

Larry D. Winn was convicted of two counts of battery,¹ each as a Class D felony. The trial court sentenced him to one and one-half years on each count to be served concurrently, and ordered him to pay restitution in an amount totaling \$19,687. On appeal, Winn raises the following restated and consolidated issues:

- I. Whether the trial court erred in admitting: (1) evidence of Winn's statements to police, which were made prior to being read his *Miranda* rights; and (2) hearsay statements, including a recording of the 911 call and subsequent "radio traffic" concerning Winn's activities.
- II. Whether the trial court erred in ordering Winn to pay restitution to his victims for lost wages and lost vacation and sick time.

We affirm.

FACTS AND PROCEDURAL HISTORY

On the night of January 13, 2006, in response to a 911 call, Officer Christopher Blila and Sergeant David Archer of the Brazil City Police were dispatched to a domestic dispute at Winn's home. Officer Blila observed a female standing in the doorway and asked her "what was going on." *Tr.* at 317. The female, later identified as Angel, answered that she had just arrived, did not know what was going on, and advised the officer to come inside and speak with Winn. When Officer Blila entered the residence, Winn stated that he had been having a verbal altercation with his girlfriend, Laura, and that she had taken his DVR. Laura and her son, Eric, lived with Winn.

When Officer Blila asked who had called the police, Eric, who had been waiting outside, stuck his head inside and stated that he had. Sergeant Archer then went outside to speak with Eric. While they were talking, Laura, who had left the residence during the

¹ See IC 35-42-2-1(a)(2)(A).

altercation, returned. She explained to Sergeant Archer that Winn had been drinking and had threatened to beat up Eric. Laura stated that she needed to enter the home to get Eric's medication. When Sergeant Archer escorted Laura into the home, Winn again asked for his DVR, and after retrieving it from her car, Laura complied. When Laura next passed Winn, he said, "I'll get you for this." *Id.* at 364. Laura asked the officers to tell Winn to stop threatening her, which they did.

Winn's twenty-year old son, Brandon, who had been witnessing the exchange, became upset, jumped up from the kitchen table, and told Sergeant Archer, "I think you need to leave." *Id.* at 322. Officer Blila walked over to Brandon and informed him that he was not in charge. *Id.* at 322, 366. The two exchanged words until Brandon got "very upset, balled up his fists," said "fuck you," and then bumped his chest into Officer Blila. *Id.* at 323, 367. Officer Blila told Brandon that he was under arrest and attempted to handcuff him. As Officer Blila started towards Brandon, Brandon pushed him out of the way, and started backing up. Winn then dove at Officer Blila, hit him in the side, and knocked him against the wall.

Winn and Officer Blila began to physically fight, while Officer Blila made several unsuccessful attempts to call for help. Sergeant Archer managed to handcuff Brandon and then joined Officer Blila in trying to subdue Winn. During the struggle, Winn attempted to gain control of Officer Blila's weapon, and Sergeant Archer attempted to subdue Winn with pepper spray. Winn stopped struggling only when Officer Blila drew his gun and said that he would shoot Winn if he continued to fight.

As a result of the melee with Winn, Officer Blila received injuries to his left wrist and forearm, and Sergeant Archer injured the fingers on his left hand. The injuries caused both officers to experience pain and suffering.

The State's amended information charged Winn with two counts of battery resulting in serious bodily injury, each as a Class C felony, one count of resisting law enforcement, a Class A misdemeanor, and one count of intimidation, a Class A misdemeanor. A jury trial was held in April 2006, which resulted in a hung jury on both battery counts. Winn was convicted of the remaining two counts and sentenced to two concurrent one-year sentences.

The State filed its intent to retry Winn on the battery counts, and then filed an amended information charging Winn with two counts of battery, each as a Class D felony. Prior to trial, Winn filed a motion to suppress the following statements that Winn made to Officer Blila at the conclusion of the altercation, which had been introduced in the first trial:

I asked Larry why he was doing this and Larry told me that I did a pretty good job of fighting him and that he was a wrestler and I had just done a pretty good job and I said Larry you almost got shot, and he said well if you had to shoot me, you had to shoot me.

Appellant's App. at 34. The trial court granted Winn's motion to suppress. At trial, however, the trial court allowed the introduction of the statements over Winn's objection.

