



Christian D. Howard (“Howard”) challenges the Madison Superior Court’s revocation of his probation and argues that the trial court abused its discretion by improperly admitting hearsay evidence that was not substantially trustworthy. We affirm.

### **Facts and Procedural History**

On April 7, 2003, on charges filed under two separate cause numbers, Howard pleaded guilty to two counts of Class C felony robbery. Howard received an aggregate twelve-year sentence with four years suspended to probation.

On May 12, 2010, during an argument with his girlfriend, Ashley Lawrence (“Lawrence”), Howard choked Lawrence, hit her in the face, and damaged her car. After the attack, Lawrence drove to a nearby gas station to call the police. Anderson Police Department Officer Tommy Federick (“Officer Federick”) responded to the dispatch and when he arrived on the scene, he observed that Lawrence was upset and crying. Lawrence told Officer Federick that Howard had hit her in the face, choked her, and damaged her car. Officer Federick observed scratches on Lawrence’s arm and neck and damage to her vehicle.

Officer Federick then brought Lawrence back to the police station, where Officer Jack Brown (“Officer Brown”) also observed fresh scratches on Lawrence’s arm and neck. While at the station, Lawrence gave a videotaped statement describing the incident. In her statement, Lawrence stated that she and Howard had gotten into an argument while Howard was driving her car to his mother’s house. When they arrived at

their destination, Lawrence asked Howard to get out of the car. He refused and instead restarted the car and began driving down the street. When Lawrence began honking the car's horn in hopes that Howard's mother would come outside, Howard stopped the car and began hitting Lawrence with a closed fist. Howard then choked Lawrence until she became weak. After releasing Lawrence, Howard started jumping on her car and kicking it. Lawrence attempted to retrieve her cell phone from the car in order to call the police, but Howard knocked it out of her hand. When Lawrence was unable to get her cell phone back from Howard, she drove to a nearby gas station to call the police.

As a result of this incident, the State filed a notice of probation violation and a notice of suspended sentence violation alleging that Howard had violated the terms of his probation and suspended sentence on his underlying burglary convictions by committing the new offenses of strangulation and battery. The evidentiary hearing was held in two parts, on August 23 and October 4, 2010. Lawrence did not testify on either date. At the first hearing, Officer Federick testified regarding the events of May 12, 2010. Specifically, he testified that when he first made contact with Lawrence, she was "emotional and crying and upset about the whole thing." Tr. p. 19. Officer Federick testified further, over Howard's hearsay objection, that Lawrence told him that Howard had hit her in the face and choked her. The trial court also admitted Lawrence's videotaped statement over Howard's hearsay objection. In overruling Howard's objections, the trial court made the following statements:

The real issue for us in this proceeding is whether or not, Ms. Lawrence wasn't here and we heard what she had to say through her videotape which

we watched, and also from reports by Officer Federick and to a lesser extent Officer Brown. And the issue for the Court is whether or not . . . her out-of-court declarations are substantially trustworthy; my conclusion [is] that they are. First, we got to see her firsthand on the video tape. Second, two different police officers saw fresh bruising and scratching and vehicle damage all consistent with the report that she gave. She's reporting these events to police officers and most people know that it's a crime or you certainly can get yourself in trouble if you make false statements to the police who are investigating allegations of . . . criminal conduct. So, given the consistencies that we actually witnessed, the police officers witnessed and the other things I've said her testimony is substantially trust worthy[.]

Tr. pp. 77-78.

At the conclusion of the evidence, the trial court determined that Howard had violated his probation by committing the new offense of battery. The trial court then revoked Howard's probation and ordered him to serve thirty-six months of his previously suspended sentence. Howard now appeals.

### **Discussion and Decision**

Howard argues that the trial court abused its discretion in admitting hearsay evidence at his probation revocation hearing that was not substantially trustworthy. Decisions regarding the admission of evidence in probation revocation hearings are reviewed on appeal for an abuse of discretion. Figures v. State, 920 N.E.2d 267, 271 (Ind. Ct. App. 2010). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id.

