MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

T. Andrew Perkins
Peterson Waggoner & Perkins, LLP
Rochester, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Ellen H. Meilaender
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Frank J. Fugate, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 19, 2021

Court of Appeals Case No. 20A-CR-1913

Appeal from the Fulton Circuit Court

The Honorable A. Christopher Lee, Judge

Trial Court Cause No. 25C01-1811-F1-818

Crone, Judge.

Case Summary

[1] Frank J. Fugate, Jr., appeals his conviction, following a jury trial, for level 1 felony child molesting. He asserts that the trial court committed fundamental error in failing to strike a particular cross-examination line of questioning by the State, and that it committed reversible error in excluding certain testimony offered by the defense. We disagree and therefore affirm.

Facts and Procedural History

[2] In 2017 and 2018, Fugate lived with his wife, Kim, and his thirteen-year-old daughter, T.F. In June 2017, Kim moved out of the trailer they were living in because she and Fugate were having marital problems. That summer, Fugate began putting his fingers inside of T.F.'s vagina. He did this on multiple occasions, usually while the two were on the couch in the main room. Fugate told T.F. that he was "the only man that could make [her] feel good." Tr. Vol. 3 at 92. He also told her that he could teach her "how to give a blowjob" and that all she had to do was ask him. *Id.* Fugate would come into T.F.'s bedroom at night and stare at her. T.F. was scared and confused by her father's behavior, and she began putting two ten-pound carpet weights in front of her bedroom door at night to prevent him from coming into her room. The last time Fugate put his fingers inside T.F.'s vagina was in the late summer or early fall of 2018.

[3] Kim moved back into the trailer in October 2018, and she immediately noticed that Fugate was more "hands on" regarding his parenting and more "overprotective" of T.F. than he had been previously. *Id.* at 67. Kim found it

strange that Fugate would regularly no longer be in bed with her when she would wake up at night. She often caught him coming out of T.F.'s room in the middle of the night, and this caused serious fights between Kim and Fugate. Regarding T.F., Kim noticed that she was "a little bit more clingy" to Kim than she had been before, and that she "didn't want to be in the home as much." *Id*. at 68-69. Kim further observed T.F.'s use of the carpet weights to block her door at night and thought it seemed like T.F. "had a system" so that she would wake up "when her dad came through the door." *Id*. at 69.

[4] Kim separated from Fugate on October 26, 2018, and that same day, she and T.F. went to the Fulton County Sheriff's Department to speak with police about Fugate. Kim met with Detective Sergeant Travis Heishman and told him that Fugate had been molesting T.F. But when T.F. met with Detective Heishman, she was "very evasive," did not want to talk, and made no disclosures that Fugate had done anything improper. *Id*. at 52. T.F. did not reveal the molesting to Detective Heishman at that time because she did not want her father to go to jail and she "was scared" that "he was going to hurt [her]" if she told the police about what he was doing. *Id*. at 94. A few days later, after meeting with several female family members who supported her, T.F. spoke again with Detective Heishman and told him that Fugate had molested her.

[5] The State charged Fugate with level 1 felony child molesting. Following a jury trial, Fugate was found guilty as charged. The trial court imposed a forty-year sentence. This appeal ensued.

Discussion and Decision

Section 1 – The trial court did not commit fundamental error.

[6] Fugate first challenges the trial court's failure to strike a particular cross-examination line of questioning by the State and to admonish the jury to disregard it. Specifically, he directs us to the following exchange during the State's cross-examination of him after he had just denied having ever inappropriately touched T.F.:

> Q: All right. So you are saying that you never molested [T.F.]?
>
> A: No.
>
> Q: You'd never commit child molesting?
>
> A: No.
>
> Q: On anyone?

Tr. Vol. 3 at 147. Before Fugate was able to answer, defense counsel objected to the last question as "asked and answered." *Id*. The trial court held a brief sidebar, excused the jury, and then entered into a discussion regarding this line of questioning with both parties and asked them how they wanted to proceed. Defense counsel argued that Fugate was being placed in an untenable position by being asked to answer the last question, and that the State's line of questioning was an improper attempt to reveal to the jury that Fugate had a prior conviction for child molesting. Despite the State's argument to the contrary, the trial court determined that Fugate had not opened the door to

evidence of his prior conviction, and that the State's line of questioning should be terminated. The parties discussed striking the pending question only but, due to concerns of drawing too much attention to the question, the State offered to simply withdraw it. The trial court agreed with that proposal, and defense counsel did not object to that chosen course of action. Upon the jury's return to the courtroom, the State withdrew the pending question and moved on to a different subject.

[7] Fugate now complains that he suffered prejudice and that the trial court should have stricken the entire line of questioning and admonished the jury to disregard it. He concedes that his counsel failed to object to the trial court's chosen course of action and that he has consequently waived this challenge. *See Hale v. State*, 54 N.E.3d 355, 358-59 (Ind. 2016) (the purpose of requiring a party to contemporaneously object is "to promote a fair trial by preventing a party from sitting idly by and appearing to assent" to a ruling by the court "only to cry foul when the outcome goes against him."). Thus, Fugate asserts that the trial court's chosen course of action resulted in fundamental error.

[8] Fundamental error is an extremely narrow exception to the general rule that a party's failure to object at trial results in a waiver of the issue on appeal. *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018). To establish fundamental error, the defendant faces the heavy burden of showing that the alleged error was so prejudicial to his rights as to make a fair trial impossible. *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014). The defendant must show that, under the circumstances, the error "constitute[d] clearly blatant violations of basic and

elementary principles of due process" and "present[ed] an undeniable and substantial potential for harm." *Id*. (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)).

