MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kenton Hall,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 2, 2022

Court of Appeals Case No. 22A-CR-282

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause No. 79D02-2003-F1-7

Bradford, Chief Judge.

Case Summary

[1] On March 17, 2020, Kenton Hall, was living with his girlfriend Maree N. and her four children. That evening after Maree had gone to sleep, Hall forced eight-year-old E.N. to perform oral sex on him. One of E.N.'s siblings, who had become suspicious of Hall's behavior that evening, alerted Maree, who caught Hall with E.N. After Maree called Hall a child molester, he told her that he "should just f***ing kill [her] right now." Tr. Vol. 56. Maree left with her children, and Hall was eventually arrested. The State charged Hall with Level 1 felony child molesting, Level 4 felony child molesting, and Level 6 felony intimidation. While in jail, Hall called Maree multiple times, in violation of a no-contact order issued by the court, telling her that he had attempted to kill himself after she had called the police. Subsequently, the State added two additional charges of Class A misdemeanor invasion of privacy.

[2] Prior to trial, Hall moved to sever the Class A misdemeanor invasion of privacy charges from the others, which motion the trial court denied. Hall also filed a motion in limine requesting that the trial court exclude all evidence of his suicide attempt, arguing such evidence would be unfairly prejudicial, which motion the trial court denied and which evidence was ultimately published to the jury. Hall was found guilty as charged and sentenced to an aggregate thirty-eight years of incarceration. Hall argues on appeal that the trial court abused its discretion in admitting evidence of his suicide attempt, the trial court abused its discretion in refusing to sever his invasion of privacy charges from his other charges and his sentence is inappropriate. We affirm.

Facts and Procedural History

[3] As of March of 2020, Maree had four children: A.N.-1, an 11-year-old daughter; A.N.-2, a 9-year-old son; E.N., an 8-year-old daughter; and, A.N.-3, a six-year-old daughter. At that time, Hall was Maree's boyfriend and lived with Maree and her children in a two-story townhouse in West Lafayette.

[4] On the night of March 17, 2020, Maree went to bed around 9:30 p.m. At the time Maree went to bed, all of the children were downstairs on the couch with Hall. Later, A.N.-1 and E.N. went upstairs to the bedroom which all the children shared and played on A.N.-1's phone while A.N.-3 went to sleep. A.N.-2 stayed downstairs and played a video game with Hall.

[5] At some point, Hall came upstairs to the children's bedroom and told E.N. to come downstairs to talk with him. The two went to the staircase, where Hall had E.N. place her mouth on his penis. A.N.-1 felt that E.N. was gone a long time, so she went to the staircase to check on them. Hall saw A.N.-1 and asked, "How much?" Tr. Vol. II p. 112. A.N.-1 asked, "How much for what?" and Hall replied, "To keep you quiet[.]" Tr. Vol. II p. 126. After Hall kept insisting, A.N.-1 finally said $20.00, so he gave her a $20.00 bill. A.N.-1 returned to the bedroom, and E.N. returned about five minutes later after telling Hall that she was tired.

[6] About ten minutes later, Hall returned to the children's bedroom, asked for E.N. again, and the two returned to the staircase. Hall again had E.N. put her

mouth on his penis, but E.N. returned to the bedroom a few minutes later and spoke with A.N.-1.

[7] The third time Hall retrieved E.N. he took her into the bedroom across the hall from the kids' bedroom, which was a locked room where Hall kept bicycles he worked on to sell. Inside, Hall pulled down his pants and underwear just past his knees and kneeled down against the wall. Hall instructed E.N. to kneel, so she did, and Hall removed her shirt. Hall told E.N. to "suck it," and, afraid Hall would hurt her if she did not comply, she put her mouth on his penis. Tr. Vol. II p. 81.

[8] After Hall took E.N. for a third time, A.N.-1 went downstairs and woke Maree. Maree and A.N.-1 returned upstairs and pushed open the door to the bicycle room. Hall had his legs spread and his genitals exposed, with his shorts below his knees and E.N. was on her knees between Hall's legs with no shirt on and her head inches from Hall's genitals. Hall jumped up, pulled up his pants, and told Maree that he was just talking to E.N. Maree and Hall then started to argue. When Maree called Hall a child molester, he told her that he "should just f***ing kill you right now." Tr. Vol. p. 56. Hall also repeatedly told Maree not to call the police.

[9] Eventually, Maree and the children left and went to the McDonald's where Maree worked. (Maree clocked in at 3:00 a.m. Around 9:00 a.m., E.N. used the restroom and saw blood coming from her "private area" when she wiped.

Tr. Vol. II p.104. Maree texted Hall that E.N. was bleeding and she was calling the police. In response, Hall slit his wrists in an attempted suicide.

