MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jamone M. Williams,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 20, 2023

Court of Appeals Case No.
22A-CR-1127

Appeal from the
Allen Superior Court

The Honorable
David M. Zent, Judge

Trial Court Case No.
02D05-2002-F4-18

Memorandum Decision by Senior Judge Baker
Judges Tavitas and Kenworthy concur.

Baker, Senior Judge.

Statement of the Case

[1] Nine-year-old K.D. told his maternal grandmother that Jamone Williams, the husband of K.D.'s paternal grandmother, molested him. Williams was subsequently convicted of two counts of child molesting. He now appeals one of those convictions as well as his sentence. We affirm both.

Issues

[2] Williams presents three issues for our review, which we restate as:

> I. Whether there was a material variance between the charging information and the proof presented at trial on Count I.
>
> II. Whether the trial court erred in sentencing Williams on Count II.
>
> III. Whether the trial court erred by conducting the sentencing hearing in the hospital.

Facts and Procedural History

[3] Growing up, K.D. spent time at the homes of both of his grandmothers. Beginning when K.D. was four years old, Williams, the husband of K.D.'s paternal grandmother, would lay down behind K.D. while he was sleeping on the couch at their home, pull down K.D's pants, and insert his penis into K.D.'s "butt." Tr. Vol. 1, p. 189. Williams also played "the blindfold game" with K.D., in which he would blindfold K.D. and then place his penis in K.D.'s mouth. *Id.* at 192.

[4] In December 2019, nine-year-old K.D. told his maternal grandmother that Williams had molested him. The State charged Williams with Count I child

molesting as a Level 4 felony.[1] Later, over Williams' objection, the State added Count II child molesting as a Level 1 felony. A jury found Williams guilty of both counts. Due to Williams' extremely poor health, he was admitted to the hospital and was there awaiting a procedure at the time of sentencing. The court held the sentencing hearing at the hospital and sentenced Williams to consecutive terms of nine and forty years. Williams now appeals.

Discussion and Decision

I. Material Variance

[5] A variance is an essential difference between the allegations in the charging document and the proof at trial. *Daniels v. State*, 957 N.E.2d 1025, 1030 (Ind. Ct. App. 2011). Williams contends there was a fatal variance between the charging information on Count I and the evidence at trial; however, he did not raise an objection at trial. Consequently, absent fundamental error, the issue is waived. *See Childers v. State*, 813 N.E.2d 432, 436 (Ind. Ct. App. 2004) (failure to make specific objection at trial waives any material variance issue).

[6] Fundamental error is egregious error that requires reversal of a conviction even if there was no objection to the error at trial. *Robey v. State*, 7 N.E.3d 371, 379 (Ind. Ct. App. 2014) (quoting *Hopkins v. State*, 782 N.E.2d 988, 991 (Ind. 2003)), *trans. denied*. The fundamental error doctrine is extremely narrow and applies

[1] Ind. Code § 35-42-4-3 (2014), (2015).

only when the error amounts to a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. *Lehman v. State*, 926 N.E.2d 35, 38 (Ind. Ct. App. 2010), *trans. denied*.

[7] Not all variances are fatal. *Daniels*, 957 N.E.2d at 1030. To determine whether a variance is fatal, we assess whether the variance either (1) misled the defendant in the preparation of his defense such that prejudice resulted or (2) left the defendant vulnerable to double jeopardy in a future criminal proceeding involving the same event and evidence. *Broude v. State*, 956 N.E.2d 130, 136 (Ind. Ct. App. 2011), *trans. denied*.

[8] Here, Williams claims the charging information was insufficiently specific to inform him of the charge he was defending against and to protect him from being tried again on the same charge. The information for Count I reads in part:

> **INFORMATION FOR CHILD MOLESTING**
>
> I.C. 35-42-4-3
>
> Sometime during the period of time between the 1st day of July, 2014 and the 1st day of December, 2019 . . . Jamone M. Williams, did perform or submit to fondling or touching with the Victim, a child who was then under fourteen (14) years of age, with the intent of arousing or satisfying the sexual desires of the Victim or Jamone M. Williams . . . .

