IN THE

Indiana Supreme Court

Supreme Court Case No. 20S-CR-546

Byron D. Harris, Jr.,
Appellant

–v–

State of Indiana,
Appellee

Argued: November 12, 2020 | Decided: March 24, 2021

Appeal from the Elkhart Circuit Court
No. 20C01-1808-F1-10
The Honorable Michael A. Christofeno

On Petition to Transfer from the Indiana Court of Appeals
No. 19A-CR-1863

Opinion by Chief Justice Rush

Justices David, Massa, Slaughter, and Goff concur.

Rush, Chief Justice.

Children as young as twelve can be tried as adults, exposing them to harsher sentences, such as lengthy incarceration. Today we examine whether such a child has the categorical right to have a parent present during criminal proceedings, even when the parent is a witness subject to a witness-separation order.

Here, fifteen-year-old Byron Harris, Jr., was waived into adult criminal court and ultimately convicted of attempted murder. Harris now asks us to reverse his conviction because his mother—as a witness—was not allowed to stay in the courtroom during his trial. He reasons both Evidence Rule 615—the rule governing witness-separation orders—and due process principles require this result.

We hold that a child in adult criminal court may use Evidence Rule 615(c) to establish that a parent is "essential" to the presentation of the defense and is thus excluded from a witness-separation order. But Harris did not make the requisite showing under the rule, nor did he show he had a due process right. And because we reject his remaining sentencing arguments, we affirm the trial court.

Facts and Procedural History

In June 2018, eighth-grader Byron Harris, Jr. approached Trestepfone Pryor and accused Pryor of robbing him. Pryor denied the allegation, and Harris walked away. The next evening, Harris walked by Pryor and fired multiple shots from a handgun. Pryor was shot twice in the leg.

The State initially filed a delinquency petition against Harris but then requested the juvenile court waive jurisdiction over the case. After a hearing, the juvenile court granted the request. The court noted that Harris's prior adjudications included serious and violent crimes like robbery, felony theft, possession of a firearm, pointing a firearm, and battery. It also determined that Harris's prior placements in the juvenile justice system had been ineffective. The State then charged Harris with attempted murder in adult criminal court.

Before trial, the State listed Harris's mother as a potential witness. And at trial, the State requested a separation-of-witnesses order. Harris—who had a history of learning disabilities and mental health problems—objected, requesting that "separation of witnesses should be taken up after voir dire" because his mother wanted "to be in the trial as much as possible." He added that "his parents would like to be present" since his trial was for "Attempted Murder, [a] Level 1 Felony." Harris, however, did not mention any right to have a parent present and never said he himself wanted his mother to be there. The court overruled the objection and ordered Harris's mother to leave the courtroom. The State never called her to testify.

After a three-day jury trial, Harris was found guilty of attempted murder. He was sentenced to thirty-seven years in the Department of Correction with five years suspended to probation.

Harris appealed; and a split panel reversed, holding that his due process rights were violated when his mother was excluded from the courtroom. *Harris v. State*, 148 N.E.3d 1107, 1115 (Ind. Ct. App. 2020). In so holding, the majority determined Harris's mother was "essential" to his defense and thus could not be excluded under Indiana Rule of Evidence 615(c), the rule governing witness-separation orders. *Id.* The dissent, on the other hand, would have concluded Harris waived any arguments related to his mother's presence, but that, waiver notwithstanding, there is no due process right of children to have a parent present in criminal court. *Id.* at 1115–16 (Vaidik, J., dissenting). Because the majority reversed Harris's conviction, the panel did not address Harris's additional arguments challenging his sentence. *Id.* at 1109 n.1 (majority opinion).

The State sought transfer, which we granted, vacating the Court of Appeals opinion. Ind. Appellate Rule 58(A).

