## MEMORANDUM DECISION

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

Brian A. Karle
Ball Eggleston, P.C.
Lafayette, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Deputy Attorney General
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

Rick S. Jarboe,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff*

July 19, 2021

Court of Appeals Case No. 20A-CR-2241

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause No. 79D02-1905-F6-603

**Bailey, Judge.**

# Case Summary

[1] Following a jury trial, Rick S. Jarboe ("Jarboe") appeals his conviction of battery, as a Level 6 felony.[1] The only issue he raises on appeal is whether he was denied his due process right to fair notice of the charges against him.

[2] We affirm.

# Facts and Procedural History

[3] For four or five months ending in April of 2019, four-year-old J.M. ("Child") and his mother, A.K. ("Mother"), lived with Mother's boyfriend, Jarboe, in a house in Lafayette. On April 18, 2019, Mother went to work at approximately 6:00 a.m. and left Child in Jarboe's care. Mother had bathed Child the night before and observed no marks on his body.

[4] While Child was in Jarboe's care that morning, Jarboe spanked Child. Following the spanking, Jarboe dropped Child off at Child's grandfather's house where Child would be cared for by his teenaged cousin, Z.K. Child showed Z.K. Child's buttocks, Z.K. took photographs of the same, and Z.K. sent a photograph by text message to Mother that same morning. Mother then texted Jarboe and accused him of hitting Child and putting his fingers in Child's

---

[1] Ind. Code § 35-42-2-1(c)(1), (e)(3) (2019).

mouth. In his return text messages, Jarboe admitted to spanking Child but denied putting his fingers in Child's mouth.

[5] After texting Mother, Z.K. also telephoned Child's grandmother ("Grandmother") and sent her a photograph of Child's buttocks. Grandmother called the police, then picked up J.M. and took him to her home where she inspected Child's buttocks and mouth.

[6] On May 22, 2019, the State charged Jarboe with one count of battery that took place on April 18, 2019, on a person less than fourteen years old, a Level 6 felony. The charging information for Count I stated in relevant part:

> On or about April 18, 2019, in Tippecanoe County, State of Indiana, Rick Steven Jarboe, a person at least eighteen (18) years of age, did knowingly or intentionally touch [J.M.], a person under the age of fourteen (14), in a rude, insolent, or angry manner;
>
> All of which is contrary to the form of the statute in such cases made and provided, to wit: I.C. 35-42-2-1(c)(1) and I.C. 35-42-2-1(e)(3), and against the peace and dignity of the State of Indiana.

App. at 13. The probable cause affidavit accompanying the charge discussed (1) a forensic interview of Child conducted on April 25, 2019, (2) Child's accusations that Jarboe struck him on the buttocks with a board, (3) text messages between Mother and Jarboe in which Jarboe admitted to striking Child; and (4) Z.K.'s statements that, on April 18, she observed injury to Child's buttocks and took photographs of the same.

[7] The State subsequently amended the charge against Jarboe to include a second count. The charging information for Count II was identical to the Count I charging information except that the former included the words "said act resulting in bodily injury to Victim 1" at the end of the first paragraph and cited subsection (g)(5)(B) of the statute—relating to bodily injury—rather than subsection (e)(3).[2] *Id*. at 46. No additional probable cause affidavit accompanied the amended charge.

[8] On September 15, 2020, the court conducted a hearing regarding the State's Notice of Intent to Offer Recorded Interview of a Protected Person. Dawn Dobyns Gross ("Gross"), the forensic interviewer, testified about her interview with Child and noted that Child discussed Jarboe spanking him on the buttocks with a board and, "on a different day," "jamm[ing]" his fingers "down [Child's] throat." Tr. v. II at 19. However, Jarboe objected to the court ruling on the admissibility of the recorded statement until the court heard Child testify. Therefore, following the testimony of the forensic interviewer, the hearing was "suspended" to October 5. *Id*. at 26; App. at 9.

[9] On October 5, following selection and preliminary instruction of the jury, the jury was excused until trial began the following morning. Following release of the jury, the suspended hearing on the admissibility of Child's recorded statement resumed. Jarboe asked Gross on re-cross examination about Child's

---

[2] I.C. § 35-42-2-1(c)(1), (g)(5)(B).

interview statements relating to Jarboe "putting fingers in [Child's] mouth or down his throat." Tr. v. II at 65-67. Child also testified at the October 5 resumption of the previously suspended hearing and, when the State asked Child whether Jarboe did anything to Child's mouth, Child stated that Jarboe stuck his fingers down Child's throat. Jarboe conducted cross examination of Child but did not ask Child about the fingers-in-the-mouth allegation.

