MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ashley Humphrey,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 30, 2023

Court of Appeals Case No. 22A-CR-1389

Appeal from the Marshall Superior Court

The Honorable Matthew E. Sarber, Judge.

Trial Court Cause No. 50D03-1909-F5-101

Foley, Judge.

[1] Ashley Humphrey ("Humphrey") appeals his convictions of Level 5 felony battery resulting in bodily injury to a disabled person[1] and Level 6 felony strangulation.[2] On appeal, Humphrey argues that the trial court abused its discretion when it excluded testimony concerning Cody Cole's ("Cole") prior instances of self-harm. For double jeopardy purposes, the trial court merged the two convictions and imposed a sentence on the battery conviction. Though not raised on appeal, we address the distinction between the merger of offenses and vacating a conviction. We affirm, reverse, and remand with instructions.

Facts and Procedural History

[2] For almost three years, Humphrey was employed as Cole's caregiver and assisted Cole, an adult with cerebral palsy, with tasks such as cooking, dressing, and getting into his wheelchair. On September 12, 2019, while at Cole's residence, Humphrey and Cole argued regarding their plans to attend a football game. The argument escalated, and Humphrey shoved Cole, who was in his wheelchair, across the room and then strangled Cole with his right hand for about "10 or 15 seconds." Tr. Vol. 2 p. 43. Humphrey eventually released Cole's neck and left the residence. Cole called his brother to let him know what happened, and Cole's aunt overheard the conversation. On September 13, 2019, Cole's aunt took Cole to the hospital where a nurse examined him.[3] Cole

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

[2] I.C. § 35-42-2-9(c).

[3] Per the medical records, Cole was examined around two in the morning. Ex. Vol. 1 pp. 25–26; 36.

had bilateral scratches behind his right and left ears and redness and scratch marks on his neck. On September 15, 2019, Cole returned to the hospital for a 72-hour post-strangulation follow up visit, at which time his neck was photographed and examined.

[3] On September 27, 2019, the State charged Humphrey with: Count I, battery resulting in bodily injury to a disabled person as a Level 5 felony and Count II, strangulation as a Level 6 felony. On April 20, 2022, a jury trial was held, and Humphrey's defense counsel sought the trial court's permission to cross-examine Cole about prior instances of self-harm Cole had disclosed during his deposition.[4] The trial court denied the request, stating, "the prejudicial effect [was] just way too high . . . [and] it substantially outweigh[ed] the probative value of [Humphrey's defense counsel] being able to ask about it." *Id*. at 64. An offer of proof was made outside the presence of the jury. The jury found Humphrey guilty on both counts. On May 17, 2022, Humphrey was sentenced to three years at the Indiana Department of Corrections on Count I only, and hereafter appeals.

[4] The deposition was not included in the record, so any reference to deposition testimony is derived from those portions of the transcript that refer to the deposition.

Discussion and Decision

I. Self-Harm Testimony

[4] Humphrey contends that the trial court abused its discretion by excluding Cole's testimony regarding his history of self-harm. The admission or exclusion of evidence is a matter that is generally entrusted to the discretion of the trial court. *Pribie v. State*, 46 N.E.3d 1241, 1246 (Ind. Ct. App. 2015). We review challenges to the admission of evidence for an abuse of the trial court's discretion. *Fansler v. State*, 100 N.E.3d 250, 253 (Ind. 2018). In those instances, we will reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Id.* Moreover, the trial court's ruling will be upheld "if it is sustainable on any legal theory supported by the record, even if the trial court did not use that theory." *Tibbs v. State*, 59 N.E.3d 1005, 1011 (Ind. Ct. App. 2016).

[5] A trial court has wide discretion in determining whether evidence is relevant. *Snow v. State*, 77 N.E.3d 173, 176 (Ind. 2017). Indiana Evidence Rule 401 provides: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Irrelevant evidence is inadmissible. *See* Ind. Evidence Rule 402. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Ind. Evidence Rule 403. Generally, errors in the exclusion of evidence are disregarded as harmless

unless they affect the substantial rights of a party. *Pitts v. State*, 904 N.E.2d 313, 318 (Ind. Ct. App. 2009), *trans. denied*.

