MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ashley Holden,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 29, 2023

Court of Appeals Case No. 22A-CR-2709

Appeal from the Marion Superior Court

The Honorable Angela Davis, Judge

Trial Court Cause No. 49D27-2107-F1-020801

Memorandum Decision by Judge May
Chief Judge Altice and Judge Foley concur.

May, Judge.

[1] Ashley N. Holden appeals her conviction of Level 1 felony child molesting.[1] Holden raises two issues on appeal:

> 1. Whether the trial court committed fundamental error when it included language in a written jury instruction indicating the elected prosecutor swore or affirmed that Holden had committed the charged offenses; and
>
> 2. Whether the trial court's sentencing order, which indicated Holden owes $1,655.00 for electronic monitoring, contradicts the trial court's sentencing statement in open court, which indicated Holden did not owe any fines, costs, or fees because she is indigent.

The State argues the instructional error was not fundamental, but it concedes the case must be remanded to the trial court for clarification of the sentencing order. We affirm in part and reverse and remand in part.

Facts and Procedural History

[2] In April 2021, Holden began living with H.M.'s family in a two-bedroom apartment after H.M.'s mother learned that she and Holden were related biologically. H.M.'s mother and father slept in one bedroom, while H.M. and his brother, R.J., slept in the second bedroom. Holden slept on a bed in the living room.

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[1] Ind. Code § 35-42-4-3(a)(1).

[3] After dark on July 2, 2021, fifteen-year-old R.J. and thirteen-year-old H.M. were in the living room with twenty-eight-year-old Holden. H.M.'s parents were asleep in their room. R.J. was playing a video game on the television and sitting with his back to Holden's bed. Holden was on her bed, and H.M. was also sitting on Holden's bed because that's where his dog was sitting. Holden began whispering H.M.'s name to get his attention, and when he finally acknowledged her, Holden asked, "do you want me to jack you off?" (Tr. Vol. 3 at 107.) H.M. understood Holden to be offering to touch his penis, and he did not want her to do that. R.J. heard Holden's question and looked back because "why would you say that?" (*Id.* at 149.) H.M. "didn't look scared, but he was, like, help, help[.]" (*Id*.)

[4] H.M. was "weirded out" and went to use the bathroom. (*Id*. at 108.) As H.M. finished washing his hands, Holden came into the bathroom, reached inside H.M.'s pants and underwear, and began fondling his penis. H.M. pushed Holden away and went into his bedroom. A few minutes later, while H.M. was on his bed playing a game on his cellular phone, Holden came into his bedroom. H.M. thought Holden entered the boys' bedroom to retrieve some of the snacks that were stored on a shelf in the room, but Holden took off her pants, climbed atop H.M., pushed down his pants and underwear, and inserted H.M.'s penis into her vagina. H.M. used his hands to prevent full penetration and was able to push Holden off him before he ejaculated. Holden then put on her clothes and left the room. H.M. took a shower.

[5] After his shower, H.M. returned to his room and told R.J. that "he just got raped." (*Id*. at 150.) H.M. was "[c]onfused, scared." (*Id*.) Holden began calling H.M.'s name, but H.M. refused to acknowledge her and sent R.J. to find out what Holden wanted. Holden told R.J. "that she was sorry." (*Id*. at 113.) When H.M. woke the next day, Holden was getting ready to go to work and told H.M. "not to tell [his] parents." (*Id*. at 116.) After Holden went to work, H.M. was "scared" to tell his parents, (*id*. at 117), but R.J. "coaxed" H.M. into telling their parents what happened. (*Id*. at 116.)

[6] H.M.'s mother called the police, and a patrol officer came to the scene to investigate. Soon thereafter, a child abuse detective and a caseworker from Child Protective Services also came to the scene. After speaking to the officer at the scene, H.M. gave a recorded statement to police, and then his parents took him to the hospital for "a full rape – rape kit on H.M., took pictures, DNA, his clothing." (*Id*. at 180.) DNA tests conducted on a swab taken from inside of the waistband and front crotch panel of H.M.'s boxer briefs contained DNA from both H.M. and Holden.

