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IN THE
COURT OF APPEALS OF INDIANA

Courtney L. Kincaid,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 3, 2021

Court of Appeals Case No. 20A-CR-1779

Appeal from the Whitley Circuit Court

The Honorable Matthew J. Rentschler, Judge

Trial Court Cause No. 92C01-1905-F1-427

Weissmann, Judge.

[1] Courtney L. Kincaid was convicted of Aggravated Battery and Neglect of a Dependent, both Level 1 felonies, following the death of a baby entrusted to her care. After making various statements to the police to explain the child's injuries, Kincaid finally admitted to forcibly throwing the baby to the ground after becoming frustrated by the infant's crying. At trial, she argued her confession had been false, and she claims for the first time on appeal that the trial court improperly limited her expert's testimony on false confessions. She also challenges her thirty-year sentence as unduly harsh because she is a well-respected first-time offender. We affirm, finding the trial court did not abuse its discretion in limiting the expert's testimony and that Kincaid's advisory-level sentence was appropriate.

Facts

[2] Kincaid, who operated an in-home day care, began caring for E. when E. was nine months old. Three months later, E.'s father left her at Kincaid's home at 7 a.m. At 10:21 a.m., Kincaid sent E.'s mother a video of a smiling E. sitting on the carpet. Less than an hour later, Kincaid sent E.'s mother a video of E. sleeping on her back, although E. normally did not sleep in that position.

[3] Forty-five minutes later at 12:04 p.m., Kincaid called 911, reporting that E. had been moaning and grunting while napping and was foaming at the mouth when Kincaid tried to waken her. Kincaid began CPR. Paramedics found E. with a strong pulse but not breathing on her own. They transported E. to the hospital, where tests showed she had a large skull fracture and intracranial brain bleed

that likely had occurred four to eight hours earlier. Medical testimony showed that such an injury can be caused by a child's head hitting a broad flat surface with great force. E. was moved to a trauma center, where she tragically died that evening.

[4] Kincaid initially told police that she did not know the source of E.'s injuries but that she shook E. while trying to revive her. Four months later, Kincaid underwent a polygraph examination and stipulated to its admissibility. Indiana State Police Sergeant Matthew Collins questioned Kincaid for three hours prior to the exam and informed her that E. had suffered a skull fracture. During the polygraph test, Kincaid denied knowing the cause of E.'s injuries. Sergeant Collins informed Kincaid that the polygraph results irrefutably showed she was lying. Kincaid later gave police several conflicting accounts as to how E. was injured, including that Kincaid accidentally dropped E. on the concrete patio. In her final account, Kincaid reported that she threw E. forward forcefully, prompting E.'s head to strike the floor. Kincaid reported E. stopped crying, stared at her, went "gray in the eyes," and eventually fell asleep. Tr. Vol. III, p. 176.

[5] The State charged Kincaid with aggravated battery and neglect of a dependent, both Level 1 felonies, and battery on a child causing death, a Level 2 felony. At her trial, Kincaid denied injuring the baby and claimed her five conflicting accounts of the baby's injury to police were lies—essentially, false confessions. Tr. Vol. IV, pp. 158, 167-68. A jury returned verdicts of guilty on all counts.

The trial court entered judgment of conviction only on the two Level 1 felonies and sentenced Kincaid to concurrent terms of thirty years for each conviction.

Discussion and Decision

[6] Kincaid raises two issues on appeal. She first claims the trial court committed fundamental error in limiting her expert's testimony on false confessions. She next asserts her thirty-year sentence was inappropriate in light of the nature of the offense and the character of the offender.