[9] We agree with Fugate that "evidence of a prior conviction is as prejudicial as evidence can get." *Thompson v. State*, 690 N.E.2d 224, 235 (Ind. 1997). However, the record shows that the questioning that occurred did not inform the jury that Fugate in fact had a prior conviction for child molesting. The trial court specifically noted this, but also noted that there was a risk moving forward that the State's line of questioning could elicit inadmissible evidence. Accordingly, the line of questioning was ended, and the final question was withdrawn. The trial court acted well within its discretion in concluding that no prejudice had occurred, and that withdrawal of the question was an appropriate course of action under the circumstances. *See Tompkins v. State*, 669 N.E.2d 394, 399 (Ind. 1996) (recognizing that trial court could have determined that witness's statement did not clearly inform jury that defendant had a criminal history); *see also Clifton v. State*, 499 N.E.2d 256, 258 (Ind. 1986) (police officer's testimony referring to an earlier investigation did "not refer to [defendant] as the subject of a criminal investigation or give any indication of criminal activity on his part"). In sum, Fugate has not met his burden to show that any error occurred, much less error so prejudicial to his rights as to make a fair trial impossible. The trial court did not commit fundamental error.

Section 2 – The trial court did not commit reversible error in excluding certain testimony offered by the defense.

[10] Fugate next asserts that the trial court erred in excluding certain testimony offered by the defense. "The admission or exclusion of evidence lies within the sound discretion of the trial court and is afforded great deference on appeal." *Whiteside v. State*, 853 N.E.2d 1021, 1025 (Ind. Ct. App. 2006). "We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion." *Id*. "An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id*. "Errors in the admission or exclusion of evidence are considered harmless unless they affect the substantial rights of a party." *Id*. "To determine whether an error in the admission of evidence affected a party's substantial rights, we assess the probable impact of the evidence on the jury." *Id*.

[11] During trial, Fugate attempted to solicit testimony from T.F.'s cousin, B.F., that T.F. told her that she had "fabricated the story" that she was molested by Fugate. Tr. Vol. 3 at 126. The State objected to the evidence as hearsay, and the trial court sustained the objection. Hearsay is a statement that is not made by the declarant while testifying at trial and that is offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c).[1] It is undisputed

[1] As noted by the State, Fugate did not offer this statement into evidence as impeachment evidence, as defense counsel never questioned T.F. about this statement. Rather, the statement was offered during B.F.'s testimony only as substantive evidence.

that T.F.'s statement to B.F. is hearsay, which is inadmissible unless it falls within an exception to the hearsay rule. Ind. Evidence Rule 802.

[12] Fugate responded to the State's hearsay objection by arguing that T.F.'s statement fell within the exception found in Indiana Evidence Rule 803(3), which provides "a hearsay exception for statements of the declarant's then-existing state of mind at the time the statement was made. State of mind, as that term is defined, may include emotion, sensation, physical condition, intent, plan, motive, design, mental feeling, pain, and bodily health." *Camm v. State*, 908 N.E.2d 215, 226 (Ind. 2009). In criminal cases involving out-of-court statements of a victim's state of mind, our supreme court has identified three instances where such statements may be admissible, the third of which is relevant in this case: "'[T]o show the intent of the victim to act in a particular way.'" *Id*. (alteration in *Camm*) (quoting *Hatcher v. State*, 735 N.E.2d 1155, 1161 (Ind. 2000)). Such declarations may be admitted not only as proof of the declarant's then-existing state of mind, but also as circumstantial evidence of the declarant's future conduct. *Id*. "A jury may infer from the declarant's past state of mind that the declarant held the same mental state at a future time and acted on it." *Id*.

[13] Fugate argues that T.F.'s alleged statement to B.F. that she fabricated her story about the molestations to police indicated her future intent to testify falsely against Fugate at trial. However, we do not necessarily see it that way, as there is nothing inherent about T.F.'s statement that appears to convey such future intent on her part. We agree with the State that the statement could just as

easily be viewed as a statement about T.F.'s past state of mind (i.e., having lied to police about being molested) as opposed to a statement of her then-existing state of mind and intent to act in a specific way in the future. *See* Ind. Evidence Rule 803(3) (providing that the exception does not extend to "a statement of memory or belief to prove the fact remembered or believed."). Accordingly, we cannot say that the trial court's decision to exclude the statement was clearly against the logic and effect of the facts and circumstances before the court.

[14] Regardless, even assuming that the statement was improperly excluded, any error did not affect Fugate's substantial rights and was harmless, given the extensive evidence of his guilt. *See Williams v. State*, 714 N.E.2d 644, 652 (Ind. 1999) (holding that exclusion of certain testimony was harmless error as it was unlikely to have weighed appreciably in defendant's favor in light of other evidence that connected him to crime), *cert. denied*. Here, T.F. offered unequivocal and detailed testimony about being repeatedly molested by her father. Although Kim did not directly witness the abuse, her testimony regarding both T.F.'s and Fugate's behavior corroborated T.F.'s story. The State also offered the testimony of Austin Annis, who stated that Fugate bragged to him in jail about how he had been going into the bedroom of a young girl who lived in his home and touching her to get her interested in sexual things. Moreover, despite his testimonial denial of the molestation, Fugate's credibility was repeatedly called into question during trial due to his inconsistent and contradictory explanations for his behavior. Under the circumstances, Fugate has failed to show that the exclusion of T.F.'s alleged

statement affected his substantial rights, and, accordingly, we conclude that any error in the exclusion of that evidence was harmless.

[15] Affirmed.

Najam, J., and Riley, J., concur.