MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Matthew J. McGovern
Fishers, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Jodi Kathryn Stein
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Nicholas Ryan Bethards,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 30, 2023

Court of Appeals Case No. 22A-CR-796

Appeal from the Floyd Superior Court

The Honorable Susan L. Orth, Judge

The Honorable Carrie K. Stiller, Judge

Trial Court Cause No. 22D01-1812-F6-2444

Opinion by Judge Brown
Chief Judge Altice and Judge Tavitas concur.

[1] Nicholas Ryan Bethards alleges the trial court committed fundamental error when it admitted certain character evidence and that the charging information lacked specificity resulting in fundamental error. We affirm.

Facts and Procedural History

[2] In 2016, Bethards entered the True North Boutique ("True North"), which was owned by Michelle Ryan, and asked Ryan for a phone charger, making her feel uncomfortable and uneasy. When he returned the charger and lingered in the store, Ryan pretended to talk on her phone until he left. Approximately one or two weeks after their first interaction, Ryan found a rose and index card left at True North's door; one side of the index card said, "True North," and the other had her name, spelled "M-E-S-H-A-L-E," which was a nickname she had during high school where she and Bethards had attended together until the eleventh grade. Transcript Volume II at 38. The note, which appeared to be written in crayon, scared Ryan, and she "perceive[d] that it was from [Bethards]." *Id.* Around a week later, Bethards again entered her store, waited in the front while she helped another customer, and eventually left. About a week later, Bethards entered the store while Ryan spoke with two customers. When he approached and interrupted the group, he "scared and shocked" Ryan and made her "very worried" and "scared for [her] own safety." *Id.* at 40-41. When Ryan asked him to leave, he slammed the door on his way out of the store and knocked over some business cards and pamphlets.

[3] On August 15, 2016, Ryan noticed that, beginning on January 31, 2016, she had received a total of thirty-seven Facebook messages from a person named Nicholas. She responded and asked him not to contact her anymore.

[4] In May 2017, Bethards entered True North with a guitar, tried to sit behind the counter, and left after being asked, slamming the door and knocking business cards and pamphlets over. Ryan filed a police report with the New Albany Police Department, and New Albany Police Captain Jerry Lawrence spoke with her about her contact with Bethards. Over the next ten days, she saw Bethards walking on the streets outside the store.

[5] On June 9, 2017, Ryan again contacted police after Bethards entered True North with flowers, acted "kind of flirty," was told to leave, and left after slamming the door. *Id.* at 52. When an officer arrived, he and Ryan gave Bethards a verbal trespass warning.

[6] In July 2018, Ryan received six letters from Bethards while he was incarcerated, and she sent the letters to police. Floyd County Sheriff's Sergeant George Johnson told Bethards to stop sending Ryan letters, after which the letters stopped.

[7] On November 23, 2018, Ryan filed a police report about an incident on the previous night, during which she and her boyfriend encountered Bethards standing on a milk crate and mumbling in an alley next to True North and close to her residence. She described feeling vulnerable, fearful, and scared. The next day, she found dead flowers, "flower petals just strung everywhere," and

graffiti on the wall next to where Bethards had stood the night before with her name, spelled M-E-S-H-A-L-E, the name of her business, and "R-I-P, dash, D-O-B-B-Y, hashtag, free-LF." Transcript Volume I at 18; Transcript Volume II at 64. She again contacted the police.

[8] On December 7, 2018, a friend of Ryan observed Bethards in a Starbucks coffee shop writing on index cards, and when Bethards deposited the cards in the tip jar, she discovered Ryan's name and True North written on the cards and brought them to Ryan. On December 20, 2018, Ryan exited the building where she lived and found flowers and a four-page letter containing writing similar to the previous letters from Bethards, and the letter included words such as "sex," "touch," her name, "love," and "True North." Transcript Volume II at 67; Exhibits Volume I at 6, 8-9.

