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ATTORNEY FOR APPELLANT:

JESSE R. POAG
Newburgh, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

THOMAS D. PERKINS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DAVID L. THOMAS,)
)
Appellant-Defendant,)
)
vs.) No. 82A01-0901-CR-37
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-0805-FB-411

May 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, David Thomas was convicted of Attempted Rape¹ and Criminal Deviate Conduct,² both as class B felonies. Thomas was subsequently sentenced to concurrent terms of twelve years imprisonment. On appeal, Thomas presents one issue for our review: Did the prosecutor commit misconduct during closing argument when he commented on evidence that was admitted by Thomas for impeachment purposes?

We affirm.

The facts favorable to the convictions reveal that on March 25, 2008, the victim, then fourteen years old, was staying at the home of Kasie Casteel, a family friend, as she often did. During the course of the evening, there were adults in the residence, including Thomas, whose nickname is “Cricket.” *Transcript* at 20. At approximately 10:00 p.m., the victim told Casteel that she was going to sleep on the couch. A few hours later, sometime between 1:00 a.m. and 3:00 a.m., Casteel and her boyfriend went to a bedroom, but Thomas remained in the living room with the victim. The victim told Thomas to lock the door when he left. The victim then went to sleep, but was awakened by Thomas, who was kneeling beside the couch and shaking her.

When the victim asked Thomas to leave her alone, he became upset. He grabbed her off of the couch while choking her. He then got on top of her and demanded to perform oral sex on her. Thomas pulled the victim’s pants down, licked her vagina, and then tried to kiss her. The victim tried to fight him off and pull her pants back up. At some point, Thomas bit

¹ Ind. Code Ann. § 35-42-4-1 (West, Premise through 2008 2nd Regular Sess.) (rape); Ind. Code Ann. § 35-41-5-1 (West, Premise through 2008 2nd Regular Sess.) (attempt).

² I.C. § 35-42-4-2 (West, Premise through 2008 2nd Regular Sess.).

the victim's lip. The victim got back up on the couch, crying. Thomas pulled her back to the floor, unzipped his pants and removed his penis, pulled the victim's pants down, and got on top of her again. The victim was crying and screaming as Thomas tried to have sex with her. When the phone rang, Thomas let the victim get up and answer it.

Eventually, the victim went to the bedroom where Casteel was and told her that Thomas had hit her. Casteel observed that the victim was crying and that she had a bite mark on her lip and marks on her cheek. Casteel went into the living room and ordered Thomas to leave. A few days later, after the victim's mother reported the incident to police, the victim gave a recorded statement to police about what had happened.

On April 30, 2008, the State charged Thomas with attempted rape and criminal deviate conduct, both as class B felonies. A two-day jury trial commenced on November 13, 2008. The jury found Thomas guilty as charged. On December 10, 2008, the trial court sentenced Thomas to twelve years imprisonment on each conviction and ordered the sentences served concurrent with each other and consecutive to sentences imposed in other causes. Thomas now appeals.

Thomas argues that the prosecutor committed misconduct when he urged the jury several times to consider the victim's unsworn, prior statement, submitted into evidence by Thomas for impeachment purposes, as substantive evidence of guilt rather than as evidence of the victim's credibility. During trial, however, Thomas did not object to the prosecutor's comments or request an admonishment.

The proper course to follow when a defendant believes an improper argument was made is to request the trial court to admonish the jury. *Cooper v. State*, 854 N.E.2d 831 (Ind. 2006). If the defendant is not satisfied with the admonishment, then he or she should request a mistrial. *Id.* The failure to request an admonishment or to move for mistrial results in waiver. *Id.* Where a defendant has failed to preserve a claim of prosecutorial misconduct, we apply a different standard for review than is applicable for properly preserved claims. *Id.* When a claim was not properly preserved, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. *Id.*

As to the former, when reviewing a properly preserved claim of prosecutorial misconduct, we determine first whether the prosecutor engaged in misconduct, and if so, we determine whether the misconduct placed the defendant in a position of grave peril to which he or she would not have been subjected. *Id.* We determine whether a prosecutor's argument constitutes misconduct by reference to case law and the Rules of Professional Conduct. We measure the gravity of peril resulting therefrom by the probable persuasive effect of the misconduct on the jury's decision, not by the degree of impropriety of the conduct. *Id.*

As to the latter element, i.e., fundamental error, when reviewing such a claim, we are mindful of our Supreme Court's observation that fundamental error in this context is "an extremely narrow exception". *Id.* at 835. It is defined as "error that makes 'a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due

process . . . present[ing] an undeniable and substantial potential for harm.” *Id.* (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)).

We first consider whether the prosecutor’s comments during closing argument amount to misconduct. At the conclusion of the victim’s trial testimony, Thomas moved to admit the victim’s prior, unsworn, recorded statement to police in an effort to impeach the victim by demonstrating inconsistencies in her version of events. The State noted the statement would not usually be admissible, but did not object to its admission. The victim’s recorded statement was eventually played for the jury. Thomas maintains that the prosecutor committed misconduct when, during his closing argument, he “urged the jury to consider the tape [of the victim’s prior, unsworn statement] as evidence of guilt, rather than as evidence of the witness’s credibility.” *Appellant’s Brief* at 7.

Our Supreme Court has addressed the parameters of proper argument by the State and found comments on credibility to be proper. Indeed, “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). Further, a prosecutor can comment on the evidence presented at trial in inviting the jury to determine the credibility of the witnesses. *See Hobson v. State*, 675 N.E.2d 1090 (Ind. 1996). This is precisely what the prosecutor did here. Thomas sought the admission of the victim’s prior, unsworn statement to police to impeach her with the inconsistencies in her story. During closing argument, the prosecutor urged the jury to consider similarities on crucial points between the victim’s trial testimony, her deposition testimony (as Thomas elicited through cross-examination), and the

victim's prior, unsworn statement. Thomas cannot admit the victim's prior, unsworn statement to demonstrate inconsistencies in the victim's story, but prevent the State from pointing out the consistencies to rehabilitate the credibility of its witness. Examining the prosecutor's remarks about which Thomas complains in the larger context in which they were made, we conclude the prosecutor fairly commented on the evidence that was presented. We find no error in the prosecutor's comments, let alone fundamental error.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.