MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Donald E. Hicks,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 24, 2023

Court of Appeals Case No. 22A-CR-2941

Appeal from the Elkhart Superior Court

The Honorable Kristine A. Osterday, Judge

Trial Court Cause No. 20D01-2102-F3-7

Memorandum Decision by Judge Bradford
Judges Riley and Weissmann concur.

Bradford, Judge.

Case Summary

[1] On an evening in June of 2020, after attending a bonfire in Elkhart County at which the then-seventeen-year-old M.M. drank alcohol and smoked marijuana, she and her friend S.D. returned to S.D.'s home, where they continued to drink. At approximately 2:30 a.m., the pair accepted an invitation from Andrew Himes, Donald Hicks, and Douglas Miller to smoke marijuana at Himes's home next door. After smoking more marijuana and drinking more alcohol, M.M. was very intoxicated and was helped to a bathroom, where she vomited, and then into a bed. Hicks joined M.M. in the bed, removed her shorts, and penetrated her anally and vaginally with his penis despite her saying "no" several times and physically resisting him. Later, Miller penetrated M.M. vaginally with his penis as Hicks and Himes alternated forcing their penises into her mouth. At one point, Himes performed oral sex on M.M. and also penetrated her vaginally with his penis. Finally, Miller forced M.M. to fellate him.

[2] The State charged Hicks with three counts of Level 3 felony rape. During Hicks, Miller, and Himes's joint trial, the State was allowed to introduce evidence that M.M. had contemplated suicide following her rape but not evidence that she had received medical treatment for her suicidal ideation. After the State elicited testimony that M.M. had received medical treatment, defendants moved for a mistrial, which motion the trial court denied. Also at trial, the defendants sought to introduce evidence that M.M. had been participating in an internet game called "Hot Girl Summer" ("HGS") in May of

2020, a game in which participants were awarded points for participating in various sexual activities. The trial court declined to allow defendants to introduce the HGS evidence. A jury found Hicks guilty of two counts of Level 3 felony rape, and the trial court sentenced him to fourteen years of incarceration, with four years suspended to probation and two years to be served on community corrections.

Facts and Procedural History

[3] On the evening of June 29, 2020, M.M. and her friend S.D. went to a bonfire in Middlebury. Before the pair left S.D.'s home, M.M. went to buy marijuana from Himes, who lived next door. At the bonfire, M.M. drank alcohol and used marijuana. The pair left and returned to S.D.'s house between midnight and 1:00 a.m., where they drank wine coolers.

[4] Around 2:00 a.m., M.M. and S.D. went outside and saw Himes, Hicks, and Miller. M.M. and S.D. continued to drink wine coolers and, after about thirty minutes, entered Himes's home when Himes, Hicks, and Miller invited them to smoke marijuana. Hicks, S.D., and M.M. went to the kitchen to smoke marijuana; the marijuana hit M.M. "pretty hard" and "took [her] wooziness to the next level[.]" Tr. Vol. VII p. 145. Miller provided shots of vodka, which M.M. felt pressured to drink because "[e]verybody was saying, you know, drink, drink, drink." Tr. Vol. VII p. 46. M.M. and S.D. drank the shots, and the alcohol made M.M. feel worse. M.M. was feeling very intoxicated by this point, and she was having trouble standing, so she sat down on the floor in front of the refrigerator. S.D. left to retrieve her vaping pen from her home, but

while there she went to the bathroom to vomit and decided to go to bed. Meanwhile, M.M. was feeling more and more intoxicated. When M.M. needed to use the restroom, she had to be assisted. Once in the bathroom, M.M. vomited so forcefully that she urinated on herself. Hicks helped M.M. to Himes's bedroom.

[5] At first, M.M. was left alone in the bedroom, but Hicks returned. Hicks got into bed next to M.M. and moved close to her; she tried to move away from him but ran out of room. Hicks placed his entire body up against M.M.'s, and she said "no." Tr. Vol. VII p. 156. Hicks pulled down M.M.'s shorts, and, when she tried to pull them back up, Hicks removed them. Hicks rolled M.M. onto her stomach. M.M. again said no and unsuccessfully attempted to resist Hicks. Hicks climbed on top of M.M. and anally penetrated her with his penis. M.M. was still squirming and saying no. M.M. felt a "jolt" go "through her body[,]" and she let out a "yelp" because it hurt "really bad." Tr. Vol. VII pp. 158, 159. Hicks also penetrated M.M. vaginally.

