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IN THE
COURT OF APPEALS OF INDIANA

Dustin Passarelli,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 9, 2023

Court of Appeals Case No.
22A-CR-1116

Appeal from the Marion Superior
Court

The Honorable Cynthia L. Oetjen,
Judge

Trial Court Cause No.
49D30-1902-MR-6769

Altice, Chief Judge.

Case Summary

- [1] Dustin Passarelli brings this interlocutory appeal, claiming that the trial court abused its discretion in determining that the testimony of a psychologist regarding Passarelli's post-traumatic stress disorder (PTSD) diagnosis should be excluded at trial. Passarelli, who is awaiting trial for murder, argues that the evidence must be admitted because it is relevant to the jury's determination as to whether he acted in self-defense.
- [2] Affirmed and remanded.

Facts and Procedural History

- [3] On February 16, 2019, Passarelli was driving southbound on I-465 when the driver of a "red car flew up behind him" with its lights flashing and horn honking. *Appellant's Appendix Vol. II* at 35. As both vehicles approached the 38th Street exit, Passarelli heard a "bang" and thought that the other driver, later identified as Mustafa Ayoubi, had either hit his vehicle or had thrown something at it.
- [4] Passarelli followed Ayoubi to a nearby apartment complex. Upon entering the parking lot, Ayoubi exited his vehicle and, according to Passarelli, yelled, "why the fu*k are you following me?" *Id.* Passarelli responded, "you just hit my fu*king car man, what the fu*k?" *Id.* at 36.

[5] In the meantime, Ayoubi's friends—Usman Ashraf, Niraj Bhatt, and Jarwar Shahzad—had walked out of one of the residential buildings to meet Ayoubi, as they had all made plans to play pool somewhere. Ashraf overheard Ayoubi and Passarelli arguing and saw Ayoubi standing on the passenger side of Passarelli's vehicle. Ashraf heard Passarelli tell Ayoubi to “go back to your fu*king country” and that “Muhammed was a pedophile.” *Id.* at 35. In response, Ayoubi told Passarelli to “shut the fu*k up” and not to say anything bad about “[his] God.” *Id.* at 36. Passarelli also stated that Ayoubi called him a “fu*king Jew” and threatened to kill him. *Id.*

[6] At some point during the argument, Passarelli threatened to shoot Ayoubi. Ashraf and Bhatt both tried to diffuse the situation by telling Passarelli and Ayoubi to “chill” and “respect.” *Id.* at 35-36. Undeterred, Passarelli told Ayoubi that he would “fu*k his friends” and “fu*k Muhammed.” *Id.*

[7] Ayoubi then walked toward the driver's side of Passarelli's car and said, “you know what—get out of the fu*king car let's take it out right now.” *Id.* Passarelli told Ashraf that he “better take [Ayoubi] inside or something's gonna happen.” *Id.* One of Ayoubi's friends heard Passarelli say, “I'll shoot you.” *Id.* at 36.

[8] As the argument continued to escalate, Ayoubi made a fist with his hand, appearing as if he was about to punch Passarelli's driver's side window.¹ In

¹ Passarelli told Detective Brian Lambert that Ayoubi punched his driver's side window two times and that the impact caused the tempered glass to “spider crack.” *Appellant's Appendix Vol. II* at 36-37.

response, Passarelli drew his Glock 19 9mm semiautomatic handgun and shot multiple times through his vehicle’s window glass, striking Ayoubi in the shoulder and then several times in the back as he was running away. Ashraf, Bhatt, and Shahzad ran behind the apartment building and called 911.

[9] After shooting Ayoubi, Passarelli moved his vehicle, called 911, and administered CPR to Ayoubi. Another resident in the apartment complex ran to the scene and “took over CPR” until the police arrived. *Id.* at 37. Officers from the Indianapolis Metropolitan Police Department and Clermont Police Department were dispatched to the scene. Ayoubi was pronounced dead shortly after their arrival.

