MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Domanique Mikail Johnson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 12, 2021

Court of Appeals Case No. 20A-CR-821

Appeal from the Marion Superior Court

The Honorable Grant W. Hawkins, Judge

Trial Court Cause No. 49G05-1809-MR-30333

Najam, Judge.

Statement of the Case

[1] Domanique Johnson appeals his conviction for murder, a felony, following a jury trial. Johnson raises two issues for our review, which we revise and restate as the following three issues:

1. Whether the State committed a *Doyle* violation when it asked an officer on rebuttal whether he had heard Johnson's version of events prior to trial.

2. Whether the State committed acts of prosecutorial misconduct that cumulatively constituted fundamental error.

3. Whether the trial court abused its discretion when it admitted certain evidence.

[2] We affirm.

Facts and Procedural History

[3] Domanique Johnson and Shiann Douglas were in a romantic relationship. They have two children together, and they lived together in Georgia until May 2018, when their relationship ended. In June, Douglas and the children moved into her mother's apartment in Indianapolis, where Douglas's cousin, Darrell Williams, also resided. Douglas then entered into a romantic relationship with Antoine Walton.

[4] During the early morning hours of August 27, Douglas and Walton were sitting in Douglas's vehicle outside her apartment. Williams's car was parked next to Douglas's along the driver's side. At some point, Williams came down from

the apartment to speak with Douglas and Walton, and he stood between his car and Douglas's to do so.

[5] At approximately 12:30 a.m., Williams saw Johnson near the apartment building about twenty to twenty-five feet away from where he was standing. Johnson greeted Williams then got into the passenger seat of a black pickup truck driven by his cousin Marcus Wilson. At the same time, Williams retrieved a firearm from his car and informed Douglas and Walton that Johnson was there. Douglas and Walton subsequently exited Douglas's vehicle.

[6] Douglas walked into the vestibule of her apartment building and stood at the door looking outside. Walton remained outside by Williams in between the two vehicles. Walton crouched down to tie his shoes, and Williams told him to stay crouched down "in case somebody gets to shooting." Ex. Vol. 2 at 32.

[7] As this was happening, Douglas saw Johnson exit the black pickup truck and point a gun towards Walton and Williams. Douglas then heard a gunshot, and she retreated further into her apartment building. As a result, she did not see anything else. A firefight then ensued during which Walton was shot. Walton died as a result of his injuries.

[8] Williams then saw Johnson running back toward the pickup truck. As Johnson entered the passenger side of the pickup truck, Williams shot Johnson in the spine. Johnson's injuries were not fatal. Following the firefight, someone called 9-1-1.

[9] Officer Barbacar Diouf with the Indianapolis Metropolitan Police Department ("IMPD") responded to the report of shots fired. Officer Diouf was on his way to an unrelated incident, so he was able to arrive on the scene within seconds of receiving the dispatch. When Officer Diouf first arrived, he spoke with Williams, who directed him to Walton's body. Officer Diouf then briefly spoke with Douglas before speaking with Williams for a second time to obtain suspect information.

[10] At 2:34 a.m., Johnson arrived at Eskenazi Hospital to receive treatment for his gunshot wound. Later that day, IMPD Detective David Everman visited Johnson in the hospital and attempted to obtain a statement regarding the events that had occurred. Johnson told Detective Everman that he could not "remember anything that occurred." Tr. Vol. 3 at 49.

[11] Detective Everman also interviewed Williams and Douglas the same day. Douglas picked Johnson out of a photo array as the person who had shot Walton. Williams did not immediately identify Johnson as the shooter, but later "conclusively state[d]" that Johnson had shot Walton. *Id.* at 54-55. Walton also picked Johnson out of the photo array. Thereafter, the State charged Johnson with murder, a felony.

[12] On November 8, 2019, Johnson deposed Williams. In that deposition, Williams explained that his identification of Johnson as the shooter was based on an assumption and that he did not want to make the same assumption under oath. According to Williams, although he did not see Johnson with a gun, he

still shot at Johnson because he believed the original shots came from Johnson's general area near the pickup truck.

