MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Derrick D. Dennis II,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 1, 2024

Court of Appeals Case No.
23A-CR-1395

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No.
02D06-2109-MR-18

Memorandum Decision by Judge Tavitas
Judges Mathias and Weissmann concur.

Tavitas, Judge.

Case Summary

[1] Derrick D. Dennis II was convicted of murder, a felony, and the jury found that the murder was committed with a firearm. The trial court sentenced Dennis to sixty years on the murder conviction plus another twenty years for the firearms enhancement. Dennis appeals and claims that the trial court: (1) abused its discretion and committed fundamental error by admitting into evidence certain statements that Dennis claims were inadmissible hearsay; and (2) abused its discretion by failing to find certain mitigating factors when imposing sentence. We disagree and, accordingly, affirm.

Issues

[2] Dennis presents two issues, which we restate as:

I. Whether the trial court abused its discretion and committed fundamental error by admitting into evidence certain out-of-court statements that Dennis claims were inadmissible hearsay.

II. Whether the trial court abused its discretion by failing to find certain mitigating factors when sentencing Dennis.

Facts

[3] The victim in this case, Gery Rucker, had a child with Bresia Juarez. On the night of September 13, 2021, Rucker was with his friends Suvanna Buchanan and Lonnel Tinker at Marcala Moses' home in Fort Wayne. The following

morning, Rucker received a phone call informing him that Dennis had slept with Juarez sometime in the recent past, which angered Rucker. Rucker told Tinker that he wanted to go to a local apartment complex where Juarez lived to speak with her. Moses then drove Rucker, Tinker and Buchanan to the apartment complex. When they arrived, Juarez was in her car in the parking lot. Rucker exited Moses' vehicle and kicked Juarez's car as she drove away. Tinker also got out of the vehicle, but Moses and Buchanan remained inside the vehicle.

[4] At the same time, Dennis was standing just inside the exterior door of the apartment building smoking a cigarette. Dennis knew that Rucker was aware that he had slept with Juarez. Rucker and Tinker approached the apartment building. Rucker opened the exterior door where Dennis was located and stood outside the door. A few seconds later, Dennis pulled out a handgun, prompting Rucker and Tinker to flee. Dennis fired his handgun multiple times at Rucker and Tinker as they fled. The bullets struck Rucker in the shoulder, chest, and arm. Rucker stumbled after being shot, and Tinker helped Rucker stay on his feet and helped him get back in Moses' vehicle. Dennis followed them and continued shooting.

[5] Moses' vehicle fled the scene, but Dennis got into his own vehicle, followed Moses, and continued to shoot at the vehicle. Realizing that Rucker had been shot multiple times, Moses drove straight to the hospital. As they were on the way to the hospital, Rucker said, "Dun Dun shot me." Tr. Vol. III p. 59.

"Dun Dun" was Dennis's nickname. Tr. Vol. II p. 240, Vol. III pp. 8, 38, 85. Rucker died at the hospital as a result of the gunshot wounds.

[6] Officers from the Fort Wayne Police Department ("FWPD") arrived at the apartment complex in response to the shooting. Alaysha Joseph, a resident of the complex, informed FWPD Officer Isaac Valencia that "Dun Dun" was the shooter. Tr. Vol. II p. 168. Joseph told the officer how to locate Dun Dun's Facebook page, which had a photograph and a date of birth that matched Dennis.

[7] FWPD Officer Kelly Parnell went to the hospital where Rucker was still being treated at that time. There, Buchanan told Officer Parnell that Dennis shot Rucker as Rucker approached Dennis to discuss Juarez. Buchanan also stated that Dennis continued to shoot at Rucker even after Rucker stumbled. FWPD Detective Brian Martin spoke with Moses at the hospital. Moses too stated that the person who shot Rucker was known as Dun Dun. Moses gave the detective Dennis's phone number.

[8] On September 21, 2021, the State charged Dennis with murder, a felony, and alleged that he used a firearm during the commission of the murder. While in jail awaiting trial, Dennis contacted Buchanan and offered to pay her and Moses $15,000 apiece if they did not testify against him.

[9] A three-day jury trial commenced on January 17, 2023, at which Dennis claimed self-defense. At trial, the State asked Officer Valencia what information he received from Joseph. Dennis objected on hearsay grounds, and

the State responded that Joseph's statements were not being offered to prove the truth of the matter asserted but to explain the course of the officer's investigation. The trial court overruled the objection, and Officer Valencia testified that Joseph told him that "Dun Dun" was the shooter. Tr. Vol. II p. 168. Officer Parnell testified about the conversation he had with Buchanan at the hospital over Dennis's hearsay objection. When Detective Martin testified about the conversation he had with Moses at the hospital, Dennis did not object. The jury found Dennis guilty and also determined that he used a firearm during the commission of the murder.

