MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Shaun Anton Whitelow,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

April 18, 2022

Court of Appeals Case No. 21A-CR-1822

Appeal from the Lake Superior Court

The Honorable Diane Ross Boswell, Judge

Trial Court Cause No. 45G03-2003-MR-3

Robb, Judge.

Case Summary and Issues

[1] The State charged Shaun Whitelow with murder and added a firearm enhancement. Following a jury trial, Whitelow was convicted of murder. The trial court then determined that Whitelow was guilty of using a firearm during the commission of the offense.

[2] Whitelow now appeals, raising multiple issues for our review which we restate as: (1) whether Whitelow waived his right to a jury trial on the firearm enhancement; (2) whether the trial court erred in admitting certain hearsay evidence; and (3) whether the State presented sufficient evidence to support Whitelow's murder conviction. Concluding that the trial court did not err in admitting hearsay evidence and the evidence was sufficient to support his murder conviction, we affirm the conviction. However, we also conclude the trial court did not secure a proper jury waiver from Whitelow for the enhancement phase and therefore we reverse the enhancement and remand for the trial court to either hold a jury trial or obtain proper waiver.

Facts and Procedural History

[3] On November 2, 2019, the Whitelow family had a birthday party for one of Whitelow's sisters. More than twenty people attended the party including Darvell Smith, Smith's children, and Willie Walker, a close friend of Whitelow's. At some point an altercation broke out at the party leading to those

attending exiting the house and the police being called.[1] Prior to the police arriving, Smith and Whitelow became engaged in a confrontation outside where Smith tackled Whitelow to the ground. Officers arrived at approximately 8:44 p.m., and police body camera footage showed a shirtless Smith outside of the party. When asked if he was alright, Smith responded, "I'm always good." Transcript, Exhibit Volume 2, Exhibit 94 (Video at 04:15).

[4] After the altercation subsided, Smith left the party while police were still present. At 9:10 p.m., Smith posted on Facebook:

> The loudest n***a in the room usually the weakest never been intimidated by no gun cuz if you pull it out and cock it and don't use it you showed me who you REALLY are and that's that showing [sic] tell life[.]

Ex., Vol. 1 at 127. At 9:12 p.m., Ashley Adkins, Smith's estranged wife, received a voicemail from Smith in which "[h]e was yelling, cussing, . . . aggressive, [and] very, very upset." Transcript, Volume 4 at 66. Adkins called Smith back ten minutes later. Smith "immediately answered the phone, cussing and screaming." *Id.* at 74. During their conversation, Smith stated "I'm about to go to jail tonight. . . . [M]y cousin Shaun just pulled a gun on me in front of my f*cking kids." *Id.* Adkins tried to calm Smith down, but he hung up on her.

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[1] The initial altercation did not involve Whitelow and Smith.

[5] Around 9:30 p.m., Smith's friend Brandon Dorsey called him. Dorsey could tell that Smith "[c]learly had an adrenaline rush going . . . . [He was] [v]ery excited . . . [and] very, very upset." *Id.* at 32. Smith told Dorsey that he got into an altercation with Whitelow and "picked him up [and] slammed him pretty hard" but after the fight was over, Whitelow pulled a gun on Smith. *Id.* at 35. Smith told Dorsey that he was going to his mom's house and then to his girlfriend's. After talking with Dorsey, Smith called his girlfriend Mary Ann Carter and told her one of his cousins had pulled a gun on him after an altercation. *See* Tr., Vol. 2 at 242. Carter could tell "he was clearly upset."[2] *Id.* at 237. In fact, in the two years that Carter had known Smith, she never heard him that upset. *See id.*

[6] Around 11:00 p.m., Smith made another Facebook post that stated, "Blood Thicker Than Water but that sh*t fall on deaf ears if ain't no communication[.]" Ex., Vol. 2 at 83. Subsequently, Smith called Carter again to let her know that he was trying to find parking near her home. After some time had passed, Smith had still not come inside so Carter tried calling him, but he did not answer. Carter could see Smith's white Crown Victoria parked down the street from her house, so she went outside to check on him. Carter found Smith

[2] Carter testified that Smith called her at 6:30 p.m., however, the timeline of the events demonstrate that she was mistaken. The State suggested 10:00 p.m. as a more likely time at trial. *See* Tr., Vol. 2 at 240.

slumped over in the driver's seat dead with "a hole in his head."[3] Tr., Vol. 2 at 247. Carter then called the police.

