



Monica M. Emmons (“Emmons”) was convicted after a jury trial of theft<sup>1</sup> as a Class D felony and was given a three-year sentence with credit for time served prior to trial. She appeals, raising the following restated issues:

- I. Whether the trial court abused its discretion when it granted the State’s motion to continue, made during trial, to allow the State to locate a witness; and
- II. Whether the trial court abused its discretion when it allowed recordings of telephone calls that Emmons made from the jail to be admitted into evidence.

The State cross-appeals, raising the following restated issue:

- I. Whether the trial court abused its discretion when it denied the State’s motion to correct error contending that the trial court had erred in awarding Emmons credit time for her pretrial confinement in another county awaiting trial on another charge.

We affirm in part, reverse in part, and remand with instructions.

## **FACTS AND PROCEDURAL HISTORY**

Chryston Dice (“Dice”) was engaged to a woman and gave her an engagement ring worth approximately \$3,100. After the engagement ended in January 2008, the woman returned the ring to Dice. Dice kept the ring and stored it in a night stand by his bed. Dice met Emmons in April 2008. Emmons was between leases and moved into Dice’s home in Greenfield, Indiana. Emmons stayed with Dice for approximately three weeks, but moved out in late June 2008, at Dice’s request. Emmons still had a key to Dice’s house.

At the end of July, Dice went to Fort Leavenworth, Kansas for his annual National

---

<sup>1</sup> See Ind. Code § 35-43-4-2.

Guard training. When he left for training, Dice left the ring in his nightstand drawer. On July 30, 2008, when Dice's sister-in-law, Tamara Rader ("Rader"), stopped by Dice's house and noticed that someone had been in the house. Rader discovered that the ring, an antique vanity, and a forty-two-inch plasma television were missing. Rader notified the police and filed a report.

On August 3, 2008, Christopher Sexton ("Sexton"), Emmons's husband, pawned Dice's ring at EZ Pawn in Anderson, Indiana and received \$300. Greenfield Police Detective J.D. Fortner ("Detective Fortner") investigated the case and recovered the ring from the pawn shop. The State charged Emmons with theft as a Class D felony.

A jury trial began on February 22, 2010. The State had subpoenaed Sexton to appear as a witness at the trial, and the trial court had advised him of the trial date in open court and ordered him to appear. However, Sexton failed to appear for trial. The State did not want to continue the trial and requested the court to issue a writ of body attachment for Sexton. Both sides objected to a continuance at that time, and the trial court said, "Heck with it. Then I'll just not continue the case and we're [sic] just to go to trial on it and we'll see where it lands." *Tr.* at 22-23. The trial court then issued a writ of body attachment for Sexton.

After the first day of trial, Emmons made telephone calls from the jail to James, and to James's girlfriend, Carina Price ("Price").<sup>2</sup> . During the calls, Emmons instructed James and Price to find Sexton and tell him not to come to court and that she would be

---

<sup>2</sup> Emmons also made a call to her former attorney. This call was not admitted into evidence, nor did the State listen to the call.

acquitted if he did not show up. *State's Ex. 11*. The State sought to have the recordings of these calls admitted into evidence. The trial court listened to them *in camera*, determined that the calls to James and Price were relevant and admitted them into evidence. Sexton did not appear by the end of testimony on the second day of trial. The State requested a recess of the trial to be able to serve the writ of body attachment on Sexton. The trial court granted the request and continued the trial until Monday, March 1, 2010 to allow the State to locate Sexton. The police successfully located Sexton, and the remainder of the trial occurred on March 1, 2010.

At the conclusion of the trial, the jury found Emmons guilty of theft as a Class D felony, and the trial court sentenced her to three years for the conviction and gave her credit for 254 days spent in the Henry County Jail prior to trial. The State filed a motion to correct error, claiming that Emmons's sentence was mandatorily consecutive to a prior Henry County conviction and that the trial court erroneously gave her "double" credit time for her time served in Henry County because she had already received credit for some of the time on her Henry County sentence. The trial court denied the State's motion. Emmons now appeals, and the State cross-appeals.