[10] At the conclusion of the hearing, Jarboe objected to the admission of the recording of Child's interview for lack of relevance other than "bolstering" Child's future jury trial testimony. *Id*. at 88-89. Jarboe also objected to the admission of specific portions of Child's recorded statements relating to the fingers-in-the-mouth allegation because "that's not charged." *Id*. at 89. The State responded that the fingers-in-the-mouth allegation was part of both battery counts because "[i]t happened at the same time" as the spanking. *Id*. at 90, 93-94. The trial court denied what it called Jarboe's "Motion in Limine"[3] seeking to exclude J.M.'s video testimony relating to the fingers-in-the-mouth incident, noting that Jarboe "has been put on notice of this as part of the single episode of the battery, of the alleged battery." *Id*. at 106.

[11] At Jarboe's subsequent October 6 jury trial, the State's evidence included testimony from J.M., Z.K., Mother, and Grandmother. J.M. testified that Jarboe spanked him with a board on April 18, 2019. He also testified that

---

[3] Jarboe's Motion in Limine is not included in the appellate record and could not be located in the trial court records on the State courts' computer system, Odyssey.

Jarboe stuck his fingers in his mouth. Z.K. testified that, when she saw J.M. on April 18, J.M. showed her his bottom and she took pictures of it and texted them to Mother. Mother testified that she then texted Jarboe about the spanking and sticking his fingers down Child's throat, and the texts between Mother and Jarboe were admitted into evidence. The text messages from Mother included the pictures Z.K. had taken of Child's buttocks, and those pictures were also separately admitted as evidence. Grandmother testified that she is a certified clinical medical assistant. She further testified that, after she picked Child up from Z.K. later that day, Child complained of pain on his buttocks and in his mouth. Grandmother testified that she inspected Child's mouth and observed "open scrape mark sores" in Child's mouth. Tr. v. II at 122. Grandmother testified that she also observed an open wound on Child's tailbone. She testified that it took approximately one week for Child's mouth to heal and two weeks for his bottom to heal. The State was permitted to admit into evidence and publish the video recording of Child's forensic interview, over Jarboe's renewed objection.

[12] The jury found Jarboe guilty of Count I, battery, and not guilty of Count II, battery with bodily injury. Jarboe was sentenced accordingly, and this appeal ensued.

# Discussion and Decision

[13] Jarboe contends that his due process right to adequate notice of the charges against him was violated because neither the charging informations nor the

probable cause affidavit referenced the fingers-in-the-mouth incident as a basis for the battery charge. As an initial matter, the State maintains that Jarboe waived his claim. The State acknowledges that Jarboe objected to the admission of the video recording of Child's forensic interview to the extent it addressed the fingers-in-the-mouth touching because it was "not charged." Tr. v. II at 89. Nevertheless, the State asserts that the due process issue is waived because Jarboe failed to raise it below in a motion to dismiss. *See, e.g.*, *Pava v. State*, 142 N.E.3d 1071, 1075 (Ind. Ct. App. 2020) (noting that, generally, a constitutional claim is waived on appeal if not first presented in the trial court in a motion to dismiss), *trans. denied*. However, this court has discretion to review a constitutional claim even if it was otherwise waived. *Giden v. State*, 150 N.E.3d 654, 658 (Ind. Ct. App. 2020), *trans. denied*. Given that Jarboe raised an objection in the trial court regarding evidence of the fingers-in-the-mouth incident and both the State and the trial court addressed that objection, and given our preference for addressing issues on the merits instead of procedural grounds like waiver, *e.g.*, *Hale v. State*, 54 N.E.3d 355, 359 (Ind. 2016), we now exercise our discretion to review the due process issue even though it was not raised in a motion to dismiss. Our review of that constitutional claim is de novo. *See, e.g.*, *Dycus v. State*, 120 N.E.3d 586, 589 (Ind. 2018).

[14] Criminal defendants have a due process right under both the State and federal constitutions to clear notice of the charges against them. U.S. Const. amend. VI; Ind. Const. art. 1, § 13. The purpose of a charging information is to provide that notice. *Tanoos v. State*, 137 N.E.3d 1008, 1015 (Ind. Ct. App. 2019) (noting

a charging information must "provide a defendant with notice of the crime of which he is charged so that he is able to prepare a defense"), *trans. denied*. Thus, an indictment or charging information must include: the title of the action and the name of the court; the "name of the offense in the words of the statute or any other words conveying the same meaning;" a citation to the statutory provision alleged to have been violated; the nature and elements of the offense; the date of the offense; the place of the offense; and the name of the defendant. I.C. § 35-34-1-2(a).

