MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Wayne W. Allen,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 15, 2021

Court of Appeals Case No. 20A-CR-1908

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D05-1808-F1-16

Mathias, Judge.

[1] Wayne W. Allen was convicted in Allen Superior Court of Level 1 felony child molesting and Level 4 felony child molesting. Allen appeals, raising several issues, which we reorder and restate as:

I. Whether the trial court erred when it admitted into evidence hearsay testimony from several witnesses;

II. Whether the trial court's admission of testimony vouching for the truthfulness of the victim's statements deprived Allen of a fair trial;

III. Whether the trial court abused its discretion when it admitted into evidence the examining nurse's medical chart;

IV. Whether Allen was denied his right to present a defense when the trial court excluded from evidence emails sent from the victim's stepmother to Allen;

V. Whether allowing the victim to testify while wearing a mask violated Allen's right to confrontation: and,

VI. Whether courtroom protocols utilized due to the COVID-19 pandemic denied Allen his right to a fair trial.

[2] Concluding that Allen has not established reversible error, we affirm.

Facts and Procedural History

[3] Allen and his wife have a daughter who died in 2009. Their daughter was married to and had three children with Scott Amstutz. The youngest child, C.A., was one week old when her mother died.

[4] C.A. and her siblings often spent the night with Allen and their grandmother and had a close relationship with their grandparents. C.A. occasionally spent

the night at her grandparents' home without her siblings present. C.A.'s last overnight with her grandparents was December 31, 2017. Shortly thereafter, the relationship between Scott and C.A.'s stepmother, Janelle, and the Allens began to deteriorate.

[5] In 2018, nine-year-old C.A. regularly had physical and emotional outbursts. Janelle discussed C.A.'s behavior with a friend, Melissa Hildebrand. Hildebrand suspected that C.A. was being abused and shared her suspicion with Janelle.

[6] On Mother's Day, May 13, 2018, C.A. was agitated and became visibly upset. Scott eventually calmed her down by using techniques suggested by C.A.'s counselor. When C.A. was calm, Scott asked her if someone had hurt her. C.A. responded, "someone's touched me all over." Tr. Vol. III, p. 14. In response, Scott and Janelle put C.A. in their vehicle so they could privately discuss the allegation with her outside of the presence of their other children. C.A. then told her father and stepmother that her grandfather, Allen, touched her "down below." *Id*. at 15. C.A. stated that Allen came into her bedroom at Allen's house at night, laid down in bed next to her, and asked her to pull her pants down. *Id*.

[7] Scott called C.A.'s counselor to report the allegation. The counselor stated that she was required to report the alleged abuse. The next day, Scott and Janelle took C.A. to her pediatrician's office, but C.A. refused to answer the doctor's

questions and became visibly upset. Janelle relayed C.A.'s allegations of molestation to the pediatrician.

[8] On May 25, Patricia Smallwood, a forensic interviewer at the Bill Lewis Center for Children, met with C.A. During the interview, C.A. disclosed that Allen sexually abused her. One week later, nurse Angela Mellon examined C.A. at the Fort Wayne Sexual Assault Treatment Center. C.A. told Mellon that Allen touched her "in [her] private" and touched her breasts beneath her clothes. Conf. Ex. Vol. p. 26. She also disclosed that Allen touched her inside her vagina and that it hurt to urinate afterwards. *Id.* C.A. stated that Allen touched her on more than one occasion when she spent the night at his home. *Id.*

[9] On August 30, 2018, the State charged Allen with Level 1 felony child molesting and Level 4 felony child molesting. Allen's first trial, which began on November 21, 2019, ended in a mistrial. Allen's second trial began on August 11, 2020. Shortly before trial commenced, Allen asked for a continuance due to the COVID-19 pandemic. Allen claimed that the jury would not be able to concentrate on the evidence because of the nationwide concern over Covid-19. The trial court denied Allen's motion. During voir dire, the trial court informed the jury panel of the procedures in place to ensure the jurors' safety. Allen did not ask any prospective jurors if the COVID-19 pandemic and the resulting courtroom procedures would distract them from performing their duties as jurors.