Standard of Review

The issues presented in this case implicate several different standards of review. We review de novo the legal questions of an evidentiary rule's scope and the existence of a constitutional right. *R.R. v. State*, 106 N.E.3d

1037, 1040 (Ind. 2018); *In re D.J.*, 68 N.E.3d 574, 577 (Ind. 2017). But we review the trial court's application of an evidentiary rule for an abuse of discretion. *Osborne v. State*, 754 N.E.2d 916, 924 (Ind. 2001). Likewise, we review for abuse of discretion a trial court's decision on whether to apply an alternative sentencing scheme. *Legg v. State*, 22 N.E.3d 763, 767 (Ind. Ct. App. 2014), *trans. denied*. And, finally, we determine whether a sentence is inappropriate by examining the nature of the offense and the character of the offender. *Knapp v. State*, 9 N.E.3d 1274, 1291–92 (Ind. 2014).

Discussion and Decision

Indiana recognizes that children who commit crimes differ from offending adults in important ways: they are less culpable, more vulnerable, and have a greater capacity for rehabilitation. *State v. Stidham*, 157 N.E.3d 1185, 1194 (Ind. 2020) (quoting *Miller v. Alabama*, 567 U.S. 460, 471–72 (2012)). Accordingly, these offenders benefit from an informal and flexible juvenile justice system with a host of statutory protections unavailable to their adult counterparts. *In re K.G.*, 808 N.E.2d 631, 636–37 (Ind. 2004).

Under certain circumstances, however, a child may be tried as an adult in the criminal justice system. *See, e.g.*, Ind. Code § 31-30-1-4 (2020). In those cases, the proceedings are no longer governed by the juvenile code. *Id.* And so the child cannot invoke certain statutory protections, such as the right to meaningfully consult with a parent. *See, e.g.*, *Philson v. State*, 899 N.E.2d 14, 20 (Ind. Ct. App. 2008), *trans. denied*.

As a child waived into adult court, Harris acknowledges he lost some rights that generally protect children in the juvenile system, but he argues that having a parent present is a protection that should persist for two reasons. He asserts that (1) a parent always falls under the "essential" exception to the rule governing separation-of-witness orders, Evidence Rule 615; and (2) as a child, he has a due process right to have his parent present for all stages of a criminal proceeding in which liberty interests are at stake. *See* U.S. Const. amend. XIV.

The State claims Harris waived these arguments by not adequately preserving them at trial. In addressing the substance of Harris's claims, however, the State concedes Rule 615(c) could be used, in some situations, to allow parents to remain in the courtroom but holds firm that a child in adult court has no due process right to have a parent present.

As explained below, we agree that Evidence Rule 615's "essential" exception provides a procedural mechanism to allow a parent-witness to remain in the courtroom despite a witness-separation order. The exception, however, is not categorical. To invoke it, a child defendant must make a proper showing; and, here, the record reveals Harris did not do so. Likewise, Harris did not properly raise a due process argument, so we need not consider whether there is an absolute constitutional right to have a parent-witness present throughout a child's criminal trial. Finally, we reject Harris's remaining arguments challenging his sentence.

I. Although children in adult criminal court may use Evidence Rule 615(c) to establish that a parent is "essential" to the presentation of their defense, Harris failed to make this showing.

Separating witnesses from each other promotes the truthfulness of their testimony. *See Harrington v. State*, 584 N.E.2d 558, 562 (Ind. 1992); *Morell v. State*, 933 N.E.2d 484, 489 (Ind. Ct. App. 2010). It ensures memories aren't tainted by hearing others testify and denies witnesses the opportunity to shape their testimony to match or contradict what others have said. *Harrington*, 584 N.E.2d at 562. Indiana Rule of Evidence 615 guarantees these truth-seeking benefits to parties.

A. Rule 615's essential-witness exception may allow a juvenile defendant's parent to remain in the courtroom despite a separation order.

Rule 615 provides that a court must exclude witnesses at a party's request or may do so on its own so that witnesses "cannot hear other

witnesses' testimony." *Id.* But to ensure parties can effectively prove or defend their cases, judges also have the discretion to find that an exception to Rule 615 applies. *Osborne*, 754 N.E.2d at 924. There are three: (1) for a party who is a natural person; (2) for a party's officer or employee if the party is not a natural person; and (3) for "a person whose presence a party shows to be essential to presenting the party's claim or defense." Evid. R. 615 (a)–(c).

