MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Kay A. Beehler
Terre Haute, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Caroline G. Templeton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Naison Jean,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff.

July 27, 2022

Court of Appeals Case No. 21A-CR-1711

Appeal from the Daviess Superior Court

The Honorable Dean Sobecki, Judge

Trial Court Cause No. 14D01-1901-F4-37

Pyle, Judge.

Statement of the Case

[1] Naison Jean ("Jean") appeals, following a jury trial, his conviction for Level 4 felony burglary.[1] Jean argues that: (1) the trial court erred by determining that he had knowingly and voluntarily waived his right to counsel; and (2) the prosecutor, during closing arguments, engaged in prosecutorial misconduct that constituted fundamental error. Concluding that the trial court did not err by determining that Jean had knowingly and intelligently waived his right to counsel and that Jean has not met his burden of showing prosecutorial misconduct and fundamental error, we affirm Jean's conviction.

[2] We affirm.

Issues

1. Whether the trial court erred by determining that Jean had knowingly and intelligently waived his right to counsel.

2. Whether the prosecutor engaged in prosecutorial misconduct that constituted fundamental error.

Facts

[3] On December 28, 2018, Brian Critchlow ("Critchlow") returned to his house in Daviess County and discovered that someone had forced open his back door. Critchlow noticed that his flatscreen television and a laptop were missing, and he called the police. Washington Police Officer Case Cummings ("Officer

[1] IND. CODE § 35-43-2-1.

Cummings") and another officer went to Critchlow's house. Critchlow had a security camera set up to record his back door, so he accessed the surveillance footage, which showed two individuals breaking into Critchlow's house and then leaving the house with Critchlow's property. Critchlow showed the surveillance video to the officers. At the time Officer Cummings watched the video, he had his bodycam activated. Officer Cummings, who had had prior encounters with Jean, immediately recognized Jean to be one of two people in the video. Officer Cummings also recognized Jean's accomplice. At the time of the offense, Jean was on probation.

[4] The State charged Jean with Level 4 felony burglary in January 2019. It appears that Jean initially represented himself pro se.[2] On February 4, 2019, Jean sent the trial court a letter, in which he apparently requested a bond modification and to be transferred to pretrial home detention. The trial court held a hearing on Jean's motion on February 22, 2019, ordered community corrections to evaluate Jean, and continued the hearing to March 1, 2019.

[5] During the March 1, 2019 hearing, the trial court denied Jean's request to be transferred to home detention. Additionally, Jean "request[ed] pauper counsel[,]" and the trial court appointed counsel ("Counsel #1") for Jean. (App. Vol. 2 at 4). Thereafter, Counsel #1 filed a motion to either reduce

[2] The record on appeal does not contain transcriptions of the initial hearing and some other hearings. Additionally, Jean's Appendix does not contain a copy of some of the letters that Jean had filed with the trial court.

Jean's bond or release him to pretrial community corrections. Following a hearing in May 2019, the trial court denied Jean's request.

[6] A few months later, on July 5, 2019, Jean filed a letter with the trial court. The trial court notified Jean's counsel and the State of Jean's letter. A few days later, Counsel #1 filed a motion to withdraw. The trial court granted Counsel #1's motion and appointed another attorney ("Counsel #2") to represent Jean. Shortly after Counsel #2 had entered his appearance, Jean filed two more letters—one on July 17, 2019 and the second on July 31, 2019—with the trial court. In these letters, Jean apparently requested to represent himself and requested to be placed on work release. The trial court notified Jean's counsel and the State of Jean's two letters.

[7] On September 12, 2019, the trial court held a pretrial hearing and addressed Jean's request to represent himself. When addressing Jean about his desire to proceed pro se, the trial court informed Jean that he would be responsible for being familiar with the Rules of Trial Procedure, Rules of Criminal Procedure, and the Rules of Evidence. Additionally, the trial court warned Jean that if he were to represent himself, then the court would not be able to explain things to him or help him. The trial court told Jean about Abraham Lincoln's quote that "a lawyer [who] represents himself has a fool for a client" and explained its applicability to Jean's decision. (Supp. Tr. Vol. 2 at 8). During the hearing, Counsel #2 informed the trial court that he had tried to communicate with Jean about this burglary case and his probation violation case but that Jean did not want to listen or speak to Counsel #2. Jean then confirmed that he wanted to

represent himself. The trial court told Jean that it thought that Jean was "making a tremendous mistake in representing [him]self, but [that he] ha[d] a right to do that." (Supp. Tr. Vol. 2 at 14). The trial court granted Jean's request to proceed pro se, allowed Counsel #2 to withdraw his appearance, and set trial dates for Jean's trial in this cause for January 21, 2020.[3] The trial court informed Jean that he would need to subpoena any witnesses and conduct discovery pursuant to the applicable rules. In regard to Jean's request to be placed on work release, the trial court ordered for community corrections to reevaluate Jean. At the end of the hearing, the trial court confirmed that Jean "underst[oo]d what [he was] biting off here" and that Jean knew that he was "on [his] own . . . now." (Supp. Tr. Vol. 2 at 17, 19).

