

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Tyree Resnover,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff



April 22, 2024

Court of Appeals Case No.
23A-CR-703

Appeal from the Marion Superior Court
The Honorable Marie L. Kern, Judge

Trial Court Cause No.
49D28-1902-F1-7066

Memorandum Decision by Chief Judge Altice
Judges Riley and Weissmann concur.

Altice, Chief Judge.

Case Summary

[1] Following a jury trial, Tyree Resnover was convicted of Level 1 felony neglect of a dependent resulting in death, for which the trial court sentenced him to thirty-eight years. On appeal, Resnover presents four issues for review:

1. Did the State present sufficient evidence to prove all the elements of the offense?

2. Did the trial court abuse its discretion in admitting post-mortem and autopsy photographs of the decedent?

3. Did the State’s comments during closing arguments—statements to which Resnover raised no objection at trial—constitute prosecutorial misconduct rising to the level of fundamental error?

4. Does the cumulative effect of the errors require reversal?

[2] We affirm.

Facts & Procedural History

[3] On February 19, 2019, Resnover and his friend, Jaylen Weaver, travelled from Marion to Indianapolis to see a concert. Weaver had booked a rental home on Primrose Avenue through Airbnb for a couple of nights. The rental was a one-story, two-bedroom house with wooden stairs leading to a basement. The landing at the bottom of the stairs was comprised of carpet over concrete. A metal pole running from floor to ceiling was located near the landing.

- [4] Accompanying Resnover and Weaver were Resnover's two-year-old daughter, Resnover's girlfriend Kira Fear, and Fear's fifteen-month-old son, D.M. Once at the rental house, Resnover and Fear prepared dinner and fed the children. Resnover, Fear, and Weaver spent the rest of the evening socializing while the children played. At some point between 10:00 p.m. and 11:00 p.m., D.M.'s grandmother spoke with D.M. and Fear in a video call. D.M. appeared normal and wanted "to play and run like he usually [did]." *Transcript Vol. II* at 224.
- [5] By 11:30 p.m., Weaver went to sleep in one of the bedrooms. Around 1:00 a.m., Resnover and Fear went to the second bedroom, leaving the two children, who were still awake, on a pallet of pillows in the living room. At some point, Fear started to feel sick and went to the bathroom. Resnover then went back to the living room and found that the children were wet from playing with their water cups. Resnover changed D.M. into dry clothes and returned to the bedroom.
- [6] According to Resnover, shortly after 2:00 a.m., he heard screaming and went to check on the children. He found the living room empty, so he went to the stairs, where he saw his daughter playing with toys in the basement and D.M. trying to climb up the stairs. D.M. was crying, and Resnover noticed he had a bloody lip and had bit his tongue. Resnover picked up D.M. and tended to his bleeding lip with towels and ice. Resnover also noticed that D.M. had a "knot" on his forehead and on the back of his head. *Exhibits Vol. 2* at 96 (State's Exhibits 210, 211). At some point, D.M. also vomited, prompting Resnover to change his clothes again. Resnover described D.M.'s demeanor as being sort of

dazed. He then told Fear that he believed D.M. had fallen down the stairs and had injured himself “pretty bad.” *Id.*

[7] At 2:52 a.m., Resnover recorded a Snapchat video in which Resnover is seen walking down the stairs to the basement and, kneeling before D.M., who appears dazed, asking D.M. to give him a kiss. D.M. puckers his lips and leans in to give Resnover a kiss as Resnover reassures D.M. that he is okay. According to Resnover, he got D.M. to stop crying, gave him some water to drink, and then put D.M. to sleep.

[8] Sometime after 4:00 a.m., Fear was feeling better and went to check on D.M. She told Resnover that she wanted to take D.M. to the hospital, but Resnover suggested that because D.M. was asleep, they should pray and wait until later that morning. Fear and Resnover went back into the bedroom.