Of the three exceptions, only the last was potentially available to Harris's mother. Though we are mindful that exceptions must be "narrowly construed and cautiously granted" to preserve the benefits of separation, *Long v. State*, 743 N.E.2d 253, 256 (Ind. 2001), we find the exception may be available for the parent of a child tried in the adult criminal justice system. Specifically, it applies if the juvenile defendant can show the parent has a "unique ability" to assist in the presentation of the defense based on the parent's intimate knowledge of the child or capacity to support the child during the proceedings. We explain in detail below.

As a threshold matter, the phrase "essential to presenting the party's claim or defense" is not limited to any certain type of person. *See* Evid. R. 615(c). While the exception has generally been applied to expert witnesses or law enforcement officers, it can cover anyone shown to meet its criteria. *See R.R. Donnelley & Sons Co. v. N. Tex. Steel Co.*, 752 N.E.2d 112, 134 (Ind. Ct. App. 2001), *trans. denied*; Advisory Committee's Notes, Fed. R. Evid. 615.

We have previously interpreted the exception's language to apply to a witness with "specialized expertise" or "intimate knowledge" of a case, such "that a party's attorney could not effectively function without the presence and aid of the witness." *Hernandez v. State*, 716 N.E.2d 948, 950 (Ind. 1999) (quoting 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 615.04(3)(b) (2d ed. 1999)). In *Hernandez*, the victim-witness was deemed "essential and necessary; not just preferable" because his "personal knowledge" of the case gave him the "unique ability to assist the State." *Id.* at 951 & 951 n.3 (alterations omitted). This knowledge was not simply factual knowledge of the offense but, rather, stemmed

from the witness's "long history" with the defendant and was critical to help counter the defendant's theory of self-defense. *Id.*

Similarly, the Northern District of New York, applying the nearly identical Federal Rule of Evidence 615, determined that a student's teacher and assistant superintendent were "essential" to a school's defense against the student's allegations of sexual harassment by other students in the classroom. *Bruneau v. S. Kortright Cent. Sch.*, 962 F. Supp. 301, 305 (N.D.N.Y. 1997). The court determined that the teacher would've been "directly aware" of what happened that day. *Id.* And it found the assistant superintendent had "direct contact" with the student's guardian regarding the allegations, was well versed in the school's policies, and was aware of remedial actions taken. *Id.* Thus, both witnesses were excluded from the separation order. *Id.*

A witness's capacity to support an anxious child may also give the witness the "unique ability" to assist in the presentation of a case. For example, the Third Circuit reasoned that the mother of a sexual assault victim could be an "essential" witness while her child testified. *Gov't of Virgin Islands v. Edinborough*, 625 F.2d 472, 475 (3d Cir. 1980). The court determined that for a person unfamiliar with testifying in court—particularly a child—the experience could be frightening. *Id.* Thus, a familiar and protective individual could actually aid in the truth-seeking process by helping the witness feel more comfortable. *See id*.

Guided by the reasoning underlying these decisions, we conclude that parents of children tried in adult criminal court—children like Harris—can also satisfy the "essential" witness exception. Parents may possess "intimate knowledge" of critical aspects of the child's case or may be the only ones able to help the defendant deal with any anxiety and fully participate in the trial. In those cases, the juvenile defendant could show a parent possesses the "unique ability" to assist the defense—thus, rendering them "essential" under Rule 615(c).

Though we hold that Rule 615(c) is the proper vehicle to permit a parent-witness to remain in the courtroom despite a separation-of-witnesses order, the exception is not automatic. *See R.R. Donnelley*, 752

N.E.2d at 134 (holding there are no "automatic exemption[s]" under 615(c)). Child defendants must still affirmatively show their parent's presence is "essential."

B. Harris failed to show his mother was "essential."

To show a parent is "essential," a child must first invoke Rule 615(c) and then convince the trial court that they need the parent to assist with their defense. *See Long*, 743 N.E.2d at 256.

Though we're not establishing a categorical rule that every parent of a juvenile is essential, courts should remain mindful of the differences between the developmental abilities and emotional maturity of children and adults. *See, e.g.*, *Miller*, 567 U.S. at 465, 471–72; *Hall v. State*, 264 Ind. 448, 451, 346 N.E.2d 584, 586 (1976). A child's brain, regardless of whether the child is tried in adult court, is not fully developed; and courts can take this immaturity into account once Rule 615(c) is invoked. *See J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2005).

