MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Bernadette A. Kovacs
Rahman Law Office
Ferdinand, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Evan Matthew Comer
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Nathan C. Albrecht,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 8, 2021

Court of Appeals Case No. 20A-CR-2190

Appeal from the Dubois Circuit Court

The Honorable Nathan A. Verkamp, Judge

Trial Court Cause No. 19C01-1908-F1-879

Crone, Judge.

Case Summary

[1] A jury found Nathan C. Albrecht guilty of two counts of level 1 felony child molesting and one count of level 6 felony harmful performance before a minor. On appeal, Albrecht argues that the trial court erred in admitting the forensic interview of the victim, R.R., allowing the State to add the level 6 felony charge to the charging information, and denying his request to depose R.R. regarding that charge. Albrecht also argues that statements by R.R.'s mother and the prosecutor resulted in fundamental error and that his convictions are not supported by sufficient evidence. We affirm.

Facts and Procedural History

[2] R.R. was born in August 2007. Around December 2010, his mother, Vicki Schnarr, divorced his father, with whom he has had little contact. In December 2013, Schnarr and R.R. started living with Schnarr's boyfriend, Frank Phillips, in Huntingburg. At that time, R.R. was in kindergarten. According to Schnarr, R.R. had "a hard time focusing, sitting still, paying attention, basically." Tr. Vol. 2 at 143. Dr. Dean Beckman, who has been R.R.'s physician since R.R.'s birth, *id*. at 100, diagnosed him with attention deficit disorder (ADD) and prescribed him medication. When R.R. was in the second grade, "[h]is behavior started to get much worse[,]" in that "[h]e was getting a lot more aggressive -- physically, towards his teachers and the aides." *Id*. at 144. R.R. was referred to a child psychiatrist, who prescribed "additional medication[.]" *Id*. at 146.

[3] Schnarr and R.R. stopped living with Phillips in March 2015. In July 2016, it was disclosed that Phillips had molested R.R. By the time R.R. started third grade that year, "his behavior had gotten … so much worse." *Id*. at 147. He was "tearing up classrooms and his aggressive behavior had just gotten completely out of control." *Id*. In December 2016, R.R. was admitted to Evansville Psychiatric Children's Hospital, where he was diagnosed with oppositional defiant disorder (ODD), "wean[ed]" off his old medications, and prescribed new medications for ADD and anxiety. *Id*. at 148. R.R. was released from the hospital in March 2017.

[4] That summer, Schnarr and R.R. moved to Jasper. Because R.R. did not have a male role model in his life, it was recommended that Schnarr enroll him in the Mentors for Youth program. Schnarr filled out an application, and a case manager interviewed Schnarr and R.R. and conducted a home visit. Albrecht had applied to be a mentor with the program, which required him to undergo background checks, submit personal and employment references, and participate in online training. Albrecht was also required to undergo a home visit; at that time, he resided with his aunt and uncle in Jasper. In the process of matching R.R. with a mentor, the case manager gave Albrecht R.R.'s profile, which listed his favorite activities and stated that he had been molested. *Id*. at 248. Albrecht expressed an interest in being matched with R.R., and the match was completed in August 2017.

[5] Initially, Albrecht spent approximately three or four hours with R.R. every other weekend, and they often played video games. R.R. started the fourth

grade, and according to Schnarr, "[i]t's probably the best year he ever had." *Id.* at 149. After several months, with the approval of Schnarr and Mentors for Youth, R.R. started spending approximately one overnight per month at Albrecht's aunt and uncle's home.

[6] When R.R. entered the fifth grade in 2018, he transitioned from the elementary school to the middle school, and there were "a few problems with him adjusting. But it was just mainly … not wanting to focus, not wanting to listen. Nothing really aggressive or anything like [Schnarr] had seen in the past." *Id.* at 150. In December 2018, Albrecht moved into his own apartment in Ferdinand, and R.R.'s overnight visits continued. Around that time, R.R.'s "second semester [of] fifth grade was really, really getting bad. The aggressive behavior and things like that started coming back." *Id.* at 151.

