MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Latisha L. Bradley,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 29, 2022

Court of Appeals Case No. 21A-CR-1790

Appeal from the Daviess Superior Court

The Honorable Dean A. Sobecki, Judge

Trial Court Cause No. 14D01-1907-CM-1126

Brown, Judge.

[1] Latisha L. Bradley appeals her conviction for battery as a class B misdemeanor. Bradley raises several issues, which we revise and restate as:

I. Whether the trial court abused its discretion in admitting statements by Calvin Jackson on a recording taken from a law enforcement officer's body camera and in excluding an affidavit of Jackson; and

II. Whether the evidence is sufficient to sustain Bradley's conviction.

We affirm.

Facts and Procedural History

[2] On July 9, 2019, an argument between Bradley and Calvin Jackson began over the discipline of one of their children, and the disagreement continued through July 10th. On the second day, Bradley contacted dispatch for the Washington Police Department asking to speak with an officer, and after speaking with her briefly, Washington Police Officer Barry Hudson told her to come to the police station. Bradley brought three children with her to the station, and after she arrived, Officer Hudson spoke with her and Jackson on the steps outside of the station.

[3] On July 22, 2019, the State charged Bradley with battery as a class B misdemeanor. At the jury trial, Bradley represented herself *pro se*. The alleged victim, Bradley's partner Jackson, did not appear at the trial because the State was unable to locate and serve him with a subpoena.

[4] Officer Hudson testified that a disagreement between Bradley and Jackson began over the discipline of one of their children, and "the fight started on July 9th and it rolled into July 10th." Transcript Volume II at 53. He stated that dispatch received a call at 4:41 p.m. on July 10th, he spoke to Bradley over the phone, "she gave [him] a brief story" about "what had taken place that day," and the latest incident of physical violence in the disagreement had occurred thirty minutes prior to the call. *Id.* at 48. He agreed with the statement that Jackson reported that Bradley struck him on July 10th. When the prosecutor asked Officer Hudson to clarify if Jackson had stated the date on which he had been struck, Bradley objected and asserted that the statements referred to by Officer Hudson were hearsay and she could not confront her accuser. The court overruled the hearsay objection "under the excited utterance exception to hearsay" and stated that "[t]he other statements that you're talking about, quite frankly, don't enter into this argument over the hearsay, and we'll deal with whatever other statements there may be when you need to enter those into evidence." *Id.* at 52.

[5] Officer Hudson continued testifying, stating that his conversation with Jackson had been recorded on his body camera and, according to Jackson, on the 10th at 1:00 p.m., Bradley "doused him with windshield washer fluid," she "retrieved a knife from the kitchen and began to come after [Jackson] and [their] son," Jackson told her "that he was going to leave her, and she became angry again and struck him again," and she had hit him in the face. *Id.* at 53-54. Bradley did not otherwise object during the examination of Officer Hudson

until the prosecutor moved to admit the body camera recording, arguing the video was inadmissible because it violated her "Fifth Amendment rights as well as [her] Sixth Amendment rights," and she stated that "[i]t's also inadmissible because it's hearsay and Officer Hudson has bias toward me." *Id.* at 55. The court overruled the objections and admitted the video into evidence.

[6] The prosecutor played portions of the body camera recording, and Officer Hudson answered accompanying questions. Officer Hudson testified that Jackson stated that Bradley beat him on July 9th and July 10th, and their children were crying and attempted to shield him from Bradley on the 10th. According to Officer Hudson, Bradley admitted that, on the 10th, she struck Jackson on his arm and head, and she stated, "I slapped him in the face, yes, I did." *Id.* at 58. On redirect, Officer Hudson testified that Bradley arrived at the police station "[w]ithin five, six minutes" after the original call to dispatch. *Id.* at 66.

[7] At the conclusion of the presentation of evidence, Bradley sought to admit "a sworn affidavit that was given to the Prosecution by Calvin Jackson." *Id.* at 73. The prosecutor objected to the document as hearsay. Bradley stated that Jackson was "not a protected person," "didn't show up today," the prosecutor had "not given [her] any chance to depose him, speak with him," and it was her "Sixth Amendment right to talk with [her] accuser." *Id.* at 74. The court sustained the objection and declined to admit the affidavit. The jury found Bradley guilty. The court sentenced Bradley to 180 days, ordered that she serve

one weekend in jail, and suspended the remainder of the sentence to supervised probation.