[6] At some point, Miller, Himes, and Hicks were in the bedroom at the same time. Miller penetrated M.M. vaginally with his penis, while Hicks and Himes alternated putting their penises in M.M.'s mouth. M.M. unsuccessfully tried to "dodge" them by moving her head. Tr. Vol. VII p. 175. At another point, Himes performed oral sex on M.M. and penetrated her vaginally with his penis. Finally, Miller put his penis inside M.M.'s mouth and held her head in place as he did so.

[7] On February 25, 2021, the State charged Hicks with three counts of Level 3 felony rape. During a combined trial for Hicks, as well as Himes and Miller (who had also been charged in connection with the assault on M.M.), the trial court permitted the State to introduce evidence that M.M. had considered committing suicide in the months after she had been raped, but it declined to allow the State to present evidence of medical treatment for her suicidal ideation. The prosecutor asked M.M.'s mother whether M.M. had ever expressed a desire to kill herself, and her mother said yes. The prosecutor asked whether she had "t[aken] [M.M.] for treatment with a medical doctor," and her mother said yes. Tr. Vol. VII p. 19. Defendants objected and the prosecutor explained that he had misunderstood the trial court's ruling and agreed to have the question struck from the record. Defendants moved for a mistrial, and the trial court denied the motion, concluding that they had not been subjected to grave peril. The trial court, however, sustained defendants' objection to the testimony, struck the witness's response, and admonished the jury not to consider it.

[8] Defendants also made offers to prove that in May of 2020, M.M. had posted on Instagram that she had started HGS. Purportedly, HGS was a game in which players could earn points through kissing or participating in various sexual acts. M.M. indicated that HGS was supposed to be fun and had been "just a joke" that had played "no role" in her entry into Himes's home on June 29, 2020. Tr. Vol. VII p. 100. Defendants alleged that the exclusion of this evidence would violate their constitutional rights to present a defense and to cross-examine

witnesses. The trial court declined to admit the HGS evidence. At the conclusion of trial, the jury found Hicks guilty of two counts of Level 3 felony rape and not guilty of one.

[9] At sentencing, Hicks argued that the trial court should give mitigating weight to the fact that he had been seventeen years old when he committed his offenses. The trial court found two aggravating circumstances: the harm, injury, loss, or damage to M.M. was significant and greater than the elements necessary to prove the offenses of which he was convicted, and Hicks committed a crime of violence in the presence of Himes's two children, both of whom were younger than eighteen. As a mitigating circumstance, the trial court found that Hicks did not have a history of delinquent or criminal activity and noted that the mitigating weight was "temper[ed]" by the fact that Hicks had been only seventeen years old when he committed his offenses. Tr. Vol. IX p. 240. In its written sentencing order, the trial court wrote, "As a mitigating factor: the Court finds the defendant has no prior history and was 17 years of age at the time of the offense." Appellant's App. Vol. II p. 166. The trial court sentenced Hicks to an aggregate term of fourteen years of incarceration, with four years suspended to probation and two years to be served in Elkhart County Community Corrections.

Discussion and Decision

I. Evidence of M.M.'s Participation in HGS

[10] Hicks claims that his rights to present a defense and to cross-examine witnesses were infringed when he was not allowed to present evidence about consent,

specifically M.M.'s participation in HGS. 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). To the extent the admissibility of evidence turns on a constitutional question, the constitutional issue is reviewed *de novo*. *Hall v. State*, 36 N.E.3d 459, 466 (Ind. 2015).

[11] While defendants do have a right to present a defense, "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *U.S. v. Scheffer*, 523 U.S. 303, 308 (1998). "[R]ulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Id*. "Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id*. (citations omitted).

[12] The United States Supreme Court has "found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Id*. In *Holmes v. South Carolina*, the Court explained that

> well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or

> potential to mislead the jury [as well as] evidence that is repetitive …, only marginally relevant or poses an undue risk of harassment, prejudice [or] confusion of the issues.

547 U.S. 319, 326–27 (2006) (internal quotation marks and citations omitted).

[13] That said, we conclude that Hicks's proposed evidence, that M.M. had allegedly participated in a game that had had a possible sexual dimension, violates the rape shield rule, which is neither arbitrary nor disproportionate to the purposes it is designed to serve. *See* Ind. Evidence Rule 412; Ind. Code § 35-37-4-4; *see also State v. Walton*, 715 N.E.2d 824, 826 (Ind. 1999) (observing that Evidence Rule 412 was not adopted verbatim from the rape shield statute, and, to the extent there are any differences, Evidence Rule 412 controls). Evidence Rule 412 provides that, in a criminal case, the victim's past sexual conduct or sexual predisposition is not admissible except when the evidence is covered by one of the following provisions:

> (A) evidence of specific instances of a victim's or witness's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
> (B) evidence of specific instances of a victim's or witness's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
> (C) evidence whose exclusion would violate the defendant's constitutional rights.

