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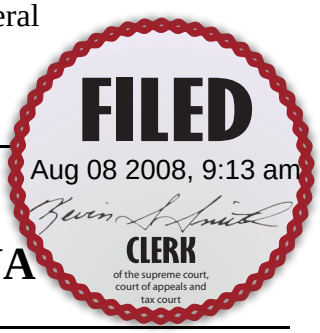

IN THE COURT OF APPEALS OF INDIANA

JOHN COBLE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0802-CR-164
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Special Judge
Cause No. 48D01-0311-FB-441

August 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

John Coble appeals his conviction for class B felony sexual misconduct with a minor. We affirm.

Issues

Coble raises the following issues for our review:

I. Whether the trial court abused its discretion in excluding evidence of the victim's relationships with other men and general family dysfunction;

II. Whether the trial court abused its discretion in admitting certain testimony of the victim's stepfather; and

III. Whether the prosecutor's alleged misconduct during closing argument constituted fundamental error.

Facts and Procedural History

Around 3:00 a.m. on July 13, 2003, fifteen-year-old A.M. was sleeping in her bedroom in a house she shared with her mother and stepfather. Her stepfather's brother, Coble, was spending the night in order to attend his father's funeral the next day. Coble entered A.M.'s bedroom and stood by her bed. He called her name, but she pretended to be asleep. He tried to kiss her, but she moved her head. He then fondled her breasts and tried to put his hand inside her underwear, but she stopped him. After two more attempts, Coble inserted his finger into A.M.'s vagina. She pushed him away, went upstairs to her parents' bedroom, and asked her mother if she could sleep on the floor. When her mother asked what was wrong, A.M. said she would tell her the next day.

After sleeping in her parents' room for the remainder of the night, A.M. followed her mother around the next day. When her mother asked her if Coble had done something to her,

A.M. began to cry. After Coble left the house, A.M. told her parents what had happened and reported the matter to the police.

On November 20, 2003, the State charged Coble with class B felony sexual misconduct with a minor. On May 12, 2006, Coble filed an offer of proof regarding A.M.'s relationships with other men and general family dysfunction. In response, the State filed a motion in limine. A jury trial, held on August 17, 2006, ended with the jury unable to reach a verdict. On November 1, 2007, a second jury trial began. The trial court granted the State's motion in limine on that date. The jury found Coble guilty as charged. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Exclusion of Evidence

Coble contends that the trial court erred by excluding evidence regarding A.M.'s other sexual relationships and general family dysfunction. Questions regarding the admissibility of evidence are left to the sound discretion of the trial court. *C.C. v. State*, 826 N.E.2d 106, 110 (Ind. Ct. App. 2005), *trans. denied*. We review such rulings for an abuse of discretion. *Marcum v. State*, 772 N.E.2d 998, 1000 (Ind. Ct. App. 2002). "[W]e will affirm if there is any evidence supporting the trial court's decision." *C.C.*, 826 N.E.2d at 110. "Moreover, a claim of error in the admission of evidence will not prevail on appeal unless a substantial right of the party is affected." *Id*.

Indiana's Rape Shield Rule, embodied in Indiana Evidence Rule 412, provides in pertinent part:

(a) In a prosecution for a sex crime, evidence of the past sexual conduct of a

victim or witness may not be admitted, except:

> (1) evidence of the victim's or of a witness's past sexual conduct with the defendant;
> (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;
> (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or
> (4) evidence of conviction for a crime to impeach under Rule 609.

The purpose of the Rape Shield Rule is "to encourage the reporting of sexual assaults and to prevent victims from feeling as though they are on trial for their sexual histories." *McVey v. State*, 863 N.E.2d 434, 443 (Ind. Ct. App. 2007), *trans. denied*.

Here, Coble's offer of proof asserted that A.M. had engaged in sexual relationships with two adult males. None of the exceptions to the Rape Shield Rule apply to such evidence, and therefore the trial court did not abuse its discretion by excluding it.

Coble also argues that the trial court improperly excluded evidence regarding dysfunctional relationships within A.M.'s family. Specifically, Coble challenges the trial court's exclusion of evidence that A.M.'s parents had allowed her to have other older men stay at the house with her. Because this argument is framed in terms of A.M.'s sexual reputation and lack of sexual innocence, it likewise falls within the ambit of the Rape Shield Rule. *See* Note, "If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases," 10 VAL. U. L. REV. 127 (1976) ("Giving away sex has no more in common with rape than giving away money has in common with armed robbery.") (quoted in 12 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE § 412.102 at 660 n.21 (3d ed. 2007)). As such, the trial court did not abuse its discretion by excluding this evidence.