[9] Starting at 6:12 a.m., Resnover’s phone was used to make several internet searches. The searches included “what is the signs of concussion,” “what is the signs of concussion for a baby,” “my baby hands an [sic] legs are locking,” and “how to tell if a concussion is serious.” *Id.* at 123, 124 (State’s Exhibit 214). Around 10:00 a.m., Resnover’s daughter woke him up. It was then that Resnover found D.M. “not looking right at all.” *Id.* at 98.

[10] Resnover and Fear woke up Weaver and told him D.M. was not breathing. Weaver called 911 at 10:15 a.m. and handed the phone to Fear, who gave it back to him after the call was dropped or she hung up. Resnover and Fear then asked Weaver to drive them in his car to the hospital. After being directed to

the wrong location by GPS, they eventually flagged down an ambulance that was passing by.¹ Because the ambulance was already transporting a patient, the ambulance driver called 911 while the EMT on board began treating D.M. At 10:32 a.m., emergency personnel and another ambulance were dispatched to the scene.

[11] One of the first police officers to arrive at the scene immediately noted that D.M. was gray, had discolorations on his skin, and was “pretty much lifeless at that point.” *Transcript Vol. III* at 2. A firefighter arrived shortly thereafter and noted that D.M. was not breathing, did not have a pulse, and had mottling around his face and chest, which occurs from the settling of blood after death. Rigor mortis had already set in. A paramedic in the second ambulance assessed D.M. and, observing that rigor and livor mortis had set in, determined that he was deceased.

[12] At the scene, Reslover repeatedly showed to various emergency responders the Snapchat video he recorded during the early morning hours showing him asking D.M. for kisses. Those who viewed the video later described D.M. as appearing “lethargic or drunk,” “shaky,” and that he “didn’t look like he was fully there”. *Id.* at 5, 81.

¹ The ambulance was part of a private ambulance service used to transport patients between facilities and to and from doctor’s appointments.

[13] After D.M. was pronounced deceased, police detained Resnover and Fear in separate vehicles and eventually transported them to the police station.² At the station, Resnover was advised of his rights and agreed to give a recorded statement setting out some of the facts detailed above.

[14] On February 24, 2019, the State charged Resnover with one count of neglect of a dependent resulting in death as a Level 1 felony. A multi-day jury trial commenced on January 25, 2023. At trial, Resnover objected to admission of the post-mortem and autopsy photographs, which were Exhibits 6-17, 19-25, and 160-193. Resnover expressed concern that the State was trying the case as a murder case even though Resnover was not charged with such crime. He further argued that the photos “serve no purpose, but to inflame the prejudice of jurors against [him].” *Transcript Vol. II* at 129. In response, the State argued that the photos were necessary to establish the elements of the charged offense. The trial court overruled Resnover’s objection.

[15] At trial, the State presented the testimony of Dr. John Cavanaugh, who performed an autopsy on D.M.’s body the day after his death. Dr. Cavanaugh noted a total of twenty-nine injuries, including internal and external injuries, to D.M.’s head, torso, and limbs. The injuries included areas of discoloration or bruises on various parts of D.M.’s body as well as abrasions to his chest, arms, nose, and mouth. Dr. Cavanaugh described many of these injuries as “minor

² Weaver left the scene with Resnover’s daughter before police could speak to him.

and superficial and most of which could be explained by normal activities of kids.” *Transcript Vol. III* at 198.

[16] Dr. Cavanaugh identified injuries of significance as a large bruise or a series of bruises on D.M.’s forehead, a fan-shaped series of bruises to his right cheek, a large bruise on the back of his right ear, and a basal skull fracture at the back of his head. He noted that the basal skull fracture had three fracture lines radiating from the impact point, one of which lacerated the pituitary gland. He opined that such fracture indicated “significant force applied to the skull” and concluded that it resulted from a “significant impact injury.” *Id.* at 194. Dr. Cavanaugh noted that around the impact point, there was bleeding throughout three layers of the brain and there was a subdural hemorrhage, i.e., a blood clot. Dr. Cavanaugh also noted a diffuse hematoma over the entire top of D.M.’s head, beneath the scalp and bleeding around vertebrae in D.M.’s neck, which he identified as being consistent with a whiplash injury.