[9] On December 26, 2018, the State charged Bethards with stalking as a level 6 felony. It later alleged that he was an habitual offender. While incarcerated on these charges, he made multiple phone calls to his mother, sister, and his pastor, during which he made statements such as, "[t]hey got letters that I wrote from jail that say — that talk about True North (ph) and God and the Lord being a woman," "[a]ll I did was write this girl a couple letters from jail. I left some flowers there. That's it. They are harassing me," and "I sent her 37 messages, okay. Every one of them was a verse out of like Chapter 43 in the book of Isaiah." Transcript Volume II at 128, 133, 139. On August 30, 2019, the State moved for a 404(b) hearing on evidence it planned to introduce at trial, and at the hearing on September 3, 2019, the prosecutor requested that the

court give limiting instructions to the jury because the State would be mentioning "other instances of contact that may have arisen between the parties prior to . . . December 20th of 2018." Transcript Volume I at 103. In response, Bethards's counsel stated, "I'm not really too concerned about anything," he was "probably not too worried about" the phone calls, and he believed the State would "not [be] introducing it for character purposes." *Id.* at 118-119, 124.

[10] On August 27, 2019, a jury trial commenced. During opening statements, Bethards's attorney argued that Bethards would likely say he "wasn't trying to harm anybody [and] . . . wasn't trying to frighten anyone, or threaten anyone, or intimidate anyone, or terrorize anyone," he stated that "[s]talking is . . . what the State put up there, is that [Bethards] ha[d] to knowingly and intentionally engage in a course of conduct of harassment," the jury would receive information later about the meaning of harassment, "that course . . . of conduct has to have created . . . to a reasonable person . . . fear, . . . frightened, [sic] intimidated, threatened or terrorized," and "the fourth element is that the person identified as the victim . . . is actually placed in one of those categories of frightened, intimidated, threatened or terrorized." *Id.* at 148-149.

[11] Captain Lawrence testified, noting his initial involvement and mentioning that Bethards had a "warrant out of Clark County." *Id.* at 158. After Captain Lawrence's testimony, Bethards's counsel requested a limiting instruction be given to the jury, and the trial court admonished the jury, stating:

> [E]vidence may be introduced of [Bethards's] course of conduct prior to the date of the offense charged in this information. The

> evidence has been received solely on the issue of [Bethards's] truthfulness, purpose, intent and motive. This evidence is to be considered by you only as it relates to the material elements of the offense as alleged. You may not consider this evidence, if any, as any evidence of [Bethards's] character.

Id. at 165-166.

[12] Sergeant Johnson testified about his work in the "Investigations of the Correctional Division," his contact with Bethards after he had "sent out" letters, the content of those letters, the process of "jail call privileges at the Floyd County Jail," recordings of jail phone calls made by Bethards and sent to the prosecutor's office, and the origin of the letters Bethards sent from jail. *Id.* at 225, 227, 247. After his testimony, the court again instructed the jury, stating:

> Members of the jury, you're instructed that evidence has been introduced that [Bethards] was temporarily in custody. You may not consider or discuss this evidence for any reason other than whether it relates to the material elements of the offense as alleged. You may not consider this fact as any evidence of [Bethards's] character or guilt.

Transcript Volume II at 20.

[13] Ryan testified as to the dates on which her encounters with Bethards occurred, how she felt during the encounters, and the details of her encounters with Bethards, and she mentioned that he had sent her four letters while incarcerated. After Ryan's testimony, the court again instructed as follows:

> You are instructed that evidence has been introduced that [Bethards] was temporarily in custody. You may not consider or discuss this evidence for any reason other than whether it relates to the material elements of the offense as alleged. You may not consider this fact as any evidence of [Bethards's] character or guilt.

Id. at 107.

[14] The jury found Bethards guilty of stalking as a level 6 felony. Bethards pled guilty to being an habitual offender. The trial court sentenced him to an aggregate sentence of eight years.

Discussion

I.

[15] The first issue is whether the charging information lacked sufficient detail for Bethards to formulate a defense and constituted fundamental error. Bethards argues the information lacked the requisite specificity and necessary elements, he did not know for which specific offense he was charged, and he therefore could not mount an intelligent defense.

