MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Scott H. Duerring
South Bend, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Nicole D. Wiggins
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Mikell J. Gary,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 27, 2022

Court of Appeals Case No. 21A-CR-2104

Appeal from the Elkhart Circuit Court

The Honorable Michael A. Christofeno, Judge

Trial Court Cause No. 20C01-2002-F3-5

Najam, Judge.

Statement of the Case

[1] Mikell Gary appeals his conviction for armed robbery, a Level 3 felony, and his adjudication as a habitual offender following a jury trial. Gary presents two issues for our review:

1. Whether the trial court violated his Sixth Amendment right of confrontation when it admitted into evidence a video recording of the victim's statement to police at the scene of the robbery.

2. Whether the State presented sufficient evidence to support his conviction for armed robbery.

[2] We affirm.

Facts and Procedural History

[3] On January 14, 2020, at 11:10 p.m., Melina Rojas was outside her apartment in Elkhart, unloading groceries from her minivan, when two men approached her. One of the men, Gary, had a gun and demanded that Rojas give him her money and cell phone, and she complied. The two men left, and Rojas located a phone and called 9-1-1.

[4] After hearing a dispatch regarding the robbery, Corporal Tyler Kruse with the Elkhart Police Department arrived at the scene at 11:16 p.m. and spoke with Rojas, who was "crying" and "clearly pretty distraught[.]" Tr. Vol. 2 at 120. Rojas described the robbery to Corporal Kruse, who recorded her statements

with his body camera. Rojas later identified a man other than Gary as the assailant from a photo array.

[5] During the ensuing investigation, Detective Scott Hauser noticed that a nearby gas station had a surveillance camera pointed in the direction of Rojas' apartment complex. After watching footage from a few of the station's cameras, Detective Hauser found a video recording of the robbery, and he also found video recordings showing the faces of Gary and his accomplice inside the gas station before the robbery. Detective Hauser had "backtracked" from the footage of the robbery and saw footage showing that the two men had been inside the gas station and walked to Rojas' apartment complex immediately prior to the robbery. *Id.* at 168.

[6] Detective Tim Foltz, who has known Gary since 2018, subsequently identified him from still photos taken from the surveillance video. When Detective Hauser later interviewed Gary, Gary admitted that he had been at the gas station that night, but he denied having robbed Rojas.

[7] The State charged Gary with armed robbery, a Level 3 felony, and with being a habitual offender. During the trial, Rojas did not testify. But the trial court admitted into evidence the body camera footage of Rojas' statement to Corporal Kruse, and the State presented testimony implicating Gary in the robbery. A jury found Gary guilty of armed robbery, and Gary pleaded guilty to being a habitual offender. The trial court entered judgment of conviction

accordingly and sentenced Gary to an aggregate term of sixteen years executed. This appeal ensued.

Discussion and Decision

Issue One: Sixth Amendment

[8] Gary contends that the trial court violated his Sixth Amendment right of confrontation when it admitted into evidence the body camera footage of Rojas' statement to Corporal Kruse. As our Supreme Court has stated:

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

Hall v. State, 36 N.E.3d 459, 466 (Ind. 2015). But where, as here, "'a constitutional violation is alleged, the proper standard of appellate review is de novo.'" *Id.* (quoting *Speers v. State*, 999 N.E.2d 850, 852 (Ind. 2013)).

[9] It is well settled that "[t]he Sixth Amendment to the United States Constitution guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *McCain v. State*, 948 N.E.2d 1202, 1206 (Ind. Ct. App. 2011). The Confrontation Clause applies to an out-of-court statement if it is testimonial, the declarant is unavailable, and

the defendant had no prior opportunity to cross-examine the declarant. *Young v. State*, 980 N.E.2d 412, 418 (Ind. Ct. App. 2012) (citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004)).

