Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-038

OCTOBER TERM, 2020

State of Vermont v. Brenda Marie Thomson*	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 776-7-16 Wmcr
		Trial Judge: John R. Treadwell

In the above-entitled cause, the Clerk will enter:

Defendant appeals from her aggravated-domestic-assault and reckless-endangerment convictions following a jury trial. She challenges the court's admission of the complainant's hearsay statements to a police dispatcher and state trooper and its admission of a hearsay statement by her adult son. Defendant also argues for the first time on appeal that the court should have sua sponte granted her a judgment of acquittal on the reckless-endangerment charge. We affirm.

Defendant was charged with the crimes above based on events that occurred in July 2016. The following evidence was presented at trial. Defendant and the complainant are the divorced parents of a minor child. They continued to have financial disputes after their divorce. At the time of the alleged incident, defendant lived about ten miles from the complainant. On that day, the complainant went to defendant's home to pick up the parties' son. Defendant exited the house wearing a bathrobe and asked the complainant about providing her money. The parties began to argue and went inside the house. They eventually went upstairs. Defendant went into her room and told the complainant to stay out while she dressed. The complainant offered to pay defendant in several days. According to the complainant, defendant replied, "why don't you get out of my f***ing house before I shoot you?" The complainant heard defendant rummaging through her drawers. He said he would leave and went to the top of the stairs, telling defendant she was acting like an asshole.

At that point, defendant's adult son appeared at the bottom of the stairs. He yelled, "don't talk to my mother that way." Defendant then came up behind the complainant and put a gun to the back of his head. The complainant heard a sound like a click. He started to creep down the stairs and defendant started hitting him on the top of his head with the gun, saying that she wanted to "blow his f***ing brains out." Over defendant's hearsay objection, the complainant testified that the son screamed, "[a]re you f***ing crazy, that gun's loaded." The son lunged past the complainant to grab the gun and the complainant exited the home. The complainant described the gun as a very old, rusty pistol, like a Beretta with a long barrel. The complainant ran to his truck, where the parties' minor son was waiting. He drove to the police station but there was no one there so he called the State Police.

A police dispatcher told the complainant to meet a state trooper near defendant's house. The complainant testified that he was "freaking out" and "pretty upset" at the time; he had not calmed down by the time he talked to the trooper.

The dispatcher testified that she could tell that the complainant was upset. As discussed in greater detail below, the court allowed the dispatcher to testify to the complainant's hearsay statements under the excited-utterance exception to the hearsay rule. See V.R.E. 803(2) (providing hearsay exception for "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). The dispatcher testified that the complainant told her that thirty minutes earlier, defendant pulled a gun on him. He left the residence and was feeling unsafe.

The dispatcher also received a call from defendant. Defendant said that the complainant forced his way into her home, and they were arguing. Defendant told the dispatcher that she threated to shoot the complainant and that she pulled a gun. Her son told the complainant that he believed the gun was loaded and that defendant had cocked the trigger. Defendant told the dispatcher that it was lucky her son showed up when he did because, otherwise, she did not know what would have happened.

The trooper testified as well. He stated that when he met the complainant, the complainant was "clearly shaken up," he was pacing, and his hand was shaking. The court allowed the trooper's testimony about the substance of the complainant's statements under Rule 803(2) and it rejected defendant's argument that the evidence should be excluded as needlessly cumulative under Vermont Rule of Evidence 403. The trooper testified that the complainant told him that he went to defendant's house to retrieve his son and that he and defendant began to argue about money. The argument migrated to the second floor where defendant pulled a .22 caliber pistol from her drawer and threatened to shoot him with it.

The trooper also testified to his conversation with defendant that day. She similarly described an argument about money, which continued upstairs. Defendant said that she grabbed a firearm from her drawer, loaded it, and told the complainant to "get out of my f***ing house . . . or I'm going to shoot you." The complainant put his hands over his head in a defensive posture and he started going down the stairs. Defendant's adult son was at the bottom of the stairs, yelling at the complainant not to talk to his mother that way. Defendant denied pointing the weapon at the complainant. The trooper spoke with defendant again several days later. This time she said the gun was unloaded when she grabbed it from her drawer and that she loaded it after complainant left and put it back in the drawer.

