IN THE

Indiana Supreme Court

Supreme Court Case No. 19S-LW-444

Dylan Thomas Tate,
Appellant,

–v–

State of Indiana,
Appellee.

Argued: November 5, 2020 | Decided: January 28, 2021

Appeal from the Madison Circuit Court
No. 48C01-1804-F1-1126
No. 48C01-1810-MR-2542
The Honorable Angela Warner Sims, Judge
On Direct Appeal

Opinion by Justice Slaughter

Chief Justice Rush and Justices David, Massa, and Goff concur.

Slaughter, Justice.

A jury found Dylan Tate guilty of molesting and murdering an eighteen-month-old boy. During sentencing, the jury found three statutory aggravators beyond a reasonable doubt and recommended life imprisonment without parole for the murder conviction, which the trial court adopted. In this direct appeal, Tate argues that the trial court committed fundamental error by admitting improper character evidence and medical-personnel testimony and that the jury had insufficient evidence of two of the aggravators. We affirm.

I

Tate's convictions arise from the death of H.H., the toddler son of his girlfriend, Jennifer Harris. In February 2018, Tate and Harris put H.H. to bed after spending the day running errands. Tate then began drinking; around midnight, the couple went to sleep. Four hours later, while Harris was still asleep, Tate crashed his car, pulled H.H. from the vehicle, and rushed him to the hospital. Hospital staff saw that H.H. was the victim of life-threatening trauma, was not breathing, and was bruised all over his body. Examining H.H., they found myriad injuries, including significant brain damage; tearing, bleeding, and bruising around H.H.'s anus; scrapes around his genitals; a paper towel in his airway; and what appeared to be a burn mark on his back and bite marks on his left arm and leg. Although doctors temporarily brought H.H. back to life, they declared him brain dead two days later. The coroner determined the cause of death was multiple blunt-force trauma with traumatic brain injury.

Police interviewed Tate three times about the boy's injuries. After the investigation, the State charged Tate with crimes resulting in H.H.'s death. At trial, the State argued that Tate had beaten H.H., stuffed a paper towel down his throat to quiet his screaming, molested him, and then crashed his car to cover up these crimes. In addition to testimony from H.H.'s mother and the medical personnel who treated H.H., the State relied on Joshua Basey, a fellow inmate in Tate's cell block. Basey testified that Tate admitted to shoving the paper towel down H.H.'s throat and crashing the car to cover up the cause of H.H.'s injuries.

The jury returned guilty verdicts against Tate on five counts:

- Count I, neglect of a dependent resulting in death, a level 1 felony;
- Count II, operating a vehicle while intoxicated endangering a person with a passenger less than eighteen years of age, a level 6 felony;
- Count III, operating a vehicle with blood alcohol content greater than 0.15 with a passenger less than eighteen years of age, a level 6 felony;
- Count IV, felony murder; and
- Count V, child molesting, a level 1 felony.

The State sought life without parole for Count IV based on three statutory aggravators: murder of a child less than twelve years old, intentionally killing the victim while committing or attempting child molest, and torture. The jury found all three aggravators and recommended life without parole.

The trial court then entered convictions on Counts I, II, IV, and V, but not on Count III due to double-jeopardy concerns. After entering the convictions, the trial court sentenced Tate to an aggregate sentence of life without parole plus fifty-two and a half years, as follows:

- Counts I (forty years) and IV (life imprisonment without parole) to run concurrently to each other.
- Counts II (two and a half years) and V (fifty years) to run consecutively to each other and to Counts I and IV.

Tate now appeals.

II

There are two issues here. The first is whether the trial court committed fundamental error during the guilt phase by admitting certain testimony. We hold that Tate showed no error, let alone fundamental error. The second issue is whether the State introduced enough evidence during sentencing to support the torture and child-molest aggravators. We find sufficient evidence supporting these two aggravators and reject

Tate's invitation to reweigh the evidence. We hold that any error was harmless and that the remaining, undisputed aggravator outweighed any mitigators. Thus, we affirm his convictions and sentence.