[10] During the three-day jury trial, the trial court allowed witnesses to remove their masks while testifying if they chose to do so. C.A. did not want to remove her mask while she testified, and Allen did not object. C.A. testified that Allen removed her pajamas and "touched [her] in the wrong spot . . . . [Her] private spot."[1] Tr. Vol. III, pp. 45, 47–48. C.A. described where and when the molestation occurred and the pajamas that she had been wearing. C.A. explained that Allen only came into the bedroom and touched her when her sister was not also sleeping in the room. *Id*. at 46. And C.A. revealed that Allen told her not to tell anyone that he had touched her and that if she did tell, he "would hurt someone." *Id*. at 49.

[11] Janelle described the first time C.A. disclosed the molestation. Janelle testified that, during C.A.'s May 2018 outburst, she asked C.A., "did he hurt you" and "did he touch you." *Id.* at 96, 103. After C.A. responded, Janelle, Scott, and C.A. continued the conversation in private. Janelle explained that after their conversation with C.A., she and Scott contacted C.A.'s counselor and her pediatrician. *Id*. at 97. C.A. appeared upset when the pediatrician examined her, so Janelle told the pediatrician what C.A. had disclosed to her. *Id*. at 98. And after Janelle spoke to C.A.'s counselor, the counselor told Janelle that she would have to make a report to the Department of Child Services. *Id*. Janelle also testified that she took C.A. to be examined at the Bill Lewis Center for

[1] C.A. qualified as a protected person under Indiana Code section 35-37-4-6, and therefore, C.A.'s hearsay statements were admissible under that statute.

Children and the Sexual Assault Treatment Center. Janelle did not repeat C.A.'s specific disclosures.

[12] Scott testified that C.A. told him Allen had touched her. *Id.* at 15. Scott also stated that he did not believe C.A. would "make up" the allegations. *Id.* at 15–16. And, during Janelle's cross-examination, Allen's counsel implied that C.A.'s parents were angry at Allen and encouraged C.A. to think that Allen had molested her. Janelle testified, "[t]hat is ludicrous. I'd never do that to a child, no." *Id*. at 112. Allen did not raise a vouching objection to Scott's and Janelle's testimony.

[13] Mellon, the sexual assault nurse examiner, testified to her general procedures, including how she explains her role to patients and the examination. *Id*. at 192–93. Mellon then described her conversation with and examination of C.A. for the jury. C.A. understood that Mellon was "a nurse [who] helps you when you're sick." Conf. Ex. Vol. p. 25; *see also* Tr. Vol. III, p. 213. The State introduced Mellon's examination report. Allen objected, arguing that the State had not established a sufficient foundation under Indiana Evidence Rule 803(4). The trial court admitted the report over Allen's objection. The report contained C.A.'s statements to Mellon describing Allen's sexual abuse.

[14] Allen testified in his defense and denied molesting C.A. During closing arguments, Allen argued that Janelle suggested to C.A. that Allen touched her inappropriately and noted that Janelle and Scott made the initial reports of molestation to law enforcement officials and medical personnel because C.A.

refused to speak to anyone. Tr. Vol. IV, pp. 237–38. Allen claimed that Janelle was angry with Allen and his wife because they "intruded on stepmom's turf." *Id.* at 240.

[15] The jury found Allen guilty as charged. The trial court ordered Allen to serve an aggregate thirty-six-year sentence in the Department of Correction. Allen now appeals.

I. Hearsay Testimony

[16] We review the admission of evidence, including purported hearsay, for an abuse of discretion. *Turner v. State*, 953 N.E.2d 1039, 1045 (Ind. 2011). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances. *Id.* But even if a trial court abuses its discretion in admitting certain evidence, reversal is required only if the admission

> prejudices the defendant's substantial rights. To determine whether an evidentiary error was prejudicial, we assess the probable impact the evidence had upon the jury in light of all of the other evidence that was properly presented. If we are satisfied the conviction is supported by independent evidence of guilt such that there is little likelihood the challenged evidence contributed to the verdict, the error is harmless.

Blount v. State, 22 N.E.3d 559, 564 (Ind. 2014).

[17] Hearsay is an out-of-court statement that "is not made by the declarant while testifying at the trial" and is offered for "the truth of the matter asserted." Ind.

