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ATTORNEY FOR APPELLANT:

KIMMERLY A. KLEE
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MARJORIE LAWYER-SMITH
Special Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

RICKY E. ULSHAFER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0909-CR-937
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Richard Sallee, Senior Judge
Cause No. 49G22-0812-FC-277883

June 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Ricky Ulshafer appeals his conviction for Class C felony battery. We affirm.

Issues

The issues before us are:

I. whether the trial court properly denied Ulshafer's motion for mistrial; and

II. whether the trial court properly admitted a 911 phone call recording into evidence.

Facts

The evidence most favorable to the conviction is that in December 2008, Adam Durham, Sr., and Nancy Brumley lived together in a house in Indianapolis. Also living at the house was their teenage son, Adam, Jr., Brumley's sister, Adeline Blankenship, and Blankenship's boyfriend, Johnny Maxey. Blankenship had also recently been in a relationship with Ulshafer.

On the morning of December 6, 2008, Ulshafer went to Durham and Brumley's home and began knocking on the doors and windows. Eventually, Adam, Jr., answered the door, and Ulshafer asked to speak to Blankenship. While Blankenship and Ulshafer talked on the porch, Adam, Jr., watched them from the side of the house. After learning that Blankenship had spent the night there with Maxey, Ulshafer called her a "lying, cheating, whore" and asked her to return his house keys and a ring he had recently given her. Tr. p. 160.

Brumley and Maxey were standing just inside the house listening to Ulshafer and Blankenship, and they overheard Ulshafer say that he was going to slit Blankenship's throat

and let her die. Maxey then went out onto the porch, and he and Ulshafer began arguing. Eventually, they agreed to fight in front of the house.

The two men then engaged in a fist fight. Soon, however, Ulshafer retrieved a knife and began stabbing Maxey with it repeatedly while saying "die, die, die." Id. at 82. Adam, Sr., then came outside and was able to break up the fight. Adam, Jr., made a 911 call to report the incident; Brumley took over the conversation about halfway into the call. Police apprehended Ulshafer shortly thereafter.

The State charged Ulshafer with Class C felony battery. Before trial, the State filed a notice of intent to introduce evidence that, in August 2008, Ulshafer had choked Blankenship and asked who her new boyfriend was, and that, in October 2008, Ulshafer had threatened to kill both Blankenship and Maxey. The trial court ruled that it would permit the State to introduce evidence of the October 2008 incident, but not the August 2008 incident.

During trial, the State questioned Brumley about what Maxey and Ulshafer said to each other before the fight, and Brumley responded that she remembered Maxey saying he "wasn't going to let Rick talk to her like that and . . . he wasn't going to let Rick hurt her no more." Id. at 75. Ulshafer immediately moved for a mistrial, claiming that Brumley's response violated the trial court's pretrial ruling regarding the admissibility of the evidence. The trial court denied the motion and offered to admonish the jury, but Ulshafer did not request an admonishment. Later, the trial court permitted the State, over Ulshafer's objection, to introduce a recording of the 911 call Adam, Jr., had made. The jury found Ulshafer guilty as charged. He now appeals.

Analysis

I. Motion for Mistrial

Ulshafer first contends the trial court erred in denying his mistrial motion. The trial court is best positioned to assess the circumstances of a trial error and its probable impact on the jury and, therefore, the denial of a mistrial motion lies within the sound discretion of the trial court, and we review it only for abuse of that discretion. Lucio v. State, 907 N.E.2d 1008, 1010 (Ind. 2009). "The overriding concern is whether the defendant 'was so prejudiced that he was placed in a position of grave peril.'" Id. (quoting Gill v. State, 730 N.E.2d 709, 712 (Ind. 2000)).

Additionally, "'[a] timely and accurate admonition is presumed to cure any error in the admission of evidence.'" Randolph v. State, 755 N.E.2d 572, 575 (Ind. 2001) (quoting Heavrin v. State, 675 N.E.2d 1075, 1084 (Ind. 1996)). Refusal of an offer to admonish the jury constitutes a waiver of any error in the denial of a mistrial motion. Id. Here, Ulshafer did not accept the trial court's offer to admonish the jury regarding Brumley's testimony. Thus, he has waived any complaint with respect to the denial of his mistrial motion.

Waiver notwithstanding, we cannot say the trial court abused its discretion in denying the motion. Brumley made one brief reference to Maxey not wanting Ulshafer to "hurt" Blankenship anymore. Tr. p. 75. The essence of Ulshafer's argument is that this statement could have been inferred by the jury to mean Ulshafer had physically harmed Blankenship in the past. It is debatable in the first place whether this brief utterance even violated the trial court's pretrial evidence ruling to the extent that ruling prohibited the State from introducing

evidence of a prior physical attack by Ulshafer upon Blankenship. To "hurt" someone within the context of a romantic relationship can mean much more than physically hurting someone; in common parlance, it also can refer to emotionally hurting someone. It is not abundantly clear that Brumley (and Maxey) were referring to Ulshafer physically, rather than emotionally, hurting Blankenship in the past.

