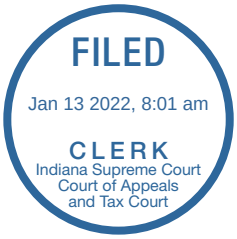
## MEMORANDUM DECISION



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# IN THE
# COURT OF APPEALS OF INDIANA

Randy Bussen,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff*.

January 13, 2022

Court of Appeals Case No. 21A-CR-1205

Appeal from the Wayne Superior Court

The Honorable Charles K. Todd, Jr., Judge

Trial Court Cause No. 89D01-1811-F1-16

**Bailey, Judge.**

# Case Summary

[1] Randy L. Bussen ("Bussen") appeals his convictions, following a jury trial, of two counts of child molesting as Level 1 felonies.[1]

[2] We affirm.

# Issues

[3] Bussen raises two issues on appeal which we restate as follows:

I. Whether the trial court committed reversible error when it admitted alleged hearsay and vouching testimony.

II. Whether there was prosecutorial misconduct that rose to the level of fundamental error.

# Facts and Procedural History

[4] A.B. ("Child") was born on September 27, 2010. Her mother, J.S. ("Mother"), and her father, Bussen, lived together at the time of Child's birth but separated shortly thereafter. Bussen began having scheduled visitation with Child in 2014.

[5] On November 2, 2018, the State charged Bussen with six counts of child molesting as to his then-eight-year-old daughter, Child. At Bussen's April 5th

[1] Ind. Code § 35-42-4-3(a).

through 7th, 2021, jury trial, Child was called to testify. Child asked to take a "break" and a "breather" when she was first asked to talk about Bussen's molestation of her. Tr. v. III at 23. Following her break, Child testified in detail about two incidents when Bussen molested her when she was three or four years old. As to each incident, Child described her age, the timing and location of the incidents, who was in the house at the time, what she was wearing, what positions she and Bussen were in, what happened, and how it felt. Child testified that, in the first incident, Bussen put his penis in her mouth and her "butt." Tr. v. III at 41-42. Child demonstrated, using a stuffed monkey, what position she was in during the first incident. Child testified that the second incident occurred approximately one year after the first incident. Child stated that Bussen again put his penis "in her butt." *Id*. at 54. Child again demonstrated with the stuffed monkey the position she was in during the sexual assault. Child clarified that when she referred to "butt" she meant anus. *Id*. at 62. She stated that Bussen referred to his penis as "[m]edicine point." *Id*. at 75-76.

[6] Child testified that she did not tell anyone about Bussen's molestations of her until she told her mother and grandmother in 2018, soon after her visitations with Bussen had ceased. Child stated that she felt she could disclose the incidents at that time because she knew Bussen was no longer "able to get to [her]." *Id*. at 59. Child testified that she was "scared" to tell anyone about the molestations until visitation with Bussen stopped, at which point she "kind of

felt safer." *Id*. at 60. Child stated that she was interviewed at JACY House shortly after informing her mother of the abuse.

[7] The State called Child to testify twice at trial, and Bussen's attorney, Nathaniel Connor ("Connor"), cross-examined Child each time. Connor asked Child if she recently had watched a video recording of her interview with Amanda Wilson at JACY House, to which Child responded, "Yes." *Id*. at 69. Connor then asked Child if she remembered saying in the interview that the two instances of molestation occurred "a couple months apart," and Child stated that she remembered saying she did not know. *Id*. at 69. Connor asked Child many questions about what details she remembered from the time of the incidents. Connor also asked Child a question about a prior conversation Child had with Connor in January of that year regarding Bussen's actions toward Child. The prosecutor, Ashley Green ("Green"), also asked Child, "When we've talked before or you've talked to Mr. Connor, who did you say did [the sexual abuse]?," to which Child responded, "My dad." *Id*. at 158.

[8] Mother also testified at the jury trial. She stated that Bussen obtained visitation rights as to Child in 2014, when Child was three or four years old. Mother testified that Child changed from a happy, "spunky" child to being "very shy and withdrawn" when Child was between four and five years old and had begun visitations with Bussen. *Id*. at 125, 132. She testified that, in June of 2018, Child told her that "something happened … with her dad." *Id*. at 135, 137. Mother began to testify as to what Child told her when Connor objected on hearsay grounds. Green responded that the testimony would not be offered

for the truth of the matter asserted, but to show the effect the disclosure had on Mother's next steps. Connor then withdrew the objection. Mother stated that Child "told [Mother] that [Child's] daddy had exposed himself to her, had put his penis in her mouth, called it a medicine pointer or medicine point, and proceeded to stick it in her behind." *Id*. at 139. Mother described Child as scared and shaking during their conversation. Mother then testified that she filed a report with the police about Bussen's sexual abuse of Child, and the police began an investigation.

