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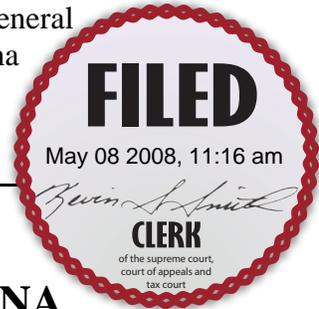
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**IN THE
COURT OF APPEALS OF INDIANA**

MARLON J. DAVIS,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 02A04-0801-CR-25

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0701-FB-10

May 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Marlon J. Davis appeals his convictions for class B felony unlawful possession of a firearm by a serious violent felon, class D felony criminal recklessness, and class D felony pointing a firearm. We affirm.

Issue

Did the trial court commit reversible error in admitting prior inconsistent statements from two witnesses?

Facts and Procedural History

The facts most favorable to the jury's verdict indicate that LaToya Trigg lived in a Fort Wayne apartment with her young son, who was fathered by Davis, and with her mother, Denise Trigg. Davis occasionally lived there as well. On the night of January 13, 2007, Denise and LaToya were in the apartment with her son and some friends. Davis visited briefly with LaToya and left the apartment. Davis returned and argued with LaToya, who told him to leave. LaToya dialed 911 and told the operator that Davis had started an argument with her. Davis asked for half his rent money back, and Denise gave him a \$100 bill. The argument escalated, and Denise stepped between LaToya and Davis. Denise pushed Davis and felt an object at his waist that she assumed was a weapon. LaToya, who was still on the phone with the 911 operator, stated, "If it's my time to die, it's my time to

die,” and told the operator that “he” had a gun.¹ Davis left the apartment and fired several shots through the front door, which was at least slightly ajar.

Fort Wayne Police Officer Peter Mooney was dispatched to LaToya’s apartment at 10:52 p.m. and arrived two to three minutes later. He saw two bullet holes in the front door, a bullet hole in the wall, and nine-millimeter shell casings both inside and outside the threshold. LaToya and Denise were the only adults in the apartment. Both women were crying; LaToya was “extremely upset[,]” and Denise was “rather hysterical[.]” Tr. at 202. According to Officer Mooney, Denise told him that as she pushed Davis, “she felt a hard object and she pushed so the butt of a gun was displayed and at that point then, [Davis] raised his shirt and displayed the gun and then pulled it out and then her words, aimed ... aimed it recklessly at everybody in the apartment.” *Id.* at 210.

Officer Juancarios Gutierrez, who had also heard the dispatch, apprehended Davis approximately fifteen minutes later. In Davis’s left front pants pocket, Officer Gutierrez found a \$100 bill and a nine-millimeter Luger Winchester bullet with a casing that matched those found in LaToya’s apartment. Davis did not have a firearm in his possession.

Sometime after Officer Mooney’s arrival, Detective Michael Epps entered the apartment. LaToya told Detective Epps that Davis had pulled a firearm from his waistband. Denise told Detective Epps that she pushed Davis “and felt what she believed was a handgun in his waist.” *Id.* at 248. She further stated that Davis removed the gun from his waistband, pointed it at everyone in the apartment, and cocked it. Finally, Denise told Detective Epps

¹ Over Davis’s objection, the State played a portion of the tape recording of LaToya’s 911 call to the jury. Because there is no transcript of the recording, we simply quote from the recording verbatim. Davis

that “she heard a gunshot and she saw the weapon firing as [Davis] was exiting the apartment” and that “four to five shots” were fired. *Id.* at 249.