[7] In "May, June and July of 2019, there [were] quite a few times [Schnarr] didn't let R.R." spend the night with Albrecht "because [R.R.'s] behavior got so bad that [she] would use that as a punishment for him." *Id.* at 159. On August 20, 2019, Schnarr picked up R.R. from his after-school caregiver, Amanda Fight. Fight told Schnarr that "R.R. had said something the previous day that had really upset" Fight's daughter, and Fight "thought it was really weird" and "wanted [Schnarr] to know." *Id.* at 161. Fight said that R.R. told her daughter that he wished that he could make a "portal so he could go through it and suck his own d*ck." *Id.* at 162. When they got home, Schnarr asked R.R. why he said that, "[a]nd he said, because that is what Nathan does to me." *Id.* Schnarr told R.R. "[t]hat it was wrong, and [they] needed to report it right away." *Id.*

R.R. "immediately started" crying and screamed, "I don't want Nathan to get into trouble. I love Nathan. Nathan loves me." *Id.*

[8] That evening, Schnarr took R.R. to the Ferdinand Police Department and reported his accusation, and she "was told that they would be contacting [her] for a forensic interview for R.R." *Id.* at 165. The interview was scheduled for August 22 at the Southwestern Indiana Child Advocacy Center. On that date, the Center's executive director, Tammy Lampert, conducted a videotaped forensic interview of R.R. R.R. told Lampert that Albrecht had given him some video games and was planning on giving him some more games, and he did not want Albrecht to get arrested. But R.R. stated that Albrecht did "something wrong to [him]—he molested [him]." State's Ex. 4a. R.R. stated that Albrecht "sucked [his] d*ck" on multiple occasions during his overnight visits in Albrecht's apartment. *Id.* R.R. made markings on an anatomical drawing of an unclothed child to show which body parts were involved in the molestations. State's Ex. 3. R.R. further stated that on multiple occasions Albrecht put a clear "plastic" object around his own "d*ck" and manually masturbated "white stuff" into it in R.R.'s presence,[1] and Albrecht also had R.R. manually masturbate him into a clear plastic object. State's Ex. 4a. R.R. stated that Albrecht kept those objects in his bathroom and that Albrecht told him that the masturbation helped him become "tired." *Id.*

[1] R.R. used a hand gesture to describe Albrecht's conduct.

[9] According to Lampert, R.R. was "cooperative[,]" "articulate[,]" and "gave great detail," but as the interview progressed, he "shut down" and "became very distracted. His communication had dwindled, and he no longer wanted to be in the interview." Tr. Vol. 2 at 204, 203, 202. Consequently, Lampert stopped the interview and resumed it the following day. On the second day, after almost ten minutes of questioning, R.R. stated that he gets "upset" talking and thinking about Albrecht's actions and that the more he talks about it, the closer he gets to not being able to "hold it in." State's Ex. 4b. Shortly thereafter, R.R. became visibly upset, asked to "change the subject," and engaged in repetitive physical gyrations for the final twenty minutes of the interview while remaining largely nonverbal. *Id*.

[10] Ferdinand Police Department Officer Eric Hopkins watched the interview videos and met with Schnarr so that "she could provide [him] some dates that she was for sure that R.R. had spent the night over at [Albrecht's]." Tr. Vol. 3 at 5. Officer Hopkins then obtained Albrecht's phone number from Mentors for Youth, called him, and arranged to meet him at his residence. Officer Hopkins and a detective talked with Albrecht in his driveway, and then the detective obtained a warrant to search Albrecht's bathroom for condoms. Numerous unopened packages of condoms, as well as used condoms, were found in Albrecht's bathroom.

[11] On August 26, 2019, the State charged Albrecht with three counts of level 1 felony child molesting, alleging that he knowingly or intentionally performed oral sex on R.R. between December 15, 2018, and June 28, 2019 (Count 1), on

or about June 29, 2019 (Count 2), and on or about July 20, 2019 (Count 3). In September 2019, the trial court set the omnibus date for October 22, 2019. In May 2020, the court scheduled a final pretrial conference for August 3 and a jury trial for September 2. On August 3, the State filed a notice of intent to introduce R.R.'s forensic interview videos at trial pursuant to the Protected Person Statute, Indiana Code Section 35-37-4-6. The State requested a protected person hearing, which was held on August 13 and 14 and will be described in greater detail below. On August 18, the trial court ruled that R.R. was unavailable to testify at trial and that the videos would be admitted in lieu of his live testimony.