[13] At Johnson's ensuing jury trial, the State asked a firearms expert: "And so anyone can ask for analysis of something having to do with a crime that has occurred; is that correct? Or I guess not anyone, but anyone involved in—in the parties, for example, defense could ask for some testing to be done. Is that accurate?" Tr. Vol. 2 at 233. The expert responded that he did not know if defense counsel could ask for testing. Johnson did not object to this line of questioning.

[14] The State also called Officer Diouf as a witness. The State asked him numerous questions about what Williams had said when Officer Diouf first arrived on the scene. After describing his initial interaction with Williams and Williams's demeanor, Officer Diouf testified that Williams had told him where the shooters went following the shootout. When the State asked Officer Diouf for specifics about what Williams had said, Johnson objected to Officer Diouf's testimony on the ground that the testimony was hearsay. The trial court overruled Johnson's objection based on its conclusion that the statement was an excited utterance.

[15] The State continued to question Officer Diouf about what Williams had told him. When the State asked Officer Diouf to recount what Williams had told him about the person who left the vehicle from which shots were fired, Johnson lodged his second objection based on hearsay, which the trial court also

overruled. The State then asked Officer Diouf where Williams was standing when he shot at the vehicle from which shots were fired, and Johnson raised his third hearsay objection. The trial court sustained Johnson's objection. The State attempted to rephrase the question. Johnson again objected, and the trial court asked Officer Diouf if Williams had volunteered any information without being asked a question. Officer Diouf answered in the negative. The State moved on and continued its direct examination.

[16] The State called Douglas as a witness. She testified about a series of text messages she had exchanged with Johnson approximately two weeks before the shooting. One of the messages Douglas received from Johnson said, "I'm in Indiana I might kill myself after I kill da opps." Ex. Vol. 2 at 15. Douglas testified that "opps" meant "opposition" and referred to Walton. Tr. Vol. 2 at 146-47.

[17] Johnson then testified in his defense. Johnson testified that he had been at Douglas's apartment complex visiting a friend and that Wilson had picked him up from there. Johnson claimed that, on their way out of the complex, he saw Douglas walking into her apartment building, so he asked Wilson to turn around so he could see his children. According to Johnson, he exited Wilson's pickup truck and saw Walton standing next to Williams. Johnson claimed that he made eye contact with Walton, and Walton immediately bent down. Johnson testified that he tried to speak but was "confronted with gunfire." Tr. Vol. 3 at 71.

[18] On cross examination, the State asked Johnson whether he had given his attorneys the name of a friend he had visited the night of the incident and whether Johnson's friends and family had reached out to the people Johnson had been with the night of the shooting. Johnson did not object to this line of questioning.

[19] Also on cross examination, the State introduced into evidence a photo of online messages that had taken place between Johnson and Walton a few weeks prior to the shooting. The messages included derogatory language such as anti-gay and racial slurs. Johnson objected to admission of the photo on the grounds that it was not relevant or timely. After a short discussion to determine the timeliness of the photo, the trial court overruled Johnson's objection. Johnson then objected to admission of the photo on the ground that it was highly prejudicial. The trial court overruled Johnson's objection.

[20] On re-direct examination, Johnson testified that the messages reflected his intention to fight Walton. On re-cross examination, Johnson claimed that Walton had "engaged the fight" in another portion of messages not included at trial. *Id.* at 89-90. In response, the State said, "if your lawyer has other parts of the conversation they want us to see, then we'll let [defense counsel] . . . ." *Id.* at 90. Johnson objected to this statement. The trial court overruled Johnson's objection, and the State did not pursue the matter further.

[21] In an attempt to rebut Johnson's account of the shooting, the State recalled Detective Everman and elicited testimony from him about whether he had

heard Johnson's version of events before trial. Specifically, the State asked Detective Everman if trial was the first time he had heard Johnson's "story." *Id.* at 100. The trial court allowed Detective Everman to answer the question over Johnson's objection. Detective Everman said, "My answer is yes, this is the first time." *Id*. at 101.

