MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kyler Butler,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 3, 2023

Court of Appeals Case No. 22A-CR-51

Appeal from the Posey Circuit Court

The Honorable Craig Goedde, Judge

Trial Court Cause No. 65C01-1801-F1-41

Memorandum Decision by Judge Vaidik
Judges Riley and Bailey concur.

Vaidik, Judge.

Case Summary

[1] Kyler Del Butler was convicted of Level 3 felony aggravated battery and Level 6 felony criminal recklessness. The trial court enhanced his sentence twice after he was found to be a habitual offender and to have used a firearm in the commission of the offense. He now appeals, arguing the trial court erred in admitting certain evidence, the evidence is insufficient to support the aggravated-battery conviction, and his sentence was impermissibly double-enhanced. We affirm.

Facts and Procedural History

[2] On the night of January 20, 2018, Butler's childhood friend, Tyler Neth, drove him to the home of Cassidy Curtis, a woman Butler was seeing. As the two approached Curtis's house in Neth's SUV, they saw a green Dodge Durango in Curtis's driveway. In the Durango were William Reynolds and John Mattingly. While Neth and Butler could not see who was in the Durango, Butler had recently gotten into a fight with Reynolds over Curtis and knew that Reynolds sometimes drove a green Durango. Neth and Butler circled the block until the Durango left then followed it. At one point, the Durango began accelerating backward toward the SUV. As Neth tried to back up the SUV, Butler reached into the backseat, grabbed Neth's assault rifle, and pointed it out the car window. Butler shot at the Durango approximately eleven times, striking Mattingly once in the shoulder. Butler and Neth then fled the scene.

[3] The next day, Neth voluntarily went to the police station and gave a statement to detectives. The State charged Butler with two counts of Level 1 felony attempted murder, Level 3 felony aggravated battery, Level 5 felony battery by means of a deadly weapon, and Level 6 felony criminal recklessness. The State also filed a habitual-offender enhancement and a firearm enhancement. Butler, who had fled the state, was arrested in Nevada and brought back to Indiana for trial.

[4] The eight-day jury trial was held in October 2021. Mattingly testified about his injury, including that he was hospitalized for two days and required surgery to repair his broken clavicle. He testified he experienced pain and had to wear a sling for three months but no longer felt any pain from the injury. He also stated there remains a "six-inch scar on [his] shoulder," which he showed to the jury. Tr. Vol. VI p. 197.

[5] Neth testified about the events described above. He also testified that while Butler was in jail in Nevada, he called Neth. Neth stated he had been friends with Butler for twenty-five years and was familiar with his voice, as well as the voice of Butler's mother, Kathy Butler, whom Neth had spoken to "hundreds" of times, including on the phone. Tr. Vol. IV p. 150. The State then introduced two tapes containing recorded phone conversations Butler had while in the Nevada jail awaiting extradition, one to Neth and one to Kathy. Neth confirmed he had recently listened to the tapes and recognized the first as being a recorded phone conversation between him and Butler and the second as being

between Butler and Kathy. Over Butler's objection, the court admitted the calls, and both were played for the jury. *See* Exs. 9-10.

[6] The calls begin with an automated message from the jail system—approximately three minutes long—stating the date, time, payment information, the inmate's identification number, that the call is being recorded, and that the call comes from "an inmate at Clark County Detention Center." Ex. 9, 2:17-19. In Exhibit 9, Butler identifies himself by name and discusses the case with Neth. At one point, Neth states, "When I went down and talked to them I told them what you told me, that you were shooting at the tires at the back of the vehicle," and Butler replies, "That's all I was doing." *Id.* at 5:59-6:08. In Exhibit 10, Butler again identifies himself by name, and he and Kathy discuss his case. Kathy asks, "Are you going to tell the truth?" and Butler says, "Nope," and "You know I can't do that." Ex. 10, 4:58-5:10. Later, he states, "It was a bad decision, I don't know how it happened, I don't even know what I was thinking." *Id.* at 9:25-31. Also during this call, Butler and Kathy identify Reynolds and Mattingly as the people who were shot at. After both calls were played, Neth again testified that he and Butler were the speakers in Exhibit 9 and that Butler and Kathy were the speakers in Exhibit 10.

