

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Edward Lee Smith,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 15 2022
Court of Appeals Case No.
21A-CR-1716
Appeal from the
Marion Superior Court
The Honorable
Cynthia L. Oetjen, Judge
Trial Court Cause No.
49D30-2009-MR-29830

Molter, Judge.

- [1] Edward Smith was convicted, after a jury trial, of murder and carrying a handgun without a license as a Class A misdemeanor, and he received an

aggregate sentence of sixty years. Smith appeals his convictions and raises several issues for our review, which we consolidate and restate as follows: (1) whether the trial court abused its discretion when it admitted an officer's bodycam footage containing a witness's statements; and (2) whether the trial court abused its discretion when it admitted another witness's videotaped deposition after she was deemed unavailable for Smith's jury trial. Finding that the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

- [2] On the morning of September 23, 2020, Smith entered a garage behind 621 Grant Avenue in Indianapolis where Christopher Greene and Kristie Leake-Hahn were living. Smith entered the garage at around 10:00 a.m. and shot Greene, who was unarmed, in front of Leake-Hahn, Ashley Boyd, and Tony Johnson before fleeing the garage. Soon after, Boyd and a neighbor called the police to report the shooting, telling the operator that Greene was dying. While on the phone with the operator, Boyd identified Smith as the person who had shot Greene and described him as wearing a black hat and a blue Indiana Pacers shirt.
- [3] Police arrived at the scene, including Officer Trimble who spoke with Boyd. When the police arrived at the scene, Boyd and Leake-Hahn were performing CPR on Greene. Boyd told Officer Trimble that Smith had run down an alley and gotten on a bicycle, again describing the previously mentioned attire. Boyd's conversation with Officer Trimble was recorded on Officer Trimble's bodycam.

[4] Several minutes later, Smith was seen on his bicycle near the shooting and was stopped by police. Smith's movements from the garage to where he was stopped by the police were verified by tracking information from a GPS bracelet he was wearing. When Smith was arrested, he was wearing a Superman shirt and no hat, and he was not carrying a weapon. Security footage from a nearby convenience store less than an hour before the shooting showed Smith speaking to a police officer investigating a separate incident at the convenience store, and the footage showed Smith wearing the blue Indiana Pacers shirt and black hat. This same interaction was captured on the police officer's bodycam as he spoke with Smith. Leake-Hahn also identified Smith as the shooter from a photo array. No firearm or ammunition was found at the scene of the shooting.

[5] Smith was charged with murder, unlawful possession of a firearm by a serious violent felon as a Level 4 felony, and carrying a handgun without a license as a Class A misdemeanor. Before the jury trial, Leake-Hahn was hand-served a subpoena for the trial during a deposition. Although the State was in contact with Leake-Hahn via text message the morning of the first trial and expected her to be available for the first trial, she failed to appear for the trial. The trial court allowed the State to present Leake-Hahn's deposition testimony over Smith's objections. In his objection, Smith stated he was unable to adequately cross-examine Leake-Hahn at her deposition because the State failed to provide the defense text messages that recounted a fight between Boyd and Greene the day before the shooting. The trial court overruled Smith's objection, holding

that Smith had the opportunity for confrontation. Smith's first jury trial ended without a verdict, and a mistrial was declared.

[6] Smith filed a motion in limine before the second trial to prevent the State from presenting Boyd's statements from Officer Trimble's bodycam. During a hearing on the motion, the State argued that Boyd's statements were admissible because the ongoing emergency surrounding the shooting at the time the statements were given rendered them non-testimonial, and they were subject to hearsay exceptions as a present sense impression and an excited utterance. The trial court agreed with the State and denied Smith's motion.

[7] The trial court also reaffirmed its holding that Leake-Hahn was unavailable and excluded Boyd as a possible witness because she did not appear for depositions. The prosecutor later learned that her failure to appear at the first trial was because she had concerns for her safety. Extensive efforts were made by the prosecutor to secure her attendance at the second trial, including offering to provide her housing and accommodations before the trial, repeatedly sending text messages, sending a detective to locate her, using the services of the Indianapolis Metropolitan Police Department, and securing a body attachment order. However, the State was unable to locate her, and Leake-Hahn did not appear for the second trial.

[8] During the second trial, Smith testified on his own behalf and explained that he was outside of the garage near the time of the shooting but that he did not enter the garage. At the conclusion of the second trial, the jury found Smith guilty of

murder and Class A misdemeanor carrying a handgun without a license. The trial court sentenced him to sixty years for the murder conviction and one year for the carrying a handgun without a license conviction, ordering the sentences to run concurrently for an aggregate sentence of sixty years. Smith now appeals.

Discussion and Decision

[9] Smith challenges two of the trial court’s evidentiary rulings. We review a trial court’s evidentiary rulings for an abuse of discretion. *King v. State*, 985 N.E.2d 755, 757 (Ind. Ct. App. 2013), *trans. denied*. An abuse of discretion will be found where the decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn from them. *Hudson v. State*, 135 N.E.3d 973, 979 (Ind. Ct. App. 2019).