Defendant's adult son testified for the defense. He said that after the complainant went into the house, he heard yelling and screaming and went inside to see what was going on. As he approached the door, he could hear the complainant cursing at defendant and calling her names. He and defendant told the complainant to leave, which he did. The son testified that he never saw a gun. The son acknowledged on cross-examination that he had provided a signed written statement to police in which he said that defendant had threatened to shoot the complainant if he did not leave.

The jury convicted defendant of both charges and this appeal followed.

We begin with defendant's challenges to the admission of the dispatcher's and trooper's hearsay statements concerning the complainant's statements to them. Defendant argues that the court erred in admitting these statements as excited utterances under Rule 803(2) because the complainant was engaging in rational and reflective dialogue. She further asserts that the hearsay

statements should have been excluded under V.R.E. 403 as cumulative evidence that bolstered the complainant's testimony and that the error was not harmless.

On review, we defer to the trial court's factual findings with respect to Rule 803(2)'s requirements and recognize its broad discretion in making evidentiary rulings. See State v. Ayers, 148 Vt. 421, 424 (1987) (explaining that "[t]he underlying factual findings to support the elements of the exception are for the trial court and will not be overturned unless they are clearly erroneous or there is an abuse of discretion") (citing McCormick on Evidence § 297, at 857 (E. Cleary 3d ed. 1984) (observing trial courts have "wide discretion" to determine whether declarant was under the influence of the exciting event) (additional citations omitted)); see also State v. Martin, 2007 VT 96, ¶ 29, 182 Vt. 377 ("In conducting a Rule 403 balancing, the trial court has broad discretion and we will not overturn its decision unless the court completely withheld its discretion or exercised it on clearly untenable or unreasonable grounds."). We find no abuse of discretion here.

Rule 803(2) provides a hearsay exception for "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." As the language of the rule suggests, there are "[t]wo requirements . . . essential to the excited utterance exception: (1) a startling event or condition, and (2) a spontaneous utterance in reaction to the event or condition made under the stress of excitement and not as a result of reflective thought." State v. Solomon, 144 Vt. 269, 272 (1984). "[T]he underlying rationale for the exception lies in the assumption that a person's powers of reflection and fabrication will be suspended when he is subject to the excitement of a startling event, and any utterances he makes will be spontaneous and trustworthy." Id. "[T]he key consideration is the condition of the declarant." State v. Ives, 162 Vt. 131, 142 (1994) (quotation omitted).

The trial court found that the complainant was still under the "stress of excitement" caused by the incident at the time he talked to the dispatcher. It cited the complainant's testimony that he was very upset and "freaking out" when he called; it also cited the dispatcher's testimony that the complainant was upset. The court rejected defendant's argument that the evidence should be excluded as more prejudicial than probative under V.R.E. 403. The court reached a similar conclusion with respect to the trooper's testimony. It found the factual predicate for Rule 803(2) satisfied based on the complainant's testimony and it determined that, while time was not of the essence under the rule, it was reasonable for the complainant to still be under the stress of excitement from the event one hour later. It found the trooper's observation of the complainant's physical condition consistent with its conclusion. As to Rule 403, the court found that the potentially cumulative nature of the testimony did not outweigh its probative value.

The court's determination that the complainant remained "under the stress of excitement caused by the event or condition" is supported by the evidence. V.R.E. 803(2). As reflected above, the complainant called the police dispatcher within half an hour of the incident. He testified that he was still "really upset about what had happened." He was "freaking out" and still "pretty upset." The dispatcher testified that she could tell by the complainant's voice that he was upset. The complainant testified that he was still upset at the time he spoke to the trooper not long thereafter and the trooper observed physical signs consistent with this testimony. While defendant urges us to construe the evidence differently, we do not reweigh the evidence on appeal. We defer to the trial court's findings because that court "is in the best position to determine the credibility of the evidence and witnesses before it and to then weigh that evidence." State v. Huston, 2020 VT 46, ¶ 10. In a similar vein, we defer to the court's assessment of the evidence under Rule 403. See State v. Shippee, 2003 VT 106, ¶ 13, 176 Vt. 542 (mem.) (recognizing trial court's broad discretion under Rule 403 and explaining that party must show "court either completely withheld its

discretion or exercised it on grounds clearly untenable or unreasonable"). We find no error in the court's admission of these hearsay statements.