[15] However, the State "is not required to include detailed factual allegations in a charging information." *Grimes v. State*, 84 N.E.3d 635, 640 (Ind. Ct. App. 2017), *trans. denied*. Rather, the absence of a detail in a charging information "is fatal only if the phraseology misleads the defendant or fails to give him notice of the charges against him." *Little v. State*, 501 N.E.2d 447, 451 (Ind. 1986); *see also Evans v. State*, 497 N.E.2d 919, 922 (Ind. 1982) ("Where the charging instrument informs the defendant of the offense with which he is charged, the time and the place of its commission, the victim's identity and the type of weapon used, the instrument is drafted with sufficient specificity and need not disclose the specific conduct by defendant which led to the injury."); *Pavlovich v. State*, 6 N.E.3d 969, 975 (Ind. Ct. App. 2014) (holding an information was not defective for failing to state precisely how the crime was committed where the information tracked the language of the criminal statute and "alleged commission of every necessary element of that crime"), *trans. denied*.

[16] Here, the State charged Jarboe, in the alternative, with two counts of battery.[4] The charging instruments tracked the language of the relevant subsections of the criminal statute and alleged commission of every necessary element of the crime. I.C. § 35-42-2-1(c)(1), (e)(3), (g)(5)(B). Therefore, the charging informations met the specificity requirements of state law and due process. *See* I.C. § 35-34-1-2(a); *Grimes*, 84 N.E.3d at 640. The charging instruments were sufficient to enable Jarboe to determine the crime for which a conviction was sought—i.e., the crime of touching J.M. in a rude, insolent, or angry manner on April 18, 2019, in Tippecanoe County per Count I, or doing the same which resulted in bodily injury per Count II. *See id*. While Jarboe maintains that the charging informations, together with the probable cause affidavit, were insufficient to notify him that the act of battery included both the spanking of J.M. and the fingers-in-the-mouth incident, neither state statute nor due process requires that such factual detail be alleged in the charging instruments.[5] *Id*.

[17] Moreover, although the absence of factual details in the charging instruments did not deprive Jarboe of notice of the charges against him or mislead him as to those charges, *Grimes*, 84 N.E.3d at 640, the trial court correctly found that

---

[4] The State brought the two counts in the alternative because the offense in Count I is included in the offense in Count II. *See, e.g.*, *Wadle v. State*, 151 N.E.3d 227, 249 (Ind. 2020) ("[I]f the facts show only a single continuous crime, and one statutory offense is included in the other, then the prosecutor may charge these offenses only as alternative (rather than as cumulative) sanctions" for purposes of double jeopardy). The jury found Jarboe guilty of count I only.

[5] Thus, we need not look to the probable cause affidavit filed with the first count of battery, as Jarboe suggests. It is only where a charging instrument lacks "appropriate factual detail" that we look to additional materials, such as a probable cause affidavit, to determine whether a defendant was given notice of the charges against him. *Gutenstein v. State*, 59 N.E.3d 984, 995 (Ind. Ct. App. 2016), *trans. denied*.

Jarboe nevertheless had actual, pre-trial notice of the facts upon which the State intended to rely to establish the crime of battery. Prior to trial, the State gave notice of its intent to introduce into evidence the recording of Child's forensic interview, during which Child stated that Jarboe hit his buttocks with a board and stuck his fingers in Child's mouth. At a pre-trial hearing related to that Notice, Jarboe had the opportunity to—and did—cross examine the forensic interviewer and object to introduction of the evidence related to the fingers-in-the-mouth allegation. In addition, the State made it clear at that same hearing that it was not alleging separate battery offenses but one single incident of battery that consisted of both hitting J.M. and putting fingers in J.M.'s mouth.[6] Thus, although the charging informations provided Jarboe with all the notice required by state law and due process, Jarboe nevertheless had additional, actual pre-trial notice of the detailed factual allegations related to the charged crime of battery.

# Conclusion

[18] Jarboe was not denied his due process right to fair notice of the charges against him.

---

[6] To the extent Jarboe contends that the State actually included two separate and distinct offenses in one battery count, he is mistaken. The State alleged that Jarboe hit J.M. and stuck his fingers in J.M.'s mouth all during the same incident of battery on April 18, 2019. Although there was conflicting evidence regarding whether the fingers-in-the-mouth incident occurred at a different time, it was up to the jury to determine the credibility of the witnesses and weigh the evidence on that point.

[19] Affirmed.

May, J., and Robb, J., concur.