Evid. R. 412.

[14] This rule reflects the reality that

> [i]nquiry into a victim's prior sexual activity is sufficiently problematic that it should not be permitted to become a focus of the defense. Rule 412 is intended to prevent the victim from being put on trial, to protect the victim against surprise, harassment, and unnecessary invasion of privacy, and, importantly, to remove obstacles for reporting sex crimes.

Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997).

[15] Although Hicks frames his claim as a constitutional one, he seems to actually be arguing that evidence about HGS was admissible pursuant to Evidence Rule 412(b)(1)(B) to prove consent. Specifically, Hicks argues that "[evidence about M.M.'s participation in HGS] might have shown that since she was consensually involved in a game in which one earns points for sexual activity, she was still engaged in consensual sexual activity" and that Hicks was "prevented from presenting evidence before the jury that she consented to sex with Hicks." Appellant's Br. p. 11. Evidence Rule 412, however, prohibits Hicks's proposed evidence about HGS for several reasons. Hicks sought to present evidence that M.M. had participated in HGS, a game in which a participant could earn points for activities ranging from kissing to sex with multiple, simultaneous partners. Nothing about that evidence, however, constituted "specific acts […] with respect to the person accused of the sexual misconduct." Evid. R. 412(b)(1)(B). Hicks's evidence was purely generalized and, in fact, did not even show that M.M. had engaged in any consensual sex at all because points could be earned solely through kissing.

[16] Moreover, to the extent that Hicks is arguing that he should have been allowed to offer HGS evidence to prove consent notwithstanding the limits imposed by

Evidence Rule 412, the exclusion of the HGS evidence was not arbitrary. The evidence he proposed did not show that M.M. had consented to any sexual activity with Hicks. Defendants' offer of proof did not contain any evidence that Hicks knew about M.M.'s participation in HGS or that M.M. wanted to earn points by having sex with him. Instead, it only showed that M.M. had thought of HGS as a "joke" and that it had played "no role" in her entry into Himes's home. Tr. Vol. VII p. 100. Hicks has failed to meet his burden to show that evidence about HGS in any way proved that M.M. consented to any sexual activity with him.

[17] Hicks's claim that he was denied an opportunity to fully cross-examine M.M. fails for similar reasons. The rape shield rule and statute do not violate a defendant's Sixth Amendment right to confront witnesses absent a showing of actual impingement on cross-examination. *See Watson v. State*, 134 N.E.3d 1038, 1044 (Ind. Ct. App. 2019), *trans. denied*. A defendant's right to cross-examine witnesses is not without limits, and a defendant is not entitled to cross-examine a witness "in whatever way, and whatever extent, that a defendant might wish." *Id*. Hicks claims that cross-examining M.M. about her participation in HGS would have tested her credibility but fails to explain how. M.M. did not deny that she had participated in HGS in general. As mentioned, the proposed evidence did nothing to prove consent, and it did not discredit M.M.'s testimony that Hicks had compelled her to have sex against her will. In

other words, Hicks has not met his burden to show that there was any actual impingement on his right to cross-examine M.M.[1]

[18] Hicks also failed to show any actual impingement on his right to cross-examine S.D. During an offer to prove made outside the presence of the jury, S.D. said that she did not know anything about HGS and was not involved in it. Hicks insists that he had a right to confront her about HGS evidence to test her credibility, but Hicks has not cited any legal authority in support of his claim that otherwise inadmissible evidence must be admitted solely to test the credibility of a witness about that same evidence. Here, the jury never learned about whether S.D. knew anything about HGS, so there was no basis to test her credibility on the subject. *See Nasser v. State*, 646 N.E.2d 673, 681 (Ind. Ct. App. 1995) ("The general rule is that cross-examination must lie within the scope of the direct examination."). Moreover, Hicks concedes that S.D. was not present when he raped M.M. Consequently, Hicks has failed to explain how cross-examining S.D. would have helped the jury "ascertain the credibility of M.M.'s account of what happened and whether M.M. consented to sex." Appellant's Br. p. 12.

