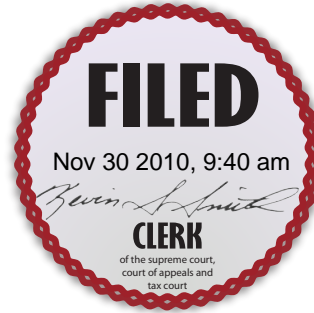


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ANASTACIO CARRERA,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A02-1003-CR-238

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0902-FA-024816

November 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Anastacio Carrera (“Carrera”) appeals his two convictions of Child Molestation and two convictions of Sexual Misconduct with a Minor.

We affirm.

Issues

Carrera presents two issues for our review, which we restate as:

- I. Whether the trial court committed fundamental error when it permitted the State to present a statement of law during closing argument that had been previously disallowed as a jury instruction; and
- II. Whether there was sufficient evidence of Carrera’s intent to arouse or satisfy his own or his victim’s sexual desires to support the jury’s verdict?

Facts and Procedural History

D.A., the victim, was born in 1994 and was approaching her sixteenth birthday at the time of the trial giving rise to this appeal. D.A first met Carrera when she was nine years old. Carrera was a long-time friend of D.A.’s family, and frequently attended family functions, including at least one of D.A.’s birthday parties.

Sometime after D.A.’s twelfth birthday, Carrera began to comment on changes in D.A.’s appearance and maturity and began to hug her instead of giving her his usual handshake. Carrera eventually began to fondle D.A.’s genitalia.

In February 2007, after D.A. had reached the age of thirteen, Carrera forced D.A. to engage in sexual intercourse with him. After this incident, Carrera continued to fondle D.A., though he did not again engage in sexual intercourse with D.A. for some time. Carrera also

warned D.A. not to tell anyone about these incidents because both he and D.A. could get in trouble and because her parents would go to jail if they reported him to the police.

Around June 2008, Carrera began to enter D.A.'s room around midnight several weekends per month and compel D.A. to engage in sexual intercourse with him. D.A. repeatedly told Carrera that what they were doing "wasn't right." (Tr. 134.) After July 2008, D.A. locked the window to the room so that Carrera would not be able to enter. While no further episodes of sexual intercourse occurred, in January 2009, Carrera came up behind D.A. in the kitchen of her home, put his arms around her, and kissed her. D.A.'s mother ("Mother") found D.A. and Carrera kissing, slapped each of them, asked Carrera why he would do something like that, and demanded that Carrera make things right with Mother's sister, with whom he lived and who is the mother of his children.

A few days after this incident, D.A. ran away from home and returned on January 13, 2009, after hearing that Carrera might have a sexually-transmitted disease. D.A. told Mother about the encounters with Carrera. Mother told D.A.'s uncle; he in turn called the Indianapolis Metropolitan Police Department.

Officer Teresa Welborn ("Officer Welborn") responded to the uncle's call. As Officer Welborn took brief informational statements from D.A. and Mother, Carrera came to the home. The police detained Carrera. Officers then took D.A. and Mother to speak with Detective Derek Cress ("Detective Cress"), a child abuse detective; Carrera was taken to Detective Cress in a separate vehicle.

On February 11, 2009, the State filed its information against Carrera. Carrera was

charged with one count of Child Molesting, as a Class A felony¹; one count of Child Molesting, as a Class C felony²; one count of Sexual Misconduct with a Minor, as a Class B felony³; and one count of Sexual Misconduct with a Minor, as a Class C felony.⁴

A jury trial was held on January 11, 2010, and January 12, 2010. The jury found Carrera guilty on all four counts. On February 4, 2010, the trial court entered judgment against Carrera on all four counts and sentenced him to a total of thirty-nine years imprisonment. It also determined Carrera to be a sexually violent predator.⁵

This appeal followed.

Additional facts will be introduced as required.