Discussion

I.

[8] Bradley argues the admission of Officer Hudson's testimony concerning Jackson's statements on the recording and the court's exclusion of Jackson's affidavit violated her confrontation rights under the Indiana Constitution and Federal Constitution. She claims the trial court erred in admitting Officer Hudson's testimony about the body camera recording in which Jackson stated, in part, that Bradley struck and poured windshield washer fluid on him. She also contends the court erred in not admitting Jackson's affidavit. With respect to Bradley's argument that she was denied her confrontation rights, because the issue is one of constitutional law, we review her claim *de novo*. *See Jones v. State*, 982 N.E.2d 417, 421-422 (Ind. Ct. App. 2013) (constitutional challenges are reviewed de novo), *trans. denied*.

[9] The Indiana Constitution provides that "[i]n all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face[.]" IND. CONST. art. 1 § 13. 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). But while the language of Indiana's provision has much the same meaning and history as that employed in the Sixth Amendment, it has a special concreteness and is more detailed. *Id.*

When a witness states what the declarant said as here pursuant to an exception to the hearsay rule, the constitutional requirement of a face-to-face meeting is fulfilled because the witness reporting the hearsay is on the stand. *Id.* In other words, "in that situation the declarant is not the witness." *Id.* Here, the witness recounting Jackson's out-of-court statements was Officer Hudson, testifying under oath, and Bradley confronted him face-to-face on cross-examination. Bradley's Indiana constitutional right of confrontation was therefore not violated. *See id.* at 756-757 (observing that "[t]he witnesses recounting [declarant's] out-of-court statements were the Paramedic and the Forensic Nurse, both of whom testified under oath and whom Ward confronted face to face" and holding that defendant's "Indiana constitutional right of confrontation was therefore not violated").

[10] The Sixth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Indiana Supreme Court concluded that the Sixth Amendment prohibits the introduction of testimonial statements by a non-testifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Ward*, 50 N.E.3d at 757 (citing *Crawford v. Washington*, 541 U.S. 36, 54, 124 S. Ct. 1354 (2004)). The United States Supreme Court did not provide an exhaustive definition of "testimonial" statements. *Id.* (citing *Crawford*, 541 U.S. at 68, 124 S. Ct. 1354). Rather, it declared that the label "applies at a minimum

to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* The United States Supreme Court has explained that "[s]tatements 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 v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273 (2006). "In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Michigan v. Bryant*, 562 U.S. 344, 358-359, 131 S. Ct. 1143, 1155 (2011). "To determine whether the 'primary purpose' of an interrogation is 'to enable police assistance to meet an ongoing emergency,' which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." *Id.* at 359, 131 S. Ct. at 1156 (quoting *Davis*, 547 U.S. at 822, 126 S. Ct. 2266). "Formality is not the sole touchstone of our primary purpose inquiry . . . although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Bryant*, 562 U.S. at 366, 131 S. Ct. at 1160 (quotation omitted).

[11] Here, the record demonstrates that the primary purpose of Officer Hudson's discussion with Jackson was to enable police assistance to meet an ongoing emergency. First, Jackson and Bradley gave their statements on the steps of the police station. Second, because Jackson's statements were excited utterances,

as discussed below, they "are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood." *Bryant*, 562 U.S. at 361, 131 S. Ct. at 1157. Third, three of their children came to the police station while Bradley and Jackson gave statements, and Jackson told Officer Hudson that a two-day fight ensued after a disagreement about how to discipline one of the children, the most recent physical incident occurred about thirty-five minutes before Jackson made the statements, and while Jackson and Bradley were at the station, Jackson stated that Bradley had struck him multiple times, their children had tried to shield him from her, Bradley poured washer fluid on him, and she came at him and their son with a knife. Officer Hudson's discussion with Jackson gave him more information than the brief story relayed to him by Bradley over the phone, and it allowed him to assess the situation and the possible danger to the potential victim and to the children. Based on the circumstances of the encounter, as well as the statements and actions of Jackson and Officer Hudson, we conclude that Jackson's statements were not testimonial and accordingly that Bradley was not denied the right of confrontation under the Sixth Amendment. *See McQuay v. State*, 10 N.E.3d 593, 599 (Ind. Ct. App. 2014) (holding that statements obtained to assess and meet an ongoing emergency were not testimonial).