Finally, Coble asserts that the State opened the door to evidence of A.M.'s sexual

history by comparing her to Dorothy in *The Wizard of Oz* and emphasizing the importance of children feeling safe in their own homes. A party may open the door to otherwise inadmissible evidence by presenting similar evidence that leaves the trier of fact with a false or misleading impression of the facts related. *Ortiz v. State*, 741 N.E.2d 1203, 1208 (Ind. 2001). Here, however, the State offered the analogy to emphasize A.M.'s young age and the location at which the crime is alleged to have occurred. The record indicates that a fifteen-year-old girl went to sleep in her own bed and woke to find her stepuncle fondling her. The trial court acted within its discretion in excluding evidence of A.M.'s other relationships.

II. Stepfather's Testimony

Coble next contends that the trial court violated Indiana Evidence Rule 704(b) by admitting certain testimony of A.M.'s stepfather. Evidence Rule 704(b) states, "Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."

A.M.'s stepfather, Danny Coble ("Danny"), who is Coble's brother, appeared as a witness for the State. On direct examination, Danny testified regarding a telephone conversation between himself and Coble that occurred a couple months after the alleged molestation, when Coble was refused a gun permit due to allegations pending against him. Coble called Danny to inquire about A.M.'s allegations.

> [PROSECUTOR:] And did you tell [Coble] about the allegations that had been made?
>
> DANNY: Yes.
>
> [PROSECUTOR:] And what did he say in response, if anything?

DANNY: He said, "Well, that's not the way I remember it happening."

[PROSECUTOR:] And how did that make you feel.

DANNY: Mad. Because I'd had some doubts, you know, until that point, but—

[PROSECUTOR:] After he said that—

DANNY: I didn't have any doubts.

DEFENSE COUNSEL-MR. GODFREY: Objection to the conclusion that he's making of that, Judge. I don't think that's proper.

THE COURT: Overruled.

DEFENSE COUNSEL-MR. GODFREY: Okay.

Tr. at 205.

Coble asserts that, Danny "was improperly allowed to testify that he believed the allegations of the girl and that the defendant was guilty." Appellant's Br. at 16. First, we note that the specific basis on which Coble challenged Danny's testimony is unclear. We conclude that Danny neither made a direct assertion that he believed A.M.'s allegations nor made an inadmissible legal conclusion that Coble was guilty; he simply stated that Coble's denial erased his previous doubts. "Rule 704(b) does not prohibit presentation of evidence that leads to an inference, even if no witness could state opinion with respect to that inference." 13 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE § 704.201 at 589 (3d ed. 2007)). Consequently, we find no abuse of discretion here.

Moreover, even if we were to agree with Coble that the trial court erred in admitting this evidence, we would conclude that such error does not require reversal. "Errors in the admission of evidence will not result in reversal if the error is harmless, i.e., if the probable

impact of the evidence upon the jury is sufficiently minor so as to not affect a party's substantial rights." *Cox v. State*, 854 N.E.2d 1187, 1197 (Ind. Ct. App. 2006). A defendant is entitled to a fair trial, not a perfect trial. *Davis v. State*, 835 N.E.2d 1102, 1110 (Ind. Ct. App. 2005), *trans. denied* (2006). Danny's statement was ambiguous and extremely brief, and the record as a whole clearly supports the jury's verdict. Thus, we find no grounds for reversing Coble's conviction.

III. Prosecutorial Misconduct

Finally, Coble argues that the prosecutor engaged in misconduct that deprived him of a fair trial. Specifically, he challenges certain closing statements made by the prosecutor. Coble concedes that he did not object to the statements during closing argument. "[A]n appellate claim of prosecutorial misconduct presented on appeal in the absence of contemporaneous trial objection will not succeed unless the defendant establishes not only the grounds for prosecutorial misconduct but also the additional grounds for fundamental error." *Booher v. State*, 773 N.E.2d 814, 818 (Ind. 2002). We review a claim of prosecutorial misconduct to 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 or she would not have been subjected." *Id*. at 817 (citation and quotation marks omitted). We measure the gravity of peril not by the degree of impropriety of the conduct but by its probable persuasive effect on the jury's decision. *Id*. For fundamental error to occur, the alleged misconduct "must make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process and present an undeniable and substantial potential for harm." *Id*. (citation and internal quotation

marks omitted).