[10] Upon inspection, Passarelli’s vehicle had no “damage whatsoever to the outside.” *Id.* at 37. His car window, however, was shattered from the gunfire. Passarelli’s handgun contained nine live rounds and police officers collected seven spent cartridge shells from his vehicle. An autopsy revealed that Ayoubi had been shot once in the shoulder from the front and seven times in the back.

[11] The State charged Passarelli with murder on February 21, 2019. Thereafter, on July 15, 2019, Doctor John Mundt, Ph.D., conducted a psychological evaluation of Passarelli at the Marion County Jail. Dr. Mundt is a licensed clinical psychologist with a “professional focus on the evaluation and treatment

of psychological trauma.” *State’s Exhibit 1*. He is on staff at the Jesse Brown VA Medical Center in Chicago, where he evaluates and treats veterans for PTSD and other post-traumatic reactions. Dr. Mundt is also an assistant professor in the Department of Psychiatry at the University of Illinois-Chicago.

[12] Passarelli’s counsel specifically requested that Dr. Mundt assess Passarelli’s “psychological and military history” and draw a conclusion as to how Passarelli’s background “could have affected his mental and emotional functioning at the time of the offense.” *State’s Exhibit 1*. To that end, Dr. Mundt reviewed Passarelli’s medical, psychiatric, and prescription-drug records from the Indianapolis VA Medical Center. He also spoke with Passarelli’s ex-wife and a former co-worker.

[13] Dr. Mundt learned that Passarelli enlisted in the Army in April 2009. He completed his training as a medic and was stationed at Fort Hood, Texas, on November 5, 2009, when an Army psychiatrist killed thirteen soldiers on the base and wounded more than thirty others. As Passarelli was a trained medic, he helped provide emergency medical care after that shooting and recalled the event as “terrifying.” *Id.*

[14] Thereafter, Passarelli was deployed to Iraq from July 7, 2011, until April 14, 2012, where he experienced a “high level of combat exposure.” *Id.* Passarelli told Dr. Mundt that he was “subjected to enemy fire and attack, including ‘close quarters’ combat situations” in numerous instances. *Id.* Passarelli reported witnessing deaths and injuries of civilians and fellow soldiers.

Passarelli was ultimately dismissed from the Army on May 1, 2012, with an “other-than-fully-honorable discharge” after fighting with a fellow soldier. *Id.*

[15] Passarelli reported experiencing symptoms of anxiety and PTSD early in his military career that culminated with the onset of “hyperarousal, irritability, and insomnia” while in active combat. *Id.* After his discharge, Passarelli was rated by the VA as 70% disabled, based on PTSD diagnosis as well as multiple medical conditions incurred during his service with the army. Passarelli sought mental health treatment through the VA Medical Center, but his treatment history was described as “erratic.” *Id.* Rather than attending therapy sessions, Passarelli’s treatment had “largely been psychopharmacological in nature.” *Id.* In March 2014, Passarelli was prescribed Paroxetine, an antidepressant, to treat what was documented as “subsyndromal PTSD.” *Id.*

[16] After meeting with Passarelli and conducting several screens, Dr. Mundt opined that Passarelli’s “combat training and on-the-job experiences in the warzone ... have the effect of ensuring that soldiers like Mr. Passarelli will respond to a physical assault against them with a greater degree of force, possibly lethal in nature.” *Id.* He concluded that military veterans like Passarelli will often respond to violence in a way that can be “reflexive, methodical and precise, akin to ‘muscle memory.’” *Id.*

[17] As for the shooting of Ayoubi, Dr. Mundt concluded that “Passarelli’s description of his behavior at the time of the ... shooting strongly suggests that

he reacted to what he perceived as a severe threat,” and that Passarelli’s military training ensured that he “responded with significant force.” *Id.*

