MEMORANDUM DECISION

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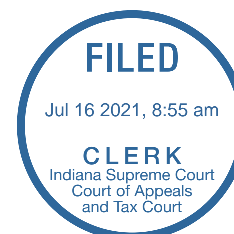

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IN THE
COURT OF APPEALS OF INDIANA

Brian Bresnahan,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 16, 2021

Court of Appeals Case No. 21A-CR-242

Appeal from the Marion Superior Court

The Honorable Angela Dow Davis, Judge

Trial Court Cause No. 49D27-2001-CM-1163

Tavitas, Judge.

Case Summary

[1] Brian Bresnahan appeals his conviction for domestic battery, a Class A misdemeanor. Bresnahan argues that the deputy prosecutor committed prosecutorial misconduct during closing arguments that amounted to fundamental error. Finding no fundamental error as a result of the deputy prosecutor's closing arguments, we affirm.

Issue

[2] Bresnahan raises one issue, which we restate as whether fundamental error occurred as a result of the deputy prosecutor's closing arguments.

Facts

[3] On December 21, 2019, Bresnahan hosted a holiday party at his residence with his wife, J.M. At approximately 10:00 p.m., most of the guests had left the party, but Bresnahan and three others were outside. J.M. was trying to go to sleep, but Bresnahan and the guests outside were being too loud. J.M. told them that it was "time for them to go" and that they should "either call an Uber or [J.M. would] call the police." Tr. Vol. II p. 88. Bresnahan responded, "if anyone's going to leave, it's going to be you." *Id.* Eventually, the guests left, and J.M. walked into the kitchen. Bresnahan followed her, grabbed her from behind, and threw her against the wall. Bresnahan then started punching J.M. on the head and face. J.M. dropped to the ground, and Bresnahan began dragging her as he continued punching her on the back of her head. Bresnahan told J.M. that "he was going to take [her] out like the trash that [she] was." *Id.*

at 90. At some point, J.M. lost consciousness. Neighbors heard J.M. yelling for help and found her face up on the driveway wearing pajamas with a ripped collar. When J.M. woke up, she was on the driveway, and a neighbor was standing over her telling her that "help was on the way." *Id.* at 91.

[4] The State charged Bresnahan with domestic battery, a Class A misdemeanor; domestic battery, a Level 6 felony; strangulation, a Level 6 felony; and kidnapping, a Level 6 felony. A jury trial was held on November 5, 2020. During closing arguments, defense counsel argued that J.M. was intoxicated and behaving oddly during the evening in question and that J.M. fell on the "snowy, icy driveway." Tr. Vol. II p. 165. The deputy prosecutor then argued during the State's closing arguments:

> [Deputy Prosecutor]: So, was she intoxicated? I don't know. Maybe. Maybe she was intoxicated. I remember when the State—God, fortunately we don't do that anymore—I remember when the State—I'm sorry, the Defense used to argue that the rape victim was intoxicated, so she's asking for it.
>
> [Defense Counsel]: Judge, I would object. This is completely inappropriate.
>
> THE COURT: I'll sustain the objection.
>
> * * * * *
>
> [Deputy Prosecutor]: The argument that we have, then, is the fact is he—her being intoxicated is that an excuse? Does that give him the right to beat her up? And I would say to you, no, it doesn't.

> Again, and again, and again, they want to go back to the fact that she was intoxicated. Nowhere do they say that she wasn't assaulted by him. They say she was intoxicated, like she had it coming to her.
>
> [Defense Counsel]: Judge, this is inappropriate. Can we approach, please?
>
> THE COURT: I'll sustain the objection.
>
> [Deputy Prosecutor]: Sorry, Your Honor.
>
> THE COURT: And the jury is to disregard his last statement.

Id. at 168.

[5] The jury found Bresnahan guilty of domestic battery, a Class A misdemeanor, and not guilty of the remaining charges. The trial court sentenced Bresnahan to 184 days with 180 days suspended to probation. Bresnahan now appeals.

Analysis

[6] Bresnahan argues that fundamental error occurred as a result of the deputy prosecutor's statements during closing arguments. If a defendant properly raises and preserves the issue of prosecutorial misconduct, then we determine: "'(1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected.'" *Isom v. State*, 31 N.E.3d 469, 490 (Ind. 2015) (quoting *Baer v. State*, 866 N.E.2d 752, 756 (Ind.