[17] Considering the pattern or “constellation of injuries”, Dr. Cavanaugh concluded that D.M. died from “multiple blunt force injuries” and that the manner of death was homicide. *Id.* at 197. He identified the basal skull fracture as the lethal injury but noted that the other head injuries that caused endocranial bleeding could also have been lethal. Dr. Cavanaugh determined that an “unwitnessed stair fall,” as alleged by Resnover, “would not explain the entirety of the constellation of injuries . . . , nor would [it] explain the single lethal injury.” *Id.* at 203.

[18] The State also presented the testimony of Dr. Tara Holloran, a child abuse pediatrician at Riley Hospital for Children, who analyzed D.M.’s injuries. Dr. Holloran similarly opined that D.M.’s injuries were not consistent with a fall down stairs but rather were the result of “severe physical abuse, including abusive head trauma.” *Transcript Vol. IV* at 212. Dr. Holloran also opined that based on D.M.’s condition in the Snapchat video, timely medical care would have likely saved D.M.’s life.

[19] During closing arguments, the State suggested that the stair fall was “a coverup” and argued that the evidence showed Resnover “neglected [D.M.] over and over and over again.” *Transcript Vol. V* at 110. The State also pointed out the bruises on D.M.’s leg and the fan-shaped bruise on his face and suggested that such could be indicative of a hand. Resnover did not object to these statements. Ultimately, the jury found Resnover guilty as charged. On March 3, 2023, the trial court sentenced Resnover to thirty-eight years executed.

[20] Resnover now appeals. Additional facts will be provided as necessary.

Discussion & Decision

1. Sufficiency

[21] Resnover challenges the sufficiency of the evidence supporting his conviction for Level 1 felony neglect of a dependent resulting in death. When reviewing the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor assess the credibility of witnesses. *Fix v. State*, 186 N.E.3d 1134,

1138 (Ind. 2022). “When there are conflicts in the evidence, the jury must resolve them.” *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022). Thus, on appeal, we consider only the probative evidence and the reasonable inferences supporting the conviction and will affirm “unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Fix*, 186 N.E.3d at 1138 (quoting *Jackson v. State*, 50 N.E.3d 767, 770 (Ind. 2016)). Stated differently, our task is to “decide whether the facts favorable to the verdict represent substantial evidence probative of the elements of the offenses.” *Young*, 198 N.E.3d at 1176 (quoting *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007)). On review, the evidence need not exclude every reasonable hypothesis of innocence, but instead, “the evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” *Drane*, 867 N.E.2d at 146.

[22] Ind. Code § 35-46-4-1 sets out, in pertinent part:

(a) A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally . . . (1) places the dependent in a situation that endangers the dependent’s life or health . . . commits neglect of a dependent, a Level 6 felony.

(b) However, the offense is . . . (3) a level 1 felony if it is committed under subsection (a)(1) . . . by a person at least eighteen (18) years of age and results in the death or catastrophic injury of a dependent who is less than fourteen (14) years of age.

In the charging information, the State alleged that the specific conduct that constituted neglect was that Resnover “did knowingly place [D.M.] in a

situation that endangered [D.M.]’s life or health, to wit: *failure to seek timely medical care for injuries*, and which resulted in the death of [D.M.]”³ *Appellant’s Appendix Vol. II* at 58 (emphasis supplied).

[23] Reslover first challenges the sufficiency of the evidence as it pertains to whether he *placed* D.M. in a dangerous situation by failing to seek medical attention. In this vein, Reslover points out that Fear, D.M.’s mother, was present the entire time and that as D.M.’s biological parent, she alone was responsible for D.M.’s care and the decision to seek medical attention. Reslover argues that because he “had no legal authority to decide what Fear did with her own child,” he cannot be said to have *placed* him in a dangerous situation. *Appellant’s Brief* at 19.

