MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Mark D. Altenhof
Elkhart, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Jodi Kathryn Stein
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

M.H.,
Appellant-Respondent,

v.

State of Indiana,
Appellee-Petitioner.

March 24, 2022

Court of Appeals Case No. 21A-JV-2122

Appeal from the Elkhart Circuit Court

The Honorable Michael A. Christofeno, Judge

The Honorable Heidi J. Cintron, Magistrate Pro Tempore

Trial Court Cause No. 20C01-2103-JD-64

Najam, Judge.

Statement of the Case

[1] M.H. appeals his adjudication as a delinquent child for committing intimidation, as a Level 5 felony when committed by an adult; battery, as a Level 5 felony when committed by an adult; and carrying a handgun without a license, as a Class A misdemeanor when committed by an adult. M.H. raises one issue for our review, which we revise and restate as whether the trial court abused its discretion when it admitted the testimony of a witness as evidence.

[2] We affirm.

Facts and Procedural History

[3] On July 20, 2020, T.J. was at his house with A.L. and B.D. At one point, there was a "ruckus" outside, and T.J. encountered a "bunch of people" who were yelling at him. Tr. at 43. The people "surrounded" T.J., and one girl got "physical" with him. *Id.* T.J. pushed the girl off of him, and the girl went to get M.H. M.H. arrived at T.J.'s house and "pointed a gun" at T.J.'s head. *Id.* M.H. then "smacked" T.J. with his hand and "smacked [T.J.] with the gun." *Id.* at 46. M.H. told T.J. that T.J. "would be killed" if he "ever c[a]me around" M.H. or the girl. *Id.* at 51. M.H. then left, and T.J.'s mother called the police.

[4] Corporal Nathanael Eddy with the Elkhart Police Department responded to T.J.'s house. When Corporal Eddy arrived, T.J. was "pretty physically and emotionally upset." *Id.* at 67. Corporal Eddy observed some "red marks" and "swelling" to T.J.'s face. *Id.* T.J. informed Corporal Eddy that "some guy" had "threatened to kill him." *Id.* at 69. T.J. also told Corporal Eddy that the

male had "hit him in the head with a gun and pressed a gun to his head." *Id*. Someone at the scene identified M.H. as the suspect to Corporal Eddy.

[5] The State filed a petition alleging M.H. to be a juvenile delinquent because he had committed intimidation, as a Level 5 felony if committed by an adult; battery, as a Level 5 felony if committed by an adult; and carrying a handgun without a license, as a Class A misdemeanor if committed by an adult. At the ensuing fact-finding hearing, the State called A.L. as its first witness. A.L. testified that, on the day of the offense, he saw some "dudes" go into T.J.'s house. *Id*. at 15. When the State asked A.L. what had occurred inside the house, he testified that he "didn't remember." *Id*. at 16. The State then asked if there was anything that "might help [him] remember, like if [he] had given a statement that same day to the police." *Id*. at 17. A.L. responded, "nah, no." *Id*. The State again asked: "You don't think that would help you remember what happened?" *Id*. And A.L. again said, "no." *Id*.

[6] At that point, the State requested a brief recess in order to show A.L. a video "of what he talked to the police about" to "possibly refresh his memory." *Id*. at 18-19. M.H. objected on the ground that A.L. had "indicated that it would not refresh his recollection." *Id*. at 19. The court overruled the objection and allowed the State to show the video to A.L. off the record. After he watched the video, A.L. testified that a male went to T.J.'s house, "slap[ped]" T.J., and "put a gun" towards T.J.'s head. *Id*. at 21. He also testified that he heard the male say, "stay away from my sister . . . before somebody end[s] up getting killed[.]" *Id*. at 24.

[7] The State then called B.D. as a witness. B.D. testified that, on the day of the offense, he "heard yelling" and saw a person with "a gun on" T.J. *Id*. at 31. In addition, T.J. testified about the offense. Specifically, T.J. testified that M.H. had slapped him with his hand and a gun and had threatened to kill him. Further, Corporal Eddy testified that T.J. informed Corporal Eddy that a male had slapped him and threatened him. And Corporal Eddy testified that someone had identified M.H. as the suspect and that he knew M.H. to be a minor and ineligible to carry a handgun. *See id*. at 76.

[8] Following the hearing, the court adjudicated M.H. a delinquent for having committed intimidation, as a Level 5 felony if committed by an adult; battery, as a Level 5 felony if committed by an adult; and carrying a handgun without a license, as a Class A misdemeanor if committed by an adult. The court then sentenced M.H. to probation. This appeal ensued.

