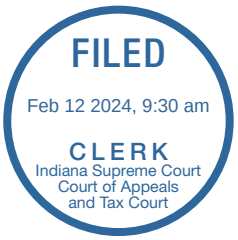
MEMORANDUM DECISION



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IN THE COURT OF APPEALS OF INDIANA

William Stinnett,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 12, 2024

Court of Appeals Case No. 23A-CR-1515

Appeal from the Washington Circuit Court

The Honorable Larry W. Medlock, Judge

Trial Court Cause No. 88C01-1909-F4-743

Memorandum Decision by Judge Riley
Judges Crone and Mathias concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, William Stinnett (Stinnett), appeals his conviction for child molesting, a Level 4 felony, Ind. Code § 35-42-4-3(b).

[2] We affirm.

ISSUES

[3] Stinnett presents two issues on appeal, which we restate as follows:

(1) Whether the trial court properly excluded evidence and testimony of a previous uncharged incident in another county; and

(2) Whether the Prosecutor committed misconduct during closing argument.

FACTS AND PROCEDURAL HISTORY

[4] Stinnett is the step-grandfather of C.C., born in 2005. After C.C.'s parents divorced when she was in "about third/fourth grade," C.C. lived with her mother in New Pekin, Indiana, before they moved to Campbellsburg in Washington County, Indiana. (Transcript Vol. II, p. 190). After moving to Campbellsburg, Stinnett, whose house was a ten-minute drive away, began meeting C.C., then ten or eleven years old, as she got off the school bus. Stinnett always departed before C.C.'s stepmother came home from work.

[5] When C.C. was in the fourth and fifth grade, Stinnett began touching her inappropriately. Instead of giving her a hug, he touched her breasts before

hugging her. Stinnett also placed his hands under C.C.'s pants and touched her vagina. On another occasion, he tried to convince C.C. to touch his penis. Stinnett continued to touch C.C. inappropriately until she was in the eighth grade, when she disclosed Stinnett's behavior to two of her friends. C.C.'s mother overheard the conversation and, after C.C. explained what had occurred, her parents contacted the police. During a forensic interview, C.C. disclosed that Stinnett had touched her breasts on several occasions in Washington County. Law enforcement officers visited Stinnett at his residence. Stinnett informed the officers that he thought he had a good relationship with C.C. as they used to joke, play, and wrestle. He admitted recalling several occasions when he had "grab[bed] [C.C.] in the wrong place" but later regretted the touching. (Tr. Vol. III, p. 52).

[6] On September 11, 2019, the State filed an Information, charging Stinnett with Level 4 child molesting, which was subsequently amended to correct a scrivener's error. On July 30, 2020, Stinnett filed a motion to depose C.C. During the deposition, he questioned her about an incident that had occurred at a pool party for his sixtieth birthday at his residence in Orleans, Orange County, and that he had previously mentioned during a statement to law enforcement. Stinnett had told police that he had drank so many alcoholic beverages during the birthday celebration that he was "too intoxicated to be out in public." (Tr. Vol. III, p. 56). By the time he grabbed C.C. and threw her in the pool, he "was pretty well drunk." (Tr. Vol. III, p. 54). Stinnett indicated that C.C. tried to resist him, but he "took her phone away from her[,]" and

"ended up wrestling around with her and picking her up" to "throw her in the pool." (Tr. Vol. III, p. 54). Stinnett admitted that he "may have" grabbed C.C.'s breasts during the incident and that she was "a handful." (Tr. Vol. III, p. 55). C.C. affirmed that, during this occasion, Stinnett "threw her into the pool and may have tried to touch her" breasts. (Tr. Vol. III, pp. 10-11).

[7] On May 15-16, 2023, the trial court conducted a jury trial. When Stinnett's statement to law enforcement was introduced into evidence, Stinnett did not object to the particular statements he had made concerning the uncharged Orange County pool party incident. Stinnett also introduced testimony from a witness who was present at the birthday party in Orange County and who testified that although Stinnett touched C.C. "under her leg" when he threw her in the pool, the witness did not see Stinnett touch C.C.'s breasts. On cross-examination by the State, the witness noted that Stinnett's wife had "told [her] she needed [her] to come here [at trial] and testify about" the pool party. (Tr. Vol. III, p. 37).

[8] Stinnett also elicited testimony from an investigating detective who affirmed that Stinnett was not charged with child molesting in Orange County. Stinnett also attempted to call a second witness to testify about the Orange County incident, but the State objected, and the trial court sustained the State's objection. During closing arguments, the State, without Stinnett objecting, told the jury

> There were a couple of telling moments from the defense like the, the pool party in Orleans, I call that a red herring, just over and

> over. Let's not talk about all the times that [C.C.] actually testified to about touching breasts and putting his hands down her pants, let's keep talking about a pool party in Orleans where there was no testimony here from [C.C.] that anything happened there. It's just a red herring. It was some type of attempt to discredit the officers. There was also a ploy where the [d]efendant's wife called one of his friends and seemed to have said come on in today, I need you to testify about this pool party. Say you didn't see nothing and she didn't know anything of what she was talking about and she was called in here by the defendant's wife. Those tactics were attempts to distract you from what was really happening between [Stinnett] and [C.C.].

