MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Corey Allen McNamee,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 1, 2024

Court of Appeals Case No.
23A-CR-1831

Appeal from the
St. Joseph Superior Court

The Honorable
Elizabeth C. Hurley, Judge

Trial Court Cause No.
71D08-2205-F5-111

Memorandum Decision by Senior Judge Baker
Judges Bailey and Kenworthy concur.

Baker, Senior Judge.

Statement of the Case

[1] The State charged Corey Allen McNamee with Level 5 felony domestic battery by means of a deadly weapon after he repeatedly struck his brother with an aluminum bat. A jury determined McNamee was guilty. He appeals, arguing the prosecutor committed misconduct so severe that it amounted to fundamental error. Concluding that McNamee has not proven prosecutorial misconduct, much less fundamental error, we affirm.

Facts and Procedural History

[2] On May 19, 2022, Danny Ray McNamee, Sr. ("Senior"), and his son, Danny Ray McNamee, Jr. ("Junior"), arrived at Senior's house in Senior's car. McNamee, who was also Senior's son, lived with Senior. McNamee angrily approached Senior's car and threatened to shoot both men.

[3] Junior argued with McNamee, saying that he also had a gun. Junior then called the police. McNamee went inside the house, and Junior went to his own vehicle. McNamee exited the house carrying an aluminum bat and approached Junior, swinging the bat at him. Junior blocked two swings with his arm, but McNamee struck Junior on the chin with the third swing.

[4] Junior got into his car, and McNamee hit the car with the bat. Next, the police arrived, and they arrested McNamee after interviewing all three men.[1] An officer noted Junior's chin was lacerated and bleeding.

[5] The State charged McNamee with Level 5 felony domestic battery by means of a deadly weapon. At trial, McNamee claimed self-defense. The jury determined McNamee was guilty as charged, and the trial court imposed a sentence of one year, suspended to probation. This appeal followed.

Discussion and Decision

[6] McNamee argues the prosecutor committed misconduct during closing arguments by misstating evidence. "In reviewing a claim of prosecutorial misconduct, we determine (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 should not have been subjected." *Carter v. State*, 956 N.E.2d 167, 169 (Ind. Ct. App. 2011), *trans. denied*. "Misconduct is measured by case law and the Rules of Professional Conduct." *Craft v. State*, 187 N.E.3d 340, 347 (Ind. Ct. App. 2022), *trans. denied*. "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 v. State*, 854 N.E.2d 831, 835 (Ind. 2006).

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[1] An officer's body camera recorded the interview with Senior. The recording was admitted at trial only to impeach Senior's testimony, rather than as substantive evidence.

[7] McNamee concedes he did not timely object to the prosecutor's statements during closing arguments. "Where 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." *Cooper*, 854 N.E.2d at 835. "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.'" *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014) (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)). When considering fundamental error, a court's 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." *Id.*

[8] "It is proper for a prosecutor to argue both law and fact during final argument and propound conclusions based on his analysis of the evidence." *Seide v. State*, 784 N.E.2d 974, 977 (Ind. Ct. App. 2003). In McNamee's case, during closing arguments the prosecutor told the jury, in relevant part:

> It's easy to laugh this off as some movie, brothers being brothers. But you've seen all the facts. And the facts are undisputed, by the way. It's undisputed that there was a verbal argument. It's undisputed that they both threatened each other with guns. It's undisputed that [Junior] walked away. And that's corroborated by the other evidence. It's corroborated that this happened in the street because there's marks on [Junior's] car too. We've heard

> there was no physical altercation at all and yet here's [Junior,] he's cut. He's bleeding. Again, his car is in the street. This happened at his car. [McNamee] is not protecting his property. He's not protecting his dad.

Tr. Vol. II, pp. 80-81. And during his rebuttal argument, the prosecutor further stated:

> [Senior] did not dispute that [McNamee] also had a gun. [Senior] did not dispute that [McNamee] also threatened him with a gun. And [Senior] did not dispute that [McNamee] threatened first. [Senior] was kind of nonlinear. He made it real clear he didn't want to say anything. It's undisputed that [McNamee] threatened him first. It's undisputed that [Junior] was walking away. He was in the street by the time [McNamee] hit him with the bat.

Tr. Vol. II, pp. 89-90.

[9] McNamee argues the prosecutor misstated the facts by stating some circumstances of the case were "undisputed," when the record showed there were factual disputes. McNamee further points to Senior's testimony as proof of the existence of factual disputes. We disagree that the record shows the facts were in conflict as to the specific points raised by the prosecutor. Junior testified that he and McNamee argued and threatened each other with guns, but McNamee made the first threat. Senior did not specifically dispute those facts, stating only that Junior "started" the altercation with McNamee. Tr. Vol. II, p. 62. Senior further stated Junior called the police before McNamee approached him and Junior, but that statement also does not specifically counter Junior's

testimony. In addition, Senior did not disagree that Junior was going to his car when McNamee attacked him, stating he could not "really recall" what Junior was doing. *Id.* at 69. Perhaps McNamee perceived Junior as possibly going to get his gun rather than walking away from the situation, but each side was allowed to present to the jury their interpretations of Junior's actions. Based on these circumstances, we cannot conclude the prosecutor misstated the facts during closing argument. *See Neville v. State*, 976 N.E.2d 1252, 1261 (Ind. Ct. App. 2012) (no prosecutorial misconduct in description of sequence of phone calls; emphasis was on content of calls, and prosecutor's statement was reasonable commentary on evidence), *trans. denied*. There was no prosecutorial misconduct, and thus we need not address the question of fundamental error.

Conclusion

[10] For the reasons stated above, we affirm the judgment of the trial court.

[11] Affirmed.

Bailey, J., and Kenworthy, J., concur.

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