MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Blossum N. Kirby,

Appellant-Defendant

v.

State of Indiana,

Appellee-Plaintiff

April 8, 2024

Court of Appeals Case No.
23A-CR-1583

Appeal from the Marion Superior Court

The Honorable Linda Brown, Judge

The Honorable Peggy Hart, Magistrate

Trial Court Cause No.
49D36-2206-F6-17475

Memorandum Decision by Judge Kenworthy

Chief Judge Altice and Judge Felix concur.

Kenworthy, Judge.

Case Summary[1]

[1] Blossum Nicole Kirby appeals her convictions for two counts of Level 6 felony neglect of a dependent,[2] raising three issues for our review:

> 1. Does sufficient evidence support Kirby's convictions?
>
> 2. Was there fundamental error due to the trial court's failure to give a specific unanimity instruction?
>
> 3. Was there fundamental error due to alleged prosecutorial misconduct?

[2] Concluding sufficient evidence supports Kirby's convictions and discerning no fundamental error, we affirm.

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[1] We held oral argument in this case on March 19, 2024, at the Honeywell Center in Wabash, Indiana. We extend our appreciation to the Honeywell Center staff and Wabash County Bar Association for the invitation and hospitality. We also thank the students from Wabash High School, Southwood High School, and Northfield High School for their attention and thoughtful questions. Lastly, we thank counsel for both parties for the quality of their arguments and for remaining after the argument to answer the students' questions.

[2] Ind. Code § 35-46-1-4(a)(1) (2021).

Facts and Procedural History

[3] Kirby is the mother of fraternal twins, N.M. and M.M. When Kirby gave birth to the twins in April 2022, she was homeless. Kirby did not have a car. Instead, she relied on a bicycle as her primary method of transportation.

[4] On June 24, 2022—a hot, sunny, summer day with temperatures reaching over 90 degrees Fahrenheit—Kirby left her mother's house with her infants to go to a friend's house. Kirby's destination was about five miles away and took around thirty minutes by bicycle. Kirby placed her two-month-old infants in a wrapping-paper-lined milk crate strapped to the front of her bicycle with bungee cords. The infants wore nothing but diapers. Kirby also brought a bag containing baby items—milk bottles, baby wipes, spare diapers, baby formula, and children's books.

[5] Sometime during her ride, Kirby passed a restaurant located by a busy intersection. Suezann Lynch—an employee at the restaurant—looked out a window and saw Kirby across the street "wrecking her bike." *Tr. Vol. 3* at 138. According to Lynch, Kirby's bicycle was "falling" and the milk crate holding N.M. and M.M. "was turning over to the left." *Id.* Lynch did not see the infants fall out of the crate, although she thought they were going to. Concerned for the infants' safety, Lynch ran out of the restaurant and across "very busy" traffic. *Id.* at 150. Lynch made it across the street and told Kirby to come to the restaurant's parking lot, which Kirby did. One of Lynch's co-

workers recorded part of the interaction on a cell phone.[3] As this happened, one baby cried loudly while the other was "real lethargic." *Id.* at 140. Lynch then took N.M. and M.M. inside the restaurant and called the police.

[6] While inside, Lynch noticed both infants were "sunburnt real[ly] bad." *Id.* at 141. One infant had "probably the worst" diaper rash Lynch had ever seen and the other had a bleeding cut on the inside of their finger. *Id.* Kirby sat in the restaurant's lobby. Lynch observed Kirby with "her eyes closed, like leaning back and forth, like she was nodding off." *Id.* at 144–45. Kirby was "rambling" and "saying things that didn't make a lot of sense." *Id.* Lynch thought Kirby "was out of it." *Id.* at 144. EMTs arrived and took N.M. and M.M. to the hospital. The Department of Child Services ("DCS") initiated Child in Need of Services ("CHINS") proceedings soon after.

[7] The State charged Kirby with two counts of Level 6 felony neglect of a dependent. A jury found Kirby guilty as charged. Additional facts are provided when necessary.

1. Sufficient Evidence Supports Kirby's Convictions

[8] Kirby first claims insufficient evidence supports her convictions. A sufficiency-of-the-evidence claim warrants a "deferential standard of appellate review, in

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[3] The recording shows Kirby wearing what she called a "mobile carrier." *Id.* at 169; *State's Ex.* 1. The "mobile carrier" appears to be a baby wrap—a long piece of fabric used to strap an infant to a parent's chest or back. Although Kirby was wearing the baby wrap, there is no indication she used it to transport either of the infants during the underlying incident.

which we 'neither reweigh the evidence nor judge witness credibility[.]'" *Owen v. State*, 210 N.E.3d 256, 264 (Ind. 2023) (quoting *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). Instead, we respect the fact-finder's exclusive province to weigh conflicting evidence, *Phipps v. State*, 90 N.E.3d 1190, 1195 (Ind. 2018), and consider only the probative evidence and reasonable inferences that support the judgment of the trier of fact, *Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021). We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Teising v. State*, 226 N.E.3d 780, 783 (Ind. 2024). "It is not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" *Sallee v. State*, 51 N.E.3d 130, 133 (Ind. 2016) (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)).