[12] On August 19, Albrecht filed a motion to redact the videos to remove any mention of the masturbation incidents. On August 21, the State filed a motion to amend the charging information to add Count 4, level 6 felony harmful performance before a minor. On August 24, Albrecht filed an objection to the State's motion to amend, and the trial court issued an order granting the motion. On August 25, the trial court held an initial hearing on the amended charging information and gave Albrecht an opportunity to renew his objection. Albrecht also requested permission to depose R.R. regarding the new charge. The trial court denied Albrecht's request and affirmed its ruling on the State's motion to amend.

[13] A jury was selected on September 2, and trial was held on September 3. The forensic interview videos were played for the jury over Albrecht's objection, and the transcript of R.R.'s testimony at the protected person hearing was read into

the record. The jury found Albrecht guilty on Counts 1, 3, and 4 and not guilty on Count 2. The trial court imposed concurrent executed sentences of thirty years on Counts 1 and 3 and one year on Count 4. Albrecht now appeals.

Discussion and Decision

Section 1 – The trial court did not abuse its discretion in admitting the forensic interview videos.

[14] Albrecht argues that the trial court erred in admitting the forensic interview videos pursuant to the Protected Person Statute. "As a general matter, the decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal." *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). "[W]e will not reverse the trial court's decision unless it represents a manifest abuse of discretion that results in the denial of a fair trial." *Id*. "An abuse of discretion in this context occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law." *Id*. at 703.

[15] The Protected Person Statute "allows for the admission of otherwise inadmissible hearsay evidence relating to specified crimes whose victims are deemed 'protected persons.'" *Tyler v. State*, 903 N.E.2d 463, 465 (Ind. 2009). Here, the statute applies because R.R. was the victim of a sex crime and was under fourteen years of age. Ind. Code § 35-37-4-6(a)(1), -(c)(1). The purpose of the Protected Person Statute is to "spare children the trauma of testifying in open court against an alleged sexual predator." *Tyler*, 903 N.E.2d at 466.

According to our supreme court, because the statute "impinges upon the ordinary evidentiary regime[,]" the "trial court's responsibilities thereunder carry with them … 'a special level of judicial responsibility.'" *Carpenter*, 786 N.E.2d at 703 (quoting *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999)).

[16] The Protected Person Statute reads in relevant part,

> (d) A statement or videotape that:
>
> > (1) is made by a person who at the time of trial is a protected person;
> >
> > (2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and
> >
> > (3) is not otherwise admissible in evidence;
>
> is admissible in evidence in a criminal action for an offense listed in subsection (a) … if the requirements of subsection (e) are met.
>
> (e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) … if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:
>
> > (1) The court finds, in a hearing:
> >
> > > (A) conducted outside the presence of the jury; and
> > >
> > > (B) attended by the protected person in person or by using closed circuit television testimony …;

that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:

(A) testifies at the trial; or

(B) is found by the court to be unavailable as a witness for one (1) of the following reasons:

(i) From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate.

….

(f) If a protected person is unavailable to testify at the trial for a reason listed in subsection (e)(2)(B), a statement or videotape may be admitted in evidence under this section only if the protected person was available for cross-examination:

(1) at the hearing described in subsection (e)(1); or

(2) when the statement or videotape was made.

Ind. Code § 35-37-4-6.[2]

[17] On the first day of the protected person hearing in this case, the State called R.R.'s physician, Dr. Beckman, as a witness. The doctor testified that R.R. had been diagnosed with ADD, ODD, and anxiety disorder, as well as post-traumatic stress disorder (PTSD), which is "a more recent diagnosis because [R.R.] has had many stressors in his life, and we are trying to get more psychological services for him." Tr. Vol. 2 at 60. Dr. Beckman further stated that R.R. has had a "very rough childhood[,]" needs "very frequent monitoring because of the dynamics with his mental illness[,]" and is on several medications to treat his conditions. *Id.* at 60, 61. The doctor opined that R.R. "would have a meltdown […] at the sight of the perpetrator"; when asked to elaborate, he explained that he "wouldn't be surprised if [R.R.] threw himself on the floor, would hit himself -- cry uncontrollably -- get out of the witness stand and run out of the room." *Id.* at 64-65. Dr. Beckman stated that if R.R. were to have a meltdown, "this would have more of a detriment to what we're

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[2] The Protected Person Statute further provides that if a statement or videotape is admitted,

> the court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement or videotape and that, in making that determination, the jury shall consider the following:
>
> (1) The mental and physical age of the person making the statement or videotape.
>
> (2) The nature of the statement or videotape.
>
> (3) The circumstances under which the statement or videotape was made.
>
> (4) Other relevant factors.

