MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Lisa M. Johnson
Brownsburg, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Tyler Banks
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Jimmy L. England,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 26, 2021

Court of Appeals Case No. 20A-CR-2130

Appeal from the Greene Circuit Court

The Honorable Erik C. Allen, Judge

Trial Court Cause No. 28C01-1910-F1-2

Najam, Judge.

Statement of the Case

[1] Jimmy L. England appeals his conviction for child molesting, as a Level 4 felony, and his adjudication as a habitual offender. England raises a single issue for our review, which we restate as whether the trial court committed fundamental error when it did not intervene to restrict the State's closing arguments. We affirm.

Facts and Procedural History

[2] In October 2019, the State charged England with two counts of child molesting, one as a Level 1 felony and one as a Level 4 felony. The State later amended the information to also allege that England was a habitual offender. England's alleged victim, C.G., was twelve years old at the time of the offenses and suffered from multiple physical and intellectual disabilities.

[3] At England's trial, C.G. testified that, in the summer of 2019, England approached her in her home, removed his penis from his pants, made her put her hand on his penis, made her "move[her] hand around . . . on it" for "a couple minutes," and "made [her] kiss it" by forcing her head "down onto" it for a "few seconds." Tr. Vol. II at 184. While he made C.G. do those acts, England touched C.G.'s breasts and vagina.

[4] Alverton Lerch, who lived with C.G. and C.G.'s mother at that time, also testified. He stated that he walked into the room when England was compelling C.G. to engage in those acts. He stated that he observed C.G. pull away when he walked in and further observed England "trying to put his penis

back in his pants." *Id.* at 118. And Greene County Sheriff's Detective Shawn Cullison testified that, when he interviewed England about the incident, England "changed his story" at one point before admitting that C.G. "was laying on top of him with his penis out." *Id.* at 212.

[5] Prior to the parties' closing arguments, the court instructed the jury as follows:

> [Y]ou have the right to determine both the law and the facts. The Court's instructions are your best source in determining the law.
>
> * * *
>
> When the evidence is completed, the attorneys may make final arguments. These final arguments are not evidence. The attorneys are permitted to characterize the evidence, discuss the law[,] and attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit.

Id. at 94, 100.

[6] The State then argued as follows in its lead closing argument:

> [A]bout this intent to arouse element that we're going to discuss on [the Level 4 felony]. [The] Indiana Supreme Court has stated that the intent to arouse element of child molesting may be established by circumstantial evidence and may be inferred from the Defendant's conduct in the natural and usual sequence to which such conduct usually points. There've been a number of cases over the course of Indiana history that . . . go on to talk about intent to arouse or satisfy sexual desires and they may be inferred from the evidence that the accused intentionally touched [a] child's genitals. . . . [In] Lockhart, the [d]efendant[] rubbed

> an eleven-year-old boy's penis. In the [Weis] case, . . . the [d]efendant . . . rubbed a ten-year-old girl's vagina. The court's upheld [sic] that was clearly done with an intent to arouse . . . or satisfy sexual desires of either of the [d]efendant or the young victim.

Tr. Vol. III at 15-16. England did not object to those statements.

[7] In his closing argument, England focused on various purported inconsistencies with the State's evidence. The State responded to England's argument in its rebuttal:

> [Defense counsel] spent quite a bit of those twelve minutes talking to you about little inconsistencies. And, and I expected it and she's doing her job. I mean that [is] just [a] common [d]efense tactic. And it's why I spend so much time during jury selection and also . . . in opening and now in closing talking about what you're [sic] focus is. And your focus is . . . , did the State prove each element of each offense? Not what color jeans somebody was wearing. Not what time of day this happened. Did the State prove each of those elements . . . ? So again, little inconsistencies, there's going to be little inconsistencies in every trial . . . . This happened almost a year ago. And, we're talking about a twelve, now a thirteen-year-old girl, who does have some delays. And . . . two parents trying to come in here and tell you the truth about what happened. But again, it's been a year. There are little inconsistencies. But ask yourself, were those elements met?

Id. at 26-27. Again, England did not object to those statements.

[8] The court then read its final instructions to the jury. The court reiterated that the jury was the finder of the law and the facts, that the court's instructions

were the jury's "best source in determining the law," and that the jury's verdict must be "based only on the evidence admitted and the instructions on the law." *Id.* at 31, 36. After deliberating, the jury found England not guilty of the Level 1 felony charge but guilty of the Level 4 felony charge. England then admitted to being a habitual offender. After a sentencing hearing, the court sentenced England to an aggregate term of twenty-six years. This appeal ensued.

Discussion and Decision

[9] On appeal, England asserts that the trial court committed fundamental error when it did not interject itself in the State's closing arguments.[1] "An error is fundamental, and thus reviewable on appeal, 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) (quotation marks omitted). Further, fundamental error

> is extremely narrow and encompasses only errors so blatant that the trial judge should have acted independently to correct the situation. At the same time, *if the judge could recognize a viable reason why an effective attorney might not object, the error is not blatant enough to constitute fundamental error*.

Id. (emphasis added; quotation marks and citations omitted). "An attorney's decision not to object . . . is often a tactical decision, and our trial courts can

[1] England does not dispute that he failed to preserve his arguments with timely objections in the trial court.

readily imagine any number of viable reasons why attorneys might not object." *Nix v. State*, 158 N.E.3d 795, 801 (Ind. Ct. App. 2020), *trans. denied*. And, in the similar context of requesting an admonishment, we have recognized that "[t]he risk calculus inherent in a request for an admonishment is an assessment that is nearly always best made by the parties and their attorneys and not *sua sponte* by our trial courts." *Merritt v. State*, 99 N.E.3d 706, 710 (Ind. Ct. App. 2018), *trans. denied*.

[10] England first asserts that the State's comment in its lead argument at closing that England's intent to arouse either his or C.G.'s sexual desires may be inferred from an act of touching, although a correct statement of law, was "problematic" for three reasons. Appellant's Br. at 7. In particular, he objects to the State's assertion because it "concerned an appellate sufficiency review standard," it "unfairly focused the jury's attention on and highlighted a single piece of evidence," and it undermined the State's burden of proof by allowing the jury "to infer the existence of one element . . . from the evidence of another element." *Id.*

[11] But we conclude that England's arguments do not meet the high burden of showing fundamental error. As we explained in *Merritt*, "admonishments are double-edged swords. On the one hand, they can help focus the jury . . . . However, on the other hand, they can draw unnecessary attention . . . ." 99 N.E.3d at 710. So also here—the trial court could readily have concluded that defense counsel legitimately decided not to object to the State's comments so as

to not draw more attention to them. Accordingly, the trial court had no obligation to interject itself into that calculus.

[12] England also asserts that the State's comment in its rebuttal that it was a "common [d]efense tactic" to point out inconsistencies resulted in fundamental error. *See* Tr. Vol. III at 26. But England's argument here does not demonstrate how the State's rebuttal made a fair trial impossible. Indeed, in *Ryan v. State*, the Indiana Supreme Court held that there was no error in the prosecutor saying that the defense attorney's arguments were "how guilty people walk" and a "classic . . . trick." 9 N.E.3d 663, 669-70 (Ind. 2014). And that holding was on a properly preserved objection, not the heightened burden England faces to show fundamental error. The State's rebuttal here was not even close to the argument permitted in *Ryan*. Accordingly, we reject England's argument that the State's rebuttal resulted in fundamental error, and we affirm England's convictions.

[13] Affirmed.

Riley, J., and Crone, J., concur.