[18] On October 22, 2019, Passarelli filed witness and exhibit lists in preparation for trial and listed Dr. Mundt as an “expert of PTSD.” *Appellant’s Appendix Vol. II* at 119. Thereafter, on August 18, 2021, the trial court conducted a hearing as to the admissibility of Dr. Mundt’s testimony. During that hearing, Passarelli’s counsel acknowledged that while a formal notice of self-defense had not been filed with the court, it was, nonetheless, a “self-defense case.” *Transcript Vol. II* at 15. Counsel went on to explain that his intention in calling Dr. Mundt was “extremely limited” and explained that Dr. Mundt’s testimony would inform the jury:

regarding PTSD and how in general terms that impacts perception of events. And specifically, regarding the danger someone believes they’re in or their – their point of view of determining apparent danger and imminence of a threat. And still, that – that would be – basically he’s offering evidence *that informs that objective point of view from a – the context of how generally people with this issue could be impacted. . . . I intend to offer it as a general statement regarding PTSD and how that disorder and that trauma affects, in general, someone’s point of view.*

Id. (emphasis added).

[19] In response, the State pointed out that Dr. Mundt’s testimony regarding PTSD concerned Passarelli’s mental capacity at the time of the offense. It therefore maintained that this type of evidence is only admissible in support of an insanity defense—a defense that Passarelli had not raised. Because Passarelli

was raising the issue of self-defense rather than insanity, the State asserted that Dr. Mundt’s testimony should not be admitted at trial.

[20] After considering the evidence and arguments, the trial court summarily ruled that Dr. Mundt’s anticipated testimony was inadmissible. Thereafter, Passarelli filed a motion to certify the matter for a discretionary interlocutory appeal, arguing that certification should be granted because “the admissibility of expert testimony regarding Defendant’s past trauma [] and the impact on the issue of self-defense” involved a substantial question of law that should be resolved prior to trial. *Appellant’s Appendix Vol. II* at 174-76. The State agreed that resolution of the issue before trial “would be beneficial to both parties and promote an orderly disposition of the case.” *Id.* at 179. The trial court granted Passarelli’s motion on April 14, 2022, and certified its order for interlocutory appeal. We accepted jurisdiction on June 20, 2022, and this appeal follows.

Discussion and Decision

[21] Passarelli argues that the trial court abused its discretion in precluding Dr. Mundt from testifying at trial about the PTSD diagnosis and the trauma that he suffered while serving in the Army. Passarelli contends that Dr. Mundt’s testimony is relevant to the jury’s decision as to whether he acted in self-defense.

I. Standard of Review

[22] The admission of evidence is left to the trial court’s sound discretion, and we afford that decision a great deal of deference on appeal. *Small v. State*, 736 N.E.2d 742, 744 (Ind. 2000). We review a trial court’s decision concerning the exclusion or admission of evidence for an abuse of discretion. *Hall v. State*, 177 N.E.3d 1183, 1193 (Ind. 2021). A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. *Abbott v. State*, 183 N.E.3d 1074, 1083 (Ind. 2022).

II. Passarelli’s Arguments

[23] In support of his claim that the trial court abused its discretion in excluding Dr. Mundt’s anticipated testimony from the trial, Passarelli first directs us to Ind. Code § 35-41-3-2(c)(1) and (2), which provide that a person “is justified in using deadly force and does not have a duty to retreat if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person . . . or the commission of a forcible felony.” And under I.C. § 35-41-3-2(d)(1) and (2), a person “is justified in using reasonable force, including deadly force, against any other person and does not have a duty to retreat if the person reasonably believes that the force is necessary to prevent or terminate the other person’s unlawful entry of or attack on the person’s . . . occupied motor vehicle.”

[24] To employ self-defense, “a defendant must satisfy both an objective and subjective standard: he must have actually believed deadly force was necessary

to protect himself, and his belief must be one that a reasonable person would have held under the circumstances.” *Little v. State*, 871 N.E.2d 276, 279 (Ind. 2007) (quoting *Weston v. State*, 682 P.2d 1119, 1121 (Alaska 1984)). The phrase “reasonably believes,” as used in the self-defense statute, requires both subjective belief that force was necessary to prevent serious bodily injury and that such actual belief was one that a reasonable person would have under the circumstances. *Little*, 871 N.E.2d at 279 The second part of this analysis requires the jury to consider “what a reasonable person would believe if standing in the shoes of the defendant.” *Washington v. State*, 997 N.E.2d 342, 349 (Ind. 2013).

