MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Abbigail Grace Fetterhoff,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 29, 2024

Court of Appeals Case No.
23A-CR-2226

Appeal from the Howard Superior Court

The Honorable Matthew J. Elkin, Judge

Trial Court Cause No.
34D01-2210-F6-3327

Memorandum Decision by Chief Judge Altice
Judges Bradford and Felix concur.

Altice, Chief Judge.

Case Summary

[1] Abbigail Grace Fetterhoff appeals her conviction for disorderly conduct, a Class B misdemeanor. She claims that the deputy prosecutor's references during closing argument to facts not in evidence constituted prosecutorial misconduct rising to the level of fundamental error.

[2] We affirm.

Facts & Procedural History

[3] On the afternoon of October 23, 2022, Fetterhoff was inside a Village Pantry yelling at the cashier and manager for about ten minutes, causing a line to grow behind her at the register. Cassandra Schultz, a frequent customer of the store who had never met Fetterhoff before, observed the confrontation while she stood in line. Schultz overheard Fetterhoff "using a lot of expletives" while making threats and "yelling about being carded for alcohol." *Transcript* at 49. Fetterhoff eventually left the store but then came back inside a few times to continue yelling. *Id*. at 50.

[4] When Fetterhoff came in a final time, Schultz left the store having made her purchase. Schultz was worried that "something might transpire" after she left, so she walked to the back of Fetterhoff's vehicle and memorized the license plate. *Id*. at 51. Schultz did this because she was aware that employees of the

Village Pantry "had called the sheriff a couple times but … they hadn't gotten there before [Fetterhoff] left." *Id*.

[5] Fetterhoff exited the store while Schultz was looking at the license plate and started yelling at Schultz and calling her names. Schultz attempted to diffuse the situation while walking back toward the store, but Fetterhoff followed and continued to angrily confront Schultz. Schultz turned and told Fetterhoff to "just go." *Id*. at 56. Fetterhoff then got into Schultz's face, nose to nose, so Schultz, feeling threatened, pushed her away. Fetterhoff immediately responded "oh, hell no" and "came at [Schultz] pretty hard." *Id*. at 53. Fetterhoff swung at Schultz at least twice before Schultz was able to take her to the ground to try to keep from being attacked. Fetterhoff grabbed Schultz's hair while others tried to separate her from Schultz. Once separated, Fetterhoff drove away.

[6] Schultz's nose was bleeding and there was "some scratching" on the tip of it resulting from the brief scuffle. *Id*. At trial, Schultz testified that Fetterhoff had tried to punch her multiple times, but she could not recall details of actually being hit due to "adrenaline … running." *Id*. at 57. Upon viewing a video recording of the incident, which was admitted into evidence, Schultz agreed that it "maybe" showed her being punched in the nose but that "[i]t was really hard to see from the video." *Id*. When asked on cross-examination whether she knew when her nose was injured, Schultz responded, "just during the fight, that's all I know." *Id*. at 59.

[7] Alan Weimer of the Howard County Sheriff's Department was the deputy who responded to the incident. He testified that after Fetterhoff's arrest for battery, Fetterhoff initially told him that Schultz was the aggressor having grabbed her by the throat. Fetterhoff later acknowledged to Deputy Weimer that it was "more of a shove." *Id*. at 64.

[8] At Fetterhoff's August 2023 jury trial for Level 6 felony battery resulting in moderate bodily injury, Schultz and Deputy Weimer were the only witnesses called. A video of the encounter outside the Village Pantry was entered into evidence, along with pictures of Schultz's injury and blood drops at the scene.

[9] During closing arguments, the parties agreed that the primary issue for the jury was whether Fetterhoff acted in self-defense during the physical altercation with Schultz. The deputy prosecutor began by noting Fetterhoff's behavior inside the store that day and referenced, more than once, an incident the previous day in which Fetterhoff was mad about having to provide her license to purchase alcohol. He stated that Fetterhoff had "already jawed at the people in the store yesterday [and] at least two times today" but chose not to "get in her car and drive away" after losing the argument. *Id*. at 75. Instead, Fetterhoff followed Schultz and "continue[d] to jaw at her for whatever reason." *Id*. at 76. The deputy prosecutor then focused his argument on the details of the altercation in the parking lot to show that Schultz was the one who acted in self-defense, not Fetterhoff. The deputy prosecutor told the jurors to use their common sense and "look at the video[,]" as it "tells the answer." *Id*. at 77.