(Tr. Vol. III, pp. 92-93). At the conclusion of the evidence, the jury found Stinnett guilty as charged. On June 7, 2023, the trial court conducted a sentencing hearing, at which the trial court imposed a sentence of seven years, with three years suspended to probation.

[9] Stinnett now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Admissibility of Evidence*

[10] Stinnett contends that the trial court abused its discretion by excluding the testimony of the second witness concerning the uncharged incident at the pool party in Orange County. As decisions to admit or exclude evidence fall within the trial court's sound discretion, we afford those decisions deference and review them for an abuse of discretion. *Wright v. State*, 108 N.E.3d 307, 313 (Ind. 2018). We will reverse a trial court's decision to admit evidence only if the decision was clearly against the logic and effect of the facts and

circumstances and the error affects the defendant's substantial rights. *Id.* (quotation marks and alteration omitted).

[11] At trial, Stinnett elicited evidence that when he questioned C.C. during her deposition, she stated that Stinnett "threw her into the pool and may have tried to touch her" breasts at the pool party at his residence in Orange County. (Tr. Vol. III, p. 10). After the first witness testified that although she saw Stinnett touch C.C. "under her leg," she did not see him touch C.C.'s breasts and the investigating officer affirmed that Stinnett was not charged in Orange County with child molesting, Stinnett proposed to call a second witness to testify about the pool party. (Tr. Vol. III, p. 35). The State objected as to relevance, arguing "[w]e're talking about something that happened in Orange County pushing in the pool and the jury's heard testimony about it prior. There's no allegation involved in Orange County in this trial." (Tr. Vol. III, p. 68). After considering Stinnett's offer of proof, the trial court noted that, "I let one witness in to talk about it. I just think it just becomes overly prejudicial at some point," and excluded the testimony of the second witness. (Tr. Vol. III, p. 72).

[12] Pursuant to Indiana Rule of Evidence 403, "[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." We note that all relevant evidence necessarily is "prejudicial" in a criminal prosecution. *Wages v. State*, 863 N.E.2d 408, 412 (Ind. Ct. App. 2007), *trans. denied*. The danger of unfair prejudicial impact arises from the potential for a jury to

substantially overestimate the value of the evidence, or its potential to arouse or inflame the passions or sympathies of the jury. *Id*. In *Sargent v. State*, 875 N.E.2d 762, 766-67 (Ind. Ct. App. 2007), we concluded that the trial court did not abuse its discretion when it excluded the testimony of two witnesses and a DCS report that would have further impeached the victim's credibility. Because Sargent had already been permitted to introduce evidence that impacted the victim's credibility, we concluded that the exclusion of additional evidence was permitted under Evidence Rule 403. *Id*. at 767.

[13] Likewise, here, although he had not been charged with the incident in Orange County, the trial court allowed Stinnett to present testimonial evidence which supported the allegation that no misconduct had occurred at the pool party and affirmed that he had not been charged with it. After this presentation, the trial court acted within the parameters of its discretion to exclude further testimony about an uncharged incident, as the jury could have substantially overestimated the value of the evidence and treated it as charged misconduct.[1] See *Wages*, 863 N.E.2d at 412.

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[1] Stinnett makes an additional argument that the testimony of the second witness would have been admissible under Indiana Evidence Rule 404(b), as it would have established Stinnett's and C.C.'s relationship and "would have proven that C.C. may have manufactured this story out of anger." (Appellant's Br. p. 15). Indiana Rule of Evidence 404(b) provides in part: "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent ... or absence of mistake or accident[.]" The rule is designed to prevent the jury from making the "forbidden inference" that prior wrongful conduct suggests present guilt. *Barker v. State*, 695 N.E.2d 925, 930 (Ind. 1998). In order for evidence of other crimes, wrongs, or acts to be admissible, the court must (1) determine that the evidence is relevant to a matter at issue other than the defendant's propensity to commit the charged act, and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. *Hicks v. State*, 690

[14] In a related argument, Stinnett maintains that by applying the Indiana Rules of Evidence which supported the exclusion of the testimony of the second witness to the pool party incident, his constitutional right to present a defense was violated. He contends that "[e]ven if the trial court was correct—that the evidence was 'overly prejudicial'—the application of this rule of evidence "infringed on the weighty interest" of Stinnett and his attempt to demonstrate that C.C. was manufacturing accusations against him out of frustration and anger over his relentless teasing and playful wrestling." (Appellant's Br. p. 23).

