MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Deonlashawn Cammron Simmons,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff

May 26, 2023

Court of Appeals Case No. 22A-CR-1114

Appeal from the Lake Superior Court

The Honorable Natalie Bokota, Judge

Trial Court Cause No. 45G02-2011-MR-46

Memorandum Decision by Judge Vaidik
Judges Tavitas and Foley concur.

Vaidik, Judge.

Case Summary

[1] The State charged Deonlashawn Cammron Simmons with the 2019 murder of a fourteen-year-old Chicago girl in Gary. The State also sought firearm and habitual-offender enhancements. A jury trial was held, and Simmons was found guilty of murder. Simmons admitted to the enhancements, and the trial court sentenced him to 105 years. Simmons now appeals his conviction, arguing the trial court erred in admitting a firearm report from the ATF and in not redacting a portion of his videotaped interview and that the evidence is insufficient to support his conviction. We find that the court did not err in failing to redact a portion of Simmons's interview and that the admission of the ATF report was harmless error. We also find that the evidence is sufficient to support Simmons's conviction. We therefore affirm the trial court.

Facts and Procedural History

[2] T.T. was adopted by Felisha Varnado when she was two years old, and they lived in Chicago. As T.T. got older, she was "prone to running away." Tr. Vol. II p. 228. Varnado last saw T.T. on July 31, 2019, when she was fourteen years old. Sometime after July 31, T.T. moved into a shelter. She left the shelter on September 1, and the shelter reported her as a runaway.

[3] On September 8, Lisa Marie Castro was having a birthday party for her fourteen-year-old daughter at their apartment on the south side of Chicago.

During the party, a girl, later identified as T.T., showed up uninvited. Neither Castro nor her daughter had seen T.T. before. T.T. said she didn't have any parents, lived with her "auntie," and came to their house because she saw them feeding other children. Tr. Vol. III p. 158. Castro decided to find a ride home for T.T. Castro didn't have a car, so she called Simmons, who was on his way to the party with his girlfriend and their children. Simmons and his girlfriend dropped off their children at the party and left with T.T. When Simmons and his girlfriend later returned to the party, T.T. was not with them. Simmons told Castro he dropped off T.T. somewhere east on 35th Street.

[4] Eight days later, on the morning of September 16, a NIPSCO worker found a deceased female in an alley at 20th Avenue and Pennsylvania Street in Gary and called 911. The victim had been shot in the head, and her wrists were bound with a spark-plug cord. The victim, who had no identification, had been dead around two to four days according to a forensic pathologist. Near the victim, the police found a 9 mm spent shell casing (manufactured by Blaser) and a Mastercard in the name of "Sharenea Simmons." *Id.* at 84. After canvassing the area, the police focused on determining the identity of the victim. They consulted many agencies, including the National Center for Missing and Exploited Children, which created a composite sketch to publish on television and social media. About two weeks later, the police preliminarily identified the victim as T.T., and DNA testing confirmed that a couple of months later.

[5] Meanwhile, the police investigated the Mastercard found near T.T.'s body. They learned that Sharenea lived on Pennsylvania Street near the alley and that her uncle—Simmons's father—lived a block away from her.

[6] After identifying the victim as T.T., the police started investigating her social-media activity. The police learned that T.T. had a Facebook account under the username "Kaylah DaGhee." *Id.* at 232. The police obtained a search warrant and received records from Facebook. According to the location history, the last location for the username was September 14 at 1:27 a.m. near 6932 South Michigan Avenue in Chicago. *Id.* at 234. The police later found out that Simmons's mother lived at this address. *Id.* at 238. The police also learned from the Facebook records that the username had been communicating with Simmons's Facebook account. The police then obtained a search warrant for Simmons's account.

[7] An expert analyzed the Facebook records for T.T. and Simmons. T.T.'s account was "very active" from September 10 until September 13 at 8:15 p.m., at which point "activity cease[d]." Tr. Vol. V p. 22. Simmons's account was active from September 10 until September 15 and then "kind of stopped." *Id.* at 23. Both accounts shared the same IP address—meaning "they were using the same Internet access points"—eighteen times between September 12 and 13, with the last time being September 13 at 8:15 p.m. *Id.* at 26. The shared IP address meant they were in the same house or area. After obtaining another warrant from Facebook for machine cookies and conducting additional

analysis, the expert determined that T.T.'s and Simmons's accounts accessed Facebook on the same device during this same time. *Id.* at 28-29.