[9] Connor cross-examined Mother, and specifically asked her about details regarding the night when Child told Mother about Bussen's abuse. Connor also questioned Mother about "issues with [her] memory" due to seizures. *Id*. at 150.

[10] The State's final witness was Amanda Wilson ("Wilson"), the Executive Director of JACY House, which is a child advocacy center that conducts "forensic interview[s]" and "provide[s] advocacy services" for children. *Id*. at 162-63. Wilson described her professional background and her training and certification as a forensic interviewer. Wilson testified that she interviewed Child on June 18, 2018. Wilson then described the type of forensic interviews of children conducted at JACY house and the protocols the organization uses in those interviews to avoid leading children to specific answers. Wilson stated that Child appeared appropriate for her age during her interview. Without objection, the State entered into evidence a screenshot of the video recording of the interview Wilson conducted with Child. Wilson then discussed Child's

demeanor during the interview as typical for her age. When Green asked Wilson, "After you conducted the interview, based on your discussions, did you, yourself, have any concerns about abuse?," Connor objected on the grounds that the question was "not appropriate." *Id*. at 179-80. The objection was overruled, and Wilson answered the question in the affirmative.

[11] Wilson then provided additional testimony about interviewing children generally, including the effects of trauma and the age of the child on a child's memory, and the factors interviewers use to gauge credibility and motives. Wilson testified, without objection, that she uses those factors or protocols "every time [she is] interviewing a child." *Id*. at 196. Wilson also discussed delayed disclosures of child abuse, in general, including the reasons for delayed disclosure. Wilson ended her direct examination testimony by stating that she applied to Child all the factors about which she had previously testified, and Bussen did not object.

[12] Connor cross-examined Wilson and asked her to once more go over the factors and protocols she uses in interviews of children. Wilson reviewed the factors and process used in interviews and answered questions about Child's demeanor during her specific interview. On redirect examination, Wilson testified that she does not work for law enforcement and that her goal is not to obtain a conviction but to ensure child safety.

[13] At the close of Bussen's case, after he had testified on his own behalf, the attorneys made closing arguments to the jury. In her closing, Green noted that

Child had consistently stated to Mother, Child's grandmother, Wilson, Green, and Connor that Bussen was the person who committed the acts of molestation of Child. Green stated regarding Child's testimony,

> She's a child. She did her best. And I ask you to think about why would she lie about something like this. What does she have to gain from coming in here and sitting there and going through this[?] What does she have to gain from telling this over and over again, these details, they're horrible. She's embarrassed. She's had to tell strangers. She doesn't get to see her dad or that family anymore. She's had everything to lose. This has not made her life better. You think a ten-year-old enjoys saying these types of things in front of strangers over and over again[?] She has gained nothing.

Tr. v. IV[2] at 19.

[14] In Connor's closing argument he asserted there was evidence indicating that Mother did not have good parenting skills. He also questioned Mother's memory, given her seizure disorder. And Connor referenced Wilson's testimony, stating "After she talked to [Child], she had concern. I get it. I think any human being that would hear an accusation like that would have concern." *Id*. at 30-31. Connor raised a question about why Wilson's testimony at trial was longer than her interview of Child.

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[2] Transcript volume IV is incorrectly identified in the Odyssey case management system as Transcript volume II, 98 pages.

[15] Green gave her final argument to the jury after Connor's closing. Green pointed out that Connor had talked about parenting, and then Green asked, "How much did this man have to say when given the chance to talk about his relationship with his daughter [Child]? How much? Not much at all." *Id*. at 38. Green again stated, "What does [Child] have to gain from coming in here and telling you these things that she was molested by the Defendant? She gains nothing, but she was brave enough to come do it and she did it anyways with nothing to gain." *Id*. at 39. Green noted Connor's criticism of Wilson for not knowing the answers to some questions about statistics and then stated that Wilson does not work for the State or any party but is "the neutral person" who is "worried about those kids." *Id*. at 41. Green noted that Connor had discussed the length of Wilson's interview with Child and stated in reference to the video recording of that interview, "I just want to make clear the rules of evidence don't allow us to show you that video. There's no hide the ball there. [Child] was here to testify, right? That's what we can show you, she can tell you." *Id*.