[7] Police responded to Carter's residence. At the scene, they found three fired nine-millimeter bullet casings right next to the Crown Victoria. *See* Tr., Vol. 3 at 197. They also found a set of keys with a fob laying in the street "just north of the crime scene" where Smith was parked. *Id.* at 53.

[8] Police then obtained video surveillance footage from the homeowners near where Smith had been parked. One of the videos showed a man approach Smith's vehicle. The man walks up to the driver's window, raises his right arm, and three flashes appear in rapid sequence. *See* Ex., Vol. 2 at 71, Exhibit 165 (Video at 00:48-00:50). The man was wearing a dark hooded garment. A forensic video technician was able to enhance the video quality to show that the man in the video was wearing white shoes with a broad black outline along the sides of the shoe and a triangular dark colored area near the ankles. *See* Ex., Vol. 2 at 70. Photos of Whitelow taken at the party show him wearing similar shoes. *See* Ex., Vol. 1 at 106. Police also obtained fourteen home and business surveillance videos and determined that Smith's car had been followed by an early 2000s model dark-colored Chevrolet Impala. *See* Tr., Vol. 4 at 156-57.

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[3] An autopsy later determined that Smith had been shot several times, and that he was killed by a gun shot fired into the left side of his head. *See* Ex., Vol. 1 at 70, 72.

[9] On November 14, police interviewed Whitelow. Whitelow stated that there had been no altercation at the party between himself and Smith. Whitelow also claimed his girlfriend drove him home from the party around 10:30 p.m. and that he stayed home the rest of the night. However, Whitelow's girlfriend testified that she did not bring him home from the party and did not know how he got home. Whitelow also told police that Walker drove a dark or charcoal colored Chevrolet Impala. *See id.* at 147-48.

[10] Police then took the keys and fob found near Smith's car to the residences of the party attendees and activated the fob near vehicles outside. At the house where the party occurred, the fob activated a 2003 Lincoln Aviator that belonged to Whitelow. The detective then found that the keys opened Whitelow's front door. Whitelow admitted the keys were his but claimed they had been stolen the night of the party.

[11] On March 17, 2020, the State charged Whitelow with murder. Subsequently, an amended information was filed adding a use of firearm enhancement. At trial the State offered evidence, over objection, of Whitelow and Smith's altercation at the party. This evidence included:

- Smith's 9:12 p.m. voicemail and 9:22 p.m. phone call to Adkins;
- Smith's 9:30 p.m. phone call with Dorsey;
- Smith's 10:00 p.m. phone call to Carter; and
- Two Facebook messages posted by Smith.

[12] The jury found Whitelow guilty of murder. Whitelow's trial counsel then informed the trial court that Whitelow would be waiving his right to a jury trial regarding the firearm enhancement. *See* Tr., Vol. 5 at 126-28. The trial court found Whitelow guilty of the firearm enhancement and sentenced Whitelow to sixty years in the Indiana Department of Correction. Whitelow now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Right to Jury Trial

[13] Whitelow contends that the trial court "committed fundamental error by failing to secure a proper waiver of Whitelow's [jury] trial rights with regards to the firearm enhancement." Brief of the Appellant at 11.

[14] A criminal defendant must receive a jury trial, unless he waives it. *Horton v. State*, 51 N.E.3d 1154, 1158 (Ind. 2016). The right to a jury trial also applies to firearm enhancements. *See* Ind. Code § 35-50-2-11(f) ("If the person was convicted . . . in a jury trial, the jury shall reconvene to hear evidence in the [firearm] enhancement hearing."). "[W]aiver of the Indiana constitutional jury trial right must be knowing, voluntary[,] and intelligent[.]" *Horton*, 51 N.E.3d at 1158 (internal quotations omitted). Further, in Indiana felony prosecutions, waiver is valid only if communicated personally by the defendant. *Kellems v. State,* 849 N.E.2d 1110, 1113-14 (Ind. 2006); *see also Bradtmiller v. State*, 113 N.E.3d 255, 257 (Ind. Ct. App. 2018) (holding that requirement of personal waiver applies to habitual offender enhancements). A violation of the right to

trial by jury is a fundamental error and cannot be considered harmless. *See Horton*, 51 N.E.3d at 1160.

