MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Daniel James Orshonsky,

Appellant-Defendant

v.

State of Indiana,

Appellee-Plaintiff

May 29, 2024

Court of Appeals Case No.
23A-CR-982

Appeal from the
Porter Superior Court

The Honorable Michael S. Bergerson, Senior Judge

Trial Court Cause No.
64D05-2001-F1-759

Memorandum Decision by Judge Foley
Judges Pyle and Tavitas concur.

Foley, Judge.

[1] Following a jury trial, Daniel James Orshonsky ("Orshonsky") was found guilty of Class A felony child molesting,[1] Level 1 felony child molesting,[2] and Class A misdemeanor intimidation.[3] Due to double jeopardy concerns regarding the two child molesting counts, the trial court entered judgment of conviction only on the Level 1 felony and sentenced Orshonsky to forty-five years, executed in the Indiana Department of Correction ("DOC"). The trial court also entered judgment of conviction on the Class A misdemeanor intimidation conviction and sentenced Orshonsky to one year executed to be served consecutive to his forty-five-year sentence, resulting in an aggregate sentence of forty-six years executed in the DOC. Orshonsky appeals and raises the following restated issues for our review:

I. Whether the trial court abused its discretion when it permitted the State to ask leading questions during the direct examination of C.D.;

II. Whether the trial court abused its discretion when it excluded evidence related to Mother's reluctance to sign releases of medical records; and

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[1] Ind. Code § 35-42-4-3(a).

[2] I.C. § 35-42-4-3(b).

[3] I.C. § 35-45-2-1(a)(1).

III. Whether the trial court abused its discretion when it imposed a forty-five year sentence for Orshonsky's Level 1 felony child molesting conviction.

[2] We affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[3] On October 26, 2012, Orshonsky and Kristen Decker-Vanderwoude ("Mother") were married. Mother has three daughters and one son—M.D., K.D., C.D., and S.D.("the Children")—from a previous marriage.[4] C.D. was born on August 27, 2010. In 2013, Orshonsky and Mother were having marital difficulties and began participating in marriage counseling with the head pastor at their church and the pastor's wife. In September 2013, Orshonsky, Mother, and the Children moved into a new house. At that time, Mother worked part-time cleaning houses, and C.D. had not yet started Kindergarten. Mother would occasionally take C.D. or her other children with her to clean a house. During the days that she could not take the Children with her, Orshonsky would watch the Children while Mother cleaned.

[4] Sometime in 2014, while having a conversation about Orshonsky, then three-year-old C.D. said to Mother, "I no like daddy days[ ] because Daddy sticks his wiener in my mouth." Tr. Vol. 3 p. 143. Mother confronted Orshonsky about

[4] Hereinafter, the "Children". We also note that the record is silent regarding the Children's father's involvement in their lives during the times relevant to this case. Therefore, the use of "dad" or "daddy" is in reference to Orshonsky.

C.D.'s comment, and his reaction was "[i]mmediate anger and defense and shock." *Id.* Mother wanted to report C.D.'s comment to the head pastor and his wife, but Orshonsky did not want to say anything because he knew that they would "immediately have to report it elsewhere." *Id.* at 144. Ultimately, Mother did not tell anyone about C.D.'s statement.

[5] On May 25, 2016, Orshonsky adopted the Children. However, the relationship between Orshonsky, Mother, and the Children deteriorated due to Orshonsky's mistreatment of Mother "and [his] verbally, emotionally . . . [h]arsh punishment [of the Children] that [Mother] didn't necessarily agree with." *Id.* at 149–50. Orshonsky was also physically abusive to the Children. One time, the police were called after Orshonsky "hit [K.D.] across the face and shoved her into the stove." *Id.* at 155. Mother considered divorce, but based upon her religious beliefs that she could only seek a divorce under biblical grounds, such as abandonment or adultery, Mother remained married to Orshonsky.