[10] The State charged Hall with Level 1 felony child molesting, Level 4 felony child molesting, and Level 6 felony intimidation. On March 23, 2020, a no-contact order was issued against Hall with regard to Maree and the four children. (Tr. Vol. II at 46; State's Ex. 3). Despite this order, Hall made several calls to Maree from the jail. (Tr. Vol. II at 47; State's Ex. 4A). During one call, Hall tried to convince Maree to scare E.N. into recanting her story and warned Maree that they could not have a baby or be married unless E.N. changed her statement. (State's Ex. 4A at 4/6/2020). On a call the next day, while confronting her about when she contacted police, Hall told Maree that he had slit his wrists when she had texted him that she was calling the police because E.N. was bleeding. The State subsequently added two counts of Class A misdemeanor invasion of privacy for these calls. (App. Vol. II at 71-73).

[11] Hall's jury trial was held in October of 2020. Prior to trial, the trial court denied Hall's motion in limine requesting that the trial court exclude all evidence of Hall's suicide attempt. Despite making some statements which suggest that he intended to object, Hall did not object to Maree's testimony of the suicide attempt or to the admission of the jail call. After the evidence had been admitted during trial, Hall renewed his motion in limine, and the State and trial court noted that the evidence had already been admitted. When the jail calls were later published to the jury, Hall renewed his objection, and the trial court again overruled it. Hall was found guilty of Level 1 felony child

molesting, Level 4 felony child molesting, Level 6 felony intimidation, and both counts of Class A misdemeanor invasion of privacy. Hall was ultimately sentenced to thirty-four years for Level 1 felony child molesting; two years for Level 6 felony intimidation; and one year each for Class A misdemeanor invasion of privacy. The trial court ordered the sentences to run consecutively for an aggregate thirty-eight-year sentence, with a thirty-two year executed sentence and six years suspended to probation.

Discussion and Decision

I. Evidence of Suicide Attempt

[12] A trial court has broad discretion in ruling on the admissibility of evidence. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). We will reverse a trial court's ruling on the admissibility of evidence only when it constitutes an abuse of discretion. *Id*. An abuse of discretion occurs only where the trial court's ruling is clearly against the logic and effect of the facts and circumstances and the error affects the party's substantial rights. *Clark v. State*, 994 N.E.2d 252, 260 (Ind. 2013).

[13] "[A] trial court's ruling on a motion in limine is not a final order. [….] The ruling does not determine the ultimate admissibility of the evidence; that determination is made by the trial court in the context of the trial itself." *McGill v. State*, 160 N.E.3d 239, 245 (Ind. Ct. App. 2020) (citing *Clausen v. State*, 622 N.E.2d 925, 927 (Ind. 1993)). "[I]t it is well-settled that in order to preserve error in the denial of a pre-trial motion in limine, the appealing party must

object to the admission of the evidence at the time it is offered." *Perez v. Bakel*, 862 N.E.2d 289, 295 (Ind. Ct. App. 2007).

[14] Hall argues that the trial court erred by admitting evidence of his suicide attempt, arguing that the evidence was irrelevant and prejudicial. The State, in turn, argues that this evidence was properly admitted as evidence of consciousness of guilt and that Hall had also waived appellate review of this issue by failing to object to its admission contemporaneously at trial and failing to argue fundamental error. Hall did file a pretrial motion requesting that the trial court exclude all evidence of his suicide attempt, which motion was denied by the trial court. During trial, however, Hall did not object to Maree's testimony that Hall had talked to her about slitting his wrists on the night of the incident after she had called the police. Further, though Hall's counsel made some indication later on during the trial that he intended to object to the recordings of the jail calls in which Hall's suicide attempt is discussed, he failed to do so contemporaneously with the admission of those phone calls. *See Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) ("A contemporaneous objection at the time the evidence is introduced at trial is required to preserve the issue for appeal, whether or not the appellant has filed a pretrial motion to suppress."). Instead, Hall objected before those recordings were set to be published before the jury. Though there was an objection made to the introduction of the contested evidence, it was made after the evidence had already been admitted, which was too late. A "failure to timely object to the erroneous *admission* of evidence at trial will procedurally foreclose the raising of such error on appeal

unless the admission constitutes fundamental error." *Stephenson v. State*, 29 N.E.3d 111, 118 (Ind. 2015) (citing *Davis v. State*, 598 N.E.2d 1041, 1048 (Ind. 1992)) (emphasis added). Because Hall fails to argue that the admission of this evidence constitutes fundamental error, he has waived that issue for review. Ind. App. R. 46(A)(8)(a).

[15] Further, even if Hall had not waived review of the admission of the contested evidence, its admission was harmless. "The erroneous admission of evidence is harmless error where a guilty finding is supported by substantial independent evidence of guilt." *Bates v. State*, 495 N.E.2d 176, 178 (Ind. 1986). Hall's convictions were supported by testimony from E.N.; A.N.-1, who observed and alerted her mother to the fact that Hall was behaving strangely toward E.N. on the night in question; and Maree, who walked in on Hall and E.N. His convictions were also supported by evidence indicating that Hall threatened each of the witnesses with retaliation when confronted about his crimes and contacted Maree in violation of the court's no-contact order. Thus, regardless of whether the admission of evidence of Hall's attempted suicide amounted to an abuse of discretion, given that there was more than enough evidence to convict, we find the admission of the challenged evidence, even if erroneous, can only be considered harmless.

