



## **STATEMENT OF THE CASE**

Travis R. Rush appeals his conviction for battery, as a Class C felony. Rush raises two issues for our review:

1. Whether the trial court abused its discretion when it admitted into evidence an audio recording of Rush and his wife, Vicki.
2. Whether the State presented sufficient evidence to support Rush's conviction.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

In 2001, Rush and Vicki married. They lived in Logansport with their three minor children. In April of 2008, Rush and Vicki separated after their relationship became strained and tense. At the time, Vicki was working twelve-hour shifts from 6:00 p.m. to 6:00 a.m. at Tyson Foods in Logansport. While she was at work, Rush would watch after the children. It was not unusual for Rush to call Vicki at work.

On April 25, 2008, Rush called Vicki at work. That phone call was recorded by Vicki's supervisor, Jamie Simmons. Simmons informed Vicki that he had recorded the call, and Vicki authorized Simmons to record any future phone calls.

On April 29, Rush again called Vicki at work. That call was also recorded by Simmons, although Simmons was unable to capture the beginning of the conversation. During the phone call, Rush became angry at Vicki and threatened her. And, after the conversation, Vicki left work and went home out of concern for the safety of her children.

En route to her home, Vicki called the Logansport Police Department and requested that an officer meet her at her residence. However, Vicki arrived home before an officer arrived, and, while still on her cell phone with the dispatcher, she entered her house. As she stepped over the threshold, she saw Rush standing to her right. Rush said something to her and then struck her in the face with his fist. The dispatcher heard Vicki scream and also heard a loud, angry male voice. Rush then took Vicki's cell phone out of her hand, and the dispatcher got disconnected.

After Rush struck her in the face, Vicki retrieved her car keys and attempted to run. However, as she passed her kitchen sink, Rush grabbed her from behind, pulled her to the floor, and raised his foot over her as if he were going to stomp on her. Vicki rolled onto her left side and curled up her body. She then lost consciousness.

Logansport police arrived shortly thereafter. Officer Parmeter was the first to arrive on the scene. As he entered the residence, he observed a large amount of blood on the kitchen floor. He also saw Vicki staggering around the kitchen, bleeding profusely from her face and head. Rush was sitting at the kitchen table, and when Officer Parmeter ordered Rush to place his hands on his head, Rush instead lit a cigarette. Other officers then arrived and arrested Rush.

Paramedics then arrived on the scene and immediately transported Vicki to the hospital. There, Vicki was in severe pain and appeared confused at times. Medical staff performed CT scans on her head and face. As a result of the battery, Vicki had facial injuries and lacerations around her nose, mouth, and the left side of her head, accompanied by bruising. One of the lacerations on her nose required sutures to close, as

did a laceration around her left eyebrow. Her nose was fractured in several places and was displaced, requiring surgery to repair. As a result, Vicki now has trouble with her sense of smell. Vicki also suffered a concussion, and upon her discharge from the hospital she was prescribed antibiotics and pain medication.

On May 2, 2008, the State filed an information against Rush charging him with, among other things, battery as a Class C felony. On March 24, 2010, Rush filed a motion to suppress the April 25, 2008, and April 29, 2008, recorded telephone conversations. In support of the admissibility of those conversations, Vicki testified that, after Simmons had recorded the April 25th conversation, she gave him permission to make future recordings, although she did not specifically tell him to record the April 29th conversation. The trial court ruled that the April 25th conversation was of poor quality and, therefore, inadmissible. However, the court concluded that the April 29th recording was authorized, clear, and admissible.

The court held Rush's jury trial on April 14-15, 2010. Rush objected to the State's request to admit the April 29th recording, but the court overruled Rush's objections. However, when the recording was played to the jury, the court informed the jury that that recording was "being offered for the limited purpose of proving or tending to prove that Mr. Rush was angry during the telephone conversation that occurred prior to the incident. I caution you that the language used[,] while offensive[,] is not an element of the offense as charged." Appellant's App. at 318. At the close of the State's case, Rush moved for a directed verdict, which the court denied. Rush then rested his case without presenting evidence and moved for a judgment on the evidence, which the court denied. The jury

found Rush guilty of battery, as a Class C felony, and the court entered the judgment of conviction and sentence accordingly. This appeal ensued.

## **DISCUSSION AND DECISION**

### **Issue One: Admission of Recordings**

Rush first argues that the trial court abused its discretion when it admitted into evidence the April 29 recorded conversation. Our standard of review of a trial court's admission of evidence is an abuse of discretion. Speybroeck v. State, 875 N.E.2d 813, 818 (Ind. Ct. App. 2007). A trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before the court. Id. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. Dawson v. State, 786 N.E.2d 742, 745 (Ind. Ct. App. 2003), trans. denied.

Rush contends that the trial court abused its discretion for three reasons. First, Rush asserts that the recordings lacked sufficient foundation. Second, Rush argues that the recording violated the Indiana Wiretap Act. And, third, Rush suggests that the admission of the recordings violated his Sixth Amendment right to confront witnesses against him. None of Rush's arguments are persuasive.

As our Supreme Court has held:

The foundational requirements for the admission of a tape recording made in a non-custodial setting are: (1) that the recording is authentic and correct; (2) that it does not contain evidence otherwise inadmissible; and (3) that it be of such clarity as to be intelligible and enlightening to the jury.

Kidd v. State, 738 N.E.2d 1039, 1042 (Ind. 2000). Rush asserts that none of those three requirements were met here.

