MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

James E. Starks,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

May 6, 2024

Court of Appeals Case No.
23A-CR-2105

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No.
02D06-2111-MR-21

Memorandum Decision by Judge Riley
Judges Brown and Foley concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, James Starks (Starks), appeals his convictions and sentence for murder, a felony, Ind. Code § 35-42-1-1(1); criminal recklessness, a Level 5 felony, I.C. § 35-42-2-2(b)(2)(A); and a use of a firearm enhancement, I.C. § 35-50-2-11(g).

[2] We affirm.

ISSUES

[3] Starks presents this court with two issues, which we restate as:

(1) Whether the trial court abused its discretion in admitting certain hearsay statements as excited utterances and course-of-investigation evidence; and

(2) Whether Starks' sentence is inappropriate in light of the nature of his offenses and his character.

FACTS AND PROCEDURAL HISTORY

[4] During the early morning hours of April 9, 2017, Marcus Rogan (Rogan) attended a party at the Bleu Diamond, a strip club formerly located in the 9400 block of Lima Road in Fort Wayne, Indiana. Rogan went to the party in the company of his friends C.J. Hogue (Hogue) and Gataree Smith (Smith) and his relatives David Masterson (Masterson) and Deshawn Rogan (Deshawn). The Bleu Diamond was hosting a public party, and the club was packed to capacity

with people. Ashley Drudge (Drudge) was the manager of the Bleu Diamond who was working the party, which had security checking for weapons at the entry door. Around 4:00 a.m., Drudge saw Starks, who was known by the nickname "Peanut" or "Nut", walk toward the club's stage and open fire with a handgun. (Transcript Vol. III, p. 5). Starks shot Rogan ten times, hitting Rogan's head, neck, left and right shoulders, left and right upper chest, and abdomen. Starks also shot Hogue, Smith, and Deshawn. Starks then fled the club, along with panicked club patrons.

[5] Starks was captured on the club's surveillance cameras in the act of shooting. Although the camera angle is from the back, Starks' light grey hoodie and part of his face is visible. Surveillance footage taken immediately after the shootings showed Starks exiting the club. His face is seen in profile, and his grey hoodie is visible. A caller to 9-1-1 described the shooter as wearing a grey hoodie and jeans. Rogan's mother, Lakisha Rogan (Lakisha) received a phone call within five minutes of the shooting that Rogan had been shot and that "Nut" had done it. (Tr. Vol. II, p. 173). Law enforcement arrived minutes after the shooting and found a chaotic scene. Rogan was pronounced dead. Nine shell casings were collected from around Rogan's body. Although investigators spoke to Drudge and several club patrons, no witnesses reported seeing anything or identified Starks as the shooter.

[6] Around two weeks after the shootings, Drudge contacted law enforcement and reported that Starks had posted on Snapchat that he had "killed that [n**ger]." (Tr. Vol. III, p. 23). Starks contacted Rogan's sister, Zikesha Rogan (Zikesha),

on Facebook and told her to "keep his name out of [her] mouth." (Tr. Vol. III, p. 90). A few months after Rogan's murder, Starks saw Zikesha at a club and told her that "he would send [her] the same place where he sent [her] brother[.]" (Tr. Vol. III, p. 92). On July 12, 2017, a 9mm Lugar handgun with an obliterated serial number was recovered during a traffic stop of a car driven by a man unrelated to the instant offenses. Once the Luger's serial number was restored, it was discovered to have been originally purchased by Starks.

[7] On August 9, 2017, Starks was in an Allen County courtroom on an unrelated matter. Rogan's brother, Andrew Rogan (Andrew), was also in court that day, along with Joseph Cain (Cain). Cain overheard Starks discussing the Bleu Diamond shooting with another inmate and saying that they could not charge him with the shootings because they did not have any shell casings. Cain observed Starks and Andrew get into a heated argument about Rogan's death, and Starks stated that "he was going to do to [Andrew] what he did to his brother." (Tr. Vol. III, p. 210). Once they were in the courtroom, Starks had a message passed to Lakisha, who was in the courtroom gallery that day to support Andrew, that "[h]e'll be home in [] 2025." (Tr. Vol. II, p. 178). Starks laughed and blew Lakisha a kiss.

