MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Suzy St. John
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Tyler G. Banks
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Stephen J. Michael,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 19, 2022

Court of Appeals Case No. 21A-CR-2485

Appeal from the Greene Circuit Court

The Honorable Erik C. Allen, Judge

Trial Court Cause No. 28C01-2010-FA-1

Brown, Judge.

[1] Stephen J. Michael appeals his convictions for rape, sexual misconduct with a minor, child molesting, and incest. Michael raises three issues which we revise and restate as:

I. Whether the trial court abused its discretion in not severing the charges;

II. Whether the trial court abused its discretion in admitting certain social media messages between Michael and S.M.; and

III. Whether the evidence is sufficient to sustain Michael's conviction for sexual misconduct with a minor as a class B felony.

We affirm in part, reverse in part, and remand.

Facts and Procedural History

[2] Michael is the father of S.M., who was born in 1998, E.M., who was born in 2000, and A.M., who was born in 2010. He is also the uncle of C.E., who was born in 1998.

[3] S.M. lived at multiple places while growing up including "a trailer at Newark" and at the residence of her grandmother, C.H. Transcript Volume II at 187. In the summer before her sixth-grade year, while living with C.H., S.M. went to Michael's bedroom to watch a movie. While she was lying down on the bed, Michael began touching her, removed her clothes, and inserted his penis into her vagina. S.M.'s mother walked into the room, saw what was happening, and closed the door. After Michael "kind of [rose] up," S.M. pushed him off of her, put on her clothes, and went to her room. *Id.* at 219.

[4] When S.M. was fourteen or fifteen years old and would arrive at "the woods behind [her great-grandmother's] house," Michael would make her "give him blowjobs" and insert his penis in her vagina. *Id.* at 222.

[5] When S.M. lived in an apartment in Worthington in about 2017 when she was eighteen years old, Michael had a key because "he was considered a maintenance man," which was a job he obtained after S.M. began living at the apartment. *Id.* at 201. While she was living there, Michael unlocked her door at 7:00 or 8:00 a.m. while S.M. was in her bedroom sleeping and attempted to remove her clothes. She told him no several times and "tried to fight him off." *Id.* at 206. Michael touched S.M.'s vagina and penetrated her vagina with his penis. Prior to this incident, Michael "did it a lot to" her, "[t]here [were] a lot of times before the apartment," and the touching began when S.M. was five years old. *Id.* at 203.

[6] Meanwhile, E.M. had a "weird" relationship with Michael. *Id.* at 241. Beginning when she was seven years old and living in Spencer, Michael had sex with her. Michael "would force himself" on her "[m]ostly every 2 weeks" for a period of about six or seven years. *Id.* at 242-243. During one incident when she was thirteen years old, E.M. attempted to push Michael off of her, but he inserted his penis into her vagina. "It stopped when [she] moved out when [she] was" nineteen years old. Transcript Volume III at 3.

[7] Michael also "touched" and "raped" A.M. beginning when she was five or six years old and ending when she was seven or eight years old. *Id.* at 27-28.

During the first incident, Michael touched A.M.'s vagina, inserted his fingers into her vagina, and grabbed her hand to make her touch his penis.

[8] In 2009, C.E.'s mother left C.E. and her two other children with her sister, Teresa Michael, and Michael. In late 2009 or early 2010, C.E.'s mother moved back to Indiana and stayed with C.H. "[o]ff and on from 2009 to 2012." *Id.* at 39. C.E. lived with C.H. from 2008 to 2011 and moved back in again in 2012. During another period of time when C.E. was eight or nine years old, C.E. lived with Michael and Teresa in Newark when her mother went to Ohio. In Newark, Michael came into her room she shared with S.M. and E.M. C.E. had her own bed at the beginning but then she and S.M. "ended up sharing a bed because [they] were scared" of Michael "coming in and touching" them. *Id.* at 46. While in Newark, Michael touched C.E. "a lot of times." *Id.* at 48. After C.E. moved to C.H.'s house, Michael would ask her if she wanted "to go to the Dollar Store or something" and they would go "have intercourse at . . . the sewer treatment place." *Id.* at 50. Specifically, C.E. "would lay in the backseat of the vehicle," and Michael engaged in "vagina intercourse" with her. *Id.* at 54. This occurred "a lot" and "quite a few times within a month." *Id.* at 50, 55.

