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IN THE
COURT OF APPEALS OF INDIANA

WARREN RODRICK BULLOCK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A01-0908-CR-401
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Mark A. Smith, Judge
Cause No. 32D04-0904-FD-81

August 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a bench trial, Warren Rodrick Bullock was convicted of domestic battery in the presence of a child,[1] a Class D felony, and criminal confinement[2] as a Class D felony for crimes against his wife, L.B. He appeals, raising the following restated issues:

I. Whether the trial court abused its discretion when it allowed the contents of L.B.'s written statement to the police from the night of the offense to be admitted into evidence as recorded recollection under Indiana Evidence Rule 803(5);

II. Whether the trial court abused its discretion when it excluded Bullock's evidence of prior consistent statements made by L.B.; and

III. Whether the trial court abused its discretion when it admitted hearsay testimony by Deputy Jobe to rebut testimony of L.B.'s son, R.R.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY[3]

Bullock, his wife, L.B. and L.B.'s ten-year-old son, R.R. lived together in Brownsburg, Indiana. On April 21, 2009, an argument began between L.B. and Bullock. During the course of the argument, L.B. called 911 and told the operator that Bullock had kicked her leg, hit the side of her face, and dragged her out of a chair and out of a room. *Tr*. at 50, 52. Hendricks County Sheriff's Deputy Gregory Jobe was one of two deputies that responded to the domestic disturbance call. When Deputy Jobe arrived, he met with

[1] *See* Ind. Code § 35-42-2-1.3(b)(2).

[2] *See* Ind. Code § 35-42-3-3.

[3] Oral argument was heard on this case on June 30, 2010 in Indianapolis. We commend counsel on the quality of their written and oral advocacy.

L.B. and noted that she was very upset. *Id*. at 71. He also observed that L.B. had a red mark on her wrist.

L.B. completed a written statement for the officers, in which she reported that, during her argument with Bullock, she was sitting in a chair in the bedroom, and when she got up to leave, Bullock threatened that if she "got up again he would split [her] head open." *Id*. at 62. She also stated that Bullock dragged her from the room in the presence of her son and kicked her "a couple of times" and grabbed her wrist. *Id*. at 62-63. L.B. then ran downstairs and called 911. Deputy Jobe spoke with R.R., who told the officer that Bullock had grabbed L.B. and thrown her out of the bedroom and into the hallway. *Id*. at 73. While in the presence of Deputy Jobe, and in response Bullock's comment that he did not hit L.B., R.R. also said that Bullock had pushed L.B. down. *Id*. at 75. Pictures were taken of the injury to L.B.'s wrist and a bruise on her leg.

The State charged Bullock with domestic battery in the presence of a child, a Class D felony, two counts of criminal confinement, each as a Class D felony, and two counts of intimidation, each as a Class D felony. On April 27, 2009, L.B. filed a statement, in which she recanted her previous written statement that Bullock had battered and confined her. Prior to Bullock's bench trial on June 12, 2009, the State dismissed all but the domestic battery and one criminal confinement charge against Bullock.

At trial, R.R. stated that, on April 21, 2009, Bullock did not hit L.B. and that he did not remember what he told the officer that day. *Id*. at 17, 18. On cross-examination, testimony was elicited from R.R. that he had seen Bullock pick up L.B. gently and take her out of the bedroom and that that there had been no argument between them at that

time. *Id*. at 20-21. At the close of his testimony, R.R., who was attending the trial with his mother and sister, was sent out of the courtroom, and the State told the trial court it did not want to retain him for rebuttal. *Id*. at 21.