Discussion and Decision

Use of a Statement of Law During Summation

Carrera claims that the trial court's failure to respond to prosecutorial misconduct in the State's use of a statement of law disapproved as a jury instruction as an exhibit during closing argument constitutes error that entitles him to a new trial on all counts. See Ludy v. State, 784 N.E.2d 459 (Ind. 2003). Carrera asserts that the effect of the prosecution's use of the statement, which statement this Court has rejected as a jury instruction, is the same as if the trial court had issued the statement as a jury instruction. Thus, Carrera's argument goes, by permitting the State's use of this statement of law as a "backdoor" jury instruction, the

¹ See Ind. Code § 35-42-4-3(a).

² See I.C. § 35-42-4-3(b).

³ See I.C. § 35-42-4-9(a).

⁴ See I.C. § 35-42-4-9(b).

⁵ See I.C. § 35-38-1-7.5.

trial court effectively issued an improper instruction to the jury.

The statement in question sets forth that a “conviction may be based solely on the uncorroborated testimony of a single eyewitness, including the alleged victim if such testimony establishes each element of the crime beyond a reasonable doubt.” (Tr. 486.) This statement was used as a jury instruction during a trial and our supreme court ruled on appeal that “the giving of this instruction is error,” because it “unfairly focuses the jury’s attention on and highlights a single witness’s testimony ... presents a concept used in appellate review that is irrelevant to a jury’s function ... [and] may mislead or confuse the jury” through its use of the term “uncorroborated.” Id. at 460-61.

Carrera urges that prosecutorial misconduct occurred through the State’s use of a statement that constitutes reversible error when given as a formal jury instruction. Carrera thus concludes that the trial court abused its discretion when it denied his motion to restrict the State from using the instruction Ludy disapproved.

When reviewing an allegation of prosecutorial misconduct, we make two inquiries. First, we determine by reference to case law and rules of conduct whether the prosecutor engaged in misconduct, and, if so, we next determine 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. The gravity of the 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. The conduct of closing argument is within the sound discretion of the trial court. When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. If the party is not satisfied with the admonishment, then he should move for a mistrial.

Ramsey v. State, 853 N.E.2d 491, 498-99 (Ind. Ct. App. 2006) (citations omitted) (emphasis added), trans. denied.

Carrera did not use the procedure set forth in Ramsey. Carrera objected during argument to the use of both the exhibit with the Ludy instruction and the use of a portion of the exhibit that included a number of case citations purported to support that statement. The trial court denied Carrera's objection as to the statement from Ludy, but instructed the State not to use the portion of the exhibit that included a list of citations. In ruling on Carrera's objection to the exhibit with the Ludy instruction, the court said:

Well, this is a matter for the lawyers in my mind. State is not going to get away with saying this is the law, there's been a witness say this, you must convict.... If they do you'll get up and jump all over them.... You can as an advocate say hey, don't be misled. This is not commanding you, this is simply saying that on those rare cases where it's a one-on-one and there's a conviction, that that is enough to sustain a conviction. So I'll leave that to the advocates and I'll overrule your objection to the visual aid....

(Tr. 474.)

When the State referred to the exhibit and repeated its statement of law to the jury, Carrera did not object and ask the court to admonish the jury. Neither did Carrera move for a mistrial. Thus the standard recited in Ramsey does not apply here.

When the proper procedure for objecting to prosecutorial misconduct during summation is not followed, we may review the trial court's ruling for fundamental error.

But fundamental error is extremely narrow and available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible.

Jewell v. State, 887 N.E.2d 939, 942 (Ind. 2008).

The statement of law from Ludy which Carrera insists constitutes prosecutorial

misconduct was restricted from use as a jury instruction because it “invite[s] [the jury] to violate its obligation to consider all the evidence.” Ludy, 784 N.E.2d at 462. But that statement was not used as a jury instruction here—it was instead only a part of the State’s closing argument.