Evidence Rule 801(c). Subject to certain exceptions, hearsay is generally not admissible as evidence. Evid. R. 802.

[18] Allen challenges the admission of Janelle's description of her conversation with C.A. when Janelle initially asked C.A. if she had been touched inappropriately. Over Allen's objection, the trial court allowed Janelle to recount the statements she made to C.A. in May 2018, when C.A. first disclosed the molestation. Specifically, the court permitted Janelle to testify that she asked C.A. "did he hurt you" and "did he touch you." Tr. Vol. III, p. 96. Janelle did not disclose C.A.'s responses to those questions, but revealed that she subsequently called C.A.'s counselor, took C.A. to her pediatrician, and took C.A. to be interviewed at the Dr. Bill Lewis Center for Children. *Id*. at 98–99. Janelle also stated that she discussed the situation with her friend, Melissa Hildebrand. Janelle's own statements are not hearsay. Therefore, the trial court properly admitted them over Allen's objection. *See* Evid. R. 801(c).

[19] Thereafter, the State presented Hildebrand's testimony. Hildebrand briefly testified that on or around Mother's Day 2018, before C.A. made her accusation against Allen, Janelle mentioned to Hildebrand her concern that C.A. was being abused. Tr. Vol. III, p. 129. Hildebrand testified that she learned that C.A. had accused Allen of sexual abuse days after she and Janelle spoke. *Id*. Allen did not object to Hildebrand's testimony.

[20] "Failure to object at trial waives the issue for review unless fundamental error occurred." *Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013) (quoting *Treadway*

v. State, 924 N.E.2d 621, 633 (Ind. 2010) (citation omitted)). "The fundamental error doctrine is an exception to the general rule that the failure to object at trial constitutes procedural default precluding consideration of the issue on appeal." *Id.* This exception "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." *Id.* (quoting *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006)). "Harm is not shown by the fact that the defendant was ultimately convicted; rather, harm is found when error is so prejudicial as to make a fair trial impossible." *Hoglund v, State*, 962 N.E.2d 1230, 1239 (Ind. 2012).

[21] Allen has not shown that Hildebrand's testimony constitutes fundamental error. Hildebrand simply recounted the conversation she had with Janelle before C.A. told her parents that Allen molested her. Hildebrand only obtained knowledge of the evidence in this case during her discussions with Janelle. Hildebrand did not claim that C.A. had made any statements directly to her. Arguably, Hildebrand's brief hearsay testimony was largely irrelevant.[2] Hildebrand's testimony had no bearing on the credibility of C.A.'s accusations. At most, it bolstered Janelle's credibility and supported the inference that Janelle suspected C.A. was being sexually abused before she asked C.A. whether someone had touched her. Under these facts and circumstances, we cannot conclude that the

[2] There was only one reference to Hildebrand's testimony during closing arguments and it was made by defense counsel.

error in admitting Hildebrand's testimony was so prejudicial as to make a fair trial impossible.

II. Vouching Testimony

[22] Allen next claims that the trial court improperly allowed Scott and Janelle to vouch for the veracity of C.A.'s molestation allegations. Indiana Evidence Rule 704(b) provides that "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." When a witness's testimony even indirectly suggests that a child witness was telling the truth, the testimony violates the prohibition against vouching set forth in Rule 704(b). *Hoglund*, 962 N.E.2d at 1236. Such vouching testimony is considered an invasion of the province of the jurors in determining what weight they should place upon a witness's testimony. *Carter v. State*, 31 N.E.3d 17, 29 (Ind. Ct. App. 2015), *trans. denied*.

[23] Allen argues that the trial court abused its discretion when it admitted Scott's testimony, in reference to C.A.'s accusation, that "it's not something that I would think someone would make up" and "[t]here's no way my kid is making this up." Tr. Vol. III, pp. 15–16. But Allen did not raise a Rule 704(b) objection to this testimony.[3]

[3] Allen only made a continuing hearsay objection to Scott's testimony recounting C.A.'s allegation that Allen touched her privates. Tr. Vol. III, pp.13–14.