During L.B.'s testimony, she was asked about what she had reported to the police on the day of the incident, and she initially stated that she had told the police that Bullock had hit her and dragged her. *Id*. at 29. She went on to state that she did not remember anything else she may have told the police. *Id*. The State attempted to enter L.B.'s written statement into evidence, and Bullock objected, claiming the statement was hearsay. *Id*. The State then laid the foundation for the introduction of the document as a recorded recollection by eliciting testimony from L.B. that she had written the statement, but did not remember what she had written because she was very upset at the time she had written it. *Id*. at 30-32. The trial court ultimately concluded that the State had laid a foundation sufficient to admit L.B.'s initial written statement as a recorded recollection, and the statement was read into the record. *Id*. at 62-63. The recording of the 911 call, in which L.B. stated that Bullock hit her, kicked her, pushed her out of a chair, and dragged her out of the bedroom, was also played and admitted into evidence over objection. *Id*. at 49-53, *State's Ex*. 6.

The State called Deputy Jobe as its last witness and attempted to elicit testimony from him regarding what R.R. had told him about Bullock's actions against L.B. *Id*. at 72. The defense made a hearsay objection, and the State responded that the deputy's testimony was rebuttal. *Id*. at 72-73. The trial court allowed the testimony. Deputy Jobe then testified that R.R. had informed him that Bullock had grabbed L.B. and had thrown

her out of the bedroom. *Id*. at 73. He further testified that R.R. said that Bullock had pushed L.B. down. *Id*. at 75.

During the defense's case-in-chief, Bullock called Realtha Shaffer and attempted to question her regarding a conversation she had with L.B. about the incident that occurred on April 21, 2009. *Id*. at 84. The State objected based upon hearsay, and Bullock's counsel argued that the testimony would be in reference to "a prior consistent statement" and "inconsistent statements that were made at the time." *Id*. at 85, 87. The trial court sustained the objection on the basis that Shaffer was an improper impeachment witness and that the testimony did not constitute proper impeachment under Indiana Evidence Rule 613 because of L.B.'s in-court recantation. *Id*. at 88-89. At the conclusion of the trial, the trial court found Bullock guilty as charged. Bullock now appeals.

DISCUSSION AND DECISION

I. Standard of Review

Because all three issues raised by Bullock concern the admission or exclusion of evidence, the same standard of review applies to each one. A trial court has broad discretion in ruling on the admission or exclusion of evidence, and such a ruling will be disturbed on review only upon a showing of an abuse of that discretion. *Kimbrough v. State*, 911 N.E.2d 621, 631 (Ind. Ct. App. 2009). An abuse of discretion occurs if the court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*.

II. Admission of L.B.'s Written Statement

Bullock argues that the trial court abused its discretion when it allowed evidence of L.B.'s initial written statement to the police to be admitted into evidence, specifically contending that it was an abuse of discretion for L.B.'s prior written statement to be admitted as a recorded recollection under Indiana Evidence Rule 803(5). He claims that this rule is only to be used where the witness has insufficient recollection and is not intended as a means of introducing otherwise inadmissible evidence to contradict a witness's testimony at trial. Bullock also claims that L.B.'s statement did not meet the requirements of Indiana Evidence Rule 803(5) because L.B. testified that her statement was not true, and under the rule, there must be some acknowledgement that the statement was accurate when it was made. He likens this case to *Ballard v. State*, 877 N.E.2d 860, 863 (Ind. Ct. App. 2007), where this court found the State failed to show that the recorded recollection correctly reflected the witness's knowledge because the witness did not vouch for the accuracy of her prior statement.

Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay evidence is generally inadmissible pursuant to Evidence Rule 801(c). *Ballard*, 877 N.E.2d at 862. Indiana Evidence Rule 803(5), however, provides an exception to the hearsay rule for a memorandum or record if: (a) the memorandum or record relates to a matter about which a witness once had knowledge; (b) the witness has insufficient recollection at trial to enable the witness to testify fully and accurately; (c) the witness is shown to have made or adopted the memorandum or record; (d) the memorandum or record was adopted when the matter

was fresh in the witness's memory; and (e) the memorandum or record is shown to reflect the witness's knowledge correctly. *Impson v. State*, 721 N.E.2d 1275, 1282-83 (Ind. Ct. App. 2000). "'[B]efore a statement can be admitted under the recorded recollection hearsay exception, certain foundational requirements must be met, including some acknowledgment that the statement was accurate when it was made.'" *Ballard*, 877 N.E.2d at 862 (quoting *Williams v. State*, 698 N.E.2d 848, 850 n.4 (Ind. Ct. App. 1998), *trans. denied*)). A trial court should not admit a witness's statement into evidence when the witness cannot vouch for the accuracy of the statement nor remember having made the statement. *Id*.