A

Tate argues that the trial court committed fundamental error by admitting inadmissible testimony from Detective Cliff Cole and H.H.'s medical providers. Tate also styles these same claims as prosecutorial misconduct. Because Tate did not object to the admissibility of the testimony, request an admonishment to the jury, or move for a mistrial, he waived his claims. *Ryan v. State*, 9 N.E.3d 663, 667 (Ind. 2014). Thus, whether styled as "prosecutorial misconduct" or trial-court error, Tate must establish fundamental error on appeal, *id.* at 667–68, but he has not done so.

Fundamental error is an exception to the general rule that a party's failure to object at trial results in a waiver of the issue on appeal. *C.S. v. State*, 131 N.E.3d 592, 595 (Ind. 2019). An error is fundamental if it made a fair trial impossible or amounted to a clear violation of basic due-process principles. *Id.* This is a formidable standard that applies only where the error is so flagrant that the trial judge should have corrected the error on her own, without prompting by defense counsel. *Id.* at 596. Because Tate does not show error at all, let alone fundamental error, we decline to grant him relief on the basis of Detective Cole's testimony or that of H.H.'s medical providers.

1

During the State's case in chief, its witnesses discussed the underlying incident and investigation, including the investigatory tactics used by police and the impressions of medical providers about what happened once Tate and H.H. arrived at the hospital. Although Tate did not challenge this testimony at trial, he now argues that the trial court committed fundamental error by allowing three witnesses—Detective Cole, Nurse Jessica Birge, and Dr. Thomas Short—to provide what Tate calls improper character evidence, contrary to Indiana Rule of Evidence 404(a)(1).

This rule provides that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Ind. Evidence Rule 404(a)(1). As to Detective Cole's testimony, Tate points to the following exchange between the State and the detective:

> Q. [Y]ou said things like – I don't think you're a monster, I don't think that you would do something like that, um – first of all is that true?
>
> A. No.
>
> Q. Why would you say something like that?
>
> A. Myself – when I'm doing interviews, other Detective doing interviews, it's a technique that we used to try to establish a little bit of a rapport to keep the interview going. Maybe um – help them – maybe mitigate the reasoning behind it – the "ABC" happened, this is what – this is why we did "D". So that's just a technique we use.

Tate claims Detective Cole's testimony violates Rule 404(a)(1) because the "only logical purpose" for this testimony was to solicit prejudicial character evidence. Taken out of context, the statements could sound as if the detective did not think Tate had committed the crimes he was charged with. Critically, Rule 404(a)(1) does not prohibit all references to an accused's character; it prohibits only references used to show the accused acted according to his propensity for bad character on a specific occasion. Tate's assertion that the term "monster" falls into this category does not make it so. His view ignores that the most obvious purpose for this testimony was to contextualize the detective's statements during his interview with Tate. The record itself belies Tate's characterization. Once the State put the detective's statement in context as part of his typical interview technique, the State immediately passed the witness without referencing "monster" in any follow-up questions to Detective Cole or any other witness.

As to Nurse Birge and Dr. Short, Tate takes issue with their testimony about his behavior at the hospital. In particular, Tate challenges Dr.

Short's testimony that his original impression of Tate was that he "seem[ed] like a threat" when he was banging on the hospital door and shouting. And Tate takes issue with both Nurse Birge's and Dr. Short's testimony that he slept on a cot in a hospital hallway while H.H. was being treated.

According to Tate, the purpose of this testimony was to convict him based on his propensity to be "a scary monster" instead of any actual evidence of the charged conduct. Neither the record nor the law supports this view. To suppose that the jury relied on an insinuation about Tate's character instead of evidence that Tate committed the charged conduct belies the ample, unchallenged evidence in the record. To this, Tate offers no response. And his argument does not explain how this testimony was character evidence or how it was used impermissibly to establish his propensity to molest and kill children. We thus find his fundamental-error argument waived. Ind. Appellate Rule 46(A)(8)(a). But even had Tate developed this argument, Rule 404(a)(1) does not prohibit eyewitnesses from describing their perceptions of a defendant's demeanor and behavior during events giving rise to the charged conduct.