[22] In its closing argument, the State addressed the hearsay evidence the trial court had admitted as an excited utterance:

> And for the reasons we talked about, the reasons why that was kind of allowed into evidence, that's right after the shooting. He didn't have a chance to think about this. He hasn't had a chance to sit down and compare[] notes with [Douglas] and say, okay, now (indiscernible) [Johnson] did it. Is that right? No. He—he's upset that his friend is dead and he's telling Officer Diouf, [Johnson] did this.

Id. at 113. Johnson did not object to this statement.

[23] During its rebuttal closing argument, the State discussed the lack of corroboration for Johnson's version of events and said, "of course the burden is on the State here, but the defense has subpoena power." *Id*. at 123. Johnson did not object to this statement. The State also told the jury that Williams "knew [the shooter] was [Johnson], but he didn't wanna tell in the beginning. Why? Because he was scared. He's a murderer. But he told Officer Diouf, without telling the name, the person who shot jumped in that black truck and drove off. And that was the truth." *Id*. at 125.

[24] In addition, during its rebuttal closing argument, the State discussed Douglas's testimony about her text messages with Johnson. In so doing, the State said, "When (indiscernible) immediately knew, that means opposition, of course it does." Tr. Vol. 3 at 122. Johnson asserts, and the State does not dispute, that the full quote of the State's statement is "When I saw that, I immediately knew, that means opposition. Of course it does." Appellant's Br. at 35; Appellee's Br. at 23.

[25] At the conclusion of the trial, the jury found Johnson guilty as charged. The trial court entered judgment of conviction accordingly and sentenced him to sixty years in the Department of Correction. This appeal ensued.

Discussion and Decision

Issue One: Doyle *Violation*

[26] Johnson first alleges that the State committed a *Doyle* violation when it asked Detective Everman on rebuttal whether he had heard Johnson's version of events before trial.[1] A *Doyle* violation occurs when the State references a defendant's post-*Miranda* silence:

> In *Doyle v. Ohio,* 426 U.S. 610 (1976), the United States Supreme Court held that using a defendant's post-arrest, *post-Miranda* silence to impeach an exculpatory story told for the first

[1] On appeal, the parties dispute whether the court can take judicial notice of the probable cause affidavit that was not in evidence to establish when Johnson received *Miranda* warnings. However, we need not address that issue. Even if we were to agree with Johnson that the court can take judicial notice of the probable cause affidavit, Johnson has not demonstrated that the State committed a *Doyle* violation.

> time at trial violated the defendant's due process rights. *Doyle* rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial. The key to *Doyle* is that it protects the defendant from being found guilty simply on the basis of a legitimate choice to remain silent. . . . [A] prosecutor's comment on a defendant's pre-arrest, pre-*Miranda* silence is not prohibited.

Barton v. State, 936 N.E.2d 842, 850-51 (Ind. Ct. App. 2010) (internal citations omitted), *trans. denied*.

[27] Notably, "while *Doyle* bars the use of a defendant's silence for impeachment, '*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements.'" *Trice v. State*, 766 N.E.2d 1180, 1184 (Ind. 2002) (quoting *Anderson v. Charles*, 447 U.S. 404, 408 (1980)). In *Trice*, for example, Trice made several statements to police about a shooting in which she was involved before she invoked her right to counsel. At trial, Trice provided an account of the shooting that was inconsistent with her prior statements. The State pointed out these inconsistencies when it cross-examined Trice and during its closing argument. The Indiana Supreme Court found no *Doyle* violation because, "if a defendant does not remain silent, he cannot later claim that the silence was used against him." *Trice*, 766 N.E.2d at 1184.