[10] The trial court held a sentencing hearing on May 22, 2023. The trial court found no significant mitigators and found as aggravating the nature and circumstances of the crime, that Dennis had a significant prior criminal history, and that past attempts at rehabilitation had proved unsuccessful. The trial court imposed a sentence of sixty years on the murder conviction, which it enhanced by twenty years for the use of a firearm. Dennis now appeals.

Discussion and Decision

I. Admission of Out-of-Court Statements

[11] Dennis first claims that the trial court erred by permitting the law enforcement witnesses to testify about the statements made to them at the crime scene and at the hospital. We review challenges to the admission of evidence for an abuse of the trial court's discretion. *Combs v. State*, 168 N.E.3d 985, 990 (Ind. 2021), *cert. denied*. We will reverse only where the decision is clearly against the logic and

effect of the facts and circumstances and the error affects a party's substantial rights. *Clark v. State*, 994 N.E.2d 252, 259-60 (Ind. 2013). "The effect of an error on a party's substantial rights turns on the probable impact of the impermissible evidence upon the jury in light of all the other evidence at trial." *Gonzales v. State*, 929 N.E.2d 699, 702 (Ind. 2010). "The improper admission of evidence is harmless error when the conviction is supported by such substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." *Pelissier v. State*, 122 N.E.3d 983, 988 (Ind. Ct. App. 2019)*, trans. denied*. "The erroneous admission of evidence may also be harmless if that evidence is cumulative of other evidence admitted." *Id.*

[12] Dennis claims that the trial court erred in admitting certain out-of-court statements because they were hearsay. Hearsay is defined as "a statement that (1) is not made by the declarant while testifying at the trial or hearing; and (2) is offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Evidence Rule 802 provides that "[h]earsay is not admissible unless these rules or other law provides otherwise." Dennis claims that three witnesses were permitted to testify about inadmissible hearsay statements. We address each in turn.

A. Officer Valencia and Joseph's Statements

[13] Officer Valencia testified that Joseph told him that Dun Dun was the person who shot at Rucker. Dennis claims that Joseph's statement to Officer Valencia was inadmissible hearsay; that is, it was a statement made out of court and was

offered to prove that the shooter was named Dun Dun. Even if this statement was inadmissible hearsay, any error in its admission was harmless. Moses, Tinker, and Buchanan all testified at trial that they witnessed a man they knew as Dun Dun shoot Rucker. *See* Tr. Vol. II. pp. 243-44; Tr. Vol. III pp. 45, 56. Tinker and Juarez testified that Dennis was known as Dun Dun. Juarez also testified that she saw Rucker approach Dennis and heard gunshots. Joseph's out-of-court statement to Officer Valencia was, therefore, cumulative of other evidence, and any error in the admission of this statement is harmless. *See Stewart v. State*, 167 N.E.3d 367, 374 (Ind. Ct. App. 2021) ("[I]t is well-settled that the erroneous admission of evidence which is cumulative of other evidence admitted without objection does not constitute reversible error.") (citing *Hoglund v. State*, 962 N.E.2d 1230, 1240 (Ind. 2012)).

B. Officer Parnell and Buchanan's Statements

[14] Dennis claims that Officer Parnell's testimony about what Buchanan told him at the hospital was inadmissible hearsay. The State argues that Buchanan's statements were admissible as excited utterances. "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 rule against hearsay, regardless of whether the declarant is available as a witness." Ind. Evidence Rule 803(2). "To meet the excited utterance exception, three elements must be present: (1) a 'startling event or condition' has occurred; (2) the declarant made a statement while 'under the stress or excitement caused by the event or condition;' and (3) the statement was 'related to the event or condition.'"

Ramsey v. State, 122 N.E.3d 1023, 1032 (Ind. Ct. App. 2019) (quoting *Lawrence v. State*, 959 N.E.2d 385, 389 (Ind. Ct. App. 2012), *trans. denied*).

> This test is not mechanical and admissibility turns on whether the statement was inherently reliable because the witness was under the stress of the event and unlikely to make deliberate falsifications. The lapse of time is not dispositive, but if a statement is made long after a startling event, it is usually less likely to be an excited utterance.
>
> The heart of the [excited utterance] inquiry is whether the declarant was incapable of thoughtful reflection. The rationale behind admitting excited utterances is that startling events and absence of opportunity for reflection vest the statements with reliability and reduce the likelihood of falsification.

