MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jesse W. Blinson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 30, 2024

Court of Appeals Case No. 22A-CR-2920

Appeal from the Madison Circuit Court

The Honorable Angela G. Warner Sims

Trial Court Cause No. 48C01-1803-F1-698

Memorandum Decision by Chief Judge Altice
Judges May and Foley concur.

Altice, Chief Judge.

Case Summary

[1] Following a jury trial, Jesse W. Blinson was convicted of Level 1 felony child molesting and Level 4 felony child molesting for acts committed against his then-girlfriend's minor daughter, C.P., between 2015 and 2017. He raises the following restated issues:

1. Did the trial court abuse its discretion when it admitted C.P.'s forensic interview under Indiana's Protected Person Statute?

2. Did the trial court commit reversible error by allowing C.P.'s therapist to testify about issues that C.P. was experiencing in 2021?

3. Did statements made by the prosecutor during voir dire constitute prosecutorial misconduct amounting to fundamental error?

[2] We affirm.

Facts & Procedural History

[3] From March 2015 to May 2017, Blinson lived with his girlfriend, Mary Steele (Mother), C.P., born in February 2011, and Mother's mother (Grandmother) at Grandmother's residence. Mother worked 9:00 p.m. to 7:00 a.m., and Grandmother worked 7:30 a.m. to 4:00 p.m. While Mother was at work, Blinson helped care for C.P., including sometimes putting her to bed and

assisting with bathing. Around May 2017, Blinson and Mother ended their relationship and he moved out.

[4] A few months later, Mother began dating Justin Pierce. Blinson sent threatening text messages to Pierce and at least two of Pierce's family members and made threats to Mother on Facebook. On August 27, 2017, Mother and Pierce went to the Anderson Police Department (APD), bringing C.P. with them, to report the threats.

[5] After the three of them left the police station, they went to Pierce's apartment. Mother and Pierce discussed with each other that C.P., then six years old, had been "acting very off", not talkative and happy as normal, and seemed "slightly depressed" when they would talk about Blinson, causing them to wonder "if he's ever done anything to her." *Transcript Vol. II* at 83, 129. Mother asked C.P. if something was wrong but C.P. was not responsive to her, so Mother suggested to Pierce that he ask C.P. Pierce then asked, "[D]id [Blinson] ever hurt [you] in any kind of way" "like, did he ever [] spank you", to which C.P. disclosed that Blinson would sometimes spank her on the bottom "for fun." *Id.* at 86, 129. C.P. demonstrated by smacking and grabbing her bottom and rubbing it with her hand in circles. Pierce asked if anything else happened, and C.P. disclosed that Blinson showed her his "boy part," and when asked whether she touched it, C.P. replied, "I didn't want to." *Id.* at 87.

[6] Later that day, Pierce contacted the police, and APD Officer Travis Thompson came to Pierce's apartment. After speaking with Mother, Officer Thompson made a report to the Indiana Department of Child Services (DCS).

[7] Ten days later, on September 6, Mother took C.P. to Kids Talk, a child advocacy center, where Tyrica Osborn conducted a forensic interview of C.P. Mother was not present, and the interview was video recorded.

[8] During the interview, C.P. reported that Blinson tried to make her touch his "boy part" while they were at Grandmother's house and that he had touched her "girl part" and "behind." *State's Exhibit 1*; *Confid. Exhibit Vol.* at 61, 62, 67, 70, 72. She described instances when Blinson pulled down her pants and tried to touch her girl part with his hand while she was at the bathroom sink, touched her girl part with his boy part while she was walking into the shower, and that he put his "big nipple" in her "behind" and it felt "sad" and "painful." *Confid. Exhibit Vol.* at 68, 72, 82, 90-91. She also reported that, at "the splash house," Blinson touched her "front hind" under her bathing suit with his hand and was "like picking it." *Id*. at 77, 80. She described an occasion when Blinson grabbed her out of her bed, carried her to the kitchen, set her on the counter, pulled down his pants, and touched his "big nipple" and then "pee" came out, which was "greenish-yellow, like diarrhea." *Id*. at 85. C.P. stated that, during one or more of these occurrences, Blinson told her that he "didn't love [her]" and would spank her if she told anyone. *Id*. at 63; *see also id.* at 82.