[8] Jean appeared for a hearing on November 6, 2019. Jean requested a bond reduction, and the trial court modified his bond. The trial court released Jean on his own recognizance with the condition that he be placed in a pre-trial community corrections program on work release.

[9] On December 31, 2019, Jean appeared at a pretrial hearing, during which Jean "indicate[d] [that] he would like an attorney[.]" (App. Vol. 2 at 7). The trial court cancelled the January 2020 jury trial date and appointed counsel ("Counsel #3") for Jean.

---

[3] The trial court also set a hearing date for the petition to revoke Jean's probation and suspended sentence in another cause for November 6, 2020, and it set a trial date for another pending cause for February 2020.

[10] Thereafter, in February 2020, community corrections filed a notice to terminate Jean's placement after he had been arrested on charges of domestic battery and criminal mischief. The trial court terminated Jean's pre-trial placement and placed him on a no-bond hold.

[11] Following a May 2020 pretrial conference, the trial court scheduled Jean's jury trial for October 20, 2020. Thereafter, on July 7, 2020, Jean sent the trial court a letter, in which Jean stated that he no longer wanted a court-appointed attorney. Jean stated that his attorney was "doing nothing" for him. (App. Vol. 1 at 25). Jean filed this letter in this cause and in his four other pending causes. The trial court notified Jean's counsel and the State of Jean's letter.

[12] A few months later, on September 18, 2020, Jean sent the trial court another letter in which he again stated that he no longer wanted counsel to represent him. In this letter, Jean stated that his attorney had "done nothing" for him, and he asserted that his counsel would "hang[] up" on Jean when Jean called him. (App. Vol. 2 at 26). The trial court notified Jean's counsel and the State of Jean's letter.

[13] On October 14, 2020, Counsel #3 filed a motion asking the trial court to consider Jean's request to proceed pro se. This motion provided as follows:

> 1. Throughout the history of this case, [Jean] has not been satisfied with any of the three public defenders this Court has appointed for him. He has written letters to the Court on various occasions and for a period of time represented himself in this matter and then requested court appointed counsel again.

> 2. [Jean] has requested from counsel that counsel withdraw and he be allowed to represent himself. Counsel spoke with [Jean] about his request and if that is how he wants to proceed. Counsel advised [Jean] that the Court is unlikely to continue the trial and if his request is granted, the trial will still commence on October 20, 2020 and that [Jean] will be held to the same standard as a licensed attorney. [Jean] indicated that he desires to represent himself. Counsel advised [Jean] of the pitfalls of representing himself and that counsel believes it would be a mistake for him to represent himself. [Jean] indicated that he wanted to represent himself and wants to tell the judge everything he believes that counsel has done wrong.
>
> 3. Counsel has no choice but to bring this matter before the Court as [Jean] has the constitutional right to represent himself.

(App. Vol. 2 at 38).

[14] On October 19, 2020, the trial court held a hearing on Jean's motion to proceed pro se. Jean told the trial court that he wanted to represent himself and that he understood that the jury trial was not going to be continued. The trial court told Jean that he had "the right to represent [him]self at trial, just the same as [he] ha[d] the right to have a lawyer representing [him]." (Tr. Vol. 2 at 25). Before the trial court allowed Jean to make a final decision, the court explained the services and skills of appointed counsel that Jean would be giving up if he were to proceed pro se. For example, the trial court explained that counsel had skills in selecting a jury, presenting a defense at trial, examining and cross-examining witnesses, recognizing objectionable evidence, and preserving the record for purposes of appeal. The trial court informed Jean that he would "not

receive any special treatment" and warned Jean that his decision "not to have an attorney c[ould] turn out to be a very bad decision." (Tr. Vol. 2 at 26, 27).

