MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Anthony Harry Day,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

February 11, 2025

Court of Appeals Case No.
24A-CR-1273

Appeal from the Lake Superior Court

The Honorable Gina L. Jones, Judge

Trial Court Cause No.
45G03-1702-MR-2

Memorandum Decision by Judge Weissmann
Judges Pyle and Felix concur.

Weissmann, Judge.

[1] Anthony Day shot his ex-girlfriend, Sabrina McIntosh, before shooting and killing McIntosh's new boyfriend, Ajohnte Griffin. For this, Day was convicted of murder, attempted murder, and possession of a firearm by a serious violent felon (SVF). Day now appeals his convictions, raising multiple evidentiary issues. Finding no reversible error, we affirm. However, we sua sponte address an irregularity in how the trial court treated Day's possession of a firearm by a SVF conviction at sentencing. We remand for clarification in that regard.

Facts

[2] Day and McIntosh ended their relationship in 2017, and McIntosh began dating Griffin not long after. A month after the breakup, McIntosh and Griffin returned home late one night. As McIntosh prepared to take a bath, she heard commotion in another room. She found Day and Griffin engaged in a physical struggle, each holding a gun. McIntosh tried to call 911. But when Day threatened to start shooting unless she hung up, she dropped the phone.

[3] Day then said, "I've been wanting to do this," and shot McIntosh in the shoulder. Exhs. Vol. II, p. 167. McIntosh ran out the front door and hid in a neighbor's ditch. Seconds later, she heard a gunshot, Griffin yell "no" or "ah," and then a second gunshot. *Id.* at 174. Still hiding, McIntosh saw Day walk to the alley behind the house.

[4] Police responded to the scene after hearing the gunfire and encountered McIntosh as she came out of her hiding place. She was "very afraid," clutching

her bleeding shoulder, and falling over as she tried to run to police. Tr. Vol. III, p. 64. McIntosh told an officer that "her ex, [Day], had just shot her, and he just shot her boyfriend." *Id.* at 66. She also expressed concern that Day may be on his way to shoot her mother and daughter, too. Police then found Griffin dead on the front porch with a gunshot wound to his head.

[5] A few days after the shooting, Day was taken into custody. He was charged with murder (Count 1), Level 1 felony attempted murder (Count 2), and Level 5 felony battery by means of a deadly weapon (Count 3). Two additional counts were later added: Level 6 felony stalking (Count 4) and Level 4 felony possession of a firearm by a serious violent felon (Count 5).

[6] At Day's jury trial, McIntosh gave detailed testimony as to her relationship with Day, their breakup, and the events of the shooting. But this trial ended in a mistrial. When the State attempted to contact McIntosh about testifying again at the second trial, she could not be located. As a result, the trial court allowed a transcript of McIntosh's testimony from the prior trial to be read into the record at the second trial, over Day's objection. Responding officers also testified to their investigation and their interactions with McIntosh on the night of the shooting. Day's brother, Alonzo, testified that Day stopped by his house shortly after the shooting, said "something bad had happened," and switched vehicles. *Id.* at 81.

[7] The jury ultimately found Day guilty of all counts except stalking. The trial court convicted him of murder, attempted murder, and possession of a firearm

by a SVF, but did not convict him on the battery charge due to double jeopardy concerns. Day now appeals his convictions.

Discussion & Decision

[8] On appeal, Day alleges the trial court erred in admitting various pieces of evidence. And based on our review of the record, we also sua sponte address the trial court's inconsistent treatment of Count 5, possession of a firearm by a SVF, during sentencing.

I. Evidentiary Challenges

[9] "A trial court has broad discretion in ruling on the admissibility of evidence." *Turner v. State*, 953 N.E.2d 1039, 1045 (Ind. 2011). Accordingly, we review the admission or exclusion of evidence for abuse of that discretion. *Id.* A trial court abuses its discretion when its evidentiary ruling is clearly against the logic and effect of the facts and circumstances before the court. *Id.* But even when the trial court errs in this regard, we will not reverse if the error was harmless. *Id.* at 1058; Ind. Trial Rule 61. An error is harmless if it does not "affect the substantial rights of a party," as determined by the probable impact the evidence had on the jury. *Turner*, 953 N.E.2d at 1049.

[10] Day first argues the trial court erred in admitting McIntosh's prior testimony, based on its finding that she was unavailable to testify. Day also challenges the admission of various witness statements, arguing one failed to qualify as an excited utterance and others were made without the requisite personal

knowledge. For each challenged evidentiary issue, we find either there was no error or even if an error occurred, it was harmless.

A. Prior Testimony

[11] McIntosh's testimony from the first trial was admitted under Indiana Evidence Rule 804(b)(1), which provides that a declarant's former testimony is admissible if the declarant is now unavailable as a witness and the party against whom the testimony is offered (here, Day) had an opportunity for cross-examination.

[12] Day challenges only the trial court's determination that McIntosh was unavailable to testify at the second trial. A witness is deemed unavailable if the proponent of the evidence (here, the State) "has not been able, by process or other reasonable means, to procure" the witness's attendance. Ind. Evidence Rule 804(a)(5). This requires the State to make a "reasonable, good-faith effort" to secure the witness's presence. *Berkman v. State*, 976 N.E.2d 68, 76 (Ind. Ct. App. 2012).