Ind. Code § 35-37-4-6(h). The trial court in this case instructed the jury accordingly.

trying to achieve with our treatment. He […] has regressed with his mental illness and I think right now this would be […] a huge problem and even cause further potential mental harm to him." *Id*. at 65. When asked for his opinion on R.R.'s ability to communicate in Albrecht's presence, the doctor replied, "I do not feel that he can do that." *Id*.

[18] On the second day of the hearing, the State called R.R., who was placed under oath and testified remotely via Zoom. The State asked R.R. to identify Albrecht, which he did by looking at him on the video screen, and rested. Defense counsel then questioned R.R. at length, including about his relationship with Albrecht. R.R. stated that Albrecht "molested" him more than once by "putting his mouth up to" his "private parts." *Id*. at 88. He further stated that "the first time it happened [he] didn't really feel like it was a bad thing and then eventually [he] kind of told someone about it" because he "felt like it was wrong." *Id*. at 89. Defense counsel asked if "anything else bad ever happen[ed,]" and R.R. replied, "I don't think so." *Id*. at 93.

[19] Finally, the State called Schnarr and asked if she had "noticed any changes in [R.R.'s] behavior recently[.]" *Id*. at 96. Schnarr replied,

> Well, things were going better and then Monday I informed him of what was going to happen today [Friday], just give him a little heads up, and as soon as I said [Albrecht's] name, he immediately just stiffened up. For the rest of the day, we could tell he was a little edgy. That night he couldn't sleep, which for the past about year, […] I had no problem with him sleeping and then he woke up Tuesday morning just throwing up and after I got to thinking, it seems like every time, that's happened a couple

> times, and every time it's happened [it's] once [Albrecht's] name been brought up.

Id. Schnarr testified that R.R. was "extremely anxious" before the hearing that morning and repeatedly asked to be reassured that Albrecht was not going to be in the same building. *Id*. at 97.

[20] The trial court said that it would watch the forensic interview videos and take the matter under advisement. Four days later, the court issued an order with the following findings:

> 5. After review the Court finds that videotape of the interviews conducted by [the Center provides] sufficient indications of reliability.
>
> 6. Based on the testimony of [R.R.'s] treating physician, the Court finds that [R.R.'s] testifying in the physical presence of the defendant will cause [R.R.] to suffer serious emotional distress such that [R.R.] could not reasonably communicate. As such, [R.R.] is found to be unavailable.
>
> 7. [R.R.] was available to cross-examine at the hearing held August 14, 2020.
>
> THEREFORE, the Court finds that the videotaped interviews of [R.R.] should be admitted at trial pursuant to I.C. 35-37-4-6.

Appellant's App. Vol. 2 at 116-17.

[21] On appeal, Albrecht first contends that the trial court's finding regarding the reliability of the interview videos is insufficiently specific. Albrecht did not object on this basis when the videos were offered into evidence at trial, and

therefore this contention is waived. *See Williams v. State*, 530 N.E.2d 759, 760 (Ind. Ct. App. 1988) ("An objection must be made at the time evidence is offered at trial to preserve any error in its admission or any defect in any preliminary determination as to its admissibility."), *trans. denied* (1990); *Stevens v. State*, 691 N.E.2d 412, 420 n.2 (Ind. 1997) ("A trial court should be given the opportunity to correct its own mistakes before asking a review from a court of appeals.") (quoting *Brown v. State*, 239 Ind. 184, 188, 154 N.E.2d 720, 721 (1958)), *cert. denied* (1998). Waiver notwithstanding, Albrecht offers nothing to suggest, let alone establish, that the trial court's reliability determination is clearly against the logic and effect of the facts and circumstances before it.

