MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Ryan D. Bower
Bower Law Office, LLC
Salem, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Kelly A. Loy
Assistant Section Chief Criminal Appeals, Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

John J. Bortka,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 29, 2022

Court of Appeals Case No. 21A-CR-1594

Appeal from the Washington Circuit Court

The Honorable Larry W. Medlock, Judge

Trial Court Cause No. 88C01-2004-F6-271

Bradford, Chief Judge.

Case Summary

[1] At all times relevant to this appeal, John Bortka was incarcerated in the Washington County Jail. Bortka was charged with Level 6 felony sexual battery after he touched another inmate, J.H., in an unwanted manner on two separate occasions. At trial, the State introduced part of a recording of a conversation that Bortka had with law enforcement officials after J.H.'s parents reported the incidents involving Bortka. The trial court admitted part of the recording over Bortka's objection. The trial court also included the pattern jury instruction for the term "knowingly" in its final instructions to the jury. Bortka was eventually found guilty and sentenced to a 365-day term of incarceration. On appeal, he contends that the trial court abused its discretion in admitting portions of the recording of his conversation with law enforcement and in instructing the jury. We affirm.

Facts and Procedural History

[2] At all times relevant to the instant matter, J.H. and Bortka were incarcerated in the Washington County Jail. At times, Bortka would refer to J.H. as "girl[1] or sexy." Tr. Vol. II p. 41. Although jail policy prohibited entering another inmate's cell, Bortka entered J.H.'s cell on two occasions and touched him without permission. On the first occasion, J.H. was alone in his cell when

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[1] The record reflects that J.H. is a biological male.

Bortka entered without permission. Bortka approached J.H., who was "between the bed and the toilet," and attempted to hug him. Tr. Vol. II p. 41. In an attempt to maintain space between he and Bortka, J.H. held Bortka "at elbows length." Tr. Vol. II p. 41. Bortka proceeded to "hump" J.H.'s leg, "like a dog would," by "thrusting his pelvis on [J.H.'s] … leg." Tr. Vol. II p. 42. J.H. did not invite the behavior and told Bortka to stop before exiting the cell.

[3] On the second occasion, J.H. was lying on the top bunk reading a book, while his cellmate was having a conversation with another inmate "who was standing at the door." Tr. Vol. II p. 42. At some point, while J.H. "wasn't paying attention," Bortka entered the cell and touched J.H., poking his "chest, [his] penis[,] and [his] butt." Tr. Vol. II p. 42. In order to get Bortka to stop, J.H. moved away from him. As with the first occasion, J.H. did not invite Bortka to touch him or indicate that he wanted Bortka to continue. J.H. reported the incidents to his parents, who then reported the incidents to jail officials.

[4] On April 27, 2020, the State charged Bortka with Level 6 felony sexual battery. Bortka's jury trial commenced on March 2, 2021. During trial, the trial court admitted portions of a recording of a conversation that Bortka had had with various law enforcement officers after J.H.'s parents had reported Bortka's acts involving J.H. over Bortka's objection. After the conclusion of the presentation of the evidence, the jury found Bortka guilty as charged. The trial court subsequently sentenced him to a 365-day term of incarceration.

Discussion and Decision

I. Admission of Evidence

[5] Bortka contends that the trial court abused its discretion in admitting part of a recording containing statements he made to law enforcement during their initial investigation into the complaint filed by J.H.'s parents. "The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for an abuse of discretion." *Warren v. State*, 182 N.E.3d 925, 932 (Ind. Ct. App. 2022). "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id.*

[6] In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held "that a person questioned by law enforcement officers after being taken into custody or otherwise deprived of his freedom of action in any significant way" must be warned of his right to remain silent and of his right to an attorney. *State v. Brown*, 70 N.E.3d 331, 335 (Ind. 2017) (internal quotation omitted). "The trigger to require the announcement of *Miranda* rights is custodial interrogation." *Id.* (citing *White v. State*, 772 N.E.2d 408, 412 (Ind. 2002)). Bortka argues that "[t]he trial court erred in admitting the statements he made during the custodial police interview because no waiver [of his *Miranda* rights] was given." Appellant's Br. p. 5.

[7] For its part, the State argues that "*Miranda* is not implicated when, as here, a defendant was not in custody and provided a voluntary statement to police." Appellee's Br. p. 10 (citing *White*, 772 N.E.2d at 412). In support of this

argument the State relies on our decision in *Vanzyll v. State*, 978 N.E.2d 511, 515 (Ind. Ct. App. 2012), in which we concluded that an inmate, who was questioned in his cell regarding a violation of one of the jail's administrative procedures, was not in "custody" for purposes of *Miranda* at the time he was questioned. The State further asserts that "[t]o the extent Bortka claims that a past traumatic brain injury rendered his statements involuntary or that he could not waive his *Miranda* rights, Bortka has failed to demonstrate that any former injury impairs his ability to understand." Appellee's Br. p. 14.