[6] In June 2019, then eight-year-old C.D. exhibited behavior that worried Mother, so she "tried to get to the bottom of where it was coming from" by asking her some questions. *Id.* at 156. C.D. told Mother that "on daddy days" she "remember[ed] Dad sticking his wiener in [her] mouth." *Id.* at 158. Mother did not report C.D.'s disclosure to anyone, claiming she did not know what to do with that information. In September 2019, Mother and Orshonsky were in an argument that ended with Orshonsky eventually leaving the house after telling Mother that "he was going to take all the money out of [their] bank account and [that Mother and the Children would] never see him again." *Id.* at

160. The Children were present while Orshonsky and Mother argued. Mother was distraught, and M.D. and K.D. checked on Mother. While talking to M.D. and K.D., Mother mentioned that she thought C.D. was sexually abused by Orshonsky, and M.D. and K.D. disclosed that Orshonsky had molested them too. The following day Mother told two family members that C.D., M.D., and K.D. had been molested by Orshonsky and that they needed help. Eventually, Mother, K.D., and one of the family members reported the Children's allegations to the Porter County Sheriff's Department. Detective Darrell Hobgood interviewed C.D., M.D., and K.D., and C.D. told him that Orshonsky "threatened to '[d]o it worse' if she ever told anyone" about the child molesting. Appellant's App. Vol. II p. 22. The Indiana Department of Child Services became involved.

[7] On October 4, 2019, a forensic interview of the Children was conducted by a forensic interviewer at Dunebrook, and C.D., M.D., and K.D. all disclosed that Orshonsky molested them. On January 27, 2020, the State charged Orshonsky with: Count I child molesting as a Class A felony; Count II, child molesting as a Class A felony; Count III, child molesting as a Class A felony; Count IV, child molesting as a Level 1 felony; Count V, child molesting as a Class C felony; Count VI, child molesting as a Class C felony; and Count VII, intimidation as a Class A misdemeanor. On September 12, 2022, Mother was deposed. When asked if she would disclose the names of her and the Children's counselors and "sign a HIPAA release[ ] or healthcare records releases[,]" she refused to do so. Tr. Vol. 3 p. 198. Forty days later, Mother

disclosed the names of the counselors and signed the releases. The State filed a motion in limine to prohibit the defense from referencing anything regarding Mother "not initially agreeing to release her and the Children's mental health records when first requested by Defense Counsel." Appellant's App. Vol. II p. 110.

[8] A jury trial was held on February 6, 8, and 9 of 2023. Mother and the Children testified at the trial. At the outset of then twelve-year-old C.D.'s direct examination, C.D. stated, "Sorry. I can't do this . . . . I'm sorry[,]" which led to the following colloquy:

> [The State]: Judge, can I suggest a recess?
>
> THE COURT: Do you need a little bit of time?
>
> [C.D.]: Yes.
>
> THE COURT: Okay. We'll take a short recess and have her come back on in after that recess.

Tr. Vol. 4 p. 152. After the recess, the direct examination of C.D. resumed, and Orshonsky objected to one of the questions, stating that the question was leading, which the trial court overruled, stating "it wasn't leading." *Id.* at 159. The direct examination of C.D. continued, and Orshonsky again objected on the same ground and asked for a continuing objection, which the trial court acknowledged. The trial court also noted that "most of the questions that have been asked of this witness have not been leading" and that the court was

"permitted to allow the State to proceed with its examination with the limited use of leading questions[.]" *Id.* at 177–78.

[9] Orshonsky sought to introduce evidence that Mother initially refused to sign the medical releases to support his theory that Mother encouraged the Children to claim that Orshonsky molested them. During the offer of proof, Orshonsky claimed that Mother's reluctance to sign the releases was based upon her desire to avoid disclosure of her counseling records that revealed Mother's belief in the necessity of biblical grounds for a divorce from Orshonsky. Orshonsky's theory was that the child molesting allegations were used by Mother to provide a basis for Mother to divorce Orshonsky in a way that was consistent with Mother's religious beliefs. The trial court ultimately excluded the evidence over Orshonsky's objection.