[19] Although Hicks draws our attention to *Zawacki v. State*, 753 N.E.2d 100, 103 (Ind. Ct. App. 2001), *trans. denied*, it does not help him because it has been

[1] Although Hicks cites Article 1, section 13, of the Indiana Constitution, he does not independently analyze or argue under that section and so has waived any claim pursuant to that provision. *See Watson*, 134 N.E.3d at 1044 (concluding that defendant waived his Article 1, section 13, claim when he "fail[ed] to advance a separate argument under this provision").

abrogated by a revision to Evidence Rule 412. In *Zawacki*, the trial court had excluded evidence "relating to 'the past sexual conduct' of the victim or witnesses other than the accused." *Id*. at 102 (record citation omitted). Specifically, Zawacki sought to introduce evidence that the victim had asked Zawacki if she could have a same-sex, sexual relationship with his daughter, a request that Zawacki had denied. *Id*. at 102. We concluded that the evidence "did not fall within the confines of our Rape Shield Law[,]" which, at the time, only excluded "evidence of the victim's or of a witness's past sexual conduct with the defendant" or "evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded." *Id*. at 103. Since *Zawacki* was decided, however, Evidence Rule 412 has been amended and now generally prohibits evidence offered to prove that a victim or witness engaged in other sexual behavior or of a person's sexual predisposition. Evid. R. 412. Because *Zawacki* is no longer good law, it does not help Hicks.

[20] Finally, we conclude that the State did not open the door to evidence regarding HGS. During its direct examination of the sexual-assault nurse examiner who examined M.M., the State introduced the nurse's report and asked her to explain it to the jury. One of the topics the State asked the nurse to explain was the part of the report that discussed whether there had been any "other intercourse" in the five days leading up to the examination. Tr. Vol. V p. 150. The medical purpose underlying questions about a person's recent sexual history were relevant to help determine what risks of infections might exist that would need to be tested for and treated. On cross-examination, the nurse

explained that M.M. had engaged in sexual activity with an unknown person two days before the examination.

[21] It is true that evidence that is otherwise inadmissible can be admitted if a party has opened the door to that evidence, but for that exception to apply, the party must have first left the trier of fact "with a false or misleading impression of the facts related." *Garcia-Berrios v. State*, 147 N.E.3d 339, 343 (Ind. Ct. App. 2020), *trans. denied*. Hicks has not shown that there was anything about the nurse's testimony that left the jury with a false or misleading impression, let alone one that could only be rebutted through evidence of HGS. Moreover, Hicks's argument fails to explain how *a co-defendant's* cross-examination of M.M.'s prior sexual history meant that *the State* had opened the door.

II. Sentencing

[22] Hicks contends that the trial court abused its discretion in sentencing him, specifically that it did not consider his age (seventeen at the time of his offenses) to be a mitigating circumstance. Sentencing decisions are within the trial court's sound discretion, and we review those decisions only for an abuse of that discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007) (citation omitted). A trial court may abuse its discretion in a variety of ways, including by failing to enter a sentencing statement when the trial court has not issued the advisory sentence, entering a sentencing statement using reasons for the sentence that are not supported by the record, entering a sentencing statement that omits reasons that are not clearly supported by the record, and entering a sentencing statement with

reasons that are improper as a matter of law. *Id*. at 490–91. An "abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Id*. (citations omitted).

[23] Contrary to Hicks's assertion, the record clearly indicates that the trial court did, in fact, take his age into account when sentencing him, just not in the way that Hicks contends it should have. The trial court observed that Hicks's co-defendants were "older men who were much more sophisticated than you in a lot of ways, probably very influential[.]" Tr. Vol. IX pp. 237–38. When it observed that Hicks had a lack of criminal or juvenile history, it said, "I will also take into consideration and temper that mitigating factor by the fact that he was only 17 years of age at that point in time[.]" Tr. Vol. IX p. 240. In its sentencing order, the trial court wrote, "As a mitigating factor: the Court finds the defendant has no prior history and was 17 years of age at the time of the offense." Appellant's App. Vol. II p. 166. To the extent Hicks is challenging the specific mitigating weight given to his age, that claim is not available for appellate review. *See Anglemyer*, 868 N.E.2d at 493–94 ("To the extent Anglemyer complains that the trial court abused its discretion in failing to give his proffered mitigating factor greater weight, this claim is not available for appellate review.").

[24] Moreover, to the extent that the trial court found Hicks's age to "temper" his lack of a criminal record, "the trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance or to

give the proffered mitigating circumstances the same weight the defendant does." *See Wilkes v. State*, 917 N.E.2d 675, 690 (Ind. 2009). It is "not reversible error to fail to consider a factor that is not significant in relation to all the circumstances of the case." *Id*. (citing *Anglemyer*, 875 N.E.2d at 220–21)). "Focusing on chronological age is a common shorthand for measuring culpability, but for people in their teens and early twenties it is frequently not the end of the inquiry." *Ellis v. State*, 736 N.E.2d 731, 736 (Ind. 2001). "There are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful." *Id*. "[A]ge is not a per se mitigating factor[,]" let alone "automatically a significant mitigating factor." *Gross v. State*, 769 N.E.2d 1136, 1141 n.4 (Ind. 2002). A defendant must show a nexus between his age and his culpability—which Hicks has not done—and failure to do so means that a defendant has not shown that his age was a significant mitigator. *See id*.