> To determine whether the statements are testimonial, we look at the primary purpose of the interrogation. *Turner v. State*, 953 N.E.2d 1039, 1055 (Ind. 2011) (citing *Michigan v. Bryant*, [562] U.S. [344, 358], 131 S. Ct. 1143, 1155, 179 L. Ed.2d 93 (2011)). If the circumstances objectively indicate that "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" then the statements are non-testimonial. *Davis v. Washington*, 547 U.S. 813, 822, 827, 126 S. Ct. 2266, 165 L. Ed.2d 224 (2006) (holding that the victim's statements to a 911 operator, while the perpetrator was in the home, were non-testimonial because their primary purpose was to enable police assistance to meet an ongoing emergency). However, if "circumstances objectively indicate" the primary purpose is to "prove past events potentially relevant to later criminal prosecution" then statements are testimonial. *Id.* . . .
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> In our primary purpose inquiry, one of the most important factors is "the existence of an ongoing emergency[,]" because it "focuses the participants on something other than 'prov[ing] past events potentially relevant to later criminal prosecution.'" *Bryant*, 131 S. Ct. at 1157 (quoting *Davis*, 547 U.S. at 828-30, 126 S. Ct. 2266). Determining whether an emergency exists and is ongoing is a "highly context-dependent inquiry." *Id.* at 1158. We consider whether the interrogation is targeted at responding to a call for help where a threat to people is ongoing as compared to an interrogation targeted at establishing past events. *See Davis*, 547 U.S. at 827, 126 S. Ct. 2266.
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> An additional factor we consider is the formality and circumstances in which the questioning takes place. "Although formality is not the sole touchstone of our primary purpose

> inquiry, a statement's formality or informality can shed light on whether a particular statement has a primary purpose of use at trial." *Turner*, 953 N.E.2d at 1055 (citing *Bullcoming v. New Mexico*, [564] U.S. [647, 671], 131 S. Ct. 2705, 2721, 180 L. Ed.2d 610 (2011) (Sotomayor, J., concurring)) (internal quotation marks omitted).
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> We also look at the "statements and actions of both the declarant and interrogators[,]" because they can provide "objective evidence of the primary purpose of the interrogation." *Bryant*, 131 S. Ct. at 1160. If questions are targeted at trying to resolve an ongoing emergency as opposed to gathering information about past events, then the responses are less likely to be considered testimonial. *See State v. Martin*, 885 N.E.2d 18, 21 (Ind. Ct. App. 2008) ("[T]he officers' questions to Brooks sought to resolve the ongoing emergency by establishing Martin's identity, the type of car he was driving, and his state of mind."); *see also Davis*, 547 U.S. at 827, 126 S. Ct. 2266 (2006).

Id. at 418-19.

[10] Here, Gary asserts that the State did not meet its burden to prove that Rojas' statement to Corporal Kruse was non-testimonial and that, therefore, the trial court erred when it admitted that statement into evidence at trial. Initially, we note that Gary has not cited "to the pages of the Transcript where the evidence was identified, offered, and received or rejected," which is required under Indiana Appellate Rule 46(A)(8)(d). Neither has Gary stated the grounds for his objection to the body camera footage to the trial court. Thus, Gary has not shown that he objected to the body camera footage on Sixth Amendment grounds. *See Halliburton v. State*, 1 N.E.3d 670, 683 (Ind. 2013) (noting settled

Indiana law that a defendant may not argue one ground for objection at trial and then raise new grounds on appeal).

[11] In any event, the transcript shows that Gary objected to State's Exhibit 102, which consisted of approximately twelve minutes of the body camera footage, on Sixth Amendment grounds. Tr. Vol. 2 at 129-30. According to the transcript, Gary objected to Exhibit 102 in its entirety. However, on appeal, Gary acknowledges that the "first minute" of Rojas' statement is "non-testimonial" because she told Corporal Kruse the direction the assailants had gone after the robbery, which was relevant to an ongoing emergency. Appellant's Br. at 10. Gary asserts only that the remaining "11 minutes" of the footage was testimonial and, therefore, prohibited under the Sixth Amendment. *Id.* at 10-11.

[12] As we stated in *Gayden v. State*, 863 N.E.2d 1193, 1198 (Ind. Ct. App. 2007), *trans. denied*,

> [t]o preserve a claim of error regarding the admission of evidence, the trial objection must include the specific ground for the exclusion of the evidence. *See Coates v. State*, 650 N.E.2d 58, 61 (Ind. Ct. App. 1995) (statement of reason for objection must be "full and comprehensive"). Also, the objector must be specific as to the part or parts of the evidence being objected to. *Baker v. Wagers*, 472 N.E.2d 218, 220 n.2 (Ind. Ct. App. 1984) (where document contained hearsay and non-hearsay, it was objector's burden to identify hearsay portion and specifically object and move to strike that portion), *trans. denied* (2005). *If the evidence is admissible in part and the objection is not confined to the inadmissible portion, no claim of error is preserved if the objection is overruled*. *Senco Products, Inc. v. Riley*, 434 N.E.2d 561, 565 (Ind. Ct. App. 1982)

> (where only part of the evidence to which a general objection is made is subject thereto, the objection is properly overruled).

