MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jerry Tyrone Cook, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 21, 2021

Court of Appeals Case No. 21A-CR-902

Appeal from the Vanderburgh Circuit Court

The Honorable Kelli E. Fink, Magistrate

Trial Court Cause No. 82C01-1910-F3-7021

Bradford, Chief Judge.

Case Summary

[1] After allegations were levied that Jerry Tyrone Cook, Jr., sexually assaulted his niece A.J., Cook was charged with, *inter alia*, two counts of Level 3 felony rape and Level 5 felony incest. On the first day of trial, after the jury had been impaneled but prior to the presentation of evidence, the State first became aware of and discovered to Cook photographs of injuries to A.J.'s genitalia. The State thereafter sought the admission of the photographs into evidence. Cook moved to exclude the photographs or, in the alternative, for a continuance. The trial court denied Cook's motion and admitted one of the photographs over Cook's objection. Cook contends that the trial court abused its discretion in denying his request for a continuance. Cook also contends that the trial court abused its discretion by allowing A.J. to testify about the strain the case has put upon her familial relationships and that the evidence is insufficient to sustain his conviction of one of the rape charges.

[2] We conclude that because the photograph was cumulative of other specific evidence of the injuries sustained by A.J. and the nature of A.J.'s injuries was not in serious evidentiary dispute, the admission of the photograph in question was harmless. We further conclude that the trial court did not abuse its discretion in admitting the testimony of the victim and the evidence is sufficient to sustain the challenged conviction. As such, we affirm.

Facts and Procedural History

[3] A.J. was born on April 17, 1999. Cook is A.J.'s biological uncle. On October 3, 2019, Cook, A.J., and several other family members gathered at A.J.'s home to watch football. Cook and A.J. both drank alcohol while Cook was at A.J.'s home. Later that evening, after he had left A.J.'s home, Cook texted A.J. and asked her if she wanted to smoke marijuana. Cook returned to A.J.'s home after she responded in the affirmative.

[4] Instead of smoking marijuana, Cook drove A.J. to a nearby alley, where he tried to make her touch his penis. When she refused, Cook grabbed A.J.'s arms, held her down, and removed her pants and underwear. He then placed his mouth on her vagina. A.J. later indicated that "[i]t felt like he was biting me." Tr. Vol. III p. 5.

[5] Cook then climbed on top of A.J. and attempted to engage in vaginal sexual intercourse. A.J. told Cook to stop and attempted to push him off of her. A.J. escaped to the backseat, began crying, and asked Cook to take her home. Upon arriving at home, A.J. immediately reported Cook's actions to her mother.

[6] After dropping A.J. off at home, Cook fell asleep at the wheel of his vehicle in the middle of an intersection. Soon thereafter, he was arrested for operating a vehicle while intoxicated. Cook submitted to a chemical test, which revealed his blood-alcohol concentration ("BAC") to be 0.188%.

[7] A.J. was subsequently treated in the emergency room, where she complained of "extreme pain to her genitals" and underwent a sexual assault exam. Tr. Vol. II p. 132. At the time, her labia "were markedly swollen" to the point that the

swelling precluded an internal exam of A.J.'s vagina. Tr. Vol. II p. 132. A.J. told the sexual-assault nurse and the responding law enforcement officer that Cook had sexually assaulted her.

[8] Upon being interviewed by law enforcement, Cook initially denied that A.J. had been in his vehicle on the night in question. After being shown text messages sent between he and A.J., Cook admitted that A.J. had been in his vehicle but claimed that they had only smoked marijuana. Upon being informed that A.J. had accused him of raping her and being asked "what's it going to mean if your DNA is in [A.J.'s] sexual assault kit," Cook indicated that "if that happens then she participated because [I] wouldn't force her." Tr. Vol. III p. 79. Analysis of the DNA recovered from A.J.'s genitalia subsequently revealed the presence of DNA belonging to an individual other than A.J. and that the sample was "1564 times more likely [to have] originated from [Cook] or any of his male paternal relatives than if it originated from an unknown unrelated male individual." Tr. Vol. III p. 70.

[9] On October 7, 2019, the State charged Cook with two counts of Level 3 felony rape, and Level 5 felony incest. The State also alleged that Cook was a habitual offender. On April 15, 2020, the State amended the charging information to include Class A misdemeanor operating a vehicle with a BAC of 0.15% or more.