[9] To convict Kirby of Level 6 felony neglect of a dependent as charged, the State was required to prove beyond a reasonable doubt Kirby: (1) had the care of dependents N.M. and M.M.; and (2) knowingly; (3) placed them in a situation that endangered their life or health. *See* I.C. § 35-46-1-4(a)(1). Kirby does not dispute N.M. and M.M. were dependents in her care. Rather, Kirby focuses her challenge on whether the State presented sufficient evidence to show her subjective awareness of a high probability she placed N.M. and M.M. in actual and appreciable danger.

A. Subjective Awareness

[10] Kirby acknowledges "[p]lacing the babies in the milk crate was undisputedly unwise and something no parent would condone as more than a temporary resting place." *Appellant's Br.* at 14. Even so, Kirby argues the State failed to present sufficient evidence Kirby *knew* there was a high probability she put her children in danger by placing them in the milk crate bungee-corded to her bicycle as she rode near a busy street.

[11] "Knowingly" is a statutorily defined term. "A person engages in conduct 'knowingly' if, when [s]he engages in the conduct, [s]he is aware of a high probability that [s]he is doing so." I.C. § 35-41-2-2(b). The *mens rea* requirement of the neglect statute requires proof that a defendant had "a subjective awareness of a 'high probability' that a dependent had been placed in a dangerous situation." *Marksberry v. State*, 185 N.E.3d 437, 442 (Ind. Ct. App. 2022) (quoting *Shultz v. State*, 115 N.E.3d 1280, 1286 (Ind. Ct. App. 2018)), *trans. denied*; *see also Villagrana v. State*, 954 N.E.2d 466, 469 (Ind. Ct. App. 2011) (noting Indiana does not criminally penalize those who negligently neglect a dependent). To make this showing, the State "need only prove the accused was aware of facts that would alert a reasonable caregiver under the circumstances to take affirmative action to protect the child." *Dexter v. State*, 945 N.E.2d 220, 224 (Ind. Ct. App. 2011), *summarily aff'd in relevant part*, 959 N.E.2d 235, 237 (Ind. 2012). Absent a confession, such a finding normally requires the fact finder to resort to inferential reasoning to determine the defendant's mental state. *See Becklehimer v. State*, 190 N.E.3d 975, 978 (Ind. Ct. App. 2022). Thus, appellate courts "must look to all the surrounding circumstances of a case to

determine if a guilty verdict is proper." *Id.* (quoting *McMichael v. State*, 471 N.E.2d 726, 731 (Ind. Ct. App. 1984), *trans. denied*).

[12] The State presented sufficient evidence from which a jury could reasonably infer Kirby was aware of facts that would alert a reasonable caregiver to take affirmative action to protect the infants. Kirby rode her bicycle near a busy intersection as her two-month-old infants lay unrestrained, visibly sunburnt, and mostly unclothed in the milk crate bungee-corded to the front of her bicycle. Additionally, Kirby would have been aware of the hot and sunny conditions on that summer day. Considering all the surrounding circumstances, the State presented sufficient evidence Kirby was subjectively aware of a high probability she placed her infants in a dangerous situation.[4] *See Dexter*, 945 N.E.2d at 224–25 (concluding tossing a wet child in the air over a bathtub after two people had warned the defendant not to do so because they were afraid the child would get hurt was sufficient to show the defendant was subjectively aware of a high probability he placed the child in a dangerous situation).

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[4] Kirby also directs us to the recorded interaction she had with Lynch and another restaurant employee. Although the audio is far from clear, Kirby seems to indicate police told her to transport her infants in her baby wrap. *See State's Ex.* 1. Officer Rachel Goetz testified at Kirby's trial concerning information Kirby shared with her regarding a discussion with an unidentified law enforcement officer. According to Officer Goetz's testimony, Kirby relayed that the unidentified officer informed her she needed to place her infants in the baby wrap. Officer Goetz was unable to confirm Kirby had spoken to another law enforcement officer. Even if we were to accept Kirby's account of the interaction, it would further support the jury's conclusion Kirby subjectively knew she endangered N.M. and M.M. because she had previously been warned placing them in the milkcrate subjected them to a substantial risk of harm. Ultimately, however, we are not permitted to reweigh evidence. *See Owen*, 210 N.E.3d at 264.