Additionally, when dealing with probation revocation hearings, we keep in mind that a defendant is not entitled to probation; rather, probation is a conditional liberty which is a favor, not a right. Jones v. State, 838 N.E.2d 1146, 1149 (2005). However,

once the State grants this favor, it cannot be revoked without certain procedural safeguards. Mateyko v. State, 901 N.E.2d 554, 557 (Ind. Ct. App. 2009), trans. denied. But because probation revocation deprives a probationer only of a conditional liberty, he is not entitled to the full array of due process protections afforded a defendant at a criminal trial. Id.

These limited due process rights allow for procedures that are more flexible than criminal prosecutions and allow courts to admit evidence that would not be permitted in full-blown criminal trials. Reyes v. State, 868 N.E.2d 438, 440 (Ind. 2007). Indeed, the Indiana Rules of Evidence, including the rules against hearsay, do not apply in probation revocation hearings. See Cox v. State, 706 N.E.2d 547, 551 (Ind. 1999); Ind. Evid. Rule 101(c)(2). Rather, courts in probation revocation hearings may consider “any relevant evidence bearing some substantial indicia of reliability. This includes reliable hearsay.” Cox, 706 N.E.2d at 551. And while the due process principles applicable in probation revocation hearings afford the probationer the right to confront and cross-examine adverse witnesses, this right is narrower than in a criminal trial. Figures, 920 N.E.2d at 271. “For these reasons, the general rule is that hearsay evidence may be admitted without violating a probationer’s right to confrontation if the trial court finds the hearsay is ‘substantially trustworthy.’” Id. (quoting Reyes v. State, 868 N.E.2d 438, 442 (Ind. 2007)).

Here, Howard argues that the trial court abused its discretion by admitting Lawrence’s hearsay statements, both in the form of Officer Federick’s testimony and

Lawrence's videotaped statement, because these statements were not substantially trustworthy. We disagree.

With regard to Lawrence's statements to Officer Federick, we note that this court recently addressed the admissibility of a battery victim's hearsay statements to police in the context of a criminal trial in Boatner v. State, 934 N.E.2d 184 (Ind. Ct. App. 2010). In Boatner, an officer was seated in an unmarked patrol car when he saw a woman, later identified as A.J., who was not wearing shoes and appeared to be disoriented. Id. at 185. As A.J. approached him, the officer noticed that she appeared to be pregnant and was crying. Id. Before the officer could ask A.J. a question, she told him that "she had nowhere else to go" and that her boyfriend, who was later identified as Boatner, had pushed her down and hit her in the face. Id.

As a result of this incident, Boatner was charged with battery. Id. at 186. A.J. did not testify at trial, but the officer testified that A.J. told him that Boatner had pushed her down and hit her. Id. On appeal, Boatner argued that the trial court abused its discretion in admitting the officer's statements because they constituted inadmissible hearsay. This court disagreed and concluded that the officer's testimony was admissible under the "excited utterance" exception set forth in Indiana Evidence Rule 803(2), which provides that "[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" is not excluded by the hearsay rules. Id. at 187. We observed that

[i]n order for a hearsay statement to be admitted as an excited utterance, three elements must be present: (1) a startling event has occurred; (2) a

statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event. This is not a mechanical test, and the admissibility of an allegedly excited utterance 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 heart of the inquiry is whether the declarant was incapable of thoughtful reflection.” Although the amount of time that has passed is not dispositive, a statement that is made long after the startling event is usually less likely to be an excited utterance.

Id. at 186 (citations omitted) (quoting Jones v. State, 800 N.E.2d 624, 627 (Ind. Ct. App. 2003)). We concluded that although some time had elapsed since the event, A.J.’s physical and psychological condition at the time she spoke to the officer indicated that she was still under the stress of excitement caused by Boatner’s battery. Id. at 187. Specifically, we noted that A.J. was “disoriented, crying, without shoes, and almost ran to [the officer] in her attempt to find help.” Id.

