## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.


ATTORNEY FOR APPELLANT

David W. Stone IV
Anderson, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

Ryan M. Palmer,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

June 4, 2021

Court of Appeals Case No. 20A-CR-2013

Appeal from the Madison Circuit Court

The Honorable Angela Warner Sims, Judge

Trial Court Cause No. 48C01-1909-F4-2095

**Weissmann, Judge.**

[1] Ryan Palmer was convicted of Level 4 felony child molesting and sentenced to six years in prison. He now appeals, arguing that the trial court abused its discretion in admitting recordings of Palmer's jailhouse telephone calls and that the State failed to prove beyond a reasonable doubt he acted to arouse his sexual desires. Finding that the trial court did not abuse its discretion and that a reasonable jury could find each element of the crime proved beyond a reasonable doubt, we affirm.

## Facts

[2] Palmer and M.C. were both members of the tight-knit community that frequents the Anderson Speedway. Palmer and M.C.'s father were old friends, and M.C. had known Palmer her whole life. Tr. Vol. I, p. 54.

[3] On July 4, 2019, Palmer was helping a pit crew. M.C. was there with her family to support her father, who had a car in one of the races. When the car owned by M.C.'s father won its race, Palmer joined M.C. and her family in celebration at the winner's circle. There, Palmer and M.C. hugged. During the hug, Palmer touched M.C.'s bottom. The touch made M.C. "uncomfortable," but she thought it was an accident. Tr. Vol. I, p. 56. M.C. was 11 years old. Palmer was 22.

[4] Later that same day, M.C.'s father asked Palmer to watch M.C. and her siblings for a moment. Eventually everyone met back at the pits. There, according to M.C., "I was standing by my dad because he was talking. And then Ryan picked me up. And at first, my back was facing towards my dad. Then [Ryan]

turned around. And whenever he turned around, my body like slid down, and he was touching my butt." Tr. Vol. I, pp. 58-59. M.C. no longer thought the touchings were accidental.

[5] M.C. waited until the drive home to tell her father what happened. Her father immediately contacted the police. Palmer was ultimately arrested and charged with one count of child molesting, a Level 4 felony. The case went to trial.

[6] After a day of jury selection, Palmer phoned two relatives from jail. Both calls began with a recording that stated: "Hello, this is a free call from Ryan, an inmate at Madison County Jail. This call is subject to recording and monitoring." Ex. 1, Track 1, 0:00; Track 2, 0:00.

[7] In the first call, Palmer told a relative, "I'd like for someone to get hold of [estranged wife] and let her know what to f**king say and everything." Ex. 1, Track 1, 2:50. After some back and forth, he then said, "If you can, shoot her a message and tell her, remember to say you were with him the whole, full time. You were never (sic) left him, you know." The relative agreed. Ex. 1, Track 1, 3:09-3:21.

[8] In the second call with a different relative, Palmer again worried about his wife's testimony, saying, "[My attorney] is worried that she's going to say that she wasn't with me the whole time when she was." Ex. 1, Track 2, 2:58. The relative responded that Palmer's wife could not "back out of what she's already said because she can get in trouble for that." Ex. 1, Track 2, 3:08; Tr. Vol. I, 203-04.

[9] The next day, the State moved to enter recordings of the calls into evidence, arguing that Palmer was attempting to influence his estranged wife's testimony. Defense counsel objected, arguing that the prejudicial nature of the calls, which reveal that Palmer was in custody, outweighed what little probative value they had, as Palmer was merely expressing concern that his wife might lie to hurt him. The trial court judge admitted the recordings over the defense's objections.

[10] The jury found Palmer guilty, and the judge sentenced him to six years in prison.

## Discussion and Decision

[11] Palmer raises two issues. First, he argues that the trial court abused its discretion in admitting recordings of his jailhouse telephone calls. Second, he argues that the State failed to prove each element of his charge beyond a reasonable doubt.

## I. Admission of Evidence

[12] Palmer argues that the jailhouse recordings were more prejudicial than probative, in violation of Indiana Evidence Rule 403. That rule states that the court may exclude relevant evidence if it is unfairly prejudicial. Ind. Evid. R. 403. We review these rulings for abuse of discretion. *Baer v. State*, 866 N.E.2d 752, 753 (Ind. 2007). The relevant inquiry is not whether the evidence in question is merely prejudicial, but *unfairly* so. *Id.*

[13] Palmer compares admitting calls that announce his incarceration to requiring a defendant to wear a prison jumpsuit. The United States Supreme Court held in *Estelle v. Williams* that forcing a defendant to wear identifiable jail or prison clothing denies that defendant due process and the presumption of innocence. 425 U.S. 501, 505 (1976); *see Bledsoe v. State*, 274 Ind. 286, 410 N.E.2d 1310, 1313 (Ind. 1980). In support of that ruling, the Court in *Williams* observed, "The defendant's clothing is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play." *Williams*, 425 U.S. at 505.