B. Actual and Appreciable Danger

[13] Next, Kirby contends the State failed to present sufficient evidence she placed N.M. and M.M. in actual and appreciable danger. Panels of this Court have repeatedly held the neglect statute "must be read as applying only to situations that expose a dependent to an 'actual and appreciable' danger to life or health." *Becklehimer*, 190 N.E.3d at 978 (quoting *Scruggs v. State*, 883 N.E.2d 189, 191 (Ind. Ct. App. 2008), *trans. denied*). To be in "actual and appreciable" danger, the child "must be exposed to some risk of physical or mental harm that goes substantially beyond the normal risk of bumps, bruises, or even worse that accompany the activities of the average child." *Id.* (quoting *Scruggs*, 883 N.E.2d at 191). But the State does not have to wait for the harm to come to fruition before it may intervene. *See id.* at 979 (explaining the purpose of the neglect statute is to "'authorize the intervention of the police power to prevent harmful consequences and injury to dependents' without having to wait for actual loss of life or limb") (quoting *Gross v. State*, 817 N.E.2d 306, 309 (Ind. Ct. App. 2004)). In the end, there is "a fine line between properly exercising the police power to protect dependents and improperly subjecting every mistake a parent may make in raising his or her child to prosecutorial scrutiny." *Id.* at 981 (quoting *Gross*, 817 N.E.2d at 311).

[14] The State presented sufficient evidence Kirby put N.M. and M.M. in actual and appreciable danger by placing them in a wrapping-paper-lined milk crate attached to her bicycle by bungee cords while she rode near a street with "very busy" traffic. *Tr. Vol. 3* at 150. Plus, Lynch saw Kirby "wrecking her bike"

such that the milk crate holding N.M. and M.M. "was turning over." *Id.* at 138. The State did not have to wait for the unrestrained infants to be harmed before it could intervene. *See Becklehimer*, 190 N.E.3d at 978. Said another way, the State presented sufficient evidence Kirby exposed N.M. and M.M. to risk of physical harm substantially beyond the normal risks that accompany the activities of the average child.[5]

2. No Fundamental Error Due to Failure to Give Specific Unanimity Instruction

[15] Kirby next asserts the trial court committed fundamental error when it failed to give a specific jury instruction on unanimity "after the State proposed different acts on which the jurors could base their verdict." *Appellant's Br.* at 19. Because Kirby neither objected to the trial court's instructions nor tendered her own instruction, we will review her claim only for fundamental error. *See Baker v. State*, 948 N.E.2d 1169, 1178 (Ind. 2011).

[16] The "fundamental error" exception to waiver is "extremely narrow, and 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

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[5] Kirby points to her participation with DCS before her criminal charges were filed and claims "[t]his was a matter that could have and should have been left to DCS without involving the criminal justice system." *Appellant's Br.* at 18. The decision to prosecute "lies within the prosecutor's discretion so long as the prosecutor has probable cause to believe that the accused committed an offense." *Neeley v. State*, 457 N.E.2d 532, 534 (Ind. 1983). Kirby does not argue the prosecutor lacked probable cause she committed an offense. Although we are sensitive to Kirby's struggles with poverty, it is not our role to override the prosecutor's discretion.

fundamental due process." *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). An error is fundamental "if it made a fair trial impossible or amounted to a clear violation of basic due-process principles." *Tate v. State*, 161 N.E.3d 1225, 1229 (Ind. 2021). This "formidable standard . . . applies only where the error is so flagrant that the trial judge should have corrected the error on [their] own, without prompting by defense counsel." *Id.*

[17] In Indiana, a guilty verdict in a criminal case "must be unanimous." *Baker*, 948 N.E.2d at 1174 (quoting *Fisher v. State*, 291 N.E.2d 76, 82 (Ind. 1973)). We require unanimity "as to the defendant's guilt," but not as to the "theory of the defendant's culpability." *Taylor v. State*, 840 N.E.2d 324, 333 (Ind. 2006). To address problems that sometimes arise regarding jury unanimity, our Supreme Court in *Baker* held where "evidence is presented of a greater number of separate criminal offenses than the defendant is charged with," and the State does not "designate a specific act (or acts) on which it relies to prove a particular charge," the jurors "should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged." 948 N.E.2d at 1175–77. The phrase "a greater number of separate criminal offenses than the defendant is charged with" refers to situations where evidence "is presented of entirely separate criminal incidents, each of which could be used to support a conviction." *Baker v. State*, 223 N.E.3d 1142, 1146 (Ind. Ct. App. 2023).