[8] In November 2017, law enforcement learned that all the shell casings recovered from the Bleu Diamond had been fired from the gun that was traced to Starks after being recovered in the July 2017 traffic stop. However, nothing further happened in the investigation until August 2022 when Drudge, who had pleaded guilty to a burglary charge, contacted the Allen County Prosecutor's

Office seeking to cooperate in the investigation of Rogan's death. Drudge identified Starks as the shooter who killed Rogan and wounded the three other victims. On November 9, 2021, the State filed an Information, charging Starks with murder, Level 5 felony criminal recklessness, Level 5 felony carrying a handgun without a license with a prior conviction, and a use of a firearm enhancement.

[9] On July 11, 2023, the trial court convened Starks' four-day jury trial. During her testimony, Lakisha told the jury that "a family member" had called her from the Bleu Diamond five minutes after the shooting and told her that "Nut" had shot Rogan. (Tr. Vol. II, p. 173). Although Lakisha did not name the family member who had called, she described him as someone with whom she was very familiar and whose voice was "panic[ked]", "scared", and "hurt". (Tr. Vol. II, p. 173). During the call, Lakisha could "hear the chaos in the background. Lot[s] of screaming and stuff." (Tr. Vol. II, p. 173). The trial court overruled Starks' objection to this testimony as hearsay and admitted Lakisha's testimony as an excited utterance. Fort Wayne Police Department officers Joshua Franciscy, Matt Foote, and Daniel Peters (Officer Peters) described the investigation directly after the shootings and related that the club patrons and Rogan family members did not provide any helpful information. Officer Peters testified that he was notified at the scene that there was a witness, Shannqurida Starks (Shannqurida), who might know who the shooter was and that he planned to take her statement after he finished talking to other witnesses. Over Starks' hearsay objection, Officer Peters was permitted to

inform the jury that he had been told that Shannqurida had said, "I can't believe my cousin did this." (Tr. Vol. III, p. 136). The State had admitted into evidence the surveillance footage from the Bleu Diamond, as well as photographs of Starks taken in April 2017 that showed his appearance around that time.

[10] At the close of the evidence, the jury found Starks guilty of murder, criminal recklessness, and carrying a handgun without a license. Thereafter, the State elected not to present evidence regarding Starks' prior conviction for carrying a handgun without a license that would have elevated the most recent handgun carrying charge to a Level 5 felony, but the State did proceed on the use of a firearm enhancement by having the evidence from the first phase of the trial incorporated into the enhancement proceeding. The jury subsequently found Starks guilty of using a firearm to murder Rogan.

[11] On August 7, 2023, the Allen County Probation Department filed Starks' presentence investigation report that detailed his criminal record. Starks, who was twenty-nine years old at the time of sentencing, had a juvenile record of adjudications for leaving home without permission, false informing, and interfering with a drug or alcohol screening test. Starks was placed in the Detention Alternative Program but was subsequently placed under the supervision of the Allen County Juvenile Probation Department. Starks was later ordered to participate in parenting programming and random drug screens and was placed on a zero-tolerance status for violations. Starks ultimately served 120 days in the Allen County Juvenile Center before being released on

May 29, 2012. As an adult, Starks had nine misdemeanor convictions for offenses including battery, disorderly conduct, resisting law enforcement, and carrying a handgun without a license. Starks had felony convictions for Level 5 felony battery by means of a deadly weapon and Level 5 felony carrying a handgun without a license. Starks had received suspended sentences, probation, and executed sentences for these offenses. Starks had his suspended sentences revoked four times, his probation revoked once, and his home detention placement revoked once.

[12] On August 14, 2023, the trial court held Starks' sentencing hearing. Prior to issuing its sentences, the trial court vacated Starks' conviction for carrying a handgun without a license. The trial court declined to find that undue hardship to Starks' son was a mitigating circumstance, as Starks had argued. The trial court found Starks' criminal record, prior failed attempts at rehabilitation, and the nature and circumstances of the offenses as aggravating circumstances. The trial court sentenced Starks to sixty-three years for his murder conviction, to five years for his criminal recklessness conviction, and to twenty additional years for Starks' use of a firearm in the commission of the murder. The trial court ordered Starks to serve his sentences consecutively, for an aggregate sentence of eighty-eight years.