[10] The jury found Orshonsky guilty of Count III, Class A felony child molesting, Count IV, Level 1 felony child molesting, and Count VII, Class A misdemeanor intimidation—all charges pertaining to C.D. The jury hung on the remainder of the charges, which all pertained to either M.D. or K.D. The trial court, being "[m]indful of potential double jeopardy considerations" between Counts III and IV, entered judgment of conviction only on Count IV and sentenced Orshonsky to forty-five years, executed in the DOC. The trial court also entered judgment on Count VII and sentenced Orshonsky to one year executed to be served consecutive to his forty-five-year sentence, which resulted in an aggregate sentence of forty-six years executed. This appeal ensued.

Discussion and Decision

I. Leading Questions

[11] The admission or exclusion of evidence is a matter that is generally entrusted to the discretion of the trial court. *Pribie v. State*, 46 N.E.3d 1241, 1246 (Ind. Ct. App. 2015). "In cases such as this one, where the defendant does not appeal the denial of a motion to suppress and the evidence is admitted over the defendant's objection at trial, we frame the issue as whether the trial court abused its discretion in admitting the evidence at trial." *Kyles v. State*, 888 N.E.2d 809, 812 (Ind. Ct. App. 2008). In those instances, we will reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Id.* Moreover, the trial court's ruling will be upheld "if it is sustainable on any legal theory supported by the record, even if the trial court did not use that theory." *Tibbs v. State*, 59 N.E.3d 1005, 1011 (Ind. Ct. App. 2016).

[12] Orshonsky asserts that the trial court erred when it permitted the State to ask leading questions while examining C.D. Indiana Evidence Rule 611(c) provides that leading questions should not be used on direct examination "except as may be necessary to develop the witness's testimony." Our Supreme Court identified the questioning of child witnesses as fitting within this exception. *See King v. State,* 508 N.E.2d 1259, 1263 (Ind. 1987) (noting that a trial court is permitted to allow leading questions when a child is a witness "given the varying degrees of comprehension of young people."). The Court has explained: "Our case law has allowed leading questions on direct

examination to develop the testimony of certain kinds of witnesses—for example, children witnesses; young, inexperienced, and frightened witnesses; special education student witnesses; and weak-minded adult witnesses. . . ." *Williams v. State,* 733 N.E.2d 919, 922 (Ind. 2000). "The trial judge is best able to determine the capabilities of the witness and [the trial court's] decision to permit a certain manner of questioning will not be overturned absent a clear showing of prejudicial error." *King,* 508 N.E.2d at 1263.

[13] Orshonsky claims the following questions posed by the State were leading:

> [The State:] Do you remember times when [Orshonsky] would call you into his bedroom?
>
> [C.D.:] Yes.
>
> [The State:] So what were you doing when he would call you into his bedroom?
>
> [C.D.:] I would be like either walking upstairs to grab a toy or something that I forgot, and [S.D.] wouldn't be with me.
>
> . . . .
>
> [The State:] So would you go into [Orshonsky's] bedroom then?
>
> [C.D.:] Yes.
>
> [The State:] What would [Orshonsky] say when you went into the bedroom?

[C.D.:] He would just tell me to come -- come here.

[The State:] Okay. So what would you do then?

[C.D.:] I would listen to him.

[The State:] And so you walk over to him; what would [Orshonsky] do then?

[C.D.] He would be just sitting in his room or --

[The State:] Where is he sitting in his room?

[C.D.:] Um, probably on his bed.

[The State:] . . . when you say [Orshonsky's] room, where is that . . . ?

[C.D.:] My parent's room.

. . . .

[The State:] So C[.D.], just point with that pen; you're referring to the parent's room as [Orshonsky's] room, correct?

[C.D.:] Yes.

[The State:] Okay. So what would [Orshonsky] do – he's sitting in his room on the bed; what would he do next?

[C.D.:] He would just tell me to wait.

[The State:] So what did he do then?

[C.D.:] He would go to the bathroom.

[The State:] Okay. So what would happen after he came out of the bathroom?