In the present case, the State sought to admit L.B.'s written statement into evidence at trial as a recorded recollection. In attempting to lay a foundation for this hearsay exception, the State elicited testimony from L.B. that she had made the written statement on the night of the incident. *Tr*. at 27. In response to questions by the State as to what she had told the police in her written statement, L.B. stated she could remember telling the police that Bullock had hit her and dragged her, but that she could not remember telling the police anything further. *Id*. at 28-29.

In order to be admitted as a recorded recollection, the memorandum or record must concern a matter about which the witness once had knowledge but now has insufficient recollection to allow full and accurate testimony. Ind. Evidence Rule 803(5). Therefore, when the State cannot show that the witness has insufficient recollection of the event at issue, the statement is not being offered to refresh the witness's memory, and the recorded recollection exception does not apply. *See Marcum v. State*, 772 N.E.2d 998,

1002 (Ind. Ct. App. 2002) (finding it was error where statement was offered to contradict witness's testimony and not because witness had insufficient recollection).

Here, the State did not make a showing that L.B. could not remember the events of the night of April 21, 2009; it merely showed that she could not remember making the written statement to police. Therefore, L.B.'s written statement to the police was not shown to accurately reflect her recollection and did not meet the requirements to be admitted as a recorded recollection under Evidence Rule 803(5). The trial court abused its discretion in admitting the written statement.

III. Exclusion of Defense Witness's Testimony

Bullock argues that the trial court abused its discretion when it excluded the testimony of Shaffer, who was called to testify as to prior statements L.B. had made that were consistent with her in-court testimony. He contends that this testimony by Shaffer should have been admitted to rehabilitate L.B. after she had been impeached by the State. Because, in the present case, the State used L.B.'s prior out-of-court statements to impeach her in-court testimony, Bullock contends that it was an abuse of discretion for the trial court to deny him the opportunity to rehabilitate her as a witness through the use of prior consistent statements.

"'When prior statements are used to impeach and rehabilitate a witness they are not hearsay because they are not used to prove the truth of the matter asserted.'" *Bassett v. State*, 895 N.E.2d 1201, 1213 (Ind. 2008) (quoting *Birdsong v. State*, 685 N.E.2d 42, 46 (Ind. 1997), *cert. denied* (2009)). Our Supreme Court has held that Evidence Rule 801, which prohibits the use of hearsay as substantive evidence, "'did not replace the

admissibility of prior consistent statements to rehabilitate a witness, but merely allowed a certain subset of these statements to be used as substantive evidence of the truth of the matter asserted.'" *Id*. at 1214 (quoting *Moreland v. State*, 701 N.E.2d 288, 293 (Ind. Ct. App. 1998)). Therefore, where a witness has been impeached by evidence of statements made out of court contradictory to those made in court on the witness stand, it is permissible on rebuttal to introduce prior consistent statements made at or about the time of the impeaching statements for rehabilitation purposes. *Id*.; *Moreland*, 701 N.E.2d at 293.

In the present case, Bullock attempted to admit testimony of Shaffer regarding prior statements L.B. had made which were consistent with her in-court testimony that she had lied about the events of April 21, 2009 when she made her written statement to the police. The trial court excluded this testimony finding that Shaffer was an improper impeachment witness. We find that this was an abuse of discretion. Here, the State had used L.B.'s written statement to the police, which was a prior out-of-court statement, to impeach her in-court testimony. Because Bullock was attempting to introduce Shaffer's testimony concerning a prior statement of L.B. that was consistent with her in-court testimony for the purpose of rehabilitation, we conclude that it was an abuse of discretion for the trial court to exclude such testimony.[4]

[4] We note that Shaffer's testimony was only admissible because L.B.'s prior written statement was admitted into evidence by the trial court. Had the trial court correctly excluded L.B.'s written statement, then there would have been no need to use the testimony of Shaffer for the purpose of rehabilitating L.B.'s testimony.

