Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

KIMBERLY A. JACKSON
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

FILED
Nov 16 2011, 9:19 am
CLERK
of the supreme court, court of appeals and tax court

IN THE COURT OF APPEALS OF INDIANA

LEWIS R. ROSS, JR.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 84A04-1103-CR-172
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael Rader, Judge
Cause Nos. 84D05-0904-FD-983 and 84D05-0906-FD-1935

November 16, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Lewis R. Ross, Jr., ("Ross") challenges the Vigo Superior Court's decision to revoke his probation. On appeal, Ross claims that the trial court abused its discretion in admitting into evidence the out-of-court statements of the victim and in relying upon these statements in revoking Ross's probation.

We affirm.

Facts and Procedural History

On October 10, 2010, Ross pleaded guilty to Class D felony operating a vehicle while intoxicated with a prior conviction in one cause and to Class D felony domestic battery in a second cause. In exchange for Ross's plea, the State agreed to dismiss other pending charges.[1] The trial court accepted Ross's plea and sentenced him to consecutive terms of one and one-half years' incarceration, with all but 180 days suspended and 185 days of informal probation.

On January 26, 2011, Officer David Minnic ("Officer Minnic") was dispatched to a house in Terre Haute, where he spoke with P.W., who was Ross's girlfriend. P.W. was "upset and crying," and told Officer Minnic that Ross grabbed her around the throat and pushed her down, causing her to hit her head on a table. Tr. Vol. II, p. 4. She also stated that Ross grabbed her by the arm and threw her on the couch. Officer Minnic observed red marks and scratches on P.W.'s neck and a large knot on the back of her head.

[1] The pending charges in the first cause were Class A misdemeanor operating a vehicle while intoxicated endangering a person and Class A misdemeanor resisting law enforcement. In the other cause, the pending charges were Class D felony strangulation, Class C felony criminal confinement, and Class A misdemeanor domestic battery.

While she was speaking with Officer Minnic, P.W. received a text message from Ross, who was using his mother's phone. P.W. told Officer Minnic where Ross's mother lived and described Ross's car. Officer Minnic then passed this information on to another officer, John Perillo ("Officer Perillo"), who went to Ross's mother's house. When Officer Perillo arrived at the house, he noticed a car that matched the description of Ross's car. And when he felt the hood of the car, it was still warm despite the cold weather. Officer Perillo then went to the house and spoke with Ross's mother, who claimed that Ross was not there. However, when she consented to a search of her house, the police found Ross hiding in her basement.

On January 31, 2011, the State filed a petition to revoke Ross's probation. The petition alleged that Ross had violated the terms of his probation by being charged with a new felony offense based on the January 26 incident with his girlfriend. The trial court held a combined probation revocation hearing and a probable cause hearing on the new charge on February 22, 2011. At the hearing, Officer Minnic testified regarding what Ross's girlfriend had told him on the night in question. When Officer Minnic stated, "[P.W.] told me that her and Ross got into an argument because Ross, she didn't want Ross to be loud," Ross objected to this testimony on hearsay grounds. Tr. Vol. II, p. 5. The trial court overruled his objection, and Officer Minnic proceeded to testify regarding what P.W. had told him. Officer Perillo also testified that he went to Ross's mother's house and found Ross hiding in the basement. At the conclusion of the hearing, the trial court found that Ross had violated the terms of his probation. The trial court ordered

Ross's probation revoked and sentenced him to two consecutive terms of 185 days. Ross now appeals.

Discussion and Decision

Ross claims that the trial court abused its discretion in admitting Officer Minnic's testimony in which he related P.W.'s out-of-court statements that Ross had attacked her. 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 (Ind. Ct. App. 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. Evidence.

Rule 101(c)(2). Instead, 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, 868 N.E.2d at 442).

Ross claims that Officer Minnic's testimony was hearsay upon hearsay because Officer Minnic "apparently" testified based on his written police report. Although the transcript supports Ross's contention that Officer Minnic did appear to use his police report while testifying, he did not object to Officer Minnic's use of the police report at the hearing. This issue is therefore waived for purposes of appeal. See Delarosa v. State, 938 N.E.2d 690, 694 (Ind. 2010) (noting that failure to make contemporaneous objection to evidence at trial waives the issues for appeal).[2]

Turning to the question of the admissibility of P.W.'s statements, it is clear that Officer Minnic did testify regarding P.W.'s out-of-court statements and that such statements were offered in evidence to prove the truth of the matter asserted. These

[2] Moreover, Ross does not explain why Officer Minnic's use of the police report during his testimony constitutes hearsay, especially since the report was not introduced into evidence. See Ind. Evid. R. 612 (noting that witness may use a writing or object to refresh the witness's memory); Ind. Evid. R. 801(c) (defining hearsay as 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) (emphasis added). Because of the volume of work of police officers, it is entirely proper for them to refer to their reports when testifying. Cf. Gault v. State, 878 N.E.2d 1260, 1262 (Ind. 2008) (where police officer refreshed his recollection by referring to his police report).

statements would therefore appear to be classic hearsay. See Ind. Evidence Rule 801(c) (defining hearsay as 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). We disagree with Ross, however, that this hearsay was insufficiently reliable to be admissible in a probation revocation hearing.

