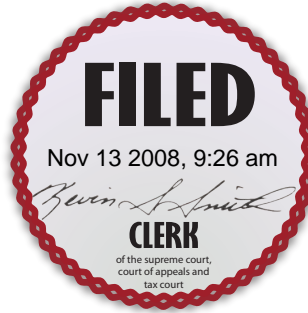


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

FRED S. MOTT,)

Appellant-Defendant,)

vs.)

No. 20A03-0806-CR-267

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0504-MR-59

November 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Fred S. Mott appeals his conviction for Murder,¹ a felony. He presents the following consolidated and restated issues for review:

1. Did the prosecutor commit misconduct amounting to fundamental error during closing argument?
2. Did the lead detective's testimony that Mott was the only remaining viable suspect amount to fundamental error?

We affirm.

On the night of January 28, 1991, sixteen-year-old Kari Nunemaker and a friend drove their cars away from a parking lot in Elkhart, Indiana, with plans to meet at a McDonald's in Dunlap on their way home. Nunemaker, however, never arrived at the McDonald's. Her naked body was found eight days later in a wooded area off the side of a road in Bristol, Indiana. Nunemaker had been raped and murdered. Nunemaker died of asphyxia due to cervical compression.

Around the time Nunemaker would have been driving down Main Street in Elkhart, a witness observed a young girl in a car stopped behind her at a railroad crossing. The witness watched as a light-skinned black man walked up to the car on the driver's side and the young girl opened her door.² The man leaned down and said something to the girl. When the witness looked back again, she saw the door close but did not see the man.

Mott lived in government housing at 422 State Street, only blocks away from the railroad crossing. Robert Coggain and his girlfriend, Rita Snider, lived in the apartment above him. On or about the night of Nunemaker's abduction, Coggain and Snider heard a

¹ Ind. Code Ann. § 35-42-1-1 (West, PREMISE through 2007 1st Regular Sess.).

violent altercation and screaming from Mott's apartment. Snider explained that she heard a young lady screaming for about thirty to forty minutes. Believing that the young woman was in danger and needed help, Snider convinced Coggain to go down and check on her. By that time, there was "dead silence" in Mott's apartment. *Transcript, Vol. III* at 206. Snider stood behind Coggain as he banged on the door and demanded to know if everything was okay. A man eventually cracked the door and responded, "She's fine." *Id.* at 257. They no longer heard the woman.

Coggain and Snider were still concerned for the young woman, but they returned to their apartment and kept watch. About ten or fifteen minutes later, they observed a light-skinned black man (whom Snider later identified as Mott) come out of the apartment carrying something over his right shoulder. The large object Mott was carrying appeared to be rolled up in a rug or blanket. Snider believed it to be the body of the young woman she had heard screaming. Coggain and Snider observed as Mott put the object in the trunk of a car, which was similar in general description to Nunemaker's car. After Mott drove away, Coggain and Snider returned to Mott's apartment and knocked on the door to see if the woman was inside. They never heard from her again. Further, it appears that Mott never returned to his apartment and eventually fled to California.

Two days after her disappearance, Nunemaker's car was recovered behind a home at 1527 Morton Street, a home to which Mott had ties.³ Thereafter, on February 5, a truck

² The witness's description of the car fit the description of Nunemaker's car. Further, the driver-side window of Nunemaker's car could not be lowered, which would have required her to open her door to speak with the man.

³ Mott had been to the residence several times and had recently helped friends move out of that residence.

driver discovered the girl's naked body in a wooded area off the side of the road. Vaginal slides were prepared at the autopsy, and the slides revealed the presence of sperm. Due to technological limitations at the time, DNA tests were apparently not performed on the samples. The case remained unsolved for many years.

In 2004, Detective Thomas Littlefield of the Indiana State Police Cold Case Division was assigned as lead investigator. Littlefield's investigation eventually focused on Mott, whom he located in California. A blood sample was obtained from Mott in March 2005. A subsequent DNA analysis revealed that Mott could not be excluded as a DNA donor in the sperm fraction of the vaginal slide. In other words, the DNA profile obtained from the sperm fraction was consistent with Mott's DNA sample. The possibility of someone having any possible combination of this DNA profile was 1 in 862,000 individuals of Caucasian descent and 1 in 546,000 individuals of African-American descent.

On April 25, 2005, the State charged Mott with the 1991 murder of Kari Nunemaker. Following a jury trial, Mott was convicted as charged on February 1, 2008, and subsequently sentenced to sixty years in prison. Mott now appeals.

1.

Mott initially argues the State committed prosecutorial misconduct during closing argument. Recognizing that he did not object below, Mott contends that the alleged misconduct rose to the level of fundamental error.