[25] Passarelli maintains that evidence of his “traumatic experiences during his service in the Army and his PTSD diagnosis is relevant to the *objective* component” of his self-defense claim. *Appellant’s Brief* at 15 (emphasis added). In other words, Passarelli contends that the jury should consider whether an individual similarly situated who suffers from PTSD—and had been trained to respond to threats with deadly accuracy—would believe that a threat was imminent and that deadly force was necessary to protect himself.

[26] In support of his claim that Dr. Mundt’s anticipated testimony is admissible for that purpose, Passarelli directs us to *Higginson v. State*, 183 N.E.3d 340 (Ind. Ct. App. 2022), where the defendant, Peggy Sue Higginson, was charged with murdering her husband. *Id.* at 341. Prior to trial, Higginson filed a notice of intent to raise a claim of self-defense under I.C. § 35-41-3-11(b)(2) (effects-of-battery statute) through a doctor’s testimony. *Id.* at 342. This statute provides:

(b) This section applies under the following circumstances when the defendant in a prosecution raises the issue that the defendant was at the time of the alleged crime *suffering from the effects of battery as a result of the past course of conduct of the individual who is the victim of the alleged crime*:

(1) The defendant raises the issue that the defendant was not responsible as a result of mental disease or defect under section 6 of this chapter, rendering the defendant unable to appreciate the wrongfulness of the conduct at the time of the crime.

(2) The defendant claims to have used justifiable reasonable force under section 2 of this chapter. The defendant has the burden of going forward to produce evidence from which a trier of fact could find support for the reasonableness of the defendant's belief in the imminence of the use of unlawful force or, when deadly force is employed, the imminence of serious bodily injury to the defendant or a third person or the commission of a forcible felony.

(Emphasis added).

[27] Prior to trial, a physician diagnosed Higginson with PTSD because of the cumulative effect of years of alleged physical, sexual, and mental abuse that she had suffered by her husband. As Higginson claimed that she was suffering the effects of PTSD at the time of the offense, she sought to admit her doctor's testimony at trial to "support the reasonableness of her apprehension of imminent harm." *Id.* at 342-43.

[28] During a deposition, Higginson’s doctor answered “no” to the question of whether PTSD prevented Higginson from understanding the wrongfulness of her conduct when she killed her husband. *Id.* The State then moved to exclude the doctor’s anticipated testimony, arguing that PTSD evidence was inadmissible to support Higginson’s self-defense claim. *Id.* The trial court granted the State’s motion and on interlocutory appeal, we reversed and determined that Higginson could use effects-of-battery evidence in her self-defense claim because

[i]t would make very little sense for Indiana Code section 35-41-3-11 to state that it allows the use of effects-of-battery evidence, which, again, ‘refers to a *psychological condition* of an individual who has suffered repeated physical or sexual abuse inflicted by another individual,’ in self-defense claims while actually limiting the use of that evidence to insanity defenses. Ind. Code section 35-31.5-2-109 (emphasis in original). To entirely forbid the use of effects-of-battery evidence or psychological trauma, in self-defense cases that fall under Indiana Code section 35-41-3-11, would render the self-defense portion of the statute superfluous.

Id. at 344.

[29] In arriving at this result, we examined the distinction between an insanity defense and a claim of self-defense. We noted our Supreme Court’s decision in *Marley v. State*, 747 N.E.2d 1123 (Ind. 2001), which explained that “where the defendant claims that battered women’s syndrome has affected her ability to appreciate the wrongfulness of her conduct, she must proceed under the

insanity defense.” *Higginson*, 183 N.E.3d at 343 (citing *Marley v. State*, 747 N.E.2d 1123, 1128 (Ind. 2001)). The *Marley* Court stated:

[W]ithin the ambit of the terms comprising the definition of legal insanity, complete mental incapacity must be demonstrated before criminal responsibility can be relieved. In short, as a general proposition *Indiana has long held that a defendant may not submit evidence relating to mental disease or defect except through an insanity defense.*

747 N.E.2d at 1128 (cleaned up) (emphasis added).

[30] We observed that, unlike in *Marley*, *Higginson* was not seeking to be relieved of criminal responsibility because of a mental disease or defect. *Id.* at 343. Rather, she sought to admit effects-of-battery evidence in support of her self-defense claim. *Id.* at 344. Thus, we reasoned that “[w]hile *Marley* outlines one such scenario in which evidence must be brought under the insanity defense, *Marley* does not completely foreclose the use of testimony regarding the psychological effects of battery in self-defense cases.” *Id.* at 345. More particularly, we observed that

While there are clearly limits to what a defendant may do in using effects-of-battery evidence when arguing self-defense, [the defendant] may use effects-of-battery evidence in her self-defense claim. [The doctor] may testify as to evidence which relates to the general reasonableness of one’s apprehension of fear, given the psychological trauma which comes from battery. However, as stated above, [the doctor] may not reach an ultimate factual determination exclusive to the jury: for instance, she may not testify that [the defendant] was, given the psychological trauma she suffered due to her battery, reasonable in using justifiable

force. *In essence, [the doctor] may testify as to the objective component of a person’s reasonable belief that they were under threat of imminent harm, given their PTSD, but not [the defendant’s] specific subjective belief.*

Id. at 345-46 (citations omitted) (emphasis added).

[31] In light of *Higginson*, Passarelli argues that the same result must attach here even though the effects-of-battery statute does not apply to him. Passarelli points out that the jury will ultimately decide whether his subjective belief was reasonable *and*, “whether a reasonable person would have believed [that deadly force was necessary] under the circumstances.” *Appellant’s Brief* at 18. Notwithstanding these assertions, we confined our discussion and holding in *Higginson* to self-defense cases that are raised under the effects-of-battery statute. *Id.* We also made it clear that “evidence which is clearly encompassed by the traditional bounds of an insanity defense is still not suitable for a self-defense claim. . . . The use of effects-of-battery evidence in self-defense cases need not run afoul of the well-established ‘principles of Indiana law’ outlined in *Marley*.” *Higginson*, 183 N.E.3d at 345.

[32] Indeed, if this type of evidence is available to any defendant who raises a claim of self-defense, the self-defense portion of the effects-of-battery statute would be superfluous and meaningless. *Higginson* permits defendants who raise a self-defense claim under the effects-of-battery statute to present psychological evidence in support of their claim, and Passarelli has not shown that we have abandoned established precedent and created a new rule in *all* self-defense

cases. As *Higginson* was narrowly tailored to address only effects-of-battery cases, Passarelli's reliance on *Higginson* is misplaced.

[33] We also note that our Supreme Court has rejected a similar argument when a claim of sudden heat was raised. Sudden heat involves “anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary man; it prevents deliberation and premeditation, excludes malice, and renders a person incapable of cool reflection.” *Wilson v. State*, 697 N.E.2d 466, 474 (Ind. 1998). Murder is mitigated to voluntary manslaughter if the defendant can demonstrate that he acted under sudden heat. *Brantley v. State*, 91 N.E.3d 566, 573-74 (Ind. 2018).

[34] In *Wilson*, the defendant claimed that he acted under sudden heat when he shot and killed his estranged wife and attempted to kill her new boyfriend. *Id.* at 469-70. Wilson maintained that seeing his wife with her new boyfriend “enraged him to the level of sudden heat,” and he responded the way he did because he suffered from PTSD. *Id.* More particularly, Wilson claimed that his PTSD caused him to “react to stressful situations more harshly than other people react to those situations.” *Id.* at 474. Following his convictions for murder and attempted murder, Wilson appealed and maintained that the trial court erred in refusing to give his tendered instruction on voluntary manslaughter. In rejecting that argument, the court in *Wilson* determined that the existence of sudden heat is analyzed from the standpoint of an “ordinary man.” *Id.* It also recognized that an “otherwise normally stressful encounter does not suddenly inflame sudden heat, mitigating murder, simply because a

person suffers from a psychological disorder which gives him a ‘hair trigger.’”