[7] Police went to Holden's place of employment to speak with her, and Holden agreed to go to the child abuse office to give a statement. During the interview, Holden initially "denied that any type of sexual touching or anything of that nature occurred between her and H.M." (Tr. Vol. 4 at 54.) After Holden learned the police intended to conduct DNA tests, she reported that H.M. "put his finger inside of her vagina." (*Id*. at 55.) Police obtained a search warrant to

have DNA samples collected from Holden. A swab taken of Holden's left finger contained DNA from both Holden and H.M.

[8] On July 7, 2021, the State charged Holden with two counts of Level 1 felony child molesting – the first alleged "sexual intercourse"[2] and the second alleged "other sexual conduct as defined in Indiana Code Section 35-31.5-2-221.5[.]"[3] (Appellant's App. (Confidential) Vol. 2 at 41.) The trial court held a jury trial on September 27, 2022. After the jury was sworn, the trial court read Preliminary Instructions, one of which provided:

> PRELIMINARY INSTRUCTION NO. 4
>
> IN THIS CASE, THE STATE OF INDIANA HAS CHARGED THE DEFENDANT WITH COUNT I, CHILD MOLESTING, A LEVEL 1 FELONY AND COUNT II, CHILD MOLESTING, A LEVEL 1 FELONY. THE CHARGES READ AS FOLLOWS:

[2] Indiana Code section 35-31.5-2-302 defines sexual intercourse as "an act that includes any penetration of the female sex organ by the male sex organ."

[3] Indiana Code section 35-31.5-2-221.5 defines "other sexual conduct" as "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."

CASE NUMBER: 49D27-2107-F1-020801 FILED: 7/7/2021

STATE OF INDIANA
MARION COUNTY, ss:

IN THE MARION SUPERIOR COURT
CRIMINAL DIVISION

Cause No: 49D27

STATE OF INDIANA)
)
vs.)
)

ASHLEY N HOLDEN W/Female
DOB 5/23/1993

INFORMATION
COUNT I
CHILD MOLESTING
I.C. 35-42-4-3(a) and I.C. 35-42-4-3(a)(1)
A LEVEL 1 FELONY
COUNT II
CHILD MOLESTING
I.C. 35-42-4-3(a) and I.C. 35-42-4-3(a)(1)
A LEVEL 1 FELONY

DV

On this date, the undersigned Deputy Prosecuting Attorney of the Nineteenth Judicial Circuit, being duly sworn on his/her oath (or having affirmed), says that in Marion County, Indiana

COUNT I

On or about July 2, 2021, ASHLEY N HOLDEN, a person of at least twenty-one (21) years of age, did perform sexual intercourse with H[redacted]M[redacted], a child under the age of fourteen years (14);

COUNT II

On or about July 2, 2021, ASHLEY N HOLDEN, a person of at least twenty-one (21) years of age, did perform other sexual conduct as defined in Indiana Code Section 35-31.5-2-221.5 with H[redacted]M[redacted], a child under the age of fourteen years (14);

all of which is contrary to statute and against the peace and dignity of the State of Indiana.

July 7, 2021
Date

RYAN MEARS
Marion County Prosecutor
19th Judicial Circuit

COUNT I

THE CRIME OF CHILD MOLESTING IS DEFINED BY STATUTE AS FOLLOWS:

A PERSON WHO, WITH A CHILD UNDER FOURTEEN (14) YEARS OF AGE, PERFORMS OR SUBMITS TO ANY SEXUAL INTERCOURSE OR OTHER SEXUAL CONDUCT WHEN IT IS COMMITTED BY A PERSON AT LEAST

TWENTY-ONE YEARS OF AGE, COMMITS CHILD MOLESTING, A LEVEL 1 FELONY.

BEFORE YOU MAY CONVICT THE DEFENDANT, THE STATE MUST HAVE PROVED EACH OF THE FOLOWING:

1. THE DEFENDANT, ASHLEY N. HOLDEN;

2. WHEN [H.M.] WAS A CHILD UNDER FOURTEEN (14) YEARS OF AGE;

3. KNOWINGLY;

4. PERFORMED;

5. SEXUAL INTERCOURSE;

6. WITH [H.M.];

7. AND WHEN ELEMENTS 1 THROUGH 6 TOOK PLACE THE DEFENDANT WAS AT LEAST TWENTY-ONE YEARS OF AGE.

IF THE STATE FAILED TO PROVE EACH OF THESE ELEMENTS BEYOND A REASONABLE DOUBT, YOU MUST FIND THE DEFENDANT NOT GUILTY OF CHILD MOLESTING, A LEVEL 1 FELONY, CHARGED IN COUNT I.

