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IN THE
COURT OF APPEALS OF INDIANA

HERIBERTO E. RIVERA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1010-CR-1142
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
Cause No. 49G22-0905-FA-49601

May 27, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Heriberto Rivera appeals his five convictions for child molesting following a jury trial. Rivera raises a single issue for our review, which we restate as whether the trial court committed fundamental error when it limited Rivera's cross-examination of the victim's mother. We affirm.

FACTS AND PROCEDURAL HISTORY

In September of 2008, Rivera sexually molested ten-year-old J.Q. J.Q. did not tell his parents about the molestation, but a few days later J.Q. told his mother that his anus was sore. J.Q.'s mother, Transito Carrera, examined the area and told J.Q. that the irritation was because J.Q. had not bathed and that he needed to take a bath. The irritation disappeared after about two weeks.

About seven months later, on Good Friday in 2009, J.Q.'s family held a party at their home, and Rivera attended. Upon seeing Rivera at the home, J.Q. told Carrera that Rivera had molested him in September of 2008. Carrera took J.Q. to Wishard Hospital the following Monday.

On May 22, 2009, the State charged Rivera with five counts of child molesting, two as Class A felonies and three as Class C felonies. The trial court held a jury trial in August of 2010, and J.Q. testified against Rivera. Carrera also testified at the trial, through an interpreter, and the following exchange occurred during cross-examination:

> Q [by Rivera's counsel] You did not tell any police officer who investigated this case that [J.Q.] asked you to look at his butt at any time after this party. Did you?
>
> A I don't remember.

Q You don't remember whether you did tell a police officer that or not. Is that your answer?

A I don't remember.

* * *

Q When the police finally came to investigate this case in Holy Week of '09, don't you think it was important to tell them everything that could possibly relate to the allegation that [J.Q.] was making against Mr. Rivera?

A It was important. actually, everything that he has told me. It's just a lot that he has told me.

Q You do agree that your son never mentioned anything about Mr. Rivera doing anything bad to him for seven months [from September 2008 to April 2009]?

A He didn't tell me anything.

Q Therefore, would you agree that you had no reason to take [J.Q.] to a doctor to have him examined because of any suspicious thing that may have happened with Mr. Rivera?

A Of course I had a reason to take him to the doctor.

Q You didn't take him to the doctor, though. Did you?

A We did take him to the doctor when he told me the truth.

Q Two days after this incident in September of 2008, you took [J.Q.] to the doctor?

A Only Saturday and Sunday passed and we waited till Monday so we could take him to his doctor.

Q You are telling me and the jury that you took [J.Q.] to the doctor within a week of this alleged incident in September of '08 to have his butt checked out. Is that what you are telling us?

A I am saying that I took [J.Q.] to the doctor two days after he told me the truth.

Q And isn't it true that you have no medical records from any doctor that establishes or even suggests that [J.Q.] had been sexually molested? Isn't that correct?

* * *

A The doctor is the one that has to give that report and I am the mother of the child that told me he was abused. What more do you want?

Q Isn't it true that if you received medical information from a doctor who examined [J.Q.] shortly after this alleged incident, that you would have then immediately gone to the authorities and reported a child molest?

A I go, if he tells me it happened, I would go to the doctor, to the authorities, to anybody.

Q Isn't it true that you did not go to the authorities with any claim of sexual molestation of your son for seven months after the alleged incident? Yes or no?

A I did go to the authorities when the doctor called the report, or the authorities.

> THE COURT: Mr. Mohler [for Rivera], move on. I think you have covered this area.

* * *

Q Do you recall giving a deposition on May 14 of this year about this case?

A I don't know the exact date but we did go with the detective and we had a conversation with him about this.

Q Do you recall talking to me and answering my questions, under oath, in May of this year?

A Yes.

* * *

Q During this deposition, do you agree that I was present, you were present, there was a court reporter, and there was a representative from the prosecutor's office? Do you agree with that?

A Yes.

Q Do you recall that you were sworn to tell the truth?

A Yes.

Q Do you recall me asking you questions and you giving answers to my questions?

A Yes, of course. The questions you asked, I answered.

Q Do you recall that the purpose for the questions was to find out what you, as [J.Q.'s] mother, knew about this case?

