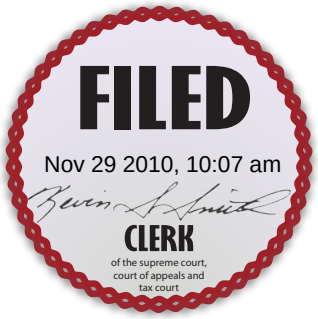


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# IN THE COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| JOHN D. HEMMINGS, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 63A01-1003-CR-162 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE PIKE CIRCUIT COURT
The Honorable Jeffrey L. Biesterveld, Judge
Cause No. 63C01-0807-FB-463

**November 29, 2010**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

John D. Hemmings ("Hemmings") was convicted in Pike Circuit Court of Class B felony sexual misconduct with a minor. The trial court sentenced Hemmings to twenty years, with fifteen years executed and five years suspended to probation. Hemmings appeals and raises two issues, which we restate as:

> I. Whether the trial court abused its discretion in admitting his recorded statement into evidence; and
>
> II. Whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

**Facts and Procedural History**

The facts relevant to our discussion of this appeal are that in November and December of 2007, fifty-eight-year-old Hemmings had repeated sexual contact with C.M., his fifteen-year-old step-granddaughter. On one occasion, Hemmings forced C.M. to fondle him in a pole barn located on his property. On two subsequent occasions, Hemmings had sexual intercourse with C.M.

Hemmings's sexual involvement with C.M. was reported to the police in July 2008, and Indiana State Police Detective Tobias Odom ("Detective Odom") investigated the report. On July 28, 2008, Detective Odom went to Hemmings's house to speak with Hemmings's wife, Sharon. While Detective Odom was speaking with Sharon, Hemmings arrived at the residence. Detective Odom asked Hemmings if he wanted to talk, and after being twice advised of his Miranda rights, Hemmings agreed to give an audio-recorded interview.

The taped interview was conducted across the street from Hemmings's house, in Detective Odom's car with the windows rolled down. At one point during the interview, Hemmings stated "I do think the way you're talking, I do think I need to get a lawyer." Ex. Vol, State's Ex. 1. Detective Odom continued the interview, and Hemmings admitted that C.M. had fondled him in the pole barn, but claimed that C.M. had initiated the encounter. Hemmings denied ever having intercourse with C.M.

On July 29, 2010, the State charged Hemmings with Class B felony sexual misconduct with a minor for engaging in sexual intercourse with C.M. At trial, the State called C.M. as its first witness. C.M. testified regarding the fondling incident that took place in the pole barn, as well as the two incidents of sexual intercourse, without objection from Hemmings. The State then sought to introduce a redacted version of Hemmings's recorded statement to Detective Odom. Hemmings objected on three separate grounds. First, Hemmings argued that he unequivocally invoked his right to counsel during the interview, and that Detective Odom's continued questioning was therefore improper. Second, Hemmings argued that the audio recording was of such poor quality that it was unintelligible and likely to cause the jury to speculate as to its content. Third, Hemmings argued that the tape contained inadmissible evidence of uncharged misconduct. The trial court overruled the objections and admitted the redacted statement into evidence.

On October 22, 2009, the jury found Hemmings guilty as charged. At Hemmings's sentencing hearing, Hemmings called five witnesses to testify on his behalf. The State then called D.T.L., a fifteen-year-old boy who testified that Hemmings

molested him on two separate occasions. At the conclusion of the hearing, the trial court sentenced Hemmings to twenty years, with five years suspended to probation. Hemmings now appeals. Additional facts will be provided as necessary.

## I. The Recorded Statement

Hemmings argues that the trial court abused its discretion when it admitted, over his objection, the redacted version of his recorded statement to Detective Odom. The admission of evidence is within the sound discretion of the trial court, and we will reverse only for an abuse of that discretion. Rogers v. State, 897 N.E.2d 955, 959 (Ind. Ct. App. 2008), trans. denied. A trial court abuses its discretion if its decision is clearly against the logic and the effect of the facts and circumstances before the court, or if the court has misinterpreted the law. Id. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling, but we also consider the uncontested evidence favorable to the defendant. Collins v. State, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), trans. denied.