(Emphasis added).

[13] In his brief on appeal, Gary states, "*With the exception of the first minute of Officer Kr[]use's body cam footage of the statement of Rojas*, the admission of State's Exhibit 102 was in violation of Gary's Sixth Amendment right of confrontation." Appellant's Br. at 11 (emphasis added). As Gary points out, during the first minute of her statement, Rojas indicated to Corporal Kruse that the two men had left the scene on foot traveling north, and Corporal Kruse relayed that information to other officers. Thus, that part of her statement is relevant to the ongoing emergency of an armed man on the loose. Because Gary challenged State's Exhibit 102 in its entirety, however, and acknowledges on appeal that the first minute of the footage was non-testimonial and did not violate his Sixth Amendment right, Gary has waived this issue for our review. *See Gayden*, 863 N.E.2d at 1199 (holding that "[b]ecause at least a portion of the recording included non-testimonial evidence, the trial court did not abuse its discretion by overruling Gayden's objection to the entire recording, and the issue is waived for review").

[14] Waiver notwithstanding, we agree with the State that the substance of Rojas' statement to Corporal Kruse in State's Exhibit 102 was merely cumulative of the recording of Rojas' 9-1-1 call, to which Gary did not object. It is well settled that the improper admission of evidence is harmless error when the erroneously admitted evidence is merely cumulative of other evidence before

the trier of fact. *Hunter v. State*, 72 N.E.3d 928, 932 (Ind. Ct. App. 2017), *trans. denied*. Here, even if we were to assume that the trial court abused its discretion when it admitted State's Exhibit 102, because that evidence was cumulative of other evidence, any error was harmless.

Issue Two: Sufficiency of the Evidence

[15] Gary next contends that the State presented insufficient evidence to prove that he committed the armed robbery of Rojas. Our standard of review on a claim of insufficient evidence is well settled:

> For a sufficiency of the evidence claim, we look only at the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh the evidence. *Id.* We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.*

Love v. State, 73 N.E.3d 693, 696 (Ind. 2017). To prove robbery, as a Level 3 felony, as charged, the State was required to show that Gary, while armed with a deadly weapon, knowingly or intentionally took property from Rojas by putting Rojas in fear. Ind. Code § 35-42-5-1 (2021).

[16] Gary's sole claim on appeal is that he is not the man who robbed Rojas. He asserts that "[n]o one testified that it was Gary who committed the robbery." Appellant's Br. at 13. He maintains that Rojas, who did not testify at trial, identified the two assailants as approximately 5'6" tall and approximately seventeen or eighteen years old, while he is approximately 6'1" tall and thirty

years old at the time of the robbery. Further, as Gary points out, when Rojas was shown a photo array of possible suspects, she was "90 percent sure" it was someone other than Gary who had robbed her. Tr. Vol. 2 at 222. But Gary's contentions on appeal are merely a request that we reweigh the evidence, which we cannot do.

[17] Contrary to Gary's assertion on appeal, the State presented testimony that Gary robbed Rojas. Detective Hauser testified that the surveillance video taken inside the gas station prior to the robbery showed Gary wearing a white hoodie with a black coat over it and white shoes. Indeed, Gary admitted to police that he was in the gas station prior to the robbery. Detective Hauser also testified that surveillance video taken outside the gas station showed Gary walking from the gas station to the location of the robbery. And Detective Hauser testified that Gary was the man holding a "metallic" object in his hand in the surveillance video depicting the robbery. *Id.* at 192. In addition, Detective Foltz testified that he has known Gary since 2018, and he saw Gary just two weeks before the robbery in January 2020. Detective Foltz identified Gary as one of the men in the surveillance videos based on his face, his jacket, and his hat. The evidence is sufficient to support Gary's conviction for robbery, as a Level 3 felony. *See, e.g.*, *Wright v. State*, 828 N.E.2d 904, 906 (Ind. 2005) (holding evidence sufficient to prove defendant committed burglary where surveillance video of burglary showed a person wearing the same clothes as defendant and defendant attempted to conceal his identity when questioned by officer).

[18] Affirmed.

Bradford, C.J., and Bailey, J., concur.