[13] Starks now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Admission of Hearsay Evidence*

[14] Starks contends that the trial court committed reversible error when it admitted certain hearsay evidence. As a general matter, the decision to admit or exclude evidence is entrusted to the sound discretion of the trial court. *Morgan v. State*, 228 N.E.3d 512, 516 (Ind. Ct. App. 2024). We will reverse only where the trial court's ruling is contrary to the logic and effect of the facts and circumstances before it or the reasonable inferences to be drawn therefrom. *Id*. Starks challenges the admission of Lakisha's testimony that a family member called her and reported that Starks shot Rogan, as well as the admission of Officer Peters' testimony that Shannqurida had reportedly stated that "I can't believe my cousin did this." (Tr. Vol. III, p. 136). We address each of these arguments in turn.

A. *Lakisha's Testimony*

[15] The parties do not dispute that the challenged portion of Lakisha's testimony was hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay evidence is generally not admissible unless the Rules of Evidence or some other law provides for it. Evid. R. 802. One exception to the general prohibition on hearsay is that for the admission of excited utterances, which are defined as statements "relating to a startling event or condition, made while the declarant was under the stress of

excitement that it caused." Evid. R. 803(2). Our supreme court has explained the rationale for the admission of excited utterances as follows:

> The underlying rationale of the excited utterance exception is that such a declaration from one who has recently suffered an overpowering experience is likely to be truthful. While the event and the utterance need not be absolutely contemporaneous, lapse of time is a factor to consider in determining admissibility. Similarly, that the statements were made in response to inquiries is also a factor to be considered. Whether given in response to a question or not, the statement must be unrehearsed and made while still under the stress of excitement from the startling event.

[16] *Hardiman v. State*, 726 N.E.2d 1201, 1204 (Ind. 2000) (citations omitted). The admissibility of evidence as an excited utterance "turns on whether the statement was inherently reliable because the witness was under the stress of an event and unlikely to make deliberate falsifications." *Davenport v. State*, 749 N.E.2d 1144, 1148 (Ind. 2001). To have evidence admitted pursuant to this exception, the proponent of the evidence must establish three foundational elements: (1) a startling event; (2) a statement made while the declarant was under the stress of excitement caused by the event; and (3) that the statement relates to the event. *Wallace v. State*, 79 N.E.3d 992, 997 (Ind. Ct. App. 2017). We do not apply this test mechanically; rather, we consider the particularities of each case. *Id.*

[17] Here, Lakisha testified that a family member with whom she was very familiar called her within five minutes of the shooting, that the caller's voice sounded panicky, scared, and hurt, and that Lakisha could hear screaming and yelling in

the background of the call. The caller said that Rogan had been shot and that "Nut" had done it. (Tr. Vol. II, p. 173). Rogan's murder was a startling event, the caller was still under the stress of the shooting, and the caller's statement related to the startling event. *See Wallace*, 79 N.E.3d at 997. We conclude that a sufficient foundation existed for the admission of Lakisha's hearsay testimony identifying Starks as the shooter as an excited utterance. *See Holmes v. State*, 480 N.E.2d 916, 918 (Ind. 1985) (holding that an officer's description of a witness' identification of Holmes as the shooter was admissible as an excited utterance, where the witness made the identification within minutes of the shooting and was still distraught); *Turner v. State*, 183 N.E.3d 346, 359 (Ind. Ct. App. 2022) (no error in the admission of witness' identification of Turner as the person who killed the victim, where she made the statement less than half an hour after she witnessed the killing and she was very upset, emotional, and traumatized), *trans. denied*.

[18] On appeal, Starks argues that the foundation for the admission of this evidence was lacking because there was no showing that the caller was present during the shooting or any evidence establishing "when the call was made or how close in time or proximity it was to the actual shooting." (Appellant's Br. p. 14). These arguments are without merit, as Lakisha testified that she received the call from a close family member who "was there" within "five minutes after it happened." (Tr. Vol. II, pp. 172-73). Starks implies that Lakisha's failure to provide the name of the caller fatally undermined the reliability of the hearsay; however, Starks fails to support this argument with any legal authority. We

decline to so hold under the circumstances of this case, where Starks did not raise this specific challenge at trial and it was clear from Lakisha's testimony that she knew the identity of the caller. Accordingly, we find no abuse of the trial court's discretion in admitting this testimony. *See Morgan*, 228 N.E.3d at 516.

B. *Officer Peters' Testimony*

[19] Starks also challenges the admission of Officer Peters' testimony about Shannqurida's statement, "I can't believe my cousin did this." (Tr. Vol. III, p. 136). Starks contends that this evidence was inadmissible hearsay. The State counters that the evidence was non-hearsay, course-of investigation evidence.