[15] The trial court then asked Jean about his level of education and legal experience. Jean stated that he had finished high school and acknowledged that he did not have any legal training. Additionally, the trial court confirmed that Jean had not been threatened and had not been promised any special treatment for him to proceed without counsel. The trial court then confirmed that Counsel #3 was prepared for the jury trial the following day. Additionally, the trial court questioned Counsel #3 about his specific preparations and "everything that he needed to do to prepare for the trial[.]" (Tr. Vol. 2 at 32). The trial court told Jean that Counsel #3 was Jean's "third competent counsel" and that counsel had "done everything that he needs to prepare for this trial tomorrow[.]" (Tr. Vol. 2 at 32). The trial court then asked Jean if he wanted to proceed to trial with Counsel #3, who was "fully prepared to try the case," or if he wanted to "represent [him]self, given all the things that we've talked about all the other times." (Tr. Vol. 2 at 32). Jean responded that he "want[ed] to represent [him]self." (Tr. Vol. 2 at 33). The trial court granted Jean's request to proceed pro se and provided Jean with standby counsel.

[16] The following day, the trial court held a two-day jury trial. The State presented Critchlow and Officer Cummings as witnesses, who testified to the facts of the offense as set forth above. The State also introduced into evidence Critchlow's surveillance video and Officer Cummings' bodycam video.

[17] Officer Cummings testified that, when he had originally watched Critchlow's surveillance video, he had "know[n] exactly who the individuals [we]re." (Tr. Vol. 2 at 137). The officer also confirmed that he was confident in his identification of Jean and that he did not have any doubts. During the officer's testimony, the State introduced booking photographs of Jean taken in January 2019 after the burglary. When Jean cross-examined Officer Cummings, Jean stated that it was not Jean in the video. Following the officer's testimony, the trial court gave jurors an opportunity to provide written questions. One juror submitted a "request . . . to get a still shot from [the] video[.]" (Tr. Vol. 2 at 151).[4] The trial court noted that the juror's request was not a question to the witness and was not proper.

[18] After the State had rested its case, Jean consulted with standby counsel for over an hour during the lunch recess and prepared notes for final argument. Thereafter, the trial court asked Jean if he was "still intending to represent himself[,]" and Jean responded, "Yes." (Tr. Vol. 2 at 154). Jean did not testify or present any witnesses.

[19] During the State's closing argument, the prosecutor discussed the surveillance video, which, he argued, showed "the actual crime" occurring and provided the jury with "video evidence of who committed the crime." (Tr. Vol. 2 at 167). The prosecutor then addressed the prior juror request to obtain a still photo

[4] The record on appeal does not contain a copy of the juror's written request.

from the video. The prosecutor stated, "You don't need to compare this because you're a stranger trying to compare two different views of a person you don't know." (Tr. Vol. 2 at 168). The prosecutor then reminded the jury that it had presented evidence of Jean's identification. Specifically, Officer Cummings, who had already known Jean, had testified that "he immediately knew exactly who it was[.]" (Tr. Vol. 2 at 168). The prosecutor argued that the officer's testimony about his immediately recognition of Jean showed the officer's credibility of his identification testimony.

[20] When Jean made his closing argument, he stated that he was not in the surveillance video. He argued that the State had not proven that he was the person in Critchlow's surveillance video because the State had not taken his fingerprints, had not found shoe prints, and had not shown that he had Critchlow's television. Additionally, Jean argued that it did not matter if Officer Cummings thought Jean was in the video and that the only thing that mattered was if the jury thought it was Jean on the video.

[21] During the State's rebuttal argument, the prosecutor reminded the jury that Jean's closing argument and the State's closing argument were not evidence. The jury found Jean guilty as charged. The trial court imposed a 3,600-day sentence to be served in the Indiana Department of Correction.

[22] Jean now appeals.

Decision

[23] Jean argues that: (1) the trial court erred by determining that he had knowingly and voluntarily waived his right to counsel; and (2) the prosecutor engaged in prosecutorial misconduct that constituted fundamental error. We will review each argument in turn.

1. Waiver of Counsel

[24] Jean contends that the trial court erred by determining that he had knowingly and voluntarily waived his right to counsel. We disagree.

[25] The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to counsel. *Hopper v. State*, 957 N.E.2d 613, 617 (Ind. 2011). "This protection also encompasses an affirmative right for a defendant to represent himself in a criminal case." *Id.* When a defendant waives his right to counsel and proceeds pro se, the trial court must determine that the defendant's waiver of counsel is knowingly, intelligent, and voluntary. *Jones v. State*, 783 N.E.2d 1132, 1138 (Ind. 2003). A trial court should make the defendant "aware of the dangers and disadvantages of self-representation, so that the record will establish that [the defendant] knows what he is doing and [that] his choice is made with eyes open." *Hopper*, 957 N.E.2d at 618 (internal quotation marks and citations omitted). Our supreme court has made clear that there is no definitive language that a trial court must use in its advisement to a defendant who wishes to waive his right to counsel. *See Poynter v. State*, 749 N.E.2d 1122, 1126 (Ind. 2001) (explaining that "[t]here are no prescribed