[28] Likewise, in *Barton*, Barton's pre-*Miranda* statements to first responders were inconsistent with his trial testimony. The State pointed out these inconsistencies in its rebuttal closing argument. On appeal, this Court held that the State's comments did not amount to a *Doyle* violation because they were not

directed solely at Barton's post-*Miranda* silence. *Barton*, 936 N.E.2d at 851. The *Barton* court further noted that "the State's rebuttal comments were responsive to Barton's closing argument." *Id.* at 852.

[29] The case at bar is similar to *Barton* and *Trice*. Here, when Detective Everman first visited Johnson, Johnson told Detective Everman that he had no recollection of the shooting. Yet when he took the stand, Johnson testified that he had acted in self-defense. The State then recalled Detective Everman to the stand in an attempt to rebut Johnson's testimony by asking Detective Everman if he had previously heard Johnson's version of the events. It was a proper trial tactic for the State to raise these inconsistencies in Johnson's testimony. *See Trice*, 766 N.E.2d at 1184; *Barton*, 936 N.E.2d at 851-53. Because the State's questioning of Detective Everman was not directed solely at Johnson's post-*Miranda* silence, and because the State pursued this line of questioning to rebut Johnson's trial testimony, the State did not commit a *Doyle* violation. And, thus, as we have already noted, we need not determine when Johnson received *Miranda* warnings. *See* footnote 1.

Issue Two: Prosecutorial Misconduct

[30] Johnson next alleges that the State made numerous statements throughout the trial that amount to prosecutorial misconduct and cumulatively constituted

fundamental error.[2] When a party does not properly preserve a claim of prosecutorial misconduct, "the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue." *Sobolewski v. State*, 889 N.E.2d 849, 856 (Ind. Ct. App. 2008) (citing *Cooper v. State,* 854 N.E.2d 831, 835 (Ind. 2006)).

> [T]o establish fundamental error, the defendant must show that, under the circumstances, the trial judge erred in not *sua sponte* raising the issue because alleged errors (a) constitute clearly blatant violations of basic and elementary principles of due process and (b) present an undeniable and substantial potential for harm. The element of such harm is not established by the fact of ultimate conviction but rather depends upon whether [the defendant's] right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he otherwise would have been entitled. In evaluating the issue of fundamental error, our task in this case is to look at the alleged misconduct in the context of all that happened and all relevant information given to the jury—including evidence admitted at trial, closing argument, and jury instructions—to determine whether the misconduct had such *an undeniable and substantial effect on the jury's decision* that a fair trial was impossible.

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[2] In his brief on appeal, Johnson asserts that the "unobjected-to misconduct cumulatively rise [to] fundamental error." Appellant's Br. at 29. We note that, while Johnson did not object to the majority of the statements he now challenges, he did object to one. However, he makes no separate argument on appeal regarding that alleged misconduct. Rather, he only alleges that the cumulative effect of the purported errors amounted to fundamental error.

Ryan v. State, 9 N.E.3d 663, 667-68 (Ind. 2014) (internal quotation marks and citations omitted).

[31] The statements Johnson now challenges fall into three broad categories: (1) burden shifting, (2) vouching for witness credibility, and (3) inadmissible evidence used during closing argument. We address each argument in turn.

Burden Shifting

[32] Johnson claims the State attempted to shift the burden of proof to him four times during trial. "It is not improper for a prosecutor to focus on the uncontradicted nature of the State's case in closing arguments. It is, however, improper for a prosecutor to suggest that a defendant shoulders the burden of proof in a criminal case." *Dobbins v. State*, 721 N.E.2d 867, 874 (Ind. 1999) (internal citations omitted). Burden shifting can be cured by admonishments and jury instructions. *Id.*

[33] Johnson takes issue with the following: the State's question to the firearms examiner about whether the defense can ask for forensic testing to be done; the State's question to Johnson about whether he provided his friend's information to his attorneys; the State's comment to Johnson that his attorney could present additional evidence; and the State's comment during rebuttal closing argument that, while the State has the burden of proof, Johnson had subpoena power.