[20] We find *Blount v. State*, 22 N.E.3d 559 (Ind. 2014), to be instructive. In that case, our supreme court considered the admissibility of a detective's description of two witnesses' statements identifying Blount by his nickname as the shooter of a handgun. *Id*. at 565-69. While acknowledging that "[o]ut-of-court statements made to law enforcement are non-hearsay if introduced primarily to explain why the investigation proceeded as it did[,]" the court recognized that course-of-investigation evidence is often irrelevant and is only excluded from the hearsay rule if the propriety of the investigation is challenged or where the evidence is necessary to "bridge gaps in the trial testimony that would otherwise substantially confuse or mislead the jury." *Id*. at 565. The *Blount* court applied a three-part test to determine the admissibility of such evidence that entailed consideration of the following factors: (1) whether the evidence describes an

out-of-court statement asserting a fact susceptible of being true or false; (2) the evidentiary purpose of the proffered statement; and (3) whether the fact to be proved under the suggested purpose for the statement is relevant to some issue in the case, taking into account the danger of undue prejudice and the probative value of the statement. *Id*. at 566-67. The statements at issue in *Blount*, namely the witnesses' provision of Blount's nickname when the detective asked them who shot the gun, was susceptible of being true or false. *Id*. at 567. The State proposed that the statements were offered to show why the police focused their investigation on Blount, which was a non-hearsay purpose. *Id*. The *Blount* court, therefore, went on to consider the third step of the test and concluded that

> the out-of-court statements have little probative value when considered for the State's proffered purpose of explaining why the officers pursued Blount. Blount made no allegation of police impropriety in narrowing their investigation to him; thus, the *reason* the police included Blount in the photo array was simply not at issue.

[21] *Id*. (emphasis in the original). The court held that the danger of unfair prejudice substantially outweighed any probative value of the statements, where the goal of the admission of the evidence could have been accomplished through less prejudicial means, the statements were essentially direct accusations that Blount was the shooter, and no limiting instruction was provided. *Id*. at 568. Although the court held that the trial court erred in admitting the challenged statements, it ultimately affirmed Blount's conviction for being a serious violent

felon in possession of a handgun, where his conviction was sufficiently supported by independent evidence of his guilt such that the inadmissible hearsay did not contribute to the jury's verdict. *Id*. at 568-69.

[22] We come to similar conclusions here. Officer Peters testified that Shannqurida had stated that "I can't believe my cousin did this." (Tr. Vol. III, p. 136). This out-of-court statement contained a factual assertion capable of being true or false–that her cousin had done the shooting. The State offered this evidence for the non-hearsay purpose of showing the course of the investigation. However, Starks did not question the propriety of the investigation, and the State has not identified any gaps in the evidence that might have misled or confused the jury absent this testimony. *See Blount*, 22 N.E.3d at 567. We conclude that the challenged statement had little probative value for proving its stated purpose but that the danger of undue prejudice was high, where the jury could have reasonably inferred that Shannqurida, who shared Starks' last name, was speaking of him, she asserted that he was the shooter, and there was no limiting instruction to the jury that it should not consider her statement as substantive evidence of Starks' guilt. *See id*. at 568. Therefore, the trial court erred when it admitted this hearsay statement.

[23] However, we conclude that the error in the admission of the hearsay statement does not require reversal. The jury heard evidence that a family member who was at the club during the shooting called Lakisha immediately thereafter and identified Starks as the shooter, that eyewitness Drudge identified Starks as the shooter, and that Starks bragged about the shooting on Snapchat. In addition,

the jury learned that Starks had made similar statements implicating himself in Rogan's murder to Zikesha and Cain and that Starks was the original purchaser of the murder weapon. The jury also saw the surveillance footage from the Bleu Diamond with the shooter's profile visible and photographs of Starks' appearance around the time of the offenses. In light of this substantial independent evidence of Starks' guilt and the fact that the State only mentioned the statement once in rebuttal closing argument, the erroneously admitted out-of-court statement did not contribute to the jury's verdict. *See id*. at 568-69.