Discussion and Decision

[9] M.H. contends that the trial court abused its discretion when it admitted A.L.'s testimony about the offense. As our Supreme Court has stated:

> Generally, a trial court's ruling on the admission of evidence is accorded "a great deal of deference" on appeal. *Tynes v. State*, 650 N.E.2d 685, 687 (Ind. 1995). "Because the trial court is best able to weigh the evidence and assess witness credibility, we review its rulings on admissibility for abuse of discretion" and 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.'" *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014) (quoting *Clark v. State*, 994 N.E.2d 252, 260 (Ind. 2013)).

Hall v. State, 36 N.E.3d 459, 466 (Ind. 2015). M.H. specifically contends that the trial court abused its discretion when it admitted A.L.'s testimony as evidence because the State elicited that testimony by improperly refreshing his recollection in violation of Indiana Evidence Rule 612.

[10] Indiana Evidence Rule 612(a) provides that, "[i]f while testifying, a witness uses a writing or object to refresh the witness' memory, an adverse party is entitled to have the writing or object produced at trial, hearing, or deposition in which the witness is testifying." Our Supreme Court has explained that, "[a]lthough Evidence Rule 612(a) clearly envisions the use of writings to refresh a witness' memory, it does not address the method by which the witness' memory may be refreshed." *Thompson v. State*, 728 N.E.2d 155, 160 (Ind. 2000). The Court further noted that a simple colloquy is all that is required under Evidence Rule 612. *Id*.

> The witness must first state that he does not recall the information sought by the questioner. The witness should be directed to examine the writing, and be asked whether that examination has refreshed his memory. If the witness answers negatively, the examiner must find another route to extracting the testimony or cease the line of questioning.

Id.

[11] On appeal, M.H. contends that, "after multiple attempts to get [A.L.] to testify the way the State wanted," A.L. "maintained that he couldn't recall the events" and that there "was nothing the State could have him review that would refresh his recollection." Appellant's Br. at 9. Accordingly, M.H. asserts that "[t]here

was simply no foundation set by the State that would allow" the State to use the video to refresh A.L.'s recollection. *Id*. And M.H. maintains that it is "impossible to know" if A.L.'s testimony was "from his own independent recollection from the day in question, or if he was simply regurgitating his prior statements from the video." *Id*. at 11.

[12] However, we need not decide whether the trial court erred when it allowed A.L. to testify after having refreshed his memory because any error in the admission of that testimony was harmless. It is well settled "that 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.'" *Troutner v. State*, 951 N.E.2d 603, 612 (Ind. Ct. App. 2011) (quoting *Pruitt v. State*, 834 N.E.2d 90, 117 (Ind. 2005)), *trans. denied*. That is, even if the trial court errs in admitting or excluding evidence, this Court will not reverse the defendant's conviction if the error is harmless. *See id*. "An error in the admission of evidence is harmless where the 'probable impact' of the erroneously admitted evidence, 'in light of all the evidence in the case, is sufficiently minor so as to not affect the substantial rights' of the defendant." *Caesar v. State*, 139 N.E.3d 289, 292 (Ind. Ct. App. 2020) (quoting Ind. Appellate Rule 66(A)), *trans. denied*.

[13] Here, T.J. testified that M.H. arrived at his house, and "pointed a gun" at his head. Tr. at 43. In addition, T.J. testified that M.H. "smacked" T.J. with his hand and with a gun. *Id*. at 46. And T.J. testified that M.H. told T.J. that T.J. "would be killed" if he "ever c[a]me around" M.H. or the girl. *Id*. at 51. B.D. also testified that he saw a person with "a gun on" T.J. *Id*. at 31. Further,

Corporal Eddy testified that, when he arrived at T.J.'s house, T.J. was "pretty physically and emotionally upset" and that he had "red marks" and "swelling" on his face. *Id*. at 67. Corporal Eddy then testified that T.J. had reported that "some guy" had "threatened to kill him" and had "hit him in the head with a gun and pressed a gun to his head." *Id*. at 69. *Id*. And Corporal Eddy testified that someone at the scene had identified M.H. as the suspect and that he knew M.H. to be a minor and ineligible to carry a handgun. *See id*. at 76.

[14] In light of all of the evidence before the court, we can say with confidence that the probable impact of A.L.'s testimony after he refreshed his recollection was sufficiently minor so as to not affect M.H.'s substantial rights. *See Caesar*, 139 N.E.3d at 292. Accordingly, we conclude that the error, if any, in the court's admission of that testimony was harmless. We affirm M.H.'s adjudication as a delinquent child.

[15] Affirmed.

Vaidik, J., and Weissmann, J., concur.