MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Lawerance Knighten,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 26, 2022

Court of Appeals Case No. 22A-CR-454

Appeal from the Marion Superior Court

The Honorable Cynthia L. Oetjen, Judge

Trial Court Cause No. 49D30-1909-F1-36523

Bradford, Chief Judge.

Case Summary

[1] Lawerance Knighten was convicted of Level 1 felony child molesting for acts involving his then-seven-year-old niece, T.B. On appeal, Knighten contends that his conviction should be overturned because the State committed fundamental error by allegedly engaging in prosecutorial misconduct during both *voir dire* and closing argument. Concluding otherwise, we affirm.

Facts and Procedural History

[2] Knighten is T.B.'s uncle and lived with his mother, Arlene Brandon, T.B.'s paternal grandmother, in Indianapolis. On January 18, 2018, when T.B. was seven years old and Knighten was over twenty-one years old, T.B.'s mother, Diamond, arranged to have Arlene to watch T.B. while she worked. Arlene, who was recovering from a broken arm, reluctantly agreed. Diamond dropped T.B. off at Arlene's apartment on January 18, 2018.

[3] T.B. remained at Arlene's apartment the next day and spent the night of January 19, 2018, at Arlene's apartment. At some point that evening, T.B. fell asleep in Knighten's bedroom as she watched cartoons on television. T.B. awoke when Knighten pulled down her jeans past her buttocks, feeling his fingernails scrape against her skin. Knighten then inserted his penis into T.B.'s anus, causing T.B. to feel pain. Knighten briefly removed his penis from T.B.'s anus when T.B. attempted to pull up her jeans. Knighten, however, "pulled them right back down" and reinserted his penis into her anus. Tr. Vol. III p.

139. Knighten eventually stopped and, after he removed his penis from her anus, T.B. turned over and asked for a glass of water. T.B. followed Knighten out of the bedroom. Knighten returned to his bedroom after giving T.B. a glass of water.

[4] T.B. then approached Arlene and asked her to "text [T.B.'s] mom." Tr. Vol. III p. 141. Arlene gave T.B. her phone. T.B. texted her mom, but when she did not answer, T.B. "texted [her] stepmom," Basheeba "B.B." Johnson, who "came and picked [T.B.] up." Tr. Vol. III p. 141. When B.B. arrived, she found that T.B. "looked sad." Tr. Vol. III p. 156. T.B., who was usually a happy child, looked "teary-eyed" and "was quiet and ready to go." Tr. Vol. III pp. 157, 156. Although her mood and mannerisms suggested otherwise, T.B. denied that anything was wrong when pressed by B.B. B.B. did not see Knighten in the apartment before she and T.B. left, but Arlene indicated that he was "in a back room." Tr. Vol. III p. 156.

[5] T.B. did not disclose the molestation until July of 2019. At the time, T.B. was "bawling" and "her tears wouldn't stop coming." Tr. Vol. III p. 170. T.B. told Diamond that Knighten had "put it in" and pointed downward towards her vagina and buttocks. Tr. Vol. III p. 172. Diamond reported the incident to police, after which T.B. was examined at Community Hospital East and

submitted to a forensic interview. On September 17, 2019, the State charged Knighten with Level 1 felony child molesting.[1]

[6] Knighten's case proceeded to a jury trial on August 16, 2021. During *voir dire*, the State questioned the prospective jurors' ability to convict when presented only with testimony, as opposed to physical evidence. In doing so, the State stated that "[t]he law in the State of Indiana is that you can convict on the testimony of one credible witness if you believe that witness' testimony beyond a reasonable doubt. That's the law okay? Why do you think the law would be that way…?" Tr. Vol. III p. 38. The State then discussed with various prospective jurors the example of a bank robbery where the perpetrator acted in "broad daylight" and took no action to hide his identity, suggesting that criminals do not tend to act under such obvious circumstances. Tr. Vol. III p. 38. The State then continued as follows:

> Okay. So it's a crime of opportunity, right, that somebody takes advantage of an opportunity that they have (inaudible) to be seen or heard or something like that, right? So when we talk about credible testimony of one witness you believe beyond a reasonable doubt, I would imagine it's likely because oftentimes crimes don't happen in broad daylight under surveillance cameras et cetera. Now, I've told you the state of the law in Indiana is credible testimony of one witness. If you believe that person's testimony beyond a reasonable doubt that is enough to convict. Is there anybody sitting here … that disagrees with that and says that shouldn't be the state of the law – it's not fair? I

[1] The State amended the charging information on August 12, 2021, to correct a misspelling in both Knighten's and T.B.'s names.