[24] We reiterate that "[f]ailure to object at trial waives the issue for review unless fundamental error occurred." *Halliburton*, 1 N.E.3d at 678. While the trial court erred in admitting Scott's vouching testimony, the erroneous admission does not amount to fundamental error. Scott was describing his reaction to C.A.'s initial disclosure that Allen molested her. And even if Scott had not stated that he believed C.A., it would be reasonable for the jury to assume that a parent would believe his child's statement that she had been sexually abused. We may reasonably conclude that vouching testimony from a trained investigator or law enforcement official carries with it a more substantial risk of prejudice than similar testimony from a young child's parent. Moreover, Scott was thoroughly cross-examined by Allen concerning his response and reaction to C.A.'s abuse allegation, including the circumstances surrounding the discussion and Scott's actions immediately following C.A.'s disclosure.[4] For these reasons, we cannot conclude that Allen's opinion that his child would not make up an allegation of abuse was so prejudicial as to make a fair trial impossible.

[25] Allen also argues that Janelle was impermissibly allowed to vouch for C.A.'s credibility. In response to the theory that C.A.'s parents were angry at Allen and encouraged C.A. to think that Allen had molested her, Janelle testified

[4] These circumstances included Scott physically restraining C.A. just before she made her allegation because her parents could not control her physically otherwise, and that C.A.'s parents did not take immediate action after C.A. disclosed the sexual abuse but had a family movie night and waited until the next day to contact authorities.

"[t]hat is ludicrous. I'd never do that to a child, no." Tr. Vol. III, p. 112. Allen did not object to this testimony.

[26] Contrary to Allen's argument, Janelle's testimony did not vouch for the truthfulness of C.A.'s statement that Allen molested her. Janelle's testimony addressed her own credibility in response to Allen's allegation that Janelle coached C.A. to state that Allen molested her. Accordingly, there is no error.

III. Course of Investigation Testimony

[27] Allen also argues that the trial court abused its discretion by admitting "course of investigation" testimony. "Out-of-court statements made to law enforcement are non-hearsay if introduced primarily to explain why the investigation proceeded as it did." *Blount*, 22 N.E.3d at 565.

> Although course-of-investigation testimony may help prosecutors give the jury some context, it is often of little consequence to the ultimate determination of guilt or innocence. The core issue at trial is, of course, what the defendant did (or did not do), not why the investigator did (or did not do) something. Thus, course-of-investigation testimony is excluded from hearsay only for a limited purpose: to "bridge gaps in the trial testimony that would otherwise substantially confuse or mislead the jury." The possibility the jury may wonder why police pursued a particular path does not, without more, make course-of-investigation testimony relevant. Indeed, such testimony is of little value absent a direct challenge to the legitimacy of the investigation[.]
>
> Our concern is the danger of prejudice where reliance on the course-of-investigation exclusion is misplaced. Indeed, "the use of out-of-court statements to show background has been identified as an area of widespread abuse." There is a risk the

> jury will rely upon the out-of-court assertion as substantive evidence of guilt—rather than for the limited purpose of explaining police investigation—and the defendant will have no chance to challenge that evidence through cross-examination. . . . And this danger is even higher where the out-of-court declarant directly accuses the defendant of committing the instant crime.

Id. at 565–66 (internal citations and footnote omitted).

[28] Allen claims that the persons involved in investigating C.A.'s allegation of molestation offered hearsay statements under the guise of course-of-investigation testimony. But these witnesses generally testified only to their own procedures and observations of C.A.'s physical condition and demeanor.

[29] C.A.'s pediatrician testified that he examined C.A. due to a concern of sexual abuse and that the exam was unremarkable. Tr. Vol. III, pp. 122–24. The DCS investigator discussed her method for investigating an allegation of sexual abuse and establishing a safety plan to ensure that the children did not have any contact with Allen. *Id*. at 139–40. She explained the forensic interview process to the jury and indicated that interviews take place at the Dr. Bill Lewis Center outside the presence of the child's parents. *Id.* at 141. The investigator did not conduct C.A.'s interview, but she observed it via video. And the investigator testified that, in the interview, C.A. disclosed that Allen sexually abused her. *Id*. at 142. The investigator also recommended that the Amstutzes take C.A. to the Sexual Assault Treatment Center.