Appellant's App. Vol. 2, p. 18. At trial, K.W. testified about the blindfold game, and in its closing, the State told the jury this was the basis for Count I.

The gist of Williams' argument is that fundamental error resulted from the State charging him in Count I under Indiana Code section 35-42-4-3(b), child molesting based on "fondling or touching," instead of Section 35-42-4-3(a), child molesting based on "other sexual conduct" which includes the sex organ of one person and the mouth of the other. *See* Ind. Code §§ 35-42-4-3, 35-31.5-2-221.5 (2014).

[9] At trial, Williams denied that he committed these acts and claimed that K.D.'s maternal grandmother fabricated the allegations out of jealousy. *See* Tr. Vol. 1, pp. 178-80. And he does not suggest his defense would have changed had he been charged under Section 35-42-4-3(a). *See, e.g.*, *Broude*, 956 N.E.2d at 136 (defendant not misled by variance in preparation of defense where he denied any sexual touching such that defense would have been same no matter the factual nature of child molesting allegations).

[10] Further, when multiple criminal statutes could apply to a single crime, the State may prosecute under either provided that it does not discriminate against any class of defendants. *Coy v. State*, 999 N.E.2d 937, 945-46 (Ind. Ct. App. 2013) (quoting *Skinner v. State*, 732 N.E.2d 235, 238 (Ind. Ct. App.), *aff'd by* 736 N.E.2d 1222 (Ind. 2000)). Generally, whether to prosecute and what charges to file are decisions that rest in the prosecutor's discretion. *Id.* at 946. "Moreover, '[t]he State need not prosecute under the more specific of two statutes, nor under the statute carrying the lesser penalty.'" *Coy*, 999 N.E.2d at 946 (quoting *Beech v. State*, 162 Ind. App. 287, 296, 319 N.E.2d 678, 684 (1974)).

[11] Williams neither claims that charging him under Sub-section 35-42-4-3(b) constitutes discrimination against a class of defendants nor contends that his conduct was not chargeable under this sub-section. Instead, he asserts the charge is "misleading," and "absent any specifics as to the act that constitutes touching or fondling," a conviction thereon "in no way precludes a conviction [in a later proceeding] . . . for child molest based on oral sex." Appellant's Br. p. 15.

[12] A charging information must be in writing and state (1) the name of the offense, (2) the statute violated, (3) the elements of the offense charged, and (4) the date, time, and location of the offense to indicate it occurred within the limitations period and within the jurisdiction of the court where filed. Ind. Code § 35-34-1-2(a) (2018). "The State is not required to include detailed factual allegations in a charging information." *Laney v. State*, 868 N.E.2d 561, 567 (Ind. Ct. App. 2007), *trans. denied*.

[13] Count I charged Williams with child molesting under Indiana Code section 35-42-4-3 and alleged that Williams performed or submitted to touching or fondling with a child under the age of fourteen and with the intent to arouse or satisfy the sexual desires of himself or the victim between July 1, 2014 and December 1, 2019. *See* Appellant's App. Vol. 2, p. 18. While we agree that Sub-section 35-42-4-3(a)(1) more precisely describes the oral sex offense in this case, both Sub-sections (a)(1) and (b) were technically applicable to the facts. Therefore, we do not agree with Williams that fundamental error resulted

merely because a different sub-section of the same statute more closely fit the crime.

[14] Further, any alleged variance did not expose Williams to double jeopardy in a later criminal proceeding. The State was not required to precisely spell out in the information how Williams was alleged to have molested K.W. *See Laney*, 868 N.E.2d at 567. As we stated above, the State alleged the offense, the statute violated, the elements of the offense, and identified a date range during which this act was alleged to have occurred. At trial, K.W. testified about the specific details of the blindfold game that Williams engaged in with K.W. within that date range. Double jeopardy principles would preclude another trial and conviction based on the same evidence and facts presented in Williams' first trial.

II. Sentencing

[15] Williams asserts that his Sixth Amendment right to trial by jury was violated when his sentence was enhanced based upon a fact not found by the jury—that the victim was under the age of twelve. The charging and sentencing scheme in this case is as follows:

A. Charging Statute

[16] Williams was charged in Count II with Level 1 felony child molesting for committing an act of other sexual conduct with K.W. when Williams was at least twenty-one years old and K.W. was less than fourteen years old. *See* Appellant's App. Vol. 2, p. 58; Ind. Code § 35-42-4-3(a)(1).