[18] Although the State did not designate a specific act in charging Kirby,[6] no specific unanimity instruction was required because the State did not present evidence of "entirely separate criminal incidents." *Baker*, 223 N.E.3d at 1146. Rather, Kirby's acts were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Id.* (quoting *Walker v. State*, 932 N.E.2d 733, 735 (Ind. Ct. App. 2010)). As Kirby rode her bicycle with her infants in the strapped-on milk crate, she nearly crashed along a road with busy traffic. While this was happening, the infants were wearing just diapers, exposing them to the hot summer sun. And N.M. had a bleeding cut on the inside of her finger, suggesting it happened recently. The State therefore did not present evidence of entirely separate criminal incidents such that it was error, let alone fundamental error, for the trial court to not give a specific unanimity instruction.[7] *See, e.g., Benson v. State*, 73 N.E.3d 198, 203 (Ind. Ct. App. 2017) (holding no specific unanimity instruction was

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[6] The amended charging information read:

> On or about June 24, 2022, BLOSSUM NICOLE KIRBY, having the care of N.M., a dependent, did knowingly place said dependent in a situation that endangered the dependent's life or health[.]

Appellant's App. Vol. 2 at 114. Kirby's charges were identical besides the name of the dependent.

[7] Even if it was error to not give a specific unanimity instruction, such error would not be fundamental. Put simply, Kirby has not shown the alleged error made a "fair trial impossible or amounted to a clear violation of basic due-process principles." *Tate*, 161 N.E.3d at 1229. For example, the jury was instructed that its verdict must be unanimous. *Tr. Vol. 3* at 192 (instructing the jury they must "all agree" on the verdict); *see also Appellant's App. Vol. 2* at 169 (instructing the foreperson, "Do not sign any verdict form for which there is not unanimous agreement."); *see also Tr. Vol. 3* at 48 ("The verdict must also be unanimous.").

required when the jury heard evidence the defendant shot a gun at police on two separate occasions during a brief, continuous pursuit), *trans. denied*.

3. No Fundamental Error Due to Alleged Prosecutorial Misconduct

[19] Kirby also claims fundamental error occurred due to prosecutorial misconduct during the State's closing argument. The issue of prosecutorial misconduct implicates a two-part determination: "(1) whether the prosecutor engaged in misconduct, 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." *Isom v. State*, 31 N.E.3d 469, 490 (Ind. 2015) (quoting *Baer v. State*, 866 N.E.2d 752, 756 (Ind. 2007), *cert. denied*), *cert. denied*. Because a prosecutor has a duty to present a persuasive argument, placing a defendant in grave peril, by itself, is not misconduct. *Ryan v. State*, 9 N.E.3d 663, 667 (Ind. 2014). We measure whether a prosecutor's argument constitutes misconduct by reference to case law and the Rules of Professional Conduct. *Id.* And 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." *Id.* (quoting *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006)).

[20] Where a defendant fails to properly preserve a claim of prosecutorial misconduct, our standard of review is different from that of a properly

preserved claim.[8] Under these circumstances, a defendant must establish "not only the grounds for the misconduct but also the additional grounds for fundamental error." *Isom*, 31 N.E.3d at 490 (quoting *Cooper*, 854 N.E.2d at 835). Fundamental error is "intended to place a heavy burden on the defendant." *Castillo v. State*, 974 N.E.2d 458, 468 (Ind. 2012). Thus, our task 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." *Ryan*, 9 N.E.3d at 668.

[21] The State began its closing argument with the following statement:

> Ladies and gentlemen of the jury, today we stand to seek justice for the most vulnerable among us. Two defenseless babies, N.M. and M.M. We, as the Prosecution, have presented a case that paints a picture of neglect for the lives of these innocent babies. It is our duty to prove beyond a reasonable doubt that Ms. Kirby is guilty of two counts of neglect of a dependent. And I ask you to carefully consider the events that we presented to you at trial.

