MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Thomas L. Green,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 19, 2023

Court of Appeals Case No.
22A-CR-1615

Appeal from the
Elkhart Superior Court

The Honorable
Kristine A. Osterday, Judge

Trial Court Case No.
20D01-2101-F4-3

Memorandum Decision by Senior Judge Shepard
Judges Mathias and Weissmann concur.

Shepard, Senior Judge.

[1] Thomas Green appeals his conviction of stalking, contending the trial court erred in its admission of certain evidence. He also appeals his consecutive sentencing. Concluding there was no error on either point, we affirm.

Facts and Procedural History

[2] Green and the victim, S.R., were in a relationship for about six years, during which time they had a son. Their relationship, beyond co-parenting their son, ended in September 2017. Although no longer a couple, S.R. and Green continued to spend time together with their son on the weekends, and they spoke on the phone or texted most days just as if they were still a couple.

[3] Since the end of her relationship with Green, S.R. had not dated anyone else, and Green had not seen her with another man. Then, in November 2020, S.R. and Eddie Scott, a co-worker, left work on their break and went to a nearby gas station to get lunch. As S.R. was getting a drink, she heard Green's voice. Green said to Scott, "That's my baby's mama." Tr. Vol. 2, p. 178. S.R. told Green not to make a scene, and Green responded, "You going to make me kill this n****r." Tr. Vol. 3, p. 97. S.R. and Scott paid for their food, and they all exited the store. As S.R. and Scott walked to S.R.'s car, Green told her that Scott was not to get in her car. Nevertheless, S.R. and Scott got in her car and drove away with Green following them in his car, a silver Chevy Cruze. Green followed them until they pulled into their employer's parking lot. After this

incident, Green, S.R., and their son all spent Thanksgiving and Christmas together at Green's mother's home.

[4] Things changed in the new year. On January 3, 2021, Martel Griffin, a co-worker of Scott and S.R., was out at his car in the parking lot when Green pulled up in a Chevy Cruze and began asking Griffin questions about Scott. Green asked if Griffin knew Scott, if he knew what time Scott got off work, if he knew what kind of car Scott drove, and if he knew how long Scott had "been messing around with S[.R]." Tr. Vol. 3, p. 135. Green then told Griffin he would wait for Scott and directed him not to tell Scott. Griffin immediately told Scott about the incident.

[5] The following day on January 4, Griffin was giving Scott a ride home from work. Scott asked him to stop at a gas station for a drink. Griffin pulled into a nearby station, and they saw Green sitting in his car. Scott told Griffin not to stop. The pair stopped at the next gas station on their route, and Scott went in. Green followed them in the same car he had driven the previous day. When they left the station, Green continued following them. Griffin turned onto Scott's street but backed into a neighbor's driveway to keep Green from knowing where Scott lived. Green pulled up and blocked them in. He got out of his car and began walking toward Griffin's car, pulling up the front of his shirt as he went. When he did so, Griffin saw the handle of a gun sticking out of Green's pants. Griffin drove through the neighbor's grass to get away, and a few blocks away, Scott flagged down a police officer.

[6] On January 7, on their morning break at work, S.R. and Scott went to a nearby gas station for snacks. The station's surveillance video from that time and date showed a car, similar to the one known to be driven by Green, drive past the gas station while S.R. and Scott were inside and unaware of Green's presence at the time. The next day, Scott used S.R.'s phone to text Green and tell him to leave Scott alone. They exchanged several text messages, one of which, sent by Green, said: "If i [sic] really wanted your bitch ass i [sic] could have got both of you hoes at speedway yesterday." Ex. Vol. 5, p. 38 (State's Ex. 15).

[7] On January 8 and 9, Green also sent several text messages to S.R. One message contained a meme[1] showing Kermit the frog sitting on a stool with the words, "Ever just look at someone and think, 'This motherf***er is going to be the reason I go to jail.'" *Id.* at 33 (State's Ex. 10).

[8] On January 11, S.R. went to a nearby gas station on her morning break at work. As she made her way back to her car after getting a drink, she felt something in her back. S.R. turned around to find Green. He put a gun to her face, against her cheek, and asked, "Where's that n****r at?" Tr. Vol. 2, p. 217. S.R. believed Green was referring to Scott. She ran back into the station and asked the employee to call the police. John Weaver was also at the gas station

[1] A meme is an amusing or interesting item, such as a captioned picture, that is spread widely online, especially through social media. https://www.merriam-webster.com/dictionary/meme [https://perma.cc/NG3W-2T5P] (last visited May 12, 2023).

that morning and testified at trial to seeing a man with a gun approach a woman.