[24] We disagree. According to Reslover’s own account, he was the one who found D.M. crying and injured at the bottom of the stairs. He checked him over, noting two large knots on D.M.’s head—one on his forehead and one at the back of his head—and a busted lip. Reslover also indicated that D.M.’s behavior caused him to question whether D.M. was okay. He clearly believed D.M.’s injuries were significant enough to tell Fear that D.M. hurt himself “pretty bad,” and that she should check on him. *Exhibits Vol. 2* at 97. Fear, however, was too sick at the time to assess D.M. This left Reslover as the only adult who was aware of and could assess D.M.’s injuries and the need for

³ Reslover does not dispute that he is an adult and that D.M. was less than fourteen years old.

medical treatment. Further, when Fear eventually checked on D.M. and thought his injuries were serious enough to warrant a trip to the hospital, Resnover convinced her to wait until later that morning. From this evidence the jury could have reasonably concluded that by failing to seek prompt medical attention, Resnover, as the adult taking charge of the situation, “placed” D.M. in a situation that endangered his life.

[25] Resnover next argues that the State failed to prove that he voluntarily assumed care of D.M. We disagree. The evidence showed that Resnover helped prepare a meal and feed D.M. and that he later assumed the care of D.M. after Fear became sick. In his statement to the police, Resnover explained that he had changed D.M.’s clothes and diaper when he discovered that D.M. was wet from playing with a cup of water. Resnover also comforted D.M. when he found him on the basement stairs, and he treated D.M.’s bleeding lip. Resnover continued to comfort D.M., asking for and sharing kisses with D.M. and reassuring D.M. that he was alright. From this evidence, the jury could have reasonably concluded that Resnover voluntarily assumed care of D.M. *Fisher v. State*, 548 N.E.2d 1177 (Ind. Ct. App. 1990) (finding that where defendant paid for food and diapers, performed household duties, and was seen holding the dependent was sufficient evidence from which it could be reasonably inferred that defendant voluntarily assumed care of dependent). *Kellogg v. State*, 636 N.E.2d 1262, 1264 (Ind. Ct. App. 1994) (finding sufficient evidence that defendant had voluntarily assumed care of a dependent where defendant operated a car down the highway with a child in the back seat).

[26] Resnover argues that the State failed to prove that he acted knowingly. “When the allegation of neglect is the failure to provide medical care, the State must show that the need for medical care was actual and apparent and the accused was actually and subjectively aware of that need.” *C.T. v. State*, 28 N.E.3d 304, 307 (Ind. Ct. App. 2015) (citing *Fout v. State*, 619 N.E.2d 311, 313 (Ind. Ct. App. 1993)), *trans. denied*. “When there are symptoms from which the average layperson would have detected a serious problem necessitating medical attention, it is reasonable for the jury to infer that the defendant knowingly neglected the dependent.” *Patel v. State*, 60 N.E.3d 1041, 1051-52 (Ind. Ct. App. 2016) (quoting *Mitchell v. State*, 726 N.E.2d 1228, 1240 (Ind. 2000), *abrogated on other grounds by Beattie v. State*, 924 N.E.2d 643 (Ind. 2010)).

[27] Resnover argues he did not observe the symptoms, save one, that Dr. Holloran explained an average person may have observed in cases where a child had sustained a head injury with cerebral edema. Resnover maintains that there is no evidence that he observed symptoms other than crying, such as looking stunned, loss of consciousness, looking sleepy, seizures, inability to eat or drink, and/or agonal respiration. He also points out that Dr. Holloran testified that D.M.’s symptoms could have progressed after he fell asleep. He therefore maintains that the State failed to prove that he was subjectively aware that D.M. had suffered a serious injury and that he knowingly failed to seek immediate medical care.

