

STATEMENT OF THE CASE

Defendant-Appellant, Steven M. Johnson (Johnson), appeals his conviction for failure to stop after an accident resulting in serious bodily injury, as a Class D felony, Ind. Code § 9-26-1-1.

We affirm.

ISSUES

Johnson raises two issues on appeal, which we restate as:

- (1) Whether the trial court erred by refusing to admit the 911 call made by Johnson after the accident; and
- (2) Whether the trial court abused its discretion by refusing to give Johnson's tendered instruction on self-defense.

FACTS AND PROCEDURAL HISTORY

On July 3, 2008, at approximately 11:00 p.m., Johnson and his passenger, Jeremiah Nuzum (Nuzum), were driving south on U.S. 31 in Marion County, Indiana. As Johnson was driving, he cut off a motorcyclist who was part of a group consisting of 15 to 25 motorcyclists. One of the riders in the group, Matt Mauller (Mauller), confronted Johnson about his driving. When Mauller reached Johnson's car, he took off his helmet and told Johnson to "SLOW THE F*** DOWN, OR GET OFF THE F****IN' ROAD," to which Johnson responded, "whatever, man." (Transcript p. 313) (capitalization in original).

At the next intersection, Johnson came to a complete stop causing a motorcycle driven by William Gerber (Gerber), with Jami Wilson (Wilson) as a passenger, to crash into the back of his vehicle. Wilson sustained injuries, requiring emergency transportation to a hospital. Right after the accident, Johnson pulled over onto Hickory Street for “a few minutes” but never exited the vehicle. (Tr. p. 243). Once Johnson saw motorcyclists coming around the corner, he drove away from the accident without attempting to render aid or exchange information. As Johnson was driving away from the accident, Nuzum called 911 to report the incident.¹ After the 911 call, they fled to a nearby apartment complex where a friend of Nuzum resided. One of the motorcyclists followed Johnson and obtained a description of his vehicle and his license plate number, which was provided to the police. Approximately thirty minutes later, police located Johnson’s vehicle in the apartment complex and Johnson approached the police and said he was the person involved in the earlier accident.

On July 7, 2008, the state filed an Information, charging Johnson with Count I, failure to stop after an accident resulting in serious bodily injury, a Class D felony, I.C. § 9-26-1-1, and Count II, criminal recklessness, a Class D felony, I.C. § 35-42-2-2. On January 14 and 15, 2009, a jury trial was held. At the close of the evidence, the jury found Johnson guilty as charged of failure to stop after an accident resulting in serious bodily injury but not guilty of criminal recklessness. On January 30, 2009, Johnson was

¹ The 911 call was initially made by Nuzum, who then handed the phone to Johnson as soon as the operator answered the call.

sentenced to 680 days with 500 days executed on home detention and 180 days suspended to probation.

Johnson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Admissibility of 911 Call

Johnson argues that the trial court erred when it sustained the State's hearsay objection to the admissibility of the 911 call he made after the accident. Specifically, Johnson argues that this evidence is admissible under two hearsay exceptions: excited utterance and public records. The State responds by arguing that Johnson's statements were rightfully excluded because they were self-serving exculpatory hearsay statements that lacked trustworthiness and demonstrated thoughtful reflection.

In reviewing the admission or exclusion of evidence at trial, we defer to the decision of the trial court. It is within the sound discretion of the trial court to admit or exclude evidence. *Hardiman v. State*, 726 N.E.2d 1201, 1203 (Ind. 2000). This court will not reverse the trial court absent an abuse of that discretion. *Id.* "A trial court abuses its discretion when its evidentiary ruling is clearly against the logic, facts and circumstances presented." *Id.* Moreover, the admission of hearsay is not grounds for reversal where it is merely cumulative of other evidence admitted. *Id.* Errors in the admission of evidence "are to be disregarded as harmless error unless they affect the substantial rights of a party." Ind. Trial Rule 61. Our supreme court has explained "an

error will be found 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 the substantial rights of the parties.” *Fleener v. State*, 656 N.E.2d 1140, 1142 (Ind. 1995).

A. *Excited Utterance*

Hearsay is “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.” Evid. R. 801(c). Hearsay is generally not admissible at trial, unless it falls within an exception. *See* Evid. R. 802. Johnson now argues that the 911 call, which clearly categorizes as a statement made out of court and offered to prove the truth of the matter asserted, should nevertheless have been admitted under the excited utterance exception to the hearsay rule. For a statement to be admitted as an excited utterance exception, 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) the statement relates to the event. *Yamobi v. State*, 672 N.E.2d 1344, 1346 (Ind. 1996).

During the trial, Johnson attempted to introduce the 911 call while cross-examining Nuzum during the State’s case-in-chief. The state objected to its admission, claiming the statements in the call were self-serving exculpatory hearsay that lacked trustworthiness. The trial court declined to rule on whether the 911 call was an excited utterance and reiterated that unless Johnson testified, the recording was inadmissible because he was not subject to cross-examination, stating: “If [Johnson] wishes to exercise his right to be

heard, he must waive his right to be silent.” (Tr. p. 284). The trial court was incorrect to find that Johnson was required to testify in order to introduce the 911 call under Ind. Evidence Rule 803.

