In MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Christopher J. Petersen
Goshen, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Jodi Kathryn Stein
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Jonah Denning,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 21, 2021

Court of Appeals Case No. 21A-CR-672

Appeal from the Elkhart Superior Court

The Honorable Kristine A. Osterday, Judge

Trial Court Cause No. 20D01-1906-F3-25

Molter, Judge.

[1] Jonah Denning appeals his conviction for Level 3 felony rape and his aggregate sentence of twelve years with two years suspended. He contends (1) the State

committed prosecutorial misconduct through statements during closing argument, and (2) the trial court failed to consider certain mitigating factors when sentencing him. Because Denning acknowledges he waived his claim of prosecutorial misconduct, he must show fundamental error, which we do not find here. Also, Denning failed to clearly present his youthful age, family background, employment history, and low probability of recidivism as mitigating circumstances to the trial court, so he waived those considerations for his appeal. Regardless, he has failed to persuade us that the trial court overlooked those mitigating circumstances. We therefore affirm.

Facts and Procedural History

[2] Sixteen-year-old C.C. and 17-year-old Denning were students at different high schools and met over Facebook around February 2019. Appellant's Conf. App. Vol. 2 at 7; Tr. Vol. 4 at 123, 178–79. They began communicating daily through texting and video calls, and by early March 2019 they were dating. Appellant's Conf. App. Vol. 2 at 12; Tr. Vol. 4 at 153–54, 176, 195. Their communications involved discussions about the circumstances in which C.C. would be comfortable having sex with Denning for the first time, which included that it was important to C.C. that they would be in a private room and that Denning would wear a condom. Tr. Vol. 4 at 186–87, 201–02.

[3] On March 3, Denning and C.C. visited his church. Tr. Vol. 4 at 184, 190. While there, Denning took C.C. to a vacant room, and they began engaging in consensual intimate conduct which progressed to Denning touching C.C.'s vagina. *Id.* at 190–92. C.C. became uncomfortable that they were in a room in

the church and that someone might walk in, so she told Denning that she wanted to stop and leave the room. *Id.* at 192–93. After initially attempting to dissuade C.C. of her concerns, Denning relented, and they left the room. *Id.* at 192–94.

[4] C.C. and Denning continued to communicate, and the two teenagers went to a movie with C.C.'s family a couple of weeks later. *Id.* at 196–97. During the movie, Denning repeatedly tried to touch C.C.'s vagina, but C.C. pushed his hand away from her each time. *Id.* at 197–98. The next day, on March 17, 2019, Denning and C.C. visited his church again. *Id.* at 203–04. Like before, Denning took C.C. to a vacant room and they began kissing. *Id.* at 205–07. However, this time, Denning tightened his hold on C.C. and inserted his fingers into her vagina. *Id.* at 207. C.C. asked Denning to stop and told him that he was hurting her. *Id.* at 208. But Denning did not stop. *Id.* at 208–09. Instead, he pushed C.C. against a window and began performing oral sex. *Id.* C.C. told Denning "no" and that she "wanted to stop," but he responded that "we're okay." *Id.* at 209.

[5] Denning next laid C.C. on the ground and started unbuckling his belt. *Id.* at 211–12. Again, C.C. repeatedly said "no" and tried to back away from him, but Denning pulled her to him and inserted his penis into her vagina. *Id.* at 212–13. He then flipped their positions and instructed C.C. to perform oral sex on him, pushing her head down while he inserted his penis into her mouth. *Id.* at 213–24. Throughout the incident, C.C. told Denning "no," "stop," and that he was hurting her. *Id.* She also scratched him and tried to injure his penis

with her braces. *Id.* at 220, 223–24. Denning then changed their positions again, and repeatedly inserted his penis into her vagina despite C.C. saying "no" and "stop." *Id.* at 223–224.

[6] After the incident, C.C. curled up into a ball against a wall and cried. *Id.* at 225. She said she felt sick and needed some air, so Denning and C.C. walked outside together, and while they were walking Denning told C.C. "he was sorry and that he knows he made [her] do it and that it was the worst mistake that he has made." *Id.* at 225–226. C.C. then texted her mother to come and get her. *Id.* at 226.

[7] C.C. and Denning communicated by text message afterward. Denning again apologized to C.C. and admitted that he forced her into having sexual intercourse. *Id.* at 233–35. C.C. responded that she should not have "to say no to him a million times" for him to listen to her. *Id.* at 235.

