## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

In the Matter of C.C., (Minor Child), Child In Need of Services,

W.F. (Grandfather/Guardian), and D.S. (Second Mother),

*Appellant-Respondents,*

v.

Indiana Department of Child Services

*Appellee-Petitioner.*

December 1, 2021

Court of Appeals Case No. 21A-JC-807

Appeal from the Huntington Circuit Court

The Honorable Michael J. Rush, Senior Judge

Trial Court Cause No. 35C01-2010-JC-30

**Tavitas, Judge.**

## Case Summary

[1] W.F. ("the Guardian") appeals the trial court's order adjudicating minor child, C.C. (the "Child"), as a child in need of services ("CHINS"), as alleged by the Huntington County Office of the Department of Child Services ("DCS"). The Guardian maintains that the trial court abused its discretion by improperly admitting hearsay evidence via two witnesses. In the first instance, we find that the court properly admitted the Child's out-of-court statements to D.S. ("Second Mother"),[1] pursuant to the present sense impression and excited utterance exceptions to the rule against hearsay. In the second instance, even assuming arguendo that the trial court improperly admitted the Child's statements to the DCS family case manager ("FCM"), we find that the error was harmless. Accordingly, we affirm.

## Issue

[2] Guardian raises one issue on appeal—namely whether the trial court abused its discretion in admitting the Child's out-of-court statements into evidence.

## Facts

[3] R.C. ("Mother") and D.S. ("Second Mother") are the parents of the Child, who was born in September 2009. The Child suffers from an emotional disability that affects his ability to perform day-to-day activities and his ability to regulate

[1] The Child's biological father now identifies as "Second Mother[.]"

his emotions. The Child also has an individualized education program ("IEP").[2] Since an undetermined date, the Child has resided with the Guardian, who is the Child's paternal grandfather.[3]

[4] On the evening of October 19, 2020, the Guardian struck the Child in the face, shoved the Child to the floor, slammed him against a refrigerator multiple times, and pushed him up a flight of stairs to the Child's bedroom. The Child suffered cuts on his inner bottom lip and bruising to his inner upper lip, as well as soreness on the back of his head. Approximately ten minutes after the incident, the Child telephoned Second Mother and recounted the circumstances of the incident.

[5] Second Mother waited for DCS's office to open and for an opportunity to speak with Mother before she reported the incident to DCS the next day, which was October 20, 2020. Also that day, the Child showed his injuries to school counselor Nicole Harner, who notified DCS. The Child appeared "nervous or uneasy" during the conversation with Counselor Harner. Tr. p. 12. At approximately 9:00 a.m. on October 21, 2020, FCM Christina Roberts interviewed the Child at school and photographed his injuries. Later that day,

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[2] An IEP is "a written document[ ] that describes how a student will access the general education curriculum and the special education and related services needed to participate in the educational environment." *Metropolitan School Dist. Of Lawrence Tp. v. M.S.*, 818 N.E.2d 978, 988 n.4 (Ind. Ct. App. 2004).

[3] The record on appeal is silent as to why Mother and Second Mother do not have physical custody of the Child.

FCM Roberts removed the Child from school and placed the Child in foster care.

[6] On October 22, 2020, DCS filed a CHINS petition alleging the Child was a CHINS due to, inter alia, physical abuse by the Guardian. On October 23, 2020, and November 20, 2020, the trial court held initial hearings, wherein Mother and Second Mother admitted that the Child was a CHINS.

[7] On March 12, 2021,[4] the trial court held a contested factfinding hearing as to the Guardian only, who denied that the Child was a CHINS. The Guardian did not testify at the CHINS fact finding hearing. DCS family case manager FCM Roberts testified regarding her observations of the Child's physical injuries. When counsel for DCS sought further details, counsel for the Guardian objected on hearsay grounds "to what [the Child] reported." Tr. Vol. p. 15. Counsel for DCS responded that the present sense impression exception to the rule against hearsay applied. Counsel for the Guardian asked some preliminary questions, elicited testimony that FCM Roberts' conversation with the Child occurred at 9:00 a.m. on October 21, 2020, and reiterated the hearsay objection.

[8] The following exchange occurred between the trial court and counsel:

> [Counsel for the Guardian]: Judge, I'm going to object. I don't think any of this testimony's present sen[se] impression. It

[4] At the time of the hearing, the Child was eleven years old.