[28] We defer to the jury’s assessment of the evidence. The State’s evidence showed that Resnover believed D.M. fell down the stairs and sustained knots to his

forehead and the back of his head and that he vomited after he sustained the head injuries. During his video statement, Resnover demonstrated how, after the fall, D.M. exhibited a stunned look that made Resnover question if D.M. was okay. From the Snapchat video, the jury was provided with a glimpse of D.M.'s demeanor after he was injured and how he appeared shaky and dazed. Resnover clearly believed D.M.'s injuries were significant enough to tell Fear that D.M. hurt himself "pretty bad." *Exhibits Vol. 2* at 97. After Fear checked on D.M., she felt his injuries warranted taking him to the hospital, leading to a reasonable inference that his serious condition was readily apparent. Yet, Resnover convinced Fear to not seek medical attention. Further, internet searches regarding signs and seriousness of concussions in children and suggesting that D.M.'s limbs were locking were made using Resnover's phone. From this evidence, the jury could have reasonably concluded that Resnover was subjectively aware that D.M. had suffered some type of serious injury and that he knowingly failed to seek medical care for such injury.

[29] Resnover argues that the State failed to present sufficient evidence that the failure to timely seek medical care resulted in D.M.'s death. To prove Resnover committed neglect, the State was required to prove that his failure to seek treatment resulted in D.M.'s death. *Skeens v. State*, 151 N.E.3d 1248 (Ind. Ct. App. 2020), *trans. denied*; *see also Patel v. State*, 60 N.E.3d 1041 (Ind. Ct. App. 2016). We have held that this language "implicates proximate causation." *Patel*, 60 N.E.3d at 1052. In other words, the State must have proved that

D.M.'s death would not have occurred but for Resnover's failure to seek medical treatment.

[30] Here, Dr. Cavanaugh testified that the basal skull fracture was the fatal injury. The State also presented the testimony of Dr. Holloran, who described the various ways doctors can treat swelling of the brain from the impact that caused D.M.'s basal skull fracture or the other head injuries. Dr. Holloran reviewed the Snapchat video showing D.M. and, being aware of his injuries, concluded that "it would be very likely" that D.M. would have survived if he had reached a medical facility in a timely manner.⁴ *Transcript Vol. IV* at 232. From this evidence the jury could have reasonably concluded that Resnover's failure to seek prompt medical treatment after D.M. sustained his head injuries resulted in D.M.'s death. *See Brown v. State*, 770 N.E.2d 275, 281 (Ind. 2002) (finding sufficient evidence where "chances for survival were good had she received prompt medical treatment").

[31] In sum, we reject the invitation to reweigh the evidence. Resnover's conviction was supported by sufficient evidence.

⁴ Resnover argues that the evidence does not establish that D.M. suffered the basal skull fracture prior to the Snapchat video. There is ample evidence, however, from which one could infer that the injury occurred prior to the video.

2. Admission of Photographs

[32] Resnover argues that the trial court abused its discretion in admitting fifty-two post-mortem and autopsy photographs of D.M.'s body. Resnover maintains that the photos were not probative because they did not depict how D.M. appeared on the night of the injury and that they served no purpose but to inflame the prejudice of jurors against him. Resnover expressed concern at trial that "the State wants to try a different case than they've charged . . . I think the State wants to try this case as if they're trying a murder case and they're not." *Transcript Vol. II* at 128.

[33] Because the admission and exclusion of evidence falls within the sound discretion of the trial court, we will review the admission of photographic evidence only for abuse of discretion. *Corbett v. State*, 764 N.E.2d 622, 627 (Ind. 2002). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effects of the facts and circumstances before it. *Payne v. State*, 854 N.E.2d 7, 17 (Ind. Ct. App. 2006). "Generally, photographs that depict a victim's injuries or demonstrate the testimony of a witness are admissible." *Ward v. State*, 903 N.E.2d 946, 958 (Ind. 2009).

[34] Indiana Evidence Rules 401 through 403 govern relevancy of evidence. Relevant evidence is admissible; irrelevant evidence is not. Evid. R. 402. Evidence is relevant if it has any tendency to make any "fact that is of consequence to the determination" of the action more or less probable. Evid.