[6] Here, Humphrey asserts, and we agree, that the evidence of Cole's self-harm may be relevant under Indiana Rule of Evidence 401 because it would "have been determinative in the jury deciding whether [Cole]'s injury occurred in the manner in which he claimed or had occurred due to him inflicting it on himself." Appellant's Br. p. 8. Although relevant, we agree with the trial court that the evidence's "probative value is minimal and [] substantially outweighed by the prejudicial effect." Tr. Vol. 2 p. 68. The trial court attributed a low probative value to the testimony because, during Humphrey's offer of proof, it became apparent that Cole's self-harm was limited to his arms. More importantly, Cole explicitly denied ever using a fork to make cuts on his neck:

> Mr. Hoover: . . . "Have you ever hurt yourself when you get upset?" He said that sometimes I've been known to do that, yeah. I said, "Okay. How do you do that when you do that to yourself?" He said, "Sometimes I'll - - sometimes I'll make little cuts on my arms, like, with a fork or something." I did - - asked him, "Okay. Have you ever used a fork to make cuts on your neck?" And he said, "No."

Id. at 65–66.[5] The trial court stated that it would have admitted the evidence "had it been related to his neck," but because Cole's self-harm was "only limited to his arm and . . . was only once," the trial court concluded that the

[5] Cole also denied making cuts on his ears. *See* Tr. Vol. 2 p. 66.

prejudicial effect outweighed the probative value. *Id.* at 67. Moreover, the record fails to reflect the temporal relationship between the self-harm and the strangulation, especially since it is unclear whether Cole self-harmed on multiple occasions or only once.[6] Based upon the record provided, we cannot conclude that the trial court's ruling was an abuse of discretion. *See Kimbrough v. Anderson*, 55 M.E.3d 325, 335 (Ind. Ct. App. 2016) (this court concluded that the trial court did not abuse its discretion when it "conducted a Rule 403 balancing and determined that admitting [the] testimony would confuse the issues and mislead the jury.").

II. Double Jeopardy

[7] Even though not raised by the parties, we briefly address the trial court's decision to "merge" Counts I and II at sentencing. "As questions of double jeopardy implicate fundamental rights, we routinely address specific double jeopardy violations even when the parties have not begun the conversation." *Morales v. State*, 165 N.E.3d 1002, 1009 (Ind. Ct. App. 2021) (citing *Whitham v. State*, 49 N.E.3d 162, 168 (Ind. Ct. App. 2015); *Williams v. State*, 892 N.E.2d 666, 668 (Ind. Ct. App. 2008), *trans. denied*), *trans. denied*.

[8] "If a trial court does not formally enter a judgment of conviction on a jury verdict of guilty, then there is no requirement that the trial court vacate the

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[6] On page 66 of the transcript, defense counsel reads from the deposition which suggests that Cole self-harmed more than once, but on page 67 of the transcript, the State and the trial court refer to the same deposition suggesting that he only self-harmed once on the arm.

'conviction,' and merger is appropriate." *Kovats v. State*, 982 N.E.2d 409, 414–15 (Ind. Ct. App. 2013) (quoting *Townsend v. State*, 860 N.E.2d 1268, 1270 (Ind. Ct. App. 2007)). A trial court "merges" two counts when it declines to formally enter judgment on the lesser offense. "However, if the trial court does enter judgment of conviction on a jury's guilty verdict, then simply merging the offenses is insufficient and vacation of the offense is required. *Id*. at 414-15 (citing *Green v. State*, 856 N.E.2d 703, 704 (Ind. 2006); *Gregory v. State*, 885 N.E.2d 697, 703 (Ind. Ct. App. 2008)).

[9] In the case at bar, the trial court correctly concluded that a conviction under Counts I and II would constitute double jeopardy. In its judgment order issued at the conclusion of the jury trial, the court entered a judgment and conviction of both Counts I and II. In its Findings and Decree issued at the conclusion of the sentencing hearing, the trial court "merged" Counts I and II, but failed to vacate the prior judgment of conviction for Count II. Here, because a judgment of conviction had already been entered on Count II, the proper procedure is to vacate that conviction, rather than merge the offenses. We, therefore, remand to the trial court with instructions to vacate the conviction entered for Count II.

Conclusion

[10] Based on the foregoing, we affirm Humphrey's conviction for Level 5 felony battery resulting in bodily injury to a disabled person (Count I), and remand with instructions to vacate Humphrey's Level 6 felony strangulation conviction (Count II).

[11] Affirmed, reversed, and remanded with instructions.

Robb, J., and Mathias, J., concur.