[22] Albrecht also contends that the trial court erred in finding R.R. to be unavailable, nitpicking at the length and frequency of Dr. Beckman's office visits with R.R., his lack of expertise in child psychology, and the fact that he "had not observed R.R. have a physical meltdown in his office like the one he speculated R.R. may have in court." Appellant's Br. at 20. Albrecht's argument is unpersuasive. The Protected Person Statute specifically states that a finding of unavailability may be based on the testimony of a "physician," such as Dr. Beckman, as well as "other evidence." R.R. has been Dr. Beckman's patient since birth, and Schnarr's testimony regarding R.R.'s sleeplessness, vomiting, and extreme anxiety before the protected person hearing buttresses the doctor's opinion that Albrecht's physical presence would cause R.R. to suffer serious emotional distress such that he could not reasonably communicate at trial. We conclude that ample evidence supports the trial

court's unavailability finding, and we find no abuse of discretion in the court's admission of the forensic interview videos.[3]

Section 2 – The trial court did not violate Albrecht's due process rights in allowing the State to amend the charging information.

[23] Next, Albrecht contends that the trial court erred in allowing the State to add the harmful performance count to the charging information, claiming that the amendment violated his due process rights. Indiana Code Section 35-34-1-5(b) provides that an information may be amended in matters of substance by the prosecuting attorney upon giving written notice to the defendant at any time up to thirty days before the omnibus date if the defendant is charged with a felony or before the commencement of trial if the amendment does not prejudice the defendant's substantial rights. "A defendant's substantial rights 'include a right to sufficient notice and an opportunity to be heard regarding the charge; and, if the amendment does not affect any particular defense or change the positions of either of the parties, it does not violate these rights.'" *Erkins v. State*, 13 N.E.3d 400, 405 (Ind. 2014) (quoting *Gomez v. State*, 907 N.E.2d 607, 611 (Ind. Ct. App. 2009), *trans. denied*). "Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges."

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[3] Albrecht also claims that the admission of the videos violated his constitutional confrontation rights because they "included statements about an act that had been uncharged at the time of the protected person hearing but was added prior to the jury trial." Appellant's Br. at 21. This argument is practically identical to his argument that the trial court erred in denying his request to depose R.R., which we address below.

Id. at 405-06 (quoting *Sides v. State*, 693 N.E.2d 1310, 1313 (Ind. 1998), *abrogated on other grounds by Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007)).

[24] "We generally review the trial court's decision on whether [to] permit an amendment to a charging information for an abuse of discretion." *Howard v. State*, 122 N.E.3d 1007, 1013 (Ind. Ct. App. 2019), *trans. denied*. An argument that an amendment violated the defendant's constitutional due process rights presents a question of law that we review de novo. *Id*. "[G]enerally a defendant's failure to request a continuance after a trial court allows a pre-trial substantive amendment to the charging information results in waiver." *Keller v. State*, 987 N.E.2d 1099, 1108 (Ind. Ct. App. 2013), *aff'd on reh'g*, 989 N.E.2d 1283, *trans. denied*. Albrecht failed to request a continuance here. In his reply brief, Albrecht argues that "a motion for continuance would not have given him adequate time to prepare his defense" because the trial court denied his request to depose R.R. regarding the new charge. Reply Br. at 7. But a continuance would have given Albrecht adequate time to request certification of the trial court's ruling(s) for interlocutory appeal.[4] Moreover, R.R.'s cross-examination testimony at the protected person hearing that he did not think that anything "bad" besides the molestations "ever happened" created a conflict with his forensic interview statements that Albrecht could have exploited at trial. Questions of waiver aside, we conclude that Albrecht had sufficient notice and

[4] At the initial hearing on the amended charging information, the trial court observed that Albrecht could "ask for a continuance and explore [his] other options …." Tr. Vol. 2 at 116.

an opportunity to be heard regarding the harmful performance charge and that the amendment did not affect his defense or change his position that he never acted inappropriately with R.R. Accordingly, we find no due process violation.[5]

Section 3 – The trial court did not violate Albrecht's constitutional rights in denying his request to depose R.R.

[25] In a related argument, Albrecht asserts that the trial court erred in denying his request to depose R.R. about the harmful performance charge, claiming that the ruling "implicated [his] right to confront and cross-examine an accuser under the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution." Appellant's Br. at 28. The State first argues, and we agree, that "Albrecht has waived any state-constitution claim under Article 1, Section 13 for failure to raise an independent state-law argument." Appellee's Br. at 37. *See Watson v. State*, 134 N.E.3d 1038, 1044 (Ind. Ct. App. 2019) (finding that defendant waived Article 1, Section 13 claim where he

[5] Albrecht complains that "the State was well-aware of the uncharged act and the condoms' connection to it yet waited until after the protected person hearing and just shy of two weeks prior to the commencement of the jury trial to file its Motion to Amend Charging Information." Appellant's Br. at 27-28. This argument ignores the fact that the State filed its motion to amend in response to Albrecht's own motion to redact any mention of the uncharged act from the forensic interview videos.