The jury returned a verdict of guilty on both counts. On March 5, 2007, the trial court sentenced Winn to serve two concurrent one and one-half year terms to be served concurrently with the one-year sentences previously imposed in the first trial. Winn now appeals.

DISCUSSION AND DECISION

I. Admission of Evidence

The decision to admit or exclude evidence is a matter within the sound discretion of the trial court. *Jacobs v. State*, 802 N.E.2d 995, 998 (Ind. Ct. App. 2004); *Pickens v. State*, 764 N.E.2d 295, 297 (Ind. Ct. App. 2002), *trans. denied*. An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Jacobs*, 802 N.E.2d at 998. Even if the trial court abused its discretion in admitting evidence, we will not reverse a conviction if the error is harmless. *Id.*; *Bonner v. State*, 650 N.E.2d 1139, 1141 (Ind. 1995).

A. Pre-Miranda Statements

After the altercation, Winn said that Officer Blila had done a pretty good job of fighting. Winn contends that the trial court erred in admitting these statements because they were made after Winn was placed in custody but prior to his being read his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

In his brief, Winn argues that these statements were unconstitutionally obtained. We need not reach this issue because “[s]tatements obtained in violation of the federal constitution and erroneously admitted are subject to harmless error analysis.” *Storey v. State*, 830 N.E.2d 1011, 1021 (Ind. Ct. App. 2005). Assuming without deciding that these statements were improperly admitted, we are convinced that the statements “did not contribute to the conviction.” *Id.*

To convict Winn of two counts of Class D felony battery of a law enforcement officer, the State had to prove that Winn: (1) knowingly or intentionally touched Officer Blila and Sergeant Archer; (2) in a rude, insolent, or angry manner; (3) while the officers were engaged

in the execution of their official duties; (4) causing bodily injury. IC 35-42-2-1(a)(2)(A). The evidence revealed that Officer Blila and Sergeant Archer responded to a 911 call of a domestic disturbance at Winn's home. While questioning Winn and his son Brandon, tempers flared, and Winn attacked Officer Blila causing him to fly into the kitchen wall. *Tr.* at 324, 367. Winn, using his chest, hit Officer Blila in the left arm and shoulder. He then attempted to get Officer Blila in a headlock and continued to slam him against the wall. *Id.* at 324, 325. During the scuffle, Winn punched Officer Blila and grabbed him "by the groin." *Id.* at 369. Meanwhile, as Sergeant Archer was attempting to subdue Winn, Winn grabbed three fingers on one of Sergeant Archer's hands and "bent them straight back." *Id.* at 370. Both officers reported that the fight caused them bodily injury.²

Winn contends that this evidence alone would have been insufficient to convict him because, without the impermissible statements, the State would have been unable to prove his *mens rea*. Specifically, he argues that, in light of evidence of his intoxication, the statements were the only evidence of Winn's "intent to knowingly or intentionally touch" the officers in a rude, insolent or angry manner. *Appellant's Br.* at 17. Winn's suggestion that voluntary intoxication is a defense to negate the *mens rea* for battery is misplaced. *Sanchez v. State*, 749 N.E.2d 509, 517 (Ind. 2001) ("the voluntarily intoxicated offender [is] at risk for the consequences of his actions, even if it is claimed that the capacity has been obliterated to achieve the otherwise requisite mental state for a specific crime"). Generally, "[i]ntoxication is not a defense in a prosecution for an offense and may not be taken into consideration in

² IC 35-41-1-4 defines "bodily injury" as "any impairment of physical condition, including physical pain." *See Wilson v. State*, 835 N.E.2d 1044, 1050 (Ind. Ct. App. 2005), *trans. denied*.

determining the existence of a mental state that is an element of the offense unless the defendant meets the requirements of IC 35-41-3-5.” IC 35-41-2-5. Intoxication is a defense to prohibited conduct, “only if the intoxication resulted from the introduction of a substance into the body: (1) without [the person’s] consent; or (2) when [the person] did not know that the substance might cause intoxication.” IC 35-41-3-5. Here, Winn makes no claim that he was intoxicated without consent or that he did not know that drinking would cause intoxication. *See Johnson v. State*, 832 N.E.2d 985, 1001 (Ind. Ct. App. 2005), *trans. denied*. The inclusion of these statements, if error, is merely cumulative of the other evidence that was properly admitted to convict Winn.