[16] Article 1, § 13 of the Indiana Constitution requires that a defendant be informed of the nature and cause of the accusation against him. This mandate is given effect through Ind. Code § 35-34-1-2(a)(4), which requires that the information be in writing "setting forth the nature and elements of the offense charged in plain and concise language without unnecessary repetition. . . ." The information should state the offense in the language of the statute or in words

that convey a similar meaning. *Smith v. State*, 465 N.E.2d 702, 704 (Ind. 1984). Minor variances from the language of the statute do not make an information defective, so long as the defendant is not misled or an essential element of the crime is not omitted. *Id.* "[W]here a charging instrument . . . lack[s] appropriate factual detail, additional materials such as the probable cause affidavit supporting the charging instrument may be taken into account in assessing whether a defendant has been apprised of the charges against him." *State v. Laker*, 939 N.E.2d 1111, 1113 (Ind. Ct. App. 2010), *trans. denied* (citing *Patterson v. State*, 495 N.E.2d 714, 719 (Ind. 1986)).

[17] Bethards admits he did not move to dismiss the charging information by the statutory deadline, and to avoid waiver, he must show fundamental error, an extremely narrow exception that allows a defendant to avoid waiver of an issue. *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). For error in a charging information to be fundamental, "it must mislead the defendant or fail to give him notice of the charges against him so that he is unable to prepare a defense to the accusation." *Miller v. State*, 634 N.E.2d 57, 61 (Ind. Ct. App. 1994). It is error that makes "a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm." *Cooper*, 854 N.E.2d at 835. "This exception is available only in 'egregious circumstances.'" *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) (quoting *Brown v. State*, 799 N.E.2d 1064, 1068 (Ind. 2003)), *reh'g denied*. "Fundamental error is meant to permit appellate courts a means to correct the most egregious and blatant trial errors that

otherwise would have been procedurally barred, not to provide a second bite at the apple for defense counsel who ignorantly, carelessly, or strategically fail to preserve an error." *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014), *reh'g denied*.

[18] Ind. Code § 35-45-10-5(a) provides that a "person who stalks another person commits stalking, a Level 6 felony." Ind. Code § 35-45-10-1 provides that "stalk" means:

> a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened.

[19] The record reveals the charging information stated that "on or about December 20, 2018 . . . Bethards did then and there stalk Michelle Ryan," Appellant's Appendix Volume II at 18, and to the extent Bethards argues the charging information did not contain any of the required elements of stalking, we note that its wording mirrors the language in Ind. Code § 35-45-10-5(a).[1] The information specified the date of the offense, the victim, and the statute pursuant to which Bethards's activities were charged as a crime. Although the information does not include the factual basis underlying the charge, the

[1] To the extent Bethards mentions possible double jeopardy concerns and cites *Ross v. State*, 172 Ind. App. 484, 360 N.E.2d 1015 (1977), and *Wurster v. State*, 708 N.E.2d 587 (Ind. Ct. App. 1999), we note the probable cause affidavit sufficiently detailed the crime and circumstances for which Bethards was being charged, and even had it failed to do so, "it is the record, not just the indictment or the information, which provides protection from subsequent prosecutions for the same offense." *Gaby v. State*, 949 N.E.2d 870, 876, n.5 (Ind. Ct. App. 2011).

probable cause affidavit contains the factual basis for multiple incidents of harassment and the incident on December 20, 2018, and it further states that Bethards's actions made Ryan feel "uncomfortable and afraid for her safety and her business." *Id.* at 19. During his opening statement, Bethards's counsel referenced language from both Ind. Code §§ 35-45-10-5 and 35-45-10-1, noted every element of Ind. Code § 35-45-10-1, agreed with the State's definition of stalking which quoted Ind. Code § 35-45-10-1, and stated the jury would receive information later about the meaning of harassment. During Ryan's cross-examination, he suggested that Bethards's acts might not have constituted harassment by asking her if people communicate and understand interactions differently. In closing argument, Bethards's counsel discussed the alleged incidents of harassment and argued these were "encounters" rather than "incidents" and did not constitute harassment, and he referenced the elements of stalking from Ind. Code § 35-45-10-1. Transcript Volume II at 120. The charging information and probable cause affidavit adequately apprised Bethards of the nature of the charge against him, did not prevent him from formulating an intelligent defense, and did not so prejudice his rights that a fair trial was impossible. We cannot say Bethards has demonstrated fundamental error.