"fail[ed] to advance a separate argument under this provision."), *trans. denied* (2020).[6]

[26] The State also argues—and again, we agree—that decisions regarding pretrial depositions are governed by Indiana's trial rules and statutes, not the Sixth Amendment, and thus no constitutional violation occurred. *See State v. Owings*, 622 N.E.2d 948, 951-52 (Ind. 1993) (noting that criminal defendants "generally have no constitutional right to attend depositions" because "the constitutional right of confrontation applies only to 'those criminal proceedings in which the accused may be condemned to suffer grievous loss of either his liberty or his property,' and a deposition taken for purposes of discovering information is not such a proceeding.") (quoting *Bowen v. State*, 263 Ind. 558, 564, 334 N.E.2d 691, 695 (1975)); *Brady v. State*, 575 N.E.2d 981, 987 (Ind. 1991) (noting that right of confrontation "does not exist when the deposition of a witness is taken."); *Murphy v. State*, 265 Ind. 116, 119, 352 N.E.2d 479, 482 (1976) (noting that "criminal defendants have a right under our statute and rules of procedure to discovery, including the taking of depositions from those persons listed as State's witnesses."). Albrecht cites no other basis for his challenge, so we end our discussion here.

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[6] Albrecht quotes this Court's "observations about the confrontation rights under the Indiana Constitution and the Constitution of the United States of America" in *Gardner v.* State, 641 N.E.2d 641 (Ind. Ct. App. 1994), Appellant's Br. at 22, but he made no separate state constitutional argument below and has made none on appeal.

Section 4 –Schnarr's testimony did not result in fundamental error.

[27] Indiana Evidence Rule 704(b) provides, "Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." "Such testimony is an invasion of the province of the jurors in determining what weight they should place upon a witness's testimony." *Rose v. State*, 846 N.E.2d 363, 367 (Ind. Ct. App. 2006).

[28] Albrecht claims that Schnarr impermissibly vouched for the truthfulness of R.R.'s allegations on several occasions and therefore violated Evidence Rule 704(b). Because Albrecht did not object to the challenged testimony at trial, he failed to preserve his claim of error and therefore must establish that fundamental error occurred. "An error is fundamental … if it 'made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm.'" *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018) (quoting *Knapp v. State*, 9 N.E.3d 1274, 1281 (Ind. 2014)). "The element of such harm is not established by the fact of ultimate conviction but rather depends upon whether the defendant's right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he otherwise would have been entitled." *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014) (citation, quotation marks, and alterations omitted). "The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule."

Absher v. State, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007). "[A]t bottom, the fundamental-error doctrine asks whether the error was so egregious and abhorrent to fundamental due process that the trial judge should or should not have acted, irrespective of the parties' failure to object or otherwise preserve the error for appeal." *Whiting v. State*, 969 N.E.2d 24, 34 (Ind. 2012). "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." *Ryan*, 9 N.E.3d at 668.

[29] Only two of the challenged statements were made during the prosecutor's direct examination of Schnarr. The first statement recounted her interaction with R.R. after they reported his allegations against Albrecht to the police: "On the way back, I just -- you know, I asked him again if he was sure because this is a very serious accusation. And he was absolutely sure and then he just said he didn't want to talk about it anymore so I just -- I didn't push him." Tr. Vol. 2 at 166. This statement does not vouch, either directly or indirectly, for the truth of R.R.'s allegation; it merely describes R.R.'s certainty, and it does not suggest that Schnarr shared that certainty. The second statement was a response to a question regarding whether Schnarr and R.R. had discussed the details of the alleged crimes since they "had a meeting with DCS" sometime after the forensic interview: "I don't want to make him relive it." *Id*. at 168. This

isolated instance of what could be considered indirect vouching was neither egregious nor abhorrent to fundamental due process.