[30] Forensic Interviewer Patricia Smallwood testified at trial and described her training, method, and reasons for conducting a forensic interview. Smallwood

described C.A.'s demeanor during the interview. *Id*. at 174. Angela Mellon examined C.A. at the Sexual Assault Treatment Center. Mellon described the Center, the examination room, and her protocols. She testified how she explains her role and examination to young patients. *Id*. at 192. Mellon provided a detailed description of the procedures she follows during a typical examination. *Id*. at 196–97. And Mellon specifically described her interaction and examination of C.A. *Id*. at 205. She also explained to the jury why and how she charts her medical findings. *Id*. at 217–21.

[31] Although these witnesses referred to C.A.'s molestation allegation, which was why each witness interviewed or examined the child, only one witness, the DCS investigator, testified as to a specific statement made by C.A. during the examinations or interviews. Without citation to the record, Allen claims that the witnesses testified "as to the veracity of C.A.'s allegations" because the "lengthy investigatory process . . . implanted the idea that a detailed process was followed after C.A.'s allegations, and accordingly, it must be true." Appellant's Br. at 33.

[32] Because Allen did not raise hearsay or "course of investigation" testimony objections at trial, he must establish fundamental error. *Halliburton*, 1 N.E.3d at 678. Aside from his general claim that details of the investigative process could lead the jury to believe that C.A. was telling the truth, Allen does not cite to any specific testimony that would support his argument. The testimony by the witnesses discussed above consisted mostly of the witness's general methods and practices of investigating claims of sexual abuse. Aside from the DCS

investigator repeating C.A.'s statement that Allen molested her, there was no testimony from which the jury could infer that additional evidence discovered during the investigation corroborated C.A.'s claims. And the danger of unfair prejudice is mitigated because C.A. testified that Allen molested her, and she was subjected to cross examination at trial. *See Blount*, 22 N.E.3d at 565–66. For these reasons, we conclude that Allen has not established that any error in admitting the testimony described above was so prejudicial as to make a fair trial impossible.

IV. Drumbeat Repetition

[33] Allen also claims that when viewed cumulatively, the hearsay testimony, the course-of-investigation testimony, and Scott's vouching testimony created a prejudicial drumbeat repetition of the allegations against him. In support of this this argument, Allen directs us to *Stone v. State,* 536 N.E.2d 534, 541 (Ind. Ct. App. 1989)*, trans. denied*, where our court reversed a child molesting conviction because the State used multiple witnesses to produce a "drum beat repetition" of the child victim's story. In that case, four adult witnesses testified to out-of-court statements made by the child, and one testified before the child took the stand. *Id.* at 537. The child's story was repeated a total of seven times during trial. *Id.* We concluded that the child's credibility "became increasingly unimpeachable as each adult added his or her personal eloquence, maturity, emotion, and professionalism to [the child's] out-of-court statements," so that the "presumption of innocence was overcome long before [Stone] got to the stand." *Id.* at 540.

[34] On the other hand, in *Surber v. State*, 884 N.E.2d 865, 864 (Ind. Ct. App. 2008), *trans. denied*, we concluded that the defendant failed to establish reversible error because the child victim was the first witness to testify and was subject to cross examination. Also, the adult witnesses who repeated the child's statements at trial were brief, consistent, and did not elaborate on the child's testimony. *Id.*

[35] The circumstances here are like those in *Surber*. Only Scott testified before C.A., and he revealed that C.A. disclosed to him that Allen had touched her "down below." Tr. Vol. III, p. 15. Scott explained that C.A. stated Allen came into her bedroom at Allen's house at night, laid down in bed next to her, and asked her to pull her pants down. *Id.* C.A. testified next and was subject to cross-examination. She provided more details about how and when the molestation occurred, the pajamas she was wearing, and Allen's threats to ensure her silence. The remaining witnesses that testified concerning C.A.'s allegation limited their testimony to C.A.'s general disclosure. No other witness repeated the specific details of C.A.'s molestation or elaborated on her story. For these reasons, we are unpersuaded by Allen's claim that he was prejudiced because several witnesses testified that C.A. alleged Allen molested her.