[15] Here, after the jury returned its murder verdict, the following exchange took place during a bench conference:

> The Court: [F]or the enhancement phase, does your client wish to proceed with the jury?
>
> [Trial Counsel]: No, he will allow the Court to make that determination.

Tr., Vol. 5 at 126. The trial court then released the jury and stated:

> All right. [Trial counsel] for Mr. Whitelow, the State of Indiana has filed a firearm enhancement.
>
> It's my understanding that you have chosen to go forward today with the Court making the decision on the enhancement; is that correct?

Id. at 128. Whitelow's counsel answered, "That is correct." *Id.*

[16] These two questions were the extent of the trial court's inquiry regarding waiver. Whitelow was never personally addressed. Therefore, the trial court failed to confirm Whitelow's personal waiver before proceeding to a bench trial. Accordingly, we reverse Whitelow's firearm enhancement and remand for further proceedings.

II. Admission of Hearsay Evidence

A. Standard of Review

[17] Hearsay is any statement made out of court and offered to prove the truth of the matter asserted in court. Ind. Evidence Rule 801(c). Hearsay is inadmissible unless it falls within one of the exceptions to the rule against hearsay. Evid. R. 802. We will reverse a trial court's ruling concerning hearsay only upon an abuse of discretion. *Carr v. State*, 106 N.E.3d 546, 554 (Ind. Ct. App. 2018), *trans. denied*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Gaby v. State*, 949 N.E.2d 870, 877 (Ind. Ct. App. 2011). We will affirm the trial court's evidentiary ruling on any basis supported by the record. *Carr*, 106 N.E.3d at 554.

B. Excited Utterance

[18] Whitelow argues that the "trial court abused its discretion when admitting hearsay evidence pertaining to Whitelow pointing a firearm at [Smith]." Br. of Appellant at 16. The evidence at issue was admitted pursuant to the excited utterance exception to the rule precluding hearsay.[4] Evid. R. 803(2).

[19] For a hearsay statement to be admitted as an excited utterance under Indiana Evidence Rule 803(2), three elements must be shown: (1) a startling event

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[4] The three phone conversations, voicemail and Facebook messages were all admitted over objection. *See* Tr., Vol. 2 at 239; Tr., Vol. 4 at 33, 72, 74, 86.

occurs; (2) a statement is made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event. *Jenkins v. State,* 725 N.E.2d 66, 68 (Ind. 2000). This 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.*

[20] Whitelow challenges whether the statements were "made while under the stress caused by the event." Br. of Appellant at 18. First, Whitelow contends that the lapse of time between the event and the statements make them inadmissible as excited utterances.

[21] Although the time period between the startling event and a subsequent statement is, of course, one factor to consider in determining whether the statement was an excited utterance, no precise length of time is required. *See Holmes v. State,* 480 N.E.2d 916, 918 (Ind. 1985) (upholding trial court's determination that a statement was an excited utterance even though the time frame for the statement was not clear from the record). Here, some time had elapsed between the altercation and the multiple challenged statements. However, the amount of time that had passed is not dispositive. *See Williams v. State*, 782 N.E.2d 1039, 1046 (Ind. Ct. App. 2003), *trans. denied*. In *Williams*, a victim was shot, and his statements were made approximately between thirty minutes and an hour after that startling event. "Even though some time had passed since he was shot, his statements are inherently reliable because [he] was still under the stress of excitement resulting from the [event.]" *Id.* As in

Williams, Smith's statements were not so far removed from the event to make them inadmissible as excited utterances.[5]

[22] Whitelow also argues that although Smith initially appears agitated in police body camera footage, Smith is shown calmly telling an officer, "I'm always good[,]" Ex., Vol.2, Ex. 94 (Video at 04:15), "demonstrat[ing] that [Smith] was at no point under stress even during the event itself." Br. of Appellant at 19. We disagree. Smith's ability to answer one question from police calmly is not necessarily indicative of his mental state. Getting into a physical altercation and having a gun pointed at you is an inherently stressful event as evidenced by Smith's interactions after he left the party.

[23] All of the witnesses who spoke to Smith that night testified that Smith was noticeably upset. Adkins stated that she received a voicemail from Smith where "[h]e was yelling, cussing, . . . aggressive, [and] very, very upset[,]" and that when she called him back, Smith "immediately answered the phone, cussing

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[5] Whitelow notes that

> the *bare minimum* lapse of time between the event and the hearsay statements is as follows: twenty-six minutes for the first Facebook post, twenty-eight minutes for the voicemail, thirty-eight minutes for the call with Adkins, forty-six minutes for the call with Dorsey, one hour and sixteen minutes for the call with Carter, and a still indeterminate amount of time for the Facebook post that was admitted without a timestamp.