I. Expert Witness Testimony

[7] The trial court limited the testimony of Professor Alan Hirsch, an expert in interrogations and false confessions, to two areas: (1) contrary to public belief, people sometimes confess to crimes they have not committed; and (2) certain interrogation techniques used by law enforcement contribute to false confessions. App. Vol. II, p. 158. The trial court prohibited Professor Hirsch from testifying as to his opinion that the police questioning of Kincaid "featured an aggressive application of the interrogation tactics known to contribute to false confessions." *Id.*; Ex., p. 44. The trial court further ruled that Professor Hirsch must speak in generalities and not offer an opinion as to "the impact that police interrogations had on this particular defendant." *Id.*

[8] At trial, Professor Hirsch testified extensively about the Reid Technique, an interrogation approach featuring three phases: isolation, confrontation, and minimization. Tr. Vol. IV, pp. 114-26; Exs., p. 12. According to Professor Hirsch, the technique can lead to false confessions. Tr. Vol. II, p. 119.

[9] During trial, Kincaid did not object to the limitations imposed on Professor Hirsch's testimony. On rebuttal, two of the officers who questioned Kincaid testified they did not employ the Reid Technique. Acknowledging she failed to preserve any error arising from the limitations on Professor Hirsch's testimony, Kincaid relies on fundamental error to revive her claim.

[10] The fundamental error doctrine is extremely narrow. *Kelly v. State*, 122 N.E.3d 803, 805 (Ind. 2019). A fundamental error is one that renders a fair trial impossible or constitutes a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm. *Id.* Violation of a constitutional right does not automatically equate to fundamental error. *Id.* at 805-06.

A. Limitations On Expert Witness' Testimony Did Not Deprive Kincaid of Fair Trial

[11] Kincaid contends the trial court's limitations on Professor Hirsch's testimony constituted fundamental error because they improperly encroached on Kincaid's constitutional right to present witnesses in her defense. *See* U.S. Const. amend. VI; Ind. Const. art. I, § 13. Essentially, she argues that Professor Hirsch should have been allowed to offer an opinion as to whether the officers used the Reid Technique and whether this technique could have contributed to her false confession. To prevail on this claim, Kincaid must convince us that our holding in *Jimerson v. State*, 56 N.E.3d 117, 121 (Ind. Ct. App. 2016), *trans.*

denied, either does not apply here or contravenes the Indiana Supreme Court's decision in *Miller v. State*, 770 N.E.2d 763, 773 (Ind. 2002).

i. *Jimerson* Was Not Wrongly Decided

[12] In *Miller*, our Supreme Court held that expert testimony is permitted on matters not within the common knowledge and experience of ordinary people. *Id.* "An expert witness is to function as a specialist to supplement the jurors' insight." *Id*. Relying on *Miller* more than a decade later, we ruled that "experts may testify on the general subjects of coercive police interrogation and false or coerced confessions" and about "the techniques the police used in a particular investigation." *Jimerson*, 56 N.E.3d at 121. However, expert testimony crosses the line from admissible to inadmissible where the experts "comment about the specific interrogation in controversy in a way that may be interpreted by the jury as the expert's opinion that the confession in that particular case was coerced or false." *Id.* Doing so would improperly invade the province of the jury and violate Indiana Evidence Rule 704(b), which prohibits witnesses from testifying as to "opinions concerning intent, guilt, or innocence in a criminal case." *Id.*

[13] *Jimerson* reckoned that *Miller* meant "an expert should not be invited to cross the line at which the jury can proceed without further aid." 56 N.E.3d at 123. *Jimerson* concluded an expert in false confessions could testify in generalities about interrogation techniques but not about the facts of a particular interrogation. *Id.* That conclusion was based on the view that, "[w]here a jury is

able to apply concepts without further assistance, highlighting individual exchanges or vouching for the truth or falsity of particular evidence is invasive." *Id.*

[14] Kincaid claims *Miller* drew no such line, meaning *Jimerson* improperly expanded *Miller's* limitations on expert testimony. Kincaid argues that *Jimerson* underestimated the assistance jurors need in cases involving alleged false confessions. The State sidesteps this part of Kincaid's argument by asserting the trial court's limitations on Professor Hirsch's testimony were consistent with *Miller,* which both parties agree is binding.