[8] However, we need not determine whether Bortka's *Miranda* rights were implicated or if his statements were voluntary because, regardless of whether Bortka's statements to law enforcement could be classified as falling under the purview of *Miranda* or as voluntary statements, we conclude that admission of the challenged statements was, at most, harmless.

> [W]here the trial court has erred in the admission of evidence, we will not reverse the conviction if that error was harmless. *Cooley v. State*, 682 N.E.2d 1277, 1282 (Ind. 1997). Generally, errors in the admission of evidence are to be disregarded unless they affect the substantial rights of a party. *Montgomery v. State*, 694 N.E.2d 1137, 1140 (Ind. 1998). In viewing the effect of the evidentiary ruling on a defendant's substantial rights, we look to the probable impact on the fact finder. *Id.* The improper admission is harmless error if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court there is no substantial likelihood the challenged evidence contributed to the conviction. *Lafayette v. State*, 917 N.E.2d 660, 666 (Ind. 2009).

Turner v. State, 953 N.E.2d 1039, 1058–59 (Ind. 2011).

[9] Bortka's conviction is supported by substantial independent evidence of guilt such that we are convinced that there is no substantial likelihood that Bortka's statements on the recording, even if erroneously admitted at trial, contributed to his conviction. J.H. testified at trial, detailing both occasions when Bortka entered his cell and touched him in an unwanted manner. J.H. indicated that on the first occasion, Bortka humped his leg and on the second he poked his penis. J.H.'s testimony is sufficient to prove that Bortka committed sexual battery. Furthermore, to the extent that Bortka claims that the admission is not harmless because reference to the recording can be found on five pages of the transcript, we note that Bortka does not point to any comment presented in the recording that related to the incidents with J.H. and apart from a statement that he was "not gay," we find none reflected in the written transcript, which included a written record of the statements that were admitted from the recording. Tr. Vol. II p. 58. Thus, the admission of the challenged evidence, even if erroneous, was at most harmless.

II. Jury Instructions

[10] Bortka also contends that the trial court erred in instructing the jury. Specifically, Bortka argues that the trial court erred in including the pattern instruction setting forth the definition of the term "knowingly" in its final instructions to the jury.

> The well-settled standard by which we review challenges to jury instructions affords great deference to the trial court. *State v. Snyder*, 732 N.E.2d 1240, 1244 (Ind. Ct. App. 2000). The manner of instructing the jury lies within the trial court's sound discretion. *Id.* Thus, the trial court's ruling will not be reversed unless the instructional error is such that the charge to the jury misstates the law or otherwise misleads the jury. *Id.* Jury instructions must be considered as a whole and in reference to each other; even an erroneous instruction will not be error if the instructions taken as a whole do not misstate the law or otherwise mislead the jury. *Womack v. State*, 738 N.E.2d 320, 325 (Ind. Ct. App. 2000), *trans. denied*.

Lewis v. State, 759 N.E.2d 1077, 1080–81 (Ind. Ct. App. 2001).

[11] Bortka acknowledges that he did not object to the challenged instruction at trial, arguing on appeal that the inclusion of the challenged instruction amounted to fundamental error. "A claim that has been waived by a defendant's failure to raise a contemporaneous objection can be reviewed on appeal if the reviewing court determines that a fundamental error occurred." *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010). "The 'fundamental error' rule is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002). "The error claimed must either 'make a fair trial impossible' or constitute 'clearly blatant violations of basic and elementary principles of due process.'" *Brown*, 929 N.E.2d at 207 (quoting *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009)). "This exception is available only in 'egregious circumstances.'" *Id.* (quoting *Brown v. State*, 799 N.E.2d 1064, 1068

(Ind. 2003)). "This requires him to show that the trial court should have raised the issue *sua sponte* due to a blatant violation of basic and elementary principles, undeniable harm or potential for harm, and prejudice that makes a fair trial impossible." *Harris v. State*, 76 N.E.3d 137, 140 (Ind. 2017) (emphasis in original).

[12] Although Bortka argues that the trial court committed fundamental error by giving the allegedly improper jury instruction, Bortka does not argue, much less establish, that he was prejudiced by the alleged error. Further, Bortka has not shown that the giving of the allegedly improper instruction caused him undeniable harm or made a fair trial impossible. Bortka, therefore, has failed to prove that the trial court committed fundamental error in instructing the jury.

[13] The judgment of the trial court is affirmed.

Najam, J., and Bailey, J., concur.