Ramsey, 122 N.E.3d at 1032 (citations and internal quotations omitted). Here, Buchanan's statements to Officer Parnell meet all three requirements to be admissible as an excited utterance.

[15] First, a startling event—the shooting—had occurred. Second, Buchanan made the statement while still under the stress or excitement caused by the shooting. Officer Parnell testified that Buchanan was still "upset" and "crying." Tr. Vol. II p. 190. Even though the shooting had occurred several hours before Buchanan's statement, this is not dispositive. *Ramsey*, 122 N.E.3d at 1032 (citing *Teague v. State*, 978 N.E.2d 1183, 1187 (Ind. Ct. App. 2012)). Buchanan saw Dennis shoot her friend Rucker. Dennis even shot at the car in which Buchanan was an occupant, and Buchanan was clearly still under the stress of the shooting when Officer Parnell spoke with her. Third, Buchanan's

statements were regarding the event that caused her distress—the shooting. Accordingly, we cannot say that the trial court abused its discretion by concluding that Buchanan's statements to Officer Parnell were admissible under the excited utterance exception to the hearsay rule. *See Newbill v. State*, 884 N.E.2d 383, 397 (Ind. Ct. App. 2008) (holding that trial court did not err in concluding that rape victim's statement to police officer, which was made up to five and one-half hours after the rape, were admissible under the excited utterance exception because the victim was still "extremely distraught" at the time of the statement).

[16] Moreover, any error in the admission of Buchanan's out-of-court statement to Officer Parnell would be harmless because it was cumulative of her trial testimony. Buchanan testified unequivocally at trial that Dun Dun shot Rucker. Tr. Vol. II pp. 56-57. The admission of evidence that is cumulative of other evidence admitted without objection is harmless. *Stewart*, 167 N.E.3d at 374 (citing *Hoglund*, 962 N.E.2d at 1240).

C. Detective Martin and Moses' Statements

[17] Dennis also claims that Detective Martin's testimony about the statements made to him by Moses were inadmissible hearsay. Dennis acknowledges that he did not object to this portion of Detective Martin's testimony. He, therefore, failed to preserve this argument for purposes of appeal. *See Williams v. State*, 211 N.E.3d 547 (Ind. Ct. App. 2023) ("The failure to timely object to the introduction of evidence at trial ordinarily waives appellate review of the issue[.]"), *trans. denied*.

[18] To avoid waiver of this issue, Dennis claims that the admission of Moses's out-of-court statement was fundamental error. Fundamental error is a "daunting" standard. *Harris v. State*, 76 N.E.3d 137, 140 (Ind. 2017) (quoting *Griffith v. State*, 59 N.E.3d 947, 956 (Ind. 2016)). To establish fundamental error, a defendant must "show that the trial court should have raised the issue *sua sponte* due to a blatant violation of basic and elementary principles, undeniable harm or potential for harm, and prejudice that makes a fair trial impossible." *Id*. (citing *Shoun v. State*, 67 N.E.3d 635, 640 (Ind. 2017); *Knapp v. State*, 9 N.E.3d 1274, 1281 (Ind. 2014)). Dennis has not met this daunting standard.

[19] First, Moses's statements were admissible under the excited utterance exception to the hearsay rule. She witnessed the shooting; she was driving the car when Dennis shot at it; and when she was interviewed at the hospital she was still extremely upset. *See* Tr. Vol. III p. 46 (Moses testifying that she was "sh[a]ken up" and "scared" when she spoke with Detective Martin). Accordingly, there was no error, much less fundamental error, in the admission of Moses' statements to Detective Martin.

[20] Moreover, Moses testified unequivocally at trial that Dun Dun shot Rucker. Thus, Detective Martin's testimony relating Moses' statements at the hospital was merely cumulative of her trial testimony and, therefore, harmless. *See Stewart*, 167 N.E.3d at 374 (citing *Hoglund*, 962 N.E.2d at 1240).

[21] In summary, the trial court did not err by admitting into evidence the out-of-court statements made by Joseph, Buchanan, and Moses to law enforcement.

And, even if we assume error, any error was cumulative and, therefore, harmless.