[C.D.:] He would be stripped.

[The State:] So what do you mean by stripped?

[C.D.:] He wouldn't have any pants on.

[The State:] Would he have a shirt on?

[C.D.:] Sometimes.

[The State:] Would you see [Orshonsky's] penis then?

[C.D.:] Yes.

[The State:] And what did it look like?

[C.D.:] Just a penis, I guess.

[The State:] So what -- he would come out of the bathroom, have no pants on; what would he do next?

[C.D.:] He would go over to the bed.

[The State:] What would he do on the bed?

[C.D.:] He would lie down.

[The State:] What would you do?

[C.D.:] Um, I would be, like, just standing there I guess.

[The State:] Okay. Did [Orshonsky] tell you to do anything then?

[C.D.:] He would tell me to come here.

[The State:] So then what did you do when you went to him?

[C.D.:] Um, I would just like stand in front of him.

[The State:] Then what?

[C.D.:] He would force me to suck on his penis.

[The State:] Would he ask you to do that?

[C.D.:] Yes. And if I refused, he would push my head down.

[The State:] So what were some of the things that he either asked or said to you?

[C.D.:] . . . he would be saying like do it or just forcefully pushing me into doing it.

[The State:] So how would he forcefully push you?

[C.D.:] Um, he would push his hands into my head and forcefully put my head down.

[The State:] What did you do, did you touch [Orshonsky's] penis?

[C.D.:] No.

[The State:] Did your mouth touch [Orshonsky's] penis?

[C.D.:] Yes.

[The State:] Okay. So how is [Orshonsky] -- is he still on the bed?

[C.D.:] Yes.

[The State:] How is he on the bed?

[C.D.:] He would be lying down with his legs off.

[The State:] Where are you?

[C.D.:] I would be standing in front of him.

[The State:] Okay. So how is it -- describe for the jury how he is lying down on the bed and you're standing?

[C.D.:] He would be lying down in front of me and -- I don't know how to explain it.

[The State:] When -- let me ask you this way: When you walked up to him, was he lying down?

[C.D.:] Yes.

[The State:] Okay. So when he pushed your head down onto his penis, was he lying down?

[C.D.:] Kind of. He would be like sitting up kind of, like halfway sitting up to -- enough to see me, instead of just lying straight down and staring at like a ceiling or something.

[The State:] Are his legs on the bed?

[C.D.:] No, they would be hanging off.

[The State:] Okay. So you're on the side of the bed, right?

[C.D.:] Uh-huh.

[The State:] [Orshonsky's] back is either lying down or partially sitting up?

[C.D.:] Yes.

[The State:] Did you ever get in the bed with [Orshonsky]?

[C.D.:] No.

[The State:] Did you ever stand on the side of the bed?

[C.D.:] No.

[The State:] How did that make you feel, [Orshonsky] putting his penis in your mouth?

[C.D.:] It would hurt.

[The State:] How would it hurt?

[C.D.:] It would hurt my neck because he would be pushing my head down.

[The State:] Did you have any sort of reaction to it?

[C.D.:] Um, not really, because I was a defenseless child. I wouldn't be able to stand up or stand up for myself or do anything to help myself.

[The State:] How did it feel in your mouth?

[C.D.:] Uncomfortable.

[The State:] So what do you mean by uncomfortable?

[C.D.:] Like, it would just feel weird.

[The State:] Would it make you gag?

[C.D.:] Yes.

[The State:] How would you know that it was over?

[C.D.:] He would get mad at me and scream at me to leave.

[The State:] He would scream at you to leave; is that what you said?

[C.D.:] Yes.

[The State:] Were there any times where he kind of jumped up from the bed?

[C.D.:] Yes.

[The State:] So tell us about that.

[C.D.:] Um, he -- I would just be doing it. Um, I would just be sucking on his penis or whatever because I was forced to do it, and then he would, um, he would kind of like push me aside and he would jump up from the bed and like run to the bathroom or something.