Because Tate does not establish error under Rule 404(a)(1), and no such error is obvious on the face of the record, the trial court did not commit fundamental error in allowing Detective Cole's, Nurse Birge's, or Dr. Short's testimony. And we reject any suggestion that the probative value of such testimony was substantially outweighed by the danger of unfair prejudice to Tate. Thus, we decline to grant Tate relief on these grounds.

2

Tate also argues that the trial court committed fundamental error by allowing the following testimony from H.H.'s medical providers in violation of Indiana Rule of Evidence 702(b):

- Nurse Birge's testimony about the stages of H.H.'s bruising and her opinion of the injuries' source.
- Dr. Short's testimony about H.H.'s injuries and his opinion of their source.
- Nurse Kyra Zylo's testimony about the stages of H.H.'s bruising and her opinion of the injuries' source.

- Dr. Nathaniel Swinger's testimony about the source of H.H.'s injuries.
- Dr. Shannon Thompson's testimony about her opinion of the source of H.H.'s injuries.

Tate argues that these witnesses were unqualified to give expert testimony and that their testimony did not rest on reliable scientific data. But Tate does not provide specific citations to the purportedly inadmissible testimony, explain how their testimony about H.H.'s bruising and other injuries violates Rule 702(b), or provide cases that support his view. We find this undeveloped argument waived. App. R. 46(A)(8)(a).

Even were we to entertain Tate's waived argument, we discern no error on this record, let alone fundamental error. A fundamental error must be so obvious from the record that the trial court was remiss not to remedy it. Here, based on their experience treating trauma victims, the medical professionals testified that H.H.'s bruises did not look as if they had been caused moments earlier in a car accident. And it is not obvious that anything was amiss in their doing so. Rule 702(a) allows witnesses to testify to their opinions if they have specialized "knowledge, skill, experience, training, or education" that would be helpful to the trier of fact. Evid. R. 702(a). Seemingly, the opinions of H.H.'s trained medical providers along with their experience treating emergency-room trauma patients was helpful to the jury in determining the nature and extent of H.H.'s injuries. Even accepting that Rule 702(b) requires that a court be "satisfied" that "scientific testimony . . . rests upon reliable scientific principles", without further explanation from Tate, we discern no violation of this rule, let alone one that should have been obvious to the trial court.

Because Tate did not object at trial—when the court and parties could have explored the validity of the witnesses' testimony firsthand—he has the burden on appeal to show that a fair trial was impossible. Tate does not meet his burden. At no point does he show that the challenged testimony deprived him of any chance of a fair trial. His only explanation is that the alleged errors, taken together, had the cumulative effect of

making it impossible for the jury to be fair and impartial. But Tate's assertion does not make it so. Given the ample, unchallenged evidence in the record, we reject Tate's argument. We hold that he has not shown that the jury could not be fair and impartial and that the trial judge needed to intervene to make a fair trial possible. Thus, Tate cannot show fundamental error and is not entitled to relief on this ground.

Next, Tate argues that the State impermissibly referred to Dr. Thompson as an "expert" during her direct examination. But Tate's argument mischaracterizes both the facts and the law. First, the State did not call Dr. Thompson an expert; it asked whether she had ever testified as an expert witness in other cases. Second, the case Tate relies on, *Farmer v. State*, 908 N.E.2d 1192, 1199 (Ind. Ct. App. 2009), said only that the **trial judge** should not call witnesses "experts" in front of the jury lest the court seem to bolster their testimony. *Farmer* does not address the situation where, as here, the State asked a witness about her history testifying as an expert witness. And we are aware of no rule prohibiting such testimony. Lastly, even if Tate could show that this testimony was inadmissible, he does not establish that such an error would have deprived him of the possibility of a fair trial. We thus decline to vacate his convictions on this ground.