[15] We agree with Kincaid that *Jimerson* ventures beyond the dictates of *Miller*. But it did so only because *Miller*, unlike *Jimerson*, involved the complete exclusion of expert testimony on false confessions. 770 N.E.2d at 772. Although *Miller* anticipated that some of the excluded expert testimony might be inadmissible under Evidence Rule 704, it concluded the trial court could purge the inadmissible testimony by sustaining individualized trial objections. *Id.* at 774. *Miller's* ultimate holding was broad: "excluding the proffered expert testimony in its entirety deprived the defendant of the opportunity to present a defense." *Id.*

[16] Although the Indiana Supreme Court in *Miller* addressed the broad issue of the admissibility of expert testimony on false confessions, we repeatedly have considered the narrower issue presented here: whether expert testimony regarding police interrogation techniques in a specific case violates the

prohibition against opinions on guilt or innocence in Evidence Rule 704. In *Callis v. State*, 684 N.E.2d 233, 239 (Ind. Ct. App. 1997), *trans. denied*, we rejected a claim that such testimony merely concerned the reliability of the interrogation process, not the truthfulness of witnesses. We ruled that the expert's testimony regarding the phenomenon of coerced confessions was admissible, but opinion testimony about the interrogation amounted to an improper "opinion as to which witness was telling the truth about" the defendant's statements. *Id.* at 239-40.

[17] We later interpreted *Callis* and *Miller* as authorizing expert testimony on both "the general subjects of coercive police interrogation and false or coerced confessions" and "the techniques the police used in a particular interrogation." *Shelby v. State*, 986 N.E.2d 345, 369 (Ind. Ct. App. 2013), *trans. denied*. But we viewed *Callis* and *Miller* as prohibiting expert testimony "about the specific interrogation in controversy in a way that may be interpreted by the jury as the expert's opinion that the confession in that particular case was coerced or false, as this would invade the province of the jury and violate Evidence Rule 704(b)." *Id.*

[18] *Jimerson* is consistent with those decisions. In *Jimerson*, we ruled that the jury did not need expert testimony to determine which interrogation techniques described by the expert were used in the defendant's interrogation. 56 N.E.3d at 123. We further found that expert testimony analyzing the specific interrogation—that is, highlighting individual exchanges and vouching for the truth or falsity of particular evidence—invades the province of the jury. *Id.* That

is the holding in *Callis* and *Shelby* and is in accord with our Supreme Court's decision in *Miller*. We reject Kincaid's claim that *Jimerson* was wrongly decided.

ii. *Jimerson* Applies

[19] Alternatively, Kincaid claims *Jimerson* is not dispositive. She attempts to distinguish *Jimerson*, arguing that the jurors in her case demonstrated that they needed greater assistance by asking Professor Hirsch to interpret Kincaid's interrogation multiple times. Tr. Vol. IV, pp. 133-34. Without apparent objection from Kincaid, the trial court disallowed such questions and instructed the jury that Professor Hirsch could not speak to the facts of the case. *Id.* at 134. The State, on the other hand, views *Jimerson* as virtually identical to this case and, therefore, dispositive.

[20] We cannot ascertain what specific information the jury sought from Professor Hirsch because Kincaid made no offer of proof as to the contents of those questions, which are absent from the record Kincaid provided. The jury may have been seeking Professor Hirsch's opinion as to the truth or falsity of Kincaid's confession—testimony clearly prohibited under Evidence Rule 704(b). As Kincaid did not challenge the trial court's rejection of those jury questions at trial or on appeal, we can only assume the trial court properly rejected the jury questions because they sought clearly inadmissible information. Kincaid has failed to establish *Jimerson* does not apply here.

[21] In an argument the State does not address, Kincaid also asserts that the State opened the door to Professor Hirsch's broader testimony when it presented

rebuttal testimony from two of the officers who questioned Kincaid. These officers testified that they did not employ the Reid Technique during their questioning of Kincaid. Tr. Vol. IV, pp. 192-96. They also testified they did not use any confrontation or minimization tactics during their interrogations. *Id.* Kincaid suggests she should have been allowed to refute the officers' testimony with Professor Hirsch's excluded testimony. But Kincaid did not object to the rebuttal testimony; therefore, she has waived the issue. *See Golden Corral Corp. v. Lenart*, 127 N.E.3d 1205, 1215 (Ind. Ct. App. 2019), *trans. denied* (failure to object to rebuttal testimony on grounds raised on appeal waives issue for appellate review), *trans. denied*.