[34] Here, the trial court did not admonish the jury after the State made any of those statements. However, in a preliminary instruction, the trial court informed the jury that "the burden rests upon the State of Indiana to prove to each juror

every material allegation of the Information beyond a reasonable doubt." Appellant's App. Vol. 2 at 132. Additionally, the trial court provided the jury with the following preliminary instruction:

> Under the law of this State, a person charged with a crime is presumed to be innocent. To overcome the presumption of innocence the State must prove the defendant guilty, beyond a reasonable doubt, of each essential element of the crime charged. The Defendant is not required to present any evidence to prove his innocence or to prove or explain anything.

Id. at 129. Those instructions make clear that the burden was on the State to prove Johnsons' guilt. Further, those instructions cured any alleged error by the State such that the statements did not constitute prosecutorial misconduct. *See Dobbins*, 721 N.E.2d at 874.

Vouching

[35] Johnson also alleges the State improperly vouched for witnesses' credibility during its rebuttal closing argument. A prosecutor may not personally vouch for a witness. *Schlomer v. State,* 580 N.E.2d 950, 957 (Ind. 1991). However, a prosecutor may "comment on the credibility of the witnesses as long as the assertions are based on reasons which arise from the evidence." *Cooper*, 854 N.E.2d at 836 (quoting *Lopez v. State,* 527 N.E.2d 1119, 1127 (Ind.1988)). Additionally, "[p]rosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." *Dumas v. State*, 803 N.E.2d 1113, 1118 (Ind. 2004) (citing *Brown v. State*, 746 N.E.2d 63, 68 (Ind. 2001)).

[36] During its rebuttal closing argument, the State discussed Officer Diouf's testimony about what Williams had told him about the shooting. The State told the jury that Williams "knew [the shooter] was [Johnson], but he didn't wanna tell in the beginning. Why? Because he was scared. He's a murderer." Tr. Vol. 3 at 125. Johnson alleges this statement constitutes vouching because it "implied the prosecutor's personal knowledge" and "[t]here is no evidence [Williams] had any specific fear about Johnson." Appellant's Br. at 34, 35.

[37] At trial, Detective Everman testified that Williams had identified Johnson as the shooter and picked him out of a photo array. Then, when Johnson's counsel deposed Williams, he refused to definitively name Johnson as the shooter. The State subpoenaed Williams to testify at trial, but he refused, so the State and Johnson agreed to read the transcript of Williams's deposition into the record. Consequently, it was reasonable for the State to characterize Williams as hesitant and scared.

[38] The State also said during rebuttal closing argument that Williams "told Officer Diouf, without telling the name, the person who shot jumped in that black truck and drove off. And that was the truth." Tr. Vol. 3 at 125. This statement directly responded to Johnson's closing argument in which he asserted his own truthfulness and called Williams a liar. *Id*. at 117-20. The State was entitled to respond to those arguments. *Brown*, 746 N.E.2d at 70. Therefore, in the context of rebuttal closing argument, it was not misconduct for the State to combat Johnson's assertions and inferences in this manner.

[39] In addition, during its rebuttal, the State referenced Douglas's testimony about her text messages with Johnson. In so doing, the State said, "When [I saw that, I] immediately knew, that means opposition. Of course it does." Tr. Vol. 3 at 122; *see* Appellant's Br. at 35; Appellee's Br. at 23. Douglas testified that "opps" was shorthand for "opposition" and that Johnson used "opps" to refer to Walton. Tr. Vol. 2 at 146-47. It was not improper for the State to discuss that testimony.

[40] Johnson also contends that the State improperly "urged the jury to consider what the court said in its initial ruling [on the admissibility of the officer's testimony as an excited utterance exception to the rule against hearsay] as a reason to believe the evidence against Johnson." Appellant's Br. at 33. During closing arguments, the State addressed a piece of hearsay evidence the trial court had admitted as an excited utterance:

> And for the reasons we talked about, the reasons why that was kind of allowed into evidence, that's right after the shooting. He didn't have a chance to think about this. He hasn't had a chance to sit down and compare[] notes with [Douglas] and say, okay, now (indiscernible) [Johnson] did it. Is that right? No. He -- he's upset that his friend is dead and he's telling Officer Diouf, [Johnson] did this.