> mean, years ago, we didn't have video cameras, et cetera. There weren't a whole lot of witnesses, right, in cases. Is there anybody here that -- because I need to know, if you can't do it, don't go back there in the jury room if you're selected and say, well, there just weren't enough witnesses. Now's the time to say if it's something that you can't do. Is anybody here that just disagrees that that should be the state of the law and that is the law in Indiana? Is there anybody here that will tell me that they can't follow it, that they're going to need more or something like that than credible testimony that leaves you convinced beyond a reasonable doubt?

Tr. Vol. III pp. 39–40. Knighten did not object to the State's line of questioning.

[7] During closing argument, the State argued that it had proven the elements of the charged offense, pointing to T.B.'s testimony that Knighten had "put his penis in her butt." Tr. Vol. IV p. 60. The State further argued that

> In the in -- in the state of Indiana, we know, from what we heard in voir dire, testimony is evidence. So all of this stuff about whether or not testimony is enough, the law is testimony is evidence. So I'm going to talk to you in terms of what is the evidence.
>
> We also know that in the state of Indiana the credible testimony of a single eyewitness, if you believe it beyond a reasonable doubt, is enough for you to convict. We told you early on this is a testimony-evidence-only case. She held on to this information because she was scared. There's not going to be any DNA. You have to judge from the credibility of the witnesses and the things that were going on around that time, whether or not she was telling the truth, and her demeanor right here on the stand.

Tr. Vol. IV pp. 62–63. Knighten did not object to the State's argument. The State then went on to discuss the evidence presented, witness by witness. The jury ultimately found Knighten guilty as charged.

[8] On September 13, 2021, Knighten moved for a new trial, claiming jury misconduct. Following a hearing and additional briefing by the parties, the trial court denied Knighten's motion on February 7, 2022. On February 24, 2022, the trial court sentenced Knighten to a thirty-five-year term, with twenty-five years executed and ten years suspended with five of those years served on sex-offender probation.

Discussion and Decision

[9] Knighten contends that his conviction should be overturned because the State committed fundamental error by allegedly engaging in prosecutorial misconduct during both *voir dire* and closing argument. Specifically, he claims that "[f]undamental error occurred when the prosecutor repeatedly referred to the appellate standard, that the jury can convict on the testimony of one credible witness." Appellant's Br. p. 14 (internal quotation marks omitted). For its part, the State asserts that "[n]o error occurred, much less fundamental error, when the State discussed the law during *voir dire* and in closing argument." Appellee's Br. p. 10.

[10] "A claim of prosecutorial misconduct requires a determination that there was misconduct by the prosecutor and that it had a probable persuasive effect on the jury's decision. *Weis v. State*, 825 N.E.2d 896, 903 (Ind. Ct. App. 2005).

> In reviewing a claim of prosecutorial misconduct properly raised in the trial court, 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.

Ryan v. State, 9 N.E.3d 663, 667 (Ind. 2014) (cleaned up).

[11] However, in this case, Knighten did not properly preserve his claim of prosecutorial misconduct by objecting to any of the complained of statements during trial. Our standard of review for a claim of prosecutorial misconduct that has been procedurally defaulted is as follows:

> 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.
>
> We stress that a finding of fundamental error essentially means that the trial judge erred by not acting when he or she should have. 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.

Id. at 667–68 (cleaned up).

[12] In *Ludy v. State*, 784 N.E.2d 459, 460 (Ind. 2003), the Indiana Supreme Court reviewed a challenge to the following jury instruction: "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim in such testimony establishes each element of any crime charged beyond a reasonable

doubt." Defendant had objected to the instruction at trial claiming that it represented "an appellate standard … rather than something that the jury needs to be instructed about." 784 N.E.2d at 460 (ellipsis in original, internal record cite omitted). The Court concluded that

> [t]he challenged instruction is problematic for at least three reasons. First, it unfairly focuses the jury's attention on and highlights a single witness's testimony. Second, it presents a concept used in appellate review that is irrelevant to a jury's function as fact-finder. Third, by using the technical term "uncorroborated," the instruction may mislead or confuse the jury.

Id. at 461. However, this court concluded that the error "did not affect the defendant's substantial rights" and did "not require reversal." *Id.* at 463.