> happened some [ ] 36 or more hours prior to this conversation with this witness. [ ] I don't believe it's a hearsay exception and it goes directly to the heart of the [ ] allegations in this case and— and the facts that the DCS has the burden of proving.
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> [DCS]: Your Honor, if I may. I would agree with counsel if this was something that took place two weeks, three weeks thereafter, but when looking at the total timeframe of activity from an act to a— to a response, 36 hours is a relatively short period of time for that present sense impression particularly based upon the [ ] question of injury to the child.
>
> THE COURT: The objection is overruled. You may answer the question.

*Id*. at 17.

Counsel for DCS elicited FCM Roberts' testimony that the Child reported "the back of his head was sore to the touch." *Id*. Counsel for DCS asked whether the Child explained why his head was sore. *Id*. Again, counsel for the Guardian objected on hearsay grounds and argued: "Present sense impression may explain [the Child] saying that he had an injury to the back of his head, but not [ ] why or how that happened." *Id*. at 18. The trial court responded, "I might not permit a jury to hear this, but as the judge in the case and finder of

fact, I think it's relevant and I'm going to permit you to testify over objection."[5] *Id*. The following colloquy ensued:

> [DCS]: So, how did— what did you learn about the injuries of [the Child] and how they came about?
>
> [FCM Roberts]: [The Child] said that the [ ] injury to the back of his head was from hitting a refrigerator. From being shoved into a refrigerator.
>
> [DCS]: Did he say how he was shoved into a refrigerator?
>
> [FCM Roberts]: He said that [the Guardian] did it.
>
> [DCS]: Okay. And did you touch the back of his head?
>
> [FCM Roberts]: I did look [ ] I didn't see any open areas, scabs or raised bumps but he did—
>
> [DCS]: But his testimony was that the back of his head was sore?
>
> [FCM Roberts]: Yes.

*Id*. at 18.

[9] DCS introduced the photographs of the Child's injuries and, subsequently, sought to elicit FCM Roberts' testimony as to what the Child attributed the

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[5] We are perplexed by the trial court's statements. Hearsay rules of evidence are the same whether a jury or the trial court is the fact finder.

injuries. Counsel for the Guardian again objected and lodged a continuing hearsay objection. *See id*. at 20. The trial court allowed the testimony. FCM Roberts testified as follows:

> [FCM Roberts]: [The Child] reported that he had an altercation with his grandfather regarding [ ] a bicycle that was broken [ ], that his grandfather had taken him into the house and shoved him into the refrigerator multiple times striking [the Child's] head on the refrigerator and that the [C]hild was shoved to the ground and slapped in the mouth, which is where the— the bruising to his mouth came from.
>
> * * * * *
>
> [ ] I believe [the Child] said that afterwards he was sent upstairs and that his grandfather shoved him up the stairs on the way up.

*Id*. at 21.[6]

[10] Next, Second Mother testified that, at approximately 7:00 or 8:00 p.m. and "about 10 minutes after he was struck[,]" the Child telephoned her "crying" and "upset[.]" *Id*. at 29, 30. The Guardian again objected on hearsay grounds to any introduction of the Child's statements to Second Mother. Counsel for DCS asked preliminary questions to establish the application of the excited

[6] Without objection, FCM Roberts also testified that she spoke with the Guardian at the police station, and he declined to speak without counsel, but added "that if we had spoken to [the Child] then we didn't need anything else." Tr. p. 22. FCM Roberts also spoke with Mother, who "said [the Guardian] had informed her that he had popped [the child] in the mouth . . . ." *Id*. FCM Roberts also testified that "we have had some concerns [ ] regarding [the Guardian]'s behavior and potentially his mental state as reflected from that behavior and whether [ ] he is in a good place to take care of [the Child]." *Id*. at 22-23.

utterance exception to the rule against hearsay. The trial court overruled the objection. Second Mother then testified: The Child "asked [the Guardian] to help repair the bike and . . . [the Guardian] got angry, took [the Child] in the house [ ] slapped him— I think . . . three times— had thrown him into the fridge, and then shoved him up the stairs screaming and raging."[7] *Id*. at 32.