V. Mellon's Examination Report

[36] Allen also argues that the trial court abused its discretion when it admitted into evidence Nurse Mellon's examination report because the report contained

inadmissible hearsay statements.[5] Allen contends that the trial court improperly admitted the report under Evidence Rule 803(4), which allows the admission of statements, "regardless of whether the declarant is available as a witness" when the statement

> (A) is made by a person seeking medical diagnosis or treatment;
>
> (B) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and
>
> (C) describes medical history; past or present symptoms, pain or sensations; their inception; or their general cause.

[37] This medical treatment or diagnosis exception is "based upon the belief that a declarant's self-interest in seeking medical treatment renders it unlikely that the declarant would mislead the medical personnel [] she wants to treat her." *Ramsey v. State*, 122 N.E.3d 1023, 1030 (Ind. Ct. App. 2019), *trans. denied* (quoting *Palilonis v. State*, 970 N.E.2d 713, 726 (Ind. Ct. App. 2012), *trans. denied*). "In order to satisfy the requirement of the declarant's motivation, the declarant must subjectively believe that he or she was making the statement for the purpose of receiving medical diagnosis or treatment." *Id.* at 1031 (citing 13

[5] The State argues that Allen failed to raise a Rule 803(4) objection at trial and specifically that C.A. understood Nurse Mellon's role. But Allen made this argument at trial when Mellon was asked to testify whether C.A. understood Mellon's role before the State sought to admit the medical chart. Tr. Vol. III, pp. 206–12; 215–16. Counsel addressed both admission of both C.A.'s specific response and the chart in its entirety. The trial court allowed Allen to make a continuing objection to admission of the contents of the chart, and when the State sought to admit the chart, he objected "for all the reasons that we [] indicated at the previous sidebar with the Court and counsel." *Id.* at 216. The trial court overruled the objection.

Robert Lowell Miller Jr., Ind. Prac.: Ind. Evid. § 803.104 at 312 (4th ed. 2018)).

As we explained in *Ramsey*:

> There is a two-step analysis for determining whether a statement is properly admitted under Indiana Evidence Rule 803(4): "(1) whether the declarant is motivated to provide truthful information in order to promote diagnosis and treatment; and (2) whether the content of the statement is such that an expert in the field would reasonably rely upon it in rendering diagnosis or treatment."

Id. (quoting *Palilonis*, 970 N.E.2d at 726).

[38] First, we observe that "[s]tatements made by victims of sexual . . . molestation about the nature of the . . . abuse—even those identifying the perpetrator—generally satisfy the second prong of the analysis because they assist medical providers in recommending potential treatment for sexually transmitted disease, pregnancy testing, psychological counseling, and discharge instructions." *VanPatten v. State*, 986 N.E.2d 255, 260 (Ind. 2013) (citing *Palilonis*, 970 N.E.2d at 726–27).

[39] Therefore only the first prong is at issue in this appeal. The declarant's motivation can generally be inferred from the fact that a victim sought medical treatment. *Walters v. State*, 68 N.E.3d 1097, 1100 (Ind. Ct. App. 2017) (citing *VanPatten*, 986 N.E.2d at 260–61), *trans. denied*. However, when parents bring their young children to a medical provider, the inference of the child's motivation may be less than obvious, as the child may not understand the purpose of the examiner or the relationship between truthful responses and

accurate medical treatment. *Id.* at 1100–01 (citing *VanPatten*, 986 N.E.2d at 260–61). In such situations, "evidence must be presented to show the child understood the medical professional's role and the importance of being truthful." *Id.* at 1101. "Such evidence may be presented 'in the form of foundational testimony from the medical professional detailing the interaction between [her] and the declarant, how [she] explained [her] role to the declarant, and an affirmation that the declarant understood that role.'" *Id.* (quoting *VanPatten*, 986 N.E.2d at 261).

[40] C.A. was nine years old when Mellon examined her. The Sexual Assault Treatment Center, where Mellon examined C.A., "is set up just like a doctor's office" with an exam chair, scale, growth chart, and equipment to take patient's vital signs. Tr. Vol. III, p. 191. Mellon, who was wearing scrubs, discussed her role with C.A. and twice explained why nurses examine patients. Mellon asked C.A. if she understood Mellon's role, and C.A. described a nurse as someone that "helps you when you're sick." *Id.* at 213.While DCS and law enforcement requested that Mellon perform the examination, there is no evidence in the record that C.A. was aware of that fact.