We first note that P.W.'s statement was made while she was still under the stress of the excitement caused by Ross's battery. One of the exceptions to the general prohibition to the admission of hearsay evidence is the "exited utterance" exception, 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 rule. Ind. Evidence Rule 803(2). 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. Boatner v. State, 934 N.E.2d 184, 186 (Ind. Ct. App. 2010). "The heart of the inquiry is whether the declarant was incapable of thoughtful reflection." Id. (quoting Jones v. State, 800 N.E.2d 624, 627 (Ind. Ct. App. 2003)).

Here, P.W. was still under the stress of excitement caused by Ross's battery when she told Officer Minnic that Ross had grabbed her by the throat and pushed her down and then grabbed her arm and threw her on the couch. Officer Minnic testified that P.W. was "upset and crying" when he spoke to P.W. Tr. Vol. II, p. 4. It is therefore unlikely that she deliberately falsified the statements she made to Officer Minnic. See Hardiman, 726 N.E.2d at 1204 (noting that someone who is still under the stress of excitement from the

event is likely to be truthful); Boatner, 934 N.E.2d at 186 (concluding that battery victim's statement to police officer that defendant had pushed her down and hit her in the face was admissible under the excited utterance exception to the hearsay rule even though some time had elapsed since the battery because the victim was "disoriented, crying, without shoes, and almost ran to [the officer] in her attempt to find help.").

But P.W.'s statements to Officer Minnic contained additional indicia of reliability beyond her excited state and the resulting lack of thoughtful reflection. Officer Minnic personally observed the scratches and marks on P.W.'s neck and the knot on her head, which was consistent with P.W.'s statements regarding Ross's attack. We also note that P.W. made this statement to a police officer, and people are generally aware that making false statements to police regarding criminal activities may have serious legal repercussions. See Ind. Code § 35-44-2-2 (2004) (defining crime of false reporting); Trimble v. State, 842 N.E.2d 798, 803 (Ind. 2006), aff'd on reh'g (noting that reliability of report by "concerned citizen" is based partly on whether the citizen has identified herself and thereby subjected herself to civil liability or prosecution for false reporting).

We therefore conclude that P.W.'s statements were sufficiently reliable to be admissible at the probation revocation hearing. See Marsh v. State, 818 N.E.2d 143, 146 (Ind. Ct. App. 2004) (concluding that child victim's hearsay statement that her father struck her in the mouth was sufficiently reliable to be admissible at probation revocation hearing where child welfare worker met with child and viewed wounds on her mouth).

Ross's citation to Figures, supra, is unavailing. In that case, we held that it was error for the trial court to have admitted a probable cause affidavit into evidence at a

probation revocation hearing where the affidavit was from a case that had been dismissed due to "evidentiary problems." 920 N.E.2d at 272. Here, the State did not introduce into evidence a probable cause affidavit. It instead proffered the testimony of Officer Minnic and the statements of P.W., which we have already determined were admissible, and reliable, hearsay.

Similarly, Ross's reliance on Carden v. State, 873 N.E.2d 160, 164 (Ind. Ct. App. 2007), and Baxter v. State, 774 N.E.2d 1037 (Ind. Ct. App. 2002) is misplaced. Carden simply held that a probation officer's testimony about a mapping system, which was used to show that a residence where the probationer stayed was within two blocks of a daycare center in violation of the terms of probation, was unreliable where the State presented no evidence regarding the mapping system or how it worked. 873 N.E.2d at 164. And Baxter held that an uncertified, unverified incident report, which was not signed by the arresting officer or the alleged author of the report was insufficiently reliable to be admitted at a probation revocation hearing. 774 N.E.2d. at 1043. In contrast, here P.W.'s statements bore sufficient indicia of reliability and were admissible.

Conclusion

The statements of Ross's victim were sufficiently reliable to be admitted at a probation revocation proceeding and were admissible under the excited utterance exception to the hearsay rule. And from these statements, and the testimony of the police officers, there was sufficient evidence to support the trial court's finding that Ross violated the terms of his probation.

Affirmed.

BAILEY, J., and CRONE, J., concur.