Moreover, Carrera sought to draw the jurors’ attention to evidence and inferences favoring his position during both the presentation of evidence and his closing argument. Carrera sought to show that D.A. was not a credible witness and used cross-examination and witnesses on his own behalf to do so. Carrera attempted to impeach D.A. during her testimony, during Mother’s testimony, and during Detective Cress’s testimony. Carrera also argued that D.A. was not a credible witness during his own summation. The State also adduced evidence from Mother and Detective Cress that tended to bolster D.A.’s testimony. Any possible prejudicial effect of the statement of law from Ludy was mitigated by Carrera’s regular and direct attack upon D.A.’s credibility during both the presentation of evidence and his own summation. The State’s production of its own evidence reinforcing D.A.’s testimony and credibility further mitigates any harm that might have been caused by the Ludy instruction, because it demonstrates that the state depended upon more than uncorroborated testimony. Thus, even though it is inappropriate as a jury instruction, the value of the statement from Ludy without citation and used as a demonstrative exhibit during summation is not so great as to constitute “a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied.” Jewell, 887 N.E.2d at 942.

Carrera did not properly preserve his objection to the State’s use of the language from

Ludy to adequately pursue a claim of prosecutorial misconduct, and we find no fundamental error in the use of that language by the State. Carrera is not entitled to a new trial on this ground.

Whether There is Sufficient Evidence of Intent

Carrera also challenges the intent element of the conviction entered against him as to his Class C conviction for Sexual Misconduct with a Minor.

To convict Carrera of this offense as charged, the State was required to prove beyond a reasonable doubt that, on or about or between February 17, 2008, and January 13, 2009, Carrera, being at least twenty-one years old, performed or submitted to any fondling or touching with D.A. when she was between fourteen and sixteen years old, and did so with intent to arouse or satisfy his or D.A.'s sexual desires. See I.C. § 35-42-4-9(b); (App. 25). Carrera claims there was insufficient evidence to show he intended to arouse or satisfy his own or D.A.'s sexual desires when he grabbed her from behind and kissed her.

When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh evidence. Id. We will affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). “The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” Id. (quoting Pickens v. State, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001)).

As to the question of intent,

The element of intent of child molesting may be established by circumstantial evidence and inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points. We have found sufficient evidence to support a finding of touching with intent to satisfy sexual desires where a defendant put his arm around the shoulder of a child and let his hand hang, touching her breast, and where he placed his hand on the shoulder of another child and then on her breast.

Cruz Angeles v. State, 751 N.E.2d 790, 797-98 (Ind. Ct. App. 2001) (citations omitted), trans. denied.

We note first that there is ample evidence in the record of numerous incidences of sexual contact between Carrera and D.A. to support Carrera's conviction for this offense even if we were to determine that the kissing incident did not satisfy the intent element at issue here. The kissing incident is not the only possible episode of conduct charged in the information. The information instead directs itself to a broad period of time during which a number of incidents occurred, any number of which support the conviction Carrera now challenges. See Krebs v. State, 816 N.E.2d 469, 473-74 (Ind. Ct. App. 2004) (noting that "proof of the exact time the act occurred is not essential to the State's case.")

Even if the information did apply only to the kissing incident of January 2009, there was sufficient evidence of intent to support the jury's verdict. D.A. testified about numerous incidents in which Carrera fondled her genitalia, kissed her, and engaged in sexual intercourse with her. Before any sexual activity between Carrera and D.A. occurred, Carrera commented on how attractive D.A. was becoming to him. Mother testified that when she found D.A. and Carrera kissing, Carrera said that he didn't mean to do it but acceded to

Mother's demands that he make things right between himself and Mother's sister. The significant number of sexual encounters over the course of two years is sufficient to allow a reasonable jury to infer Carrera's intent to arouse or satisfy his own or D.A.'s sexual desires when he kissed her in January 2009.⁶

Conclusion

Carrera has failed to establish any fundamental error in the State's use of the statement from Ludy without citation on a demonstrative exhibit used in its closing argument. There is also sufficient evidence of Carrera's intent for a reasonably jury to convict Carrera of Sexual Misconduct with a Minor.

Affirmed.

RILEY, J., and KIRSCH, J., concur.

⁶ We decline to engage in Carrera's parsing of the word "kiss" and the importance or lack thereof of any testimony about how Carrera and D.A. might or might not have been touching each other when Mother saw them. This is an invitation to re-weigh the evidence, which we cannot do. See Drane, 867 N.E.2d at 146.