

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ellen E. Ellet,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 7, 2023

Court of Appeals Case No.
22A-CR-1253

Appeal from the Noble Superior
Court

The Honorable Steven T. Clouse,
Judge

Trial Court Cause No.
57D01-2103-F5-14

Memorandum Decision by Judge Weissmann
Judges May and Crone concur.

Weissmann, Judge.

- [1] Ellen Ellet appeals her convictions on two counts of domestic battery. She argues the trial court fundamentally erred in admitting testimony that vouched for the credibility of the victim's testimony. We disagree and affirm.

Facts

- [2] Ellet and her ex-husband have two sons, I.E., 10 years old at the time, and E.E., 8 years old, and a daughter, A.E., 6 years old. Ellet had legal custody of the children, but all three children lived mainly with their father.
- [3] One day, while the children were staying at Ellet's house, E.E. and Ellet began shouting at each other after Ellet's dog escaped from E.E.'s bedroom and entered Ellet's bedroom closet. When Ellet asked E.E. to be more respectful, E.E. responded, "[O]r what?" Tr. Vol. II, p. 195. Moments later, Ellet walked into E.E.'s bedroom carrying a clothes hanger.
- [4] Seeing the hanger in Ellet's hand, E.E. asked "What are you going to do with that?" *Id.* Ellet responded, "I'm either going to hit you [with the hanger] or you[re] going to do what I say." *Id.* Ellet proceeded to strike E.E. with the hanger in the chest and back. I.E. attempted to stop Ellet by grabbing her, but Ellet shrugged I.E. off, throwing him onto the bed. When E.E. attempted to shove Ellet away from him, Ellet struck him in the left ear with her fist. Ellet also called E.E. several derogatory names. E.E. suffered bruising on his left ear and left arm. The children reported the incident to their father the next

afternoon, and he reported the abuse to the Indiana Department of Child Services (DCS) a few days later.

- [5] A DCS family case manager (FCM), Karlee Miller, investigated the incident. FCM Miller interviewed all three children about the incident and then arranged for further forensic interviews for each of the three children at a local child advocacy center. E.E. also received a pediatric evaluation to determine whether his injuries may have been self-inflicted. Based on these interviews and the pediatric evaluation, FCM Miller determined that the report of abuse had merit.
- [6] The State charged Ellet with two counts of domestic battery, a Level 5 and a Level 6 felony. At Ellet's jury trial, the State called FCM Miller to explain DCS's investigation into the incident. After describing the investigative process, FCM Miller stated that the children's stories all "aligned" and she made the decision to "substantiate the investigation" into the abuse allegations against Ellet. Tr. Vol. III, pp. 63, 67. When asked to elaborate, FCM Miller explained that "substantiation can be coincided with guilty." *Id.* at 67.
- [7] Ellet objected to FCM Miller's description as a misstatement of the law. After an inaudible sidebar, the State asked a series of clarifying questions. First, the State questioned FCM Miller about whether the burden of proof applied to a DCS "substantiation" is "much lower" than the burden of proof in a criminal case. *Id.* at 68. FCM Miller agreed it was. The prosecutor then clarified, "You don't look at it from a beyond a reasonable doubt standard, as we do," to which FCM Miller again agreed. *Id.*

- [8] During cross-examination, FCM Miller elaborated on the forensic interview process and explained that Ellet's request to observe the children's interviews was denied because, as its standard, "DCS does not allow the perpetrators to come to the interviews, as it can be intimidating for the children." *Id.* at 79. Besides her misstatement of law objection, Ellet did not ask the trial court to exclude any of FCM Miller's testimony.
- [9] The jury found Ellet guilty as charged, and the trial court sentenced her to an aggregate sentence of 4 years imprisonment, with 3½ years suspended.

Discussion and Decision

- [10] Ellet appeals her convictions, arguing the trial court committed fundamental error in admitting portions of FCM Miller's testimony into evidence. Although FCM Miller impermissibly vouched for the children's allegations against Ellet, we find no fundamental error and affirm Ellet's convictions.
- [11] The decision to admit or exclude evidence is committed to the trial court's "sound discretion and is afforded great deference on appeal." *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). Typically, a trial court's evidentiary decision will be reversed only if "it represents a manifest abuse of discretion that results in the denial of a fair trial." *Id.* But because Ellet did not contemporaneously object to the admission of FCM Miller's testimony at trial, her arguments are

waived on appeal.¹ To circumvent her waiver, Ellet must meet a higher standard of review—that of fundamental error.