B

Tate further argues that the State failed to introduce enough evidence to support the jury's finding of the torture and child-molest aggravators. Under Indiana law, the State can seek a sentence of life imprisonment without parole by alleging a statutory aggravator under Indiana Code subsection 35-50-2-9(a). Such a sentence requires at least one aggravating circumstance that outweighs any mitigating circumstances. Ind. Code § 35-50-2-9(l). When a defendant challenges the sufficiency of an aggravator, we review only the probative evidence and reasonable inferences supporting the verdict to determine whether there is substantial evidence on which a reasonable trier of fact could find the aggravator beyond a reasonable doubt. *Schuler v. State*, 112 N.E.3d 180, 188 (Ind. 2018). A reviewing court must not reweigh the evidence; it can look only at the

evidence, along with its reasonable inferences, tending to support the verdict. *Id.*

Here, the jury found that the State proved three statutory aggravators beyond a reasonable doubt:

- Tate intentionally killed a child younger than twelve;
- Tate murdered the child while molesting or attempting to molest him; and
- Tate tortured his victim.

Tate claims the State provided insufficient evidence of the torture and child-molest aggravators, but he does not challenge the jury's finding that he intentionally killed a child younger than twelve. As shown below, we find that there was substantial evidence of both the torture and child-molest aggravators on which the jury could reasonably rely. And we are convinced the jury would have found, as do we, that the remaining unchallenged aggravator outweighed any mitigators. Thus, we uphold Tate's life-without-parole sentence.

1

Section 35-50-2-9 requires aggravating circumstances that, if alleged, allow the State to seek a sentence of life imprisonment without parole. One of these aggravators is that the defendant "tortured the victim". I.C. § 35-50-2-9(b)(11). Because our statutes do not define "torture", we have forged two general guidelines for finding torture. Torture is either the intentional infliction of a prolonged period of pain or punishment for coercive or sadistic purposes; or the gratuitous infliction of an injury substantially greater than that required to commit the underlying crime. *Nicholson v. State*, 768 N.E.2d 443, 447 (Ind. 2002).

Here, the medical records alone provide significant support for the jury's finding of torture. Recall that H.H. arrived at the hospital bruised all over, and the doctors and nurses found myriad injuries, including a paper towel stuffed down his throat and significant brain damage from blunt-force trauma. H.H.'s anus was torn, bleeding, and bruised, and there were scrapes from his anus to his genitals. His scrotum had been cut and

doctors could see what looked like bite marks on his arm and leg and a cigarette burn on his back.

Despite this, Tate argues the record is "completely devoid" of evidence that H.H. was subject to an "appreciable period of pain". Tate argues that because the record suggests that the injuries all occurred during one overnight period, they happened over too brief a period to qualify as "torture". He also argues that there was "absolutely no evidence" that H.H.'s injuries were designed to coerce him or indulge Tate's sadistic impulse. Tate's arguments mischaracterize the record and are thus unavailing.

First, a reasonable jury could find that Tate subjected H.H. to an appreciable period of pain. Tate argues that witness testimony showed that H.H. was injury free leading up to that night, except for a small bruise and scratch on his forehead. This may be true. But even if H.H.'s injuries all occurred in the four to five hours between when he was put to bed and when he reached the hospital, that is enough. A reasonable jury could find an "appreciable" period of pain when Tate inflicted hours of prolonged abuse and physical pain on a toddler. Tate offers no case law to bolster his claim that several hours is not an "appreciable" period, and we decline to find this period legally insufficient on this record.