[25] Finally, even if the trial court did abuse its discretion in its consideration of Hicks's age, any error that may have occurred can only be considered harmless. We will affirm a sentence unless we "cannot say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances." *McCain v. State*, 148 N.E.3d 977, 984 (Ind. 2020). The trial court found two aggravating circumstances, neither of which Hicks challenges on appeal. First, the trial court found that the harm, injury, loss, or damage was significant and greater than the elements required to prove the offense, noting that M.M. could not complete an examination of her

anus because it was too painful due to injuries Hicks had caused. The trial court also found that Hicks had committed a crime of violence in the presence of children less than eighteen years old. The trial court noted that Himes's two children were in the apartment, the apartment was small, a "reasonable person could conclude that these children were able to see and/or hear what was occurring[,]" and that this was a "significant factor[.]" Tr. Vol. IX pp. 239–40. In light of the significant and unchallenged aggravating circumstances, we conclude that any sentencing error that may have occurred can only be considered harmless. *See id*.

III. Mistrial Motion

[26] Finally, Hicks contends that the trial court abused its discretion in denying his mistrial motion, which was based on testimony from M.M.'s mother that M.M. had received medical treatment related to suicidal ideation following Hicks's rape of her. The decision to grant or deny a mistrial lies within the sound discretion of the trial court, and reversal is required only if the defendant demonstrates that he was so prejudiced that he was placed in a position of grave peril to which he should not have been subjected. *Mickens v. State*, 742 N.E.2d 927, 929 (Ind. 2001). The gravity of peril is measured by the probable persuasive effect on the jury's decision, not the impropriety of the conduct. *Id*. We will review a trial court's decision on a motion for mistrial with great deference, as that court is in the best position to assess the circumstances surrounding the event and the probable impact of the alleged error on the jury. *Norton v. State*, 785 N.E.2d 625, 627 (Ind. Ct. App. 2003). To prevail on an

appeal from the denial of a mistrial motion, "the defendant must demonstrate that the conduct complained of was both error and had a probable persuasive effect on the jury's decision." *Pierce v. State*, 761 N.E.2d 821, 825 (Ind. 2002). "After all, a mistrial is an extreme remedy that is only justified when other remedial measures are insufficient to rectify the situation." *Mickens*, 742 N.E.2d at 929.

[27] The trial court permitted the State to introduce evidence that M.M. had contemplated suicide in the months after she was raped, but it declined to allow the State to present evidence of medical treatment for that suicidal ideation. The prosecutor asked M.M.'s mother whether M.M. had ever expressed a desire to kill herself, and her mother said yes. The prosecutor then asked whether M.M.'s mother had "t[aken M.M.] for treatment with a medical doctor," and she said yes. Tr. Vol. VII p. 19. The defendants objected to the testimony and moved for a mistrial, but the trial court found that they had not been subjected to grave peril and denied the mistrial motion. The trial court, however, sustained the defendants' objection, struck the witness's response, and admonished the jury not to consider it.

[28] First, we cannot say that Hicks's was subjected to any grave peril, because it is hardly surprising that a person contemplating suicide would receive some sort of medical care. We fail to see how M.M.'s mother's brief reference to medical care could have been more damaging to Hicks than her testimony that M.M. had experienced suicidal ideation following her rape. Moreover, the trial court admonished the jury to disregard the testimony in question, and we "must

presume that the jury obeyed the [trial] court's instructions in reaching its verdict." *Isom v. State*, 31 N.E.3d 469, 481 (Ind. 2015). A "clear instruction, together with strong presumption that juries follow courts' instructions and that an admonition cures any error, severely undercuts the defendant's position." *Lucio v. State*, 907 N.E.2d 1008, 1011 (Ind. 2009). Hicks has not identified any deficiency in the trial court's admonition or any indication that the jury failed to take it to heart. *See, e.g.*, *Biggerstaff v. State*, 266 Ind. 148, 150, 361 N.E.2d 895, 896–97 (Ind. 1977) (concluding that an isolated nature of a remark and an immediate admonition established the absence of grave peril requiring mistrial). Hicks has failed to establish that the trial court abused its discretion in denying his mistrial motion.

[29] We affirm the judgment of the trial court.

Riley, J., and Weissmann, J., concur.