I. Admission of Boyd’s Bodycam Statements

[10] Smith argues that his Sixth Amendment rights under the United States Constitution, specifically under the Confrontation Clause, and his right of confrontation under Indiana Constitution Article 1, section 13¹ were violated by

¹ Article 1, Section 13 of the Indiana Constitution provides in relevant part: “In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face” “Indiana’s right to a face-to-face meeting is, ‘[t]o a considerable degree, . . . co-extensive’ with the federal confrontation right.” *Ward v. State*, 50 N.E.3d 752, 756 (Ind. 2016) (quoting *Brady v. State*, 575 N.E.2d 981, 987 (Ind. 1991)). Here, while Smith raises a claim under the Indiana Constitution, he does not differentiate that analysis from the Sixth Amendment analysis, instead explaining that the right to confrontation under the Indiana Constitution is co-

the admission of the bodycam statements. The Confrontation Clause states that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. This clause guarantees defendants the opportunity to cross-examine witnesses. *United States v. Owens*, 484 U.S. 554, 557 (1988). A hearsay statement made by a witness who does not testify at trial violates the Sixth Amendment if it is testimonial, the witness is unavailable, and the defendant lacked a prior opportunity for cross-examination. *Howard v. State*, 853 N.E.2d 461, 465 (Ind. 2006) (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)).

[11] A statement is testimonial if it is “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Everroad v. State*, 998 N.E.2d 739, 742 (Ind. Ct. App. 2013), *trans. denied*. “[T]estimonial statements are those that are substitutes for live testimony, that is ‘they do precisely what a witness does on direct testimony.’” *Lehman v. State*, 926 N.E.2d 35, 40 (Ind. Ct. App. 2010) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)), *trans. denied*. Statements are nontestimonial “when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” *Davis*, 547 U.S. at 822. Statements become testimonial when their purpose is establishing or proving past events for criminal prosecution. *Id.*

extensive with federal right. We therefore reach the same conclusion under both the Sixth Amendment and Article 1, section 13.

[12] The test used by courts to determine if a statement is testimonial is the primary purpose test. The primary purpose test sets out an analysis of the statement and the actions of the parties. *Michigan v. Bryant*, 562 U.S. 344, 360 (2011). Statements made by an individual as a result of police questioning could be deemed as testimonial. *Id.* “[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.” *Id.* at 361. The goal of the test is to determine whether statements made were to create an out-of-court substitute for trial testimony. *Id.* at 358.

[13] In this case, Boyd’s statement to Officer Trimble, which was recorded on his body camera, was non-testimonial and thus admissible evidence. Shortly after the shooting took place, Officer Trimble appeared on the scene and asked Boyd, who was giving Greene CPR, where the shooter had gone. Boyd replied that the shooter was Smith and that he had fled on his bike through an alley, along with describing Smith’s attire. Officer Trimble then gave orders through his radio and gave the description of the suspect. The primary purpose of Boyd’s statement to the officer was to give information to address the ongoing emergency. *Davis*, 547 U.S. at 822.

[14] Officer Trimble asked Boyd a question about vital information within the crime scene in order to locate and arrest the shooter. The emergency nature of the crime, along with the limited scope of the question asked by the officer indicate

that the trial court did not err in finding Boyd's statements as non-testimonial. Indeed, this court has previously held that witness statements made after a shooting to identify a suspect were not testimonial. *Wallace v. State*, 836 N.E.2d 985, 996 (Ind. Ct. App. 2005).

[15] Smith also argues that Boyd's statements captured in the bodycam footage were inadmissible because they constituted hearsay. The Indiana hearsay rule states that "an out of court statement offered in court to prove the truth of the matter asserted" is inadmissible. *Turner v. State*, 953 N.E.2d 1039, 1055 (Ind. 2011). However, Indiana Evidence Rule 803(2) outlines an exception to the hearsay rule for an excited utterance, which is "a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Excited utterances occur when the individual does not have ample time to reflect or falsify information given that they are under the stress of excitement of the event. *Yamobi v. State*, 672 N.E.2d 1344, 1346 (Ind. 1996). There is also an exception under Indiana Rule of Evidence 803(1) for statements which reflect a present sense impression, which is defined as "a statement describing or explaining an event, condition, or transaction, made while immediately after the declarant perceived it."

[16] In response to the objection that the statements were hearsay, the trial court held that Boyd's statements to Officer Trimble were admissible either as excited utterances or present sense impressions. The trial court did not abuse its discretion in this finding. Boyd was at the scene of the shooting, and the statements she made identifying Smith were uttered just a few minutes after the

shooting and death of Greene occurred. The circumstances of the event demonstrate that Boyd was under the stress of excitement of the incident evidenced by the 911 call and statements made to Officer Trimble.

[17] Smith argues that Boyd's statements were not excited utterances because time had passed from the 911 call, and Boyd seemed to have calmed down from her excited state. Appellant Br. at 25. While Boyd was not in the same frenzied state that she was in during the 911 call, Officer Trimble's bodycam shows that Boyd was still under major distress and agitation given the death of Greene in front of her. Our Supreme Court has ruled that statements can be admitted as excited utterances up to over an hour after an incident. *Yamobi*, 672 N.E.2d at 1347. Here, not even ten minutes had passed between the time Boyd called 911 and the statements to the officer.