Second, Tate did not develop his argument or offer case law to support his view that H.H.'s injuries were not inflicted for a coercive or sadistic purpose. He thus waived this argument. App. R. 46(A)(8)(a). But even had he developed it, the evidence indicated that he severely beat H.H., bit him on the arm and leg, and burned his back with a cigarette. This evidence was sufficient for the jury to reasonably infer that Tate was indulging a sadistic impulse.

Finally, Tate raises an unrelated argument that the trial court relied only on the "number and nature" of H.H.'s injuries in its findings. Because Tate did not develop this argument, we find it waived. App. R. 46(A)(8)(a). Perhaps Tate could have made a colorable argument that a jury relying on the number and nature of H.H.'s injuries runs afoul of *Nicholson*. But Tate never made this argument. And in any event, *Nicholson* does not foreclose a jury from relying on the number and nature of the

victim's injuries. There, the State argued that torture requires only that the defendant inflicted "severe physical or mental pain", and we reasoned that this could not be enough since any stabbing or shooting victim would be subject to severe physical pain. *Nicholson*, 768 N.E.2d at 447.

But our understanding that the legislature intended "torture" to mean something more does not mean that a jury cannot rely on the number and nature of the victim's injuries in finding the torture aggravator. Indeed, the jury here was entitled to draw all reasonable inferences from the evidence, including evidence as to the number and nature of H.H.'s injuries. As pointed out above, one such inference, based on evidence that Tate had severely beaten H.H., bitten him on his arm and leg, and burned his back with a cigarette was that Tate was indulging a sadistic impulse. We hold that Tate's challenge to his sentence on this ground fails.

2

Like the "torture" aggravator discussed above, Subsection 35-50-2-9(b)(1)(C) allows the State to seek an enhanced sentence if "the defendant committed the murder by intentionally killing the victim while committing or attempting to commit . . . child molesting." (cleaned up). Child molest occurs when a person "knowingly or intentionally performs or submits to sexual intercourse or other sexual conduct", including anal penetration, with a child younger than fourteen. I.C. §§ 35-42-4-3(a), 35-31.5-2-221.5(2). Thus, the State had to show that Tate intentionally killed H.H. while committing a sexual act like anal penetration. Under our case law, "while committing" means a continuing chain of events that is part of the same transaction. *Davis v. State*, 477 N.E.2d 889, 894–95 (Ind. 1985). For this aggravator, the jury had to find that Tate intentionally killed H.H. as part of the same series of occurrences in which Tate also molested H.H. In other words, the State had to connect the murder and the child molesting.

Here, there is uncontroverted evidence that when H.H. went to bed that night, he was nearly injury free. In addition to H.H.'s fatal injuries, he also sustained injuries to his anus and scrotum. And three doctors testified that the cause of the injuries to H.H.'s anus was trauma from penetration. The jury also heard evidence that H.H.'s injuries, including those to his anus and scrotum, occurred that night while Tate was alone with H.H.

The record shows that injuries to the rectum can heal quickly and even disappear within twenty-four hours. H.H.'s mother testified that he was okay when she and Tate changed his diaper and onesie to get him ready for bed. She testified that she fell asleep around midnight while Tate was still awake. And she said that the next day, she found H.H.'s bloody onesie and his bloody diaper. Finally, the jury heard from Basey, Tate's fellow inmate, that Tate acknowledged he was with H.H. when the boy became "all bloody" and that Tate removed H.H.'s clothes and diaper.

Despite this overwhelming evidence, Tate argues that the record was "completely devoid" of evidence linking the killing with the child molesting, i.e., the State presented no evidence that Tate killed H.H. "while committing" child molest. Tate does not address the evidence suggesting that H.H. had significant rectal injuries that occurred while he was alone with the boy—substantial probative evidence from which the jury could reasonably infer that Tate intentionally killed H.H. while molesting him. Because Tate does not develop this argument, we find it waived. App. R. 46(A)(8)(a). But even had he developed it, the record supports the jury's finding.