[13] In *Weis*, the defendant contended that "the prosecutor improperly informed the jury that it could convict [him] on the sole basis of" an alleged victim's testimony. 825 N.E.2d at 904. Weis conceded on appeal that the trial court had properly instructed the jury but pointed to "the prosecutor's repeated questions to the jury during voir dire concerning the testimony of the alleged victim, and his comments during closing argument, that the jury [could] convict [Weis] based on [the alleged victim's] testimony." *Id.* (internal record quotation omitted). Weis argued that the prosecutor's statements "left the jury with precisely the same impact as would a jury instruction." *Id.* (internal record quotation omitted). In finding no error, we concluded that

> [t]he mere fact that a jury may not be instructed on a certain point of law does not lead to the conclusion that argument concerning that point of law is also improper. Here, the essence of the case involved the credibility of two witnesses: Weis, who denied sexually abusing J.S., and J.S., who implicated Weis as her abuser. We view the State's argument that the jury could convict if it believed J.S.'s testimony as an appropriate characterization of the evidence.

Id. (cleaned up).

[14] In *Vasquez v. State*, 174 N.E.3d 623, 631 (Ind. Ct. App. 2021), *trans. denied*, this court considered whether "the trial court abused its discretion by permitting the prosecutor to argue an appellate standard of review to the jury in closing argument." In its statements, the prosecutor made numerous references to the effect of "the uncorroborated testimony of the victim is sufficient" to sustain a conviction. *Id.* at 632. On appeal, Vasquez argued that "the prosecutor's argument in this case was more egregious than the argument in *Weis*, in that the prosecutor referenced not the testimony of K.D. or M.D., which was approved in *Weis*, but rather the appellate standard, which had been disapproved in *Ludy*." *Id.* at 632–33. Agreeing with Vasquez, this court concluded that

> [t]he prosecutor's argument repeatedly used the term "uncorroborated[,]" which *Ludy* had held may confuse or mislead the jury. Moreover, the argument focused the jury away from how the evidence met the elements required for conviction and toward the appellate standard, which *Ludy* made clear is irrelevant to a jury's function as fact-finder.

Id. at 633 (cleaned up). However, this court concluded that the error did not rise to the level of reversible error. *Id.* at 634.

[15] In this case, during *voir dire*, the State questioned the prospective jurors' ability to convict when presented only with testimony, as opposed to physical evidence. In doing so, the State stated that "[t]he law in the State of Indiana is that you can convict on the testimony of one credible witness if you believe that witness' testimony beyond a reasonable doubt." Tr. Vol. III p. 38. The State went on to say, "I've told you the state of the law in Indiana is credible testimony of one witness. If you believe that person's testimony beyond a reasonable doubt that is enough to convict." Tr. Vol. III p. 40. Likewise, during closing argument, the State stated that

> in the state of Indiana, we know, from what we heard in voir dire, testimony is evidence. So all of this stuff about whether or not testimony is enough, the law is testimony is evidence. So I'm going to talk to you in terms of what is the evidence.
>
> We also know that in the state of Indiana the credible testimony of a single eyewitness, if you believe it beyond a reasonable doubt, is enough for you to convict. We told you early on this is a testimony-evidence-only case. She held on to this information because she was scared. There's not going to be any DNA. You have to judge from the credibility of the witnesses and the things that were going on around that time, whether or not she was telling the truth, and her demeanor right here on the stand.

Tr. Vol. IV pp. 62–63. Upon review, we conclude that the line of questioning used by the State in *voir dire* and its arguments in closing are more akin to the statements at issue in *Weis* than in *Vasquez*. As we did in *Weis*, we view the

State's argument that the jury could convict if it believed T.B.'s testimony as an appropriate characterization of the evidence. *See Weis*, 825 N.E.2d at 904.

[16] Furthermore, even if the State's questions during voir dire and argument during closing argument did erroneously focus on the appellate standard, similar to the Indiana Supreme Court in *Ludy* and this court in *Vasquez*, we conclude that any error did not amount to fundamental error. The jury was specifically instructed by the trial court (1) that it was to determine the law and the facts and the best source of the law was the trial court's instructions, (2) that it was the exclusive judge of the evidence and credibility of witnesses, (3) of some factors that it could consider when judging witness credibility, (4) that statements by the attorneys were not evidence, (5) of the presumption of Knighten's innocence, (6) of the State's burden to prove its case beyond a reasonable doubt, and (7) that it was to base its verdict on the evidence at trial and the trial court's instructions on the law. As in *Ryan* and *Vasquez*, the trial court's instructions made it clear to the jury that the court's instructions were the best source of controlling law and that arguments of counsel were not evidence; thus, any error from the State's comments to the jury here did not rise to the level of fundamental error. *Ryan*, 9 N.E.3d at 672–73 (finding no fundamental error from prosecutorial misconduct where the jury was properly instructed); *Vasquez*, 174 N.E.3d at 634 (finding no reversible error from prosecutorial misconduct where the jury was properly instructed).

[17] The judgment of the trial court is affirmed.

Robb, J., and Pyle, J., concur.