[16] The trial court issued both preliminary and final instructions to the jury which included statements that the jurors were the exclusive judges of the credibility of the witnesses.[3] The jury found Bussen guilty of both counts of child molesting

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[3] *See, e.g.*, Preliminary Jury Instruction 8, Tr. v. III at 10, and Final Jury Instruction 10, Tr. v. IV at 46 ("You are the exclusive judges of the evidence, which may be either witness testimony or exhibits."); Preliminary Jury Instruction 13, Tr. v. III at 12 ("When the evidence is completed, the State and Defendant will make final statements. These final statements are not evidence. The parties are also permitted to characterize the

as Level 1 felonies, and the court sentenced Bussen accordingly. This appeal ensued.

# Discussion and Decision

## Admission of Evidence

*Standard of Review*

[17] Bussen asserts that the trial court erred in admitting testimony on several occasions. Where alleged error in the admission of evidence is properly preserved by a timely objection, we review the admission for abuse of discretion. *E.g.*, *Hoglund v. State*, 962 N.E.2d 1230, 1237 (Ind. 2012). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* However, where no objection is made to testimony, any claim related to its admission is waived for appellate review. *See, e.g.*, *Garber v. State*, 152 N.E.3d 642, 646 (Ind. Ct. App. 2020).

> In such cases, review is limited to determining if fundamental error occurred. The [fundamental error] doctrine applies only in "extraordinary circumstances," *Hardley v. State*, 905 N.E.2d 399, 402 (Ind. 2009), and is meant to cure the "most egregious and blatant trial errors that otherwise would have been procedurally barred, not to provide a second bite at the apple for defense counsel who ignorantly, carelessly, or strategically fail to preserve

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evidence, discuss the law and attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit.").

> an error." *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014). A fundamental error is such a gross error that it renders a fair trial "'impossible.'" *Hardley*, 905 N.E.2d at 402 (quoting *Barany v. State*, 658 N.E.2d 60, 64 (Ind. 1995)).

*Id*.

[18] "Generally, errors in the admission of evidence are to be disregarded unless they affect the substantial rights of a party." *Hoglund*, 962 N.E.2d at 1238 (citation omitted); *see also* Ind. Trial Rule 61 (regarding "Harmless Error").

> In viewing the effect of the evidentiary ruling on a defendant's substantial rights, we look to the probable impact on the fact finder. The improper admission is harmless error if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court there is no substantial likelihood the challenged evidence contributed to the conviction. Moreover, any error in the admission of evidence is not prejudicial, and is therefore harmless, if the same or similar evidence has been admitted without objection or contradiction.

*Hoglund*, 962 N.E.2d at 1238 (quotations and citations omitted); *see also, e.g.*, *Garber*, 152 N.E.3d at 646 (citation omitted) ("It is well-settled that even the improper admission of evidence is harmless error when the erroneously admitted evidence is merely cumulative of other evidence before the trier of fact.").

*Challenged Testimony*

[19] On appeal, Bussen challenges the following testimony: (1) Wilson's testimony that, following her interview with Child, she had concerns about abuse; (2)

Wilson's testimony regarding factors she uses to assess a child's credibility in general and that she applied such factors to Child, in particular; and (3) Mother's testimony regarding what Child told her about the molestation. Bussen objected at trial to the admission of (1), above; therefore, we review the admission of that testimony for an abuse of discretion. *See Hoglund*, 962 N.E.2d at 1237. However, Bussen either failed to object or withdrew his objection at trial as to (2) and (3), above; therefore, we review that testimony only for fundamental error. *See Garber*, 152 N.E.3d at 646.

[20] Bussen contends that both Mother's and Wilson's challenged testimony were inadmissible "vouching" or "bolstering" evidence that should have been excluded under Rule of Evidence 704(b), which prohibits, among other things, testimony "to opinions concerning … whether a witness has testified truthfully." Bussen also asserts that Mother's testimony about what Child told her was inadmissible hearsay. *See* Ind. Evidence Rule 802. In addition, he contends that all of the challenged testimony, cumulatively, creates an impermissible "drumbeat repetition" that is unduly prejudicial.