Rush first asserts that a proper foundation was not established because the recording proffered at trial was a copy, and therefore not “authentic,” and that the recording omitted the beginning of the conversation, and therefore not “correct.” But Indiana Evidence Rule 1003 generally permits duplicates to be offered in lieu of originals, and Rush does not explain why that Rule should not apply here. Further, Vicki testified that the recording played for the jury was the same conversation that she had held with Rush on April 29, even though the beginning of the conversation was missing. Her testimony authenticated the recording. See Ind. Evidence Rule 901(a).

Rush also claims that the recording only contained evidence which was unfairly prejudicial and therefore inadmissible under Indiana Evidence Rules 402, 403, and 404. But the trial court gave the jury a limiting instruction before it permitted them to hear the recording, and the conversation was not irrelevant. We are not, therefore, persuaded by Rush’s assertions to the contrary.

Third, Rush asserts that the State lacked a proper foundation for the recording because it lacked clarity. But Rush acknowledges that “the audio of the conversation could be understood.” Appellant’s Br. at 12. Rush’s argument on this issue is simply a request for this court to reweigh the evidence, which we will not do. See Dawson, 786 N.E.2d at 745.

Rush next contends that the trial court abused its discretion in admitting the audio recording because Simmons obtained the recording in violation of the Indiana Wiretap Act (“the Act”). Under the Act, “[a] person who knowingly or intentionally intercepts a communication in violation of this article commits unlawful interception, a Class C

felony.” Ind. Code § 35-33.5-5-5(b). “Interception” is defined as “the intentional[ ] recording . . . of the contents of an electronic communication by a person other than a sender or receiver of that communication, without the consent of the sender or receiver . . . .” I.C. § 35-33.5-1-5. The contents of an interception under the Act may not be received into evidence or otherwise disclosed during a court proceeding, absent certain circumstances not present here. I.C. § 35-33.5-5-1.

Rush contends that Simmons’ April 29 recording of Rush’s conversation with Vicki was unlawful because neither he nor Vicki knew that Simmons was recording the conversation at the time of the conversation. But Rush ignores Vicki’s testimony, wherein she stated that she had authorized Simmons to record her telephone conversations while she was at work. Rush cites no law supporting his suggestion that the receiver of an electronic communication must give the recorder new authorization each time a communication is received. Because the recording was authorized by the receiver of the communication, the Act cannot be applied to exclude the conversation from the jury’s consideration.

Finally, Rush contends that his Sixth Amendment right to confront witnesses was violated when the court admitted the recordings without first calling Simmons to testify. Out-of-court, testimonial statements are admissible at trial only if the declarant is unavailable to testify and the defendant has had a prior opportunity to cross examine the declarant. Williams v. State, 930 N.E.2d 602, 607 (Ind. Ct. App. 2010), trans. denied. However, the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. Id. (quotation omitted).

Thus, if a statement is either nontestimonial or nonhearsay, the federal Confrontation Clause will not bar its admissibility at trial. Id. at 607-08 (footnote omitted).

Rush confuses authentication with confrontation. Simmons' testimony may have been used to authenticate the recording,<sup>1</sup> but the recording did not contain any out-of-court statements by Simmons. Calling Simmons as a witness, then, would not have cured any confrontational defect in the recording. Further, the only declarants in the recording were Vicki and Rush. Vicki was subjected to cross-examination, and Rush's statements are nonhearsay. See Ind. Evidence Rule 801(d)(2). Thus, the trial court did not err when it admitted into evidence Simmons' audio recording of Vicki's April 29, 2008, conversation with Rush.

### **Issue Two: Sufficient Evidence**

Rush also contends that the State failed to present sufficient evidence that he committed battery, as a Class C felony. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside.

To convict Rush of battery, as a Class C felony, the State needed to prove beyond a reasonable doubt that he knowingly or intentionally touched another person in a rude,

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<sup>1</sup> This is not to say that Simmons' testimony was necessary where, as here, the receiver of the communication gave authenticating testimony.

insolent, or angry manner, resulting in serious bodily injury. I.C. § 35-42-2-1(a). Under Indiana law, “ ‘Serious bodily injury’ means bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus.” I.C. § 35-41-1-25. “Whether bodily injury is ‘serious’ is a question of degree and, therefore, appropriately reserved for the finder of fact.” Whitlow v. State, 901 N.E.2d 659, 661 (Ind. Ct. App. 2009).

Rush’s sole argument on this issue is that the State failed to show that Vicki’s bodily injuries were “serious bodily injur[ies].” See I.C. § 35-42-2-1(a). The State’s evidence showed that, as a result of Rush’s battery, Vicki was unconscious for a time and was in extreme pain. She was disorientated when officers arrived; she had suffered a concussion; she had two lacerations on her face that required sutures; her nose was displaced and required surgery; and, upon her discharge from the hospital, she was prescribed pain medication. Vicki also testified that, as of the trial two years after the attack, she still had impairment in the function of her nose. Thus, the State presented ample evidence that Vicki’s bodily injuries were serious, and Rush’s arguments to the contrary are nothing more than requests for this court to reweigh the evidence.

### **Conclusion**

In sum, the trial court did not err in admitting into evidence the April 29, 2008, audio recording between Rush and Vicki. And the State presented sufficient evidence to support Rush’s conviction for battery, as a Class C felony. Accordingly, we affirm Rush’s conviction.

Affirmed.

DARDEN, J., and BAILEY, J., concur.