[9] On September 7, Mother took C.P. to Community Hospital in Anderson, where Holly Renz, R.N. performed a sexual assault examination (SANE) on C.P. According to Renz's narrative, she asked C.P. if anyone had touched her "who-ha"[1] for no good reason, and C.P. replied that Blinson had touched her "who-ha" with his hand and with his "who-ha" and that he had touched her "butt" with his "who-ha." *Id.* at 137. C.P. indicated that these things happened more times than she could remember.

[10] On March 18, 2018, the State charged Blinson with Level 1 felony child molesting and Level 4 felony child molesting. In January 2022, the State filed a Motion to Introduce Videotape by Protected Person and requested a hearing. Among others testifying at the April 2022 hearing was Tracey Townsend, C.P.'s current therapist and a licensed social worker certified in child trauma. Townsend began treating and providing psychotherapy to C.P. – mostly by Zoom – in October 2021.

[11] Townsend testified that, although Mother would initially be part of the video call, most of the session would be with C.P. only. Mother reported that C.P. was having issues with soiling herself and wiping herself after going to the bathroom, that she resisted bathing, and that she would not enter the bedroom where the abuse occurred. Townsend also testified that C.P. was too afraid to sleep in her own bedroom, would not enter her bedroom without someone with

[1] Mother had told Renz that C.P. used "who-ha" to refer to her genitalia. *Id.* at 137.

her, could not sleep alone, had been seeing a shadow of a man on her bed, and continued to have nightmares and experience traumatic memories of being sexually abused. Townsend confirmed that these reports were coming directly from C.P., not Mother, and that "Mom's not even aware of some of these symptoms." *Transcript Vol. I* at 26. C.P. told Townsend that her abuser was Mother's prior boyfriend from when C.P. was three or four years old, although Townsend did not recall C.P. stating the person's name.

[12] Townsend stated that it was "very hard" for C.P. to talk about these things, describing that C.P. would "turn her head to the side" and "speak very softly." *Id*. Townsend testified that, in her professional opinion, being in the same room or in the presence of Blinson "definitely" would cause C.P. to shut down or not be able to communicate and that it could be a trigger for C.P. *Id*. at 30, 31. Townsend's treatment notes from October to December 2021 were admitted over Blinson's objection.

[13] Also testifying at the protected person hearing was Townsend's supervisor, Dr. John Wenger, a psychologist with forty-eight years of experience. Dr. Wenger read and signed off on Townsend's notes from her consultations with C.P. and consulted with Townsend as needed. In his professional opinion, because of the "extreme trauma" and "the way it was manifested" with encopresis and enuresis – issues with or withholding urine or bowel movements – he had concerns about C.P. being in Blinson's presence and opined that it would be tremendously stressful, traumatic, and damaging "to have to testify in front of others especially who she perceives to be the perpetrator." *Id*. at 41.

[14] The State also called Officer Thompson, who spoke to Mother at Pierce's apartment, and Julie Coon, the lead forensic interviewer at Kids Talk, who testified to the proper protocol for child forensic interviews and stated that such was followed in C.P.'s interview. The trial court admitted, over Blinson's objection, C.P.'s recorded interview at Kids Talk and the SANE narrative and examination records.

[15] Blinson called C.P. to testify. Over Blinson's objection, C.P. was permitted to testify by video from a separate room.[2] C.P. was eleven years old at that time and was living with Mother and Grandmother. C.P. confirmed that she had told the judge that she knew how to tell the truth. When asked if she remembered any of Mother's past boyfriends, C.P. replied, "Yes, but I don't like talking about them." *Id*. at 69. When asked if she remembered their names, she stated, "I remember all of them. I just don't like talking about them." *Id*.