Perhaps anticipating this result, Tate focuses instead on what he terms "conflicting" evidence of whether the molest even occurred. The jury was free to consider all the evidence in the record to explain the injuries to H.H.'s anus and scrotum, including alternative causes. But the jury ultimately found that Tate molested H.H. and murdered him during the molestation. By asking the Court to ignore the evidence that does not support Tate's arguments, he asks us to substitute our view of the evidence for that of the jury—something we will not do. We thus hold that Tate's challenge to the child-molest aggravator fails and decline to order resentencing on this ground.

Because there was evidence of both the torture and child-molest aggravators on which the jury could reasonably rely, Tate's insufficiency arguments fail, and he is not entitled to resentencing.

Finally, even if Tate had not waived his arguments and were correct that no reasonable jury could find as this jury did, the unchallenged aggravator—that he intentionally killed a child less than twelve years old—is enough here to affirm his life-without-parole sentence. When a defendant challenges an aggravator, but at least one proper aggravator remains, we ask whether the alleged error was harmless. See, e.g., *Lambert v. State*, 675 N.E.2d 1060, 1065 (Ind. 1996). If the error was harmless, we need go no further. But if the error was not harmless, we can either remand or independently reweigh the aggravating and mitigating circumstances to determine whether the sentence should stand. *Id.*

Here, we hold that any error concerning the torture and child-molest aggravators was harmless. An error is harmless where it can be said with assurance that the error did not affect the substantial rights of the party. Ind. Trial Rule 61. As applied to a sentencing irregularity, a harmless error has no substantial effect on the jury's verdict. *Lambert*, 675 N.E.2d at 1065. Such is the case here. The jury would have been just as likely to recommend a life-without-parole sentence for Tate had it considered only the murder-of-a-child aggravator. The jury heard the details of H.H.'s brutal murder, including the undisputed fact that H.H. was an eighteen-month-old child and the overwhelming evidence that he sustained injuries at the hands of Tate, who was entrusted with his care. The jury then unanimously found beyond a reasonable doubt that Tate murdered H.H. The jury's charge under Section 35-50-2-9 is to decide whether one or more aggravating circumstances outweigh any mitigating circumstances. I.C. § 35-50-2-9(l)(2). At sentencing, the only mitigator the trial court found was intoxication. We are persuaded the jury and trial court would have found that Tate's murder of H.H., a child under twelve, not only outweighed but substantially outweighed his voluntary intoxication. And thus the jury would have recommended life imprisonment without parole even without the two challenged aggravators. Tate offers no contrary argument, thus waiving any argument he might make. App. R. 46(A)(8)(a). He has neither claimed nor shown prejudice, giving us no occasion to revisit his sentence. We hold that Tate's alleged errors were harmless.

Further, even if Tate had not waived his arguments and could show both that the challenged aggravators were improper and affected his substantial rights, we independently find that the murder-of-a-child aggravator alone outweighs the intoxication mitigator. The State proved beyond a reasonable doubt that Tate killed H.H., an eighteen-month-old child. Given the overwhelming evidence that Tate's intoxication was voluntary and that he was thinking clearly enough to try covering up his crimes, we give the intoxication mitigator little weight. But even according it full weight would not change the outcome. And by making no contrary argument, Tate waives such argument. App. R. 46(A)(8)(a). We thus hold that Tate's murder of H.H., a toddler, outweighs his intoxication mitigator, properly warranting a life-without-parole sentence under Section 35-50-2-9.

The record contains substantial evidence of both the torture and child-molest aggravators on which the jury could reasonably rely. Excluding the torture and child-molest aggravators would not have altered the jury's recommendation or the trial court's decision. And the murder-of-a-child aggravator, proved beyond a reasonable doubt, outweighs Tate's intoxication. Thus, we decline to grant Tate relief based on his challenged aggravators.

* * *

For these reasons, we affirm the trial court's judgment.

Rush, C.J., and David, Massa, and Goff, JJ., concur.

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