II. *Appropriateness of Sentence*

[24] Starks requests that we independently review his sentence as authorized by Indiana Appellate Rule 7(B) and pursuant to which we may "revise a sentence authorized by statute if, after due consideration of the trial court's decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The principal role of our review under Appellate Rule 7(B) is to attempt to leaven the outliers. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). In conducting our review, we "consider not only the aggravators and mitigators found by the trial court, but also any other factor appearing in the record." *George v. State*, 141 N.E.3d 68, 73 (Ind. Ct. App. 2020), *trans. denied*. We defer to the trial court's sentencing discretion, and that deference will "prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson*

v. State, 29 N.E.3d 111, 122 (Ind. 2015). The defendant bears the burden to persuade the reviewing court that the sentence imposed is inappropriate. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018).

[25] When considering the nature of the offenses for purposes of a Rule 7(B) review, we have acknowledged that "the advisory sentence is the starting point for determining the appropriateness of a sentence." *Belcher v. State*, 138 N.E.3d 318, 328 (Ind. Ct. App. 2019) (citing *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g* 875 N.E.2d 218 (Ind. 2007)), *trans. denied*. Starks was sentenced for murder, Level 5 felony criminal recklessness, and his use of a firearm to commit the murder. Murder carries a sentencing range of between forty-five and sixty-five years, with an advisory sentence of fifty-five years. I.C. § 35-50-2-3(a). The sentencing range for a Level 5 felony is between one and six years, with an advisory sentence of three years. I.C. § 35-50-2-6(b). A person who uses a firearm to commit murder may have his sentence enhanced by between five and twenty years. I.C. § 35-50-2-11(g). Therefore, Starks faced a possible maximum sentence of ninety-one years. The trial court sentenced Starks to an aggregate sentence of eighty-eight years.

[26] We conclude that the nature of Starks' offenses merits this near-maximum aggregate sentence. Starks opened fire at the Bleu Diamond without warning, killing Rogan and wounding three others. Starks showed no restraint or mercy, shooting Rogan ten times all about his body. Starks discharged his firearm in a club that was packed with people, causing terror and chaos. In order to commit these offenses, Starks somehow evaded the security measures in place in order

to bring a firearm into the crowded club. On appeal, Starks acknowledges that his offenses were "egregious[,]" and we agree. (Appellant's Br. p. 19).

[27] Turning to Starks' character, we observe that he has a substantial criminal record of juvenile adjudications, nine misdemeanors, and two previous felonies, one of which was for carrying a firearm without a license. Starks has had the benefit of myriad interventions as a juvenile, suspended sentences, probation, and shorter executed sentences. Starks has had his suspended sentences, probation, and home detention revoked on numerous occasions. After the instant offenses, Starks threatened at least two members of Rogan's family, and he mocked Rogan's mother, Lakisha, in open court by laughing and blowing her a kiss. Lakisha spoke at sentencing about the taunting by Starks that she and her family endured for years after the murder and reminded Starks that "this was never funny." (Tr. Vol. IV, p. 75). We find Starks' conduct towards Rogan's family after the murder to be a significant illustration of his poor character.

[28] Nevertheless, Starks maintains that his sentence is too severe, given that he has a minor child and "significant" family and community support. (Appellant's Br. p. 18). However, according to Starks' presentence investigation report, his son was already thirteen years old by the time of sentencing and lived with his mother. Starks has never been ordered to pay child support for his son, Starks had not been employed since 2018, and Starks lived with his own mother prior to being taken into custody for the instant offenses. Therefore, it is unclear how much Starks' imprisonment will impact his son's life. We are mindful that

Rogan's sister, Zikesha, stated at Starks' sentencing hearing that Rogan had a daughter whose mother had died. Zikesha felt that Starks knew that he was orphaning Rogan's child when he murdered Rogan. We find little evidence in the record regarding Starks' family and community support apart from a notation in his presentence report that he "maintains a good relationship with his family." (Appellant's App. Vol. III, p. 9). In sum, Starks has failed to present this court with compelling evidence regarding the positive nature of his offenses or his character, and, therefore, we do not disturb the trial court's sentence. *See Stephenson*, 29 N.E.3d at 122.

CONCLUSION

[29] Based on the foregoing, we hold that the trial court did not abuse its discretion when it admitted Lakisha's statement and that the error in the admission of Officer Peters' statement does not require reversal. We further hold that Starks' sentence is not inappropriate given the nature of his offenses and his character.

[30] Affirmed.

[31] Brown, J. and Foley, J. concur

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