MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Darrin N. May,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 31, 2021

Court of Appeals Case No. 20A-CR-2360

Appeal from the Delaware Circuit Court

The Honorable Marianne L. Vorhees, Judge

Trial Court Cause No. 18C01-2003-F1-3

Kirsch, Judge.

[1] Darrin N. May ("May") was convicted of rape[1] as a Level 1 felony and was adjudicated as an habitual offender.[2] He raises two issues on appeal, which we restate as:

> I. Whether the admission of testimony of a sexual assault nurse examiner that stated the victim ("N.C.") identified May as her assailant violated May's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution; and
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> II. Whether the trial court abused its discretion in allowing a training coordinator for the Indiana Coalition Against Domestic Violence to testify as an expert regarding the behavior of rape victims after they have been assaulted.

[2] We affirm.

Facts and Procedural History

[3] In late 2008, May began dating N.C., and she moved in with May and May's father. *Amended Tr. Vol. 2* at 40. They had a daughter together but ended their relationship in 2011. *Id.* May and N.C. continued to communicate to raise their daughter and periodically discussed the possibility of reuniting. *Id.* at 43. In 2015, N.C. married another man, but that relationship ended in late 2018 or early 2019. *Id.* at 42. In October of 2019, May and N.C. rekindled their

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[1] *See* Ind. Code § 35-42-4-1(b)(2).

[2] *See* Ind. Code § 35-50-2-8.

relationship, so May moved in with N.C. *Id*. at 43. Their attempt to reconcile soon derailed, so in late January or early February of 2020, N.C. ended the relationship, and May moved out. *Id*. at 45-46.

[4] May and N.C. continued to talk, and May implored N.C. to reestablish their relationship. *Id*. at 46-47. On February 22, 2020, May was "begging" and "pleading" for N.C. to meet so he could convince her to patch up their relationship. *Id*. at 47. Eventually, N.C. agreed to meet May and picked him up. *Id*. at 48. N.C. told May that she wanted to reunify but would not do so until May improved his behavior. *Id*. at 49-50. After ninety minutes, N.C. dropped May off. *Id*. at 51. May was upset that N.C. dropped him off because he thought their conversation went well and that N.C. would invite him over. *Id*. N.C. returned to her apartment. *Id*. at 51-52.

[5] N.C. began to prepare to go out with her friends that evening. *Id*. May sent N.C. several text messages, telling her to cancel her plans and to get together with him instead. *Id*. at 51-52. Eventually, N.C. turned off her phone. *Id*. at 52. As N.C. applied her makeup, she turned and noticed May standing in the doorway to her bedroom. *Id*. at 53-54. N.C. could tell that May was angry and noticed that his face was "really weird" and that his eyes were "black." *Id*. at 55. May called N.C. a "whore" and accused her of getting ready to go out with a different man. *Id*. at 55. In an attempt to ignore May, N.C. walked toward her closet to finish getting ready, but May grabbed her from behind and threw her onto the bed. *Id*. at 55-56.

[6] May began yanking on N.C.'s clothes. *Id*. at 56. While N.C. tried to wrestle away, she saw that May was brandishing a knife. *Id*. May held the knife against N.C.'s neck and threatened to slit her throat. *Id*. N.C. pleaded with May to not stab her, and she began to crawl away from the bed. *Id*. at 56-57. May grabbed her from behind and positioned her so that she was bent over the bed. *Id*. at 57. May pulled N.C.'s pants down, inserted his penis into her vagina, and had intercourse with her until he ejaculated onto her buttocks. *Id*.

[7] N.C. immediately went to her friend's house and told her friend that May had raped her. *Id*. at 59-61. N.C. did not go to the hospital or call the police because she did not want to be responsible for sending May, the father of her daughter, to jail. *Id*. at 61-62. However, the next morning she sent a text message to May to express her anger toward him. *Id.* at 62. N.C. continued to text May for the next two days, hoping he would apologize. *Id*. at 65. By the third day, May had not apologized, so N.C. decided to get a restraining order against May. *Id*. N.C. spoke met with a victim advocate and told the victim advocate that May had raped her. *Id*. at 65-66. After N.C. made her disclosure, she also told an officer with the Muncie Police Department that May had raped her. *Id*. at 67-68.

[8] N.C. was then taken to a hospital for a sexual assault examination. *Id*. at 71. On February 25, 2020, she met with Chandra McCord ("McCord"), a sexual assault nurse examiner, and told McCord that May had raped her. *Id*. at 71-72, 93, 201. As part of the examination, N.C. filled out an Application for Benefits from the Sex Crime Victim's Services Fund ("Application for Benefits"), and in

the Application for Benefits, N.C. repeated her claim that May had raped her. *Id*. at 202. McCord told N.C. that the exam would involve an invasive pelvic examination. *Id*. at 72. Because she was exhausted, N.C. decided to not go through the sexual assault examination. *Id*.