[The State:] Did you ever see anything come out of his penis?

[C.D.:] Yes.

[The State:] So what did you see?

[C.D.:] Yellow gooey stuff.

[The State:] Did [Orshonsky] ever say anything about candy?

[C.D.:] Yes.

[The State:] What did he say?

[C.D.:] Um, to trick me into doing it -- to trick me into sucking on his penis, he would ask me if I wanted candy.

[The State:] For the times you didn't want to put [Orshonsky's] penis in your mouth?

[C.D.] Yes.

[The State:] What would [Orshonsky] do those times?

[C.D.:] He would get mad at me and that's when he would use his hands to push my head into it.

[The State:] How often would this happen?

[C.D.:] Um, I don't remember.

[The State:] Did it happen more than once?

[C.D.:] Yes.

[The State:] Did [Orshonsky] ever say anything to you about telling anyone about putting his penis in your mouth?

[C.D.:] Yes. He would tell me not to tell [Mother].

. . . .

[The State:] So C[.D.], going back to the last question that I asked you . . . we're talking about the things that [Orshonsky] said to you, "do it worse" if you told anyone, and then you said

> "about what happened." So what do you mean by "what happened"?
>
> [C.D.:] I meant that he -- he would make me suck on his penis.

Tr. Vol. 4 pp. 162–69, 180.

[14] The record indicates that leading questions were utilized to develop then twelve-year-old C.D.'s testimony. Indeed, at the outset of C.D.'s direct examination, she said, "Sorry. I can't do this[,]" which led the trial court to ask C.D. if she needed "a little bit of time" before proceeding further. *Id.* at 153. When C.D. indicated that she did need additional time before testifying about the sexual abuse, the trial court took a brief recess.

[15] Orshonsky claims that the State "did not make limited use of leading questions to develop C.D.'s testimony[,]" but rather repeatedly asked leading questions "to establish material elements of the offenses." *Id.*; *see also* Appellant's Reply Br. p. 6. Again, "[c]ertain witnesses, including children and young, inexperienced, and frightened witnesses, may be asked leading questions on direct examination to develop their testimony." *Riehle v. State*, 823 N.E.2d 287, 294 (Ind. Ct. App. 2005), *trans. denied*. C.D. was twelve years old, had never testified before a jury, and was reluctant to testify to the details regarding her molestation by Orshonsky, who was her adoptive father. The trial court considered C.D.'s capabilities as a child witness and permitted the prosecutor to ask a blend of leading and nonleading questions during direct examination. In response to some of the nonleading questions, C.D. testified, in detail, that

Orshonsky "would force [her] to suck on his penis . . . and if [she] refused, he would push [her] head down . . . he would push his hands into [her] head and forcefully put [her] head down." Tr. Vol. 4 pp. 162–69, 180. Given C.D.'s age, her hesitation to testify at the outset of her direct examination, and the nature of the leading questions under the circumstances, we cannot say the trial court abused its discretion when it allowed the State to ask leading questions during C.D.'s direct examination. *See Riehle*, 823 N.E.2d at 294 (concluding that the trial court did not abuse its discretion by allowing the State to use leading questions in order to elicit information from the ten-year-old reluctant victim about the details of how she had been molested).

[16] To the extent Orshonsky claims that he "suffered substantial injury from C.D.'s answers to the leading questions" in a case "where the jury was unable to reach a verdict on several counts and where the convictions hinged on C.D.'s testimony[,]" Orshonsky's contention is unpersuasive. Appellant's Br. p. 27. "It is the role of the jury, as factfinder, 'to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction.'" *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022) (quoting *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007)). C.D.'s testimony that Orshonsky "would force [her] to suck on his penis. . . [a]nd if [she] refused, he would push [her] head down" was materially consistent with the allegations C.D. made (1) when she first disclosed the sexual abuse to her Mother, (2) when she participated in the Dunebrook interview, and (3) when she testified at trial. Tr. Vol. 4 p. 165. Orshonsky had the opportunity to cross-examine C.D. to highlight

inconsistencies in her testimony to the jury, and he took advantage of that opportunity during the trial. In the end, the jury as factfinder assessed C.D.'s testimony and implicitly determined that C.D. was credible when reaching its verdict. Based on the nature of the evidence and in light of Orshonsky's opportunity to cross-examine C.D., Orshonsky has failed to demonstrate that the State's use of leading questions resulted in substantial injury under the circumstances.