II.

[20] The next issue is whether the trial court committed fundamental error in admitting evidence of Bethards's prior warrant and incarceration. Bethards argues that evidence of his warrant and incarceration was irrelevant and the prejudice of admitting such information constituted impermissible character

evidence and outweighed its probative value, and the trial was "permeated with highly prejudicial character and misconduct evidence." Appellant's Brief at 13. The State argues that Bethards invited any error by strategically choosing not to object and, regardless, the evidence was properly admitted.

[21] Even assuming that Bethards did not invite any error, we cannot say that reversal is warranted. To the extent Bethards did not object to the admission of evidence at trial and was required to do so, he must show that the trial court's decision constituted fundamental error. *See Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013) (observing that failure to object at trial waives the issue for review unless fundamental error occurred). "The erroneous admission of character and uncharged bad act evidence to prove guilt does not always require reversal. Such errors are harmless and not fundamental when . . . there is overwhelming evidence of the defendant's guilt." *Oldham v. State*, 779 N.E.2d 1162, 1173 (Ind. Ct. App. 2002) (citing *Jones v. State*, 619 N.E.2d 275, 276 (Ind. 1993)).

[22] The record reveals that two witnesses testified about Bethards's incarceration, and one testified that he previously had a warrant. In response to the prosecutor's question to Captain Lawrence asking if he had handed off the case at some point, he testified that law enforcement had been contacted at multiple points by Ryan and mentioned, unprompted, that Bethards "had a warrant out of Clark County and he was at [Ryan's] residence, [and] we sent . . . officers out to try to locate him." Transcript Volume I at 158. The prosecutor did not dwell on Bethards's warrant when mentioned during testimony, and prior to the

admonishment being given, he stated, "[w]e did not want to call attention to this." *Id.* at 164. After Captain Lawrence concluded his testimony, the court admonished the jury and stated it could not consider evidence of prior acts of Bethards as evidence of his character. After Ryan testified that Bethards sent her letters from jail and Sergeant Johnson testified that he worked in the Floyd County Jail, spoke to Bethards after learning he had "sent out" letters, and mentioned that Bethards made phone calls from jail discussing the alleged crime, the court admonished the jury after each witness that "evidence has been introduced that [Bethards] was temporarily in custody" and it should "not consider this fact as any evidence of [Bethards's] character or guilt." *Id.* at 227; Transcript Volume II at 20, 107. While deliberating, the jury submitted a question stating that Bethards's "jail time is relevant to know if he is capable of 'encountering' Ms. Ryan," and it asked for how long Bethards had been incarcerated since 2016. Transcript Volume II at 143. The court determined it could not answer and told the jury to follow the jury instructions as its best guidance. *Id.* at 143-144. We are obliged to presume "that the jury are [people] of sense, and that they will obey the admonition of the court." *Valdez v. State*, 56 N.E.3d 1244, 1253 (Ind. Ct. App. 2016), *trans. denied*. A timely and accurate admonishment is typically presumed to cure any error in the admission of evidence. *Kirby v. State*, 774 N.E.2d 523, 535 (Ind. Ct. App. 2002), *declined to follow on other grounds by Austin v. State*, 997 N.E.2d 1027 (Ind. 2013), *reh'g denied*, *trans. denied*. In light of the evidence against Bethards, we cannot say fundamental error occurred or reversal is required.

[23] For the foregoing reasons, we affirm Bethards's conviction.

[24] Affirmed.

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