[9] At some point, there was "a big family meeting" where Michael was confronted with the allegations, Michael promised that he would never do it again, but "then a week later he ended up doing it again."[1] *Id.* at 3.

[10] Over Labor Day weekend in 2020, S.M. told her boyfriend that Michael had done sexual acts to her. Her boyfriend became "really mad," and S.M. knew he was going to "try to do something that he shouldn't do because he would end up in jail." Transcript Volume II at 193. She told Michael, who was grilling, to go behind the shed because her boyfriend knew what he did. Michael did not respond and just listened and walked where S.M.'s boyfriend could not see him. S.M., A.M., and S.M's boyfriend left and went to the home of the mother of S.M.'s boyfriend where S.M. and A.M. told them what Michael had done to them. S.M.'s boyfriend and his mother decided to make a report.

[11] Michael contacted S.M. He sent S.M. a message via Facebook and asked S.M.: "So do I need to pack your guy stuff in your and his car?" Exhibits Volume 4 at 13. S.M. informed Michael that CPS was being called and that CPS said that A.M. needed to stay with her. Michael asked, "Why?" *Id.* at 14. S.M. answered: "Because of the things you have done." *Id.* Michael asked: "How did this come up[?]" *Id.* After additional messages, S.M. stated: "You can

[1] E.M. testified that after the family meeting she noticed her younger sister was not wearing any clothes while she usually slept clothed. Transcript Volume III at 3. During cross-examination, she indicated that she never actually saw Michael touch A.M. but that is what she thought happened.

thank your other daughter for this being brought up [by the way]" and identified the other daughter as E.M. *Id.* at 15.

[12] On October 16, 2020, the State charged Michael with: Count I, rape as a level 3 felony; Count II, sexual misconduct with a minor as a class B felony; Count III, incest as a level 5 felony; Count IV, child molesting as a class A felony; Count V, sexual misconduct with a minor as a level 4 felony; Count VI, sexual misconduct with a minor as a class B felony; Count VII, incest as a level 4 felony; Count VIII, rape as a class B felony; Count IX, child molesting as a class A felony; Count X, child molesting as a level 4 felony; and Count XI, child molesting as a level 4 felony. Counts I through IV related to Michael's alleged conduct with S.M., Counts V through IX related to his alleged conduct with E.M., and Counts X and XI related to his alleged conduct with A.M. On November 16, 2020, the State charged Michael with three counts of child molesting as class A felonies as Counts XII through XIV relating to his alleged conduct with C.E.

[13] On February 5, 2021, Michael filed a Motion for Severance of Counts arguing that he had the right to have the offenses severed from one another because the charges were joined solely on the ground that they were of the same or similar character. He also asserted that he would be prejudiced if he was tried on the charges at one trial.

[14] On March 11, 2021, the court held a hearing on Michael's motion and took the matter under advisement. On April 12, 2021, the court entered an order

denying the motion for severance. Specifically, the court concluded that the circumstances of *Pierce v. State*, 29 N.E.3d 1258 (Ind. 2015), were "incredibly similar to the alleged facts of the instant case" and that *Pierce* was controlling authority. Appellant's Appendix Volume II at 125. It also concluded that severance was not required under Ind. Code § 35-34-1-11(a)(1), (2), and (3), and Michael would receive a fair determination of his guilt or innocence without severance.

[15] In September 2021, the court held a jury trial. After the jury was selected, Michael's counsel moved for severance of the counts, and the court denied the motion. The State presented the testimony of Worthington Police Chief James O'Malley, S.M., E.M., A.M., C.E.'s mother, C.H., Norman Parnell, an inmate at the Greene County Jail, and Indiana State Police Detective Stacy Brown.