Defendant next challenges the admission of her son's hearsay statement, "Are you f***ing crazy? That gun's loaded." The court found the statement admissible both as an excited utterance and as a "present sense impression" under Rule 803(1) (creating hearsay exception for "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter"). Defendant challenges only the admissibility of this statement as an excited utterance. She contends that the State failed to present evidence of the son's condition at the time of the statement. Defendant maintains that it is not enough that her son walked in during the alleged "heat of the event."

We find no error. The State was not required to present explicit testimony regarding the son's demeanor for his statement to be admissible under Rule 803(2). The circumstances surrounding the making of the statement, as testified to by the complainant, provide ample support for the court's ruling. See State v. Young, 161 P.3d 967, 973 (Wash. 2007) (en banc) (recognizing that evidence to support admission of statement under Rule 803(2) "can include circumstantial evidence, such as the declarant's behavior, appearance, and condition, appraisals of the declarant by others, and the circumstances under which the statement is made"). The complainant testified that the son entered the home as the parties were fighting. According to the complainant, the son witnessed defendant put a gun to the back of the complainant's head. At that point, the complainant heard a clicking sound. Defendant was yelling that she wanted to "blow [the complainant's] f***ing brains out" as he tried to escape down the stairs. Defendant was hitting him on the head with the gun. The complainant was halfway down the stairs when the son, who was at the bottom of the stairs, screamed "Are you f***ing crazy? That gun's loaded." The son then lunged toward the complainant, who evaded him. When the complainant looked back, he saw the son grab defendant's hand and grab the gun. The court reasonably concluded based on the evidence that the son's "statement relat[ed] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." V.R.E. 803(2).

Finally, defendant argues that the court should have sua sponte granted her a judgment of acquittal on the reckless-endangerment charge because there was insufficient evidence to show that the gun was operable. She asserts that the complainant merely assumed that the clicking noise he heard was from cocking the hammer of the gun and she contends that inoperable guns, such as toy guns, can also make a clicking sound and have hammers that can be cocked. Defendant also notes that there was no evidence that the gun was retrieved or inspected or that ammunition was recovered; the gun was not submitted to the jury for its inspection; and the gun was described as old and rusty. She argues that, even assuming that the gun was loaded, that does not establish its operability. Defendant further asserts that it was not her burden to provide proof of inoperability.

Because defendant failed to move for a judgment of acquittal on this count below, we review only for plain error. State v. Davis, 2020 VT 20, ¶ 18. "[P]lain error exists only in exceptional circumstances where a failure to recognize error would result in a miscarriage of justice, or where there is glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights." Id. ¶ 20 (quotation omitted). "[A] court should move for acquittal [on its own motion] only when the record reveals that the evidence is so tenuous that a conviction would be unconscionable." Id. ¶ 21(quotation omitted).

Defendant fails to satisfy these standards here. Defendant correctly asserts that "[r]eckless endangerment requires proof that a firearm is operable." State v. Longley, 2007 VT 101, ¶ 5, 182 Vt. 452. The evidence of operability in this case was not "so tenuous that a conviction would be

unconscionable." Davis, 2020 VT 20, ¶ 21; see also State v. Kerr, 143 Vt. 597, 603 (1983) (recognizing that State may rely on circumstantial evidence and that "proof of facts includes reasonable inferences properly drawn therefrom"). The State presented evidence that defendant kept a gun in a drawer in her bedroom. On the day in question, she loaded it and threatened to shoot the complainant. The complainant heard a clicking sound. Defendant's son reacted with alarm when he came upon the scene and cried out that the gun was loaded. Defendant told a police dispatcher that her son said she had cocked the trigger and that it was a good thing her adult son showed up when he did or she did not know what would have happened. The State presented sufficient evidence from which the jury could conclude that the gun was operable, and the court did not commit plain error by failing to grant a judgment of acquittal sua sponte. See State v. Messier, 2005 VT 98, ¶ 13, 178 Vt. 412 (finding no error in denial of preserved motion for judgment of acquittal with respect to operability of weapon where, among other things, witnesses "heard the ratcheting noise of the pump action of the gun"); State v. Tillery, 922 A.2d 102, 108 (R.I. 2007) (concluding that jury could reasonable infer possession of operable weapon from defendant's overall conduct on evening in question where defendant was carrying gun, witnesses heard a "click," and defendant threated to shoot someone).

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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William D. Cohen, Associate Justice