[11] Lastly, Mother testified, without objection, that after DCS removed the Child, the Guardian told her that he "backhanded" the Child and that the contact was "just a tap" with "three fingers." *Id*. at 43. Mother also testified that: (1) the Guardian is "rough with [the Child]," but not physically abusive; (2) she believed the guardianship placement was safe for the Child "until that day"; and (3) the guardianship placement is no longer "appropriate[.]"[8] *Id*. at 40. Mother testified that she did not believe the Guardian posed a real physical threat to the Child but, rather, her concerns stemmed from the Guardian's opposition to counseling that the Child needs; she added that the Child will not receive certain services without court intervention. *Id*. at 41.

[12] The trial court adjudicated the Child as a CHINS on March 22, 2021. In its order, the trial court found, in part, as follows:

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[7] Second Mother testified that she has petitioned to terminate the guardianship, does not believe that the Child is safe in the Guardian's care, and was in favor of a CHINS finding.

[8] Mother, who resided in an assisted living facility at the time of the hearing, testified that she favored either continued foster placement or placement with Second Mother.

9) The Court finds that the Guardian forcibly pushed the child up against a refrigerator causing pain to the head of the child.

10) The Court finds that the Guardian pushed the child down to the kitchen floor, causing the child to receive cuts, scrapes and bruising to the front of his head and to the inside of his mouth.

* * * * *

12. The court finds that the acts of the Guardian (physical abuse by touching the child in a rude, insolent or angry manner causing physical injury to the child in/[a]bout the face and head) has also caused mental injury to the child as a result of said child's established mental condition.[9]

13.The Court also finds that coercive intervention by this Court is needed to ensure that the Child's needs for care, treatment and rehabilitation are met. . . .

* * * * *

The Court finds that it is in the best interests of the child to be removed from the home environment and remaining in the home would be contrary to the welfare of the child because: of the allegations admitted, of an inability, refusal or neglect to provide shelter, care, and/or supervision at the present time, and the child needs protection that cannot be provided in the home.

Guardian's App. Vol. II p. 17.

[9] The trial court found the Child, who "had an established Individualized Education Program (IEP) based on emotional disability[,]" also suffered emotional injury from the incident. Tr. Vol. II p. 17.

[13] After a hearing, the trial court entered its dispositional order on April 9, 2021. Therein, the trial court ordered the Guardian to complete a psychological evaluation, to comply with any resulting recommendations, and to participate in therapeutic visitation with the Child. Guardian now appeals.

## Analysis

### *Admission of Evidence*

[14] The Guardian contends[10] that: (1) the trial court abused its discretion in admitting FCM Roberts' and Second Mother's "hearsay testimony" regarding the Child's out-of-court statements; and (2) "[n]either the present sense impression exception nor the excited utterance exception [is] applicable to the hearsay evidence presented in this case." Guardian's Br. p. 11.

[15] The admission of the evidence is entrusted to the discretion of the trial court. *D.B.M. v. Ind. Dept. of Child Servs.*, 20 N.E.3d 174, 179 (Ind. Ct. App. 2014). Evidentiary rulings of a trial court are afforded great deference on appeal and are overturned only upon a showing of an abuse of discretion. *In re Des.B*, 2 N.E.3d 828, 834 (Ind. Ct. App. 2014). We will reverse the trial court's decision regarding admission of evidence only when the decision is against the logic and effect of the facts and circumstances before the court. *Matter of L.T.*, 145 N.E.3d 864, 868 (Ind. Ct. App. 2020). It is well-established that errors in

[10] The Guardian also contends that, without the alleged hearsay testimony, there was insufficient evidence to support the CHINS adjudication. Because we find the hearsay issue to be dispositive, we do not reach this secondary issue.

the admission of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party. *Des.B*, 2 N.E.3d at 834.

[16] Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. *In re K.R., et al.,* 154 N.E.3d 818, 820 (Ind. 2020) (citing Ind. Evidence Rule 801(c)). As a general rule, hearsay evidence is inadmissible unless it falls under a recognized exception. Evid. R. 802. These exceptions are enumerated by Indiana Rule of Evidence 803. Statements not admitted to prove the truth of the matter asserted do not run afoul of the hearsay rule—they are not hearsay. Evid. R. 802. The Child's statements to Second Mother and FCM Roberts were hearsay because they were out-of-court statements offered to prove that the Guardian physically abused the Child. We proceed to a discussion of whether the trial court properly admitted the statements as evidence, pursuant to a recognized hearsay exception.

### *A. Statements to Second Mother*

#### *1. Present Sense Impression*

[17] Among the exceptions to the rule against hearsay is "[a] statement describing or explaining an event, condition or transaction, made while or immediately after the declarant[11] perceived it." Evid. R. 803(1). Hearsay testimony may be introduced as evidence under the present sense impression exception when three requirements are met: "(1) it must describe or explain an event or

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[11] "'Declarant' means the person who made the statement." Evid. R. 801(b).

condition; (2) during or immediately after its occurrence; and (3) it must be based upon the declarant's perception of the event or condition." *Minor v. State*, 36 N.E.3d 1065, 1070 (Ind. Ct. App. 2015), *trans. denied*. The short time lapse leads to the assumption that the immediate response is unlikely to be deliberated and, therefore, provides reliability. *Mack v. State*, 23 N.E.3d 742, 755 (Ind. Ct. App. 2014), *trans. denied*.

[18] We suspect that the brief, ten-minute window between the incident and the Child's call to Second Mother allowed little time for an injured, upset, and emotionally-disabled child to deliberate; and we are inclined to find, under the circumstances before us, that the Child's statement to Second Mother bears sufficient indicia of reliability to be admissible and to satisfy the requirements of Evidence Rule 803(1).

[19] We are constrained to find, however, that the Child's statement cannot precisely be classified as being made either contemporaneously to or "immediately after" the incident. *See*, *e.g.*, *Stott v. State*, 174 N.E.3d 236, 243 (Ind. Ct. App. 2021) ("[A] delay measured in minutes can take a statement outside of the present sense impression hearsay exception.") (internal citation omitted). *See also, e.g., Jackson v. State*, 697 N.E.2d 53, 54 (Ind. 1998) ("Because admission of the statement seeks to describe or explain the "material event" of the crime, the statement must have been made during the commission of the crime or immediately thereafter.").

[20] From our review of the record, the determination that the Child telephoned Second Mother approximately ten minutes after being struck originated either with the Child or from Second Mother's deduction(s). In either event, the evidence of the timeline may be unreliable. The hearing record reveals that, in response to preliminary questions posed by counsel for DCS, Second Mother testified that the Child "said he had gone into the bathroom and looked [at himself] in the mirror," before he telephoned her. Tr. Vol. p. 30.

[21] For these reasons, we cannot state with certainty that the contemporaneity requirement of Evidence Rule 803(1) is met here. We conclude that the trial court abused its discretion in determining the Child's statement to Second Mother was admissible as a present sense impression.

### *2. Excited Utterance*

[22] Next, we consider whether the Child's statement to Second Mother satisfies the excited utterance exception to the rule against hearsay. An excited utterance is "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Evid. R. 803(2). For a hearsay statement to be admitted as an excited utterance, the proponent of the evidence must show: (1) a startling event; (2) a statement made by a declarant while the declarant is under the stress of excitement caused by the event; and (3) that the statement relates to the event. *Jenkins v. State*, 725 N.E.2d 66, 68 (Ind. 2000).

[23] "[The excited utterance inquiry] is not a mechanical test. It turns on whether the statement was inherently reliable because the witness was under the stress of an event and unlikely to make deliberate falsifications." *Id*. (citing 13, Robert Lowell Miller, Jr., INDIANA PRACTICE § 803.102 (4th ed. 2018)). *See*, *e.g.*, *Jones v. State*, 800 N.E.2d 624, 627 (Ind. Ct. App. 2003) ("The heart of the inquiry is whether the declarant was incapable of thoughtful reflection.").

[24] The record reveals that, approximately ten minutes after the physical altercation with the Guardian, the Child telephoned Second Mother. Second Mother testified that, during the call, the Child was upset, crying, and frightened as he recounted that the Guardian slapped him multiple times, slammed him against a refrigerator multiple times, and shoved him upstairs. We find that the Child's statement to Second Mother satisfies the requirements of Evidence Rule 803(2) and bears sufficient indicia of reliability to be admissible. The Child experienced a startling event when he was physically attacked by the Guardian and reported the event to Second Mother while under the stress of excitement caused by the event.

[25] We conclude that the trial court did not abuse its discretion in determining the Child's statement to Second Mother was admissible as an excited utterance. *See*, *e.g.*, *Boatner v. State*, 934 N.E.2d 184, 187 (Ind. Ct. App. 2010) (finding that, "although the exact time of the battery could not be established[,]" domestic violence victim's statement to officer that defendant pushed her down and struck her was admissible under the excited utterance exception where the victim was disoriented, crying, without shoes, and almost ran into the officer in

her attempt to find help, which indicated the victim was still under the stress of excitement caused by the battery).

### *B. Statements to FCM Roberts*

[26] We turn to whether the Child's statements to FCM Roberts satisfy the present sense impression or excited utterance exceptions to the rule against hearsay. The present sense impression and excited utterance exceptions each include a temporal[12] component. *See, e.g., Stott v. State*, 174 N.E.3d 236, 243 (Ind. Ct. App. 2021) ("The witnesses' statements to police officers [ ] are not present sense impressions because the State has not established contemporaneity between the events perceived and the declarations about those events."). *See also, e.g., McMillen v. State*, 169 N.E.3d 437, 442 (Ind. Ct. App. 2021) (finding battery victim was under the stress of a startling event when, "within minutes of being beaten by her son[,]" she told Officer Cain that [her son] attacked her").

[27] As this Court has previously opined: "The heart of the [excited utterance] inquiry is whether the declarant was incapable of thoughtful reflection. While the amount of time that has passed is not dispositive, a statement that is made long after the startling event is usually less likely to be an excited utterance." *Hurt v. State*, 151 N.E.3d 809, 813-14 (Ind. Ct. App. 2020). Here, the incident between the Guardian and the Child occurred on October 19, 2020, and FCM

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[12] *See* Evid. R. 803(1) (requiring the declarant's statement must be made "*during or immediately after*" the event or condition at issue); *see* Evid. R. 803(2) (providing that a declarant's excited utterance must be made "*while* the declarant is under the stress of excitement caused by a startling event").

Roberts' interview of the Child, wherein the Child made the statements at issue, took place two days after the incident on October 21, 2020.

[28] We find that the trial court abused its discretion in admitting the Child's out-of-court statements to FCM Roberts; however, the error was harmless. "[W]here the trial court has erred in the admission of evidence, we will not reverse the conviction if that error was harmless." *D.B.M.*, 20 N.E.3d at 179. Generally, errors in the admission of evidence are to be disregarded unless they affect the substantial rights of a party. *See* Ind. Trial Rule 61;[13] *see also D.B.M.,* 20 N.E.3d at 179; *and see In re Paternity of H.R.M.*, 864 N.E.2d 442, 450-51 (Ind. Ct. App. 2007) ("In general, the admission of evidence that is merely cumulative of other evidence amounts to harmless error as such admission does not affect a party's substantial rights.").

[29] The record reveals that: (1) the Child's statement to FCM Roberts was merely cumulative of other properly admitted evidence; and (2) there was substantial independent evidence to support the trial court's CHINS adjudication. We have already found, *supra,* that the trial court properly admitted the Child's

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[13] As our Supreme Court has previously stated:

> Indiana Trial Rule 61 requires courts, "at every stage of the proceeding," to "disregard any error or defect" that "does not affect the substantial rights of the parties." Likewise, under Indiana Appellate Rule 66(A), "[n]o error or defect" in a trial court ruling "is ground for granting relief or reversal on appeal" when "its probable impact . . . is sufficiently minor so as not to affect the substantial rights of the parties."

*Durden v. State*, 99 N.E.3d 645, 656 n.5 (Ind. 2018).

statement to Second Mother regarding the incident, pursuant to the excited utterance exception. Therein, the Child reported that the Guardian slapped, pushed, and slammed him against a refrigerator, which caused injury. Also, Counselor Harner testified that the Child showed her red marks inside his mouth, and DCS introduced photographs of the same. It is undisputed that the Child lived under the Guardian's care when he sustained the injuries. Lastly, Mother testified, without objection, that the Guardian was physically "rough with [the Child,]" *id*. at 42, and admitted he "backhanded" the Child, *id*. at 43. In light of this independent evidence, we conclude that error, if any, from the admission of the Child's statements to FCM Roberts was harmless error.

## Conclusion

[30] The trial court did not abuse its discretion by admitting the Child's statements to Second Mother regarding the incident, pursuant to the excited utterance hearsay exception. Error, if any, from the admission of the Child's statements to FCM Roberts was harmless error because substantial independent evidence supports the trial court's findings of physical abuse and mental injury. We affirm the trial court's CHINS adjudication.

[31] Affirmed.

Mathias, J., and Weissmann, J., concur.