[16] S.M. testified that she recognized State's Exhibit 4 as messages between her and Michael. When asked if it was fair to say that the general topic would be viewing pornography, S.M. answered affirmatively. She indicated that the exhibit accurately represented the conversation she had with Michael on February 2, 2020. When the prosecutor moved to admit the exhibit, Michael's counsel objected on the basis of foundation and relevance and asserted that the "prejudicial value outweighs the probative value of this document as after the fact of any alleged abuse." Transcript Volume II at 211. The prosecutor argued the messages "go towards his continued attempts to commit the crime of incest at least and goes to his overall intent of sexually violating his daughter, S.M."

Id. The court admitted State's Exhibit 4 over objection and stated that "it is relevant to the intent issue." *Id.*

[17] State's Exhibit 4 contains Facebook messages between S.M. and Michael in which one of the messages referred to watching porn.[2] S.M. stated "[d]o you think that will help," "[h]e says I need to try to masterbait [sic]," and "[b]ut I can't do that." Exhibits Volume 4 at 8. Michael wrote "[m]aybe something turn on [sic]" and "[j]ust look." *Id.* When S.M. wrote that she was not even sure where to start, Michael suggested a website, told her to "[l]ook up any thing that may turn you on" including "[b]ig dicks creampie" and "[g]irl on girl." *Id.* at 8-9. Michael asked when she had off, stated that he could "show [her] some," and "[s]o that a date." *Id.* at 10-11.

[18] When asked by the prosecutor why she was talking about watching pornography with Michael, she answered that she discovered that her boyfriend at the time had been watching pornography and she had texted Michael "to basically vent to him about my situation that was happening." Transcript Volume II at 212. She stated that she openly talked with Michael "about everything." *Id.* She also testified that the conversation had made her uncomfortable, she was "just trying to vent" about how she felt, and "it became something I was not expecting." *Id.* at 214.

---

[2] State's Exhibit 4 does not reveal the sender of the message which stated: "Watch porn." Exhibits Volume 4 at 8.

[19] Parnell testified that he had contact with Michael while he was incarcerated and that Michael said: "I didn't know fondling was a child molestation." Transcript Volume III at 77.

[20] The jury found Michael guilty as charged. On October 13, 2021, the court sentenced Michael to an aggregate sentence of 129 years.

Discussion

I.

[21] The first issue is whether the trial court abused its discretion in not severing the charges. Michael argues that he was entitled to severance of charges related to C.E. as a matter of right. Specifically, he argues that his relationship to C.E. did not create an interconnected police investigation, C.E.'s name did not surface in the original investigation, there was no overlap between the location of the offenses regarding C.E. and the other charged offenses, and the molestation of C.E. was not strikingly similar to that of the other victims. He contends that, even if he was not entitled to severance as a matter of right, severance was necessary to promote a fair determination of guilt or innocence. He also points to comments of two of the prospective jurors as evidence of prejudice.

[22] The degree of deference owed to a trial court's ruling on a motion for severance depends on the basis for joinder. *Pierce v. State*, 29 N.E.3d 1258, 1264 (Ind. 2015). Where the offenses have been joined solely because they are of the same or similar character, a defendant is entitled to severance as a matter of right. *Id.*

(citing Ind. Code § 35-34-1-11(a) (2008)). The trial court thus has no discretion to deny such a motion, and we will review its decision de novo. *Id.* "But where the offenses have been joined because the defendant's underlying acts are connected together, we review the trial court's decision for an abuse of discretion." *Id.*

[23] Ind. Code § 35-34-1-11 provides:

> (a) Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
>
> (1) the number of offenses charged;
>
> (2) the complexity of the evidence to be offered; and
>
> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

[24] In *Pierce*, the Indiana Supreme Court held:

> [E]stablishing the defendant's unique method of committing the crimes is not the exclusive way of showing his acts are connected together. Offenses can also be linked by a defendant's efforts to take advantage of his special relationship with the victims. *E.g., Turnpaugh v. State*, 521 N.E.2d 690, 692 (Ind. 1988) (finding child molestation charges were connected together where the victims were two young sisters who were overnight guests of the defendant); *Booker v. State*, 790 N.E.2d 491, 495