[8] The police obtained a search warrant for Simmons's car, and the FBI executed the warrant on September 4, 2020, nearly a year after the shooting. *See* Ex. 78. Simmons's car was parked at his mother's house at 6932 South Michigan Avenue in Chicago. During the search, they found the frame of a 9 mm semiautomatic pistol (the slide was missing) in the trunk of the car under some "fake" flooring. Tr. Vol. IV p. 173. The police also found an extended magazine containing twenty-nine 9 mm bullets in the same area of the trunk. The manufacturers of the 9 mm bullets were "AP" and "AUSA." *Id.* at 229-30. The police also obtained a warrant for Simmons's phone records. According to those records, his cell phone "pinged" at 3:47 a.m. on September 14, 2019, in the Highland/Griffith area of Indiana. *Id.* at 36, 41.

[9] The police also interviewed Simmons on September 3, 2020. Simmons acknowledged meeting T.T. in September 2019, being with her five times, giving her several rides in his car (which used to belong to his brother before he was murdered in 2015), and communicating with her on Facebook. He said that on September 13, he took T.T. with him to the vet and then they got Little Caesar's pizza. Simmons said he never saw T.T. after that and learned about her death on the news. Finally, Simmons admitted that he worked on cars.

[10] In November 2020, the State charged Simmons with murder and a firearm enhancement. The State later alleged that he is a habitual offender. Before trial,

Simmons filed a motion in limine seeking to exclude from evidence any reference to his criminal history, Appellant's App. Vol. II pp. 151-52, and the trial court granted his request, *id.* at 160. A jury trial was held in March 2022.

[11] Henry Hatch, a captain with the Lake County Sheriff's Department in charge of the firearm and tool-mark division, testified that the 9 mm gun frame found in Simmons's car "could have fired the spent casing" recovered near T.T.'s body, but he could not determine for sure one way or the other. Tr. Vol. IV p. 223. Captain Hatch also testified that the magazine found in Simmons's car fit the gun frame.

[12] Detective William Poe testified that he ran a trace of the gun frame's serial number through an ATF database and that the trace showed that the gun had been purchased for the first time on March 5, 2016. The State wanted to admit the date of purchase to rebut any claim by the defense that the gun was left over in the car from when Simmons's brother drove it. *See id.* at 199-200 (Detective Poe testifying that the gun was purchased in March 2016 after Simmons's brother "was already dead"); *see also* Tr. Vol. V p. 164 (same). Defense counsel did not object to Detective Poe's testimony. The State then sought to admit the Firearms Trace Summary (Exhibit 103), which contains the purchaser's name and address (Fort Wayne), the date of purchase (March 5, 2016), and a warning that "The information in this report must be validated prior to use in any criminal proceedings." Defense counsel objected on grounds that there was no "foundation as to authentication." Tr. Vol. IV p. 201. The State asked to present additional testimony, and Detective Poe testified that the ATF

maintains the database (eTrace), he has a username and password to access the database, a document is generated after inputting a gun's serial number, and Exhibit 103 was "maintained as a business record." *Id.* at 203. Defense counsel renewed his objection, and the trial court admitted the exhibit over his objection.

[13] Robert Dilley, a forensic scientist with the Indiana State Police Laboratory, testified about the DNA evidence. In particular, the spark-plug cord bound around T.T.'s wrists was swabbed, and there were three DNA contributors—T.T. and two unknown individuals. Dilley said Simmons was not excluded as a contributor and that it was "at least one trillion times more likely if [T.T.], Deon Simmons and some unknown individual are the contributors to that of [T.T.] and to unknown and unrelated individuals to Deon Simmons are actually the contributors." Tr. Vol. V p. 98. In other words, the analysis provided "very strong support" that Simmons's DNA was on the spark-plug cord. *Id.* Defense counsel cross-examined Dilley about the possibility that Simmons's DNA could have transferred from Simmons to T.T. (since they had been together) and then to the spark-plug cord. Dilley said it was possible but that it was a question for the jury. *Id.* at 116.