Tr. Vol. 3 at 194–95. Later in its closing statement, the State observed, "[w]itnesses have testified to the heartbreaking encounter that they observed

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[8] In her Brief, Kirby notes she objected to only one instance of alleged improper argument. Thus, on appeal, her claim is reviewable only for fundamental error. *See id.* (indicating a defendant fails to preserve a claim of prosecutorial misconduct if, at the time the alleged misconduct occurs, the defendant does not request an admonishment of the jury, and if further relief is desired, move for a mistrial).

that day." *Id.* at 197. Kirby objected, claiming the prosecutor was "playing on the sympathy of the jury by saying the heartbreaking encounter." *Id.* The trial court overruled Kirby's objection. In its rebuttal closing statement, the State argued: "[Kirby's] riding a bike with these kids unsecured in a milk crate while, apparently, under the influence." *Id.* at 201. Kirby claims these arguments "unfairly played to the jury's sympathy, invited the jury to convict for reasons other than guilt, and presented facts not in evidence." *Appellant's Br.* at 23.

[22] Kirby first argues the prosecutor committed misconduct by invoking sympathy for the infants as a basis for Kirby's guilt. It is misconduct for a prosecutor to request the jury to convict a defendant for any reason other than her guilt. *See Ryan*, 9 N.E.3d at 671. For example, it is improper for a prosecutor to invoke sympathy for a victim as a basis for a conviction, *Thornton v. State*, 25 N.E.3d 800, 806 (Ind. Ct. App. 2015), or to phrase a closing argument "in a manner calculated to inflame the passions or prejudice of a jury," *Jerden v. State*, 37 N.E.3d 494, 499 (Ind. Ct. App. 2015). Still, prosecutors may make arguments that invite the jury to make a reasonable inference from the evidence presented at trial. *See Booher v. State*, 773 N.E.2d 814, 819 (Ind. 2002). And fair characterizations of the evidence are not misconduct. *See Wrinkles v. State*, 749 N.E.2d 1179, 1197 (Ind. 2001), *cert. denied*.

[23] The prosecutor's statements referring to N.M. and M.M. as "innocent babies," "defenseless babies," and "the most vulnerable among us" related to an element of Kirby's charged offenses: that N.M. and M.M. were dependents in Kirby's care. *See* I.C. § 35-46-1-4(a)(1). Plus, the statements were fair characterizations

of the evidence presented at trial concerning that element. After all, N.M. and M.M. were two months old when Kirby placed them in the milk crate. Said differently, the prosecutor's comments accurately reflected the status of the infants during the incident underlying this case and did not amount to prosecutorial misconduct.

[24] Next, Kirby claims the prosecutor's assertion Kirby "appeared to be under the influence" was not supported by the evidence. *See Appellant's Br.* at 24. Indiana Professional Conduct Rule 3.4(e) prohibits a lawyer in trial from "allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence[.]" Still, as mentioned above, prosecutors may make arguments that invite the jury to make a reasonable inference from the evidence presented at trial. *See Booher*, 773 N.E.2d at 819; *see also Fouts v. State*, 207 N.E.3d 1257, 1267 (Ind. Ct. App. 2023) (noting a prosecutor may argue both law and facts and offer conclusions based on their analysis of the evidence), *trans. denied*.

[25] The prosecutor's statement about Kirby being "apparently, under the influence" was based on evidence presented in the record. *Tr. Vol. 3* at 201. At Kirby's trial, Lynch testified Kirby had "her eyes closed" and was "leaning back and forth, like she was nodding off" while sitting in the restaurant. *Id.* at 144–45. Lynch further noted Kirby was "rambling" and "saying things that didn't make a lot of sense." *Id.* Lynch thought Kirby "was out of it." *Id.* at 144. Although there could have been another reason for Kirby's behavior besides her being under the influence, it was not misconduct for the prosecutor to make an

argument based on a reasonable inference from the evidence presented at trial. *See Booher*, 773 N.E.2d at 819.[9]

Conclusion

[26] Concluding sufficient evidence supports Kirby's convictions and discerning no fundamental error, we affirm.

[27] Affirmed.

Altice, C.J., and Felix, J., concur.

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[9] Even if we were to determine the prosecutor committed misconduct, we do not believe such misconduct, under these circumstances, would rise to the level of fundamental error. Interspersed among the alleged improper statements, the prosecutor reiterated the State's burden of proof—beyond a reasonable doubt. *See Tr. Vol. 3* at 194. And the trial court instructed the jury the attorneys' statements are not evidence, *see id.* at 126, and "[n]either sympathy nor prejudice for or against either the complaining witness or the Defendant in this case shall be allowed to influence you in whatever verdict you may find," *Id.* at 191. Considering all the circumstances, we can comfortably say the prosecutor's statements, even if considered misconduct, did not have "an undeniable and substantial effect on the jury's decision" such that a fair trial was impossible. *Ryan*, 9 N.E.3d at 668 (emphasis omitted).

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