[30] Several of the challenged statements were made in response to defense counsel's questions regarding R.R.'s credibility, such as whether R.R. tells Schnarr what "he thinks [she] want[s] to hear" and whether "he doesn't lie[.]" *Id*. at 177. *See, e.g.*, *id*. at 177 ("He did it a lot more when he was younger, but he does want to please people."); *id*. at 177-78 ("I've never caught him in any big lies. It was always something silly like -- did you throw that on the floor? No."). And in response to defense counsel's question as to whether R.R. "still deals with the anxieties of issues related to Frank [Phillips]," Schnarr stated, "Yeah, that's one thing we're getting into with therapy right now because it has never really been addressed. The first molestation has never really been addressed." *Id*. at 173. Albrecht argues that the foregoing "statements imply that R.R. was truthful in making the allegations" against him. Appellant's Br. at 30. The State contends, and we agree, that defense counsel's questions invited any resulting error, which "precludes relief [under the fundamental error doctrine] from counsel's strategic decisions gone awry." *Brewington v. State*, 7 N.E.3d 946, 975 (Ind. 2014), *cert. denied* (2015).

[31] After the parties rested, a juror submitted a question, which was given to Schnarr without objection, regarding whether R.R. had "expressed anxiety about his friends knowing about these issues[.]" Tr. Vol. 2 at 183. Schnarr replied,

> No, not really. It's nothing he really talks about a lot, but if he does have a problem with his friends knowing because I have personally told him that he did nothing wrong. He has nothing to be ashamed of. That this was done to him and that there should be no anxiety ….

Id. at 183.

[32] Albrecht argues that this statement implies "that R.R. was truthful in making the allegations." Appellant's Br. at 30. The State contends,

> Albrecht's failure to object to the juror question is telling because, as his cross-examination strategy made clear, issues like trust, anxiety, and R.R.'s propensity for truthfulness were key parts of his overall defense strategy. R.R. invited the now-complained-of testimony during his own questioning, and in doing so, opened the door for further inquiry into the subject. Any claim for relief based on [Schnarr's] responses to cross-examination and juror questions [is] not available to Albrecht as a result of his strategic maneuvering.

Appellee's Br. at 50. We agree, *see Brewington*, 7 N.E.3d at 975, and therefore we reject Albrecht's fundamental error claim.

Section 5 – The prosecutor's statements did not result in fundamental error.

[33] Albrecht asserts that the prosecutor committed misconduct by improperly vouching for R.R. in her closing argument and on rebuttal. Because Albrecht failed to object to the prosecutor's statements at trial, he "must establish both the grounds for prosecutorial misconduct and the grounds for fundamental error to succeed on his claim." *Bean v. State*, 15 N.E.3d 12, 21 (Ind. Ct. App.

2014), *trans. denied*. "When determining whether prosecutorial misconduct has occurred, we first determine whether misconduct has in fact occurred, and if so, '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.'" *Id*. (quoting *Ryan*, 9 N.E.3d at 667).

[34] "It is inappropriate for a prosecutor to make an argument which takes the form of personally vouching for a witness." *Gaby v. State*, 949 N.E.2d 870, 880 (Ind. Ct. App. 2011); *see also* Ind. Professional Conduct Rule 3.4(e) (providing that a lawyer shall not, "in trial, … state a personal opinion as to … the credibility of a witness"). *Gaby*, 949 N.E.2d at 881. A statement concerning exaggeration or fantasy is the equivalent of a statement about truthfulness. *Bean*, 15 N.E.3d at 20. "However, a prosecutor may comment on the credibility of the witnesses as long as the assertions are based on reasons which arise from the evidence." *Lopez v. State*, 527 N.E.2d 1119, 1127 (Ind. 1988). Also, "[p]rosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." *Cooper v. State*, 854 N.E.2d 831, 836 (Ind. 2006).

[35] Albrecht claims that the following statements by the prosecutor amount to both misconduct and fundamental error:

> (1) [R.R.] didn't exaggerate. He knows fantasy from reality.
>
> (2) But the reality is what [R.R.'s] told us is, [Albrecht] sucked my d*ck and he put his thing on his penis and he went like this. That's what we need to know.