[7] Detective Korben Sellers of the Mount Vernon Police Department testified about his investigation of Butler. During this testimony, the State introduced three recorded phone calls Butler made to friends from jail in Posey County in early 2021. Over Butler's objection, these calls were admitted and played for the jury. In the calls, Butler repeatedly asks each friend about Curtis. He discusses

her relationships with other men and states one man has "herpes" and is "contaminating [Butler's] f*cking water supply" by being with Curtis. Ex. 186, 3:23-27. In these calls, Butler often uses obscene language and speaks derogatorily about Curtis, including saying she is "not all the way r*tarded" and "fried out" and that he would keep her in a "shocker collar" or "chain her up in the basement." Ex. 184, 3:27-28, 3:53-55; Ex. 185, 2:48-29; Ex. 186, 4:57-59.

[8] The State also introduced text messages Butler sent to friends and to Curtis while in jail in March 2021. Over Butler's objection, these were admitted and published to the jury. In the messages to friends, Butler asks for Curtis's number and, after receiving it, complains she responded to him only "once" and was "f*cking with" another man. Ex. 187. In the messages to Curtis, he tells her he is going to marry her and asks about the man he believes she is seeing. At one point, when Curtis fails to respond quickly enough, Butler writes, "F*ck you then you worthless b*tch." Ex. 188. At closing, the State referenced these calls and messages as showing Butler's motive, stating Butler "was seeing [Curtis]," was "obsessed with her," and didn't like that "she was also going out and seeing [Reynolds]." Tr. Vol. VIII p. 248.

[9] The jury found Butler not guilty of both counts of Level 1 felony attempted murder but guilty of Level 3 felony aggravated battery, Level 5 felony battery by means of a deadly weapon, and Level 6 felony criminal recklessness. Butler admitted being a habitual offender and using a firearm in the commission of the

offense. The court merged the Level 5 felony battery into the Level 3 felony aggravated battery due to double-jeopardy concerns.

[10] At sentencing, the State contended the court "has the ability" to run both the habitual-offender and firearm enhancements consecutively on the underlying conviction of Level 3 felony aggravated battery. Tr. Vol. IX p. 134. Butler argued the enhancements "cannot run consecutively" or, in the alternative, that they are "not mandatorily consecutive." *Id.* at 145. The court sentenced Butler to fifteen years for Level 3 felony aggravated battery, plus fifteen years for the habitual-offender enhancement and another fifteen years for the firearm enhancement. The court sentenced Butler to two years for the Level 6 felony, to be served concurrently, for an aggregate sentence of forty-five years.

[11] Butler now appeals.

Discussion and Decision

I. Jail Communications

[12] Butler contends the trial court erred in admitting various communications he made while incarcerated. Admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse such a decision only if the trial court abused that discretion. *Wilson v. State*, 30 N.E.3d 1264, 1267 (Ind. Ct. App. 2015), *trans. denied*. An abuse of discretion occurs when the trial court's decision is clearly against the logic, facts, and circumstances presented.

Id. We do not reweigh evidence or judge the credibility of witnesses, and we consider conflicting evidence most favorable to the trial court's ruling. *Id.*

A. Authentication

[13] Butler first argues the court abused its discretion in admitting Exhibits 9 and 10—calls he made from a Nevada jail to Neth and Kathy, respectively—because the calls were not properly authenticated. "To lay a foundation for the admission of evidence, the proponent of the evidence must show that it has been authenticated." *Pavlovich v. State*, 6 N.E.3d 969, 976 (Ind. Ct. App. 2014) (citation omitted), *trans. denied*. "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Ind. Evidence Rule 901(a).