COUNT II

THE CRIME OF CHILD MOLESTING IS DEFINED BY STATUTE AS FOLLOWS:

A PERSON WHO, WITH A CHILD UNDER FOURTEEN (14) YEARS OF AGE, PERFORMS OR SUBMITS TO ANY SEXUAL INTERCOURSE OR OTHER SEXUAL CONDUCT WHEN IT IS COMMITTED BY A PERSON AT LEAST TWENTY-ONE YEARS OF AGE, COMMITS CHILD MOLESTING, A LEVEL 1 FELONY.

1. THE DEFENDANT, ASHLEY N. HOLDEN;

2. WHEN [H.M.] WAS A CHILD UNDER FOURTEEN (14) YEARS OF AGE;

3. KNOWINGLY;

4. PERFORMED;

5. OTHER SEXUAL CONDUCT;

6. WITH [H.M.];

7. AND WHEN ELEMENTS 1 THROUGH 6 TOOK PLACE THE DEFENDANT WAS AT LEAST TWENTY-ONE YEARS OF AGE.

IF THE STATE FAILED TO PROVE EACH OF THESE ELEMENTS BEYOND A REASONABLE DOUBT, YOU MUST FIND THE DEFENDANT NOT GUILTY OF CHILD MOLESTING, A LEVEL 1 FELONY, CHARGED IN COUNT II.

(*Id*. at 171-74) (formatting in original) (child's name modified to initials). After the State's presentation of evidence, the court entered a directed verdict against the State on the count alleging other sexual conduct. The jury found Holden guilty of the count alleging sexual intercourse. After a sentencing hearing, the trial court imposed a twenty-one-year sentence, with one year suspended to "Sex Offender Probation." (*Id*. at 31.) At sentencing, the court indicated Holden would not be assessed fines, court costs, or probation fees, but the court's written sentencing order indicated: "The Court is assessing Court Costs and Fees in the amount of $1,655.00" for "Electronic Monitoring – CR[.]" (*Id*. at 28.)

Discussion and Decision

1. Jury Instruction

[9] Holden first argues her conviction must be set aside because the trial court committed fundamental error when it instructed the jury. We generally review instruction of the jury for an abuse of discretion. *Miller v. State*, 188 N.E.3d 871, 874 (Ind. 2022). We consider instructions "as a whole and in reference to each other; error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case." *Pattison v. State*, 54 N.E.3d 361, 365 (Ind. 2016) (quoting *Whitney v. State*, 750 N.E.2d 342, 344 (Ind. 2001)).

[10] If a defendant fails to object to an instruction, the error is waived for appellate review. *Miller*, 188 N.E.3d at 874. Nevertheless, "we may still review the

instruction for fundamental error," which is a narrow exception to waiver. *Id*. "An error is fundamental if it made a fair trial impossible or was a 'clearly blatant violation of basic and elementary principles of due process' that presented 'an undeniable and substantial potential for harm.'" *Id*. (quoting *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009)). We may provide relief under this rule "only in egregious circumstances that made a fair trial impossible." *Pattison*, 54 N.E.3d at 365.

[11] In particular, Holden asserts fundamental error occurred when the jury received a written copy of Preliminary Instruction No. 4 that contained the full charging information, including the typed name of the Marion County Prosecutor Ryan Mears and the following language: "On this date, the undersigned Deputy Prosecuting Attorney of the Nineteenth Judicial Circuit, being duly sworn on his/her oath (or having been affirmed), says that in Marion County, Indiana . . . [Holden committed the two crimes charged]." (App. Vol. 2 at 171-72.) As Holden notes, we disapproved the inclusion of such affirmation language as part of a jury instruction in *Lynn v. State*, 60 N.E.3d 1135, 1139 (Ind. Ct. App. 2016), *trans. denied.*

[12] In *Lynn*, the State brought charges of Class A misdemeanor battery and Class B misdemeanor disorderly conduct against Jay Lynn after Lynn became angry while at a social security office, argued with and struck the security officer, and had to be tased by police to be handcuffed. *Id*. at 1137. Lynn's jury was given a preliminary instruction that included language indicating: "The undersigned affiant does hereby swear or affirm under the penalties of perjury that: [Lynn

committed each of the crimes.]" *Id*. at 1139. The jury found Lynn guilty of Class B misdemeanor battery and Class B misdemeanor disorderly conduct.