[16] The trial court took the matter under advisement and, in June 2022, granted the State's motion to admit C.P.'s Kids Talk video in place of her live trial testimony, determining that the time, content, and circumstances of the forensic

[2] Also over Blinson's objection, in the room with C.P. were Townsend and a victim's advocate, as the court found their physical presence would provide support to C.P. Per the court's direction, they were not to communicate with C.P. or express emotion or gesture to her. A court representative was also present to oversee and confirm there was no communication occurring between them.

interview provided sufficient indicia of reliability. The court's findings included:

> a. This interview was reviewed by Julie Coon, an interviewer certified in the Child First forensic interviewing curriculum. Ms. Coon testified . . . that all protocol was followed in this forensic interview.
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> * * *
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> d. The child demonstrated knowledge of sexual content that would not be expected of a typical six-year-old.
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> e. The timing of the interview was near the date of the disclosure of the alleged abuse, recording a recollection that should be fairly fresh and less open to errors in memory. This timing leaves less opportunity for other influences to impair memory either intentionally or unintentionally.
>
> f. The interview is difficult to follow at times given that C.[P]. jumps around from different topics and incidents and at times is unable to give precise details. There are times C.[P]. is distracted and must be redirected. However, given her tender age and the subject matter, the court does not find that those factors outweigh other indicators of the reliability of her statement. She continues to disclose additional information as the interview progresses and maintains consistency in who did these acts to her.

Appendix at 109-10. The court noted that both Townsend and Dr. Wenger testified that C.P. has great difficulty talking about the incidents, that she was still symptomatic, and that there was great potential for harm if she were to be in the presence of Blinson. The court further found:

> 13. C.[P]. was called as a witness during the hearing by the Defendant. The court observed that C.[P].'s demeanor immediately changed when the court turned the camera so that she could see the Defendant. She put her head down and to the side, looked away, her voice softened and stated she did not want to talk about any of mom's boyfriends in response to Defendant's questions.
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> * * *
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> 15. Defendant was given the opportunity to examine C.[P.] at the hearing.

Id. at 110. Finding that testifying as a witness at trial in the presence of Blinson would cause C.P. to suffer serious emotional distress and not be able to communicate, the court granted the State's request to admit her Kids Talk statement in lieu of her live trial testimony.

[17] The matter proceeded to a two-day jury trial in November 2022. The State presented the testimony of, among others, Mother, Pierce, Osborn, Coon, Townsend, and Rita Farrell, who co-authored the Child First interviewing protocol.

[18] At trial, Mother described how, initially, Blinson treated C.P. with kindness but eventually started "getting mean" with C.P. and would tell her that he did not like her. *Transcript Vol. II* at 80. Mother also noted that "[i]t seemed like [C.P.] always had an infection" and "was always red" in her private areas, but Mother never sought treatment. *Id.* at 100.

[19] Mother testified that, after C.P. made the disclosure to her and Pierce, she did not ask C.P. any more questions about what had happened with Blinson, was not present during the Kids Talk forensic interview, did not get a copy of the transcript after the interview, and did not know what C.P. had said during the interview. Mother stated that she took C.P. to the hospital for the sexual assault examination and was present for the nurse's initial questions but C.P. "wouldn't respond while [she] was there," so Mother left the room briefly and returned for the examination. *Id.* at 91. Mother stated that C.P. began counseling after the disclosure and was currently counseling with Townsend.

[20] Pierce also testified. He stated that he and Mother were no longer dating, having broken up in February 2021. When asked how he still remembered the circumstances and details of C.P.'s 2017 disclosure, Pierce explained, "Because who would forget that?" *Id*. at 131. He testified that he had no other reason to testify other than to share what he heard and saw on the date of C.P.'s disclosure.

[21] Farrell testified that the Child First protocol is the most widely used interviewing protocol in the nation. She described it as very flexible and following the lead of the child. In Farrell's twenty-two years of practice, she had conducted 2,587 forensic interviews with children. She testified that it is very common for a child's disclosure of maltreatment to be delayed. Kids Talk lead interviewer Coon testified that Osborn followed proper interviewing protocol with C.P.

[22] During Osborn's testimony, the State offered the videotape of C.P.'s Kids Talk interview into evidence, and Blinson's counsel stated, "No objection." *Id*. at 206. The video was thereafter admitted and played for the jury.[3] Osborn testified that after C.P. told her about Blinson touching her, she showed C.P. a drawing that depicted a little girl and a little boy with no clothes on, and when she asked C.P. to show her on the paper what she was referring to as the "big nipple," C.P. circled the penis on the boy image. *Id.* at 208. When asked to show on the paper what she was referring to as a "front hind," C.P. pointed to the vagina on the girl image. *Id*. at 210.