[9] On March 3, 2020, the State charged May with Level 1 felony rape, Level 2 felony burglary, Level 3 felony criminal confinement, and Level 5 felony intimidation. *Appellant's App. Vol. 2* at 5-8. On April 27, 2020, the State filed a notice of intent to seek an habitual-offender enhancement. *Id*. at 46. The State later dismissed the Level 2 felony burglary charge. *Id*. at 169-70.

[10] On October 26, 2020, May's jury trial commenced. *Amended Tr. Vol. 2* at 20. McCord testified that she helped N.C. complete the Application for Benefits, in which N.C. had alleged that May had raped her, and that N.C. had told McCord that May had raped her. *Id*. at 202-03. May objected, arguing that N.C.'s allegation in the Application for Benefits was inadmissible hearsay. *Id*. at 203. The State countered that the identity of N.C.'s assailant was admissible under the hearsay exception for statements related to medical diagnosis and treatment. *Id*. The trial court agreed with the State and overruled May's objection. *Id*. at 203-04.

[11] Caryn Burton ("Burton"), a training coordinator with the Indiana Coalition Against Domestic Violence, also testified for the State. *Id*. at 228; *Amended Tr. Vol. 3* at 8. The State asked Burton, "in dealing with survivors in your training, experience and education, is there a misconception about victim disclosure?"

Id. at 18. Burton replied that it is "not abnormal for a victim to delay disclosure" and that "it takes time for a survivor to process" and "weigh all of their options" before deciding whether or not to report an assault. *Id*. at 18-19. May did not object to this testimony. *Id*.

[12] At trial's end, the jury found May guilty as charged. *Id*. at 20; *Appellant's App. Vol. 2* at 227, 229, 231. It also determined that May was an habitual offender. *Amended Tr. Vol. 3* at 165; *Appellant's App. Vol. 2* at 244. On November 30, 2020, the trial court vacated May's convictions for criminal confinement and intimidation due to double jeopardy concerns. *Appellant's App. Vol. 3* at 86. On the remaining conviction for Level 1 felony rape, the trial court imposed a thirty-two-year sentence to the Indiana Department of Correction and enhanced that sentence by eight years for May's status as an habitual offender. *Appellant's App. Vol. 2* at 36-41.

[13] May now appeals. We will provide additional facts as necessary.

Discussion and Decision

I. McCord's Testimony

[14] May argues that the trial court abused its discretion in allowing McCord to testify that N.C. told her that May raped her because this testimony violated May's right to confront a witness under the Sixth Amendment to the United States Constitution and the right to meet a witness face-to-face under Article 1, Section 13 of the Indiana Constitution. May has waived this issue. When May objected to McCord's testimony, he did not claim admission of McCord's

testimony violated his rights under the federal and Indiana constitutions but instead asserted that the testimony was inadmissible hearsay. *Amended Tr. Vol. 2* at 203. "[A] defendant may not argue one ground for objection at trial and then raise new grounds on appeal." *Hitch v. State*, 51 N.E.3d 216, 219 (Ind. 2016) (quoting *Gill v. State,* 730 N.E.2d 709, 711 (Ind. 2000)).[3] Because May's argument on appeal is not the same argument he made during trial, he has waived this issue. Nonetheless, we will address May's arguments on the merits.

[15] In more specific terms, May argues that McCord's testimony about what N.C. told her was testimonial hearsay and was thus inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004): "[McCord's] testimony went far beyond any medical diagnosis or treatment, and allowed McCord to repeat verbatim what N.C. had told her. May submits that the prime purpose of eliciting this portion of her testimony was in fact testimonial." *Appellant's Br*. at 11.

[16] The decision to admit or exclude evidence is within a trial court's discretion, and we afford it great deference on appeal. *Steele v. State*, 42 N.E.3d 138, 142 (Ind. Ct. App. 2015). We will reverse a ruling only if it is clearly contrary to the logic and effect of the facts and circumstances of the case or misinterprets the law. *Id*. Hearsay is a statement "not made by the declarant while testifying at the trial . . . and . . . is offered in evidence to prove the truth of the matter

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[3] We acknowledge that on appeal May briefly raises a hearsay argument against the admission of McCord's testimony similar to the argument he made during his objection at trial, but May has still waived this issue because his one-sentence argument does not constitute a cogent argument. *See* Ind. Appellate Rule 46(A)(8)(a); *Jarman v. State*, 114 N.E.3d 911, 915 n.2 (Ind. Ct. App. 2018), *trans. denied*.

asserted." Ind. Evidence Rule 801(C). The Indiana Supreme Court has described a defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution as follows:

> The Confrontation Clause of the Sixth Amendment provides in relevant part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This bedrock procedural guarantee applies to both federal and state prosecutions. The Confrontation Clause applies to an out-of-court statement if it is testimonial in nature, the declarant is not unavailable, and the defendant has had no opportunity to cross-examine the declarant.