[13] On appeal, Lynn, who had not objected to the affirmation language at trial, alleged fundamental error. *Id*. at 1138. We held Lynn had failed to demonstrate fundamental error because other instructions informed the jury that charges were not proof of guilt, that defendants are presumed innocent, and that the instructions were to be considered together as a whole. *Id*. at 1139. We also noted the affirmation language must not have impacted the jury to any great extent as it chose to find Lynn guilty of a lesser-included battery offense. *Id*. Nevertheless, we went on to assert that such affirmation language should not be included in jury instructions because it "raises several potential problems, including that it gives the semblance of attribution to the trial court or to an unknown affiant, who may or may not be available for cross-examination, [support] as to the veracity of the factual basis for the charges." *Id*.

[14] Holden argues that the error herein was more egregious than the error in *Lynn* because the affirmation herein was signed by the "elected Marion County Prosecutor" who is "a known and respected public official[.]" (Appellant's Br. at 17.) We disagree that the facts herein were more egregious. Including the name of the prosecutor eliminates the risk that the jury might have attributed such a finding to "the trial court" or some other presumptively neutral fact-finder like a grand jury. *Lynn*, 60 N.E.3d at 1139. In addition, the inclusion of the name of the prosecutor clarifies that this affirmation was made by an attorney, and other instructions explicitly informed the jury that statements of

attorneys "are not evidence" (Tr. Vol. 4 at 93), and the jurors "may accept or reject" arguments from lawyers. (Tr. Vol. 3 at 89.)

[15] Holden also attempts to distinguish *Lynn* because, in *Lynn*, the jury convicted Lynn only of a lesser included offense, whereas here the jury convicted Holden of the only charge sent to the jury. (Appellant's Br. at 17.) However, in so arguing, Holden overlooks the fact that, at the end of the State's presentation of its case, the trial court granted Holden's motion to dismiss the second count alleged against Holden. As such, the jury was given a clear example of the fact that charges brought by the State are not indicative of guilt – just as the jury was instructed by the trial court.

[16] As in *Lynn*, the trial court provided numerous other instructions that would have mitigated any possible harm from the affirmation language. Other preliminary instructions provided to the jury explicitly informed the jury that the filing of charges was not evidence of guilt, that Holden was presumed innocent until the State proved otherwise with evidence at trial, and that attorney statements are not evidence:

> The charges which have been filed is [sic] the formal method of bringing the Defendant to trial. The filing of a charge of [sic] the Defendant's arrest is not to be considered by you as any evidence of guilt. A plea of not guilty has been entered on behalf of the Defendant.
>
> The burden is on the State to prove beyond a reasonable doubt that the Defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable

doubt concerning the Defendant's guilt. But it does not mean that the Defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual, and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the Defendant's guilt, after you have weighed and considered all of the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the Defendant is probably guilty.

On the other hand, there are very few things in this world that we know with absolute certainty, and the State does not have to overcome every possible doubt. The State must prove each element of the crimes by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in the matter of the highest importance. If you find that there is a reasonable doubt that the Defendant is guilty of the crimes, you must give the Defendant the benefit of the doubt and find the Defendant not guilty of the crime under consideration.

Under the law of this State, a person charged with a crime is presumed to be innocent. This presumption of innocence continues in favor of the Defendant throughout each stage of the trial, and you should put the evidence presented to the presumption that the Defendant is innocent if you can reasonably do so. If the evidence lends itself to two reasonable interpretations, you must choose the interpretation consistent with the Defendant's innocent. [sic]. If there is only one interpretation, you must accept that interpretation and consider the evidence with all the other evidence in the case in making your decision.

> To overcome the presumption of innocence, the State must prove the Defendant guilty of each element of the crime charged beyond a reasonable doubt.
>
> * * * * *
>
> When the evidence is completed, the attorneys may make final arguments. These final arguments are not evidence. The attorneys are permitted to characterize the evidence, discuss the law, and attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit.

(Tr. Vol. 3 at 85-89.)