[9] On January 14, Green texted S.R. a picture of a set of eyes, which she took to mean that he was watching her. The following day she received a text from Green that said, "See you gone." *Id.* at 234. She believed Green was still watching her because when she received this text S.R.'s car, which was usually in her driveway at that time of day, was gone. The next few days S.R. continued getting text messages from Green, including another picture of eyes, and, "See you switched up" and "No tanning?" *Id.* at 237. S.R. believed these texts were comments on a departure from her normal routine of going tanning every day after work.

[10] The State charged Green with intimidation, a Level 5 felony;[2] domestic battery by means of a deadly weapon, a Level 5 felony;[3] stalking, a Level 5 felony;[4] carrying a handgun without a license, a Class A misdemeanor;[5] and unlawful possession of a firearm by a serious violent felon, a Level 4 felony.[6] A jury found Green guilty as charged. At sentencing, the court merged the intimidation into the domestic battery offense and merged the carrying a

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[2] Ind. Code § 35-45-2-1 (2019).

[3] Ind. Code § 35-42-2-1.3 (2020).

[4] Ind. Code § 35-45-10-5 (2014).

[5] Ind. Code § 35-47-2-1 (2017).

[6] Ind. Code § 35-47-4-5 (2020).

handgun without a license into the unlawful possession of a firearm offense. The court then sentenced Green to five years for the offense of domestic battery, six years for the offense of stalking, and twelve years for the possession of a firearm. The court also ordered that the domestic battery and possession of a firearm sentences were to be served concurrently, with the stalking sentence consecutive to that. Green now appeals.

Issues

[11] Green presents two issues for our review:

I. Whether the trial court erred in admitting certain evidence; and

II. Whether the trial court erred by ordering him to serve the sentence for his stalking conviction consecutively to other sentences.

Discussion and Decision

I. Admission of Evidence

[12] Green first contends the court erred by admitting evidence of the January 4 incident with Scott and Griffin. Specifically, he argues that admission of the uncharged misconduct violated Evidence Rules 404(b) and 403.

[13] As a general matter, the trial court is afforded considerable discretion in ruling on the admissibility and relevancy of evidence. *Nicholson v. State*, 963 N.E.2d 1096 (Ind. 2012). Because the trial court is best able to weigh the evidence and assess witness credibility, we will review its rulings on admissibility for abuse of discretion and reverse only if a ruling is clearly against the logic and effect of the

facts and circumstances and the error affects a party's substantial rights. *Canfield v. State*, 128 N.E.3d 563 (Ind. Ct. App. 2019), *trans. denied*.

[14] Evidence Rule 404(b)(1) precludes the admission of evidence of a crime, wrong, or other act to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character. Evidence is excluded under this rule when its purpose is to permit the jury to indulge in the "forbidden inference" that the defendant "must be guilty of the charged crime because, on other occasions, he acted badly." *Fairbanks v. State*, 119 N.E.3d 564, 565 (Ind. 2019). However, such evidence may be admissible for other purposes, such as "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Ind. Evidence Rule 404(b)(2). In assessing the admissibility of 404(b) evidence, a trial court must (1) determine that such evidence is relevant to a matter at issue, other than the defendant's propensity to commit the charged act and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403. *Whitham v. State*, 49 N.E.3d 162 (Ind. Ct. App. 2015), *trans. denied*. Rule 403 provides that a trial court may exclude relevant evidence if its probative value is substantially outweighed by its prejudicial effect.

[15] Here, during trial and out of the presence of the jury, the parties presented their arguments on the admissibility of testimony concerning the incident on January 4. Green's counsel objected under 404(b) because it would show Green's propensity toward violence and gun possession and argued it is irrelevant to the crime of Green's stalking of S.R. The State responded that the testimony is

admissible as evidence of Green's "indirect stalking" of S.R. and Green's harassment and terrorizing of S.R. that continued to January 11. Tr. Vol. 3, p. 76. In addition, the State noted that, in his opening statement, Green's counsel asserted Green was not the person who assaulted S.R. and put a gun in her face on January 11, placing the identity of S.R.'s accoster at issue. In view of that claim, the State also argued that the testimony of the January 4 incident was properly admissible to reflect Green's pattern of hostile behavior toward both S.R. and Scott and to show identity. The court ruled to allow the testimony over Green's objection based on motive and identity.