[14] Authentication of an exhibit can be established by either direct or circumstantial evidence. *Pavlovich*, 6 N.E.3d at 976. Absolute proof of authenticity is not required, and the proponent of the evidence need establish only a reasonable probability that the item is what it is claimed to be. *Id.* Once this reasonable probability is shown, any inconclusiveness regarding the exhibit's connection with the events at issue goes to the exhibit's weight, not its admissibility. *Id.*

[15] Butler argues "Neth's identification of the voices on the call" is not sufficient to authenticate the phone calls. Appellant's Br. p. 25.[1] "Generally, the identities of both parties must be authenticated before admitting a telephone call." *Young v. State*, 696 N.E.2d 386, 389 (Ind. 1998). Identity may be established by testimony of a witness familiar with the speaker's voice and who recognizes it in the conversation. *State v. Motley*, 860 N.E.2d 1264, 1266 (Ind. Ct. App. 2007). Identity may also be inferred from the circumstances and details included in the conversation. *Id.*

[16] Here, Neth testified he recognized Butler's voice in both calls. He also testified he recognized his own voice and that of Kathy, Butler's mother. Neth had been Butler's friend for twenty-five years and was familiar with his voice as well as Kathy's voice. This is sufficient to authenticate the calls. *See McCallister v. State*, 91 N.E.3d 554, 564 (Ind. 2018) (finding recording of a phone conversation was properly authenticated where a detective who was "familiar with [the speakers'] voices" identified them). Furthermore, the circumstances and details in these conversations confirm the identity of the speakers. For one thing, Butler identifies himself by name in both calls. And in both calls, specific details of the

[1] Butler also argues that the phone calls were not properly authenticated because the State did not provide sufficient evidence that the calls met "the requirements of a business record certification" under Evidence Rule 902(11). Appellant's Br. p. 21. Evidence Rule 902(11) states that records of regularly conducted business activity may be self-authenticating if the records meet certain requirements "as shown by a certification under oath of the custodian." Such a certification is one way the exhibits could have been authenticated here. But it is not the only way. Rather than alleging the calls were self-authenticating under Rule 902(11), the State sought to admit the calls through Neth's testimony, and it was based on that testimony that the trial court admitted the calls. Thus, we do not address Butler's argument as it relates to Rule 902(11).

crime are discussed. Butler and Neth talked about shooting at a car, while Butler and his mother spoke about his legal case and the victims.

[17] Neth's testimony identifying the speakers and the circumstances and details included in the conversations are sufficient to authenticate the phone calls.

B. Hearsay

[18] Butler next argues that even if Exhibits 9 and 10 were properly authenticated, they contain inadmissible hearsay. Hearsay is defined as "a statement that: (1) is not made by the declarant while testifying at trial or hearing; and (2) is offered in evidence to prove the truth of the matter asserted." Evid. R. 801(c); *see also Amos v. State*, 896 N.E.2d 1163, 1168 (Ind. Ct. App. 2008), *trans. denied*. Hearsay is generally inadmissible. *Amos*, 896 N.E.2d at 1168 (citing Evid. R. 802).

[19] We first note that a recording of a telephone call made from jail is generally admissible if the call involves the defendant "discuss[ing] the crime for which he is incarcerated." *King v. State*, 985 N.E.2d 755, 759 (Ind. Ct. App. 2013), *trans. denied*. Furthermore, as Butler acknowledges, his own statements on the tape are not hearsay under Evidence Rule 801(d)(2). *See Banks v. State*, 761 N.E.2d 403, 406 (Ind. 2002) ("A party's own statement offered against that party is not hearsay."). And the statements made by Kathy and Neth provide context for Butler's statements. *See Hendricks v. State*, 162 N.E.3d 1123, 1135 (Ind. Ct. App. 2021) (defendant's statements on recorded jail call were not

hearsay and the other caller's statements "allow the jury to make sense of [the defendant's] side of the conversations"), *reh'g denied*, *trans. denied*.

[20] But Butler also notes that both recorded calls begin with "a recorded voice stat[ing] that the call is coming from '. . . an inmate at the Clark County Detention Center,' the inmate's identification number, the phone number being dialed, the date and time, and a notice that the call is subject to monitoring." Appellant's Br. p. 22.[2] Butler contends that this statement constitutes inadmissible hearsay. But even assuming this is inadmissible hearsay, the "erroneous admission of hearsay testimony does not require reversal unless it prejudices the defendant's substantial rights." *Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014). And we see no such prejudice here. Much of the recorded statement merely relays generic information such as the date and telephone number associated with the call. The only prejudicial information contained in the statement appears to be that Butler was an inmate at the Clark County Detention Center when the call was made. But the jury had already been informed by Neth that Butler was arrested and jailed in Nevada and that the two had phone conversations while Butler was imprisoned. Therefore, the statement that Butler was making calls from jail is simply cumulative of other evidence. *See Purvis v. State*, 829 N.E.2d 572, 585 (Ind. Ct. App. 2005) (no

[2] Butler claims the recorded voice states his name. This is inaccurate. While the voice does state the call is coming from "an inmate at the Clark County Detention Center," Butler's name is stated only by himself.

reversible error in admitting hearsay evidence that was "merely cumulative of other evidence before the trier of fact"), *trans. denied*.