[21] Even assuming, *arguendo*, that the challenged testimony was erroneously admitted, Bussen's assertions fail because any such error was harmless. *See Cannon v. State*, 99 N.E.3d 274, 278 (Ind. Ct. App. 2018) (noting we need not address the merits of an evidentiary challenge where we conclude that any error was harmless), *trans. denied*. The errors were harmless because Bussen's convictions were supported by substantial independent evidence of his guilt—i.e., Child's own testimony. "The testimony of a sole child witness is sufficient

to sustain a conviction for molestation." *Hoglund v. State*, 962 N.E.2d 1230, 1238-39 (Ind. 2012) (citation omitted). Here, Child testified with specificity and detail about Bussen's molestation of her, and her testimony was subject to Bussen's cross-examination.[4] In contrast, the challenged testimony of Wilson and Mother was limited to brief, general statements made over the course of a three-day trial. Under these circumstances, we are not persuaded that there was a substantial likelihood that the challenged testimony contributed to the jury's verdicts. *See, e.g., Housand v. State*, 162 N.E.3d 508, 514 (Ind. Ct. App. 2020) (holding, even if the challenged testimony was improper vouching, it was harmless error where the testimony consisted of only an isolated statement made over the course of a two-day trial, the victim testified, and the defendant had ample opportunity to question the victim's credibility), *trans. denied*.

[22] Furthermore, Mother's alleged hearsay testimony about what Child told her was also harmless error because it was cumulative of Child's own testimony. *See, e.g.*, *Craig v. State*, 630 N.E.2d 207, 211 (Ind. 1994) (holding the erroneous admission of hearsay testimony about the child victim's out-of-court statement was harmless where the victim testified in detail as to the attack and about the fact of his prior statements, and there was "little to undermine [victim's] credibility"); *Hoglund*, 962 N.E.2d at 1240 (holding an error in admission of

[4] Bussen also had ample opportunity to, and did, cross-examine Mother and Wilson.

vouching testimony was harmless where it was cumulative of other testimony properly admitted).

[23] Nor did Mother's and Wilson's testimony constitute prejudicial error cumulatively, as Bussen asserts. The "drumbeat repetition" of a victim's out-of-court statements before the victim even testifies may be inadmissible as unduly prejudicial. *See Modesitt v. State*, 578 N.E.2d 649, 651-52 (Ind. 1991). However, the admission of alleged hearsay or bolstering testimony is harmless error rather than impermissible "drumbeat repetition" where the victim is the first to testify and is subject to cross examination, the victim gives specific, descriptive testimony about the molestation, and no other witnesses delve into the details of the victim's assertions—so the jury only hears the victim's story one time. *Kress v. State*, 133 N.E.3d 742, 747-48 (Ind. Ct. App. 2019), *trans. denied*. Here, Child was the first to testify about Bussen's abuse, Child did so in detail, and Child was cross-examined twice. Moreover, neither Mother nor Wilson testified about the specific details of the abuse, as Child did; thus, there was no "drumbeat repetition" of Child's allegations of abuse.

[24] Thus, we cannot say any alleged error in the admission of Mother's and Wilson's testimony affected Bussen's substantial rights. *See* T.R. 61. We find no error, fundamental or otherwise, in the admission of the challenged testimony.

# Alleged Prosecutorial Misconduct

[25] Bussen asserts that some of the prosecutor's statements in her closing argument amounted to prosecutorial misconduct. In reviewing a claim of prosecutorial misconduct that was properly raised in the trial court, we first determine whether the prosecutor engaged in misconduct and, if he or she did, we next determine "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 otherwise." *Ryan v. State*, 9 N.E.3d 663, 667 (Ind. 2014) (quotation and citation omitted). Whether a prosecutor's argument constitutes misconduct "is measured by reference to case law and the Rules of Professional Conduct." *Id*. The gravity of the peril "is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct." *Id*.

[26] However, Bussen failed to object to any of the prosecutor's closing statements at trial. Therefore, Bussen must establish not only the grounds for prosecutorial misconduct, but also that the misconduct constituted fundamental error. *See id.* That is, Bussen must show that, "under the circumstances, the trial judge erred in not *sua sponte* raising the issue [of prosecutorial misconduct] because [the] alleged errors (a) constitute clearly blatant violations of basic and elementary principles of due process and (b) present an undeniable and substantial potential for harm." *Id*. at 668 (quotation and citation omitted).

> In evaluating the issue of fundamental error, our task … is to look at the alleged misconduct in the context of all that happened

> and all relevant information given to the jury—including evidence admitted at trial, closing argument, and jury instructions—to determine whether the misconduct had such an undeniable and substantial effect on the jury's decision that a fair trial was impossible.

*Id*. Thus, fundamental error in the context of alleged prosecutorial misconduct is a "narrow exception intended to place a heavy burden on the defendant," *Castillo v. State*, 974 N.E.2d 458, 468 (Ind. 2012), that is "highly unlikely" to be met, *Baer v. State*, 942 N.E.2d 80, 99 (Ind. 2011).