[23] Townsend, who began providing therapy to C.P. in October 2021, when C.P. was ten years old, testified, over Blinson's objection, to certain things that C.P. had shared during their sessions between October and December 2021. Townsend stated that C.P. reported that she would repeatedly feel the sensation of someone touching her, even though such was not actually happening, and that these sensations would occur both at home – C.P. still lived in Grandmother's home – and other places, like at school. C.P. also told Townsend that she would see the shadow of a man on her bed and that she had not slept in her bedroom in years; rather, she could only sleep in another room and if someone else was with her. C.P. also shared with Townsend that she had nightmares about the sexual abuse. In describing C.P.'s demeanor while

[3] A transcript of the interview was introduced as an exhibit and passed to the jury to use as an aid during the video but not admitted into evidence.

disclosing these things, Townsend said that C.P. would pull a blanket over her head and slowly not talk anymore, "like she was just shutting down." *Id.* at 249.

[24] On November 3, 2022, the jury found Blinson guilty as charged. The trial court subsequently sentenced him to thirty-eight years on the Level 1 felony and to a concurrent term of ten years on the Level 4 felony. Blinson now appeals. Additional facts will be provided below as necessary.

Discussion & Decision

1. Admission of C.P.'s Kids Talk Interview

[25] We ordinarily review challenges to the admission of evidence for an abuse of the trial court's discretion. *Reynolds v. State*, 142 N.E.3d 928, 939 (Ind. Ct. App. 2020), *trans. denied*. In those instances, we will reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Id*. Here, however, Blinson did not object at trial to the State's offer to admit the videotape into evidence, and a party's failure to object to, and thus preserve, an alleged trial error results in waiver of that claim on appeal. *Batchelor v. State*, 119 N.E.3d 550, 556 (Ind. 2019). "This rule is no mere procedural technicality; instead, its purpose is to allow the trial judge to consider the issue in light of any fresh developments and also to correct any errors." *Shoda v. State*, 132 N.E.3d 454, 461 (Ind. Ct. App. 2019). To the extent that Blinson suggests that an objection was not necessary because "a ruling under the protected person statute should be considered a definitive ruling," *Appellant's Brief* at 13, he cites

no law in support, and we decline to carve out such an exception. *See*, *e.g.*, *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) (observing that defendant's pretrial motion to suppress did not preserve challenge to admissibility of evidence and that a contemporaneous objection when the evidence is introduced at trial was required).

[26] To avoid waiver, Blinson claims the trial court's error in admitting the videotape was fundamental. 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.* (quotations omitted). The claimed error must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process. *Id.* This exception is available only in "egregious circumstances." *Id*.

[27] Initially, we address the State's argument that fundamental error review is not available to Blinson because he invited the error. *See Batchelor*, 119 N.E.3d at 556 (waiver generally leaves open an appellant's claim to fundamental-error review but invited error typically forecloses appellate review). In addressing the "important distinctions" between the waiver and invited error doctrines, the *Batchelor* Court explained:

> [T]o establish invited error, there must be some evidence that the error resulted from the appellant's affirmative actions as part of a deliberate, well-informed trial strategy. . . . And when there is no evidence of counsel's strategic maneuvering, we are reluctant to find invited error based on the appellant's neglect or mere

> acquiescence to an error introduced by the court or opposing counsel.

Id. at 558 (citations and quotations omitted). The Court recognized that "cases often arise when . . . counsel's motives at trial are less than clear" and cautioned: "[W]hen a careful reading of the record fails to disclose enough information, courts should resolve any doubts against a finding of invited error rather than engage in speculation." *Id*.

[28] Blinson maintains that "the record is far from clear" that his counsel's statement of no objection was part of deliberate and well-informed trial strategy and, rather, it was "likely a result of a memory lapse or a mistaken belief the court's order after the protected person's hearing was a definitive ruling that was not subject to change." *Reply Brief* at 15. Given that Blinson litigated his opposition to the Kids Talk video at the protected person hearing, it is unclear to us what the trial strategy would have been to declare that he had no objection when it was offered into evidence. Mindful of *Batchelor's* directive that any doubt should be resolved in favor of appellate review, we decline to find that Blinson invited error and proceed to review Blinson's challenge to the admission of C.P.'s Kids Talk interview into evidence.