II. Severing the Invasion of Privacy Charges

[16] Hall also argues that the trial court abused its discretion in denying his request to sever his charges for Class A misdemeanor invasion of privacy from his other charges. Under Indiana Code section 35-34-1-9(a), offenses may be joined for

trial when the offenses are: "(1) of the same or similar character, even if not part of a single scheme or plan; (2) based on the same conduct or a series of acts connected together or constituting parts of a single scheme or plan." *See also Blanchard v. State*, 802 N.E.2d 14, 25 (Ind. Ct. App. 2004).

[17] Hall claims that he is entitled to severance as a matter of right, and that the trial court had no discretion in the matter. "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." Ind. Code § 35-34-1-11(a). Here, the invasion of privacy charge relates to Hall's jail calls to Maree while the other charges relate to his molestation of E.N. and his intimidation of Maree. Therefore, because these charges are not "the same" or of "similar character" under Indiana Code subsection 35-34-1-9(a)(1), Hall is not entitled to severance of these charges as a matter of right.

[18] Under Indiana Code subsection 35-34-1-9(a)(2), a defendant's request for severance is left to the trial court's discretion. "[W]hen the offenses are joined under subsection 9(a)(2), the court must grant a severance only if it determines that it is 'appropriate to promote a fair determination of the defendant's guilt or innocence[.]'" *Ben-Yisrayl v. State*, 690 N.E.2d 1141, 1145 (Ind. 1997) (quoting *Conner v. State*, 580 N.E.2d 214, 219 (Ind. 1991), *cert. denied*). Because this decision is within the trial court's discretion, we will only reverse "upon a showing of clear error." *Id*. (citing *Davidson v. State*, 558 N.E.2d 1077, 1083 (Ind. 1990)).

[19] Hall has failed to convince us that the trial court abused its discretion in this case. Hall called Maree from jail, where he was incarcerated due to his molestation and intimidation charges, violating a no-contact order stemming from those same charges. While the invasion of privacy charges were separate and distinct from Hall's other charges, they ultimately occurred because he had molested E.N. and intimidated Maree. Further, Hall has failed to show that "'in light of what actually occurred at trial, the denial of a separate trial subjected him to ... prejudice.'" *Harvey v. State*, 719 N.E.2d 406, 409 (Ind. Ct. App. 1999) (quoting *Brown v. State*, 650 N.E.2d 304, 306 (Ind. 1995)). Even if the charges had been severed, the jail calls would still have been admissible in a trial on Hall's molestation and intimidation charges as they were his own statements. Though Hall argues that the introduction of the jail phone calls complicated the case, he points merely to the jury's request that the calls be replayed. That alone is insufficient to support the contention that the jail phone calls so complicated the case as to prevent a "fair determination of [Hall's] guilt or innocence." *Ben-Yisrayl*, 690 N.E.2d at 1145 (quoting *Conner*, 580 N.E.2d at 219).

III. Indiana Appellate Rule 7(B)

[20] Hall contends that his thirty-four-year sentence for Level 1 child molesting is inappropriate. Indiana Appellate Rule 7(B) provides that "[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." In analyzing such

claims, we "concentrate less on comparing the facts of [the case at issue] to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." *Paul v. State*, 888 N.E.2d 818, 825 (Ind. Ct. App. 2008) (internal quotation omitted), *trans. denied*. The defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

[21] Hall was sentenced for the crimes of Level 1 felony child molesting, which has a sentencing range between twenty and fifty years with an advisory sentence of thirty years; Level 6 felony intimidation, which has a sentencing range between six months and two-and-one-half years with an advisory sentence of one year; and Class A misdemeanor invasion of privacy, which has a sentencing maximum of one year. Ind. Code. §§ 35-50-2-4, 35-50-2-7, 35-50-3-2. Hall was ultimately sentenced to thirty-four years of incarceration for Level 1 felony child molesting; two years for Level 6 felony intimidation; and, one year each for his two Class A misdemeanor invasion of privacy convictions. While Hall received the maximum possible sentence for his Class A misdemeanors, he received less than the maximum for his Level 6 felony and just above the advisory sentence for his Level 1 felony.

[22] The nature of Hall's offense does not support his argument that his sentence is inappropriate. Hall molested E.N., an eight-year-old who was in his custody and care, while other children were present and under his supervision. Hall paid one of E.N.'s siblings who was aware that he had been interacting with

E.N. frequently that evening to "keep [her] quiet[.]" Tr. Vol. II p. 122. After Maree called Hall a child molester, Hall told her "I should f***ing kill you." Tr. Vol. II p. 55.

[23] Hall's sentence is also not inappropriate in light of his character. Hall's criminal history consists of convictions for Level 6 felony domestic battery, Class A criminal trespass, Class A operating while intoxicated, and Class A misdemeanor invasion of privacy. Though Hall questions the relevance of his criminal history because some of his previous convictions are dissimilar to his crimes in this case, we are unpersuaded. As evidenced by his previous convictions for domestic battery and invasion of privacy, Hall's threatening and criminal behavior in this case was not a singular occurrence and his disregard for the laws of the State reflects poorly on his character. For the above reasons, Hall's sentence is not inappropriate.

[24] The judgment of the trial court is affirmed.

Bailey, J., and Najam, Sr.J., concur.