Id.

[35] Similar to the circumstances in *Wilson* where the defendant claimed that he acted in sudden heat because his PTSD caused him “to react more harshly than other people,” evidence that Passarelli suffered from PTSD and reacts more harshly to stressful situations than an ordinary person is inadmissible to support his claim of self-defense. That evidence does nothing to show that Passarelli’s actions were objectively reasonable. The objective component of self-defense, as adopted by our courts, is analyzed from the standpoint of an ordinary “reasonable person.” *See Washington*, 997 N.E.2d at 342. Thus, the question being presented to the jury is whether an ordinary reasonable person would have responded with deadly force if confronted with the same circumstances that Passarelli confronted. The issue is not whether a person just like Passarelli—who also suffers from PTSD caused by military combat—would have responded as Passarelli did. In short, the standard of what constitutes an “ordinary man” does not change on a case-by-case basis. *See id.* We therefore conclude that the trial court did not abuse its discretion in determining that Dr. Mundt’s anticipated testimony is inadmissible at trial to support Passarelli’s claim of self-defense.

[36] Judgment affirmed and remanded for further proceedings consistent with this opinion.

Tavitas, J., concurs.

Brown, J., dissents with opinion.

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Dustin Passarelli,
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State of Indiana,
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Brown, Judge, dissenting.

- [1] I respectfully dissent. The charge of murder is a serious allegation. Ind. Code § 35-41-3-2 provides a person “is justified in using reasonable force against any other person to protect the person . . . from what the person reasonably believes to be the imminent use of unlawful force.” The phrase “reasonably believes,” as used in the self-defense statute, “requires both subjective belief that force was necessary to prevent serious bodily injury, and that such actual belief was one that a reasonable person would have under the circumstances.” *Little v. State*, 871 N.E.2d 276, 279 (Ind. 2007). While the effects-of-battery statute at Ind. Code § 35-41-3-11(b), discussed in *Higginson v. State*, 183 N.E.3d 340 (Ind. Ct. App. 2022), may not apply, there is no question that PTSD can color a person’s

perspectives in significant ways. I would favor a determination that Passarelli may elicit testimony from Dr. Mundt as to a person's reasonable belief that he was under threat of imminent harm given his PTSD, but that Dr. Mundt may not testify as to an ultimate factual determination such as whether Passarelli was reasonable in using justifiable force. *See State v. Mizell*, 773 So. 2d 618, 620-621 (Fla. Dist. Ct. App. 2000) ("Defense counsel proposed to offer expert trial testimony from Dr. Harry Krop, a licensed clinical psychologist. Dr. Krop would testify that Mizell has been diagnosed with PTSD, and he would explain what PTSD is and how PTSD affects an individual's perceptions. . . . We view the PTSD evidence offered in this case as state-of-mind evidence, quite analogous to battered spouse syndrome (BSS) testimony that has in fact been approved many times. BSS testimony has been admitted to support a claim of self-defense. . . . [W]e hold that PTSD evidence is relevant on the question of self-defense."). *See also* Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 141 (2010) ("As more psychologically scarred troops return from combat, society's focus on and concern for these troops and their psychological disorders has increased. With this increase and with associated studies confirming the validity of the PTSD diagnosis and the genuine impact of PTSD on the behavior of veterans, greater weight may be given to the premise that PTSD is a mental disorder that provides grounds for a 'mental status defense,' such as insanity, a lack of mens rea, or self-defense. Although considerable obstacles remain, given the current political climate, Iraq and Afghanistan War veterans are in a better position to

successfully pursue these defenses than Vietnam War veterans were a generation ago, a development that may make these defenses more available for all defendants with a PTSD diagnosis.”). In my view, the jury should be entrusted to assess Dr. Mundt’s testimony together with the other evidence presented at trial.