'talking points' the court is required to include in its advisement to the defendant"); *Hopper*, 957 N.E.2d at 618 ("There is no particular formula or script that must be read to the defendant."); *Kubsch v. State*, 866 N.E.2d 726, 736 (Ind. 2007) ("There are no magic words a judge must utter to ensure a defendant adequately appreciates the nature of the situation."), *cert. denied*. "Rather, determining if a defendant's waiver was knowing and intelligent depends on the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." *Kubsch*, 866 N.E.2d at 736 (internal quotation marks and citation omitted).

[26] To determine whether a defendant's waiver of counsel was knowingly and voluntarily made, courts must consider: "(1) the extent of the court's inquiry into the defendant's decision[;] (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation[;] (3) the background and experience of the defendant[;] and (4) the context of the defendant's decision to proceed pro se." *Hopper*, 957 N.E.2d at 618. We review de novo a trial court's determination that a defendant waived his right to counsel. *McBride v. State*, 992 N.E.2d 912, 917 (Ind. Ct. App. 2013), *reh'g denied*, *trans. denied*.

[27] Here, the record reveals that Jean's decision to waive his right to counsel and to proceed pro se was made with his eyes opened. *See Hopper*, 957 N.E.2d at 618. Between March 2019 and October 2020, the trial court provided Jean with three different appointed attorneys. When Jean expressed his desire to proceed pro se and no longer retain Counsel #2, the trial court advised Jean of the dangers

of self-representation and the advantages of having counsel appointed for him. The trial court told Jean that it thought that Jean was "making a tremendous mistake in representing [him]self, but [that he] ha[d] a right to do that." (Supp. Tr. Vol. 2 at 14). Jean confirmed that he understood the trial court's advisements, yet he expressed his desire to waive his right to counsel. The trial court granted Jean's request to proceed pro se, allowed Counsel #2 to withdraw his appearance, and set trial dates for Jean's trial in this cause for mid-January 2020.

[28] In late December 2019, Jean informed the trial court that he wanted appointed counsel. The trial court cancelled the January trial date and appointed Counsel #3. Following a May 2020 pretrial conference, the trial court scheduled Jean's jury trial for October 20, 2020. In July and September 2020, Jean sent the trial court letters, in which Jean stated that he no longer wanted a court-appointed attorney. Thereafter, in mid-October 2020, Counsel #3 filed a motion for the trial court to consider Jean's request to proceed pro se. This motion indicated that Counsel #3 had advised Jean of the pitfalls of representing himself, informed him that he would be held to the same standard as a licensed attorney, and told Jean that Counsel #3 believed it would be a mistake for Jean to proceed pro se.

[29] Thereafter, the trial court held a hearing on Jean's self-representation request. The trial court again advised Jean of the dangers of self-representation and the specific advantages of having counsel appointed for him. The trial court also inquired into Jean's background, experience, and his decision for declining the

appointment of counsel. The trial court informed Jean that he would "not receive any special treatment" and warned Jean that his decision "not to have an attorney c[ould] turn out to be a very bad decision." (Tr. Vol. 2 at 26, 27). Nevertheless, Jean stated that he wanted to represent himself at trial the following day.

[30] Based on the particular facts and circumstances surrounding this case, we conclude that the trial court did not err by determining that Jean had knowingly and voluntarily waived his right to counsel.

2. Prosecutorial Misconduct

[31] Jean asserts that, during closing arguments, the prosecutor engaged in prosecutorial misconduct when he made a reference to the juror's prior request for a still photo and directed the jury to focus on Officer Cummings's testimony. Jean acknowledges that he neither objected to the prosecutor's statement nor asked for an admonishment and that he, therefore, has the burden of proving fundamental error.

[32] Our Indiana Supreme Court has explained the relevant standard of review for a claim of prosecutorial misconduct and fundamental error as follows:

> In reviewing a claim of prosecutorial misconduct . . . , we determine (1) whether misconduct occurred, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected otherwise. A prosecutor has the duty to present a persuasive final argument and thus placing a defendant in grave peril, by itself, is not misconduct. Whether a

prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct. The gravity of peril is measured by *the probable persuasive effect* of the misconduct *on the jury's decision* rather than the degree of impropriety of the conduct. To preserve a claim of prosecutorial misconduct, the defendant must—at the time the alleged misconduct occurs—request an admonishment to the jury, and if further relief is desired, move for a mistrial.