After his arrest, Davis asked to speak with a detective. At 1:29 a.m. on January 14, 2007, Davis signed an advice of rights form and spoke with Detective Epps. Davis told Detective Epps that he left LaToya’s apartment at 7:00 the previous evening and did not return. Detective Epps asked Davis to tell him about the bullet that had been found on his person. Davis asked, “[T]he one that was in [my] jacket?” *Id.* at 257. According to Detective Epps, Davis “advised that he didn’t believe that he had a bullet on him and he stated one of the officers told him he did have a bullet on him and the jacket was not his. It was cold out and he borrowed it from a friend.” *Id.*

The State charged Davis with class B felony unlawful possession of a firearm by a serious violent felon (count I), class A misdemeanor carrying a handgun without a license (count II, part I), class C felony carrying a handgun without a license having a prior felony conviction (count II, part II), class D felony criminal recklessness (count III), and class D felony pointing a firearm (count IV). Several days after Davis’s arrest, Denise asked Detective Epps if the charges against him could be dropped. Detective Epps replied that he was “not at liberty to do that” and told her to contact the prosecutor’s office. *Id.* at 250.

A two-day jury trial began on July 31, 2007. Notwithstanding their statements to investigators after the shooting, LaToya and Denise testified that Davis did not possess or shoot a firearm that night. Over Davis’s objection, the State introduced their prior inconsistent statements via Officer Mooney and Detective Epps. At the close of evidence,

does not challenge the admissibility of the recording on appeal.

the trial court dismissed part II of count II. On August 1, 2007, the jury found Davis not guilty on part I of count II and guilty on counts I, III, and IV. Davis now appeals.

Discussion and Decision

Davis contends that the trial court committed reversible error in admitting LaToya's and Denise's prior inconsistent statements. The decision to admit evidence is within the trial court's discretion and is afforded great deference on appeal. *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003).

[W]e will not reverse the trial court's decision unless it represents a manifest abuse of discretion that results in the denial of a fair trial. An abuse of discretion in this context occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law.

Id. at 702-03 (citation omitted). An error in the admission of evidence is harmless "if its probable impact on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect a party's substantial rights." *Brown v. State*, 770 N.E.2d 275, 280 (Ind. 2002).

Indiana Evidence Rule 613(b) provides in pertinent part that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Our supreme court has stated that "[o]rdinarily, prior inconsistent statements are used to impeach, not as substantive evidence of the matter reported." *Young v. State*, 746 N.E.2d 920, 926 (Ind. 2001). In other words, a prior inconsistent statement used to impeach a witness's credibility is not hearsay. *See Martin v. State*, 736 N.E.2d 1213, 1217 (Ind. 2000) ("[W]hen a prior inconsistent statement is used to impeach a witness, it is not hearsay because the statement is

not used to prove the truth of the matter asserted.”); *see also* Ind. Evidence Rule 801(c) (defining hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”); Ind. Evidence Rule 802 (“Hearsay is not admissible except as provided by law or by these rules.”).

Our supreme court has also stated that “[u]nder our [evidence] rules, ‘once a witness has admitted an inconsistent prior statement she has impeached herself and further evidence is unnecessary for impeachment purposes.’” *Appleton v. State*, 740 N.E.2d 122, 125 (Ind. 2001) (quoting *Pruitt v. State*, 622 N.E.2d 469, 473 (Ind. 1993), and citing Ind. Evidence Rule 613(b)).² If a prior inconsistent statement is used to impeach a witness, and a party believes that there is a danger that the jury would use the statement as substantive evidence, it is incumbent upon that party to request that the jury be admonished pursuant to Indiana Evidence Rule 105 that the statement is “only to be used to judge the witness’s credibility.”³ *Martin*, 736 N.E.2d at 1218 (footnote omitted); *see also Humphrey v. State*, 680 N.E.2d 836, 839 (Ind. 1997) (“Rule 105 does not preclude trial courts from giving a limiting admonition

² Our supreme court decided *Pruitt* prior to adopting the Indiana Evidence Rules in January 1994. Judge Robert Miller has observed that

[b]efore Rule 613, Indiana law provided that extrinsic evidence of the prior statement was not admissible unless the witness denied making or memory of the prior statement; if the witness admitted making the prior inconsistent statement, the impeachment was complete. Rule 613 neither requires nor forbids such an approach.