A. *Federal Constitutional Claim*

Hemmings first argues that his statement to Detective Odom about getting a lawyer constituted a request for counsel requiring further questioning to cease pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). This argument raises the threshold issue of whether Hemmings's right to counsel had accrued at the time he gave the statement, which Hemmings fails to address in his Appellant's Brief.

When an accused invokes his right to have counsel present during a custodial interrogation, police must terminate questioning until counsel has been made available

unless the accused himself initiates further communication with the police. Edwards v. Arizona, 451 U.S. 477, 484 (1981). However, under Miranda and its progeny, the right to counsel, both under the Sixth Amendment and as an adjunct to the Fifth Amendment privilege against self-incrimination, does not accrue until a defendant is subjected to "'custodial interrogation.'" Zook v. State, 513 N.E.2d 1217, 1220 (Ind. 1987) (quoting Miranda, 384 U.S. at 444)); see also Kelley v. State, 825 N.E.2d 420, 430 (Ind. Ct. App. 2005) (defendant's right to counsel had not accrued because he was not taken into custody; thus, interview need not have stopped upon defendant's request for an attorney). Accordingly, even assuming that Hemmings's statement to Detective Odom was an unequivocal request for an attorney, Detective Odom was not required to terminate the interview unless Hemmings was subjected to custodial interrogation.

Custodial interrogation has been described as "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" Id. at 427 (quoting Zook, 513 N.E.2d at 1220)). In determining whether a defendant is in custody, we apply an objective test asking whether a reasonable person under the same circumstances would believe themselves to be under arrest or not free to resist the entreaties of the police. Kubsch v. State, 784 N.E.2d 905, 917 (Ind. 2003).

Importantly for the purposes of our case, an interrogation is not rendered custodial simply because the questioning takes place in a police car. See Dye v. State, 717 N.E.2d 5, 15 (Ind. 1999). In Dye, our supreme court held that a defendant was not in custody while being transported in the front seat of a police car, without handcuffs or any type of

restraint, to a blood draw that had been scheduled in advance to take place over the defendant's lunch hour. Id. On the other hand, this court has held that a suspect who was handcuffed and sitting in the passenger seat of a police car was clearly in custody for the purposes of Miranda. Gibson v. State, 733 N.E.2d 945, 953 (Ind. Ct. App. 2000).

Here, Detective Odom asked Hemmings if he wanted to talk, and after being advised of his rights, Hemmings agreed to give an audio-recorded interview. Hemmings then voluntarily walked across the street from his home and got into Detective Odom's car, where he gave his recorded statement with the windows rolled down. Hemmings does not claim that he was placed in handcuffs or restrained in any way, and he returned to his home at the conclusion of the interview. We find these facts to be analogous to Dye, and conclude that a reasonable person in Hemmings's circumstances would not have considered himself to be under arrest or not free to leave. Accordingly, even assuming that Hemmings unequivocally requested an attorney, Detective Odom was not required to cease questioning because Hemmings's right to counsel under the federal constitution had not accrued.

B. *State Constitutional Claims*

Hemmings also argues that Detective Odom's continued questioning after he made the statement about getting a lawyer violated his rights under Article 1, Sections 13 and 14 of the Indiana Constitution. In support of this assertion, Hemmings provides scant analysis and cites only one case: Taylor v. State, 689 N.E.2d 699 (Ind. 1997). No reference was made in that case to Article 1, Section 14, and Hemmings presents no independent argument or analysis of that provision of the Indiana Constitution. We

therefore deem Hemmings's Article 1, Section 14 argument waived for failure to make a cogent argument. See Ind. App. R. 46(A)(8)(a).

