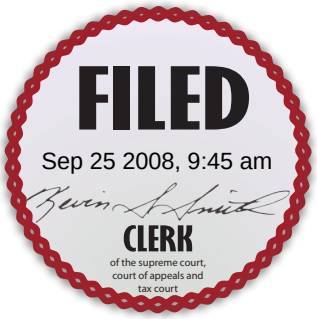

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IN THE
COURT OF APPEALS OF INDIANA

MYRON LARRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0803-CR-268
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0610-FC-395

September 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Myron Larry appeals the trial court's order revoking his probation. Larry argues that the trial court erred when it admitted unreliable hearsay statements. We first conclude that Larry has waived any argument regarding the admission of the statements because he failed to object to the statements at the revocation hearing. Waiver notwithstanding, we conclude that the trial court erred when it admitted the statements because they are not substantially trustworthy but that any error in the admission is not fundamental and is harmless because they are merely cumulative of a witness's testimony during the revocation hearing. Accordingly, we affirm the trial court's revocation of Larry's probation.

Facts and Procedural History

In September 2007, Larry, who was on social security disability assistance, pled guilty to Class C felony theft and Class C felony welfare fraud in relation to his theft of over $100,000.00 from the United States Social Security Administration ("SSA"). In October 2007, the trial court sentenced Larry to an aggregate term of seven years with five years and six months suspended to probation and the remainder of the time executed but credit given for time served. The trial court also ordered Larry to pay $108,433.00 in restitution to the SSA at a minimum of $200.00 per month in cash or by reduced Social Security benefits.[1]

[1] Larry was to pay this restitution jointly and severally with his co-defendant, who was his wife.

On December 3, 2007, Larry went into the SSA office in Anderson to inquire why his monthly disability benefits had been reduced. Larry spoke to SSA employee Sharon Hitz who explained to Larry that, because he was convicted of fraud against the SSA, an SSA rule required that the SSA withhold his monthly benefits until the "overpayment"—i.e., the money that Larry had stolen from the SSA—was repaid in full. Tr. p. 21. Larry became upset and agitated and said that "he would have to start shooting people." *Id.* at 7. After Hitz confirmed this SSA rule with her manager and told Larry the full withholding was required, Larry said, "I'll just have to go get my gun and kill every Mother F***er in here." *Id.* at 9.

On December 6, 2007, the State filed its notice of probation violation, alleging that Larry had violated his terms of probation when he entered the SSA office and threatened SSA employees. During the probation revocation hearing, Hitz testified regarding Larry's actions and threats while at the SSA office. Hitz also testified that other SSA employees—specifically, J.R. Fink, Mallory Lohning, and Tracie Canal—were nearby when Larry threatened her and had provided "a statement." *Id.* at 11. These statements were typewritten statements of the employees made on an SSA "Report of Contact" form, signed by the employees, and dated December 7, 2007. *See* State's Exhibits 1-3. The State offered the statements of the three employees as State's Exhibits 1, 2, and 3 "to corroborate [Hitz's] testimony." Tr. p. 11. Larry did not object to the State's Exhibits, and the trial court admitted then into evidence.

The trial court determined that Larry had violated his probation by committing the criminal act of intimidation, revoked his probation, and ordered him to serve his

previously suspended five-year, six-month sentence. Larry now appeals the revocation of his probation.

Discussion and Decision

Larry argues that the trial court erroneously admitted State's Exhibits 1-3 into evidence because they constituted "unreliable" hearsay.[2] *See* Appellant's Br. p. 5.

There is no right to probation, and a trial court has "discretion whether to grant it, under what conditions, and whether to revoke it if conditions are violated." *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007), *reh'g denied*. "The due process right applicable in probation revocation hearings allows for procedures that are more flexible than in a criminal prosecution." *Id.* Accordingly, "courts may admit evidence during probation revocation hearings that would not be permitted in a full-blown criminal trial." *Id.*; *see also* Ind. Evidence Rule 101(c)(2) (explaining that the Indiana Rules of Evidence are not applicable in probation proceedings). For example, "the [United States] Supreme Court specifically listed affidavits as a type of material that would be appropriate in a revocation hearing even if not in a criminal trial." *Id.* at 440-41 (referencing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and *Morrissey v. Brewer*, 408 U.S. 471 (1972)).

Nevertheless, "[t]his does not mean that hearsay evidence may be admitted willy-nilly in a probation revocation hearing." *Id.* at 440. In *Cox v. State*, 706 N.E.2d 547, 551

[2] Larry also contends that admission of State's Exhibits 1-3 violated his right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004). However, the Indiana Supreme Court has explained that because probation revocation hearings are not criminal trials, the holding in *Crawford*—which addressed the Sixth Amendment right to confrontation in criminal trials—is not implicated in probation revocation hearings. *Reyes v. State*, 868 N.E.2d 438, 440 n.1 (Ind. 2007), *reh'g denied*.

Furthermore, in Larry's Statement of Issues, he also argues that his due process rights were violated because the trial court failed to give him notice of the violation against him. *See* Appellant's Br. p. 1. Larry, however, has neither developed nor mentioned this argument in any other part of his brief and has, therefore, waived this issue for failing to make a cogent argument. *See* Ind. Appellate Rule 46(A)(8)(a).