Speers v. State, 999 N.E.2d 850, 852 (Ind. 2013), *cert. denied*, 134 S. Ct. 2299 (2014) (cleaned up).

[17] Whether an out-of-court statement is testimonial is answered by the "primary purpose test," which asks whether, in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony. *Ward v. State*, 50 N.E.3d 752, 759 (Ind. 2016) (cleaned up). Where the principal objective of a patient's statement to a medical professional is for diagnosis or treatment, such a statement is "nontestimonial" and thus does not implicate a defendant's right to confront witnesses under *Crawford*, 541 U.S. at 53-54. *Steele*, 42 N.E.3d at 143 n.5; *see also Perry v. State*, 956 N.E.2d 41, 45 (Ind. Ct. App. 2011). Furthermore, a statement that identifies an attacker "serves a primarily medical, not testimonial, purpose because a 'physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will

necessarily differ when the abuser is a member of the victim's family or household.'" *Ward*, 50 N.E.3d at 759 (quoting *Perry*, 956 N.E.2d at 49).

[18] Here, N.C.'s statement to McCord about the attack helped McCord diagnose and treat N.C., and N.C.'s statement that May was her assailant served a primarily medical, not testimonial, purpose because a medical professional's treatment "will necessarily differ when the abuser is a member of the victim's family or household." *Ward*, 50 N.E.3d at 759. Therefore, N.C.'s statements to McCord regarding the assault, including her statement that May was her attacker, were not testimonial. Thus, McCord's testimony about N.C.'s disclosure did not violate May's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

[19] May also contends that allowing McCord to testify that N.C. told her that May was her attacker violated his rights under Article 1, Section of the Indiana Constitution. May's one-sentence argument does not meet his obligation to make a cogent argument, so he has waived this issue. *See* Ind. Appellate Rule 46(A)(8)(a); *Jarman v. State*, 114 N.E.3d 911, 915 n.2 (Ind. Ct. App. 2018), *trans. denied*. Nonetheless, we will briefly address this issue on the merits.

[20] Indiana Constitution Article 1, Section 13 provides, in part: " (a) In all criminal prosecutions, the accused shall have the right to . . . meet the witnesses face to face . . . ." This constitutional provision guarantees a defendant "the right to face-to-face confrontation with witnesses against him." *Burns v. State*, 91 N.E.3d 635, 640 (Ind. Ct. App. 2018). Indiana's right to a face-to-face meeting

is, "[t]o a considerable degree, . . . co-extensive" with the federal confrontation right. *Ward*, 50 N.E.3d at 756 (Ind. 2016) (quoting *Brady v. State,* 575 N.E.2d 981, 987 (Ind. 1991)). "But while the language of Indiana's provision 'has much the same meaning and history as that employed in the Sixth Amendment, it has a special concreteness and is more detailed.'" *Ward*, 50 N.E.3d at 756 (quoting *Brady,* 575 N.E.2d at 987). For instance, where a witness states what the declarant said, the constitutional requirement of a face-to-face meeting is fulfilled because the witness reporting the hearsay is on the stand. *Id*. In other words, "in that situation the declarant is not the witness." *Id.* The same reasoning applies here. McCord testified under oath and was subjected to cross-examination by May. *Amended Tr. Vol. 2* at 206-10. May's right to face-to-face confrontation under the Indiana Constitution was not abridged. Therefore, McCord's testimony did not violate May's rights under Article 1, Section 13 of the Indiana Constitution. *See Ward*, 50 N.E.3d at 756-57.

II. Burton's Testimony

[21] May claims the trial court abused its discretion in allowing Burton to testify about whether N.C.'s behavior after she was raped was typical for rape victims. The admissibility of expert testimony is within the sole discretion of the trial court, and reversal is warranted only for abuse of that discretion. *Henson v. State*, 535 N.E.2d 1189, 1192 (Ind. 1989). May contends the State did not lay an adequate foundation to establish that Burton was testifying about a subject matter related to a scientific field beyond the knowledge of the average person and that Burton had sufficient skill, knowledge, or experience to offer an

opinion on that subject matter that would aid the jury. May correctly notes that Burton acknowledged that she was neither a psychologist nor a psychiatrist. *Amended Tr. Vol. 3* at 15-16.

