

Jermail Warren appeals his convictions of and sentences for three counts of Class B felony dealing cocaine.¹ He argues the trial court abused its discretion when it allowed the State to enter into evidence three audio recordings of the drug deals. Additionally, he contends the trial court erred when it enhanced the sentences for each count based on Warren's admission he was an habitual offender. We affirm in part, and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

On July 23, 2007, Warren sold 0.65 grams of crack cocaine for \$70 to a confidential informant (CI) and an undercover police officer. On March 4, 2008, Warren sold 0.64 grams of crack cocaine to a CI for \$50. On March 6, 2008, Warren sold 0.61 grams of crack cocaine to a CI for \$100.

On July 15, 2008, the State charged Warren with three counts of Class B felony dealing in cocaine. On November 19, the State alleged Warren was an habitual offender. After a jury found Warren guilty of all three dealing counts, he admitted being an habitual offender.

For each of the Class B felonies, the trial court imposed fifteen-year sentences, enhanced by five additional years for the habitual offender admission. The court ordered the three twenty-year sentences be served concurrently.

¹ Ind. Code § 35-48-4-1(a)(1)(c).

DISCUSSION AND DECISION

1. Admission of Audio Recordings

A trial court has broad discretion in ruling on the admissibility of evidence, and we will disturb its ruling only on a showing of abuse of discretion. *Sparkman v. State*, 722 N.E.2d 1259, 1262 (Ind. Ct. App. 2000). When reviewing a decision under an abuse of discretion standard, we affirm if there is any evidence supporting the decision. *Id.* A claim of error in the admission or exclusion of evidence will not prevail on appeal unless a substantial right of the party is affected. Ind. Evidence Rule 103(a). In determining whether error in the introduction of evidence affected a defendant's substantial rights, we assess the probable impact of the evidence on the jury. *Sparkman*, 722 N.E.2d at 1262.

The State offered into evidence three audio recordings – a phone call between Warren and a confidential informant, and two recordings of drug deals between Warren and confidential informants. Warren objected to the admission of the audio recordings because “it was cumulative, your Honor, and it was misleading as to these disks, as to the contents on the disks themselves.” (Tr. at 473.) After discussions with counsel regarding the evidence, the trial court admitted the two recordings of drug deals and did not admit the recording of the phone call.

At trial, the CIs who participated in the drug deals testified regarding the recordings thereof. Thus, even if the trial court's admission of the recordings was in error, such error was harmless because the recordings were cumulative of the CI's testimony. *See Purvis v.*

State, 829 N.E.2d 572, 585 (Ind. Ct. App. 2005) (erroneous admission of evidence is harmless if it is cumulative of other evidence), *trans. denied*.

2. Sentencing

The trial court ordered Warren to serve three concurrent twenty-year sentences by enhancing each sentence by five years for Warren being an habitual offender. Warren argues the trial court erred, and his sentences should be revised. We agree.

Our Indiana Supreme Court has held that when a defendant is convicted of multiple offenses and found to be an habitual offender, trial courts must impose the resulting penalty enhancement on *only one* of the convictions and must specify the conviction so enhanced. *McIntire v. State*, 717 N.E.2d 96, 102 (Ind. 1999). We accordingly remand to the trial court for entry of a new sentencing order indicating Warren received two fifteen-year sentences and one twenty-year sentence based on the five-year habitual offender enhancement of that sentence.

CONCLUSION

The trial court did not abuse its discretion when it admitted two audio recordings of drug deals involving Warren. However, because the trial court erroneously applied habitual offender sentencing enhancements to all three counts, we reverse and remand for removal of the enhancement from two of Warren's sentences.

Affirmed in part, reversed and remanded in part.

RILEY, J., and NAJAM, J., concur.