2007), *reh'g denied*, *cert. denied*, 552 U.S. 1313, 128 S. Ct. 1869 (2008)), *reh'g denied*, *cert. denied*, 577 U.S. 1137, 136 S. Ct. 1161 (2016)). "When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury." *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). "If the party is not satisfied with the admonishment, then he or she should move for mistrial." *Id.* The "[f]ailure to request an admonishment or to move for mistrial results in waiver." *Id.* Here, although Bresnahan objected to the comments at issue, he did not move for a mistrial and, although the trial court gave an admonishment regarding the second comment, Bresnahan did not request an admonishment regarding the first comment. Accordingly, Bresnahan has waived this argument.

[7] "Where a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim." *Isom*, 31 N.E.3d at 490. The defendant must establish "not only the grounds for the misconduct but also the additional grounds for fundamental error." *Id.* "The 'fundamental error' exception is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Id.* (quoting *Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013)). "'The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process.'" *Id.* (quoting *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010)).

[8] We begin by addressing the deputy prosecutor's second remark—"They say she was intoxicated, like she had it coming to her." Tr. Vol. II p. 168. We note that Bresnahan objected to the remark, and the trial court ordered the jury to disregard the comment. It is well-established that "[w]e presume that the trial court's admonishment cured any potential harm." *Jones v. State*, 101 N.E.3d 249, 258 (Ind. Ct. App. 2018), *trans. denied*; *see also Johnson v. State*, 901 N.E.2d 1168, 1173 (Ind. Ct. App. 2009) ("[W]here the trial court adequately admonishes the jury, such admonishment is presumed to cure any error that may have occurred."). As a result, Bresnahan has failed to demonstrate that the second remark resulted in error, much less fundamental error. *See, e.g., Jones*, 101 N.E.3d at 258 (holding that, where the trial court admonished the jury to disregard a prosecutor's comments during closing argument, we presume that the "admonishment cured any potential harm").

[9] As for the deputy prosecutor's first remark, during closing arguments, defense counsel argued that J.M. was intoxicated and behaving oddly during the evening in question and that J.M. fell on the "snowy, icy driveway." Tr. Vol. II p. 165. The deputy prosecutor then stated: "I remember when the State-God, fortunately we don't do that anymore-I remember when the State-I'm sorry, the Defense used to argue that the rape victim was intoxicated, so she's asking for it." *Id.* Although Bresnahan objected to the comment, he did not request an admonishment or a mistrial. Accordingly, Bresnahan must demonstrate that the comment amounted to fundamental error.

[10] Bresnahan argues that the deputy prosecutor "impugned defense counsel['s character] by suggesting that defense attorneys use[d] to argue that victims were asking to be raped if they were intoxicated." Appellant's Br. p. 8. Our Supreme Court has held: "[C]omments that demean opposing counsel, especially in front of a jury, are inappropriate." *Marcum v. State*, 725 N.E.2d 852, 859 (Ind. 2000). We, however, need not determine whether the deputy prosecutor's comment was improper or amounted to misconduct because Bresnahan has not established fundamental error.

[11] We note that the trial court instructed the jury as follows: "When the evidence is completed, the attorneys may make final argument. 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. II pp. 79-80. The trial court also instructed the jury that "[s]tatements made by the attorneys are not evidence." *Id.* at 172. "Jurors are presumed to follow a trial court's instructions." *Ward v. State*, 138 N.E.3d 268, 274 (Ind. Ct. App. 2019).

[12] Moreover, despite the deputy prosecutor's comment regarding J.M.'s intoxication, the jury acquitted Bresnahan of felony battery, strangulation, and kidnapping. There is no indication that the jury convicted Bresnahan of the misdemeanor battery charge due to the deputy prosecutor's isolated comment, where the jury contemporaneously acquitted him of the remaining charges. We conclude that the misconduct did not have a substantial effect on the jury's decision and that it did not make a fair trial impossible. Bresnahan has not

shown that fundamental error occurred. *See, e.g., Isom*, 31 N.E.3d at 493 (holding that, although "the State stepped over the line," the State's remarks were "relatively isolated and came near the end of a fairly lengthy summation," "any harm done by the prosecutor's remark was de minimis and not substantial," and no fundamental error occurred).

Conclusion

[13] Fundamental error did not occur as a result of the deputy prosecutor's comments during closing argument. We affirm.

[14] Affirmed.

Najam, J., and Pyle, J., concur.