Specifically, there could be any number of reasons why a parent might be "essential" to a juvenile's case. Perhaps the child has special needs. Or maybe the child is otherwise struggling to communicate with counsel or to understand what is happening in the proceeding. Or the child may need parental guidance to make life-altering decisions, like whether to pursue a line of questioning, take the stand, or accept a plea agreement. *Cf. J.D.B.*, 564 U.S. at 273; *Roper v. Simmons*, 543 U.S. 551, 569 (2005). In essence, there are myriad reasons why a parent may have the "unique ability" to aid in the presentation of their child's defense—and thereby help ensure their child has a fair trial.

Once a juvenile defendant has shown a parent has the "unique ability" to assist in the presentation of their defense, the trial court must weigh the defendant's need against the State's interest in separating the parent as a witness. In other words, the court must determine if the parent's presence will undermine the truth-seeking function of the trial.

Here, however, Harris made no showing that his mother was "essential" under Rule 615(c). When the trial court asked why his mother should be excluded from the separation order, Harris stated that she wanted to be present "as much as possible." He then referenced that he was only sixteen and facing serious charges for a Level 1 Felony. But he never argued his mother would be able to contribute to his defense. In fact, there was no mention that Harris himself wanted his mother present. Rather, it wasn't until his response brief on transfer that Harris contended his mother was "essential" under Rule 615(c). By not raising the issue before the trial court, he has waived this argument on appeal. *See Small v. State*, 736 N.E.2d 742, 747 (Ind. 2000).

II. Harris waived his argument that a juvenile defendant has a due process right to have a parent present for criminal proceedings.

Under the United States Constitution, a person cannot be deprived of life, liberty, or property without the due process of law. U.S. Const. amend. XIV.[1] Children in the juvenile justice system have many of the same due process rights guaranteed to adults accused of crimes, plus a few extra protections. *See generally In re Gault*, 387 U.S. 1, 30–31 (1967); *Gingerich v. State*, 979 N.E.2d 694, 711 (Ind. Ct. App. 2012), *trans. denied*. Many of these protections, however, are limited to the juvenile system and

[1] Harris also cites Article I, section 12 of the Indiana Constitution to argue that excluding his mother violated his due process rights. This Court has held, however, that the state constitution's "due course of law" language, while sharing "certain commonalities" with the Federal Due Process Clause, "applies only in the civil context." *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 975–76 (Ind. 2000); *see also Sanchez v. State*, 749 N.E.2d 509, 513–15 (Ind. 2001). In *McIntosh*, we recognized the "dozens of cases" that referred to "due process" under the Indiana Constitution but also noted the precedent lacked analysis of the state provision. 729 N.E.2d at 976 n.2. That is not to say our state constitution doesn't provide protections to criminal defendants. To the contrary, these protections have developed though the more specific provisions that make up our constitution's counterpart to the Bill of Rights. *Id.* at 976. Regardless, to the extent Harris argues Article I, section 12 could apply, this argument is waived, as discussed below.

do not carry over when children find themselves in adult court. *See Gingerich*, 979 N.E.2d at 711.

For example—and as relevant here—offenders in juvenile court have the right to meaningful consultation with their parents. I.C. § 31-32-5-1. And because Indiana law also makes a parent a "party" to juvenile delinquency cases, a separation order cannot exclude a parent from the proceedings, even if the parent is a witness. I.C. § 31-37-10-7(2); *K.S. v. State*, 849 N.E.2d 538, 542–43 (Ind. 2006). In the adult system, however, defendants—even if they are children—have no such right to meaningful consultation. Nor are those defendants' parents considered parties to the proceedings.

Harris argues that, despite these differences, the right to have his mother present at his trial should carry over to adult court. This right, he claims, is rooted in due process and overrides a separation order. The State responds that, while Harris may have had a right to his mother's presence in the juvenile system, that right did not transfer to adult court. Rather, according to the State, the court's separation order applied to Harris's mother simply because she was a witness.