[10] In contrast, defense counsel argued that Fetterhoff acted in self-defense after being shoved by Schultz. Counsel also argued, in the alternative, that there was no evidence presented that Schultz sustained any pain let alone substantial pain, which is needed to establish a felony battery, and that "the absolute worst we have here" is misdemeanor disorderly conduct. *Id*. at 79.

[11] The jury ultimately found Fetterhoff not guilty of battery but guilty of the lesser offense of Class B misdemeanor disorderly conduct for engaging in fighting or tumultuous conduct. The trial court then sentenced her to 180 days in the Howard County Jail, with all but time served suspended to unsupervised probation.

[12] Fetterhoff now appeals. Additional information will be provided below as needed.

Discussion & Decision

[13] Fetterhoff challenges her conviction based on prosecutorial misconduct, pointing to references by the deputy prosecutor during closing argument to an incident not in evidence that occurred the day before the charged crime. Acknowledging that she did not preserve the issue below, Fetterhoff argues that the misconduct resulted in fundamental error.

[14] Where a claim of prosecutorial misconduct has been procedurally defaulted for failure to properly raise the claim in the trial court, a defendant must establish not only the grounds for prosecutorial misconduct but also that the misconduct constituted fundamental error. *Ryan v. State*, 9 N.E.3d 663, 667-68 (Ind. 2014).

> 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. 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…. In evaluating the issue of fundamental error, our task in this case 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. at 668 (internal quotation marks and citations omitted). In sum, fundamental error provides a means to correct only the "most egregious and blatant trial errors that otherwise would have been procedurally barred[.]" *Id*.

[15] Here, there is no dispute that the deputy prosecutor improperly referred to facts not in evidence. *See Neville v. State*, 976 N.E.2d 1252, 1261 (Ind. Ct. App. 2012) ("Prosecutors may not argue facts not in evidence."), *trans. denied*. Deputy Weimer's probable cause affidavit referenced an incident the previous day during which Fetterhoff argued with an employee at the Village Pantry upon being carded. This was apparently the basis of her continued argument with employees on October 23, 2022. But there was no evidence presented at trial that Fetterhoff had argued with staff at the Village Pantry on October 22 and then returned the next day to continue the argument.

[16] There was ample evidence presented at trial, however, that Fetterhoff had entered the store on multiple occasions to argue with staff on October 23, before Fetterhoff fought with Schultz in the parking lot. And Schultz testified that she was worried that "something might transpire" inside the store, so she decided to "get a license plate for [the employees] because they had called the sheriff, a couple of times but he … hadn't gotten there before [Fetterhoff] left." *Transcript* at 51. Schultz was likely referring to calls made to the sheriff's department on October 22, but that timing would not have been clear to the jury. What was clear to the jury, nevertheless, was that Fetterhoff had made such a scene inside the store that the sheriff's department had been called more than once and that Schultz was worried for the employees.

[17] We fail to see how the deputy prosecutor's improper references to the October 22 incident were "so detrimental to the opportunities for the ascertainment of truth as to make a fair trial impossible." *Neville*, 976 N.E.2d at 1265. Whether Fetterhoff repeatedly entered the store only on October 23 to argue with staff or also argued with staff on October 22 would have been of no import to the jury under the circumstances.

[18] Further, there is no merit to Fetterhoff's assertion that the deputy prosecutor, by his multiple references to the prior incident, was "essentially asking the jury to convict Fetterhoff because she came back to the same location on October 23, 2022 that she was at the day before." *Appellant's Brief* at 11. On the contrary, the deputy prosecutor focused the jury's attention on the specific details of the interaction between Fetterhoff and Schultz, as documented on video and

testified about by Schultz, and asked the jury to use common sense and look at the video in determining guilt.

[19] Fetterhoff has failed to establish fundamental error. Therefore, we affirm her conviction.

[20] Judgment affirmed.

Bradford, J. and Felix, J., concur.

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