[12] To the extent Bradley claims the court's refusal to admit the alleged affidavit of Jackson amounted to a denial of her Confrontation Clause rights, we note the United States Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *Kubsch v. State*, 784 N.E.2d 905, 924

(Ind. 2003) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142 (1986)). "When competent, reliable evidence is excluded that is central to the defendant's case, this right is abridged." *Hyser v. State*, 996 N.E.2d 443, 448 (Ind. Ct. App. 2015), *trans. denied*. A criminal defendant, however, does not enjoy an unlimited constitutional right to offer exculpatory evidence, as the right is subject to reasonable restrictions. *Hubbard v. State*, 742 N.E.2d 919, 922-923 (Ind. 2001), *cert. denied*, 534 U.S. 869 (2001). Moreover, regardless of the theory of defense, "evidence to support the theory must comply with applicable evidentiary rules." *Kubsch*, 784 N.E.2d at 926. The trial court did not err in excluding Bradley's affidavit where it determined that document constituted inadmissible unreliable hearsay.

[13] To the extent Bradley argues that the trial court abused its discretion in admitting a recording taken from Officer Hudson's body camera which contained Jackson's statements, and in excluding an affidavit of Jackson, we note that we review the trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *Roche v. State*, 690 N.E.2d 1115, 1134 (Ind. 1997), *reh'g denied*. We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Joyner v. State*, 678 N.E.2d 386, 390 (Ind. 1997), *reh'g denied*. A trial court's ruling on the admission of evidence is generally accorded a great deal of deference on appeal. *Hall v. State*, 36 N.E.3d 459, 466 (Ind. 2015), *reh'g denied*. We do not reweigh the evidence; rather, we consider only evidence that is either favorable to the ruling or unrefuted and favorable to the defendant. *Beasley v. State*, 46 N.E.3d 1232, 1235

(Ind. 2016). Even if the trial court's decision was an abuse of discretion, we will not reverse if the admission constituted harmless error. *Fox v. State*, 717 N.E.2d 957, 966 (Ind. Ct. App. 1999), *reh'g denied*, *trans. denied*. We further note that failure to object to the admission of evidence results in waiver and precludes appellate review unless its admission constitutes fundamental error. *See Whatley v. State*, 908 N.E.2d 276, 280 (Ind. Ct. App. 2009) (citing *Cutter v. State*, 725 N.E.2d 401, 406 (Ind. 2000), *reh'g denied*), *trans. denied*. To rise to the level of fundamental error, an error "must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." *Whatley*, 908 N.E.2d at 280 (citing *Maul v. State*, 731 N.E.2d 438, 440 (Ind. 2000) (citations omitted)).[1]

[14] Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is inadmissible unless admitted pursuant to a recognized exception. Ind. Evidence Rule 802. An excited utterance is such an exception and is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Ind. Evidence Rule 803(2). Application of this rule is not mechanical and admissibility should generally be determined on a case-

[1] Bradley does not allege fundamental error in her appellate brief, and accordingly she has waived the issue on appeal. *See Curtis v. State*, 948 N.E.2d 1143, 1148 (Ind. 2011) (holding that where the defendant "failed to allege fundamental error in his principal appellate brief, this issue is waived").

by-case basis. *Love v. State*, 714 N.E.2d 698, 701 (Ind. Ct. App. 1999), *reh'g denied*. Thus, the heart of the inquiry is whether the statement is inherently reliable because the declarant was incapable of thoughtful reflection. *Yamobi v. State*, 672 N.E.2d 1344, 1346 (Ind. 1996). The statement must be trustworthy under the specific facts of the case at hand. *Id.* The focus is on whether the statement was made while the declarant was under the influence of the excitement engendered by the startling event. *Id.* The amount of time that has passed between the event and the statement is not dispositive; rather, the issue is whether the declarant was still under the stress of excitement caused by the startling event when the statement was made. *Mathis v. State*, 859 N.E.2d 1275, 1279 (Ind. Ct. App. 2007).