## **DISCUSSION AND DECISION**

### **I. Continuance**

"Rulings on non-statutory motions for continuance lie within the discretion of the trial court and will be reversed only for an abuse of that discretion and resultant prejudice." *Tolliver v. State*, 922 N.E.2d 1272, 1281 (Ind. Ct. App. 2010), *trans. denied*. An abuse of discretion occurs where the decision is clearly against the logic and effect of

the facts and circumstances before the trial court. *Id.* The trial court, in determining whether good cause exists for granting the motion, may review the circumstances of the case, as well as the allegations of the motion itself. *Poulton v. State*, 666 N.E.2d 390, 393 (Ind. 1996). We will not conclude that the trial court abused its discretion unless the defendant can demonstrate prejudice as a result of the trial court's decision on the motion for continuance. *Stafford v. State*, 890 N.E.2d 744, 750 (Ind. Ct. App. 2008).

Emmons argues that the trial court abused its discretion when it granted the State's motion for continuance to locate Sexton. She specifically contends that this is because by that point the jury had been sworn and jeopardy had attached. Emmons further claims that the State should have secured Sexton's testimony through a deposition prior to trial because it knew that he was a potential hostile witness.

Pursuant to Indiana Trial Rule 53.5, "[u]pon motion, trial may be postponed or continued in the discretion of the court, and shall be allowed upon a showing of good cause established by affidavit or other evidence." Here, the record shows that Sexton attended the last pretrial hearing prior to Emmons's trial, and the trial court ordered him to appear for the trial and informed him of the trial date. Sexton, however failed to appear as ordered, and the State requested a writ of body attachment for him. No continuance was taken at that time, and the trial court granted the State's writ and began the trial with the State presenting its case-in-chief.

On the second day of trial, when Sexton again failed to appear to testify, the State presented evidence that at the end of the first day of trial, Emmons was overheard asking her brother, "is he at your house," to which James replied, "no, but he won't be there --

he won't be found by tomorrow.'" *Tr.* at 211. The State also showed that later that night, Emmons made phone calls to James and to Price, in which she inquired as to the whereabouts of Sexton and told both James and Price to make sure Sexton was not found before the trial ended and she would be acquitted. *State's Ex.* 11. The State then requested a continuance to be able to locate Sexton.

From the evidence presented, the trial court could properly conclude that Sexton was a material witness for the State and that a brief continuance was needed in light of his absence. Therefore, at the end of the second day of trial, the trial court granted a continuance of three business days until the following Monday, March 1, 2010 for the State to secure Sexton's presence to testify as he was an integral witness to the case. Before doing so, the trial court polled the jury to determine if they would be able to come back on March 1, and all of the jury members were available to resume the trial on that date. Sexton was located during this time and appeared when the trial resumed to testify for the State. Further, the evidence demonstrated that Emmons attempted to keep Sexton from testifying. We conclude that the trial court did not abuse its discretion in allowing this brief continuance to allow the State to locate an important witness.

## **II. Admission of Audio Recordings**

The admission of evidence is within the sound discretion of the trial court, and we will reverse only on a showing of abuse of discretion. *McClendon v. State*, 910 N.E.2d 826, 832 (Ind. Ct. App. 2009), *trans. denied*; *Goldsberry v. State*, 821 N.E.2d 447, 453-54 (Ind. Ct. App. 2005). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *McClendon*, 910

N.E.2d at 832; *Goldsberry*, 821 N.E.2d at 454.

Emmons argues that the trial court abused its discretion when it allowed the recordings of her telephone calls made from jail to be admitted into evidence. She contends that this is because the recordings were highly prejudicial. She also asserts that the admission of the recordings was error because they contained hearsay statements, particularly of the recipients of the telephone calls. Emmons further claims that the recordings should not have been admitted because no foundation for the identification of the caller was established.

In the present case, the trial court listened to the recordings of the three telephone calls that Emmons made to James and Price. After doing so, the trial court determined that the recordings were “highly probative of [Emmons’s] culpability” and allowed them to be admitted into evidence. *Tr.* at 185. Relevant evidence means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ind. Evidence Rule 401. Relevant evidence is admissible, while irrelevant evidence is inadmissible. Evid. R. 402. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Evid. R. 403. In the recordings, Emmons instructs James and Price to find Sexton and tell him not to come to court and that she would be acquitted if he did not show up to testify. *State’s Ex. 11*. We agree with the trial court that the recordings were highly probative of Emmons’s culpability in that the statements contained therein were against her penal interest and showed her effort to attempt to keep Sexton from testifying and her belief

that she would be found not guilty if he did not testify. We also conclude that any prejudice in the admission of the recordings was outweighed by their highly probative value.