Although Boatner involved a criminal trial rather than a probation revocation proceeding like the case before us, we find its rationale instructive. Here, as in that case, Lawrence was still under the stress of excitement caused by Howard’s battery when she told Officer Federick that Howard had hit her in the face and choked her. As noted above, Officer Federick testified that Lawrence was “emotional and crying and upset about the whole thing.” Tr. p. 19. It is therefore unlikely that she deliberately falsified the statements she made to Officer Federick. See Hardiman v. State, 726 N.E.2d 1201, 1204 (Ind. 2000) (noting that the rationale underlying the excited utterance exception is that such an utterance from one who has recently suffered an overpowering experience and is still under the stress of excitement from the event is likely to be truthful).

Lawrence's statements to Officer Federick also contained additional indicia of reliability beyond her excited state and the attendant lack of thoughtful reflection. As noted by the trial court, two different police officers observed fresh scratches on Lawrence's arm and neck and damage to her vehicle consistent with the statements she made to the police. The trial court also noted that Lawrence made these statements to the police, and that as a general matter people are aware that making false statements to police regarding criminal activities may have serious legal repercussions. For all of these reasons, we conclude that Lawrence's statements to Officer Federick contained sufficient indicia of reliability to be considered substantially reliable, and as a result, the trial court did not abuse its discretion in admitting them.

With regard to the videotaped statement, we conclude that any error in its admission was harmless.<sup>1</sup> Assuming *arguendo* that the videotaped statement was not substantially trustworthy, we are considering an alleged violation of Howard's Fourteenth Amendment due process right to confront and cross-examine adverse witnesses. A federal constitutional error is reviewed *de novo* and must be found harmless beyond a reasonable doubt. Furnish v. State, 779 N.E.2d 576, 581 (Ind. Ct. App. 2002), trans. denied; accord Chapman v. California, 386 U.S. 18, 24 (1967); Alford v. State, 699 N.E.2d 247, 251 (Ind. 1998); see also Black v. State, 794 N.E.2d 561, 566 (Ind. Ct. App. 2003) (applying the federal constitutional harmless error standard to probation revocation

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<sup>1</sup> The State argues that Howard has waived any argument regarding the admissibility of the videotaped statement by failing to include it in the record. However, because the statement was transcribed as part of the transcript of proceedings, we are able to conduct sufficient appellate review to conclude that its admission was harmless.

proceedings). To conclude that such an error is harmless beyond a reasonable doubt, we must find that it did not contribute to the conviction, that is, that the error was unimportant in light of everything else considered by the trier of fact on the issue. Furnish, 779 N.E.2d at 582. It is well settled that any error in admitting evidence will be found harmless where it is merely cumulative of other, properly admitted evidence, even when the alleged error is of constitutional dimension. Fuller v. State, 674 N.E.2d 576, 578 (Ind. Ct. App. 1996).

Here, Lawrence's videotaped statement was merely cumulative of Officer Federick's properly admitted testimony regarding Lawrence's statements to him. In her videotaped statement, Lawrence stated that Howard hit and choked her. Officer Federick testified that Lawrence told him that Howard had hit and choked her. As we explained above, Lawrence's statements to Officer Federick were properly admitted at the probation revocation proceeding, and these statements were sufficient to support the revocation of Howard's probation for committing the new offense of battery. For all of these reasons, we cannot conclude that the trial court abused its discretion in admitting the complained-of hearsay statements at Howard's probation revocation hearing.<sup>2</sup>

Affirmed.

VAIDIK, J., concurs.

KIRSCH, J., concurs in result.

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<sup>2</sup> Howard also argues that the trial court abused its discretion in revoking his probation because in the absence of the evidence he claims was erroneously admitted, there was insufficient evidence to support revocation. We need not address this contention because we have concluded that Lawrence's statements to Officer Federick were properly admitted, and this evidence was sufficient to establish that he violated his probation by committing battery.