We now address Hemmings's Article 1, Section 13 claim. Article 1, Section 13 of the Indiana Constitution provides that "[i]n all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel[.]" The Article 1, Section 13 right to counsel, unlike the Sixth Amendment, has been said to attach prior to the filing of formal charges against the accused, provided the suspect explicitly requests to consult with an attorney. Ajabu v. State, 693 N.E.2d 921, 928 n.5 (Ind. 1998); Malinski v. State, 794 N.E.2d 1071, 1078-79 (Ind. 2003). In Taylor, our supreme court noted that over forty years before Miranda was decided on Fifth Amendment grounds, it concluded that a suspect's right to counsel under Article 1, Section 13 attaches "when a suspect is *in custody* and before any formal 'proceedings' have been initiated." 689 N.E.2d at 703-04 (emphasis added) (citing Suter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949); Batchelor v. State, 189 Ind. 69, 125 N.E.773 (1920)).

Once again, for his state constitutional arguments, Hemmings fails to address the threshold issue of whether he was in custody at the time he gave the recorded statement. As we noted above, we conclude that Hemmings was not in custody at the time he gave the recorded statement. Accordingly, even assuming that Hemmings explicitly requested an attorney, his right to counsel under Article 1, Section 13 had not yet accrued and Detective Odom's continued questioning was not improper. The admission of the recorded statement did not violate Article 1, Section 13 of the Indiana Constitution.

C. *Condition of the Recording*

Next, Hemmings argues that the trial court abused its discretion by admitting the recorded statement because it was "largely unintelligible" and likely caused the jury to speculate as to its content. Appellant's Br. at 10. To be admissible at trial, a recording must be of such clarity as to be intelligible and enlightening to the jury. Dearman v. State, 743 N.E.2d 757, 762 (Ind. 2001). The trial court has wide discretion in determining whether to admit an audio recording into evidence. Id. Every word of a recording need not be intelligible; rather, the recording, taken as a whole, "must be of such clarity and completeness to preempt speculation in the minds of the jurors as to its content." Id.

We have listened to the redacted version of Hemmings's recorded statement admitted into evidence at trial. To be sure, the sound quality is far from perfect and certain words and phrases are unintelligible. However, the majority and the substance of Hemmings's statement are readily discernible. Thus, the recording as a whole is sufficiently clear and intelligible as to be admissible.[1]

D. *Uncharged Acts*

Hemmings finally argues that his recorded statement was admitted in violation of Indiana Evidence Rule 404(b), which provides in relevant part:

[1] For a sound recording to be admissible, the proponent of the recording must also establish that "[t]he testimony elicited was freely and voluntarily made, without any kind of duress" and that "[a]ll required warnings were given and all necessary acknowledgments and waivers were knowingly and intelligently given." Lamar v. State, 258 Ind. 504, 513, 282 N.E.2d 795, 800 (1972). Hemmings argues briefly that these requirements were not met; however, he did not object on these bases at trial. Hemmings has therefore waived appellate review of these arguments. See Wright v. State, 766 N.E.2d 1223, 1231 (Ind. Ct. App. 2002).

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

This rule was designed to assure that the State, relying upon evidence of uncharged misconduct, does not punish a defendant for his character. Rogers v. State, 897 N.E.2d 955, 961 (Ind. Ct. App. 2008), trans. denied. The effect of the rule is that evidence is excluded only when it is introduced to provide the "'forbidden inference'" of demonstrating the defendant's propensity to commit the charged crime. Id. (quoting Herrera v. State, 710 N.E.2d 931, 935 (Ind. Ct. App. 1999)).

Here, the State charged Hemmings with one count of sexual misconduct with a minor for engaging in sexual intercourse with C.M. Hemmings argues that the recorded statement was inadmissible under Rule 404(b) because it contained evidence of uncharged misconduct, specifically, Hemmings's admission that C.M. had fondled him. The State responds that the statement was admissible under Rule 404(b) as evidence of "a common plan or scheme to carry on or develop an intimate relationship." Appellee's Br. at 11.