[29] Indiana Code § 35-37-4-6, known as the Protected Person Statute, applies to specific crimes, including those at issue in this case, and governs the admissibility at trial of prior statements by protected persons in certain circumstances. *Reynolds*, 142 N.E.3d at 939. The Protected Person Statute is designed to "spare children the trauma of testifying in open court against an

alleged sexual predator." *Tyler v. State*, 903 N.E.2d 463, 466 (Ind. 2009). The decision to admit statements under the Protected Person Statute will not be reversed absent a showing of a manifest abuse of discretion by the trial court resulting in the denial of a fair trial. *A.R.M. v. State*, 968 N.E.2d 820, 824 (Ind. Ct. App. 2012). An abuse of discretion occurs only when the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id*. at 825.

[30] Relevant here is the statutory requirement that the trial court, after a hearing, find "that the time, content, and circumstances of the statement … provide sufficient indications of reliability." I.C. § 35-37-4-6(f). Blinson does not dispute that C.P. qualified as a protected person under the statute; rather, he contends that, contrary to the court's findings, C.P.'s statements in the interview lacked sufficient indicia of reliability and, thus, should not have been admitted. Considerations in making the reliability determination under the statute include the time and circumstances of the statement, whether there was significant opportunity for coaching, the nature of the questioning, whether there was a motive to fabricate, use of age-appropriate terminology, and spontaneity and repetition. *Taylor v. State*, 841 N.E.2d 631, 635 (Ind. Ct. App. 2006), *trans. denied*; *M.T. v. State*, 787 N.E.2d 509, 512 (Ind. Ct. App. 2003). Doubt may be cast on the reliability of the statement or videotape if it is preceded by lengthy or stressful interviews or examinations. *Taylor*, 841 N.E.2d at 635.

[31] Here, in determining that the interview bore sufficient indicia of reliability, the court found that the interview was conducted according to proper protocol, including that Osborn interviewed C.P. one-on-one and that a multi-disciplinary team monitored from another room, communicating to Osborn by earpiece. The court found that Osborn properly built rapport with C.P. and used non-leading questions and age-appropriate language. The trial court also recognized that the Kids Talk interview occurred near the date of disclosure of the alleged abuse, which timing left less opportunity for other influences to impair memory and that, during the interview, C.P. demonstrated sexual knowledge that would not be expected of a typical six-year-old child. The trial court acknowledged that the interview was, at times, difficult to follow, as C.P. would "jump[] around from different topics and incidents" and had to be redirected, but concluded that, given C.P.'s young age and the subject matter, those factors did not outweigh other indicators of the reliability of her statement. *Appendix* at 110.

[32] Blinson argues that the trial court's reliability determination ignored that the content of C.P.'s accusations were often "bizarre and improbable" and that her "story degraded" as Osborn would ask follow-up questions. *Appellant's Brief* at 15. For instance, when Osborn asked "what did he do with the pee" that came out of his "big nipple" and went on the floor, C.P. stated that he "he drank it" and another time said that he tried to touch his big nipple with his mouth by "bending over" and tried to eat his "poop" that came out of the "big nipple." *State's Exhibit 1*; *Confid. Exhibit Vol.* at 87, 88. She also said that when Blinson

had his "big nipple" in her "behind," it was "trying to drink my stomach acid." *Id.*; *Confid. Exhibit Vol.* at 91.

[33] We find it was within the trial court's discretion to consider such terminology and phrasing as a young child trying to explain what she saw and what she experienced in her own words. As the trial court observed, C.P. demonstrated knowledge of sexual content beyond what a six-year-old normally would know, and she maintained consistency in the interview as to what happened to her, who did it, and where she was. We thus are not persuaded that the trial court's determination that C.P.'s recorded statement provided sufficient indications of reliability was an abuse of discretion due to certain "bizarre and improbable" content in the interview. *Appellant's Brief* at 15.