[15] The record reveals that Officer Hudson testified that the phone call to dispatch was placed thirty minutes after the most recent physical incident, and Bradley arrived at the station five to six minutes later with three of her and Jackson's children. The argument had occurred over the course of two days, July 9th and 10th, prior to Bradley and Jackson giving statements to Officer Hudson on July 10th. Bradley was "upset and angry at the same time" when she spoke with Officer Hudson. Transcript Volume II at 52. When the prosecutor played the body camera recording, Officer Hudson testified that Jackson stated that "[Bradley] came and she started hitting [him] this morning" on July 10th, she had doused him in windshield washer fluid that same day, Bradley "began to come after him and [their] son" with a knife, their kids were crying and "trying to shield him from her attacking him," and Jackson told Bradley "he was going

to leave her, and she became angry again and struck him again." *Id.* at 53-54, 57. A fight between Bradley and Jackson occurred approximately thirty-five minutes before they spoke to Officer Hudson, and three of Bradley and Jackson's children accompanied them to the police station. The trial court could reasonably determine that Jackson was under the stress of excitement caused by the altercation and was incapable of thoughtful reflection. Under the circumstances, we conclude that Jackson's statements contained on the body camera recording were admissible as excited utterances. We cannot say the trial court abused its discretion in admitting the recording.

[16] Further, we find that even if the court abused its discretion in admitting testimony about Jackson's statements on Officer Hudson's recording, any alleged error is harmless. Errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of the party. *Lewis v. State*, 34 N.E.3d 240, 248 (Ind. 2015). To determine whether an error in the introduction of evidence affected the party's substantial rights, we assess the probable impact of that evidence upon the jury. *Id.* Officer Hudson testified that Bradley stated that she struck Jackson, her statements are admissible as statements of a party opponent, and she does not challenge the admission of Officer Hudson's testimony about her statements. We observe that the jury heard Officer Hudson testify that Bradley stated, "I hit him in his arm and I hit him in his head" on the 10th, and that "I slapped him in the face, yes, I did" on the 10th. Transcript Volume II at 57-58. Thus, the recording

containing Jackson's statements was also cumulative of Officer Hudson's other testimony.

[17] To the extent Bradley argues that the affidavit of Jackson should have been admitted for the purpose of impeaching Officer Hudson's testimony about Jackson's statements, we hold that Bradley has waived this issue. Generally, "[a]n argument raised for the first time on appeal will not be considered." *Barker v. State*, 681 N.E.2d 727, 728 (Ind. Ct. App. 1997). At trial, the prosecutor argued the alleged affidavit was inadmissible hearsay, and Bradley responded that the court should admit it because "[i]t's [her] Sixth Amendment right to talk with [her] accuser," and she had "not been given that right, so [she] would like to present this as evidence." Transcript Volume II at 74. Thus, Bradley waived the argument that she attempted to introduce the evidence to impeach the testimony of Officer Hudson. *See Stephenson v. State*, 29 N.E.3d 111, 121 (Ind. 2015) (holding that a claim of evidentiary error concerning the admission of a witness's testimony could not be raised for the first time on appeal because the trial court never had the chance to consider the objection).

[18] Based on the record, we cannot say that the trial court abused its discretion in admitting the recording containing Jackson's statements and in not admitting the affidavit offered by Bradley.

II.

[19] The next issue is whether the evidence is sufficient to sustain Bradley's conviction. Bradley contends the prosecutor did not present sufficient evidence

to support her conviction for battery because the prosecutor based its case primarily on inadmissible hearsay. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995), *reh'g denied*. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. *Id.* We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.*

[20] Ind. Code § 35-42-2-1(c)(1) provides that a person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery as a class B misdemeanor.

[21] The record reveals that Officer Hudson testified that Jackson had told him that Bradley struck him on July 9th and July 10th, Bradley "began to come after him and [their] son" on the 10th, she poured windshield washer fluid on him, he told her "he was going to leave her, and she became angry again and struck him again," and the most recent physical incident occurred about thirty-five minutes prior to Jackson's conversation with Officer Hudson. Transcript Volume II at 53-54. Officer Hudson testified about the body camera recording agreeing that Jackson said "[July 9th] she started beating [him]," "[s]he came and started hitting [him] this morning [of the 10th]," the "kids were crying, they were trying to shield him from her attacking him," Bradley admitted that "I hit him in his arm and I hit him in his head" on the 10th, and that "I slapped him in the face, yes, I did" on the 10th. *Id.* at 57-58. Based upon our review of the

record, we conclude that evidence of probative value exists from which the trier of fact could have found beyond a reasonable doubt that Bradley committed battery as a class B misdemeanor.

[22] For the foregoing reasons, we affirm Bradley's conviction.

[23] Affirmed.

May, J., and Pyle, J., concur.