[27] Indiana Rule of Professional Conduct 3.4(e) states:

> A lawyer shall not: … (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused….

Thus, a lawyer may not imply that he has personal knowledge that is independent of the evidence. *See, e.g.*, *Hobson v. State*, 675 N.E.2d 1090, 1096 (Ind. 1996). However, a lawyer may make fair comment upon the evidence, including "comment on the credibility of the witnesses[,] as long as the assertions are based on reasons which arise from the evidence." *Ryan*, 9 N.E.3d at 671 (quotation and citation omitted); *see also Saylor v. State*, 55 N.E.3d 354, 362 (Ind. Ct. App. 2016) ("[A] prosecutor may properly argue any logical or reasonable conclusions based on his own analysis of the evidence."), *trans.*

*denied*. A lawyer is also permitted to discuss "whether a witness has any interest, bias, or prejudicial reason to lie." *Brummett v. State*, 10 N.E.3d 78, 87 (Ind. Ct. App. 2014) (noting prosecutor's statement that the victim "had nothing to gain" from testifying was permissible commentary on the evidence).

[28] Bussen challenges the following statements of the prosecutor in her closing argument as "vouching" for the credibility of witnesses: that Wilson was a "neutral person" who was "worried about those kids," Tr. v. IV at 41; that Child had nothing to gain by her testimony; that Child told Mother, Wilson, Green, and Connor that Bussen was the person who abused her; and that Child "did her best" in her testimony, Tr. v. IV at 19, and was "brave" to testify, *id*. at 39. However, the comment that Wilson was a neutral person whose concern was for children was a permissible comment on the evidence that Wilson did not work for law enforcement and her goal was not to obtain a conviction but to ensure child safety. Similarly, the prosecutor's statements that Child had no reason to lie and that Child told others about the abuse were not misconduct but fair comments on the evidence that had been presented.[5] *See Brummett*, 10 N.E.3d at 87. And the prosecutor's comments that Child "did her best" and was "brave" to testify were logical and reasonable conclusions based on the

[5] During Child's testimony, both Bussen's lawyer and the prosecutor referred to prior out-of-court statements Child had made to each of them. *See e.g.*, Tr. v. III at 158 (Green asking Child on redirect examination, "When we've talked before or you've talked to Mr. Connor [Bussen's lawyer], who did you say did [the sexual abuse]?" to which Child replied, "My dad.").

prosecutor's own analysis of Child's testimony, such as Child's need to take a break before testifying to the details of the abuse. *See Saylor*, 55 N.E.3d at 362.

[29] Furthermore, we note that, even if the prosecutor's comments could be considered improper vouching, any such misconduct was cured by the preliminary and final jury instructions informing the jury that they were the exclusive judges of witness credibility. *See Craig v. State*, 267 Ind. 359, 367, 370 N.E.2d 880, 884 (1977) (holding the defendant was not subjected to grave peril by the prosecutor's remarks about witness credibility where the jury was "given several instructions to the effect that they were the judges of credibility of witnesses").

[30] Finally, Bussen maintains that the prosecutor engaged in misconduct when she stated in her final closing remarks that the rules of evidence did not allow the jury to view the video of Wilson's interview of Child and that Bussen did not say "much at all" about his relationship with Child. Tr. v. IV at 38. Bussen claims the former remark was an impermissible reference to inadmissible evidence, i.e., the video of the interview of Child, and the latter remark impermissibly put the burden of proof on him. However, "[p]rosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." *Ryan*, 9 N.E.3d at 669. And each of the two comments Bussen challenges were made in response to allegations and inferences raised by Bussen in his closing argument. Regarding the video of the forensic interview of Child, Bussen's counsel argued in his closing that Wilson's trial court testimony was longer than her interview

of Child. That opened the door for the prosecutor to explain to the jury why the video of that interview was not in evidence. Regarding the prosecutor's comment questioning the strength of the parental bond between Bussen and Child, that remark was made in response to Bussen's inferences in his closing that Mother was not a good parent. Therefore, neither comment amounted to prosecutorial misconduct. *See id*.

[31] Bussen has failed to show that the prosecutor's challenged comments amounted to prosecutorial misconduct, much less that the comments resulted in fundamental error.

# Conclusion

[32] Bussen has failed to show that any error in the admission of the alleged hearsay and vouching or bolstering testimony affected his substantial rights; rather, even assuming such error, the error was harmless. Bussen has also failed to show the prosecutor's challenged comments amounted to prosecutorial misconduct.

[33] Affirmed.

Mathias, J., and Altice, J., concur.