[10] On September 28, 2020, after the jury had been selected but before trial began, the State learned of and received four previously undisclosed photographs of

A.J.'s injuries that were taken by A.J.'s sister following her encounter with Cook. The State immediately notified the defense and disclosed the photographs. The defense objected to the admission of the photographs, arguing that while the photographs were relevant, they were "inflammatory" and "change[d] the nature of the case." Tr. Vol. II pp. 95, 96. The defense further argued that "there's a reason why there [is] the phrase a picture is worth a thousand words, it changes the dynamic of this case." Tr. Vol. II p. 95. After the trial court indicated that it would "allow one photograph" to be admitted as evidence, defense counsel moved for a continuance. Tr. Vol. II p. 97. In support of the motion, defense counsel argued that admission of the previously-undisclosed photograph "implicates my effectiveness as an attorney, it implicates [Cook's] decision on whether to plead guilty, [and] it implicates [Cook's] due process rights." Tr. Vol. II p. 98. The trial court denied the motion for a continuance and the matter proceeded to trial.

[11] Nurse Brandi Beren testified at trial that she had examined A.J. the day after the sexual assault. Nurse Beren provided detailed testimony regarding the injuries that she observed on A.J.'s body. The photograph of A.J.'s injuries corroborated Nurse Beren's testimony. A.J. also testified that following her encounter with Cook, she suffered a burning sensation and pain in her "private area," tr. vol. III p. 8, which she described on a scale of one to ten, with "1 being no pain at all [and] 10 being the worst pain," as "[d]efinitely a 10." Tr. Vol. III p. 9.

[12] On October 1, 2020, the jury found Cook guilty as charged. Cook then admitted to being a habitual offender. The trial court subsequently sentenced Cook to an aggregate twenty-four-year sentence and found Cook to be a sexually violent predator.

Discussion and Decision

[13] Cook raises three contentions on appeal. He first contends that the trial court abused its discretion by denying his request for a continuance. He also contends that the trial court abused its discretion in admitting certain other evidence and that the evidence is insufficient to sustain one of his two convictions for rape.

I. Denial of Request for a Continuance

[14] With regard to discovery issues, the Indiana Supreme Court has held that

> [a] trial judge has the responsibility to direct the trial in a manner that facilitates the ascertainment of truth, ensures fairness, and obtains economy of time and effort commensurate with the rights of society and the criminal defendant. Where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated.

Vanway v. State, 541 N.E.2d 523, 526–27 (Ind. 1989) (internal citations omitted). "Where remedial measures are warranted, a continuance is usually the proper remedy, but exclusion of evidence may be appropriate where the

discovery non-compliance has been flagrant and deliberate, or so misleading or in such bad faith as to impair the right of fair trial." *Id.*, *see also Lewis v. State*, 700 N.E.2d 485, 486 (Ind. Ct. App. 1998) ("Generally, the proper remedy for a discovery violation is a continuance."). "When, as here, a party moves for a continuance not required by statute, we review the court's decision for abuse of discretion." *Zanussi v. State*, 2 N.E.3d 731, 734 (Ind. Ct. App. 2013). "An abuse of discretion occurs when the ruling is against the logic and effect of facts and circumstances before the court or the record demonstrates prejudice from denial of the continuance." *Id*.

[15] There is no dispute that the discovery of the photograph was not timely. In support of his contention that the trial court abused its discretion in denying his request for a continuance, Cook relies on *Lewis*. In *Lewis*, five days before the scheduled trial, the prosecution indicated to both the trial court and defense counsel "that there would be no fingerprint evidence" but, three days later, informed counsel that it intended to introduce fingerprint evidence taken from a soda can found at the scene of the attempted robbery. 700 N.E.2d at 486. Finding that Lewis was not prejudiced by the evidence, the trial court denied Lewis's subsequent motion to exclude the evidence. *Id.* at 487. On appeal, a panel of this court concluded that based on the facts of that case, "the State's delay in disclosing this evidence prejudiced Lewis" and that the proper remedy would have been for the trial court to grant a continuance to allow Lewis the opportunity to examine the new evidence. *Id.* While we acknowledge this

court's prior decision in *Lewis*, given the facts and circumstances before us in this case, we do not feel compelled to reach a similar result.

[16] In arguing that the denial of his request for a continuance constituted an abuse of the trial court's discretion, Cook asserts that part of his defense strategy prior to discovery and disclosure of the photograph was that there was no photographic evidence supporting A.J.'s claims and that following discovery of the photograph, a continuance was necessary "to give Cook a chance to reevaluate his trial strategy." Appellant's Br. p. 18. Cook's defense strategy, however, appears to have been consistent throughout the proceedings, with Cook claiming that the rape did not happen. Cook does not explain how his strategy would have changed had the pictures been discovered and disclosed earlier, apart from his counsel's claim that the existence of the photographs would have impacted his discussions with Cook regarding the wisdom in considering a guilty plea.