Tr. Vol. 3 at 113.

[41] This statement describes the hearsay evidence in terms of the definition and elements of excited utterance. This statement did not improperly vouch for

Officer Diouf's testimony. As such, the statement did not constitute misconduct.

Use of "Inadmissible" Evidence

[42] Last, Johnson alleges the State used inadmissible evidence during its closing argument. Johnson contends that the trial court excluded Officer Diouf's hearsay testimony after previously admitting it as an excited utterance. As discussed below, contrary to Johnson's assertions, the trial court did not retroactively sustain Johnson's initial objection to the hearsay. Since the evidence was admitted, it was not prosecutorial misconduct for the State to refer to it in its closing argument.

[43] In sum, the prosecutor did not commit misconduct during the trial. Johnson has not demonstrated that, due to any misconduct by the State either individually or cumulatively, he was placed in a position of grave peril such that a fair trial was impossible. Accordingly, Johnson has not established fundamental error.

Issue Three: Admission of Evidence

[44] Johnson contends that the trial court abused its discretion when it admitted certain evidence. Our standard of review is well settled. As this Court has recently stated:

> "The trial court has broad discretion to rule on the admissibility of evidence." *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017). We review evidentiary rulings for an abuse of discretion, which

> occurs when the ruling is clearly against the logic and effect of the facts and circumstances. *Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014). Moreover, we may affirm an evidentiary ruling on any theory supported by the evidence. *Satterfield v. State*, 33 N.E.3d 344, 352 (Ind. 2015).

Kress v. State, 133 N.E.3d 742, 746 (Ind. Ct. App. 2019), *trans. denied.*

[45] On appeal, Johnson specifically contends that the trial court abused its discretion when it allowed Officer Diouf to testify as to what Williams had said to him on the scene because, according to Johnson, that testimony was inadmissible hearsay. He also asserts that the court abused its discretion when it admitted as evidence a photograph of online messages he had exchanged with Walton. We address each argument in turn.

Hearsay

[46] Johnson contends that the trial court abused its discretion when it admitted Officer Diouf's testimony about what Williams had told him at the scene because Williams's "statements to Officer Diouf were inadmissible hearsay." Appellant's Br. at 38. "Hearsay is an out-of-court statement used to prove the truth of the matter asserted." *Hurt v. State*, 151 N.E.3d 809, 813 (Ind. Ct. App. 2020) (citing Ind. Evid. R. 801(c)). "Hearsay is inadmissible unless it falls under a hearsay exception." *Id.* (citing *Teague v. State*, 978 N.E.2d 1183, 1187 (Ind. Ct. App. 2012); Ind. Evid. R. 802).

[47] Here, during Johnson's trial, the State questioned Officer Diouf about the statements Williams had made to him at the scene. Specifically, the State asked

Officer Diouf what Williams had said regarding where the shooter had gone after the shooting, what Williams had said regarding the person in the vehicle from which the shots were fired, and where Williams was standing when the shots were fired.[3] Johnson contends, and the State agrees, that those statements were hearsay. However, the State contends that the trial court properly admitted those statements because they fall into an exception to the rule against hearsay. We must agree with the State.

[48] One exception to the rule against hearsay is an excited utterance:

> "A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused" is not excluded by the hearsay rule, even if the declarant is available as a witness. Ind. Evidence Rule 803(2). A hearsay statement may be admitted as an excited utterance where: (1) a startling event has occurred; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event. *Boatner v. State*, 934 N.E.2d 184, 186-87 (Ind. Ct. App. 2010). "This is not a mechanical test, and the admissibility of an allegedly excited utterance turns on whether the statement was inherently reliable because the witness was under the stress of the event and unlikely to make deliberate falsifications." *Id.* at 186. "The heart of the inquiry is whether the declarant was incapable of thoughtful reflection." *Id.* While the amount of time that has passed is not

[3] Johnson individually objected to all three questions. The trial court overruled the first two objections but sustained the third. We note that, on appeal, Johnson contends that the trial court somehow retroactively sustained all three of his objections. But the record is clear that the court only sustained the third objection and made no mention of his first or second. Thus, the trial court did not retroactively sustain his first two objections.