[34] Blinson also argues that the interview lacked reliability because C.P. made statements about what her Mother had told her, thus indicating that C.P. was "being influenced by outside sources[.]" *Id*. at 19. In support, he points to when C.P. stated that Mother told her that Blinson "tried to make every girl touch his boy part" and that Mother told her Blinson took photos of naked females on his phone. *Id*. at 18; *Confid. Exhibit Vol.* at 63. Again, looking at the entirety of the interview, C.P. did not, as Blinson suggests, "intertwine[] what her mom told her with what she remembered or knew" about what Blinson did to her. *Appellant's Brief* at 18. Rather, C.P. recounted when, where, and how Blinson touched her, and there is no indication that any of that information stemmed from Mother or anyone else directing C.P. what to say. Indeed, at the beginning of the interview, C.P. said that Mother had told her that she was

coming to the interview "to talk" but had not told C.P. what they were going to talk about, and C.P. later stated during the interview that neither Mother, nor anyone else, had told her what to say. *State's Exhibit 1*; *Confid. Exhibit Vol.* at 61. Prior to the video's admission at trial, Mother testified that she did not discuss with C.P. what to say in the interview and did not know what C.P. said in the interview.

[35] In sum, we conclude that the trial court did not abuse its discretion, let alone commit fundamental error, when it determined that the time, content, and circumstances of C.P.'s Kids Talk video bore sufficient indicia of reliability to be admitted at trial.

2. Townsend's Testimony

[36] Blinson argues that the trial court committed reversible error by admitting Townsend's testimony regarding mental health symptoms that C.P. was experiencing in 2021. The decision to admit or exclude evidence at trial is squarely within a trial court's discretion, and we afford it great deference on appeal. *Reynolds*, 142 N.E.3d at 939.

[37] Here, before Townsend testified, Blinson posed his objections to Towsend being permitted to testify at trial about her 2021 therapy sessions with C.P., and the court excused the jury to receive argument as well as testimony from Townsend. Blinson argued that whatever mental or emotional symptoms C.P. was experiencing in 2021 were too remote to the alleged 2015-2017 molestation and thus not relevant and unduly prejudicial, and moreover, Townsend's

testimony would be hearsay. The State maintained that Townsend's testimony was admissible because it was "directly from the exhibit [of her therapy notes] that was admitted at the protected person hearing," at which Blinson had the opportunity to cross-examine C.P. *Transcript Vol. II* at 195; *see also id*. at 229. The State further argued Townsend's testimony was admissible under Evid. Rule 803(4), the hearsay exception for statements made for purposes of medical diagnosis or treatment.

[38] After argument, the trial court instructed the parties that

> the court will permit the state to question [Townsend] regarding those statements that were made by C.[P]. to her that were known at the time that the protected person hearing was held. The court finds that the state satisfied the statutory requirements to provide notice to the defense knowing that those could be statements that the state would intend to introduce into trial, which then [] they had the opportunity to [] confront and cross examine.

Id. at 200. Following testimony from Townsend outside the jury's presence, the court specified that it would allow Townsend to testify only as to statements that C.P. made directly to her, such as those about "shadows um, the feeling or the sensation the tactile type [] things" and "memories or flashbacks," but that it was excluding other issues such as bed wetting or incontinence that Mother had told Townsend were occurring. *Id*. at 231-32.

[39] Consistent with that, Townsend testified, over Blinson's objection, that C.P. reported experiencing the sensation of being touched by someone, seeing a dark

figure on her bed, having nightmares, and sleeping in another room and only if someone is with her. C.P. told Townsend that the various sensations, visions, and nightmares were a result of what Blinson had done to her.

a. Relevance and Prejudice

[40] Blinson argues that the trial court erred in admitting Townsend's testimony because C.P.'s mental health symptoms in 2021 were "far too remote to be relevant" and that, even if relevant, "any slight probative value" about C.P.'s emotional or mental struggles was substantially outweighed by the risk of unfair prejudice and inflaming the passions of the jury such that Townsend's testimony about those symptoms should have been excluded. *Appellant's Brief* at 11, 26, 28.