[17] Cook's defense centered around his assertions that the sexual encounter never happened and that A.J. was being untruthful when she accused Cook. Importantly, however, there was no serious evidentiary dispute as to whether A.J. was somehow injured or the nature of A.J.'s injuries. Cook's defense was simply that he did not cause A.J.'s injuries. Admission of the picture, which again was merely additional evidence of A.J.'s injuries that was cumulative of Nurse Beren's testimony describing A.J.'s injuries, does not change Cook's defense that he did not inflict A.J.'s injuries.

[18] Further, we acknowledge that Cook argues, and other courts have noted, that photographs can, in some circumstances, affect the jury differently than spoken testimony. *See generally Gorman v. Hunt*, 19 S.W.3d 662, 668 (Ky. 2000) (noting that photographs frequently communicate testimony in a different manner than words do); *Diamond Offshore Servs. Ltd. v. Williams*, 542 S.W.3d 539, 542 (Tex. 2018) (noting that images have tremendous power to persuade); *People v. Duff*, 317 P.3d 1148, 1172 (Cal. 2014) (noting images can provide crucial corroboration of spoken testimony). However, the foreign precedent cited by Cook is not binding on this court, and we do not believe that a photograph always has more impact on a jury or is more persuasive than descriptive witness testimony. For instance, in cases where, as here, the witness testimony describes the images contained in the photograph in great detail, we do not believe that the photograph had any more impact on the jury than the testimony itself. In any event, given that there was no serious evidentiary dispute regarding the nature of A.J.'s injuries, any impact the photograph might have had on the jury was likely irrelevant to the question of who inflicted said injuries.

[19] Again, Nurse Beren provided detailed testimony regarding the injuries that she observed on A.J.'s body, testifying that A.J.'s labia majora were very swollen, "to the point where it would have been very challenging and extremely painful" to A.J. for Nurse Beren to examine the other, more interior, areas of A.J.'s genitalia. Tr. Vol. II p. 137. While testifying, Nurse Beren referred to diagrams depicting female genitalia to provide a visual aid for the jury regarding the

nature and extent of A.J.'s injuries. She also testified that the level of swelling that she observed was not normal.

[20] The photograph that was admitted in this case was merely additional evidence of A.J.'s injuries and was, at most, cumulative of Nurse Beren's descriptive testimony outlining A.J.'s injuries. We cannot say with any level of certainty that the photograph impacted the jury more than Nurse Beren's testimony. Thus, while we believe that the trial court abused its discretion by admitting the photograph and should have granted Cook's motion for a continuance, for the reasons stated above, we conclude that the denial of Cook's motion for a continuance amounted to harmless error. *See Tobar v. State*, 740 N.E.2d 106, 108 (Ind. 2000) (providing that erroneous admission of evidence that is merely cumulative is not grounds for reversal).

[21] To the extent that Cook asserts that discovery of the photograph impacted his decision whether to plead guilty, we observe that all evidence, apart from the photograph in question, was known to the parties at the time that Cook rejected two different plea offers that were offered by the State prior to trial. We fail to see how this argument is relevant in that Cook has no right to revisit a plea agreement that he refused at a time when he had been provided all evidence known to the parties.

II. Admission of Evidence

[22] Cook also contends that the trial court abused its discretion in admitting a statement from A.J. regarding changes in her familial relationships into

evidence. Decisions regarding the admission of evidence "are within the sound discretion of the trial court", and we will not reverse the trial court's decision absent an abuse of the trial court's discretion. *Gaby v. State*, 949 N.E.2d 870, 877 (Ind. Ct. App. 2011). "The trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before the court." *Id.*

[23] At trial, the State asked A.J. if she had "lost any relationships" because of her allegations against Cook. Tr. Vol. III p. 36. Cook objected, arguing that the testimony was "[i]rrelevant" and "unfairly prejudicial." Tr. Vol. III p. 36. The State responded to Cook's objection, saying:

> Her answer will be she lost her relationships with his daughters and he already opened the door in his opening [stating] that she is lying because she wants attention and there are consequences for her to make this false accusation and not losing her relationship with her cousins, his daughters. He's already brought in her - - why she would lie or false accusations, he already brought that [up] in opening.

Tr. Vol. III p. 36. The trial court indicated that it would allow the question but asked the State to rephrase it "in a more limited way." Tr. Vol. III p. 36. The State then asked: "[A.J.], you've lost relationships with [Cook's] daughters because of this; is that correct?" Tr. Vol. III p. 37. A.J. responded, "[k]ind of, sort of, yeah. We don't really talk to each other as much as we used to." Tr. Vol. III p. 37. A.J. further indicated that her family had, "generally speaking," been "pretty close-knit." Tr. Vol. III p. 37.