[16] A defendant's prior actions can be admissible to show the relationship between the parties and defendant's motive, plan, or other proper purposes. *Elliott v. State*, 630 N.E.2d 202 (Ind. 1994). More recently, this Court observed:

> Proof of the defendant's motive to commit the charged crime lends itself to three legitimate theories of logical relevance. Evidence of motive may be offered to prove that the act was committed, or to prove the identity of the actor, or to prove the requisite mental state.

Whitham, 49 N.E.3d at 166 (internal citations and quotations omitted). We also noted our Supreme Court "has made clear that 'hostility is a paradigmatic motive for committing a crime.'" *Id.* at 167 (quoting *Hicks v. State*, 690 N.E.2d 215, 222 (Ind. 1997)). Further, while not major considerations, the timing and similarity of the incidents are factors in the larger inquiry into whether the incidents are relevant to a matter in issue. *Hicks*, 690 N.E.2d 215.

[17] In its opening statement, the State characterized Green as a person "who just can't let go." Tr. Vol. 2, p. 59. The unchallenged evidence showed that in November 2020 when Green accosted Scott and S.R. in the gas station store, he told Scott that S.R. is "my baby's mama." *Id.* at 178. Then, referring to Scott, Green stated to S.R., "You going to make me kill this n****r." Tr. Vol. 3, p. 97. On their way out of the store, Green commanded S.R. not to let Scott back into her car.

[18] Other unchallenged evidence includes Griffin's testimony identifying Green and relating Green's January 3 inquiries in the employee parking lot concerning S.R. and Scott's relationship, Scott's work schedule, and the type of car Scott drove. A few days later, Green texted S.R.'s phone that he "could have got[ten]" S.R. and Scott when they were at the gas station the day before. Ex. Vol. 5, p. 38 (State's Ex. 15). S.R. testified that on January 11 she was again at a gas station close to work when Green accosted her, put a gun to her back and face, and asked, "Where's that n****r at?" presumably referring to Scott. Tr. Vol. 2, p. 217. After that, Green sent S.R. text messages that made it clear he was watching her.

[19] Although S.R. was not directly involved in the January 4 incident, evidence of the confrontation is intrinsic and highly relevant to the charged crime and Green's identity on January 11 as it demonstrates his pattern of hostility and jealousy toward S.R. and Scott as well as his motive for accosting S.R. In the larger scheme, it occurred within the charged timeframe— the day after Green had gone to Scott's employment and questioned Scott's friend Griffin and just a

week prior to S.R. being accosted. Moreover, the January 4 incident occurred under similar circumstances as the November 2020, January 7, and January 11 incidents where Green watched S.R. and/or approached her on her work breaks in gas station convenience stores near her place of employment. Thus, we conclude the testimony relating the events of Green's chase and confrontation of Scott and Griffin on January 4 is relevant to a matter at issue other than his propensity for violence and possession of a gun. *See, e.g.*, *Elliott*, 630 N.E.2d 202 (defendant's prior threats and statements concerning his ex-wife and murder victim/ex-wife's boyfriend were admissible to show relationship between parties and defendant's motive, plan, and absence of accident).

[20] Turning to the balancing required by Rule 403, we recognize that assessment of whether the probative value of evidence is substantially outweighed by its possible prejudice is a task best performed by the trial court. *Ward v. State*, 138 N.E.3d 268 (Ind. Ct. App. 2019). And trial courts are given wide latitude in performing this assessment. *Wilcoxson v. State*, 132 N.E.3d 27 (Ind. Ct. App. 2019), *trans. denied*. We will reverse the court's decision only upon a showing of abuse of discretion. *Ceaser v. State*, 964 N.E.2d 911 (Ind. Ct. App. 2012), *trans. denied*. We are mindful that, while all relevant evidence is inherently prejudicial to a criminal defendant, the question is not whether the evidence is prejudicial but whether the evidence is *unfairly* prejudicial. *Ward*, 138 N.E.3d 268. Here, Green's argument on this issue has not convinced us that the probative value of

Scott's testimony recounting the January 4 confrontation was substantially outweighed by any prejudicial effect.