[14] The extended magazine was also swabbed, and there were three DNA contributors. Dilley said Simmons was not excluded as a contributor and that it was "at least 1 trillion times more likely if Deon Simmons and two unknown individuals are the donors than if three unknown and unrelated individuals to Deon Simmons are actually the contributors to this mixture." *Id.* at 101. In

other words, the analysis provided "very strong support" that Simmons's DNA was on the magazine. *Id.*

[15] When the State sought to admit the videotaped interview of Simmons (Exhibit 75), defense counsel objected to certain portions where Simmons referenced being "home."[1] Defense counsel argued that Simmons's references to being "home" would signal to the jury that he had been incarcerated and asked for the portions to be redacted from the video. The State responded that Simmons's references to being "home" were too vague to refer to his criminal history. The trial court agreed with the State and ruled the portions were admissible:

> [The] references to since I've been home are admissible. They are ambiguous. [I] don't find that the prejudice outweighs the relevance of the total fluidity of the interview coming in. So even the last time I carried a gun was when I came home. That can be introduced to the jury.

Tr. Vol. III p. 201.

[16] The jury found Simmons guilty of murder. Simmons then admitted using a firearm and being a habitual offender. The trial court sentenced him to 105 years.

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[1] Exhibit 75 is approximately sixty minutes and is broken down into ten videos. At trial, defense counsel said there were references to "home" in several videos, *see* Tr. Vol. III pp. 194-95, but on appeal Simmons only cites one in Video 2 (2:41).

[17] Simmons now appeals.[2]

Discussion and Decision

I. Admission of Evidence

[18] Simmons challenges the admission of two pieces of evidence. We review a trial court's evidentiary rulings for an abuse of discretion. *Fansler v. State*, 100 N.E.3d 250, 253 (Ind. 2018).

[19] Simmons first argues the trial court erred in not redacting the portion of his videotaped interview where he referenced being "home." Pursuant to Indiana Evidence Rule 404(a), "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." In addition, Evidence Rule 404(b) specifically bars the admission of "[e]vidence of a crime, wrong or other act in order to show that on a particular occasion the person acted in accordance with the character." Simmons argues that his reference to being "home" gave rise to the impermissible inference that he was a person with a criminal character, that he had committed crimes in the past that led to his incarceration, and that the murder of T.T. was entirely consistent with his character.

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[2] We held oral argument on May 15, 2023, at Shelbyville High School. We thank the school's administration, staff, and students for their hospitality and counsel for their advocacy.

[20] The premise of Simmons's argument is flawed. Simmons cites only one reference to being "home" from his videotaped interview. *See* Ex. 75, Video 2 (2:41). There, Simmons said that he had nothing to do with T.T.'s death and that "since I've been home, I've been going through a lot of sh** with my family" because of his brother's murder in 2015. As the State points out, Simmons's mother lived in Chicago and his father lived in Gary, and "home" could have simply meant going to either parent's house. Simmons acknowledges this could have been an inference but claims that the "obvious inference" was that he had been "incarcerated and was returning home thereafter." Appellant's Reply Br. p. 7. The trial court did not think so given the ambiguity of the reference and the fluidity of the interview. We agree. Exhibit 75 is approximately an hour long, and Simmons's criminal history was not discussed. Simmons's reference to being home did not give rise to an impermissible inference that he had committed crimes in the past that led to his incarceration and that the murder of T.T. was entirely consistent with his character.

[21] Simmons next argues the trial court erred in admitting Exhibit 103, the ATF Firearms Trace Summary. Specifically, Simmons argues Exhibit 103 "was not appropriately authenticated and lacked foundation." Appellant's Br. p. 23. "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). 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.*

[22] Evidence Rule 902(11) allows the self-authentication of business records that meet the requirements of Indiana Evidence Rule 803(6), the business-records exception to the hearsay rule, as shown by a certification under oath from a business-records custodian or another qualified person. *Williams v. State*, 64 N.E.3d 221, 224 (Ind. Ct. App. 2016). Evidence Rule 902(11) provides:

> The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
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> * * * * *
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> **(11) Certified Domestic Records of a Regularly Conducted Activity.** Unless the source of information or the circumstances of preparation indicate a lack of trustworthiness, the original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), **as shown by a certification under oath of the custodian or another qualified person**. Before the trial or hearing, the

> proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

(Emphasis added).