[41] We find the circumstances in this case similar to those in *Walters v. State*, 68 N.E.3d 1097 (Ind. Ct. App. 2017), *trans. denied*. In that case, the victim was also examined at the Sexual Assault Treatment Center in Fort Wayne after reporting molestation to law enforcement. *Id.* at 1101. In both this case and *Walters*, the examinations were performed separately and on different days than interviews by law enforcement officials. *Id.* Further, both C.A. and the victim in

Walters were old enough to understand a nurse's role and the importance of telling the truth. *Id*. Here, as in *Walters*, Mellon wore scrubs and conducted the examination in a room that mimicked the setting of a regular doctor's office. *Id*. (explaining "if victims are older, 'the appearance of the building, the exam room, and [nurse's] scrubs and job title would probably be sufficient circumstances from which to infer [the victims] were thus motivated to speak truthfully") (quoting *VanPatten*, 986 N.E.2d at 265).

[42] In short, the evidence establishes that C.A. understood Mellon's role and the importance of providing truthful statements. For these reasons, we conclude that the trial court acted within its discretion when it admitted the medical examination chart into evidence.

VI. Right to Present Defense

[43] Allen argues that he was denied a fair trial because he was unable to present evidence of his defense at trial. Specifically, Allen's defense at trial was that Scott and Janelle were angry with Allen, and they suggested that C.A. should claim that Allen had molested her. Appellant's Br. at 47. In support of his defense, Allen sought to admit two emails Janelle sent to Allen and his wife. The trial court excluded the emails from evidence.

[44] "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Kubsch v. State*, 784

N.E.2d 905, 923–24 (Ind. 2003) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)) (internal quotation marks omitted).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 924 (citing *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

[45] To support his defense, Allen attempted to elicit testimony from Janelle about the content of two emails she sent to the Allens. Janelle sent the first email before C.A.'s disclosure, and she sent the second shortly after C.A. reported that Allen had molested her. Janelle admitted that the second email did not disclose C.A.'s molestation allegation. Tr. Vol. III, pp. 108–09. When Allen continued to ask questions about the contents of the two emails, the State objected and argued that the emails were irrelevant and contained hearsay. The trial court agreed and sustained the objection. *Id.* at 109. Later, the emails were admitted into the record via an offer to prove. Tr. Vol. IV, pp. 125–28; Ex. Vol. V at 73–78. The emails discussed C.A.'s "fits," contained personal information about C.A. and her siblings, and referenced continuing conflicts between the Allens and Amstutzes. Appellant's App. pp. 176–87.

[46] Both the State and Allen presented evidence that the Amstutzes and the Allens enjoyed a good relationship until the end of 2017. The jury heard evidence that until New Year's Eve 2017, C.A. and her siblings spent significant time with the Allens, but they did not see the Allens after that date due to family conflict. The emails discuss specific statements and acts that caused the conflict. Even though the jury did not hear evidence concerning the specific cause of the conflict, there was ample evidence from which the jury could infer that the Amstutzes and Allens were angry with each other. Through the testimony of several witnesses, the jury was presented with evidence to support Allen's defense that the Amstutzes encouraged C.A. to allege that Allen molested her because they were angry with the Allens. Therefore, the trial court's decision to exclude the emails from evidence did not deny Allen his right to present a defense.

VII. Right of Confrontation

[47] Allen argues that he was denied his federal and state constitutional rights to confront witnesses against him when C.A. was allowed to wear a mask while testifying. Notably, Allen did not object when C.A. chose to leave her mask on during trial.