Our standard of review is different where a claim of prosecutorial misconduct has been procedurally defaulted for failure to properly raise the claim in the trial court, that is, *waived* for failure to *preserve* the claim of error. The defendant must establish not only the grounds for prosecutorial misconduct but must also establish that the prosecutorial misconduct constituted fundamental error. Fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to make a fair trial impossible. In other words, to establish fundamental error, the defendant must show that, under the circumstances, the trial judge erred in not *sua sponte* raising the issue because alleged errors (a) constitute clearly blatant violations of basic and elementary principles of due process and (b) present an undeniable and substantial potential for harm. 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. In evaluating the issue of fundamental error, our task in this case is to look at the alleged misconduct in the context of all that happened and all relevant information given to the jury—including evidence admitted at trial, closing argument, and jury instructions—to determine whether the misconduct had such *an undeniable and substantial effect on the jury's decision* that a fair trial was impossible.

Ryan v. State, 9 N.E.3d 663, 667-68 (Ind. 2014) (emphasis in original; internal quotations, citations, and footnotes omitted), *reh'g denied*.

[33] Jean asserts that the prosecutor engaged in prosecutorial misconduct by making the following statement: "You don't need to compare this because you're a stranger trying to compare two different views of a person you don't know." (Tr. Vol. 2 at 168). He asserts that "the prosecutor invited the jury to disregard the evidence in the security camera clip and rely only upon the testimony of Officer Cummings." (Jean's Br. 18). Jean contends that the prosecutor's statement constituted prosecutorial misconduct because it invaded the province of the jury and improperly vouched for a witness.

[34] From a review of the record, we do not agree with Jean's assertion that the prosecutor's comment was a request to disregard the facts or that it equated to improper vouching. During the State's closing argument, the prosecutor discussed the surveillance video, which he argued, showed "the actual crime" occurring and provided the jury with "video evidence of who committed the crime." (Tr. Vol. 2 at 167). The prosecutor then addressed the prior juror request to obtain a still photo from the video. The prosecutor stated, "You don't need to compare this because you're a stranger trying to compare two different views of a person you don't know." (Tr. Vol. 2 at 168). The prosecutor then reminded the jury that it had presented evidence of Jean's identification through Officer Cummings's testimony. Specifically, Officer Cummings, who had already known Jean, had testified that "he immediately knew exactly who it was" on the surveillance video. (Tr. Vol. 2 at 168). The

prosecutor argued that the officer's testimony about his immediate recognition of Jean showed the officer's credibility of his identification testimony. "A prosecutor may comment on the credibility of a witness as long as the assertions are based on reasons arising from the evidence." *Malloch v. State*, 980 N.E.2d 887, 910 (Ind. Ct. App. 2012), *trans. denied*. When viewing the full context of the prosecutor's statements, we conclude that the prosecutor's statement was not a request for the jury to disregard the law, facts, or any admitted evidence. Therefore, the prosecutor did not engage in misconduct. *See Hollowell v. State*, 707 N.E.2d 1014, 1024 (Ind. Ct. App. 1999) (explaining that in judging the propriety of the prosecutor's remarks, we consider the statement in the context of the argument as a whole).

[35] Furthermore, Jean has not shown that the prosecutor's comment resulted in grave peril, especially where the trial court instructed the jury that it had the right to determine the law and the facts under the Indiana Constitution, that the jury was the exclusive judges of the evidence, and that the statements or arguments of the attorneys did not constitute evidence. Where a "jury is properly instructed, we will presume they followed such instructions." *Gibson v. State*, 133 N.E.3d 673, 696 (Ind. 2019) (cleaned up), *reh'g denied*, *cert. denied*. *See also Steinberg v. State*, 941 N.E.2d 515, 531 (Ind. Ct. App. 2011) (explaining that "final instructions are presumed to correct any misstatements of law made during final argument" and concluding that there was no prejudice by a prosecutor's closing remarks where the trial court correctly instructed the jury), *trans. denied*.

[36] Lastly, in light of "all relevant information given to the jury—including evidence admitted at trial, closing argument, and jury instructions[,]" we conclude that Jean has failed to show that the prosecutor's comment resulted in fundamental error and denied him a fair trial. *See Ryan,* 9 N.E.3d at 668 (explaining that when evaluating the issue of fundamental error, we are to review the alleged misconduct in the context of all that happened at trial and all relevant information given to the jury). Accordingly, we affirm Jean's conviction.

[37] Affirmed.

Robb, J., and Weissmann, J., concur.