[21] Thus, we conclude Scott's testimony of the January 4 incident was relevant to establish Green's motive for and identity as the person who accosted S.R. on January 11. Further, the testimony was of such probative value that it was not outweighed by any prejudice to Green. Accordingly, the trial court did not abuse its discretion in admitting Scott's testimony.

[22] Moreover, even if the trial court erred by admitting the testimony, that error was harmless. "'Any error caused by the admission of evidence is harmless error for which we will not reverse a conviction if the erroneously admitted evidence was cumulative of other evidence appropriately admitted.'" *Wilhelmus v. State*, 824 N.E.2d 405, 414 (Ind. Ct. App. 2005) (quoting *Iqbal v. State*, 805 N.E.2d 401, 406 (Ind. Ct. App. 2004)). The State presented independent evidence of Green's guilt in the form of S.R.'s testimony that it was Green who accosted her with a gun in the parking lot of the gas station on January 11. The State also presented John Weaver's testimony about seeing a man with a gun confront a woman at the same time and place.

[23] In addition, it was Griffin, not Scott, who gave a detailed account of the confrontation and testified to seeing Green with a gun on January 4. Although Green's counsel renewed his 404(b) objection prior to Scott's testimony regarding the January 4 incident, he neither requested a continuing objection nor renewed the objection when Griffin subsequently testified about the

confrontation. Green claims no fundamental error stemming from this failure. *See Hornsby v. State*, 202 N.E.3d 1135 (Ind. Ct. App.) (stating that where defendant failed to procure valid continuing objection and did not object when challenged evidence was offered, he had waived claim and must demonstrate fundamental error to obtain reversal), *trans. denied*, 2023 WL 2919755 (Ind. Apr. 6, 2023).

II. Consecutive Sentences

[24] Next, Green asserts the trial court erred when it ordered his sentence for stalking to be served consecutively to his other sentences. Generally, a trial court cannot order consecutive sentences in the absence of express statutory authority. *Slone v. State*, 11 N.E.3d 969 (Ind. Ct. App. 2014). On appeal, this Court reviews claims of sentencing error for abuse of discretion and reverses the trial court's decision only if there has been a manifest abuse of discretion. *Id.* (quoting *Reynolds v. State*, 657 N.E.2d 438, 440 (Ind. Ct. App 1995)).

[25] Indiana Code section 35-50-1-2(c) (2020) limits a trial court's ability to impose consecutive sentences for multiple crimes which arise out of a single episode of criminal conduct. However, this limitation does not apply to a defined list of crimes of violence. *See id.* Although stalking is not a crime of violence, both domestic battery and unlawful possession of a firearm by a serious violent felon are. *See* Ind. Code § 35-50-1-2(a)(7), (20). Therefore, both Green's convictions of domestic battery and unlawful possession are exempted from the limitations on the total of consecutive terms. Green claims that, because stalking is not a

crime of violence, his sentence for stalking cannot be served consecutively because the stalking conviction is part of a single episode of criminal conduct.

[26] Our Supreme Court has previously addressed this argument and rejected it. Because the answer rests solely on the character of the offenses, it is not necessary for us to perform a single episode analysis. In *Ellis v. State*, the Court was tasked with determining whether the existence of one crime of violence is sufficient to exempt each of the consecutively sentenced convictions from the statutory limitation. 736 N.E.2d 731 (Ind. 2000). The Court held:

> [W]e interpret the statute to exempt from the sentencing limitation (1) consecutive sentencing among crimes of violence, and (2) consecutive sentencing between a crime of violence and those that are not crimes of violence. However, the limitation should apply for consecutive sentences between and among those crimes that are not crimes of violence.

Id. at 737. Accordingly, Green's sentence for stalking can be ordered to be served consecutively to those for his other crimes, both of which are crimes of violence. *See McCarthy v. State*, 751 N.E.2d 753 (Ind. Ct. App. 2001) (holding that defendant's six-year sentence for involuntary manslaughter, which was crime of violence, could be ordered to be served consecutively to two consecutive four-year sentences for two counts of criminal recklessness, which were not crimes of violence, even though all crimes arose out of same criminal episode), *trans. denied*.

[27] Affirmed.

Mathias, J., and Weissmann, J., concur.