[18] Additionally, Boyd's proximity to the events allowed her to perceive them and record her findings through the 911 call and through her conversation with Officer Trimble. The few minutes between the events and Boyd's active measures to resuscitate Greene did not give her ample time to deliberate or falsify information. The trial court did not abuse its discretion in finding that Boyd's conversation identifying Smith with the officer was admissible as an exception to the hearsay rule as either an excited utterance or a present sense impression.

II. Admission of Leake-Hahn's Deposition Testimony

- [19] This court can reverse a decision of the trial court to admit evidence only when the admission was an abuse of discretion that results in the denial of a fair trial. *Ennik v. State*, 40 N.E.3d 868, 877 (Ind. Ct. App. 2015), *trans. denied*. When constitutional claims are made, we review them *de novo*. *Brittain v. State*, 68 N.E.3d 611, 618 (Ind. Ct. App. 2017), *trans. denied*. Regarding the availability of a witness, when a witness is deemed unavailable, an exception to the hearsay rule applies to testimony given at a deposition where the opposing party had the opportunity to offer cross examination questions. *Davis v. State*, 13 N.E.3d 939, 945-46 (Ind. Ct. App. 2014), *trans. denied*.; Evid. R. 804(b)(1).
- [20] The Confrontation Clause allows statements from witnesses who are not present at trial to be admitted when the witnesses are unavailable and the defendant had the opportunity to cross examine them sometime in the past, such as at a deposition. *Beldon v. State*, 906 N.E.2d 895, 900 (Ind. Ct. App. 2009), *summarily aff'd in relevant part*, 926 N.E.2d 480, 482 n.6 (Ind. 2010). It is within a trial court's discretion to apply hearsay exceptions when allowing the deposition testimony of an unavailable witness. *Morgan v. State*, 903 N.E.2d 1010, 1016 (Ind. Ct. App. 2009); Evid. R. 804.
- [21] Evidence Rule 804 describes that a witness is unavailable when they are absent from the trial or hearing and the statement's proponent has not been able to, by process or other reasonable means, procure the declarant's attendance. Evid. R. 804(a)(5). The Confrontation Clause is relevant when the State has made a

good faith effort to obtain the witness's presence at trial. *Beldon*, 906 N.E.2d at 900. The State can show good faith through affirmative measures such as meeting a reasonableness standard, even when there is only a remote possibility that they will produce the witness for trial. *Id.* The reasonableness standard is met when a prospective witness is served with a subpoena in order to secure their attendance at trial. *Bass v. State*, 797 N.E.2d 303, 306 (Ind. Ct. App. 2003).

[22] In this case, Smith and his counsel had ample opportunity to question and cross-examine Leake-Hahn at her deposition. Smith exercised his right of confrontation at the video deposition where Leake-Hahn answered Smith's questions regarding her experience from the incident. He had the opportunity to challenge and question Leake-Hahn's testimony regarding his acts on the morning of the shooting.

[23] Smith argues that his motivations and needs to test Leake-Hahn's deposition testimony changed in the time between her deposition and the trial. Appellant Br. at 27. After Leake-Hahn's deposition, Smith obtained text message records from his phone including conversations between Greene and Boyd that included some animosity. Smith argues that knowledge of these texts after the deposition would have changed the questions he would have asked Leake-Hahn, who was not present as a witness at trial. Smith argues that had he been able to question Leake-Hahn, he would have been able to inquire about any motivations Boyd would have had to kill Greene and whether Leake-Hahn had a motive to lie to protect Boyd. Smith, however, has not shown any evidence

other than a statement from counsel that the texts showed animosity to signal any ulterior motives from Boyd. This speculative motive introduced by Smith was properly rejected by the trial court.

[24] As for Leake-Hahn's absence from Smith's trial, the State made good-faith efforts to secure her attendance. Given Leake-Hahn's transient living situation, the State experienced great difficulty in locating her but was able to depose her. The State utilized ample resources to secure Leake-Hahn's presence as a witness during the trials but was ultimately unsuccessful. Given the evidence of the extensive efforts made by the State, the trial court's finding that the State had made a good-faith effort to have Leake-Hahn's presence at trial was not an abuse of discretion. The State met the good-faith and reasonableness standards by subpoenaing Leake-Hahn and ensuring she knew the date and time of the trials. *Berkman v. State*, 976 N.E.2d 68, 76 (Ind. Ct. App. 2012). Given the good faith efforts made by the State, the trial court did not err in finding that Leake-Hahn was unavailable and did not abuse its discretion in admitting the deposition into evidence.

[25] In sum, the trial court did not abuse its discretion in admitting Boyd's statements made to Officer Trimble through the bodycam footage or by allowing Leake-Hahn's deposition testimony into evidence.

[26] Affirmed.

Mathias, J., and Brown, J., concur.