[13] Here, the State made extensive efforts to locate McIntosh. After searching multiple databases, investigators found four addresses connected to McIntosh: one each in Indianapolis, Speedway, Gary, and Hammond. Investigators visited the Hammond and Gary addresses and taped subpoenas to the doors after no one answered. Subpoenas were sent by certified mail to the Speedway and Indianapolis addresses but were returned as undeliverable. Local police then visited the Speedway address, but McIntosh's name was not on the lease

and she could not be located. The Indianapolis address was confirmed to be vacant by its property manager.

[14] Investigators also called roughly ten phone numbers associated with McIntosh. They could reach only one of her relatives, who told investigators that McIntosh did not have an active phone number. That relative also confirmed that McIntosh did not live at the Gary address but suggested that she may be living at the Hammond address. When investigators returned to that Hammond address, again, no one answered the door. They left another subpoena at the house, knocked on the doors of four neighboring houses, and ran the license plate of a car parked nearby. Investigators also checked local jails, monitored social media, and attempted email contact with McIntosh—all to no avail.

[15] The State's varied attempts to contact McIntosh constitute reasonable, good faith efforts. They match, or even exceed, the kinds of measures that this Court has previously deemed acceptable. *See, e.g. Berkman*, 976 N.E.2d at 76 (finding reasonable State's attempted service at last known address and unsuccessful telephone contact).

[16] Still, Day argues the State should have done more, like analyzing McIntosh's cell phone data, obtaining a material witness warrant for McIntosh,[1] or requesting U.S. Marshal assistance. However, phone records could not be

[1] A material witness warrant allows a court to order the arrest and secure the presence of a person whose testimony is material to a criminal case when it appears impracticable to secure their presence by subpoena alone. *See generally* Ind. Code § 35-37-5-2.

examined without an active phone number for McIntosh. *See generally Berkman*, 976 N.E.2d at 76 (finding State's efforts sufficient where it was "speculative at best" whether further attempts would have been successful in locating a witness). We therefore find no abuse of discretion in the trial court's determination that McIntosh was unavailable.

[17] Finally, Day briefly suggests that the use of McIntosh's prior testimony violated his right to confront adverse witnesses. However, he does not develop this argument or provide citations to authorities, as required by Indiana Appellate Rule 46(A)(8)(a). As a result, Day has waived this claim. *See Martin v. Hunt*, 130 N.E.3d 135, 137 (Ind. Ct. App. 2019) ("Failure to present a cogent argument results in waiver of the issue on appeal."). However, we note that when McIntosh testified at Day's first trial, she was subjected to rigorous cross-examination by the same defense counsel who later represented Day at his second trial. And that cross-examination was included in the transcript that was read to the jury.

B. Excited Utterance

[18] Day's next evidentiary challenge pertains to the admission of McIntosh's statement that Day might be on his way to kill McIntosh's mother and daughter. She made this remark to police immediately after she was shot, and a responding officer recounted the statement when testifying about the night of the shooting. Day contends this evidence was inadmissible hearsay. *See generally* Ind. Evidence Rule 801(c) (defining "hearsay" as a statement that "is not made by the declarant while testifying at the trial or hearing . . . and is offered in

evidence to prove the truth of the matter asserted"); Ind. Evidence Rule 802 ("Hearsay is not admissible unless [the Rules of Evidence] or other law provides otherwise.").

[19] The trial court admitted McIntosh's statement as an excited utterance, an exception to the general rule that hearsay is inadmissible. *See* Ind. Evidence Rule 803(2). To be admitted as such, the proponent of the evidence must show that: (1) a startling event occurred; (2) the declarant made a statement while under the stress of excitement caused by the event; and (3) the statement related to the event. Day argues the third element was not met, as McIntosh's statement did not relate to the startling event, but was an expression of concern about the future.

[20] Even if Day were correct, any error in the admission of such statement would be harmless because the State presented substantial independent evidence of Day's guilt. This evidence included testimony that Day had an armed altercation with Griffin, shot Griffin, declared "I've been wanting to do this" before shooting McIntosh, and then fled to his brother's house to switch cars. This challenged statement was "unimportant in relation to everything else the jury considered" and there was "little likelihood [it] contributed to the conviction." *Corbally v. State*, 5 N.E.3d 463, 470 (Ind. Ct. App. 2014)

C. Personal Knowledge

[21] Day also disputes the admission of two witness statements on the basis that the witnesses lacked the requite personal knowledge for their remarks. *See generally*

Ind. Evidence Rule 602 (witness may only testify to matters within their personal knowledge).

[22] Day first claims that McIntosh lacked personal knowledge for her statement to police that Day shot Griffin, which was admitted as an excited utterance. He emphasizes that McIntosh did not actually see Griffin get shot, and then relies on *Noojin v. State,* 730 N.E.2d 672, 677 (Ind. 2000) for the proposition that statements made under the stress of an event "must be based on the declarant's personal knowledge" and cannot be "based on conjecture." [2] But *Noojin* is distinguishable.