13 Robert Lowell Miller, Jr., *Indiana Practice* § 613.203 at 303-04 (3d ed. 2007) (footnote omitted).

³ Indiana Evidence Rule 607 provides that a witness’s credibility “may be attacked by any party, including the party calling the witness.” Our supreme court has stated, however, that “a party is forbidden from placing a witness on the stand when the party’s sole purpose in doing so is to present otherwise inadmissible evidence cloaked as impeachment.” *Appleton*, 740 N.E.2d at 125. Davis does not allege, and the record does not suggest, that the State called LaToya and Denise as witnesses solely for this improper purpose.

or instruction sua sponte as a matter of discretion, but by its plain terms imposes no affirmative duty to do so.”) (footnote omitted); Ind. Evidence Rule 105 (“When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly.”).⁴ We now address Davis’s contentions regarding LaToya’s and Denise’s prior inconsistent statements.

The trial transcript indicates that the State did not question LaToya regarding whether she had told Officer Mooney that Davis had a gun on the night of the shooting; thus, the State did not give LaToya an opportunity to explain or deny any such statements or give Davis an opportunity to interrogate her thereon. When the State questioned Officer Mooney on this topic, however, Davis’s counsel objected based on hearsay and a lack of proper foundation under Evidence Rule 613 and requested a limiting admonition pursuant to Evidence Rule 105. The trial court overruled the objection but gave the following limiting admonition:

[T]he credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement or in former testimony testified inconsistent with her testimony in this case. It is inconsistent if the witness denied making the prior statement. Evidence of this kind may be considered by you in deciding the weight to be given the testimony of the witness. You may not consider that prior [sic] as substantive evidence in this case. You may not base your verdict upon it. You may only consider it for the purposes of deciding the weight to be given to the witnesses [sic] testimony.

Tr. at 246. Thereafter, Officer Mooney testified that LaToya told him that Davis had a firearm and “[p]ulled it from his waistband.” *Id.* at 247.

⁴ In *Humphrey*, the court noted that “a limiting admonition under Rule 105 (usually during trial) is to be distinguished from a limiting instruction (usually after evidence has been presented).” 680 N.E.2d at 839 n.7.

We agree with Davis that the State failed to lay a proper foundation for LaToya's prior inconsistent statement to Officer Mooney pursuant to Evidence Rule 613(b) and that the trial court abused its discretion in admitting it.⁵ Nonetheless, it is well settled that "[w]hen a limiting instruction is given that certain evidence may be considered for only a particular purpose, the law will presume that the jury will follow the trial court's admonitions." *Ware v. State*, 816 N.E.2d 1167, 1176 (Ind. Ct. App. 2004). In light of this presumption, we find no grounds for reversal.

Denise testified that she did not see Davis with a firearm on the night of the shooting and that he was standing near her inside the apartment when the shots were fired. When the prosecutor asked whether she "ever [made] any comments to any law enforcement officers that appeared as to [her] opinion as to whether or not Mr. Davis had a handgun on his person[.]" Davis replied, "Yes I did that night." Tr. at 158. Davis explained the inconsistency as follows:

Yes, at that night I'll be honest with you, I told I think it was Detective Epps that came and spoke with me. And I will be honest that I did tell him that there was a weapon and that's what I assumed. What rate the things were going and after all that noise, I assumed it was a weapon. I honestly did and I don't see

⁵ The State contends that the prosecutor "questioned LaToya Trigg about seeing [Davis] in possession of a gun on the night in question" and that LaToya denied seeing him with a gun. Appellee's Br. at 7. The testimony to which the State refers, however, relates to LaToya's 911 call, not to any statements that she made to Officer Mooney. LaToya told the 911 operator that she was arguing with Davis and later stated that "he" had a gun. At trial, LaToya claimed that "he" was Quincy Hall, who "was outside threatening [her], talking about he was going to shoot [her] because he thought [she] was calling the police on him for beating his girlfriend up." Tr. at 134. LaToya admitted making prior inconsistent statements to the 911 operator, and thus the impeachment was complete. *Appleton*, 740 N.E.2d at 125; *see id.* at 139 ("[Davis] repeatedly cheated on me over and over and over again and I told him before I even made the police call, I threatened him and I told him what I was gonna do to him because I was tired of him cheating on me over and over and over again. I had plenty enough time to fabricate my story before I called the police. It wasn't just like we had argued and I called right away. It wasn't like that. We were sitting at home drinking. He left and went to South Bridge [apartments], came back, we had our argument and I told him what I was gonna do because I was tired of him playing with me and my son over and over and over, in and out of our lives.").

anybody that wouldn't do that. But then three days later I did call [Detective Epps's] office and leave a message.