[22] Waiver notwithstanding, the officers' testimony that they did not use the Reid Technique does not raise the same concerns as Professor Hirsch's potential testimony that they did. Professor Hirsch's admitted testimony indicated the Reid Technique invites false confessions. Tr. Vol. IV, pp. 121-22. Given Kincaid's testimony that she did not commit the crimes and her presentation of Dr. Hirsch as a defense witness, Dr. Hirsch's potential testimony that the officers used the Reid Technique suggests Kincaid's admissions were false—an opinion clearly prohibited by Evidence Rule 704(b). Conversely, the officers' testimony that they did not use the technique communicates nothing about the veracity of Kincaid's statement and, therefore, was not prohibited by Evidence Rule 704(b). We fail to see how the State, by offering such admissible testimony, opened the door to Professor Hirsch's inadmissible testimony. As we find no error in the trial court's limitations on Professor Hirsch's testimony,

much less fundamental error, we conclude Kincaid was not deprived of her constitutional right to present a defense.

II. Sentence Is Not Inappropriate

[23] Kincaid next challenges her thirty-year aggregate sentence as inappropriate under Indiana Appellate Rule 7(B). This 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." App. R. 7(B). Such review requires substantial deference to the trial court because the "principal role of [our] review is to attempt to leaven the outliers, and not to achieve a perceived correct sentence." *Scott v. State*, 162 N.E.3d 578, 584 (Ind. Ct. App. 2021) (citations omitted).

[24] Kincaid concedes her offense is "disturbing" but notes her lack of intent to kill the child. Appellant's Br., p. 39. Her lesser intent, however, was recognized in the reduced charge she faced: aggravated battery, rather than murder. *See* Ind. Code §§ 35-42-1-1, -2-1.5. As to her character, Kincaid notes that nearly fifty people wrote letters in support of her praising her for her kindness, compassion, nurturing, and generosity. She also focuses on her lack of criminal history and the determination that she is at low risk to reoffend. The State counters that the trial court already exerted leniency by ordering concurrent sentences for her two convictions when it could have imposed consecutive sentences. *See* Ind. Code §§ 35-50-1-2(a)(8), (c)-(d) (allowing consecutive sentences for crimes of violence,

including aggravated battery, even where offenses were part of a single episode of criminal conduct).

[25] Kincaid's sentence was not inappropriate. As to her offense, Kincaid fatally injured an eleven-month-old baby entrusted to her care. Kincaid fractured her skull, causing the baby's brain to bleed and swell to unrecoverable proportions. The baby's injuries, which included retinal and perineural hemorrhages, were comparable to those suffered from a blow from a baseball bat. Kincaid left the baby to suffer instead of seeking immediate medical attention. She lied repeatedly to police about the cause of the baby's injuries. The trial court found, and Kincaid does not contest, that her lies exacerbated the suffering of the baby's family. Tr. Vol. V, p. 65.

[26] That chain of events also reflects disturbing features of Kincaid's character. On one hand, she was a first-time offender who had the respect and admiration of many in her community. Yet, her violence toward a defenseless baby, her willingness to delay urgently needed medical treatment while the child suffered from a life-threatening injury, and her repeated lies to police reflect a questionable character undeserving of leniency.

[27] The advisory sentence is the starting point for sentencing. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh.*, 875 N.E.2d 218 (2007). A defendant who receives an advisory sentence has a particularly heavy burden to prove it inappropriate under Appellate Rule 7(B). *Fernbach v. State*, 954 N.E.2d

1080, 1089 (Ind. Ct. App. 2011), *trans. denied*. Kincaid falls short of convincing us that her sentence is inappropriate.

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

Kirsch, J., and Altice, J., concur.