> (Ind. Ct. App. 2003) (finding child molestation charges were connected together where the defendant was hired to care for the two young victims)[, *trans. denied*]. Our Court of Appeals found such a connection where a Child Protective Services caseworker met two teenage boys through his work. *Heinzman v. State*, 895 N.E.2d 716, 719 (Ind. Ct. App. 2008)[, *trans. denied*]. The defendant forced one of the boys to perform oral sex, and he inappropriately touched the other, resulting in various sex offenses. *Id.* He had no right to separate trials because the offenses were joined on the basis that he "abused his position as a caseworker to perpetuate his child molesting scheme." *Id.* at 721.
>
> A common relationship between the defendant and the victims may even result in an interconnected police investigation into the crimes, producing overlapping evidence. *Blanchard v. State*, 802 N.E.2d 14, 25 (Ind. Ct. App. 2004) (finding crimes were connected where the death of one of defendant's sons was discovered during the investigation into the neglect of the other). In *Philson v. State*, for instance, the defendant was charged with various offenses for molesting his younger brother in a bathroom and raping his older sister in a closet. 899 N.E.2d 14, 16 (Ind. Ct. App. 2008)[, *trans. denied*]. Although the crimes were committed in different ways against different victims, they were connected together because both were "against his siblings in the same house over the same period, 2005-2006" and the "allegation with respect to the rapes of [his sister] surfaced in the course of the investigation into the molestations of [his brother]." *Id.* at 17.

29 N.E.3d at 1266.

[25] The record reveals that Michael's offenses were connected by his victims, his method, and his motive. Michael exploited his position as a father and uncle. C.E. testified that, during the time she lived in C.H.'s home, she lived there with Michael's children. She testified that Michael came into her room she

shared with S.M. and E.M. in Newark and she had her own bed at the beginning but then she and S.M. "ended up sharing a bed because [they] were scared" of Michael "coming in and touching" them. *Id.* at 46. Detective Brown testified regarding the residence on "Newark Road" and stated that when she "drove 'S' and 'C.E.' to this location, they both identified this as a, a residence that they lived in with the Michaels and that some of the incidents of abuse did occur at this location." Transcript Volume III at 97. We conclude that Michael's criminal acts were sufficiently connected and he was not entitled to severance.[3]

II.

[26] The next issue is whether the trial court abused its discretion in admitting Facebook messages between Michael and S.M. Michael argues the messages admitted as State's Exhibit 4 lacked relevance and "[t]his evidence had no other purpose but to show Michael's propensity toward behaving sexually around his daughter." Appellant's Brief at 31. He also argues the likelihood that the messages influenced the jury's decision is great because the decision depended on weighing the credibility of witnesses. The State argues that Exhibit 4 was

---

[3] Michael mentions that one prospective juror called the fact of fourteen charges "horrific" and another asked, "You have four different people [accusing] and all four of them are lying?" Appellant's Brief at 27 (quoting Transcript Volume II at 146, 85). We note that the trial court dismissed the prospective juror who stated that "you have 4 different people and are all 4 of them lying?" Transcript Volume II at 85. With respect to the prospective juror who stated that the fourteen charges were horrific, we note that the record lists the prospective juror merely as "JUROR." *Id.* at 146. It appears that the prosecutor and defense counsel were questioning two prospective jurors during this time, and the court excused one of the prospective jurors and designated the other juror as an alternate. *See id.* at 144-147. Michael develops no argument that the juror who made the comment was not the excused prospective juror.

relevant to show the relationship between S.M. and Michael and also show him attempting to create the opportunity to have another sexual encounter with her. It asserts that the messages demonstrated Michael's sexual attraction for his daughter and the continued grooming behavior he employed. It further contends that any error was harmless in light of S.M.'s unequivocal testimony and that of the other victims.