....

... I left a message on his phone and talked to another Sergeant and said hey, I wasn't completely honest with you that night. I didn't tell you I was under the influence of alcohol and I also didn't tell you that there were other people out in that hall ... in that parking lot that were arguing and fighting and there was another gentleman that threatened to shoot his girlfriend that was with Mr. Davis.

Id. at 159-60.

Later, the prosecutor questioned Officer Mooney regarding his conversation with Denise after the shooting. Davis's counsel requested a sidebar conference and remarked to the prosecutor, "[I]t sounds to me like you're starting to go in to ... to impeach LaToya and Denise based on inconsistent statements." *Id.* at 208. The prosecutor responded, "Correct." *Id.* Davis's counsel noted that the prosecutor had not specifically asked either LaToya or Denise whether they had made any prior inconsistent statements to Officer Mooney and added that "when they talked to law enforcement, they said, yeah, I said that or the 9-1-1 tape said that, and they explained it. Once that's done, there's no point in the impeachment, it's inappropriate." *Id.* The prosecutor responded, "[W]hat I would like to ask Mr. Mooney is, did Denise make any statements to you referencing whether or not Mr. Davis had any firearms on his person and then I'm done." *Id.* at 209. The trial court remarked, "That was pretty specific in her direct." *Id.* Davis's counsel replied, "[S]he already said that she did say that. She explained it. So I don't think this is anything more than pure hearsay." *Id.* The trial court stated, "No it's not, no[,] and allowed the prosecutor to ask his intended question. *Id.* Davis's counsel did not request, and the trial court did not give, a limiting admonition. According to Officer Mooney, Denise told him that

she pushed [Davis] back, she felt a hard object and she pushed so the butt of a gun was displayed and at that point then, [Davis] raised his shirt and displayed the gun and then pulled it out and then her words, aimed . . . aimed it recklessly at everybody in the apartment.

Id. at 210.

Subsequently, the prosecutor asked Detective Epps, “[W]hat if anything did Denise say as far as the presence of a firearm in the apartment?” *Id.* at 248. Davis objected based on hearsay and a lack of proper foundation under Evidence Rule 613 and requested a limiting admonition. The trial court overruled Davis’s objection and did not give a limiting admonition. Detective Epps testified that Denise had told him that Davis had a firearm that he pulled from his waistband and pointed at everyone in the apartment. The prosecutor then asked if Denise had stated whether she saw Davis discharge the firearm. Davis again made an objection, which the trial court overruled, and requested a limiting admonition, which the trial court did not give. Detective Epps testified that Denise told him that Davis “cocked the weapon and then she heard a gunshot and she saw the weapon firing as [Davis] was exiting the apartment. She advised it was four to five shots.” *Id.* at 249.

We agree with Davis that the trial court abused its discretion in admitting Denise’s prior inconsistent statements to Officer Mooney and Detective Epps. The trial transcript indicates that the State did not specifically question Denise regarding any statements she made to Officer Mooney; as such, she did not have an opportunity to explain or deny them, and Davis did not have an opportunity to interrogate her thereon pursuant to Evidence Rule 613(b). Denise did have an opportunity to explain the statements she made to Detective Epps; once she did so, the impeachment was complete, and “further evidence [was]

unnecessary for impeachment purposes.” *Appleton*, 740 N.E.2d at 125 (quoting *Pruitt*, 622 N.E.2d at 473).