[15] It is true that our supreme court has held that the evidence rule preventing evidence of specific acts of untruthfulness must yield to a defendant's Sixth Amendment right of confrontation and right to present a full defense. *Jacobs v. State,* 22 N.E.3d 1286, 1289-90 (Ind. 2015). However, the court limited this exception to very narrow circumstances—specifically prior false accusations of rape—that do not apply here. *Id*. Moreover, this court has also previously noted that it is only where a trial court excludes defense evidence under rules that serve no legitimate purpose or are disproportionate to the ends that they are asserted to promote does a constitutional question arise with respect to a claim that a defendant has been denied his defense. *Ruiz v. State*, 926 N.E.2d 532, 534 (Ind. Ct. App. 2010), *trans. denied*. Here, the trial court permitted Stinnett to

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N.E.2d 215, 221 (Ind.1997). Since we already determined that the probative value of the proffered testimony of the second witness was substantially outweighed by a danger of unfair prejudice, we do not need to analyze the admissibility of the evidence in light of Evidence Rule 404(b).

present his defense and to introduce evidence to support his allegation that C.C. was untruthful through the testimony of the first witness. The proposed testimony of the second witness, which was excluded, covered the same information as the first witness. Stinnett did not present any evidence that the excluded second witness would provide new information that the first witness could not provide. Accordingly, the trial court's ruling to exclude the testimony of the second witness did not violate Stinnett's right to present a defense.

[16] Even if the trial court erred in excluding the testimony of the second witness, this exclusion was harmless. "Errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party." *Barnhart v. State*, 15 N.E.3d 138, 143 (Ind. Ct. App. 2014). In other words, we will find an error in the exclusion of evidence harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the defendant's substantial rights. *Id*. Here, the trial court did not completely preclude Stinnett from offering testimony concerning the pool party incident. Stinnett introduced testimonial evidence in which a witness advised the jury that she did not see Stinnett touch C.C.'s breasts when he threw her in the pool. However, C.C. also unequivocally testified on direct and cross-examination that Stinnett molested her on other occasions in Washington County. In his statement to the police, which was admitted at trial, Stinnett corroborated C.C.'s claims by admitting that he had inappropriately touched her and regretted it. Therefore, any error in the exclusion of the second witness' testimony was harmless.

II. *Prosecutorial Misconduct*

[17] Next, Stinnett contends that the Prosecutor committed misconduct when the Prosecutor commented in closing argument on the elicited testimony from the witness testifying in the pool party incident that Stinnet's wife had asked the witness to testify in a particular manner and that the Prosecutor had accused Stinnet's counsel "of engaging in a ploy to ask a witness to testify in a particular manner." (Appellant's Br. p. 27).

[18] The Indiana Supreme Court has set forth the legal standards under which we review a claim of prosecutorial misconduct. In reviewing a claim of prosecutorial misconduct properly raised in the trial court, we determine (1) whether misconduct occurred, 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" otherwise. *Ryan v. State*, 9 N.E.3d 663, 667 (Ind. 2014). A prosecutor has the duty to present a persuasive final argument and thus placing a defendant in grave peril, by itself, is not misconduct. *Id*. "Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct. The gravity of 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*. To preserve a claim of prosecutorial misconduct, the defendant must—at the time the alleged misconduct occurs—request an admonishment to the jury, and if further relief is desired, move for a mistrial. *Id*.

[19] Here, Stinnett did not object to the Prosecutor's statement, did not request an admonishment to the jury, or move for a mistrial. In such instances, appellate review of a claim of prosecutorial misconduct is waived for failure to preserve the claim of error. *See id.* When a defendant has waived review of a claim of prosecutorial misconduct for appellate review, he "must establish not only the grounds for prosecutorial misconduct but must also establish that the prosecutorial misconduct constituted fundamental error." *Id*. at 667-68.

[20] Fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to "make a fair trial impossible." *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002). In other words, to establish fundamental error, the defendant must show that, under the circumstances, the trial court erred in not *sua sponte* raising the issue because 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*. In evaluating the issue of fundamental error, our task in this case 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. *See Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002).

[21] We stress that fundamental error is meant to permit appellate courts a means to correct 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 an error. *See Baer v. State*, 942 N.E.2d 80, 99 (Ind. 2011) (noting it is "highly unlikely" to prevail on a claim of fundamental error relating to prosecutorial misconduct).

[22] The evidence reflects that the contested prosecutorial statement that the witness was asked "to testify in a particular manner," was supported by the testimony of the witness that Stinnett's wife had asked her "to come up here" and testify about the pool party incident. (Appellant's Br. p. 27; Tr. Vol. III, p. 36). Moreover, the record indicates that, by making this statement, the Prosecutor was merely responding to Stinnett's counsel's opening statement in which he asserted that "everything the Prosecutor told you is a lie." (Tr. Vol. II, p. 162). Due to Stinnett accusing the State's case to be based on lies, the Prosecutor, in turn, could question the motivation of Stinnett's witness. *See Coleman v State*, 946 N.E.2d, 1160, 1167 (Ind. 2011) (prosecution is entitled to comment on its view of the evidence and is not required to accept defendant's characterization of the facts). Therefore, as the Prosecutor merely commented on the evidence in her closing argument, the statement does not rise to the level of prosecutorial misconduct, let alone to fundamental error.

CONCLUSION

[23] Based on the foregoing, we conclude that the trial court properly excluded evidence and testimony of a previous uncharged incident in another county, and that the Prosecutor did not commit misconduct during closing argument.

[24] Affirmed.

[25] Crone, J. and Mathias, J. concur