Despite the fact that the trial court misunderstood the rule of evidence, Johnson’s 911 call does not qualify as an excited utterance.² The focus of the analysis is whether the statement was “inherently reliable because the witness was under the stress of an event and unlikely to make deliberate falsifications.” *Gordon v. State*, 743 N.E.2d 376, 378 (Ind. Ct. App. 2001). *See also Lieberenz v. State*, 717 N.E.2d 1242, 1245 (Ind. Ct. App. 1999) (stating that the key inquiry is whether the declarant was “incapable of thoughtful reflection”).

² The trial court erroneously stated that Johnson had to testify in order for the 911 call to be admissible under the excited utterance. However, the heading to Ind. Evidence Rule 803 makes clear that the availability of the declarant is immaterial. The record reveals the following dialogue:

[DEFENSE COUNSEL]: And so- you are finding that it’s not an exception to the excited utterance rule? Or that the excited utterance rule doesn’t apply to defendants?

[TRIAL COURT]: I’m ruling that it doesn’t come in in] this case...at this point. Because the Defense offer[ed] [the 911 call] under the excited utterance exception...is an offer for the defendant to exercise his right to speak without waiving his right to remain silent.

[DEFENSE COUNSEL]: So- and just for purposes of the record, then, are you saying that a defendant cannot, um, have a call played under excited utterance –

[TRIAL COURT]: I’m saying that in this case, at this point, this tape, this recording doesn’t come in.

[DEFENSE COUNSEL]: Okay. And, and that’s because Mr. Johnson’s a defendant?

...

[TRIAL COURT]: Okay, I can say the same thing again. You are offering it under the excited utterance exception, understand that. And, uh, it is a recording of his voice, under conditions that you allege are excited conditions. Ah- I’m finding that whether or not it’s admissible under that exception, that it calls into play his, his right to be silent and his right to be heard. And that those rights are intention. If he wishes to exercise his right to be heard, he must waive his right to be silent.

(Tr. pp. 283-284).

In this case, while Johnson claims to have felt fear of the motorcyclists after the accident, he seemed focused on providing justification for his actions. The 911 call provides as follows:

[OPERATOR]: 911

[JOHNSON]: I was just being chased by a bunch of guys on a bike and one of them wrecked behind me. And not they're chasing us, and we're scared.

[OPERATOR]: Where are you at?

[JOHNSON]: . . . I'm trying to— there's a bunch of guys chasing us. And we didn't try to do anything.

[OPERATOR]: Are you in a car?

[JOHNSON]: Yes, I'm trying to hide from these guys.

[OPERATOR]: What kind of car are they in?

[JOHNSON]: They're on motorcycles.

. . .
[JOHNSON]: They've disappeared now. But I – didn't want anything to happen to me because they wrecked and I didn't want them to say I hit them or something.

. . .
[JOHNSON]: What do I do if they try to say I hit and ran?

[OPERATOR]: Then you tell the truth.

[JOHNSON]: Will they have a record of me calling and letting you guys know what's happened?

[OPERATOR]: Yes, everything is on a taped line.

(Defense Exhibit C). Johnson’s call to 911 demonstrated a thoughtful and deliberate purpose for placing the call. Three times during the conversation, Johnson asked the 911 operator to assure him that his actions were justified. While Johnson expressed fear, he also had enough foresight to ensure that the call was being recorded— “Will they have a record of me calling and letting you guys know what’s happened?” (Defense Exhibit C). This question to the 911 operator indicates thoughtful reflection and not a statement of someone under the stress of excitement.

Johnson also argues that Nuzum’s background comments heard during the recording of the 911 call expressing the need to get away from the other motorcyclists should have been admitted under the same theory of excited utterance or public records exception. Johnson’s argument is without merit as the trial court never excluded their comments because no motion to introduce their statements was made.³ Johnson even acknowledged that the State “appeared to have no objection to the statements made in the background by Nuzum.” (Appellant’s Br. p. 8). The trial court merely required each declarant to take the stand and to redact the recording to prevent Johnson’s statements from being heard by the jury.⁴ Thus, since Johnson never introduced either the passenger’s or the 911 operator’s comments at trial, Johnson has waived the issue. *See*

³ In response to the Defense’s question on whether the 911 operator could testify as to the conversation, the trial court stated, “You can subpoena her, you can ask her to testify, but . . . I’m not going to rule on, on a motion that hasn’t been made.” Tr. p. 283.

⁴ The trial court stated, “Well, regardless of who the witness is, uh, this tape is being offered for Mr., uh, Johnson’s statement. Uh, if you can redact other statements and use this recording to . . . uh, with other witnesses for other state, eh, other statements other than Mr. Johnson’s, the, uh, tension between self-incrimination and being silent wouldn’t exist—for those other witnesses. (Tr. p. 286).