[23] In that case, the declarant was not at the crime scene during the murders and later speculated that Noojin was the killer based only on the fact that she was with Noojin and the victims, left for 25 minutes, and came back to find the victims dead. Unlike the declarant in *Noojin*, McIntosh was present for the crime and remained within earshot of Griffin's shooting. She personally observed the armed confrontation between Day and Griffin, was herself shot by Day, and just seconds later heard additional gunfire and Griffin's cries from the home. Therefore, her identification of Day as Griffin's shooter was grounded in

[2] In a footnote, Day also alleges this testimony "was incredibly dubious as it was physically impossible for [McIntosh] to have seen what occurred." Appellant's Br., p. 12 n.3. But this doctrine requires inherently contradictory testimony from a sole witness and a complete lack of circumstantial evidence of guilt—neither of which exist here. *See Moore v. State*, 27 N.E.3d 749, 755 (Ind. 2015).

her own observations of the connected events, not mere conjecture. Thus, the trial court did not abuse its discretion in admitting this statement.

[24] Second, Day challenges the admission of his brother Alonzo's statement that police came to Alonzo's house because they were "looking for [Day]." Tr. Vol. III, p. 86. Day contends this statement was impermissibly speculative about police officers' motivations, and therefore Alonzo lacked personal knowledge to make such a remark.

[25] But the question that prompted Alonzo's statement sought only to elicit his own knowledge about the events, as it was phrased, "Do you know why the police were at your house?" *Id.* The trial court told Alonzo that he did not have to answer if he did not know, but he responded: "I guess looking for my brother." *Id.*

[26] Any error in the admission of this statement would be harmless. The jury heard a detective testify, without objection, that McIntosh gave police a description of Day's yellow Camaro, that such car was soon after found at Alonzo's house, and that police subsequently searched Alonzo's house. Alonzo also testified, without objection, that police arrived and asked to search his house approximately an hour after Day stopped by to switch cars and that Day was not at the home during the search. Thus, the challenged statement was merely an inference the jury could itself have drawn from the presented evidence. Therefore, any error was harmless because the probable impact of the

statement's admission was minimal and did not affect Day's substantial rights. *See Turner*, 953 N.E.2d at 1049.

II. Sentencing Irregularity

[27] Our review of the record revealed an irregularity in how the trial court treated Day's possession of a firearm by a serious violent felon (SVF) conviction at sentencing. We address this issue sua sponte and remand for clarification.

[28] Day was charged with murder (Count 1), attempted murder (Count 2), battery by means of a deadly weapon (Count 3), stalking (Count 4), and possession of a firearm by a SVF in violation of Indiana Code 35-47-4-5 (Count 5). After trial, the jury entered a guilty verdict on Counts 1, 2, 3, and 5, and a not guilty verdict on Count 4.

[29] But at the sentencing hearing, the trial court began to use different terminology when referring to Count 5's firearms offense. The court started the hearing by stating that it "entered judgment on the verdict for the conviction of the offenses: Count 1, Murder; Count 2, Attempted Murder; Count 3, Battery by Means of a Deadly Weapon as a Level 5 Felony; and *the enhancement for a firearm*." Tr. Vol. IV, p. 214-15 (emphasis added). When the court imposed the sentence, it ordered 60 years for murder, 35 years for attempted murder, and 12 years "on the SVF." *Id.* at 231. The court later added that "Count 5 is the possession." *Id.* at 232.

[30] The written sentencing order is also not clear as to whether the trial court treated Count 5 as a distinct offense or improperly as a sentencing

enhancement. The offense is not clearly labeled as either one, as the order states, in pertinent parts:

> The Defendant having been found guilty by a jury on March 22, 2024, the court entered judgment on the verdict for conviction of the offenses:
>
> Count I: Murder
> Count II: Attempted Murder
> Count III: Battery by means of a deadly weapon, a Level 5 Felony
> Intentional possession of a firearm by Serious Violent Felon

> The Defendant is now ordered committed to the custody of the Department of Correction for classification and confinement, as Follows:
>
> Count I: Sixty (60) years in the Department of Correction
> Count II: Thirty-Five (35) years in the Department of Correction
> Serious Violent Felon: Twelve (12) years in the Department of Correction.

App. Vol. III, p. 176-77.

[31] The inconsistency persists in the abstract of judgment, which lists only Counts 1-4 and does not mention Count 5. Instead, it includes a 12-year "sentencing enhancement" for "firearms used in [the] commission of [the] offense." *Id.* at 179.

[32] Based on our review of the record, the trial court appears to have treated Count 5 both correctly as a crime and incorrectly as a sentencing enhancement, which are not the same and have distinct sentencing implications. *Compare* Ind. Code 35-47-4-5 (crime) *with* Ind. Code 35-50-2-11 (enhancement). Accordingly, we remand for correction of these inconsistencies.

Conclusion

[33] Finding no reversible error in Day's evidentiary challenges, we affirm. However, we also remand for correction of the trial court's inconsistent treatment of Day's possession of a firearm by a SVF conviction at sentencing.

[34] Affirmed and remanded.

Pyle, J., and Felix, J., concur.

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