II. Exclusion of Evidence Concerning Reluctance to Sign Releases

[17] Orshonsky sought to elicit testimony from Mother that she refused to sign medical releases during discovery. During the offer of proof, the following colloquy took place:

> [Defense Counsel:] . . . And do you remember me asking you to also sign a HIPAA release, or healthcare records releases?
>
> [Mother:] Yes.
>
> [Defense Counsel:] You refused to do that --
>
> [Mother:] Yes.
>
> [Defense Counsel:] -- at that time?
>
> [Mother:] At that time --
>
> [Defense Counsel:] Okay.

[Mother:] -- because I'm a nurse, and I understand fully, I didn't want to release all of our medical records, which was what that asked.

. . . .

[Defense Counsel:] All right. One of the things in your counseling record is this issue of the biblical divorce.

[Mother:] Correct.

[Defense Counsel:] Is that one of the issues you did not want revealed?

[Mother:] No, not at all. There is nothing in any of those records that I would not want revealed.

[Defense Counsel:] Then what was your concern?

[Mother:] I needed to think on it. As I said, as a nurse, I understand HIPAA records. And the wording of that first release pretty much gave full release to any and all of our medical and counseling and mental health records.

. . . .

THE COURT: Okay. Then your -- your point here is that you think that this is important information to put in front of the jury here and -- or --

[Defense Counsel]: For impeachment purposes, Judge. The fact that she's resisting the disclosure of the records, . . . and then I

find the words biblical divorce, which is very important as it relates to impeachment and motivation.

THE COURT: Okay. She has not denied the fact that she talked about a biblical divorce. I don't know how --somehow resisting the -- delivering these medical records may impeach her in that regard[]. And she's [sic] not denied making that statement.

[Defense Counsel]: Judge, the statement doesn't mean anything. The fact that she resisted is the impeachment. Clearly, a reasonable jury could infer --

THE COURT: But ultimately --

[Defense Counsel]: -- that she was hiding the --

THE COURT: -- those records were produced, correct?

[Defense Counsel]: It doesn't put the fight itself, Judge, that a reasonable jury could infer that she was hiding it because of the word biblical divorce.

. . . .

[The State responds stating that it is inappropriate for the evidence to be presented to the jury since Mother ultimately signed the releases forty days after the deposition]

THE COURT: It's a red herring, and it's going to get the jury off of the -- particularly the main issues in this case. And the Court finds that her initial reluctance --if it was reluctance -- was reasonable. As any parent might be reluctant to just give a

> blanket release of medical information of either themselves or their children without having some time to think about it.
>
> . . . .
>
> THE COURT: . . . we're not going to allow the jury to infer that there was something nefarious in the production of those records . . . for some 40-day period in time, in producing the records

Tr. Vol. 3 pp. 198–203.

[18] Orshonsky claims that the evidence was relevant because it "suggests that [Mother] did not want defense counsel to discover her belief about the importance of a 'biblical divorce' and supports the defense theory that the issue motivated [Mother] to encourage the [C]hildren to claim that [Orshonsky] abused them." Appellant's Br. p. 34.

[19] A trial court's ruling excluding evidence may not be challenged on appeal unless a substantial right of the party is affected and the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked. *Lashbrook v. State*, 762 N.E.2d 756, 758 (Ind. 2002). "The offer of proof should 'reduce uncertainty as to the nature of the excluded evidence to a tolerable and acceptable level' and, by doing so, 'improve the reliability of the appellate court's guesses and estimates concerning the probability that the trial court's error was either prejudicial or harmless.'" *Henderson v. State*, 108 N.E.3d 407, 412–13 (Ind. Ct. App. 2018) (quoting *Baker v. State*, 750 N.E.2d 781, 786 (Ind.