B. Sentencing Statute

[17] For Williams' conviction of Count II, the court sentenced him under Indiana Code section 35-50-2-4 (2014). Sub-section (b) provides for a sentence of between twenty and forty years for a Level 1 felony. Sub-section (c), however, provides that a person who commits Level 1 felony child molesting, as described in the Credit Restricted Felon statute, faces a sentence of between twenty and fifty years.

C. Credit Restricted Felon Statute

[18] Indiana Code section 35-31.5-2-72(1) (2014) defines a credit restricted felon as a person who has been convicted of child molesting involving other sexual conduct if the offense is committed by a person at least twenty-one years old and the victim is less than twelve years old. At Williams' sentencing, the State asked the court to find that Williams is a credit restricted felon due to his conviction on Count II and the evidence at trial of K.W.'s birth date, making K.W. between four and nine years old when the molestations occurred. Tr. Vol. 3, p. 108. The court stated it would "take notice of the facts of the trial for [ ] showing credit restricted on Count II . . . ." *Id.* at 110. Consequently, this determination subjected Williams to an enhanced maximum sentence under Section 35-50-2-4(c)(1).

[19] In support of his Sixth Amendment argument, Williams cites this Court's recent decision in *Holmgren v. State*, 196 N.E.3d 281 (Ind. Ct. App. 2022). At Holmgren's trial the State presented evidence of incidents of molestation

occurring both before and after the victim turned twelve. At sentencing, Holmgren objected to the court's finding that the victim was under the age of twelve at the time of the offense and argued that the victim's age had to be determined by a jury beyond a reasonable doubt. Nevertheless, the court found there was some evidence the victim was under twelve at the time of the molestation and sentenced Holmgren as a credit restricted felon. This determination increased Holmgren's possible penalty on the Level 1 felony from a maximum of forty years to a maximum of fifty years. *See* Sub-sections 35-50-2-4(b), (c).

[20] In deciding Holmgren's appeal, we recalled the holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. We then held that as a matter of first impression, Holmgren's Sixth Amendment rights as described in *Apprendi* were violated by the procedure used by the court to find that the victim was less than twelve years old, thus exposing Holmgren to a greater punishment than that authorized by the jury's guilty verdict. *Holmgren*, 196 N.E.3d at 288 (quoting *Apprendi*, 530 U.S. at 494, 120 S. Ct. at 2365). We concluded that because the court, not the jury, made the determination as to the victim's age, the court could not sentence Holmgren under Sub-section 35-50-2-4(c) without violating her Sixth Amendment rights. *Holmgren*, 196 N.E.3d at 288.

[21] Here, K.D. testified at trial that he was presently eleven years old and that he was four years old when Williams first molested him and nine years old the last time the molestation occurred. Tr. Vol. 1, pp. 182, 191. In addition, K.D., his mother, and his grandmother all testified to his birth date. *Id.* at 182; Tr. Vol. 2, p. 17; Tr. Vol. 3, p. 25. At sentencing, the court determined Williams is a credit restricted felon based on the evidence that K.D. was under twelve. However, unlike Holmgren, Williams concedes in his brief that he failed to object at sentencing. Appellant's Br. p. 20.

[22] "[A] claim is generally considered forfeited if it is not objected to at trial." *Smylie v. State*, 823 N.E.2d 679, 689 (Ind. 2005). In order to avoid such forfeiture here, Williams claims the holding in *Holmgren* is new law that was announced after his sentencing hearing and which counsel could not have anticipated in order to raise an objection at Williams' sentencing. In support of his argument, Williams cites our Supreme Court's decision in *Smylie* in which the Court held that the new rule of constitutional procedure declared in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)[2] would be applied retroactively to all cases on direct review at the time *Blakely* was announced and that "a defendant need not have objected at trial in order to raise a *Blakely* claim on appeal inasmuch as not raising a *Blakely* claim before its

[2] In *Blakely*, a majority of the Supreme Court held that the rule announced in *Apprendi* applied equally to sentencing. *Blakely* concluded that for purposes of *Apprendi*, the statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

issuance would fall within the range of effective lawyering." *Smylie*, 823 N.E.2d at 690-91.