[23] As Simmons points out, the State did not produce a certification under oath of a custodian under Evidence Rule 902(11). The State doesn't dispute that it did not self-authenticate the Firearms Trace Summary under this rule. Rather, it argues the trial court properly admitted the Firearms Trace Summary "as a business record falling under the business record exception to the hearsay rule." Appellee's Br. p. 24. Evidence Rule 803(6) provides:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
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> * * * * *
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> **(6) Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
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> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
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> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

> (C) making the record was a regular practice of that activity;
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> (D) **all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification;** and
>
> (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(Emphasis added).

[24] In its brief, the State says this case is like *Embrey v. State*, 989 N.E.2d 1260 (Ind. Ct. App. 2013). There, the trial court admitted into evidence an NPLEx (National Precursor Log Exchange) report showing the defendant's purchases and attempted purchases of ephedrine and pseudoephedrine at various retailers. The State attached to the NPLEx report a "Business Records Affidavit" from James Acquisto, the custodian of records for Appriss, Inc., which maintained the NPLEx database. Acquisto averred, among other things, that Appriss provided a secure website for law enforcement to log on and search and print ephedrine and pseudoephedrine sales logs. The defendant argued the court erred in admitting the NPLEx report because Acquisto did not know about the individual purchases and attempted purchases. We ruled that the court properly admitted the NPLEx report:

> The information contained in the NPLEx report was submitted to the NPLEx database in the course of the retailers' regular business activity at the time of the purchase or attempted purchase by employees of the retailers who had firsthand knowledge of the transactions. These submissions were made by individuals who, in the routine course of their employment, had a duty to accurately report the information and could be held criminally liable for a knowing or intentional failure to make an accurate report. In addition, these individuals relied on the information contained in the database as part of the regular course of their employment as it was unlawful for them to complete the transaction if the database generated a "stop sale" alert.
>
> Because the individuals submitting the information had both firsthand knowledge of the purchases or attempted purchases as well as a duty to accurately report the purchases or attempted purchases, we conclude that Acquisto, as custodian of the records, was not required to have firsthand knowledge of the purchases or attempted purchases.

Id. at 1267.

[25] The issue in this case is different, and thus *Embrey* does not help the State. In *Embrey*, a person from NPLEx (which managed the database) submitted a certification—not a local law-enforcement officer. But here, that person was a local law-enforcement officer—not a person from the ATF (which manages eTrace). The State cites no authority suggesting that Detective Poe's use of the ATF database means that he was qualified as a "custodian or another qualified

witness" under Evidence Rule 803(6)(D). The trial court erred in finding that Exhibit 103 was properly authenticated as a business record.[3]

[26] But we find the error to be harmless. As the State points out, Simmons did not object when Detective Poe (twice) testified that he ran a trace of the gun in the ATF database, which showed that the gun was purchased in March 2016. *See* Tr. Vol. IV pp. 199-200 (Detective Poe testifying that the gun was purchased in March 2016 after Simmons's brother "was already dead"); Tr. Vol. V p. 164 (same). Simmons **only** objected when the State sought to admit the exhibit itself. Evidence that is cumulative of other unchallenged evidence generally amounts to harmless error because its admission does not affect a party's substantial rights. *Richardson v. State*, 189 N.E.3d 629, 636 (Ind. Ct. App. 2022); *see also Hall v. State*, 177 N.E.3d 1183, 1197 (Ind. 2021) (explaining that factors considered in a harmless-error analysis include whether the impermissibly admitted evidence was cumulative).

[27] Simmons argues that the Firearms Trace Summary contains additional information that harmed him. Specifically, Exhibit 103 states that the "Recovery Date" was September 4, 2020, and that the "Time to Crime" was 1,644 days. Simmons argues this information implies that the gun was stolen (presumably by him since it was found in his car). We first point out that the

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[3] At oral argument, the State appeared to concede that Exhibit 103 was not properly authenticated as a business record. *See* Oral Arg. at 35:05. Instead, the State argued, for the first time, that Exhibit 103 was properly authenticated as a public record under Evidence Rule 901(b)(7). The State has waived this argument for not raising it until oral argument.