Br. of Appellant at 18. As time is not a dispositive factor, we conclude that all the phone conversations were admissible. However, even assuming there was a time cut off that would make the earlier phone calls admissible but not the later, the subsequent conversations would merely be cumulative evidence. "Admission of cumulative evidence is within the discretion of the trial court[,]" *Traxler v. State*, 538 N.E.2d 268, 270 (Ind. Ct. App. 1989), and amounts to harmless error as such admission does not affect a party's substantial rights, *see D.B.M. v. Ind. Dep't of Child Servs.*, 20 N.E.3d 174, 179 (Ind. Ct. App. 2014), *trans. denied.*

and screaming." Tr., Vol. 4 at 66, 74. Carter testified that Smith "was clearly upset[,]" and that she never heard him that upset before. Tr., Vol. 2 at 237. Dorsey could also tell that Smith "[c]learly had an adrenaline rush going. . . . [He was v]ery excited [and] very, very upset." Tr., Vol. 4 at 32.

[24] These facts establish that Smith was still under the stress of the altercation between himself and Whitelow when he made the statements. Because Smith was still under the excitement of the event when he made the statements, they were excited utterances, and the trial court did not abuse its discretion in admitting them.

III. Sufficiency of the Evidence

[25] When reviewing the sufficiency of the evidence required to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). Instead, we consider only the evidence supporting the verdict and any reasonable inferences that can be drawn therefrom. *Morris v. State*, 114 N.E.3d 531, 535 (Ind. Ct. App. 2018), *trans. denied.* We consider conflicting evidence most favorably to the verdict. *Silvers v. State*, 114 N.E.3d 931, 936 (Ind. Ct. App. 2018). "We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt." *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009).

[26] Whitelow argues that the evidence is insufficient to support his conviction of murder. A person who knowingly or intentionally kills another human being

commits murder, a felony. Ind. Code § 35-42-1-1(1). Therefore, to obtain a conviction of murder in this case, the State was required to prove beyond a reasonable doubt that: (1) Whitelow (2) knowingly or intentionally (3) killed Smith. *See* Ind. Code § 35-41-4-1(a) (stating the standard of proof). A conviction for murder may be based entirely on circumstantial evidence, *Sallee v. State*, 51 N.E.3d 130, 134 (Ind. 2016), and the circumstantial evidence need not overcome every reasonable hypothesis of innocence; instead, "[i]t is enough if an inference reasonably tending to support the verdict can be drawn from the circumstantial evidence[,]" *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995).

[27] Here, the State alleged that Whitelow, as a passenger of Walker's Chevrolet Impala, followed Smith to Carter's home and shot Smith while he sat in his car. However, Whitelow contends that the issue is the identity of the shooter, and that the State's circumstantial evidence fails to prove Whitelow was the perpetrator. Whitelow's argument is essentially an invitation for us to reweigh the evidence which we will not do. *Drane*, 867 N.E.2d at 146.

[28] Prior to the shooting Smith told multiple people that he "slammed" Whitelow at the party leading to Whitelow pointing a gun a Smith. Tr., Vol. 4 at 35. Whitelow's car keys were found near Smith's car. Camera surveillance showed the shooter wearing shoes that matched shoes Whitelow was photographed wearing at the house party earlier that evening. *See* Ex., Vol. 2 at 70; Ex., Vol. 1 at 106. Further, Whitelow told police that he left the party with his girlfriend, but she testified that she did not drive him home from the party and did not know when he got home. Police also found footage of a car matching the make

and model of Walker's following Smith to Carter's home. Therefore, we conclude that there was sufficient evidence for a jury to conclude that Whitelow murdered Smith.

Conclusion

[29] We conclude that the trial court did not secure a proper jury waiver from Whitelow for the enhancement phase. We also conclude the trial court did not err in admitting hearsay evidence, and that the evidence was sufficient to support Whitelow's murder conviction. Accordingly, we affirm in part and reverse and remand in part for further proceedings consistent with this opinion.

[30] Affirmed in part, reversed and remanded in part.

Riley, J., and Molter, J., concur.