Davis did not request a limiting admonition as to Officer Mooney’s testimony, but he did request (and did not receive) a limiting admonition as to Detective Epps’s testimony. We note, however, that the trial court gave a final jury instruction identical to the aforementioned admonition given during trial.⁶ Thus, the instruction applied equally to both officers’ testimony and informed the jury that it could consider Denise’s prior inconsistent statements only for the purpose of determining her credibility. “We presume that the jury follows the trial court’s instructions.” *Harris v. State*, 824 N.E.2d 432, 440 (Ind. Ct. App. 2005); *see also Guy v. State*, 755 N.E.2d 248, 258 (Ind. Ct. App. 2001) (“[A] trial court’s jury instructions are presumed to cure any improper statements made during trial.”).

Moreover, we believe that in light of all the evidence in the case, the probable impact of the erroneous admission of the officers’ statements and the failure to give a limiting admonition was sufficiently minor so as not to affect Davis’s substantial rights. *Brown*, 770 N.E.2d at 280. LaToya’s and Denise’s testimony placed Davis in or just outside LaToya’s apartment at the time of the shooting, which contradicted Davis’s own self-serving statement to Detective Epps. That said, LaToya and Denise offered conflicting accounts of Davis’s location at the time of the shooting; LaToya testified that Davis had left the apartment when the shots were fired, Tr. at 142, whereas Denise testified that he was standing near her inside

the apartment. *Id.* at 161.⁷ Both LaToya and Denise admitted making statements that implicated Davis in the shooting. Officer Gutierrez apprehended Davis approximately fifteen minutes after the shooting, during which time Davis had ample opportunity to dispose of the firearm. In Davis’s left front pants pocket, Officer Gutierrez found the \$100 bill that Denise had given him and a bullet with a casing that matched those found in LaToya’s apartment. When confronted about the bullet, Davis explained that he had borrowed his jacket from a friend, even though the bullet was not found in that garment. Based on this evidence, we find no grounds for reversal and affirm Davis’s convictions.⁸

Affirmed.

⁶ See Appellant’s App. at 82 (“The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement or in former testimony testified inconsistent with his/her testimony in this case. It is inconsistent if the witness denied making the prior statement. Evidence of this kind may be considered by you in deciding the weight to be given the testimony of the witness. You may not consider that prior statement as substantive evidence in this case. You may not base your verdict upon it. You may only consider it for the purposes of deciding the weight to be given to the witnesses’ testimony.”).

⁷ Denise also testified that just before the shots were fired, a lamp was knocked over and the apartment “went black.” Tr. at 154. LaToya did not mention this incident in her testimony.

⁸ The State recites the axiom that an “appellate court will affirm a trial court’s ruling on any legal basis apparent in the record” and claims that Denise’s prior inconsistent statements were admissible as excited utterances pursuant to Indiana Evidence Rule 803(2). Appellee’s Br. at 5 (citing, *inter alia*, *Lampitok v. State*, 817 N.E.2d 630, 639 (Ind. Ct. App. 2004), *trans. denied* (2005)). The primary flaw in the State’s argument is that the prosecutor did not seek to admit Denise’s statements as excited utterances—which would have been admissible as substantive evidence—but rather for the limited purpose of impeaching her credibility. (The State did seek to admit LaToya’s statements to the 911 operator as excited utterances, *see* Tr. at 15 and 131, but Davis does not challenge the admissibility of those statements on appeal.) For a statement to be admitted as an excited utterance,

three elements must be shown: (1) a startling event, (2) a statement made by a declarant while under the stress of excitement caused by the event, and (3) that the statement relates to the event. The ultimate issue is whether the statement is deemed reliable because of its spontaneity and lack of thoughtful reflection and deliberation.

BARNES, J., and BRADFORD, J., concur.

Fowler v. State, 829 N.E.2d 459, 463 (Ind. 2005) (citation omitted), *cert. denied* (2006). Whereas Officer Mooney testified that both LaToya and Denise were crying and extremely distraught upon his arrival minutes after the shooting, Detective Epps gave no testimony regarding their demeanor or the time that had elapsed between the shooting and his arrival at the apartment. Based on the foregoing, we are disinclined to affirm Davis's convictions on the alternative basis suggested by the State.