B. Hearsay Statements

Winn further contends that the trial court erred in admitting recordings from the 911 call and the subsequent “radio traffic” relating to the occurrences at Winn’s residence, which were inadmissible hearsay. *Appellant’s Br.* at 18. Winn contends that the trial court abused its discretion because the credibility of the statements could not be assessed. However, he fails to argue how the inclusion of these statements caused him to be prejudiced. Winn states in a conclusory fashion, “The evidence was irrelevant, inadmissible hearsay and prejudicial to Larry [Winn].” *Appellant’s App.* at 20. Our Supreme Court has determined that “errors in the admission of evidence, including hearsay, are to be disregarded as harmless unless they affect the substantial rights of a party.” *Montgomery v. State*, 694 N.E.2d 1137, 1140 (Ind. 1998). Here, assuming without deciding that the trial court erred in admitting this evidence, the error was harmless.

II. Restitution

Finally, Winn argues that the trial court erred in ordering Winn to make restitution representing lost wages in favor of Officer Blila in the amount of \$9,200 and in favor of Sergeant Archer in the amount of \$10,487. Trial courts may order a person convicted of a felony or misdemeanor to pay restitution to the victim of the crime as part of the sentence or as a condition of probation. *Little v. State*, 839 N.E.2d 807, 809 (Ind. Ct. App. 2005) (citing IC 35-50-5-3). Restitution orders are within the discretion of the trial court. *James v. State*, 868 N.E.2d 543, 549 (Ind. Ct. App. 2007). This court will affirm the trial court's decision if there is evidence to support it. *Id.*

IC 35-50-5-3(a)(4) gives the trial court the authority to order restitution for earnings lost by the victim as a result of the crime, including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime. “The amount of actual loss is a factual matter which can be determined only upon the presentation of evidence.” *James*, 868 N.E.2d at 549 (quoting *Shane v. State*, 769 N.E.2d 1195, 1199 (Ind. Ct. App. 2002)).

The State argues that Winn has waived this argument by failing to challenge the restitution order. Indeed, a failure to preserve an issue for appeal usually results in waiver. *Johnson v. State*, 845 N.E.2d 147, 153 (Ind. Ct. App. 2006), *trans. denied* (citing *Slinkard v. State*, 807 N.E.2d 127, 128-29 (Ind. Ct. App. 2004)). “However, a court may remedy an unpreserved error when it determines the trial court committed fundamental error An improper sentence constitutes fundamental error and cannot be ignored on review.” *Id.* at 153 (quoting *Slinkard*, 807 N.E.2d at 129). Here, the order of restitution was granted as part

of Winn's sentencing hearing. Therefore, to ensure that Winn was not improperly sentenced, we review this claim on appeal.

Citing to IC 35-38-2-2.3(a)(5), Winn notes, "the court may, as a condition of probation, require a person to make restitution or reparation to the victim of the crime for damage or injury that was sustained by the victim." *Appellant's Br.* at 21. From this, Winn concludes that because the trial court did not place him on probation, it was error for the court to order restitution. Winn, however, fails to recognize that IC 35-50-5-3(a)(4) gives the trial court the authority to order restitution for earnings lost by the victim as a result of the crime. The trial court did not abuse its discretion in ordering restitution.

Winn next argues that the evidence did "not support a finding that the officers were unable to work for the period of time that they took off, and therefore the restitution that was ordered is not supported by the record." *Appellant's Br.* at 21. We disagree. Officer Blila testified that the two officers were injured during the fight and that the doctor allowed them to return with restrictions on the use of their injured hands. *Tr.* at 729. He further testified that the department did not have a position available for the officers to serve with these restrictions. *Id.* The officers testified as to the amount of time that they were absent from work and submitted a memorandum from the City Clerk-Treasurer of the City of Brazil that Officer Blila had lost wages in the amount of \$9,200, and Sergeant Archer had lost wages in the amount of \$10,487. *Id.* at 729, 739; *Appellant's App.* at 61-63. The trial court acted within its discretion to order Winn to repay these amounts as restitution for his actions.

Affirmed.

RILEY, J., and MAY, J., concur.