[24] Cook challenges the admission of A.J.'s testimony regarding her relationship with his daughters, again arguing that the testimony was both irrelevant and unfairly prejudicial. The State again asserts that Cook opened the door to the challenged testimony. "[W]hen a defendant interjects an issue in a trial, he opens the door to otherwise inadmissible evidence." *Beauchamp v. State*, 788 N.E.2d 881, 896 (Ind. Ct. App. 2003). "However, evidence relied upon to open the door must leave the trier of fact with a false or misleading impression of the facts related." *Id.*

[25] In his opening statement, Cook's counsel called A.J.'s credibility into question, suggesting that she had fabricated the allegations in order to receive attention from family and friends. By suggesting that A.J. had fabricated her allegations against Cook in an effort to gain attention from her family and friends, Cook opened the door to questions relating to A.J.'s familial relationships. As such, we cannot say that the trial court abused its discretion in admitting the above-discussed, limited questions relating to A.J.'s relationship with her cousins. Furthermore, even if it were error to admit the challenged evidence, such error is harmless given the other substantial evidence of Cook's guilt. *See Mathis v. State*, 859 N.E.2d 1275, 1280 (Ind. Ct. App. 2007) (providing that admission of allegedly improper evidence is harmless when the conviction is supported by substantial independent evidence of guilt).

III. Sufficiency of the Evidence

[26] Cook last contends that the evidence is insufficient to sustain his conviction for Level 3 felony rape, as charged under Count I.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146–47 (Ind. 2007) (cleaned up). Stated differently, "'[w]e affirm the judgment unless no reasonable factfinder could find the defendant guilty.'" *Mardis v. State*, 72 N.E.3d 936, 938 (Ind. Ct. App. 2017) (quoting *Griffith v. State*, 59 N.E.3d 947, 958 (Ind. 2016)).

[27] Count I reads as follows:

> on or about October 4, 2019, [Cook] did knowingly or intentionally have sexual intercourse with [A.J.]; when such person was compelled by force, and/or compelled by the imminent threat of force, contrary to the form of the statutes in such cases made and provided by I.C. 35-42-4-1(a)(1) and against the peace and dignity of the State of Indiana.

Appellant's App. Vol. II p. 20. Thus, in order to prove that Cook committed the charged offense, the State was required to prove that he "knowingly or intentionally ha[d] sexual intercourse with another person or knowingly or intentionally cause[d] another person to perform or submit to other sexual conduct … when: (1) the other person is compelled by force or imminent threat of force." Ind. Code § 35-42-4-1(a)(1). "'Sexual intercourse' means an act that includes any penetration of the female sex organ by the male sex organ." Ind. Code § 35-31.5-2-302. "'Other sexual conduct' means an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-31.5-2-221.5.

[28] "[P]roof of the slightest penetration is sufficient, and the fact-finder may infer penetration from the victim's physical condition soon after the crime." *Dinger v. State*, 540 N.E.2d 39, 40 (Ind. 1989). Furthermore, it is important to note that the statutory definition of sexual intercourse requires only "penetration of the female sex organ," not penetration of the vagina. *See* Ind. Code § 35-31.5-2-302. In *Short v. State*, 564 N.E.2d 553, 559 (Ind. Ct. App. 1991), we concluded that evidence which indicates that a defendant penetrated a victim's "external genetalia [sic] with his penis" is sufficient to prove penetration.

[29] In this case, the evidence establishes that Cook penetrated A.J.'s external genitalia with his penis. Although A.J. testified that Cook's penis did not go inside of her vagina, she did testify that "it didn't go all the way in but I felt it almost go in." Tr. Vol. III p. 20. When asked how far it went in, A.J. indicated

on a diagram of female genitalia that Cook's penis went as far as her vaginal orifice. A.J. also felt severe pain and suffered significant swelling to her external sex organs. A.J.'s indication that Cook penetrated her vaginal orifice, coupled with reasonable inferences that one can take from her condition following her encounter with Cook, is sufficient to prove penetration. *See Dinger*, 540 N.E.2d at 40 ("[T]he fact-finder may infer penetration from the victim's physical condition soon after the crime."); *Stetler v. State*, 972 N.E.2d 404, 407 (Ind. Ct. App. 2012) (providing that the clitoral hood qualifies as an internal structure of the female sex organ and proof that a defendant touched the clitoral hood is sufficient to prove penetration); *Short*, 564 N.E.2d at 559 (providing that evidence of penetration to external sex organs is sufficient to prove penetration).

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

Crone, J., and Tavitas, J., concur.