[8] C.C. visited Elkhart General Hospital with her mother that same day to report the sexual assault. *Id.* at 241–42, 244, 246. While there, she completed a sexual assault kit. Tr. Vol. 3 at 154. The hospital noted scratches on C.C.'s shoulders, abrasions on her spine, and trauma outside her vagina. *Id.* at 148, 151. C.C. also reported the sexual assault to the police that day, and Denning was charged a few months later with two counts of Level 3 felony rape, with one count for alleged forced vaginal sex and one count for forced oral sex. *Id.* at 111–12; Appellant's App. Vol. 2 at 2; Tr. Vol. 6 at 136.

[9] In March 2021, Denning was tried by a jury. Appellant's App. Vol. 2 at 4–6. During closing arguments, the State told the jury: "[t]he next question is why you should believe [C.C.'s] testimony." Tr. Vol. 6 at 8. Then the State referred to and described C.C.'s choice to disclose the sexual assault and testify at trial. at 8–9. Denning did not object to the State's statements, request an admonishment, or request a mistrial. *See id.* at 3–13.

[10] The jury found Denning guilty of one count of rape as a Level 3 felony related to forced vaginal sex, and they acquitted him of the count related to forced oral sex. *Id.* at 77–78, 137–138. The trial court sentenced him to twelve years with two years suspended. Appellant's App. Vol. 2 at 39–40. At the sentencing hearing, the trial court identified several aggravating and mitigating factors. As a mitigator, it noted Denning's lack of any prior criminal history. *Id.* And, as aggravators, the trial court found that the harm, injury, loss, or damage to C.C. was significantly greater than the elements; C.C. was vulnerable and Denning was aware of her vulnerability; and Denning committed the criminal act of using marijuana while charges were pending. *Id.* Denning now appeals.

Discussion and Decision

[11] Denning contends that his conviction must be vacated because the State committed prosecutorial misconduct during closing arguments by improperly vouching for C.C.'s credibility, and that his sentence is improper because the trial court failed to consider his youthful age, family background, employment

history, and low probability of recidivism as mitigating factors. Both arguments fail.

I. Prosecutorial Misconduct

[12] Denning first argues the State committed prosecutorial misconduct, causing fundamental error, with improper statements during closing arguments.

[13] In reviewing a claim for prosecutorial misconduct, we determine (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all the circumstances, placed the defendant in a position of grave peril to which he would not have been subjected. *Nichols v. State*, 974 N.E.2d 531, 535 (Ind. Ct. App. 2012). We determine whether a prosecutor's argument constitutes misconduct by referring to case law and the Rules of Professional Conduct. *Id.* '"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.* (quoting *Cooper*, 854 N.E.2d at 835).

[14] Generally, to properly preserve for appeal a claim that the State's closing argument amounted to prosecutorial misconduct, the defendant must not only raise a contemporaneous objection, but must also request an admonishment; if the admonishment is not given or is insufficient to cure the error, then the defendant must request a mistrial. *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). Failure to request an admonishment or to move for mistrial results in waiver. *Id.*

[15] Denning concedes that he did not preserve his claims of prosecutorial misconduct for appeal because he neither objected to the State's comments nor requested an admonishment or mistrial. Appellant's Br. at 6. Therefore, he must show fundamental error before we can reverse. *See Brown v. State*, 799 N.E.2d 1064, 1066 (Ind. 2003) ("Because Brown failed to request an admonishment or move for mistrial when the trial court overruled his objection, his claim of prosecutorial misconduct is procedurally foreclosed and reversal on appeal requires a showing of fundamental error.").

[16] Fundamental error is an extremely narrow exception to the contemporaneous objection rule that allows a defendant to avoid waiver of an issue. *Id.* "For a claim of prosecutorial misconduct to rise to the level of fundamental error, it must 'make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process and present an undeniable and substantial potential for harm.'" *Id.* (quoting *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2002)).