(Ind. 1999), *reh'g denied*, the Indiana Supreme Court held that "judges may consider any relevant evidence bearing some substantial indicia of reliability[,]" including reliable hearsay. More recently, in *Reyes*, our Supreme Court adopted the substantial trustworthiness test as the approach to be used to determine the reliability of hearsay evidence in probation revocation proceedings. *Reyes*, 868 N.E.2d at 441. In the substantial trustworthiness test, "the trial court determines whether the evidence reaches a certain level of reliability, or if it has a substantial guarantee of trustworthiness." *Id.* "[T]he substantial trustworthiness test implicitly incorporates good cause into its calculus." *Id.* When a trial court applies this substantial trustworthiness test, "ideally [the trial court should explain] on the record why the hearsay [is] reliable and why that reliability [is] substantial enough to supply good cause for not producing . . . live witnesses." *Id.* at 442 (quoting *United States v. Kelley*, 446 F.3d 688, 693 (7th Cir. 2006)).

Here, the trial court admitted State's Exhibits 1-3—the SSA employees' statements—without objection from Larry. Larry's failure to object during the revocation hearing results in waiver of the issue on appeal. *McQueen v. State*, 862 N.E.2d 1237, 1241 (Ind. Ct. App. 2007). Seeking to avoid procedural default, Larry claims that the trial court's admission of the statements constitutes fundamental error. The fundamental error exception is extremely narrow. *Id.* To qualify as fundamental error, the error must be "so prejudicial to the rights of the defendant as to make a fair trial impossible." *Carden v. State*, 873 N.E.2d 160, 164 (Ind. Ct. App. 2007). The fundamental error exception "applies only when the error constitutes a blatant violation of basic principles,

the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *McQueen*, 862 N.E.2d at 1241.

When the trial court admitted State's Exhibits 1-3, it noted that the statements were "in accordance" with Hitz's testimony and that the three people who submitted the statements were federal employees who worked for the SSA. Tr. p. 12. While the preference is for the trial court to make a determination of substantial trustworthiness on the record, this failure to do so is not fatal where the *record supports such a determination*. *See Reyes*, 868 N.E.2d at 442 (affirming the trial court's admission of affidavits in a probation revocation hearing despite the trial court's lack of detailed explanation on the record because the evidence adequately supported a finding that the affidavits were substantially trustworthy).

Here, however, the record does not support a determination that the employees' statements were substantially trustworthy. Unlike the sworn affidavits found substantially trustworthy in *Reyes*, the statements in State's Exhibits 1-3 were unsworn and unverified. The State contends that the statements were substantially trustworthy because the SSA employees were present when Larry made the threats and the trial court could have concluded that the employees were "thus accounting from [their] personal knowledge events that occurred during the regular course of business." Appellee's Br. p. 5-6. However, there is no testimony regarding the SSA's "Report of Contact" form or how the SSA typically used such a form. Although the "Report of Contact" form appears to be used for internal office purposes as some sort of incident report, we cannot conclude that these unsworn statements contain the substantial trustworthiness discussed in *Reyes*.

See Carden, 873 N.E.2d at 164 (holding that a probation officer's testimony regarding a mapping system did not have substantial trustworthiness where no evidence was presented regarding such basic things as the name and manufacturer of the mapping system, how the mapping system works, how often the mapping system is updated); *Baxter v. State*, 774 N.E.2d 1037, 1043-44 (Ind. Ct. App. 2002) (holding that a "Law Enforcement Incident Report" that was uncertified, unverified, and unsigned bore no substantial indicia of reliability), *trans. denied*. As the *Reyes* Court explained, we cannot allow hearsay evidence to be admitted "willy-nilly" during a probation revocation hearing. *See Reyes* 868 N.E.2d at 440. To allow the admission of any sort of statement—especially unsworn, unverified ones as we have here—would swallow up the hearsay exception regarding substantial trustworthiness. Thus, the trial court erred in admitting State's Exhibits 1-3 into evidence.

This error, however, is merely harmless and does not constitute fundamental error. Any error caused by the admission of evidence is harmless if the erroneously admitted evidence was cumulative of other evidence properly admitted. *Truax v. State*, 856 N.E.2d 116, 124 (Ind. Ct. App. 2006). Here, the employees' statements are merely cumulative of Hitz's testimony—which Larry does not challenge on appeal—that Larry came into the SSA office and threatened to start shooting people. Because State's Exhibits 1-3 are cumulative of Hitz's testimony and because this testimony is sufficient to support the trial court's determination that Larry had violated his probation, the admission of Exhibits 1-3 are harmless error and do not constitute fundamental error. *Cf. Carden*, 873 N.E.2d at 164 (determining that the trial court's error in admitting hearsay

evidence in a probation revocation hearing was fundamental error where the hearsay evidence was the only evidence used to revoke the defendant's probation). Therefore, we affirm the trial court's revocation of Larry's probation.

Affirmed.

KIRSCH, J., and CRONE, J., concur.