[48] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" This right of confrontation is made obligatory on the states by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406 (1965); *Brady v. State*, 575 N.E.2d 981, 985 (Ind. 1991). Similarly, Article 1, Section 13 of the Indiana

Constitution provides that "[i]n all criminal prosecutions the accused shall have the right . . . to meet the witnesses face to face." Although the federal right of confrontation and the state right to a face-to-face meeting are co-extensive to a "considerable degree," the rights guaranteed by Article 1, Section 13 are not necessarily identical to those given by the Sixth Amendment. *Brady*, 575 N.E.2d at 987. The state and federal provisions have been interpreted to encompass two distinct components: meeting witnesses face-to-face and cross-examination. *Id.*

[49] Allen was afforded the opportunity to cross-examine C.A. Therefore, our only inquiry is whether allowing C.A. to cover the lower half of her face with a mask denied Allen the right to meet the witness face-to-face.

[50] Neither the Sixth Amendment nor Article 1, Section 13 has been interpreted literally to guarantee a criminal defendant all rights of confrontation at every trial for every witness; otherwise, no testimony of any absent witness would ever be admissible at trial. *Mathews v. State*, 26 N.E.3d 130, 135 (Ind. Ct. App. 2015) (citation omitted). And a defendant's constitutional right to confront witnesses may be waived. *Hughes v. State*, 153 N.E.3d 354, 360 (Ind. 2020), *trans. denied*; *Mathews v. State*, 26 N.E.3d 130, 135 (Ind. Ct. App. 2015).

[51] Because Allen did not raise his constitutional claims at trial, his conviction will only be reversed upon a showing of fundamental error. As we stated above, fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so

prejudicial to the defendant's rights as to "make a fair trial impossible." *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002).

[52] The COVID-19 protocols during Allen's jury trial allowed witnesses to remove their masks while testifying but did not require the witness to do so. The trial court informed the witnesses that they could take their masks off if they chose to do so. *See* Tr. Vol. II, p. 241; Vol. III, pp. 39, 63, 76, 117, 153.

[53] C.A. testified in Allen's and the jury's presence. Although C.A.'s partially masked face may have impeded Allen's and the jury's assessment of her demeanor, C.A.'s tone of voice, body language, and eyes were observable during her examination. For these reasons, Allen has not met his burden of establishing that allowing C.A. to testify while masked made a fair trial impossible.

VIII. Fair Trial During the COVID-19 Pandemic

[54] Finally, Allen argues that he was "deprived of a fair trial as a result of COVID-19 protocol." Appellant's Br. at 45. Specifically, Allen claims he was deprived of a fair trial because of courtroom modifications that "resulted in counsel having their backs to the jury during the trial and caused other substantial procedural changes." *Id*. at 48. Allen also contends that the COVID-19 protocols were applied arbitrarily because C.A. was the only witness who testified while masked. And these procedures, when combined with the trial court's decision to allow C.A. to testify while masked, "impacted his trial to

such an extent" that he was deprived "of his procedural due process rights." *Id*. We disagree.

[55] Allen filed a pretrial motion to continue trial, arguing that the jurors would be distracted by the COVID-19 pandemic. The trial court denied the motion and noted that its courtroom plan for jury trials had been approved by our supreme court. Appellant's App. pp. 131–36. During voir dire, Allen did not ask the potential jurors whether the COVID-19 pandemic or the accompanying courtroom protocols would affect their ability to remain impartial or distract them from considering the evidence presented during trial. And the trial court asked the jury panel whether the jurors had concerns about serving on the jury during the pandemic. The jurors did not express any concerns.

[56] Allen's argument that the COVID-19 pandemic distracted the jurors from considering the evidence during trial is merely conjecture. There is no evidence to support his argument that the trial court's protocols denied him a fair trial, and, importantly, the trial court complied with a plan approved by our supreme court. For these reasons, Allen has not established any denial of his procedural due process rights.

Conclusion

[57] Allen has not established that the admission of the testimony discussed above prejudiced him to the extent that he was denied his right of a fair trial. The trial court did not abuse its discretion when it admitted into evidence the nurse's examination report. And the trial court's decision to exclude from evidence the

emails Janelle sent to the Allens did not deny Allen his right to present his defense. Allen has also not established that the trial court committed fundamental error by allowing C.A. to testify with her mask on. Finally, the trial court followed the COVID-19 protocols approved by our supreme court, and Allen's claim that he did not receive a fair trial because the jury was distracted by the COVID-19 pandemic is merely conjecture. For these reasons, we affirm.

[58] Affirmed.

Riley, J., and Crone, J., concur.