Without deciding whether the admission of the recorded statement violated Rule 404(b), we conclude that any error was harmless. "Errors in the admission of evidence are to be disregarded as harmless unless they affect the defendant's substantial rights." Rogers, 897 N.E.2d at 961. An error will be considered harmless if its probable impact

on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties. Id. The erroneous admission of evidence that is merely cumulative of other evidence in the record is not reversible error. Pavey v. State, 764 N.E.2d 692, 703 (Ind. Ct. App. 2002), trans. denied.

Here, the recorded statement was not the only evidence the jury heard regarding the fondling incident. Rather, C.M. testified, without objection, that Hemmings approached her in the pole barn, put his hand on her leg, exposed his penis, and forced her to touch it. Tr. p. 65. While we note that C.M.'s testimony and Hemmings's statement are not identical, they both establish the same basic fact: that C.M. fondled Hemmings in the pole barn. We therefore conclude that Hemmings's statement was cumulative of other evidence admitted without objection, and for the purposes of Rule 404(b), any error in its admission was harmless. [2]

## II. Sentencing

Hemmings also argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence imposed by the trial court. Alvies v. State, 905 N.E.2d 57, 64 (Ind. Ct. App. 2009) (citing Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007)). This appellate authority is

[2] Hemmings also claims briefly that the trial court should have suppressed his recorded statement because the State failed to disclose the statement prior to trial, in violation of the trial court's order granting Hemmings's motion requesting advance notice of the State's intention to use evidence of other uncharged acts. However, as noted above, Hemmings's statement was cumulative of C.M.'s testimony, and any error in its admission was therefore harmless.

implemented through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Anglemyer, 868 N.E.2d at 491. However, "we must and should exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires us to give 'due consideration' to that decision and because we understand and recognize the unique perspective a trial court brings to its sentencing decisions." Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007).

Hemmings committed Class B felony sexual misconduct with a minor, for which the sentence range is six to twenty years, with an advisory sentence of ten years. Ind. Code § 35-50-2-5 (2004 & Supp. 2009). Hemmings received twenty years, the maximum sentence, with five years suspended to probation. Hemmings argues that his sentence is inappropriate because he has no criminal history, the probation department recommended a lesser sentence, and prior to his conviction, he was an active member of the community and a productive member of society.

Regarding the nature of the offense, we note that Hemmings used his position of trust as C.M.'s step-grandfather to commit this crime. Moreover, although Hemmings was only charged with one count of sexual misconduct with a minor, the evidence presented at trial established that Hemmings repeatedly and forcibly violated C.M. Furthermore, Hemmings preyed on fifteen-year-old C.M. at a time in her life when she

was particularly vulnerable. C.M. had met her biological father for the first time during the summer of 2007, when she was fifteen years old. She subsequently moved in with her biological father, and who lived next door to Hemmings. Shortly thereafter, while C.M. was still adjusting to her new home and getting to know her new family, Hemmings began victimizing her. In a statement submitted to the trial court, C.M. indicated that Hemmings's actions "tore [her] family apart." Appellant's App. at 151.

With regard to the character of the offender, we note that Hemmings had no previous criminal history. However, at Hemmings's sentencing hearing, D.T.L., a fifteen-year-old boy, testified that Hemmings molested him on two separate occasions. D.T.L testified that on the first occasion, Hemmings fondled D.T.L. while the two shared a tent while camping out during a Civil War reenactment. D.T.L testified further that at another Civil War reenactment, Hemmings provided alcohol to D.T.L. and performed oral sex on him.

Although we note that the Probation Department recommended a lesser sentence for Hemmings, the trial court was in no way bound by this recommendation. Under these facts and circumstances, and giving proper deference to the trial court's sentencing discretion, we cannot conclude that Hemmings's twenty-year sentence, with five years suspended to probation, is inappropriate.

**Conclusion**

The trial court did not abuse its discretion in admitting Hemmings's recorded statement into evidence, and Hemmings's sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.