R. 401. Relevant evidence can be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” Evid. R. 403.

[35] Resnover first argues that the probative value of the photographs was low because most did not depict injuries that contributed to D.M.’s death. He points out that the fatal injury—the basal skull fracture—was not visible externally and that none of the photographs of D.M.’s body purported to show injuries indicative of the basal skull fracture. He also argues that the photos do not accurately depict the injuries that would have been visible to him at the crucial time, i.e., when a decision to seek prompt medical attention would have been made, pointing out that the discoloration of D.M.’s skin and the more prominent appearance of bruising is typical only hours after death.

[36] We first note that the photographs were not particularly gruesome and did not show D.M.’s body in an altered state. The photographs show D.M.’s entire body and close ups of areas depicting external injuries such as bruises and scrapes from different angles.⁵ The State maintains that the photographs were relevant as they were probative of the cause of D.M.’s death and that Resnover acted knowingly when he failed to seek medical attention for D.M.’s life-threatening injuries. We also note that the State did not seek to admit

⁵ Drs. Cavanaugh and Holloran referred to the pictures during their testimony. They noted that some of the injuries depicted were minor and likely resulted from normal toddler activities. They also explained that some of the pictures depicted areas caused by post-mortem changes and acknowledged the discoloration and increased prominence of bruising given the passage of time since D.M.’s death.

photographs showing D.M.'s internal brain injuries, but rather had its witnesses refer to drawings to explain their testimony regarding such.

[37] At all times, Resnover's version of events was that D.M. fell down the stairs and that such fall must have resulted in the fatal head injury(ies). The State maintains that the pictures were relevant and necessary to explain that D.M.'s injuries were not explained by a fall down the stairs. Indeed, Dr. Cavanaugh testified that the "constellation of injuries" was not indicative of a fall down stairs and emphasized that the fatal basal skull fracture was not consistent with Resnover's explanation given the significant force required to inflict such an injury that would not have been present during a fall down stairs. *Transcript Vol. III* at 197. He specifically pointed out bruises to "all four surfaces of the skull" indicating multiple, significant impacts and given the other external injuries observed on D.M.'s body, concluded that D.M.'s cause of death was "multiple blunt force injuries." *Id.* at 198, 197. He relied on the other external injuries depicted in the photographs to help him reach this conclusion.

[38] Dr. Holloran likewise opined that the basal skull fracture would not have been sustained during a fall down stairs but rather was the result of significant force to the back of D.M.'s head from another source. She too noted the other visible external injuries and how such would have made Resnover aware of the significance of the injuries D.M. had sustained.

[39] Resnover also argues that even if relevant, the sheer number of photographs was unduly prejudicial and served only to inflame the prejudice of the jurors.

Because all evidence relevant to a criminal prosecution is inherently prejudicial, the analysis under Evid. R. 403 turns on whether the prejudicial impact of the evidence will cause the jury to “substantially overestimate the value of the evidence or that the evidence will arouse or inflame the passions or sympathies of the jury.” *Fuentes v. State*, 10 N.E.3d 68, 73 (Ind. Ct. App. 2014), *trans. denied*. “Although a photograph may arouse the passions of the jurors, it is admissible unless ‘its probative value is substantially outweighed by the danger of unfair prejudice.’” *Cutter v. State*, 725 N.E.2d 401, 406 (Ind. 2000).

[40] Pictures of a deceased fifteen-month-old child will naturally inflame the passions and sympathies of a jury. Here, however, the photographs were necessary to explain how D.M. died given that he sustained injuries inconsistent with the explanation of an unwitnessed fall down stairs. Although there was an inordinate number of photographs, we note that many of the injuries depicted were shown from several angles. Having reviewed the photographs, we cannot say that the trial court abused its discretion in admitting them into evidence.

