

Case Summary

John Henry appeals his convictions for Class A felony child molesting and Class C felony child molesting. We affirm.

Issue

The sole issue before us is whether remarks by the prosecutor during closing argument constituted fundamental error.

Facts

The evidence most favorable to the convictions is that in 2004, twelve-year-old D.A. often spent the night at Henry's house. Henry had known D.A.'s mother for years, and D.A. was friends with Henry's daughters, who were close in age to D.A. One night, Henry came and laid next to D.A. while fully clothed, then he left after about an hour. Henry progressed during subsequent sleepovers to lying naked next to D.A.

Eventually, on later dates, Henry began kissing and fondling D.A. On one occasion, Henry inserted his finger into D.A.'s vagina. Another time, D.A. was sleeping in the same bed with one of Henry's daughters when Henry came into the room and made D.A. masturbate him until he ejaculated. During a separate incident in which D.A. again was sleeping with one of Henry's daughters, Henry climbed naked on top of D.A. and rubbed himself against her until he ejaculated. The last occasion on which Henry molested D.A. was when he and his wife took D.A. to an acquaintance's house to care for a cat and they all spent the night there. Henry carried D.A. into a bedroom and kissed her and inserted his finger into her vagina. When D.A. yelled out Henry's name, he stopped.

Although D.A. had told Henry's daughters what he had been doing, his activity did not come to the attention of law enforcement until approximately four years later, after D.A. told her mother what had occurred. On June 24, 2008, the State charged Henry with one count of Class A felony child molesting and one count of Class C felony child molesting.¹ During the jury trial held on August 11-12, 2009, defense counsel vigorously cross-examined D.A. regarding her molestation claims and called her veracity into question. In response to this questioning and defense counsel's closing argument pointing out inconsistencies in D.A.'s testimony, the prosecutor made the following statement during rebuttal closing argument:

In this kind of a case, you have a child molesting case. You have a child. She's older now, of course, but you found out that it's perfectly okay for defense counsel to use the tactic when using a child witness to try to humiliate that child, to try to confuse that child, to try and bully the child so that when they testify, it's almost like –

Tr. p. 226. Defense counsel objected at this point, which the trial court overruled, but defense counsel did not move for an admonishment or mistrial. The prosecutor then continued:

It's okay to question a child using those tactics under the law, but often it's very traumatic, and I would say it was traumatic here for this girl to go through that again. And probably the cross examination and her testimony lasted actually longer than the actual things that John Henry did to her.

Id. at 226-27.

¹ The charging information contained a second count of Class C felony child molesting as to a different victim. Henry successfully moved to sever trial of this charge from the charges related to D.A.

The jury found Henry guilty as charged. Henry filed a motion to set aside the jury verdict and for judgment on the evidence, which the trial court denied. Henry was sentenced accordingly, and he now appeals.

Analysis

Henry contends the prosecutor committed misconduct during her rebuttal closing argument. Henry acknowledges that although defense counsel objected to the argument, he did not request an admonishment or move for a mistrial. When a defendant contends that a prosecutor has committed misconduct during closing argument, the defendant must request the trial court to admonish the jury. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). “If the party is not satisfied with the admonishment, then he or she should move for mistrial. Failure to request an admonishment or to move for mistrial results in waiver.” Id.

Where, as here, a claim of prosecutorial misconduct has not been properly preserved, “the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error.” Id. The “fundamental error” rule “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.” Purifoy v. State, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005) (quoting Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002)), trans. denied. “The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error

rule.” Id. In other words, fundamental error requires a defendant to show greater prejudice than ordinary reversible error. Id.

Whether prosecutorial misconduct based on alleged improper argument has occurred “is measured by reference to case law and the Rules of Professional Conduct.” Cooper, 854 N.E.2d at 835. Henry bases his claim of prosecutorial misconduct largely upon this court’s decision in Bardonner v. State, 587 N.E.2d 1353 (Ind. Ct. App. 1992), trans. denied. There, we held that the prosecutor committed reversible misconduct by, during voir dire, reading extensive excerpts from Justice White’s separate concurring and dissenting opinion in United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967). That opinion outlines Justice White’s views on the difference between law enforcement and prosecutors on the one hand and defense attorneys on the other; it has been criticized as “paint[ing] with too broad a brush” and inappropriately and inaccurately describing “prosecutors in general as being more apt to be the real searchers for the truth than are defense counsel in general.” Bardonner, 587 N.E.2d at 1359 (quoting People v. Pic’l & Martin, 171 Cal. Rptr. 106, 133 (Cal. Ct. App. 1981)). We also noted in Bardonner, “It is not the jurors’ responsibility to make a finding as to the role of the prosecutor and defense counsel or to determine the character of the defense counsel. This information is certainly not relevant to the case.” Id. at 1361. Additionally, prosecutors may not make comments that portray defense counsel “as not a decent, honorable person, but a shyster.” Id. Our supreme court likewise has “emphasized the need for limits on the extent to

which prosecutors may portray themselves as seekers of truth while denigrating the role of defense attorneys.” Brown v. State, 746 N.E.2d 63, 70 (Ind. 2001).

In Brown, however, the court went on to recognize that “[w]hich [statements] represent fair or harmless techniques and which are abusive is a call best placed in the hands of trial judges.” Id. (quoting Coy v. State, 720 N.E.2d 370, 373 (Ind. 1999)). Furthermore, in Miller v. State, 623 N.E.2d 403, 408 (Ind. 1993), our supreme court expressly disapproved of prosecutors reading from Justice White’s Wade opinion. However, it found no prosecutorial misconduct because the prosecutor’s remarks had not been as extended or as pointed as had been the case in Bardonner. Miller, 623 N.E.2d at 408.

Here, we agree that the prosecutor closely approached, and arguably even crossed, the line of propriety when she accused defense counsel of “bullying” or humiliating the victim, D.A. Such comments, attempting to disparage defense counsel’s character, are at best inappropriate, and at worst error. However, not every improper comment by a prosecutor amounts to reversible prosecutorial misconduct, let alone fundamental error. We observe that the trial court was in the best position to gauge the harmfulness of the prosecutor’s commentary, and it overruled Henry’s objection to it. Moreover, it was a relatively brief observation regarding the vigorousness of defense counsel’s cross-examination, not an extended dialogue imputing improper motives to defense counsel as was the case in Bardonner. After the objection, the prosecutor’s language was much less inflammatory. We conclude that, under the circumstances, we cannot describe the

prosecutor's comments as fundamental error. Despite the fact that Henry's convictions were based almost entirely on D.A.'s uncorroborated and sometimes inconsistent testimony, the comments did not appear to be substantially harmful or to deprive Henry of fundamental due process.

Conclusion

The prosecutor's comments during rebuttal closing argument did not constitute fundamental error. We affirm.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.