[12] The fundamental error doctrine is “extremely narrow.” *Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013). It 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.” *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). “Harm is not shown by the fact that the defendant was ultimately convicted; rather harm is found when error is so prejudicial as to make a fair trial impossible.” *Hoglund v. State*, 962 N.E.2d 1230, 1239 (Ind. 2012).

[13] Ellet argues FCM Miller’s testimony violated Indiana Evidence Rule 704(b) because it vouched for the truth of the children’s abuse allegations. Rule 704(b) prohibits a witness from testifying “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.” The admission of such vouching evidence constitutes an “invasion of the province of the jurors in

¹ Although Ellet objected when FCM Miller equated “substantiating” an investigation with criminal “guilt,” Tr. Vol. III, p. 67, she objected on grounds that this was a “misstatement of law,” not that the statement constituted improper vouching. Consequently, Ellet’s claim on this issue, like the other alleged examples of impermissible vouching, is waived on appeal. See *Durden v. State*, 99 N.E.3d 645, 651 (Ind. 2018) (“To preserve a claim for review, counsel must object to the trial court’s ruling and state the reasons for that objection.”).

determining what weight they should place upon a witness's testimony.”

Gutierrez v. State, 961 N.E.2d 1030, 1034 (Ind. Ct. App. 2012).

[14] Ellet first attacks two instances where she believes FCM Miller improperly vouched for the children's testimony. First, FCM Miller stated that the children's allegations were all “aligned” and that their stories did not change during the forensic interviews. Tr. Vol. III, pp. 63-64. Second, FCM Miller referred to Ellet as “the perpetrator” and stated that she was not allowed to observe the children's forensic interviews because it may be “intimidating” for the children. *Id.* at 79. None of these statements were impermissible vouching. In both situations, FCM Miller merely described the facts surrounding the children's forensic interviews and did not provide the jury with her opinion on the veracity of the children's allegations. *See Bean v. State*, 15 N.E.3d 12, 19 (Ind. Ct. App. 2014) (holding no improper vouching occurred where witness did not “*directly* vouch for the truthfulness of [victim's] testimony”).

[15] But FCM Miller's testimony later devolved into impermissible vouching. When FCM Miller testified that she “substantiated” the report against Ellet, she impermissibly impinged on the jury's role as factfinder. Although an investigator testifying that she substantiated allegations is not always improper vouching, *Heinzman v. State*, 970 N.E.2d 214, 221-23 (Ind. Ct. App. 2012), *vacated in part, and summarily aff'd in relevant part*, 979 N.E.2d 143 (Ind. 2012), here FCM Miller compounded the error by saying “substantiation can be coincided with guilty.” Tr. Vol. III, p. 67. Although the State attempted to walk back FCM Miller's response by having her describe the lower standards of

proof in her investigation compared to the criminal charges against Ellet, FCM Miller's "guilt" analogy inescapably suggested that Ellet was "guilty," thereby indicating to the jury that FCM Miller believed the children's allegations. This crossed the line into impermissible vouching. *Bradford v. State*, 960 N.E.2d 871, 876-77 (Ind. Ct. App. 2012) (testimony that renders "an opinion regarding the truth of the allegations" is improper vouching).

[16] That said, the error in admitting FCM Miller's vouching testimony was not fundamental because it did not deny Ellet her right to due process. The improper admission of vouching testimony is not fundamental error per se. *See Hoglund*, 962 N.E.2d at 1239. For example, no fundamental error occurs when improper vouching testimony is erroneously admitted but the defendant's conviction is "supported by substantial independent evidence of [defendant's] guilt" and "the improper admission of the evidence was cumulative of other evidence properly before the jury." *Id.* at 1240. The State's efforts at clarifying FCM Miller's testimony to reflect the higher standard of proof at a criminal trial compared to DCS substantiating the investigation mitigated any prejudicial harm done. Moreover, the jury had a substantial amount of evidence unrelated to the improper vouching statement upon which to convict Ellet, including photographs of E.E.'s injuries and testimony from all three of the children describing the incident.

[17] Finding no fundamental error, we affirm Ellet's convictions.

May, J., and Crone, J., concur.