[17] During its closing argument, the State argued to the jury:

> The next question is why you should believe her testimony. Why. [J.C.], [C.C.'s] mom, gave her a choice while they sat in bed together at their house. A choice. [C.C.] could hide this forever, never say another word, or she could tell of the trauma that happened to her. She chose to disclose this. She chose to go to the hospital . . . . She got poked and prodded for over four hours at Elkhart General Hospital. Four hours as a 16 year old. She chose to tell doctors and nurses, strangers to her, what happened. She then chose to speak with Detective Miller and other police, going down to the police station. She chose to pull

> her shirt up to take photos, twice, to show what the defendant did. Twice. That's not an easy thing for anyone to do, nonetheless, a 16 year old girl . . . . She had to speak in a deposition about what happened. And most importantly, less [sic] we forget, she came into this courtroom and told 14 strangers by sitting in that chair about what the defendant did to her, what this defendant did to her. She took an oath, she sat in that chair, she told her story that's being broadcast on the internet, live streamed.

[18] Tr. Vol. 6 at 8–9. Denning argues this constituted prosecutorial misconduct in three respects.

[19] First, Denning argues the reference to C.C. participating in a medical examination, a criminal investigation, and a deposition violated Rule 3.4(e) of the Indiana Rules of Professional Conduct, which provides that a lawyer "in trial" may not "state a personal opinion" regarding "the credibility of a witness." Ind. Professional Conduct Rule 3.4(e). That argument fails because the prosecutor referred to the evidence rather than any personal opinion, and Denning does not argue that any of the prosecutor's statements are unsupported by the evidence. He also does not cite any authority concluding that references like this violate Rule 3.4(e). To the contrary, our Supreme Court has held that "a prosecutor may comment on the credibility of the witnesses as long as the assertions are based on reasons supported by the evidence." *Ryan v. State*, 9 N.E.3d 663, 670–71 (Ind. 2014) (cleaned up).

[20] Second, Denning argues that the prosecutor's reference to C.C.'s willingness to provide her testimony under the scrutiny of a public, live-streamed trial was

improper because Denning believes this suggested to the jury that they should hold it against him that he utilized his right to a jury trial. But the prosecutor did not comment on Denning's invocation of any rights at all, and Denning does not cite any authority suggesting the prosecutor's comments were improper. Just the opposite, the prosecutor was stating a key premise of our evidentiary rules, which is that testimony is more reliable when conveyed in front of the accused and the public subject to cross-examination. *See, e.g.*, *State v. Walton*, 715 N.E.2d 824, 827 (Ind. 1999) ("The right to cross-examine, as well as other forms of confrontation, ensure that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo–American criminal proceedings." (cleaned up)).

[21] Third, Denning argues the prosecutor's comments improperly invoked sympathy for the victim. To support this argument, he cites *Thornton v. State*, 25 N.E.3d 800 (Ind. Ct. App. 2015). In that case, our court observed in dicta that it was improper for the prosecutor to urge the jury to consider the fact that rape victims are "re-victimize[d]" through trial because they are made to feel as if they are the ones on trial, and we admonished the prosecutor to avoid such statements on retrial. *Id.* at 806. We said the argument was improper because a "prosecutor may not request that a jury convict a defendant for any reason other than his guilt," because it "is improper for a prosecutor to invoke sympathy for a victim as a basis for conviction," and because "a prosecutor may not urge a jury to convict a defendant to encourage other victims to come forward." *Id.* at 806.

[22] The key distinction is that the argument in *Thornton* was untethered from any issue in the case. The prosecutor in that case did not connect his argument to the witness's credibility and instead simply urged the jury to consider the victim's interests and to render a verdict that would encourage other victims to come forward. In this case, the prosecutor did not make any such suggestion and instead clearly tied the argument to a key issue in the case, which was C.C.'s credibility. The argument was essentially that a victim, especially a young victim, would be less likely to be untruthful when speaking up may entail embarrassment, and the victim's statements would be subject to so much scrutiny. The jury is free to agree or disagree with that argument, but it is not an argument untethered from issues relevant to the defendant's guilt, and it is not an improper argument.

[23] Even if the State's closing argument did constitute prosecutorial misconduct, it would not fit the extremely narrow exception for fundamental error. If it had been a violation of the Rules of Professional Conduct, it would not constitute a "clearly blatant violation," as evidenced by the fact that Denning does not cite authority holding that comments like those at issue here are improper. *Brown*, 99 N.E.2d at 1066. The comments also did not make a fair trial impossible as evidenced by the fact that the jury convicted Denning on only one rape count and acquitted him on the other. *See Stephens v. State*, 10 N.E.3d 599, 606–07 (Ind. Ct. App. 2014) (finding no fundamental error where the jury acquitted the defendant on one offense). There was also plenty of evidence to support the conviction, including evidence from C.C.'s medical examination and Denning's

acknowledgment that he wrongly forced C.C. to engage in sexual activity and that it was the biggest mistake he ever made.