II. Sentencing Discretion

[22] Dennis also claims that the trial court abused its discretion by failing to find certain mitigating factors.[1] Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007); *Phipps v. State*, 90 N.E.3d 1190, 1197 (Ind. 2018). "An abuse occurs only if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Schuler v. State*, 132 N.E.3d 903, 904 (Ind. 2019) (citing *Rice v. State*, 6 N.E.3d 940, 943 (Ind. 2014)).

[23] A trial court can abuse its discretion in a number of ways, including:

> (1) "failing to enter a sentencing statement at all"; (2) entering a sentencing statement in which the aggravating and mitigating factors are not supported by the record; (3) entering a sentencing statement that does not include reasons that are clearly supported by the record and advanced for consideration; or (4) entering a

[1] Dennis cites Appellate Rule 7(B) and notes that we may revise a sentence under this rule if we find the sentence to be inappropriate in light of the nature of the offense and the character of the offender. The brunt of Dennis's argument, however, is that the trial court abused its discretion by failing to find certain mitigators. Because Dennis does not develop any argument under Appellate Rule 7(B), we consider it to be waived. *See Foutch v. State*, 53 N.E.3d 577, 580 n.1 (Ind. Ct. App. 2016) (holding that defendant waived argument that trial court abused its sentencing discretion by failing to present a cogent argument as to how the trial court abused its discretion and instead argued that his sentence was inappropriate under Appellate Rule 7(B)).

> sentencing statement in which the reasons provided in the statement are "improper as a matter of law."

Ackerman v. State, 51 N.E.3d 171, 193 (Ind. 2016) (quoting *Anglemyer*, 868 N.E.2d at 490-91), *cert. denied*.

[24] The trial court "'is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance or to give the proffered mitigating circumstances the same weight the defendant does.'" *Weisheit v. State*, 26 N.E.3d 3, 9 (Ind. 2015) (quoting *Wilkes v. State*, 917 N.E.2d 675, 690 (Ind. 2009), *cert. denied*), *cert*. *denied*. "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Anglemyer*, 868 N.E.2d at 493 (citing *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999)).

[25] Dennis argues that the trial court abused its discretion by failing to consider as mitigating that the victim facilitated the offense and that Dennis acted under strong provocation, both of which are statutory mitigators. Ind. Code § 35-38-1-7.1(b)(3), (5). As noted by the State, however, Dennis did not argue below that the trial court should consider these specific factors as mitigating. *See* Tr. Vol. IV pp. 77-78. A trial court cannot be said to have abused its discretion for failing to consider factors that were not "advanced for consideration." *See Ackerman*, 51 N.E.3d at 193 (quoting *Anglemyer*, 868 N.E.2d at 490-91); *see also Bryant v. State*, 984 N.E.2d 240, 252 (Ind. Ct. App. 2013) ("Failure to present a

mitigating circumstance to the trial court waives consideration of the circumstance on appeal."), *trans. denied*.

[26] Waiver notwithstanding, the trial court was not required to find as mitigating that Rucker facilitated the crime or that Dennis acted under strong provocation. Rucker may have been angry with Juarez and Dennis, but the evidence favorable to the jury's verdict reveals that Rucker did not even know that Dennis was at the apartment complex before he arrived. Rucker was also unarmed. Dennis shot Rucker multiple times and followed Rucker when Rucker left in Moses' vehicle. Given these facts, the trial court was not required to find as significant mitigators that Rucker facilitated the offense or that Dennis acted under strong provocation.

[27] Indeed, the jury's rejection of Dennis's self-defense claim demonstrates that his assertion that he acted out of fear of Rucker was not clearly supported by the record. *See Wallace v. State*, 725 N.E.2d 837, 840 (Ind. 2000) (fact that jury rejected defendant's self-defense claim demonstrated that proffered mitigator that defendant acted out of fear of the victim was not clearly supported by the record); *Shields v. State*, 699 N.E.2d 636, 640 (Ind. 1998) (fact that jury rejected defendant's claims of self-defense and sudden heat demonstrated that proffered mitigator that the victim facilitated the crime was not clearly supported by the record). Because the asserted mitigators were not clearly supported by the record, the trial court did not abuse its discretion by discounting them when sentencing Dennis.

Conclusion

[28] The trial court did not abuse its discretion or commit fundamental error when it admitted into evidence certain out-of-court statements, and any error in the admission of these statements was harmless. The trial court also did not abuse its discretion by not considering certain alleged mitigators that Dennis did not argue to the trial court, and waiver notwithstanding, these alleged mitigators were not clearly supported by the record. Accordingly, we affirm the judgment of the trial court.

[29] Affirmed.

Mathias, J., and Weissmann, J., concur.

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