[17] Moreover, the final instructions informed the jury that it should construe all instructions "in connection with and in light of every other instruction given" (Tr. Vol. 4 at 92-93); its verdict "should not be based on sympathy or bias" (*id.* at 93); "Statements made by the attorneys are not evidence" (*id.*); and:

> Under the law of the state, a person charged with a crime is presumed to be innocent. This presumption of innocence continues in favor of the defendant throughout each stage of the trial, and you should fit the evidence presented to the presumption that the defendant is innocent if you can reasonably do so. To overcome the presumption of innocence, the State must prove the defendant guilty of each of the element [sic] of the crime charged beyond a reasonable doubt.

(*Id.*)

[18] Given the multitude of instructions asserting that Holden was to be presumed innocent even after being charged and that the State had the duty to prove

otherwise with evidence at trial, along with the fact the trial court did not mention this objectionable language when it read the instructions to the jury during trial, (*see* Tr. Vol. 3 at 83-84 & Tr. Vol. 4 at 92-95), Holden has not demonstrated fundamental error occurred. *See Lynn*, 60 N.E.3d at 1139 (affirmation language in jury instruction regarding charging information did not invade the province of the jury or mislead the jury to such an extent to constitute fundamental error).

2. Fees imposed

[19] Holden next asserts the trial court's written sentencing order imposes fees on her in contradiction of the trial court's statement at the sentencing hearing that Holden would not be required to pay fees or costs. "Rather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusions of the trial court." *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007). We have the "option of crediting the statement that accurately pronounces the sentence or remanding for resentencing." *Id.*

[20] The court's written sentencing order indicates Holden owes "Court Costs and Fees" of $1,655.00 for "Electronic Monitoring – CR[.]" (Appellant's App. (Confidential) Vol. 2 at 28.) In contrast, at the sentencing hearing, the trial court stated: "No fines, no court costs. I'm not even going to order any fees to probation." (Tr. Vol. 4 at 113.) The Chronological Case Summary ("CCS") entries for the date of sentencing indicate, in relevant part, that "Court Finds

Defendant Indigent as to Fines and Costs"[4] (Appellant's App. (Confidential) Vol. 2 at 24), and that Holden is ordered to participate in sex offender probation for one year with "$0 for costs." (*Id*. at 25.) Because the court's written sentencing order contradicts both the court's oral pronouncement at sentencing and the court's CCS entry following sentence, we reverse the court's imposition of electronic monitoring fees and remand for the court to enter a new sentencing order that either is consistent with the trial court's oral statement at sentencing and the CCS entry or explains why the written sentencing order is correct.[5] *See*, *e.g.*, *Murrell v. State*, 960 N.E.2d 854, 860 (Ind. Ct. App. 2012) (remanding for correction of written sentencing order).

Conclusion

[21] The trial court's inclusion of the affirmation and name of the prosecutor in the jury instruction restating the charges did not constitute fundamental error. However, we are required to reverse and remand the trial court's sentencing

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[4] The State argues we should also remand for the trial court "to impose several other fees, such as certain fees and costs associated with probation and a sexual assault victims assistance fee." (State's Br. at 17) (internal citations omitted). However, the court can order such fees be paid only "[i]f the person is not indigent[.]" Ind. Code § 33-37-2-3(a) (requiring court to determine indigency "when the court imposes costs"). Accordingly, here, where the court found Holden indigent as to costs and fees, we cannot say the court abused its discretion by not ordering Holden to pay additional fees. *Contra Holder v. State*, 119 N.E.3d 621, 624 (Ind. Ct. App. 2019) (reversing and remanding imposition of costs and fees because trial court had not conducted an indigency hearing).

[5] We note that Holden was released from custody part of the time between her arrest and her trial and that she was subject to electronic monitoring during that release. (*See* Tr. Vol. 2 at 25-26) (hearing on violation of pre-trial detention because Holden was removing tracking band from ankle). Nevertheless, the State has not directed us to evidence in the record that demonstrates the electronic monitoring fees ordered at the time of sentencing originated from Holden's pre-trial release, and we therefore must remand for clarification.

order due to the court's inconsistent statements regarding fees imposed. Accordingly, we affirm in part and reverse and remand in part.

[22] Affirmed in part, reversed and remanded in part.

Altice, C.J., and Foley, J., concur.