[41] "Evidence is relevant if ... it has any tendency to make a fact more or less probable than it would be without the evidence; and ... the fact is of consequence in determining the action." Ind. Evid. Rule 401; *Hendricks v. State*, 162 N.E.3d 1123, 1133 (Ind. Ct. App. 2021), *trans. denied*. Under Ind. Evid. Rule 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." The balancing of the probative value against the danger of unfair prejudice must be determined with reference to the issue to be proved by the evidence. *Hendricks*, 162 N.E.3d at 1134. "A court's discretion is wide on issues of relevance and unfair prejudice." *Snow v. State*, 77 N.E.3d 173, 176 (Ind. 2017).

[42] Blinson suggests that C.P.'s emotional issues could have been "triggered by intervening trauma in her life, an underlying disorder or even a false memory or belief" and "[i]t is too speculative to infer that C.P. was molested by Blinson because she has nightmares about abuse, sees a shadowy figure or feels a man touching her." *Appellant's Brief* at 26. We are unpersuaded by these arguments. Townsend's narrowly-tailored testimony about nightmares, tactile sensations of being touched, and visions that C.P. was suffering from in 2021 was relevant to the child molesting charges. And contrary to Blinson's claim, the jury was not asked to speculate or infer that Blinson was connected to the symptoms C.P. was experiencing as C.P. told Townsend such. In concluding that Blinson did not suffer undue prejudice, we observe that Townsend did not offer any opinion that C.P.'s nightmares, sensations, and visions were a product of Blinson molesting her. Further, the challenged testimony was brief, consisting of less than four pages of transcript. Moreover, to the extent Blinson argues that the emotional and mental issues may have been caused by some intervening trauma, Blinson cross-examined Townsend about another trauma that C.P. had experienced (involving a dog mauling Mother in her presence), that may have contributed to nightmares and mental symptoms she was experiencing.

[43] For these reasons, we find that the trial court did not abuse its discretion by not excluding Townsend's testimony under Evid. R. 401 or 403.

b. Hearsay

[44] Blinson also asserts that, even if relevant and not unduly prejudicial, Townsend's statements should have been excluded as hearsay. Evid. R. 803(4)

permits statements that would otherwise be hearsay to be admitted into evidence if the statement

> (A) is made by a person seeking medical diagnosis or treatment;
>
> (B) is made for -- and is reasonably pertinent to -- medical diagnosis or treatment; and
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> (C) describes medical history; past or present symptoms, pain or sensations; their inception; or their general cause.

This exception is based upon the belief that a declarant's self-interest in seeking medical treatment renders it unlikely that the declarant would mislead the medical personnel she wants to treat her. *Shoda*, 132 N.E.3d at 466 (quotations omitted).

[45] Our Supreme Court has recognized that young children may not understand the nature of the examination or the function of the examiner and may not make the necessary link between truthful responses and accurate medical treatment. *VanPatten v. State*, 986 N.E.2d 255, 261 (2013). In that circumstance, "there must be evidence that the [child] declarant understood the professional's role in order to trigger the motivation to provide truthful information." *Id*. This evidence "may be received in the form of foundational testimony from the medical professional detailing the interaction between him or her and the declarant, how he or she explained his role to the declarant, and an affirmation that the declarant understood that role." *Id*.

[46] Here, outside the jury's presence and prior to her trial testimony, Townsend explained that she and C.P., in their first session, talked about why C.P. was there – that is, for treatment of emotional or psychological injuries stemming from sexual abuse – and that C.P. understood Townsend's role was to help C.P. "to get to a place where she feels better."[4] *Transcript Vol. II* at 217. Thereafter, Townsend testified before the jury that, in her first session with a child patient, it is her practice to explain to the child what she is there to do, namely, help them with "big feelings" and problems that were caused by difficulties in their lives. *Id*. at 238.