In reviewing a properly preserved claim of prosecutorial misconduct, we determine whether the prosecutor engaged in misconduct, and if so, 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. *Cooper v. State*, 854 N.E.2d 831 (Ind. 2006). The gravity of peril turns on the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. *Id.*

Where a claim of prosecutorial misconduct has not been properly preserved, as here, the appellant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. *Id.* "Fundamental error is an extremely narrow exception '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 fundamental due process.'" *Baer v. State*, 866 N.E.2d 752, 763-64 (Ind. 2007) (quoting *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006)).

We conclude that Mott has failed to establish prosecutorial misconduct resulting in grave peril, let alone fundamental error. His initial complaint is that the prosecutor "spent a considerable portion of final summation emphasizing the impact on the victim's family, appealing to the passions of the jury, and requesting that the defendant be held accountable to lessen the impact on the victim's family." *Appellant's Brief* at 7. After reviewing the State's closing argument and rebuttal closing argument, we find that the prosecutor made no substantial reference to matters outside the evidence and did not implore the jury to convict based upon reasons other than the evidence adduced at trial or for any reason other than Mott's guilt. See *Coleman v. State*, 750 N.E.2d 370 (Ind. 2001); *Gasaway v. State*, 547 N.E.2d 898 (Ind. Ct. App. 1989), *trans. denied*. In fact, the prosecutor specifically directed the jury to "stay objective" about the case. *Transcript, Vol. V* at 11. Mott has not established fundamental error in this regard.

Mott also challenges the following statement made by the prosecutor during rebuttal closing argument:

And then we have the DNA analysis. [Defense counsel] would lead you to believe that because they say it's not a match, that's not good enough. But, again, you were here; you observed; the evidence was quite clear. The only time we talk about a match is when it's 5.9 trillion. That's impossible. There's [sic] six billion people on earth. That would mean one thousand times more people on earth is when they can say it's a match. That's because it's science, ladies and gentlemen. And science has to have their statistics. But you don't have to worry about that, because as we've explained, this hooks up to the facts. And as you see the DNA profiles, it was Fred Mott.

Id. at 42. Mott claims this is a misstatement of the evidence because “[t]here could be a DNA ‘match’ even if there were far fewer people on the Earth.” *Appellant’s Brief* at 14.

We agree with Mott that the prosecutor improperly insinuated that a match is impossible *because* the world population is much smaller than 5.9 trillion.⁴ We observe, however, that the evidence presented at trial clearly established that a match in this case was indeed impossible. The impossibility arose from the fact that the vaginal slide contained a DNA mixture. Thus, the only possible results of the DNA analysis would have been that Mott (1) was excluded as a contributor to the DNA mixture or (2) was not excluded as a contributor. The evidence established that Mott was not excluded as a contributor and that the probability of someone having any possible combination of the relevant DNA profile was

⁴ DNA experts testified that in order to conclusively determine that an individual is a match, the DNA sample must be a single source sample (containing DNA from only one individual) and the statistical probability must be at least 1 in 5.9 trillion.

1 in 862,000 individuals of Caucasian descent and 1 in 546,000 individuals of African-American descent. The prosecutor did not overstate the significance of the DNA evidence, which constituted substantial evidence of Mott's guilt. We find no fundamental error with respect to the prosecutor's closing argument.

2.

Finally, Mott challenges testimony by the lead investigator (Littlefield) that Mott remained the only viable suspect after all potential suspects were investigated over the years. He claims this testimony was "tantamount to an impermissible comment on his guilt such as is prohibited by Indiana Evidence Rule 704." *Appellant's Brief* at 7. Because there was no objection raised below, he once again asserts fundamental error.

Evid. R. 704(b) provides, among other things, that a witness may not offer an opinion concerning guilt or innocence in a criminal case. Here, even assuming that Littlefield's testimony constituted an impermissible comment on Mott's guilt, we find that Mott has wholly failed to establish that the identification of Mott as the only remaining viable suspect subjected him to fundamental error. *See Oldham v. State*, 779 N.E.2d 1162 (Ind. Ct. App. 2002), *trans. denied*.⁵ On the contrary, in light of the overwhelming evidence of Mott's guilt, we find that any error in this regard was harmless. *See McKinney v. State*, 873 N.E.2d

⁵ Under similar circumstances in *Oldham*, we found no fundamental error and explained:

A police officer's testimony that he came to believe in the course of his investigation that the defendant committed the crime is not much more prejudicial to the defendant than the simple fact that the police arrested the defendant for the crime, or that the State has charged and seeks to convict the defendant for the crime. Jurors in a criminal trial know without having to be told that the accused has been named as a defendant because the police concluded that there was probable cause to believe the defendant committed the crime, and because the State believes that there is at least probable cause to bring the matter to trial and to seek the defendant's conviction.

630 (Ind. Ct. App. 2007), *trans. denied*.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur