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IN THE
COURT OF APPEALS OF INDIANA

Tanika Stewart,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 9, 2021

Court of Appeals Case No. 20A-CR-1809

Appeal from the Vanderburgh Circuit Court

The Honorable David D. Kiely, Judge

Trial Court Cause No. 82C01-1910-MR-7595

Tavitas, Judge.

Case Summary

[1] Tanika Stewart appeals her conviction for murder, a felony, following a jury trial. Stewart challenges: (1) the trial court's admission of video surveillance

evidence; (2) the trial court's exclusion, as hearsay, of the victim's statements to Stewart; and (3) the sufficiency of the State's evidence to rebut Stewart's self-defense claim. We find no error; moreover, error, if any, from the trial court's evidentiary rulings is deemed harmless. We further find that the State succeeded in negating two elements of Stewart's self-defense claim. Accordingly, we affirm.

Issues

[2] We consolidate and restate Stewart's three appealed issues as follows:

> I. Whether the trial court erred in admitting video evidence and excluding the victim's statements to Stewart.
>
> II. Whether the State presented sufficient evidence to rebut Stewart's self-defense claim.

Facts

[3] During the relevant period, Ahmeisha Flemming, her sister, Stashaunna Flemming, and Maurice McRae lived together on Morton Street in Evansville, Indiana. On the night of October 25, 2019, and into the following morning, Ahmeisha hosted a house party. The earliest arrivals included Antonio Bushrod,[1] who arrived with two friends at approximately 10:30 p.m. Stewart

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[1] Bushrod—the decedent—is also identified in the record as "Tony[,]" "Nino[,]" "Nino for life[,]" and "Bankro for life." Tr. Vol. III pp. 9, 94.

arrived at approximately midnight in a dark-colored Chrysler 300; she was accompanied by three friends, including Lisa Bryant.

[4] When Stewart and her friends arrived, the hosts were ushering guests out of the residence with plans of socializing at a local bar; however, many guests were intoxicated and refused to leave the residence. At one point, McRae asked Stewart why she had not yet left; Stewart responded that Bushrod had taken her car keys. At approximately 12:50 a.m., the Flemming sisters and some guests left for the bar. Stewart, Bushrod, Bushrod's friends, McRae, the Flemmings' two brothers, and some other guests remained at the residence. McRae "didn't feel safe in leaving" for the bar because "the guys [at the party] were just being excessively rough with the females[,]" and Bushrod was "[b]eing real[ly] disrespectful." Tr. Vol. III pp. 55, 56. During the party, Stewart and Bushrod initially joked and roughhoused playfully; however, after Stewart rejected Bushrod's sexual advances, Bushrod verbally harassed Stewart and groped her breasts, thighs, and buttocks.

[5] At 1:00 a.m., the Evansville Police Department responded to a noise complaint regarding the party. When the police arrived, Bushrod was on the porch of the residence, and Stewart was on the sidewalk. Stewart was shouting and appeared to be angry about the police presence. Stewart did not report Bushrod's conduct to the police. At that time, the police left the residence.

[6] McRae eventually succeeded in evacuating the residence[2] and continued to monitor the lingering guests as they congregated on the porch. As Stewart exited to the porch, Bushrod slapped her bottom and "muffed" her.[3] *Id*. at 130. Bushrod's friends joined in, and the men "bullied[,]" "smothered[,]" verbally harassed, and groped Stewart. *Id*. at 62. McRae heard Stewart tell Bushrod and the other men to "back up[,]" "get out of [her] personal space[,] and stop touching [her.]" *Id*. at 58.

[7] Stewart, who was licensed to carry a concealed weapon, walked to her car, retrieved her 9-millimeter handgun, returned to the porch, and said: "If any of you touch me again, this is for you guys." *Id*. at 60. Bushrod struck[4] Stewart in the face and, according to McRae, approximately three minutes later, Stewart shot Bushrod in the chest. By Stewart's differing account, Bushrod punched her and drew his arm back to punch her again; Stewart then shot Bushrod.

[8] At approximately 1:40 a.m., Officers Charles Grimes and Michael DeBlanc of the Evansville Police Department were dispatched to the scene. Stewart approached Officer Grimes, surrendered the handgun, stated that she shot

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[2] The Jennings brothers remained inside the house with McRae.

[3] Bushrod pressed his palm against Stewart's head and shoved her. *See* Tr. Vol. III p. 70 (defining "muff[ing]" as "excessively push[ing] [a person] on the head").

[4] McRae characterized Bushrod's act of striking Stewart as a slap, and Stewart described it as a punch.

Bushrod, and was subsequently arrested. Bushrod was transported to an area hospital, where he died from the gunshot wounds.

[9] In the ensuing investigation, the police retrieved a 0.9-millimeter bullet and shell casing from the scene and obtained surveillance videos from the neighboring residents.[5] *See* State's Exhibits 34, 43-45. The videos depict Morton Street during the time of the shooting and captured some surrounding events.

[10] On October 30, 2019, the State charged Stewart with murder, a felony, and later filed a sentencing enhancement for Stewart's commission of the murder with a firearm. Stewart filed a motion in limine to exclude the surveillance videos for their poor quality. The trial court heard argument on the motion in limine and deferred its ruling until the trial.

[11] The trial court conducted Stewart's jury trial in January 2020. For the State, McRae testified as follows: (1) Bushrod, aided by his friends, harassed, struck, and touched Stewart inappropriately; (2) Stewart did not have a gun on her person during the party; (3) Stewart left the porch, retrieved her handgun from her car, returned to the porch, and warned Bushrod and the others not to touch her; (4) Bushrod and his friends continued to grope and/or batter Stewart; (5) Bushrod struck Stewart; and (6) Stewart shot Bushrod.

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[5] The police retrieved surveillance footage from the Morton Street residences of Eric Scott, *see* State's Exhibit 34; and Mariano Zamudio Alvarez, *see* State's Exhibits 43, 44, and 45.

[12] The State moved to introduce the surveillance videos to support its theory that Stewart retrieved a firearm from her vehicle, returned to the porch, and then shot Bushrod. *See* State's Exhibits 34, 43-45. Stewart did not object to the State's introduction of State's Exhibit 34; however, citing her motion in limine, Stewart lodged a continuing objection to the poor quality of the footage in State's Exhibits 43 through 45. The trial court ruled that the surveillance videos were of adequate quality and admitted all videos into evidence.

[13] Stewart took the stand in her defense. She testified that she had known of Bushrod for seven years before the incident and, particularly, of Bushrod's reputation for violence, "gang activity, [and] criminal activity." Tr. Vol. III p. 102. In September 2019, Stewart viewed a video of Bushrod, his brother, and some of his friends engaged in a violent attack on a man. *See id*. at 111 (Stewart testified: "They were stomping [the man], punching him in his face, kicking him, beating him everywhere."); *see also* Defense's Exhibit B.[6]

[14] Additionally, Stewart testified as follows: after Stewart rejected Bushrod, he became very aggressive. Bushrod and his friends groped Stewart's breasts, thighs, and buttocks and took turns pushing and striking Stewart. Stewart feared the men would "rap[e,]" beat[,]" or "knock [her] out." *Id*. at 139, 141. When Stewart demanded that Bushrod stop touching her, Bushrod struck Stewart's face. Stewart had a valid license to carry a concealed weapon, and

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[6] The video of the attack was admitted over the State's objection.

her gun was holstered inside her waistband. After Bushrod punched Stewart, Bushrod "cocked [his arm] back to hit [Stewart] again, [and Stewart] yanked out [her] gun, stepped, popped the safety and . . . shot one time." *Id.*

[15] When Stewart attempted to recount in detail Bushrod's "very aggressive" statements to her at the party, the State objected on hearsay grounds. *Id.* at 107. The trial court sustained the State's objection. Stewart did not make an offer of proof regarding the excluded testimony.

[16] At the close of the evidence, the trial court instructed the jury on, inter alia, sudden heat, self-defense, and the lesser-included offense of voluntary manslaughter. The jury found Stewart guilty of murder, and Stewart subsequently pleaded guilty regarding the sentencing enhancement. On February 19, 2020, the trial court sentenced Stewart to fifty years in the Department of Correction for murder, enhanced by five years for her use of a firearm, for a total sentence of fifty-five years. Stewart filed a motion to correct error on March 5, 2020, which was denied. Stewart now appeals.

Analysis

I. Admission and Exclusion of Evidence

[17] We review challenges to the admission of evidence for an abuse of the trial court's discretion. *Fansler v. State*, 100 N.E.3d 250, 253 (Ind. 2018). Because the trial court is best able to weigh the evidence and assess witness credibility, we only reverse "if a ruling is 'clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights.'" *Hall v.*

State, 36 N.E.3d 459, 466 (Ind. 2015) (quoting *Carpenter v. State,* 18 N.E.3d 998, 1001 (Ind. 2014)).

A. Surveillance Videos

[18] Stewart argues that the trial court erred in admitting State's Exhibits 34 and State's Exhibits 43 through 45. She maintains that these exhibits were of "such poor quality that they were not helpful to the jury, which could only speculate as to what [the surveillance videos] showed." Stewart's Br. p. 10.

[19] We observe that Stewart failed to object to the State's introduction of Exhibit 34 during her jury trial, and she failed to assert a fundamental error claim on appeal regarding Exhibit 34. *See Treadway v. State*, 924 N.E.2d 621, 633 (Ind. 2010) ("Failure to object at trial waives the issue for review unless fundamental error occurred.").[7] Stewart's claim of error regarding State's Exhibit 34 is, thus, waived. Accordingly, we confine our review of the trial court's determinations of the admissibility of State's Exhibits 43 through 45.

[20] To be admissible, video evidence must be "of such clarity as to be intelligible and enlightening to the jury." *Smith v. State*, 272 Ind. 328, 331, 397 N.E.2d 959, 962 (Ind. 1979) (quoting *Lamar v. State,* 258 Ind. 504, 513, 282 N.E.2d 795,

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[7] "The 'fundamental error' exception is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). "The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process." *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) (internal quotation omitted).

800 (Ind. 1972)). Where a video is not of perfect quality, we do not "require uniform perfection throughout a recording; rather the focus is upon whether the recording taken as a whole, or a crucial segment thereof, is of such poor quality that it is likely to lead to jury speculation as to its contents." *Smith*, 397 N.E.2d at 962-63.

[21] Having viewed the videos, we agree that the viewer cannot definitively identify any of the persons depicted; however, we find the videos have some relevancy despite their quality and limited depictions. Indiana Evidence Rule 401 provides a liberal standard for relevancy. *Konopasek v. State*, 946 N.E.2d 23, 27 (Ind. 2011). Evidence Rule 401 provides that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Generally, relevant evidence is admissible.[8] Evid. R. 402.

[22] Here, the videos allow the viewer to adequately discern certain events. State's Exhibit 43 depicts a dark sedan arriving and parking in front of the residence at approximately midnight; the vehicle's four occupants exit and approach the residence. State's Exhibit 44 shows a person seated inside the dark sedan at 12:48 a.m. A passenger-side door opens, and the vehicle's interior and exterior

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[8] A trial court may, however, exclude relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Evid. R. 403.

lights are activated. While the occupant remains inside the vehicle, another person approaches and opens the driver's door, before walking around the car to the open passenger door. That person then walks away, leaving the occupant inside the vehicle.

[23] Most pertinently, State's Exhibit 45 depicts two vehicles parked curbside in front of a residence. The State argued, and Stewart vaguely acknowledged, that the dark sedan in the foreground was Stewart's Chrysler 300; and the silver vehicle behind Stewart's vehicle belonged to Bushrod and/or his friends. Consistent with the State's theory of the case, State's Exhibit 45 depicts the following: a figure in a light-colored shirt approaches the dark sedan, opens the driver's door, leans into the vehicle, and emerges without fully entering the vehicle. The figure then walks back in the direction of the residence. Within moments, a bright flash appears on the left side of the camera frame. According to the State, the bright light was the muzzle flash from Stewart shooting Bushrod. Then, two figures enter the dark sedan, which pulls away from the curb.

[24] The State argued that the videos were relevant to show that Stewart "got her gun and willingly engaged in violence." Tr. Vol. III p. 164. State's Exhibit 45 is consistent with the testimony at trial. The footage bolsters McRae's testimony that Stewart left the porch, retrieved her gun from her vehicle, returned to the porch, where she brandished the weapon and shot Bushrod. Accordingly, we conclude that the videos were relevant and that the trial court did not abuse its discretion by admitting them.

[25] Even assuming arguendo that the trial court erred in admitting the surveillance videos into evidence, it is well-settled that the erroneous admission of evidence which is cumulative of other evidence admitted without objection does not constitute reversible error. *Hoglund v. State*, 962 N.E.2d 1230, 1240 (Ind. 2012). In light of the considerable evidence of Stewart's guilt, including her on-scene admission of guilt and McRae's testimony, we find that the admission of State's Exhibits 43 through 45 was harmless. *See Lafayette v. State,* 917 N.E.2d 660, 666-67 (Ind. 2009) ("The improper admission of evidence is harmless error when the conviction is supported by such substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.").

B. Victim's Statements

[26] Stewart argues that the trial court erred in excluding, as hearsay, Stewart's testimony recounting certain statements that Bushrod made to her at the party. Stewart maintains that, by excluding the statements, the trial court denied the jury information regarding "her state of mind as it related to her [self-defense] claim[.]" Stewart's Br. p. 17.

[27] "It is well settled that an offer of proof is required to preserve an error in the exclusion of a witness' testimony." *Heckard v. State*, 118 N.E.3d 823, 827-28 (Ind. Ct. App. 2019). "An offer of proof allows the trial and appellate courts to determine the admissibility of the testimony and the potential for prejudice if it is excluded." *See* Ind. Evid. R. 103(a)(2) (providing, "[i]f the ruling excludes

evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context"). An offer of proof must be certain, must definitely state the facts sought to be proved, and must show the materiality, competency, and relevancy of the evidence offered. *Kirk v. State*, 797 N.E.2d 837, 840 (Ind. Ct. App. 2003). Stewart's claim is, accordingly, waived because she failed to make an offer of proof.

[28] Waiver notwithstanding, hearsay is "a statement that: (1) is not made by the declarant while testifying at the trial or hearing; and (2) is offered in evidence to prove the truth of the matter asserted." Evid. R. 801(c). Hearsay is inadmissible unless it meets one of the exceptions found in Indiana Rules of Evidence. Evid. R. 802. When a statement has been excluded from evidence which was not, in actuality, hearsay, this Court will review the trial court's decision under a harmless error analysis. Ind. Trial Rule 61. "An error will be found harmless if its probable impact on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." *Caesar v. State*, 139 N.E.3d 289, 292 (Ind. Ct. App. 2020), *trans. denied*; *see* Ind. Appellate Rule 66(A).

[29] In *Sylvester v. State*, 698 N.E.2d 1126, 1129 (Ind. 1998), Sylvester killed his wife and maintained that he was guilty of manslaughter and not murder. On appeal, Sylvester alleged the trial court abused its discretion in excluding, as hearsay, his wife's statements denying she had an affair. In finding the excluded statements were not hearsay and were relevant, our Supreme Court found that their exclusion was harmless error and opined as follows:

> Defendant wanted to introduce the statements [ ] to show the circumstances which led to his "sudden heat." Thus, the statements were not being offered to show the truth of the assertions contained therein, and were not hearsay. Defendant was not trying to prove the truth of [his wife's] remarks but rather was attempting to show the effects of those remarks on his own behavior. *Statements made by a victim which are offered to show the reasons why a person acted in the way he or she did are not hearsay*. Since they were not hearsay, the only remaining inquiry is whether the statements were relevant. Defendant was attempting to support a claim of sudden heat and was seeking to establish the circumstances which lead to his state of mind. He was allowed to testify as to what he said during those conversations, but not as to what [his wife] said. The excluded statements were relevant in establishing a basis for defendant's own statements and behavior and should not have been excluded. . . .
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> * * * * *
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> Because we are convinced that exclusion of the evidence did not substantially affect defendant's rights in that its inclusion would likely have had little effect on the jury's decision, we find harmless error.

Id. at 1129-30 (citations and footnotes omitted) (emphasis added).

[30] Here, in attempting to introduce Bushrod's statements, Stewart did not seek to prove their truth; rather, Stewart sought to shed insight into her own state of mind—she was fearful and wanted to establish her perceived justification for shooting Bushrod and to support her self-defense claim. *See id*. at 1129 ("Statements made by a victim which are offered to show the reasons why a

person acted in the way he or she did are not hearsay."). We agree with Stewart that the excluded statements were not hearsay and were relevant.

[31] Although Stewart's testimony recounting Bushrod's statements should not have been excluded, we find that the exclusion of Bushrod's statements was harmless error. The State introduced McRae's testimony regarding Bushrod's behavior toward Stewart. McRae's testimony reflected Bushrod's aggressive posture toward Stewart, including that: (1) McRae did not leave the party because Bushrod was mishandling Stewart, and McRae left the front door ajar to monitor Bushrod's and his friends' conduct on the porch; (2) Bushrod groped, pushed, and struck Stewart and ignored her demands that Bushrod should stop—a demand that McRae reiterated for effect; and (3) Bushrod struck Stewart, even after Stewart warned him and brandished her gun. Additionally, during Stewart's testimony, she stated that Bushrod displayed ongoing aggression toward her after she rejected Bushrod.

[32] Based on McRae's and Stewart's testimony, we find that Bushrod's excluded statements would have merely corroborated the other admitted evidence regarding Bushrod's aggression and would not have changed the verdict. Accordingly, we conclude that the trial court's exclusion of the statements did not substantially affect Stewart's rights and constituted harmless error.

II. Self-Defense Claim

[33] Lastly, Stewart argues that the State failed to present sufficient evidence to rebut her self-defense claim. The standard of review for a challenge to the sufficiency

of the evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. *Hughes v. State*, 153 N.E.3d 354 (Ind. Ct. App. 2020). When analyzing a claim of insufficient evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the judgment. *Sallee v. State*, 51 N.E.3d 130, 133 (Ind. 2016). "It is the factfinder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." *Id.* The evidence does not have to overcome every reasonable hypothesis of innocence, and it is sufficient if an inference may reasonably be drawn to support the conviction. *Id.*

[34] Self-defense is a legal justification for an otherwise criminal act. *Gammons v. State*, 148 N.E.3d 301 (Ind. 2020). The self-defense statute provides that an individual has the right to use "reasonable force against any other person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force." Ind. Code § 35-41-3-2(c) (2013). A person is justified in using *deadly* force, and does not have a duty to retreat, if the person reasonably believes such force is necessary to prevent serious bodily injury to himself or a third person, or to prevent the commission of a forcible felony. I.C. §§ 35-41-3-2(c)(1), -(2).

[35] To prevail in presenting a self-defense claim, the defendant must show she was in a place where she had a right to be; did not provoke, instigate, or participate willingly in the violence; and had a reasonable fear of death or great bodily harm. *Wilson v. State*, 770 N.E.2d 779 (Ind. 2002). When the defendant raises

a self-defense claim which finds support in the evidence, the State carries the burden of negating at least one of the necessary elements. *Hughes*, 153 N.E.3d at 354. The State may meet its burden by rebutting the defense directly—by affirmatively showing the defendant did not act in self-defense—or by simply relying on the sufficiency of its evidence in chief. *Miller v. State*, 720 N.E.2d 696 (Ind. 1999). Whether the State has met its burden is a question of fact for the jury. If a defendant is convicted despite his claim of self-defense, an appellate court will reverse only if no reasonable person could say that self-defense was negated by the State beyond a reasonable doubt. *Wilson*, 770 N.E.2d 799.

[36] Stewart maintains that the State did not disprove any element of her self-defense claim. We cannot agree. McRae testified that, after Bushrod and his friends groped, taunted, and hit Stewart on the porch, Stewart was able to leave the group of men. McRae observed as Stewart went to her vehicle, retrieved her firearm, and returned to the porch, where the men resumed their aggression toward her. Bushrod then struck Stewart, and minutes later, Stewart shot Bushrod.

[37] The surveillance footage depicts the person alleged to be Stewart walking to her vehicle and standing alone beside the vehicle for several moments before she purportedly retrieved the firearm. Neither Bushrod nor the other men chased Stewart to her vehicle. Stewart went to her vehicle, armed herself, and returned to the fray. The evidence is, thus, clear that Stewart was no longer under physical threat when she retrieved her gun and approached Bushrod.

[38] Notably, Stewart's case-in-chief included her introduction of Defense Exhibit B—a video that showed Bushrod and his friends punching, kicking, and stomping a man. It is difficult to reconcile Stewart's testimony about her visceral response to the video with Stewart's decision to essentially recreate its circumstances by placing herself at physical odds with Bushrod and his friends. We conclude that Stewart did not "act without fault" in so doing. At that moment beside her car with keys in hand and standing safely apart from the group of men, Stewart no longer harbored a reasonable belief that she was in physical danger when she retrieved her gun.

[39] Bushrod's behavior was, no doubt, reprehensible, and it is undisputed that he struck Stewart's face. We find, however, that under the circumstances of this case, Stewart was not justified in her use of deadly force. Stewart was required to prove that she reasonably believed that such force was necessary to prevent serious bodily injury or the commission of a forcible felony. Stewart's argument here is weakened by the fact that, without interference from Bushrod and the other men, Stewart was able to leave the porch and walk to her vehicle for her gun before the final confrontation. She has not met her burden.

[40] Based on the foregoing evidence, the jury could have properly found that: (1) the situation was already de-escalated when Stewart revived the confrontation with Bushrod; (2) by returning to the porch, Stewart participated willingly in the violence; and (3) Stewart was not justified in using deadly force against Bushrod under those circumstances. We, therefore, cannot say that "no reasonable person could say that self-defense was negated by the State beyond a

reasonable doubt." *Wilson*, 770 N.E.2d at 800-01. Accordingly, Stewart's self-defense claim fails.

Conclusion

[41] Stewart's challenge to the admission of State's Exhibit 34 is waived. The trial court did not abuse its discretion in admitting State's Exhibits 43 through 45 due to their quality. Error, if any, from the exclusion of Bushrod's statements was harmless. The State presented sufficient evidence to rebut Stewart's self-defense claim. We affirm.

[42] Affirmed.

Bailey, J., and Robb, J., concur.