]or purposes of the admissibility of their testimony, this is no different than if

² Bryant does not challenge the Facebook live video on hearsay grounds.

they had been standing on cell block E-5 observing the incident.” *Pritchard*, 810 N.E.2d at 760. And witnesses may testify to things that are within their personal knowledge. *Id.*; Ind. Evidence Rule 602.

[16] Thus, Detective Jones’ testimony regarding the Facebook live video is no different than if she personally witnessed Bryant at Indy Arms Co. and pursuant to Indiana Evidence Rule 602, she is permitted to testify to things within her personal knowledge. Accordingly, we conclude the trial court did not abuse its discretion in admitting Detective Jones’ testimony.

C. Photographs

[17] Bryant also contends the trial court abused its discretion “by allowing still photographs of the Facebook live video into evidence[.]”³ Appellant’s Br. at 18. First, Bryant argues that the Photographs are inadmissible under Indiana Evidence Rule 1002. Generally, “[a]n original writing, recording, or photograph is required in order to prove its content[.]” Evid. R. 1002. However, a duplicate is admissible to the same extent as an original “unless a genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate.” Evid. R. 1003. Further, an original is not required, and other evidence of the content of a writing, recording, or

³ Bryant also argues the trial court’s admission of the Photographs violated Amendments V, VI, and XIV of the United States Constitution and Article 1, sections 12 and 13 of the Indiana Constitution. However, Bryant fails to present a cogent argument for these claims and therefore, he has waived them for appeal. *See Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) (noting that failure to present a cogent argument constitutes waiver of the issue for appellate review), *trans. denied*.

photograph is admissible if “all originals are lost or destroyed, and not by the proponent acting in bad faith[.]” Evid. R. 1004.

[18] Here, after watching the Facebook live video, Detective Jones submitted a preservation request to Facebook attempting to “freeze [Bryant’s] account from anything being removed or deleted from the account.” Tr., Vol. 2 at 118. However, due to Bryant’s Facebook account settings, his account did not store Facebook live videos so the original video could not be preserved. Thus, the original was lost due to no bad faith on the State’s part. We conclude the Photographs were admissible under Evidence Rule 1004(a).

[19] Bryant also argues the State failed to lay a foundation for admissibility of the Photographs under the silent witness theory. The “silent witness” theory permits the admission of photographs as substantive evidence, rather than merely as demonstrative evidence, as long as the photographic evidence is also relevant. *Wise v. State*, 26 N.E.3d 137, 141 (Ind. Ct. App. 2015), *trans. denied*. However, 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).

[20] Here, the Photographs were admitted as substantive evidence. Detective Jones testified that she viewed the Facebook live video posted on Bryant’s account showing him at Indy Arms Co. The Photographs include the Facebook URL,

display the caption, “Who got better aim Elijah Williamson [,]”⁴ and are dated May 28 at 12:47 p.m. Ex., Vol. I at 7-9. Detective Jones obtained records from Facebook that show Bryant posted a Facebook live video at the exact time and with the exact caption shown by the Photographs. *See id.* at 5-6.

[21] Further, there is no evidence the Photographs were altered in any way. *See Rogers v. State*, 902 N.E.2d 871, 877 (Ind. Ct. App. 2009) (finding that photographs derived from an original recording are merely duplicates and, absent evidence they were altered or changed, are admissible and conformed to requirements of silent witness theory). We conclude the State laid a sufficient foundation establishing the Photographs’ authenticity and the trial court could determine the Photographs were authentic “to a relative certainty.” *Knapp v. State*, 9 N.E.3d 1274, 1282 (Ind. 2014), *cert. denied*, 574 U.S. 1091 (2015). Thus, the trial court did not abuse its discretion by admitting the Photographs into evidence.

[22] However, even if the Photographs were admitted improperly, any error would have been harmless as they are cumulative of other evidence properly admitted. “The improper admission of evidence is harmless error when the erroneously admitted evidence is merely cumulative of other evidence before the trier of fact.” *Hunter v. State*, 72 N.E.3d 928, 932 (Ind. Ct. App. 2017), *trans. denied*. Indy Arms Co. had a liability waiver from Bryant dated May 28. Further, the

⁴ Elijah Williamson is Neal Elijah Curd. *See* Appellant’s App., Vol. II at 19.

State admitted surveillance footage from Indy Arms Co. which shows Bryant's gun range session. Therefore, even if the Photographs were improperly admitted, any error was harmless.

Conclusion

[23] We conclude the trial court did not err by allowing the State to amend the charging information and did not abuse its discretion by admitting Detective Jones' testimony or the Photographs. Accordingly, we affirm.

[24] Affirmed.

Pyle, J., and Weissmann, J., concur.