[23] A case announces a new rule of criminal procedure if "'it breaks new ground or imposes a new obligation on the . . . [g]overnment . . . [or] if the result was not dictated by precedent existing at the time the defendant's conviction became final,' . . . or if the result is 'susceptible to debate among reasonable minds. . . .'" *Henderson v. State*, 953 N.E.2d 639, 643 (Ind. Ct. App. 2011) (quoting *State v. Mohler*, 694 N.E.2d 1129, 1132-33 (Ind. 1998)), *trans. denied*. *Holmgren* neither announced a new rule of criminal procedure nor altered the rule set forth in *Apprendi*. Rather, *Holmgren* merely applied the principle set forth in *Apprendi* and its progeny.

[24] Moreover, although cases such as *Smylie* have allowed certain defendants to raise the *Apprendi*/*Blakely* issue for the first time on direct appeal, Williams does not fall into that category of defendants. The *Smylie* rule of retroactive application was specifically limited only to cases on direct review at the time *Blakely* was announced in 2004. Williams was sentenced in 2022, twenty-two years after the *Apprendi* decision, eighteen years after the *Blakely* decision, and seventeen years after the *Smylie* decision. Not only did the *Smylie* rule of retroactivity not apply to Williams' appeal but also the *Apprendi* issue was settled and well-known by the time of Williams' sentencing hearing. Accordingly, we conclude an objection was required to preserve the issue for appeal. Having failed to object, Williams has forfeited his ability to appeal on these grounds. *See Muncy v. State*, 834 N.E.2d 215, 218 (Ind. Ct. App. 2005)

(where defendant asserted his sentence violated his Sixth Amendment right to trial by jury because it was based on aggravators determined by judge not jury, Court held that "Muncy did not object on Sixth Amendment grounds during his sentencing hearing and thereby 'forfeited [his] ability to appeal [his] sentence on *Blakely* grounds.' *Smylie v. State*, 823 N.E.2d 679, 689 (Ind. 2005). Muncy did not raise any *Blakely* concerns during his sentencing hearing in November 2004, even though *Blakely* had been in effect since June 2004.").

III. Location of Sentencing

[25] Lastly, Williams argues it was error for the trial court to hold his sentencing hearing at the hospital. Generally, to preserve an error for review, litigants must raise an objection and state the reasons for that objection. *Hall v. State*, 177 N.E.3d 1183, 1194 (Ind. 2021). A party may not object in general terms but must state their objections with specificity. *Hunter v. State*, 72 N.E.3d 928, 932 (Ind. Ct. App. 2017), *trans. denied*. Moreover, any ground for an objection not specifically stated at trial is not available on appeal, and a party may not add to or change his grounds in the reviewing court. *Id.*

[26] The transcript of the sentencing hearing informs us that the sentencing hearing was held at Parkview Hospital. *See* Tr. Vol. 3, p. 104. At the start of the hearing, the court asked Williams' counsel: "Is it correct that Mr. Williams is waiving his right to be present at sentencing and he does not want to participate . . . and wants to stay in the hospital room and he does not want us to enter? Is that correct?" Tr. Vol. 3, p. 105. Defense counsel responded, "That's correct,

Your Honor. He does want to – he wants to have sentencing somewhere else, but he's not in a position to do that. So, I told him this was going forward today, and he said he didn't want to be present." *Id.*

[27] Counsel's report of Williams' wishes to have the sentencing hearing somewhere other than the hospital does not amount to an objection to the court's procedure. In addition, even if counsel's statement could be construed as an objection, there were no grounds stated for the objection. If Williams believed the court's procedure constituted error, it was incumbent upon him to lodge a specific objection to preserve the error for review. As the alleged error was not preserved for review, it is waived.

Conclusion

[28] Based on the foregoing, we conclude that a variance, if any, between the charging information and the evidence at trial on Count I was not fatal. Additionally, we conclude that Williams failed to preserve any error that may have occurred with regard to his sentencing procedure.

[29] Affirmed.

Tavitas, J., and Kenworthy, J., concur.