Regardless, as pointed out by the dissent below, Harris waived the due process issue by failing to adequately argue it. *See Harris*, 148 N.E.3d at 1115–16 (Vaidik, J., dissenting). He never said there was a constitutional right to have a parent present. Rather, as discussed above, Harris simply mentioned he was sixteen; he was being tried for a serious felony; and his mother wanted to be present. This brief explanation did not put the court or the State on notice that he was making a due process argument. Thus, he waived this claim. *See Small*, 736 N.E.2d at 747. Given Harris's waiver of the issue, we decline to address this complex due process question. This is in line with judicial restraint and the fact that Rule 615(c) already provided him a viable procedural mechanism.

III. The trial court did not abuse its discretion when it did not sentence Harris under the alternative juvenile sentencing scheme.

Harris next argues that the trial court abused its discretion by failing to sentence him under the alternative juvenile sentencing scheme, which provides that a child waived into adult criminal court may receive a suspended sentence or be placed in a juvenile facility. I.C. § 31-30-4-2(a)–(b) (2018). The scheme's purpose—to rehabilitate juvenile defendants and prevent them from becoming criminals as adults—is important, but this decision is left to the trial court's discretion. *See Legg*, 22 N.E.3d at 766.

The alternative sentencing scheme does not provide factors for courts to consider when deciding whether the scheme should apply. In *Legg*, however, our Court of Appeals found the factors for determining whether to waive a child into adult court instructive in this context. *Id.* at 767. Those factors include the severity of the act or whether it is part of a pattern of acts; whether the child is "beyond rehabilitation under the juvenile justice system"; and whether it is in the "best interests" of the community that the child be tried as an adult. I.C. § 31-30-3-2 (2018). Here, the juvenile court set out the reasons for waiving Harris into adult court. The trial court also detailed mitigating and aggravating factors in its sentencing order and specifically denied Harris's motion for alternative sentencing. Following *Legg*, it then reaffirmed each of the juvenile court's findings under the waiver statute. *See id.*

We agree with the trial court: the offense was serious and part of a pattern of delinquent acts; Harris was unsuccessful in the many rehabilitative programs made available to him; and accordingly, it was in the best interest of Harris's community that he stand trial as an adult. Thus, the trial court did not abuse its discretion in declining to sentence Harris under the alternative sentencing scheme.

IV. Harris's sentence of thirty-seven years is not inappropriate in light of the nature of his offense and his character.

Finally, Harris asks us to revise his sentence under Indiana Appellate Rule 7(B). This rule allows an appellate court to revise a sentence "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." Ind. Appellate Rule 7(B). We give considerable deference to the trial court's determination of the sentence. *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). And it is the defendant's burden to persuade us that a sentence is inappropriate. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018).

Here, Harris was sentenced to thirty-seven years in the Department of Correction with five years suspended to probation. We acknowledge this exceeds the advisory sentence by seven years. Ind. Code § 35-50-2-4(a) (2018). Yet, after examining the facts of this case, as well as his previous juvenile adjudications and the juvenile court's finding that he was beyond rehabilitation, we decline to revise Harris's sentence.

We first look to the nature of the offense. Harris fired a handgun multiple times toward Pryor, who was standing next to other potential victims. Though Pryor was struck in the leg and no one else was injured, Harris's actions could have resulted in multiple deaths. And any "speculation" that Pryor was "amid a drug deal" when the shots were fired or had previously robbed Harris does not convince us that his offense was less serious.

Harris's character likewise doesn't persuade us that his sentence was inappropriate. True, Harris was only fifteen at the time of the offense. But by that time, he already had a nearly six-year history of delinquent adjudications and pending cases. And several of his offenses were violent and included a weapon. His record also shows the rehabilitative placements he was offered in the juvenile system failed to change his behavior. And, finally, while we recognize Harris's history of mental

health problems, we note he did not explain why those issues affected his behavior or had any connection to his propensity for breaking the law. *See Legg*, 22 N.E.3d at 766.

We accordingly decline to afford Harris relief under Rule 7(B).

Conclusion

Harris did not make the requisite showing under Evidence Rule 615(c) to establish that his mother was "essential" to the presentation of his defense, nor did he show he had a due process right to have her present. And since we also reject his sentencing arguments, we affirm the trial court.

David, Massa, Slaughter, and Goff, JJ., concur.

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