Moreover, it appears that this incident was, at worst, one isolated, brief, inadvertent statement by a civilian witness. There was no other evidence or testimony related to any past physical attacks by Ulshafer upon Blankenship. The State did not refer to the statement during the rest of the trial or during closing argument. We cannot say this brief, vague utterance required the trial court to grant Ulshafer's mistrial motion. See Lucio, 907 N.E.2d at 1011 (holding trial court did not abuse its discretion in denying mistrial motion where civilian witness made a "fleeting, inadvertent" improper statement that was not referred to again during trial).

II. Admission of 911 Recording

Ulshafer next challenges the trial court's admission into evidence of a recording of the 911 call Adam, Jr., placed. "A trial court exercises broad discretion in ruling on the admissibility of evidence, and an appellate court should disturb its rulings only where it is shown that the court abused its discretion." Camm v. State, 908 N.E.2d 215, 225 (Ind. 2009). An abuse of discretion occurs if a decision is clearly against the logic and effect of the facts and circumstances before the trial court. Cochran v. State, 843 N.E.2d 980, 983 (Ind. Ct. App. 2006), trans. denied, cert. denied. An abuse of discretion also occurs if a trial court

ruling is based on an error of law or is not supported by the evidence. Id. (quoting Pruitt v. State, 834 N.E.2d 90, 104 (Ind. 2005), cert. denied).

Ulshafer first contends that the State failed to adequately authenticate the 911 recording. "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." Ind. Evidence Rule 901(a). Among other methods, authenticity may be established by "[t]estimony of a witness with knowledge that a matter is what it is claimed to be." Evid. R. 901(b)(1). "When evidence establishes a reasonable probability that an item is what it is claimed to be, the item is admissible." Thomas v. State, 734 N.E.2d 572, 573 (Ind. 2000).

With respect to recordings of phone calls, circumstantial evidence of a caller's identity may be sufficient to authenticate the recording and permit its admission into evidence. Id. at 575. Here, there was considerably more than circumstantial evidence of the 911 caller's identity. Adam, Jr., himself testified that he had listened to the 911 recording and verified that it was a recording of the call he had made. This clearly was sufficient to establish the authenticity of the recording. Although Brumley came onto the line about halfway through the call, there was no break in the call such that a separate authentication of the second half of the call should have been required.

Ulshafer's reliance upon Davenport v. State, 749 N.E.2d 1144 (Ind. 2001), is misplaced. There, our supreme court held that a 911 recording was sufficiently authenticated where the State called the local 911 communications director to testify regarding the

recordkeeping procedures for 911 calls. Id. at 1148. Although there was no such testimony in the present case, we do not believe Davenport in any way held that such testimony is required. Rather, we note that there may have been some difficulties in Davenport in having the 911 caller self-authenticate the recording because he was five years old. There were no such difficulties here in having Adam, Jr., a teenager, verify the authenticity of the recording.

Ulshafer also contends that the 911 recording was irrelevant. Essentially, he argues that it was unnecessary to introduce the 911 recording because Adam, Jr., and Brumley were available to testify directly about what had occurred. We observe that trial courts have discretion to permit the admission of even marginally relevant evidence. Myers v. State, 887 N.E.2d 170, 185 (Ind. Ct. App. 2008), trans. denied. "Evidence is relevant if it tends to prove or disprove a material fact or sheds any light on the guilt or innocence of the accused." Id. at 185-86. Additionally, the admission of evidence that is merely cumulative of other, properly admitted evidence generally does not warrant reversal of a conviction. Johnson v. State, 845 N.E.2d 147, 150 (Ind. Ct. App. 2006), trans. denied.

The 911 recording is relevant in that it tends to shed some light upon Ulshafer's guilt. Although Adam, Jr., did not identify Ulshafer as Maxey's attacker in the 911 call, Brumley did so later when she came onto the line. Furthermore, the 911 recording was at most merely cumulative of the testimony of several witnesses, including Adam, Jr., and Brumley, as to what occurred on December 6, 2008. We cannot say the trial court's admission of the 911 recording warrants reversal of Ulshafer's conviction.

Conclusion

The trial court did not abuse its discretion in denying Ulshafer's motion for a mistrial or in admitting the 911 recording into evidence. We affirm Ulshafer's conviction.

Affirmed.

BAILEY, J., and MAY, J., concur.