Emmons also claims that the recordings constituted hearsay. Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Evid. R. 801(c). Hearsay evidence is generally inadmissible pursuant to Evidence Rule 801(c). *Ballard v. State*, 877 N.E.2d 860, 862 (Ind. Ct. App. 2007). As Emmons concedes, the statements made by her on the recordings were statements by a party-opponent and therefore not hearsay. Evid. R. 801(d)(2). As for the statements by James and Price on the recordings, the recordings were not admitted for the truth of the matter asserted in their statements, but to show the “guilty knowledge of [Emmons].” *Tr.* at 189. Therefore, the statements did not constitute hearsay.

Emmons lastly argues that a proper foundation was not laid for the admission of the statements because no evidence was introduced to identify her as the caller in the recordings. “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Evid. R. 901(a). A voice on a recording may be identified by the opinion of an individual “based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.” Evid. R. 901(b)(5). Here, Detective Fortner identified the voice of the person making the telephone calls as that of Emmons. *Tr.* at 187. He had previously testified that, in the course of investigating this case, he had interviewed Emmons on four separate occasions over the course of two days.

This identification of Emmons's voice by Detective Fortner was a sufficient foundation for the admission of the recordings. We conclude that the trial court did not abuse its discretion when it admitted the recordings of the telephone calls made by Emmons from jail.

### **III. Cross-Appeal**

The State cross-appeals, contending that the trial court abused its discretion when it denied the State's motion to correct error. The decision to grant or deny a motion to correct error lies within the trial court's discretion. *James v. State*, 872 N.E.2d 669, 671 (Ind. Ct. App. 2007). As such, we review the trial court's decision for an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it or if the trial court has misinterpreted the law. *Id.*

The State argues that the trial court's denial of its motion to correct error was an abuse of discretion because the trial court erred in sentencing Emmons. The State specifically asserts that, because Emmons's sentence was mandatorily consecutive to her sentence in Henry County, she could only be awarded credit time against her aggregate sentence and not against both sentences. Therefore, the State claims that the trial court erroneously awarded Emmons "double" credit time for her time served pretrial in Henry County.

Initially, we note that Emmons did not file a reply brief to respond to the State's allegation on cross-appeal. In such a circumstance, we may reverse if we find *prima facie* error. *Reid v. State*, 883 N.E.2d 872, 873 (Ind. Ct. App. 2008). *Prima facie* is

defined as “at first sight, on first appearance, or on the face of it.” *Id.*

If after being arrested for one crime, a person commits a new crime while on probation, parole, or released on bond or on the person’s own recognizance, the sentences for the crimes shall be served consecutively. Ind. Code § 35-50-1-2(d). “It is well-settled that where a person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for the separate crimes, [Indiana Code section] 35-50-6-3 entitles him to receive credit time applied against each separate term.” *Stephens v. State*, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000), *trans. denied*. However, where he receives consecutive terms he is only allowed credit time against the total or aggregate of the terms. *Id.* To award “double” credit would defeat the intent of the legislature. *Id.*

Here, Emmons had been released on bond for an offense in Henry County at the time she committed the offense in the instant case. Thus, her sentence in this case was required to be served consecutively to her sentence in the Henry County case. I.C. § 35-50-1-2(d). The trial court in the present case awarded Emmons credit time of 254 days. Emmons had already received credit for 121 days of that time under her Henry County case when that court granted her 547 days credit for her time incarcerated in Henry County from August 7, 2008 through May 11, 2009.<sup>3</sup> We conclude that the State has showed *prima facie* error in the amount of credit time awarded to Emmons for her pretrial confinement. The trial court abused its discretion in denying the State’s motion to correct error. We therefore reverse the trial court’s award of credit time and remand

---

<sup>3</sup> It appears that the Henry County court came to this total by adding Emmons’s actual days of credit with her “good” time credit days for a total of 547 days.

with instructions to recalculate the amount of credit time.

Affirmed in part, reversed in part, and remanded with instructions.

CRONE, J., and BRADFORD, J., concur.