State did not rely on this additional information in its case. Moreover, it is apparent from context that the recovery date is the date the FBI executed the search warrant, *see* Ex. 78, and 1,644 days is the time that elapsed between the purchase date (March 5, 2016) and the recovery date (September 4, 2020). We fail to see how Simmons was harmed by this additional information.[4]

II. Sufficiency of the Evidence

[28] Simmons contends the evidence is insufficient to prove that he is the one who killed T.T. When reviewing sufficiency-of-the-evidence claims, we neither reweigh the evidence nor judge the credibility of witnesses. *Willis v. State*, 27 N.E.3d 1065, 1066 (Ind. 2015). We will only consider the evidence supporting the verdict and any reasonable inferences that can be drawn from the evidence. *Id.* A conviction will be affirmed if there is substantial evidence of probative value to support each element of the offense such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

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[4] Simmons also argues that his right to confrontation under the United States and Indiana Constitutions was violated because "the person who created the trace firearm summary was some unidentified agent at the Bureau of Alcohol, Tobacco and Firearms who was not present at trial." Appellant's Br. p. 26. The State says that Simmons has waived this argument for not objecting on these grounds at trial. *See, e.g.*, *Small v. State*, 736 N.E.2d 742, 747 (Ind. 2000) (holding that defendant waived confrontation-clause argument because he "did not object on Confrontation Clause grounds at trial"). Waiver notwithstanding, a violation of the right to confrontation is not reversible if it is harmless beyond a reasonable doubt. *See Koenig v. State*, 933 N.E.2d 1271, 1273-74 (Ind. 2010) (United States Constitution); *Torres v. State*, 673 N.E.2d 472, 474 n.1 (Ind. 1996) (Indiana Constitution). For the reasons explained above, any confrontation error was harmless beyond a reasonable doubt.

[29] The State acknowledges the case against Simmons was circumstantial. "In a circumstantial case, no single piece of evidence in isolation—no 'smoking gun'—is offered to persuade the jury to convict." *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022). "Yet a jury may be convinced, beyond a reasonable doubt, by looking at a web of facts in which no single strand may be dispositive." *Id.* (quotation omitted). "Indeed, the evidence in the aggregate may point to guilt where individual elements of the State's case might not." *Id.* (quotation omitted).

[30] The web of facts here was sufficient to convince the jury beyond a reasonable doubt that Simmons killed T.T. Simmons met T.T. on September 8, 2019, and gave her a ride that night. Simmons admitted spending time with T.T. after this date. According to Facebook records, between September 12 at 1:22 a.m. and September 13 at 8:15 p.m., Simmons's and T.T.'s Facebook accounts shared the same IP address eighteen times, meaning they were in the same house or area. Moreover, their accounts were accessed on the same device during this time. Simmons admitted being with T.T. on September 13 and taking her with him to the vet and to get pizza. He claimed he did not see her again after getting pizza. But according to Facebook records, the last location for T.T.'s account was September 14 at 1:27 a.m. near 6932 South Michigan Avenue in Chicago, where Simmons's mother lived. And according to Simmons's phone records, he was in the Highland/Griffith area of Indiana just two hours later, at 3:47 a.m. T.T.'s body was found in Gary—near where Simmons's father lived—on the morning of September 16. According to the forensic pathologist, T.T. had been

dead around two to four days. A 9 mm spent shell casing was found near T.T.'s body, and her wrists were bound with a spark-plug cord (Simmons worked on cars) that very likely contained Simmons's DNA. A year after T.T.'s death, the police searched Simmons's car and found a 9 mm gun frame and extended magazine containing 9 mm bullets in his trunk under a fake floor. Although it could not be conclusively determined that the gun fired the spent casing found at the scene, it was possible. Finally, the magazine, which most likely contained Simmons's DNA, fit the gun frame.

[31] Simmons points out that the manufacturer of the 9 mm bullet that killed T.T. was Blaser while the manufacturers of the 9 mm bullets found in the extended magazine were AP and AUSA. This is unsurprising, however, given that the gun frame and magazine were not found until a year after the shooting. Simmons, essentially conceding that his DNA was on the spark-plug cord, argues that his DNA could have gotten on the cord by the transfer of his DNA from T.T. because they had been together. Defense counsel cross-examined Dilley about the possibility of DNA transfer and made this argument to the jury during closing, but the jury rejected it. *See* Tr. Vol. V pp. 105-06, 116, 194. Finally, Simmons notes that the State didn't present any evidence of motive. Motive, however, is not an element of murder. *See Ivory v. State*, 141 N.E.3d 1273, 1280 (Ind. Ct. App. 2020), *trans. denied*. The evidence is sufficient to prove that Simmons killed T.T.

[32] Affirmed.

Tavitas, J., and Foley, J, concur.