A I told you I gave no details that day.

Q And you recall I asked you a series of questions about what happened that night in September of '08?

A I remember that you asked questions and I answered them.

Q Do you remember me asking questions about what happened the next day after you brought [J.Q.] back from Mr. Rivera's house?

A Yes, I remember.

Q Do you remember me asking you questions about what, if anything, happened for the seven months before [J.Q.] told you that something bad happened with Mr. Rivera?

* * *

A Yes . . . .

Q Lastly, do you recall me asking you a series of questions about the day in Holy Week when [J.Q.] told you something bad happened with Mr. Rivera?

A You asked.

Q With all that in mind, would you agree with me that you never once told me, in thirty-six pages of questions and answers, that [J.Q.] asked you to look at his butt a couple of days after this incident? You never told me that.

A I don't remember having told you but it is in my memory, my mind, and if you ask me questions I can tell you many things of what he told me.

Q Similar question: Isn't it true that you did not tell me in thirty-six pages of questions and answers that you visually saw redness of [J.Q.'s] butt after this incident?

A You want me to explain why?

Q I asked a "yes" or "no" question. Isn't it true that in thirty-six pages of questions and answers, you never told me that you took [J.Q.] to a doctor within the first few days after this alleged incident with Mr. Rivera? You never told me that. Did you?

A Can you repeat the question?

Q Isn't it true that you never told me in May, under oath, that you took [J.Q.] to the doctor within days of this alleged incident?

A I took him to the doctor after [J.Q.] told me the truth.

Q That's a nice answer but it's not the answer to my question.

MISS GARNER [for the State]: Objection.

<u>THE COURT: Mr. Mohler, you have covered this extensively. Move on.</u>

MR. MOHLER: She did not answer the question, Your Honor. I would like to ask . . .

<u>THE COURT: She has answered the question in many different ways. Move on.</u>

Transcript at 71-78 (emphases added). The jury then found Rivera guilty as charged, and the trial court entered its judgment of conviction and sentence in due course. This appeal ensued.

DISCUSSION AND DECISION

Rivera contends that the trial court erroneously interjected itself into his cross-examination of Carrera by telling his trial counsel to "move on," and thus stopping him from continuing certain lines of questioning during the cross-examination. According to our supreme court, however, "[t]he correct procedure to be employed when a judge makes an allegedly improper comment is to request an admonishment and, if further relief is desired, to move for a mistrial. Failure to request an admonishment or move for a mistrial results in waiver of the issue." Mitchell v. State, 726 N.E.2d 1228, 1235 (Ind. 2000) (citation omitted), abrogated on other grounds by Beattie v. State, 924 N.E.2d 643 (Ind. 2010). Here, Rivera's trial counsel did not request an admonishment or mistrial after the trial court's allegedly improper comments. Thus, he waived this issue for our review.

Seeking to avoid procedural default, Rivera claims the trial court's comments were fundamental error and made his right to a fair trial impossible. According to our supreme court:

> The fundamental error exception is extremely narrow. To qualify as fundamental error, "an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." Willey v. State, 712 N.E.2d 434, 444-45 (Ind. 1999) (citations omitted). To be fundamental error, the error "must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." Wilson v. State, 514 N.E.2d 282, 284

> (Ind. 1987). See also Ford v. State, 704 N.E.2d 457, 461 (Ind. 1998) ("This Court views the fundamental error exception to the waiver rule as an extremely narrow one, available only 'when the record reveals clearly blatant violations of basic and elementary principles [of due process], and the harm or potential for harm [can]not be denied.' ") (quoting Warriner v. State, 435 N.E.2d 562, 563 (Ind. 1982)).

Id. at 1236 (alterations original). In Mitchell, our supreme court held as follows: "After reviewing the judge's comments, we decline to permit the defendant to avoid procedural default upon her claim of fundamental error. The judge's remarks merely . . . asserted reasonable management of the proceedings." Id.

Having reviewed the transcript, we decline to accept Rivera's attempt to avoid procedural default through his claim of fundamental error. As in Mitchell, the judge's remarks here "merely . . . asserted reasonable management of the proceedings." Id. Accordingly, we affirm Rivera's convictions.

Affirmed.

ROBB, C.J., and CRONE, J., concur.