[24] There was no prosecutorial misconduct at all, let alone fundamental error, and there is therefore no basis to vacate Denning's conviction.

II. Mitigating Factors

[25] Denning next argues the trial court abused its discretion when sentencing him because it failed to consider his youthful age, family background, employment history, and low probability of recidivism as mitigating factors.

[26] Trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id.* An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.*

[27] A trial court may abuse its discretion by entering a sentencing statement which omits mitigating factors that are clearly supported by the record and advanced for consideration. *Id.* at 490–91. Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion in failing to "properly weigh such factors." *Id.* at 491. Once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating or mitigating factors, it may then "impose any sentence that is . . . authorized by statue; and . . . permissible under the Constitution of the State of Indiana." Ind. Code § 35-38-1-7.1(d).

[28] The finding of mitigating factors is not mandatory and rests within the trial court's discretion. *Storey v. State*, 875 N.E.2d 243, 252 (Ind. Ct. App. 2007), *trans. denied*. "The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor." *Id.* Additionally, the trial court is not required to attribute the same weight to proffered mitigating factors as the defendant does. *Id.* Nonetheless, the trial court may not ignore factors in the record that would mitigate an offense. *Id.* To fail to find mitigating circumstances that are clearly supported by the record may imply the trial court did not consider those circumstances. *Id.* To prevail upon appeal, the defendant must establish that the mitigating evidence is both significant and clearly supported by the record. *Id.*

[29] Denning first contends the trial court failed to consider his youth as a mitigating factor. However, Denning did not clearly cite or explain this factor at

sentencing. Tr. Vol. 6 at 122–24. At most, counsel referred to Denning as a "young man," *id.*, but that does not put the trial court on notice that he believed his age was a mitigating factor, especially since Denning concedes age is neither a statutory mitigating factor nor a *per se* mitigating factor. Appellant's Br. at 11. His argument based on his youth is therefore waived. *McKinney v. State*, 873 N.E.2d 630, 646 (Ind. Ct. App. 2007) (failure to present a mitigating circumstance to the trial court waives consideration on appeal), *trans. denied*.

[30] Waiver notwithstanding, Denning fails on appeal to establish his youthful age as a significant mitigating circumstance. Instead, he merely asserts that "youthful offenders by their age and immaturity both lack[ ] a fully developed psyche and have the obvious benefit of youth to enjoy a potentially long period of rehabilitation." Appellant's Br. at 12. Our Supreme Court has previously noted that "[f]ocusing on chronological age is a common shorthand for measuring culpability, but for people in their teens and early twenties it is frequently not the end of the inquiry. There are both relatively old offenders who seem clueless and relatively young ones who seem hardened and purposeful." *Ellis v. State*, 736 N.E.2d 731, 736 (Ind. 2000). Denning has not identified any evidence to indicate that his age reduced his culpability.

[31] Further, Denning, in one sentence, asserts the trial court did not consider other mitigating circumstances—family background, employment history, and low probability of recidivism. Appellant's Br. at 12. While he indicates that these factors are supported by the record, he offers no further argument as to how they are significant in light of the sentence the trial court imposed. Therefore,

this argument is waived under Indiana Appellate Rule 46(A)(8)(a), which requires that contentions in an appellant's brief be supported by developed reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal. *See Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004) (concluding appellant waived claim by failing to present cogent argument).

[32] Regardless, Denning's argument fails. First, as to probability of recidivism, Denning's overall risk assessment score put him in the high-risk category to reoffend. Appellant's Conf. App. Vol. 2 at 13. Next, Denning's family background and employment history were supported by the record at sentencing, but that is not enough. Tr. Vol. 6 at 122–24. To prevail upon appeal, the defendant must also establish that the mitigating evidence is significant. *Storey*, 875 N.E.2d at 252. Denning has not done so here. We therefore find that the trial court did not abuse its discretion in sentencing Denning.

[33] Affirmed.

Vaidik, J., and May, J., concur.