First, Coble challenges the prosecutor's reference to the lack of medical evidence of molestation:

> [PROSECUTOR]: Medical testimony, why would there be any medical testimony? There's no testimony he had sexual intercourse, so there's not gonna be semen. There's no bruising. He just inserted his finger into her vagina. There wouldn't be any bruising. So, even if they did go to the hospital, there's not gonna be any medical evidence, doctor is not gonna find anything. That's why there's no medical testimony. I told you the vast majority of cases involve no physical evidence.

Tr. at 292-93. Coble argues that before the State could properly make such a reference, it was obligated to present evidence of "why evidence would or [would] not be found by a medical exam if there had been full digital penetration of a 15 year old girl." Appellant's Br. at 20. We disagree. The State addressed this issue on rebuttal in response to defense counsel's statement that "[t]here just hasn't been any testimony, … certainly no medical testimony here to show that anything occurred." Tr. at 292. "A prosecutor is entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." *Hand v. State*, 863 N.E.2d 386, 395 (Ind. Ct. App. 2007). Thus, Coble opened the door to the prosecutor's statement and cannot now be heard to complain that he was denied a fair trial.

Next, Coble challenges the following reference to A.M.'s body language:

> [PROSECUTOR]: You had the opportunity to observe her body language. Some of you may have had communication classes, how the folded arms is a defense position, a position of shame. And that's exactly how she told that story, it's a clue to you about what had happened, even the detective had mentioned it, you notice the change in her disposition as they started talking about the allegations.

Tr. at 278. A prosecutor must confine his closing argument to comments based only upon the evidence presented in the record. *Gasper v. State*, 833 N.E.2d 1036, 1042-43 (Ind. Ct. App. 2005), *trans. denied*. Coble argues that the prosecutor's comment was improper due to the absence of any testimony regarding body language. Even assuming that the comment was improper, we reiterate that impropriety must rise to the level of fundamental error. Coble has failed to carry his burden of establishing fundamental error.

Finally, Coble asserts that the State committed prosecutorial misconduct by making disparaging remarks about the defense:

> [PROSECUTOR]: …. Now, defense is probably gonna get up here and make all sorts of (inaudible). You're probably wondering, what is stuff about a dog and why is the other brother being asked to leave? You're right. What does that have to do? It has nothing to do. *Smoke and mirrors, trying to confuse you.* No, he's not charged—the other brother is not charged with a crime. He's charged with the crime. Don't be confused. All that has nothing to do with the charge that he's here for. You had an opportunity to observe the defendant, have him testify for you. I submit his testimony is full of half truth, half lies, non-believable. One thing that's interesting though is the story of [A.M.] sitting on his lap. Where did that come from? I tried to tell, "You waited until today to tell us all about this?" He said, "No, I was prevented by Judge Clase." You got to listen to that. That wasn't true, that's not what Judge Clase said, he said, "You need to wait and talk to your attorney first." That's all he did, judge's [sic] do what they do, consider your rights. He had an opportunity over two (2) years to straighten it out, to give his version of events, he chose not to do that. He chose to wait and come into here.

Tr. at 279-80 (emphasis added).

First, we note that a "smoke and mirrors" reference has been held not to constitute prosecutorial misconduct. *See Donnegan v. State*, 809 N.E.2d 966, 973-74 (Ind. Ct. App. 2004) (prosecutor's remark that defense was "smoke and mirrors designed to get you to take your eye off the ball and miss what's important and focus on something stupid that doesn't

matter, has no relevance" held a permissible comment on the evidence), *trans. denied*.

Coble also asserts that the prosecutor prejudiced the jury against Coble by stating that defense counsel is "trying to confuse you." The disparagement of opposing counsel in closing arguments is improper because it may cause the jury to be prejudiced against the case of the party represented by such counsel. *Loveless v. State*, 240 Ind. 534, 542, 166 N.E.2d 864, 868 (1960). We agree that the prosecutor's remark constituted an inappropriate characterization of the defense. However, we have held that where substantial evidence of guilt exists, a prosecutor's isolated comment that defense counsel was trying to confuse the jury did not constitute fundamental error. *Roller v. State*, 602 N.E.2d 165, 169-70 (Ind. Ct. App. 1992), *trans. denied*; *see also Scherer v. State*, 563 N.E.2d 584, 586 (Ind. 1990) (prosecutor's repeated references to "snow job" by defense did not tip scales regarding defendant's guilt). Here, we conclude that the prosecutor's remark neither placed Coble in grave peril nor constituted fundamental error. Therefore, we affirm his conviction.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.