[22] Under Indiana Rule of Evidence 702, a witness's knowledge, experience, or education can provide an adequate foundation to testify as an expert:

> (a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Ind. Rule Evidence 702(a). "[O]nly one of these characteristics -- knowledge, skill, experience, training, or education -- is necessary to qualify an individual as an expert." *Lyons v. State*, 976 N.E.2d 137, 141-42 (Ind. Ct. App. 2012), *trans. denied*. "The adoption of Rule 702 reflected an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence." *Turner v. State*, 953 N.E.2d 1039, 1050 (Ind. 2011). Vigorous cross-examination, presentation of opposing evidence, and instruction on the burden of proof are the appropriate means to attack weak but admissible evidence. *Id*. Expert testimony presented in sex crime cases often includes testimony that describes typical behaviors of victims of sex crimes and that corroborates or contradicts the purported victim's accusation. *Allgire v. State*, 575 N.E.2d 600, 608 (Ind. 1991); *Simmons v. State*, 504 N.E.2d 575, 579 (Ind. 1987) (testimony regarding behavior consistent with rape trauma syndrome); *Henson*, 535 N.E.2d at 1194-95.

[23] At trial, the State questioned Burton about N.C.'s behavior soon after May had attacked her. At one point, the State asked Burton, "in dealing with survivors in your training, experience, and education, is there a misconception about victim disclosure?" *Amended Tr. Vol. 3* at 18. Burton replied that it is "not abnormal for a victim to delay disclosure" and that "it takes time for a survivor to process" and "weigh all of their options" before deciding whether or not to report an assault. *Id*. at 18-19. May did not object to this testimony. *Id*.

[24] We first observe that May has waived this issue because he did not object to Burton's testimony. *See Mays v. State*, 982 N.E.2d 387, 392 n.1 (Ind. Ct. App. 2013). Waiver aside, May's argument fails to acknowledge Burton's education and substantial experience in dealing with rape trauma syndrome that gave her specialized knowledge in the area of sexual abuse that went well beyond the knowledge of a lay observer. Among other things, Burton testified that: 1) she had received her bachelor's degree in psychology and communications from Butler University and earned her master's degree in counseling in 2007; 2) she had been the training coordinator for the Indiana Coalition Against Domestic Violence for fifteen years, which required her to coordinate approximately twenty-five to fifty training sessions across the State of Indiana for law enforcement workers, attorneys, social workers, and social services professionals on domestic and sexual violence; 3) as the training coordinator for the Indiana Coalition Against Domestic Violence, she was required to update her knowledge and training, and to that end, she had attended between five to fifteen training sessions per year; 4) she is a member of the Indiana State

Domestic Violence Fatality Review Team, which preforms systematic review of domestic violence homicides; 5) she is a member of the Indiana Lethality Assessment and Limitation Project, which helps train officers on how to identify situations with a high risk of homicide; 6) she is a member of the Indiana State Victim Assistance Academy Steering Committee, which helps create curricula for the Victim Assistance Academy; 7) during her twenty-two-year career, she has worked with 2,500 to 3,000 domestic violence and sexual assault survivors; and 8) she had been qualified as an expert on forty-seven prior occasions. *Amended Tr. Vol. 3* at 8-13.

[25] Here, while the State needed to show only that Burton possessed one of the traits common to experts to lay an adequate foundation for Burton's testimony, the State laid a foundation showing that Burton had at least four of those characteristics - knowledge, skill, experience, and training. *See Lyons*, 976 N.E.2d at 141-42. Finding that the State laid an adequate foundation for Burton's expertise also serves the policy behind the adoption of Rule 702, which was to liberalize, rather than constrict, the admission of reliable expert testimony. *See Turner*, 953 N.E.2d at 1050. And even if the evidence laying a foundation for Turner's expertise was weak – and it was not – May's cross-examination of Burton was the proper means to attack Burton's testimony, not the exclusion of Burton's testimony. *See id*.

[26] It was reasonable for the trial court to conclude that Burton had the necessary specialized knowledge to help the jury understand N.C.'s behavior after May had raped her. *See* Evid. Rule 702(a). Moreover, Burton's testimony about

N.C.'s behavior was a legitimate response to May's argument in his opening statement that N.C.'s "actions or lack of actions [were] not consistent with someone who has just been raped." *Amended Tr. Vol. 2* at 33. Burton's testimony was presented to show the jury that rape victims may choose to process their experience privately before reporting their abuse to the police. This was proper use of Burton's expert testimony. *See Stout v. State*, 612 N.E.2d 1076, 1080 (Ind. Ct. App. 1993) (recognizing that expert testimony that an individual's behavior is consistent or inconsistent with that observed from other victims is a type of evidence that is admissible), *trans. denied*. Accordingly, the trial court did not abuse its discretion in determining that the State laid an adequate foundation to establish that Burton was an expert for purposes of testifying about N.C.'s post-rape behavior.[4]

[27] Affirmed.

May, J., and Vaidik, J., concur.

[4] May also contends that Burton's testimony invaded the province of the jury and that the probative value of Burton's testimony was outweighed by its prejudicial impact. May has waived both issues for failure to make cogent argument. *See* App. R. 46(A)(8)(a); *Jarman*, 114 N.E.3d at 915 n.2.