IV. Rebuttal Testimony

Bullock argues that the trial court abused its discretion when it allowed testimony by Deputy Jobe of what R.R. told him about the incident to be admitted into evidence. He claims that this evidence violated the rules against hearsay and his Sixth Amendment confrontation rights. Bullock specifically contends that, although R.R. did testify at trial, he was no longer available for cross-examination on his out-of-court statements when Deputy Jobe testified because there was no indication that R.R. was still present at the courthouse, and he was denied an opportunity to cross-examine R.R. on the statements.

Without addressing Bullock's Confrontation Clause argument, we determine that the admission of Deputy Jobe's testimony was a hearsay violation.[5] As previously stated, hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Evid. R. 801(c). Hearsay evidence is generally inadmissible pursuant to Evidence Rule 801(c). *Ballard*, 877 N.E.2d at 862. A statement is not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition; or (B) consistent with the declarant's testimony, offered to rebut an express

[5] The State contends that Deputy Jobe's testimony was admissible because Bullock opened the door to questioning on the evidence. Otherwise inadmissible evidence may become admissible where the defendant "opens the door" to questioning on that evidence. *Roberts v. State*, 894 N.E.2d 1018, 1026-27 (Ind. Ct. App. 2008), *trans. denied*. A party may open the door to otherwise inadmissible evidence by presenting similar evidence that leaves the trier of fact with a false or misleading impression of the facts related. *Id*. at 1027. The State claims that during cross-examination of R.R., Bullock elicited testimony that R.R. had seen Bullock gently pick up L.B. to take her out of the bedroom and that there was no argument between them. *Tr*. at 20-21. It alleges that this testimony on cross-examination opened the door to Deputy Jobe's otherwise inadmissible hearsay testimony. We disagree. Although Bullock did question R.R. about whether Bullock gently picked up L.B., it was the State that initially raised this line of questioning on direct when it asked R.R. about a statement he made during a meeting at his school. *Id*. at 18-20. Therefore, Bullock did not open the door to this testimony.

> or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose . . . .

Evid. R. 801(d)(1).

Here, Deputy Jobe's testimony did not fit under the above definition of statements that are not hearsay. The statements of R.R., to which Deputy Jobe testified, were not given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Neither were the statements consistent with R.R.'s testimony, offered to rebut an express or implied charge of recent fabrication, and made before the motive to fabricate arose. As the testimony was an out-of-court statement introduced at trial for the truth of the matter asserted and it did not fit under the above definition, we conclude that Deputy Jobe's testimony was inadmissible hearsay. Therefore, the trial court abused its discretion when it admitted the testimony.

V. Harmless Error

Although we have found that the trial court abused its discretion when it admitted L.B.'s written statement to the police and Deputy Jobe's testimony as to what R.R. told him and when it excluded Shaffer's testimony regarding L.B.'s prior consistent statement, we must now determine whether these errors were harmless. If a trial court abuses its discretion by admitting the challenged evidence, we will only reverse for that error if "the error is inconsistent with substantial justice" or if "a substantial right of the party is affected." *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006) (quoting *Iqbal v. State*, 805 N.E.2d 401, 406 (Ind. Ct. App. 2004)). In viewing the effect on a defendant's substantial rights, we look to the probable impact on the factfinder. *Pitts v.*

State, 904 N.E.2d 313, 318 (Ind. Ct. App. 2009), *trans. denied*. The improper admission of evidence is harmless error when "'the conviction is supported by substantial independent evidence of guilt such that there is no substantial likelihood that the questioned evidence contributed to the conviction.'" *Hape v. State*, 903 N.E.2d 977, 991 (Ind. Ct. App. 2009) (quoting *Cook v. State*, 734 N.E.2d 563, 569 (Ind. 2000)), *trans. denied*.