> (3) [R.R.] did not say anything about what [Albrecht] did for the purpose of getting [Albrecht] in trouble or certainly for getting himself out of trouble or because he didn't want to see [Albrecht] anymore because he did enjoy playing games.
>
> (4) So when you review the fact that [R.R.] has no motivation to make it up, he doesn't fantasize, he's not living in some alternative reality where he thinks that [Albrecht] might have done this and that he's able to give us details about things that we will [sic] in the defendant's home. Very personal, intimate things that we will find in the defendant's home that you wouldn't ordinarily know about. We believe that you have no reasonable doubt here. That it's clear that R.R. was very forthright and what he told you happened is exactly what happened.
>
> (5) R.R. is a normal kid who sometimes tells a little fib to keep himself out of trouble. He's not creating grand stories as the defense would like you to believe.
>
> (6) The child we're dealing here with is R.R. and you've heard from his mom the kind of child he his [sic]. That's the evidence in front of you. He doesn't make up wild tales to get other people in trouble.

Tr. Vol. 3 at 59, 60, 62, 63, 68.

[36] Statements 1 through 4 were made during the prosecutor's initial closing argument, and statements 5 and 6 were made during rebuttal. Statement 2 is merely a distillation of the State's case for the jury, and statement 3 is purely argument. Statements 5 and 6 are responses to defense counsel's assertions that R.R. was untruthful. *See, e.g.*, *id*. at 63 ("We must face the fact that sometimes children make false allegations."), 64 ("R.R.'s behavior poses several challenges. One of […] these manifestations of his behavior is deception.

When confronted with a problem, [R.R.] acknowledges sometimes he'll lie to protect himself."), 67 ("[R.R.] clearly was upset, but that could be because of something that happened to him, but it also could be because he's upset and conflicted about knowing that […] his false statements are hurting someone that he cares about."). Consequently, they are not improper.

[37] Only statements 1 and 4 could be considered problematic with respect to vouching, but we cannot conclude that they made a fair trial impossible, either individually or collectively. The trial court's very last instructions to the jurors before closing arguments were that their "verdict should be based on the law and the facts as [they] find them" and that "statements made by the attorneys are not evidence." *Id*. at 55. The prosecutor reiterated the latter at the beginning of her remarks, and we assume that the jury followed the court's instructions. *Jones v. State*, 101 N.E.3d 249, 258 (Ind. Ct. App. 2018), *trans. denied*. Moreover, R.R.'s descriptions of Albrecht's criminal activities during the forensic interview and the protected person hearing were consistent and compelling, and he stuck with his story even though he stated that he loved Albrecht and did not want him to get in trouble. Assuming, without deciding, that the prosecutor's relatively isolated statements could be deemed misconduct, they were not sufficiently egregious and abhorrent to fundamental due process to constitute fundamental error.

Section 6 – Albrecht's convictions are supported by sufficient evidence.

[38] Finally, Albrecht argues that his convictions are not supported by sufficient evidence. In reviewing a challenge to the sufficiency of the evidence to support a conviction, we neither reweigh the evidence nor judge the witnesses' credibility, "and we respect the jury's exclusive province to weigh conflicting evidence." *Patterson v. State*, 909 N.E.2d 1058, 1061 (Ind. Ct. App. 2009). "We must consider only the probative evidence and reasonable inferences supporting the verdict." *Id.* "If the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt, we must affirm the conviction." *Id.*

[39] Regarding the molestations, Albrecht challenges only the sufficiency of the evidence that they were committed on the dates specified in the charging information. This argument is a nonstarter. "In child molestation cases, the exact date is only important in limited circumstances, such as where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies." *Love v. State*, 761 N.E.2d 806, 809 (Ind. 2002). No such circumstances are present here; for a person to be convicted of child molesting under Indiana Code Section 35-42-4-3, the victim must be under fourteen years of age, and it is undisputed that R.R. was only thirteen at the time of trial.

[40] As for the remaining conviction, Albrecht does not contend that the acts of masturbation described by R.R. during his forensic interview do not constitute harmful performance before a minor for purposes of Indiana Code Section 35-

49-3-3. Instead, he argues that R.R. "did not mention anything related to that charge during the [protected] person hearing" and that the presence of condoms in his apartment and R.R.'s knowledge of its layout "do not support the conviction in [and] of themselves because it is legal and common for a young man to have condoms and R.R. spent time at Albrecht's apartment, so he would have knowledge of the apartment layout regardless of if he was molested." Appellant's Br. at 36. This argument is merely an invitation to reweigh the evidence in Albrecht's favor, which we may not do. Therefore, we affirm his convictions.

[41] Affirmed.

Riley, J., and Mathias, J., concur.