[14] Although recordings of jailhouse telephone calls share some characteristics with prison garb—both indicate that a defendant is or was incarcerated and both are more likely to apply to indigent defendants, who are less likely to make bail—the comparison is ultimately inapt. In *Ritchie v. State*, our Supreme Court held that admitting video evidence in which a defendant appeared shackled and in jail clothing was "one step removed" from appearing in the same during courtroom proceedings. 875 N.E.2d 706, 718 (Ind. 2007). Surely audio evidence is one step further removed.

[15] The recordings are outside the scope of harm contemplated in *Williams*, at least in part, because they are unlikely to be a "continuing influence" on the jury. *See, e.g.*, *Southern v. State*, 878 N.E.2d 315 (Ind. Ct. App. 2007) (upholding trial court's decision to allow jury to see polygraph video in which defendant was wearing his jail uniform because it "consumed only a small portion of the four-day trial"); *Kelly v. State*, 460 N.E.2d 137, 139 (Ind. 1984) (upholding admission

of photo of defendant in jail, as it was not a "constant and continuing reminder" of defendant's incarceration). Though the Indiana court system has not directly addressed audio recordings like these in the context of *Williams*, the Seventh Circuit has held that "the occasional reference to the fact that [defendant] had at some point been in jail is quite different than the 'constant reminder implicit in such distinctive, identifiable attire'" as prison garb. *U.S. v. Johnson*, 624 F.3d 815, 821-22 (7th Cir. 2010).

[16] We find no reason to deviate from the Seventh Circuit's reasoning here. Admitting the recordings of Palmer's jailhouse telephone calls was neither a constitutional violation nor an abuse of discretion under Indiana Evidence Rule 403. Any prejudice stemming from knowledge of Palmer's incarceration while awaiting trial was minimal compared to the probative nature of the recordings, which documented Palmer asking a relative to tell his estranged wife how to testify. Ex. 1. Evidence of a defendant's attempts to influence witness testimony is relevant to revealing "consciousness of guilt." *Mayes v. State*, 467 N.E.2d 1189, 1194 (Ind. 1984).

[17] Even if the recordings were improperly admitted, the error was harmless. "An error is harmless when it results in no prejudice to the 'substantial rights' of a party." *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018). Palmer failed to show that, but for these recordings, he would have been acquitted. He attempts to make this showing by characterizing the trial as a "credibility contest" he lost solely because of the recordings. Appellant's Br., p. 10. But with or without the recordings, it was not unreasonable for the jury to question Palmer's credibility.

He testified that he hurt his arm on the day in question and, therefore, was physically unable to hug M.C. However, no witnesses remembered him having that injury. Tr. Vol. I, pp. 153, 176, 188, 203. He also insisted that he did not know the nature of M.C.'s allegations even after others in the close-knit Anderson Speedway community knew, including his live-in fiancée. *Id.* at 176, 206-09. Additionally, a child molesting conviction may rest solely on the testimony of the alleged victim. *Baber v. State*, 870 N.E.2d 486, 490 (Ind. Ct. App. 2007). If there had been an error in admitting the tapes, it would have been harmless.

## II. Insufficient Evidence

[18] Palmer next argues that there was insufficient evidence to convict, as the State failed to prove beyond a reasonable doubt every element of the charge. In reviewing the sufficiency of the evidence, we consider "only the probative evidence and reasonable inferences *supporting* the verdict." *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007) (emphasis in original). Unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt, we affirm. *Id.*

[19] Palmer was charged under Indiana Code § 35-42-4-3(b), which states, in relevant part:

> A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the

> sexual desires of either the child or the older person, commits child molesting, a Level 4 felony.

[20] Palmer very briefly argues that the State presented no evidence that he fondled M.C., as fondling requires a "lingering" touch. Appellant's Br., p. 11. This is a puzzling detour. The statute very clearly states that submitting a child to "fondling *or* touching" is an element of child molesting. And the information filed by the State specifically alleged Palmer "did fondle or touch" M.C. App. Vol. II, p. 19. The State presented sufficient evidence of touching, including M.C.'s testimony that "he was touching my butt." Tr. Vol. I, p. 59. Accordingly, whether the State failed to prove fondling is irrelevant.

[21] The bulk of Palmer's sufficiency argument pertains to whether the State proved beyond a reasonable doubt that he touched M.C. with the intent to arouse or satisfy his sexual desires. This element can be established through circumstantial evidence and inferred from the defendant's conduct and the "natural and usual sequence to which such conduct usually points." *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000).

[22] The evidence in favor of the verdict shows that Palmer touched M.C.'s bottom twice in one day. Palmer moved M.C. to hide the second touch from her father. Tr. Vol. I, pp. 58-59. The second touch lingered between one and five seconds. In a forensic interview, M.C. indicated that she tried to pull away from Palmer, but he pulled her back into him to touch her. *Id.* at 120-21. This evidence indicates that the touches were no accident. Palmer agreed that a grown man

touching an 11-year-old's bottom is inappropriate. *Id.* at 201. This evidence lends itself to the inference that Palmer acted with intent to arouse.

[23] Although this is a close case, we cannot say that no reasonable jury could find the elements of the crime proven beyond a reasonable doubt. Accordingly, we affirm Palmer's conviction.

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