3. Prosecutorial Misconduct

[41] Reslover argues that the State engaged in prosecutorial misconduct when, during closing argument, it argued that Reslover should be convicted for neglecting D.M. “over and over and over again” and suggesting that D.M.’s injuries were indicative of physical abuse by Reslover. *Transcript Vol. V* at 110. Reslover claims that the State essentially asked the jury to find him guilty of

physical abuse, rather than neglect based on failure to seek medical attention. Resnover did not object to the State's closing argument at trial.

[42] When reviewing a claim of prosecutorial misconduct, we will consider (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. *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). “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.” *Cooper*, 854 N.E.2d at 835 (emphasis added) (citations omitted). 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. *Id.*

[43] Our standard of review is different where, as here, a claim of prosecutorial misconduct has been procedurally defaulted for failure to properly raise the claim in the trial court, that is, waived for failure to preserve the claim of error. *See Booher v. State*, 773 N.E.2d 814, 817-18 (Ind. 2002). In such case, the defendant must establish not only the grounds for prosecutorial misconduct but must also show that the misconduct constituted fundamental error. *Id.* at 818. 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.” *Benson*

v. State, 762 N.E.2d 748, 756 (Ind. 2002). 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.” *Id.* We have noted before that it is “highly unlikely” to prevail on a claim of fundamental error relating to prosecutorial misconduct. *Baer v. State*, 942 N.E.2d 80, 99 (Ind. 2011).

[44] In referring to coin-shaped and fan-shaped bruises and asking the jury to compare such to their own hands, the State implied that such bruises were the result of physical abuse and not an unwitnessed fall down the stairs. In this vein, the State stuck to its theory that the injuries D.M. sustained, especially his head injuries, were not the result of an unwitnessed fall as explained by Resnover. The State argued that D.M.’s fatal injury was inflicted in some other manner and that Resnover was aware of just how D.M. suffered a basal skull fracture. Indeed, the day before D.M. died, he had none of the injuries except for an abrasion to his elbow, a small faded yellow bruise on his face, and an injury to the roof of his mouth. By the next day, D.M. had bruises to other parts of his body including his face, and he had suffered at least one fatal head injury. Throughout trial, the State challenged Resnover’s story of an unwitnessed, accidental fall down the stairs. The State implied that Resnover was aware of how D.M. sustained the basal skull fracture and thus knew the severity of that head injury. The State’s closing argument was consistent with

the evidence presented to the jury. In this regard, the prosecutor's statements did not amount to misconduct.

[45] Similarly, by suggesting that Reslover neglected D.M. "over and over and over" again, the State was commenting on the evidence. Such statement could also be interpreted to mean that Reslover had multiple opportunities to seek medical treatment for D.M., and he failed to do so each time. In short, the prosecutor's statement did not amount to misconduct. Even if the prosecutor's statements amounted to prosecutorial misconduct, we cannot say that they rose to the level of fundamental error.

4. Cumulative Error

[46] Reslover argues that the cumulative effect of admission of the photos of D.M.'s body and the State's comments during closing argument made a fair trial impossible. He maintains that the State presented its case in such a way that the jury could have convicted him "based upon inflamed passions as opposed to evidence of the charged elements." *Appellant's Brief* at 41.

[47] Our Supreme Court has before noted that,

This court has been willing to assume "for the sake of argument, that under some circumstances the cumulative effect of trial errors may warrant reversal even if each might be deemed harmless in isolation," but not where it has been "clear in light of the evidence of guilt that no prejudice resulted from any of the erroneous rulings, individually or cumulatively."

Inman v. State, 4 N.E.3d 190, 203 (Ind. 2014) (citing *Hubbell v. State*, 754 N.E.2d 884, 895 (Ind. 2001)). Given our resolution of the issues herein, i.e., that the photographs were properly admitted and that the prosecutor did not engage in misconduct during closing statements, Reslover's claim of cumulative error fails.

Judgment affirmed.

[48] Riley, J. and Weissmann, J., concur.

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