[21] The trial court did not abuse its discretion in admitting Exhibits 9 and 10.

C. Rule 403

[22] Butler also challenges the admission of Exhibits 184-188—calls he made and text messages he sent while in jail in Posey County regarding Cassidy Curtis—arguing the unfair prejudice far outweighed the probative value of these calls and thus they should not have been admitted under Indiana Evidence Rule 403.[3] The rule provides, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Evid. R. 403. All relevant evidence is inherently prejudicial to a defendant. *Schnitzmeyer v. State*, 168 N.E.3d 1041, 1045 (Ind. Ct. App. 2021). Because the bar for unfair prejudice is high, "courts err on the side of admissibility and consider whether there is risk that a jury will 'substantially overestimate the value of the evidence or that the evidence will arouse or inflame the passions or sympathies of the jury.'" *Id.* (quoting *State v. Seabrooks*, 803 N.E.2d 1190, 1194 (Ind. Ct. App. 2004), *reh'g denied*).

[3] Butler does not argue that these calls or messages are inadmissible due to lack of authentication or as hearsay.

[23] Butler argues these communications have "very little probative value." Appellant's Br. p. 31. We disagree. The State sought to introduce these communications as evidence of Butler's motive to shoot at Reynolds's car. Specifically, the State argued that Butler had previously fought Reynolds over his relationship with Curtis and followed Reynolds's car after seeing it in Curtis's driveway. Thus, the State's theory was that Butler's jealousy over the relationship between Curtis and Reynolds explained his decision to follow and ultimately shoot at the Durango. The jail communications buttress this theory by showing Butler's continued interest in Curtis, especially his emphasis on her other relationships and his anger when she would not contact him.

[24] However, undoubtedly, these messages are also prejudicial. Butler used obscene language and made many derogatory statements that may have inflamed the jurors, including calling Curtis a "b*tch" and saying he would chain her up in a basement. The question therefore becomes whether the probative value was substantially outweighed by unfair prejudice. The trial court determined it was not, and we do not believe the prejudice here was so high as to override the court's wide discretion on this decision. *See Snow v. State*, 77 N.E.3d 173, 179 (Ind. 2017) (noting that in close situations when the court could have admitted or excluded evidence under Rule 403, "we will not second-guess the trial court's determination").

[25] The trial court did not abuse its discretion in admitting the calls and text messages under Indiana Evidence Rule 403.

II. Sufficiency

[26] Butler next contends the State failed to prove the elements of aggravated battery beyond a reasonable doubt. To convict Butler of Level 3 felony aggravated battery as charged here, the State had to prove he knowingly or intentionally inflicted injury on Mattingly that caused "serious permanent disfigurement." Ind. Code § 35-42-2-1.5; Appellant's App. Vol. II p. 231. Butler argues the State did not sufficiently prove Mattingly suffered serious permanent disfigurement.

[27] The standard of review for sufficiency-of-the-evidence claims is well settled. "When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility." *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). We consider only the evidence supporting the verdict and any reasonable inferences that can be drawn from such evidence. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). And "[w]e will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt." *Bailey*, 907 N.E.2d at 1005.

[28] Butler argues Mattingly's injury does not rise to the level of serious permanent disfigurement. Although the legislature has never supplied a definition of the term, this Court has long defined a serious permanent disfigurement as an injury that "continu[es] or endur[es]" so that it "mar[s] or deface[s] the appearance or physical characteristics of a person." *James v. State*, 755 N.E.2d

226, 230 (Ind. Ct. App. 2001), *trans. denied*. "The degree of injury is a question of fact for the jury." *Gebhart v. State*, 525 N.E.2d 603, 604 (Ind. 1988).