2001)). In addition, appellate review of the exclusion of evidence is not limited to the grounds stated at trial, but rather the ruling will be upheld if supported by any valid basis. *Id.*

[20] Indiana Evidence Rules 401, 402, and 403 set the framework for our analysis. First, we must determine whether the excluded evidence was relevant. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Ind. Evidence Rule 401. Only relevant evidence is admissible. *See* Evid. R. 402. However, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Evid. R. 403. "Confusing the issues is concerned with the evidence growing 'so intricate that the disentanglement of it becomes difficult' or becoming such 'a mass of confused data' that the jury loses sight of the main issue." *Escamilla v. Shiel Sexton Co., Inc.*, 73 N.E.3d 663, 670 (Ind. 2017) (quoting J. Wigmore, 2 Wigmore on Evidence § 443 at 529 (1979), 6 Wigmore on Evidence § 1864 at 643.)

[21] First, we must consider whether the excluded evidence is relevant. Orshonsky's theory is that Mother wanted to shield her counseling records in order to avoid discovery of her religious beliefs regarding divorce. Orshonsky claims that since Mother testified that "[t]he bible says . . . a biblical grounds for divorce is abandonment or adultery[,]" and that child molesting is a form of adultery,

Mother "influenced the [Children] to make allegations in order to provide 'biblical grounds' for [a] divorce from [Orshonsky]." Tr. Vol. III pp. 152, 205; Appellant's Br. p. 32. Orshonsky argues that the excluded evidence was probative of Mother's desire to conceal her motive for the child molesting allegations against Orshonsky. Any probative value of the evidence was slight, at best.

[22] We next consider whether the evidence's probative value is substantially outweighed by a danger of confusing the issues before the jury. The record reveals that the trial court conducted the 403 balancing test and concluded that the fact that Mother did not immediately consent to the disclosure of the records would confuse the jury. During the offer of proof, Mother testified that she was initially reluctant to sign the releases because she needed to think about it first since the releases gave Orshonsky full access to any and all of Mother's and the Children's medical, counseling, and mental health records. Ultimately, Mother signed the releases forty days later, thus giving Orshonsky access to the biblical divorce information he intended to use to support his theory. Indeed, Orshonsky was able to question Mother regarding her need to have biblical grounds in order to divorce Orshonsky during her cross examination. *See* Tr. Vol. 3 pp. 152, 179, 204–06 (Mother testified that "[t]he Bible says that . . . a biblical grounds for divorce is abandonment or adultery[, s]o [she] didn't feel right filing for divorce [without either occurring]."). Furthermore, Orshonsky had the opportunity to cross examine Mother about her motivation in reporting the Children's allegations and whether Mother fabricated the allegations in

order to provide a basis for her to seek a divorce. Therefore, the trial court was well within its discretion to exclude the evidence under Rule 403.

III. Sentence Enhancement

[23] Orshonsky claims that the trial court erred when it enhanced his sentence for Level 1 felony child molesting pursuant to Indiana Code section 35-50-2-4(c), which contemplates a sentence enhancement when the victim was under the age of twelve. According to Orshonsky, the sentence enhancement "ran afoul of [his] Sixth Amendment right to a trial by jury and *Apprendi v. New Jersey*, 530 U.S. 466 (2000)" because the jury did not make a finding that C.D. was under the age of twelve at the time of the offense. Appellant's Br. p. 35. The State argues that Orshonsky waived this argument because he was "required to object [to] any error under *Blakely v. Washington*, 542 U.S. 296 (2004)." Appellee's Br. p. 21. Orshonsky counters, arguing that the Indiana Supreme Court in *Kincaid v. State* relaxed the rule and permitted an appellant in a criminal case to "raise a particular sentencing claim in his initial brief on direct appeal in order to receive review on the merits." 837 N.E.2d 1008, 1010 (Ind. 2005). As the Indiana Supreme Court recently explained:

> It is an essential principle of appellate procedure that "a claim is not normally available for review on appeal unless first made at trial." *Kincaid v. State*, 837 N.E.2d 1008, 1010 (Ind. 2005). However, our precedents have carved out an exception, under which "[c]ounsel need not object to preserve a sentencing error for review." *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006) (citing *Kincaid*, 837 N.E.2d at 1010). As this Court observed in *Kincaid*, we "review many claims of sentencing error"—e.g.,

> reliance on an improper aggravating circumstance or failure to consider a proper mitigating circumstance—"without insisting that the claim first be presented to the trial judge." 837 N.E.2d at 1010. *Kincaid* held that *Blakely* claims, asserting the Sixth Amendment right to trial by jury of facts that increase a maximum permissible sentence, may be raised for the first time in an appellant's initial brief. *Id.*

Oberhansley v. State, 208 N.E.3d 1261, 1269 (Ind. 2023).

[24] Trial courts have broad discretion in sentencing matters. *See, e.g.*, Ind. Code § 35-38-1-7.1(d) (permitting a trial court to impose "any sentence ... authorized by statute" if the sentence passes constitutional muster). However, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

[25] Here, the State charged Orshonsky with child molesting as a Class A felony and as a Level 1 felony which both require that the victim of child molesting be "under fourteen (14) years of age." The jury found Orshonsky guilty as charged. For double jeopardy reasons, the trial court only entered judgment of conviction on the Level 1 felony child molesting count. At the time of the sentencing hearing, Indiana Code section 35-50-2-4(b) provided: "[A] person who commits a Level 1 felony . . . shall be imprisoned for a fixed term of between twenty (20) and forty (40) years, with the advisory sentence being thirty (30) years." The trial court, however, sentenced Orshonsky to forty-five years. In doing so, the trial court referred to Indiana Code section 35-50-2-4(c),

which increases the sentencing range to between twenty and 50 years when the victim of the child molesting is less than twelve years of age.

[26] We recently addressed this issue in *Holmgren*, determining that enhancing a sentence under Indiana Code section 35-50-2-4(c) ran afoul of the Sixth Amendment because the jury was not asked to find that the victim was under the age of twelve at the time of the sexual abuse. *Holmgren v. State*, 196 N.E.3d 281, 286 (Ind. Ct. App. 2022), *trans. denied*. In that case, the State specifically requested that the trial court find that Indiana Code section 35-50-2-4(c) was applicable to Holmgren. We concluded that, under *Apprendi*, the trial court could not impose the sentence enhancement under Indiana Code section 35-50-2-4(c) without violating Holmgren's Sixth Amendment rights because the jury there was not presented with the determination of whether victim was under the age of twelve when he was molested. *Id.* at 288.

[27] Here, the State did not seek a sentence enhancement in the charging information, the enhancement was not submitted to the jury, Orshonsky did not waive his right to a jury determination regarding the enhancement, and the State did not request the trial court find the statute applicable to Orshonsky. Therefore, Orshonsky's sentence is an abuse of discretion because the forty-five year sentence exceeds the sentencing range for a Level 1 felony, and the

necessary factual findings for an enhancement were not found by the jury. We reverse Orshonsky's forty-five year sentence and remand for resentencing.[5]

Conclusion

[28] Based on the forgoing, we conclude that the trial court did not abuse its discretion when it permitted the State to ask leading questions during C.D.'s direct examination or when it excluded evidence of Mother's initial reluctance to sign the medical releases. Because the jury did not find the necessary predicate facts to support the sentence enhancement for the Level 1 felony, we reverse the trial court's forty-five-year sentence and remand for resentencing.

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

Pyle, J., Tavitas, J., concur.

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[5] Orshonsky also claims that his forty-five-year sentence is inappropriate in light of the nature of his offenses and his character. Because we reverse Orshonsky's forty-five-year sentence and remand for resentencing, we need not address Orshonsky's inappropriateness argument.

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