[47] Blinson urges that Townend's testimony about C.P.'s understanding that she was there for treatment was too "brief and conclusory." *Appellant's Brief* at 30. We disagree and find that that the requirements of Evid. R. 803(4) were sufficiently met and that C.P.'s statements to Townsend were admissible on this basis. *See Shoda*, 132 N.E.3d at 469-70 (child victim's statements to her therapist were admissible under Evid. R. 803(4) where therapist testified that she explained to child why they were meeting and that child understood the purpose). On the record before us, we do not find that the trial court erred in admitting Townsend's testimony recounting C.P.'s statements during the 2021

[4] We note that "a trial court may consider evidence from a pre-trial hearing when ruling on the admissibility of evidence at trial." *Shoda*, 132 N.E.3d at 467 n.7.

therapy sessions that described visions, sensations, and nightmares that she was experiencing at that time.[5]

3. Prosecutorial Misconduct in Voir Dire

[48] Blinson asserts that the State committed prosecutorial misconduct during voir dire by misstating the law concerning the State's burden to prove Blinson guilty beyond a reasonable doubt. Our Supreme Court has explained that, in reviewing a claim of prosecutorial misconduct:

> [W]e must determine whether the prosecutor engaged in misconduct, and if so, whether the misconduct had a probable persuasive effect on the jury. A claim of improper argument to the jury is measured by the probable persuasive effect of any misconduct on the jury's decision and whether there were repeated occurrences of misconduct, which would evidence a deliberate attempt to improperly prejudice the defendant.

Deaton v. State, 999 N.E.2d 452, 454 (Ind. Ct. App. 2013) (internal citations omitted), *trans. denied*.

[49] Blinson claims that misconduct occurred when, at various times during rounds of juror questioning, the prosecutor told the jury that reasonable doubt can only be based on the evidence, when, contrary to that, reasonable doubt is often based on a lack of evidence. For example, in discussing the concept of doubt,

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[5] The parties dispute whether the trial court admitted Townsend's testimony pursuant to the Protected Person Statute, and if so, whether doing so was proper. We need not reach these arguments, as we find that Townsend's testimony was admissible under Evid. R. 803(4).

the prosecutor stated, "It can't be reasonable doubt if it's not based on evidence. That's unreasonable because the judge is to tell you[,] you base your decision on what you hear in court." *Transcript Vol. I* at 137. Blinson maintains that the line of questioning could have misled jurors into thinking that the defense had the burden of presenting evidence of a reasonable doubt and thus was an incorrect statement of the law and, further, was "concerning and confusing." *Appellant's Brief* at 34.

[50] As an initial matter, we observe that Blinson did not object to the alleged misconduct, which precludes appellate review of his claim, unless the alleged misconduct amounts to fundamental error. *Deaton*, 999 N.E.2d at 454 (citing *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2022)). To demonstrate fundamental error, the defendant must establish not only prosecutorial misconduct but also the additional grounds for fundamental error. *Id*. To be fundamental error, the misconduct must have made a fair trial impossible or been a clearly blatant violation of basic and elementary principles of due process that presents an undeniable and substantial potential for harm. *Id*.

[51] Here, we agree with the State that the prosecutor's comments – even if they "could have been more artfully worded" to distinguish the concept of proving beyond a reasonable doubt from removal of all doubt – did not deprive Blinson of a fair trial. *Appellee's Brief* at 32. The trial court instructed the jury on the State's burden of proof, stating in part:

> To overcome the presumption of innocence, the State must prove the Defendant guilty of each element of the crime charged

> beyond a reasonable doubt. *The Defendant is not required to present any evidence to prove his innocence or to prove or explain anything*. The burden is upon the State to prove beyond a reasonable doubt that the Defendant is guilty of the crime charged. It is a strict and heavy burden. . . . *A reasonable doubt may arise either from the evidence or from a lack of evidence*. Reasonable doubt exists when you are not firmly convinced of the Defendant's guilt after you have weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It's not enough for the State to show that the Defendant is probably guilty. On the other hand, . . . [t]he State does not have to overcome every possible doubt. . . . If you find that there is a reasonable doubt that the Defendant is guilty of the crime, you must give the Defendant the benefit of that doubt and find the Defendant not guilty of the crime under consideration.

Transcript Vol. III at 82-83 (emphases added). Instructions are presumed to cure any misstatements of the law made by counsel. *See Pritcher v. State*, 208 N.E.3d 656, 665 (Ind. Ct. App. 2023) ("[O]ur courts have long held that any misstatement of law during closing arguments is presumed cured by the trial court's final jury instructions."). Blinson has failed to show that the prosecutor's statements during voir dire made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process that presented an undeniable and substantial potential for harm.

[52] Judgment affirmed.

May, J. and Foley, J., concur.