[29] Mattingly testified that he was shot in the shoulder and sustained a broken clavicle, which required a two-day hospital stay and surgery to repair. This injury left a six-inch scar that was still visible over three years later. The jury personally viewed this scar at trial.

[30] But Butler argues this scar is smaller and less conspicuous than those previously found sufficient to show serious permanent disfigurement, citing *Cornelious v. State*, 988 N.E.2d 280 (Ind. Ct. App. 2013), *trans. denied*, where this Court held the victim's twelve-inch facial scar was sufficient. But several injuries have been held by this Court to constitute serious permanent disfigurement. *See, e.g., Jones v. State*, 159 N.E.3d 55, 63-64 (Ind. Ct. App. 2020) (burns to the chest, arms, and back constitute serious permanent disfigurement), *trans. denied*; *James*, 755 N.E.2d at 230 (loss of several teeth sufficient to show serious permanent disfigurement). Not all need to rise to the level of that in *Cornelious*.

[31] There is sufficient evidence to support Butler's Level 3 felony aggravated-battery conviction.

III. Double Enhancement

[32] Butler also argues the trial court erred in "run[ning] the habitual offender and firearm enhancements consecutively on the same conviction." Appellant's Br. p. 34. Claims of improper multiple enhancements are governed by statutory

interpretation. *Woodruff v. State*, 80 N.E.3d 216, 217 (Ind. Ct. App. 2017), *trans. denied*. We review matters of statutory interpretation de novo because they raise pure questions of law. *Id.*

[33] "Generally, double enhancements are not permissible." *Daugherty v. State*, 52 N.E.3d 885, 891 (Ind. Ct. App. 2016), *trans. denied*. But it is not an impermissible double enhancement "whenever *any* two enhancements are applied to an underlying conviction." *Woodruff*, 80 N.E.3d at 218. Rather,

> there is a double enhancement issue when more than one of the types of statutes that authorize enhancements for repeat offenders are applied to the same proof of an "uninterrupted transaction." Therefore, double enhancement analysis is proper when the proof of previous criminal conduct is the basis of more than one enhancement.

Id.

[34] Here, Butler's sentence for aggravated battery was enhanced due to his status as a habitual offender and his use of a firearm in the commission of the offense. We addressed this exact situation in *Woodruff* and determined this did not constitute an impermissible double enhancement because neither the underlying conviction for aggravated battery nor the firearm enhancement was based on past criminal conduct. In other words, only one type of repeat-offender statute—the general habitual-offender statute—was used to enhance the sentence, so there was no impermissible double enhancement. The same can be said here. Butler's "aggravated battery conviction resulted in a dual enhancement, not for the same prior crimes, but for committing aggravated

battery with a firearm while being a habitual offender." *See id.* This does not violate the rule against double enhancements.

[35] Butler then argues that, even if running the enhancements consecutively is permissible, it is not mandatory, and "it is unclear whether the court understood it could run the two enhancements concurrently." Appellant's Br. p. 38. We agree the trial court could have run the enhancements concurrently. While both the habitual-offender statute and the firearm-enhancement statute require the enhancement to be added to the underlying sentence, I.C. §§ 35-50-2-8(i), 35-50-1-2(f), the statutes are silent about whether the enhancements must be served concurrently or consecutively to each other. As such, that decision is within the trial court's discretion. *See* I.C. § 35-50-1-2(c).

[36] But we disagree with Butler's contention that the trial court was unaware of this. First, we presume the trial court knows the law. *Conley v. State*, 972 N.E.2d 864 (Ind. 2012). Second, at no point does the record indicate that the trial court thought the enhancements must run consecutively. The State did not argue as such at sentencing but rather contended the trial court could—not must—run the enhancements consecutively. And Butler requested that the enhancements be run concurrently, even expressly stating that the enhancements were not "mandatorily consecutive." Thus, it appears from the record that the trial court was aware it was within its discretion to run the enhancements consecutively or concurrently.

[37] The trial court did not err in ordering Butler's enhancements to run consecutively.

[38] Affirmed.

Riley, J., and Bailey, J., concur.