Robles v. State, 705 N.E.2d 183, 187 (Ind. Ct. App. 1998) (stating that a party may not sit idly by, permit the court to act in a claimed erroneous manner, and then attempt to take advantage of the alleged error at a later time).

B. *Public Records*

Additionally, Johnson contends that the 911 call should have been admitted under the public records exception. Indiana Evidence Rule 803(8) provides in material part:

Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report . . .

Johnson argues that the 911 call was recorded by the police department as routine practice and the State stipulated to the 911 operator testifying as to the authenticity of the recording. While we acknowledge that hearsay statements made by an unavailable declarant are admissible as long as the statements fall under a “firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness,” the 911 call in this case lacks trustworthiness. *Napier v. State*, 820 N.E.2d 144 (Ind. Ct. App. 2005), (citing *Crawford v. Washington*, 541 U.S. 39, 60 (2004)). A defendant who does not testify during trial “cannot introduce exculpatory statements made outside of court in order to enhance his credibility” because the statements are self-serving and generally untrustworthy. *Sweeny v. State*, 704 N.E.2d 86, 110 (Ind. Ct. App. 1998). Similar to the reasoning that the call does not fall under the excited utterance exception because of

Johnson's thoughtful deliberation in placing the call, Johnson's statements were self-serving justifications for his actions and lack particularized guarantees of trustworthiness.

Finally, even if the trial court admitted the 911 call under either hearsay exception, it would result in harmless error. There is little evidence that the testimony would offer any more information than Nuzum already provided. During cross-examination by the defense, Nuzum stated he and Johnson were intimidated by Mauller when he approached Johnson's car and yelled at him. Nuzum also stated that they were "nervous [and] scared" at the number of motorcyclists that appeared after the accident. (Tr. p. 248). In addition, Nuzum explained to the jury that he and Johnson did not exit the vehicle because they were scared, specifically they were not "big fan[s] on gettin' whooped." (Tr. pp. 243, 253). Nuzum also testified that while Johnson was on the phone with 911, he called a friend to find a safe place to stay because he was scared the bikers would shoot him. Thus, the 911 call would have been merely cumulative of other evidence that was properly admitted, namely Nuzum's testimony, and thus, any error was harmless.

II. *Self-defense Argument*

Johnson argues that the trial court abused its discretion in refusing to give the defense's tendered instruction on self-defense. Specifically, Johnson contends that the initial confrontation with Mauller caused him to be in a state of fear, and after the accident, Johnson and Nuzum were being "chased by men on motorcycles," so he acted in self-defense and in defense of Nuzum when he fled the scene. (Appellant's Br. p. 10).

The relevant portion of the instruction tendered by Johnson is as follows: “A person may use reasonable force against another person to protect himself or someone else from what the Defendant reasonably believes to be imminent use of unlawful force.” (Appellant App. p. 155).

The trial court has discretion when instructing the jury and its decision is reviewed only for an abuse of discretion. *Stringer v. State*, 853 N.E.2d 543, 547 (Ind. Ct. App. 2006). When the trial court refuses a tendered instruction, we must consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. *Id.* Jury instructions are to be considered as a whole and in reference to each other. *Id.* “Error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case.” *Id.* “Before a defendant is entitled to a reversal, he must affirmatively show the instructional error prejudiced his substantial rights.” *Id.*

Here, the parties do not contest (1) & (3); only (2) is at issue. At trial, the trial court did not give the self-defense instruction because Johnson did not use force when leaving the scene. The trial court stated,

The jury may find that the Defendant believed that someone was going to use unlawful force against him. And if the Defendant, in leaving the scene, used his car to move somebody out of the way, to drive over somebody, used that, that force against another person, this would have been an appropriate instruction. He, uh did not use the force of the vehicle against another person.

(Tr. p. 395). Additionally, the trial court found that the evidence did not support a showing of “imminent or impending danger.” *See Whipple v. State*, 523 N.E.2d 1363, 1367 (Ind. 1998). We agree with the trial court. Based on the evidence presented at trial, Mauller’s statement, “SLOW THE F*** DOWN, OR GET OFF THE F***IN’ ROAD,” to which Johnson responded, “whatever, man,” was not a threat of bodily harm; it was an appeal to Johnson to drive safely. (Tr. p. 312-13). While Johnson claims to have felt fear from this encounter, his response to Mauller shows that he was not placed in fear and there was no threat of violence. Thus, “[a]bsent evidence of the threat of imminent serious bodily injury, a self-defense instruction is not proper.” *Whipple*, 523 N.E.2d at 1367.

CONCLUSION

Based on the foregoing, we conclude that the 911 call does not fall under either hearsay exception, the 911 call was cumulative of other evidence, and the self-defense instruction was properly refused by the trial court.

Affirmed.

BAKER, C.J., and FRIEDLANDER, J., concur.