Here, Bullock was convicted of criminal confinement as a Class D felony and domestic battery in the presence of a child, a Class D felony. In order to convict Bullock of criminal confinement as a Class D felony, the State was required to prove that Bullock knowingly removed L.B. by force, or threat of force, from their bedroom to their bathroom. Ind. Code § 35-42-3-3(a); *Supp. Appellant's App*. at 2. In order to convict Bullock of domestic battery in the presence of a child, a Class D felony, the State was required to prove that he knowingly touched L.B., who was his spouse, in a rude, insolent, or angry manner that resulted in bodily injury to L.B. and that the offense was committed in the physical presence of a child less then sixteen years of age, R.R., knowing that R.R. was present and might be able to see or hear the offense. Ind. Code § 35-42-2-1.3(a), (b); *Supp. Appellant's App*. at 1.

At trial, the properly admitted, independent evidence showed that L.B. testified that she remembered telling the police that Bullock had hit her and dragged her on the night of April 21, 2009. *Tr*. at 29. Her 911 call was also admitted into evidence,[6] and in

[6] Although the 911 recording was objected to at trial on the ground that it lacked a proper authentication, Bullock does not challenge the admission of the recording on appeal. We therefore do not reach the issue of whether the recording was properly admitted as substantive evidence.

it, L.B. stated that Bullock had kicked her, hit her, and dragged her. *Id*. at 50, 52. She specified that Bullock had kicked her in the leg, hit her in the side of the face, and pushed her out of a chair and dragged her out of the room. *Id.* at 52. Additionally, pictures showing redness on L.B.'s wrist and a bruise on her leg, which corroborated her statements, were also admitted into evidence at trial. Therefore, the properly admitted evidence showed that Bullock knowingly removed L.B. by force from their bedroom to another room, and that he knowingly touched L.B. in a rude, insolent, or angry manner resulting in bodily injury.

This properly admitted independent evidence supported Bullock's conviction for Class D felony criminal confinement. It is not sufficient, however, to support Bullock's conviction for domestic battery as a Class D felony, however. To prove domestic battery as a Class D felony, the State had to prove that Bullock battered his wife, L.B., in the physical presence of R.R. The lesser included offense of domestic battery as a Class A misdemeanor does not require the State to prove the additional factor that the battery occurred in R.R.'s presence.[7] Here, although the independent evidence supported a Class A domestic battery conviction, the only evidence proving that Bullock battered L.B. in the physical presence of R.R. was Deputy Jobe's testimony and L.B.'s written statement, which were not properly admitted.

The improper admission of L.B.'s written statement and Deputy Jobe's testimony concerning what R.R. told him constituted harmless error as to the Class D felony

[7] A person who knowingly or intentionally touches an individual who is a spouse of the other person in a rude, insolent, or angry manner that results in bodily injury to the person commits domestic battery as a Class A misdemeanor. Ind. Code § 35-42-2-1.3 (a).

conviction because substantial independent evidence of guilt was presented, but were not harmless error as to the Class D felony conviction for domestic battery Further, we also conclude that the exclusion of Shaffer's testimony regarding L.B.'s prior consistent statement was harmless error because L.B. had already testified that she had lied to the 911 operator and that she had lied when she made her written statement to the police. Thus, Shaffer's testimony would have merely been cumulative. We affirm Bullock's conviction for Class D felony criminal confinement and reverse his conviction for Class D felony domestic battery and remand to the trial court to enter a conviction for the lesser included offense of Class A misdemeanor domestic battery and to sentence Bullock accordingly.

Affirmed in part, reversed in part, and remanded with instructions.

FRIEDLANDER, J., and ROBB, J., concur.