> dispositive, "a statement that is made long after the startling event is usually less likely to be an excited utterance." *Id.*

Hurt v. State, 151 N.E.3d 809, 813-14 (Ind. Ct. App. 2020).

[49] Following the shooting, Officer Diouf responded to the scene and spoke to Williams within seconds of having received the 9-1-1 dispatch. In addition, Williams made his statements to Officer Diouf after he had been involved in a startling event—a shooting that killed Walton. Further, Williams was pacing, speaking quickly, and appeared upset when he made the statements to Officer Diouf. That behavior indicates that Williams was still under the stress of the shooting at the time he spoke with Officer Diouf. *See Jones v. State*, 800 N.E.2d 624, 628 (Ind. Ct. App. 2003). And the statements Williams's made to Officer Diouf directly related to the shooting. Accordingly, we hold that William's statements fall into the excited utterance exception to the rule against hearsay and, as such, the trial court did not abuse its discretion when it admitted Officer Diouf's testimony.

Photo of Online Messages

[50] Finally, Johnson alleges the trial court abused its discretion when it admitted as evidence a photograph of online messages between Johnson and Walton because that photograph violated Indiana Evidence Rule 403. Under Indiana Rule of Evidence 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative

evidence." *Snow v. State*, 77 N.E.3d 173, 179 (Ind. 2017) (quotation marks omitted). As our Supreme Court has made clear:

> "Trial judges are called trial judges for a reason. The reason is that they conduct trials. Admitting or excluding evidence is what they do." *United States v. Hall*, 858 F.3d 254, 288 (4th Cir. 2017) (Wilkinson, J., dissenting). That's why trial judges have discretion in making evidentiary decisions. This discretion means that, in many cases, trial judges have options. They can admit or exclude evidence, and we won't meddle with that decision on appeal. *See Smoote v. State*, 708 N.E.2d 1, 3 (Ind. 1999). There are good reasons for this. "Our instincts are less practiced than those of the trial bench and our sense for the rhythms of a trial less sure." *Hall*, 858 F.3d at 289. And trial courts are far better at weighing evidence and assessing witness credibility. *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014). In sum, our vantage point—in a "far corner of the upper deck"—does not provide as clear a view. *State v. Keck*, 4 N.E.3d 1180, 1185 (Ind. 2014).

Id. at 177. Our trial courts have "wide discretion" in applying Rule 403. *Id.*

[51] On appeal, Johnson specifically alleges that the unfair prejudicial impact of the photo of the messages substantially outweighed its probative value because it "was likely to cause confusion because it captures only a portion of a conversation"; "provide[d] no context"; was unnecessary because "Johnson's testimony alone was adequate" to demonstrate that he had confronted Walton online; and included "profanity, anti-gay and racial slurs." Appellant's Br. at 42-43.

[52] However, the photo of the online messages between Johnson and Walton showed that Johnson had threatened Walton. The relevance to the charge of murder is clear. The photo established both that Johnson knew Walton and that Johnson had the intent and motive to kill him. Based on the evidence, we cannot say that the undue prejudice was so clearly against Johnson that we are in a position to "over[i]de the trial court's wide discretion" under Rule 403. We therefore affirm the trial court's admission of the photo of that evidence.

Conclusion

[53] In sum, the State did not commit a *Doyle* violation. In addition, Johnson has not demonstrated that the State committed any prosecutorial misconduct, let alone that the cumulative effect of those statements amounted to fundamental error. And the trial court did not abuse its discretion when it admitted evidence. We therefore affirm Johnson's conviction.

[54] Affirmed.

Riley, J., and Crone, J., concur.