[27] Ind. Evidence Rule 404(b)(1) provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Rule 404(b)(2) provides: "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

[28] The standard for assessing the admissibility of Rule 404(b) evidence is: (1) the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) the court must balance the probative value of the evidence against its prejudicial effect pursuant to Ind. Evidence Rule 403. *Boone v. State*, 728 N.E.2d 135, 137-138 (Ind. 2000), *reh'g denied.* The purpose of the rule is to prevent the jury from making the "forbidden inference" that a defendant is guilty of the charged offense on the basis of other misconduct. *Hicks v. State*, 690 N.E.2d 215, 218-219 (Ind. 1997). The trial court has wide latitude in weighing the probative value of the evidence against the possible prejudice of its admission. *Crain v. State*, 736 N.E.2d 1223, 1235 (Ind. 2000). If evidence has

some purpose besides behavior in conformity with a character trait and the balancing test is favorable, the trial court can elect to admit the evidence. *Boone*, 728 N.E.2d at 138. For instance, evidence which shows the defendant's motive or plan may be admissible. *See* Ind. Evidence Rule 404(b)(2). Errors in the admission of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party. *McClain v. State*, 675 N.E.2d 329, 331 (Ind. 1996); Ind. Trial Rule 61. In determining whether error in the introduction of evidence affected the defendant's substantial rights, we assess the probable impact of the evidence upon the jury. *McClain*, 675 N.E.2d at 331.

[29] The Facebook messages between S.M. and Michael reveal that Michael instructed S.M. to "[j]ust look" at pornography. Exhibits Volume 4 at 8. He suggested a website and told her to "[l]ook up any thing that may turn you on" including "[b]ig dicks creampie" and "[g]irl on girl." *Id.* at 8-9. Michael asked when she had off, stated that he could "show [her] some," and "[s]o that a date." *Id.* at 10-11. The evidence explained his motive and demonstrated his relationship with S.M. and his plan to create an opportunity to have another sexual encounter with her. We cannot say that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Further, based upon the substantial independent evidence of guilt including S.M.'s testimony, any error in the admission of the messages did not affect Michael's substantial rights.

III.

[30] The next issue is whether the evidence is sufficient to sustain Michael's conviction under Count VI, sexual misconduct with a minor as a class B felony. Under Count VI, the State alleged:

> [O]n or about 6/22/2014 to 6/21/2015 in Greene County, State of Indiana, Stephen Michael, who was at least 21 years of age, with a child at least 14 years of age but less than 16 years of age, to-wit: Victim #2 (DOB):6/22/2000), age 14, did perform or submit to sexual intercourse contrary to the form of the statutes in such cases made and provided by I.C. 35-42-4-9(a)(1), and against the peace and dignity of the State of Indiana.

Appellant's Appendix Volume II at 31. The charging information contains a handwritten notation indicating it was a class B felony.

[31] Prior to July 1, 2014, Ind. Code § 35-42-4-9 provided that "[a] person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits sexual misconduct with a minor" and that "the offense is . . . a Class B felony if it is committed by a person at least twenty-one (21) years of age." Effective July 1, 2014, Ind. Code § 35-42-4-9 was amended to provide that "[a] person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) commits sexual misconduct with a minor," and

"the offense is . . . a Level 4 felony if it is committed by a person at least twenty-one (21) years of age."

[32] Michael argues that insufficient evidence proves sexual intercourse with E.M. during the charged period between June 22 and June 30, 2014, and, due to an amendment in the statute, "[t]he distinction becomes important because July 1, 2014, represents the dividing line between sexual misconduct with a minor as a Class B or Level 4 felony." Appellant's Brief at 35. He asserts that, based on E.M.'s testimony, it is difficult to tell whether the offense occurred before July 1, 2014, to find Michael guilty of the class B felony. The State agrees that remand is proper and that, "while there was evidence of continuing sexual contact between E.M. and Michael, no evidence was presented placing one of those instances in the eight-day time period necessary to sustain a Class B felony conviction." Appellee's Brief at 26. Under these circumstances, we remand to the trial court to enter Count VI as a level 4 felony and sentence Michael accordingly.

[33] For the foregoing reasons, we affirm Michael's convictions for Counts I through V and VII through XIV, reverse his conviction for Count VI, and remand to enter a conviction for Count VI as a level 4 felony and sentence him accordingly.

[34] Affirmed in part, reversed in part, and remanded.

Altice, J., and Tavitas, J., concur.