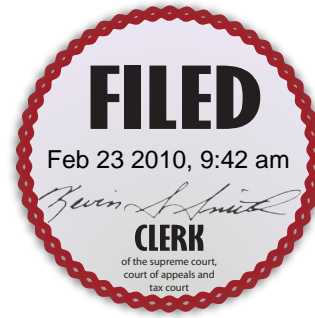


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ALRIC P. BOLT,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A03-0907-CR-335

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0709-FC-40

February 23, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Alric P. Bolt (“Bolt”) was convicted in Elkhart Superior Court of one count of Class A felony child molesting and two counts of Class C felony child molesting. The trial court sentenced Bolt to an aggregate term of thirty-five years. Bolt appeals and argues that the trial court improperly admitted into evidence photographs Bolt had taken of the victim with the victim’s mother’s (“Mother”) acquiescence and that the State committed prosecutorial misconduct when it made statements in its closing argument that improperly shifted the burden of proof to Bolt.

We affirm.

Facts and Procedural History

On July 24, 2007, forty-year-old Bolt insisted that his girlfriend’s eleven-year-old daughter, M.W., take a shower with him. While in the shower, Bolt washed M.W. with his hands. He touched M.W.’s breasts and genital area. Bolt also placed a finger inside of M.W.’s labia. He washed M.W.’s buttocks and inner thighs. Bolt then told M.W. to wash him. M.W. began to wash his chest but he moved her hand to his penis and made her wash it. While this occurred, Bolt closed his eyes and tilted back his head. Bolt then said he was done and left the shower. When asked about the incident by Mother, Bolt claimed that he had just washed M.W.’s hair.

On September 5, 2007, the State charged Bolt with two counts of Class C felony child molesting. On July 24, 2008, the State added a count of Class A felony child molesting. Following a three-day jury trial which began on May 4, 2009, Bolt was found guilty as charged. On May 28, 2009, the trial court sentenced Bolt to concurrent terms of

five years on each of the Class C felony child molesting and thirty-five years for the Class A felony child molesting. Bolt now appeals.

I. Admission of Evidence

Bolt initially argues that the trial court improperly admitted into evidence photographs Bolt had taken of M.W. while Mother was present that showed M.W. in various stages of undress. The admission of evidence falls within the sound discretion of the trial court. Swingley v. State, 739 N.E.2d 132, 133 (Ind. 2000). We review the admission of photographic evidence for an abuse of discretion. Id. Photographic evidence which is relevant may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice. Id.

The exhibit admitted at trial consisted of a number of small photographs taken by Bolt that showed M.W. in various stages of undress. These photographs had been taken when M.W. was eight or nine years old. Mother had assented to the taking of the photographs and was present when they were taken.

The State sought to admit the photographs after testimony by Mother that M.W. had gone with Bolt to Walmart two days after the molestation. Bolt's purpose in presenting Mother's testimony was to show that M.W. had other opportunities to talk about the molestation outside the presence of Bolt and Mother and that M.W. could not have been too afraid of Bolt since she went to Walmart with him shortly after the molestation. The trial court determined that this testimony questioned the credibility of M.W. and also placed Mother's credibility into question.

Bolt contends that the photographs were irrelevant because they were taken approximately two years before the actions underlying the current charges occurred and that they lacked probative value. During Bolt's questioning of Mother, Bolt called into question M.W.'s credibility by seeking to show that M.W. had other opportunities to tell someone about the molestation by Bolt. The trial court determined that the photographs were relevant to explain why M.W. acted as she had and not immediately reported the molestation to her mother even though the photographs had been taken approximately two years before.

Bolt also argues that the photographs lacked probative value. The photographs graphically supported M.W.'s alleged lack of trust in Mother. The testimony elicited from Mother established that Mother was aware that the photographs were being taken, that she assented, either explicitly or implicitly, and that M.W. knew that Mother was aware of the taking of the photographs. Tr. p. 413. The photographs are probative in that they impeach the credibility of Mother and explain the reluctance of M.W. to disclose the molestation to Mother.

Bolt finally argues that the prejudice of these photographs outweighs their probative value. However, the probative value of these photographs is very high. The photographs were presented to show why M.W. did not immediately report the molestation and did not report the molestation to Mother. Without the photographs, M.W.'s reticence to speak about her molestation would remain unexplained and could be interpreted by the jury to impugn her credibility. While the photographs were certainly damaging to Bolt's defense, they were necessary to respond to Mother's testimony and to

explain the actions of M.W. The probative value of the photographs outweighed any prejudicial impact on the jury. The trial court did not abuse its discretion when it admitted the photographs as evidence to address credibility issues raised by Bolt during his examination of Mother.

II. Prosecutorial Misconduct

Bolt argues that the State committed prosecutorial misconduct when it improperly referenced Bolt's decision not to testify on his own behalf and improperly shifted the burden of proof to Bolt. To preserve an issue regarding the closing argument, Bolt was required to contemporaneously object to the statement and request an admonishment. "Failure to request an admonishment results in a waiver of the issue for appellate review." Flowers v. State, 738 N.E.2d 1051, 1058 (Ind. 2000). Bolt failed to object to the alleged offending statements; therefore the issue is waived.

However, Bolt attempts to avoid this waiver by claiming that the statement was fundamental error. Prosecutorial misconduct may constitute fundamental error, but the misconduct must be so prejudicial to the defendant's rights as to make a fair trial impossible. Gasper v. State, 833 N.E.2d 1036, 1042 (Ind. Ct. App. 2005), trans. denied. A prosecutor must confine closing argument to the evidence presented in the record but may argue both the law and facts and conclusions based on his or her analysis of the evidence. Id.

During the State's closing argument, the prosecutor said:

In this case, there has been no evidence whatsoever other than Alric Bolt molested her in this manner and form. The only other option you have been given is that the child somehow is confusing hair washing with these touches I've just discussed. That is not plausible and that does not make

sense. The reason why it does not make sense is because *in order to call this child a liar, I submit to you, you have got to come up to these jurors and say to them, 'This is why she lied; this is her motive.'*

Tr. pp. 463-464 (emphasis added).

While these statements are poorly worded, they do not rise to the level of fundamental error. The State appears to be addressing testimony that called into question M.W.'s credibility and attempted to summarize the evidence presented at trial. Not only did the State not commit misconduct, the statements could have had no impermissible persuasive effect on the jury. Based on these facts and circumstances, we conclude that the State did not commit prosecutorial misconduct, much less fundamental error.

Conclusion

The trial court did not abuse its discretion when it admitted the photographs taken by Bolt of M.W. into evidence. Bolt waived the issue of prosecutorial misconduct by failing to contemporaneously object to statements made in closing argument, and there is no fundamental error regarding the prosecutor's conduct at issue.

Affirmed.

BARNES, J., and BROWN, J., concur.