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IN THE COURT OF APPEALS OF INDIANA

SHANE L. CUMMINGS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0808-CR-476
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0403-FB-59

December 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Shane L. Cummings appeals his conviction for class B felony sexual misconduct with a minor.[1] We affirm.

Issues

Cummings raises two issues, which we restate as follows:

I. Whether the trial court abused its discretion in denying his motion for mistrial; and

II. Whether the prosecutor committed misconduct that constitutes fundamental error.

Facts and Procedural History

The facts most favorable to the verdict follow. In February 2004, Cummings lived with his half-sister, J.F., in his isolated Elkhart home. He was over twenty-five years old, and she was fifteen. J.F. had been living with Cummings since she was ten or eleven years old. Their relationship resembled that of a husband and wife rather than a brother and a sister. Cummings took care of J.F., buying her food and clothing. The clothing Cummings bought J.F. to wear was age-inappropriate. J.F. did not have her own bedroom and slept with Cummings in his bed. After the eighth grade, J.F. stopped attending school and was home-schooled by Cummings.

Around Valentine's Day, J.F. planned a trip with her older sister, Shannon Elliott, to visit their mother in Tennessee. About a week before the trip, J.F. was packing for the trip. Cummings became angry about her leaving, "punching holes in the walls and breaking

[1] *See* Ind. Code § 35-42-4-9(a)(1).

things." Tr. II at 69.[2] He sat down on the couch and told J.F. that he loved her and did not want her to go. He began to kiss J.F. and touch her legs and breasts. He took off her pants and had sexual intercourse with her.

J.F. went to Tennessee with Elliot. On the way back, J.F. became "agitated and didn't want to go home." *Id*. at 35. Elliot saw that J.F. was flushed, shaking, and crying. Elliot asked J.F. what was wrong. J.F. took a piece of paper and wrote that Cummings was "messing with" her. *Id*. at 72. J.F. gave it to Elliot, who stopped the car and started crying after she read the note. Elliot did not bring J.F back to Cummings' home, but instead took J.F. to her own house. Cummings called Elliot's house and told Elliot that he loved J.F., missed her, and wanted to hold her. During another telephone call, Elliot asked Cummings if he had had sexual intercourse with J.F. He replied that he had and that he felt it was not wrong. As time went on, Cummings began to blame J.F. for his behavior.

On March 22, 2004, the State charged Cummings with class B felony sexual misconduct with a minor. The information was amended to add six counts of child molesting. However, the additional charges were severed, and Cummings was permitted to proceed to trial on the original charge. On February 26, 2008, a jury found Cummings guilty as charged. The trial court sentenced him to fifteen years' imprisonment. Cummings appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Mistrial

[2] Because the jury transcript consists of two volumes, we use "Tr. I" to refer to the first day's transcript and "Tr. II" to refer to the second day's.

During *voir dire*, the prosecutor questioned a potential juror about her ability to judge the credibility of a child witness. The juror responded, "I think you would want to know the past history of that person and that of the accused." Tr. I at 82. The prosecutor responded,

> What if you are prevented from hearing the past history? Your oath is to do what? Based upon the evidence presented? I know what you want to do, ma'am. …. But I have to follow all of these laws. If you [] can only base it upon the evidence presented, let's say you don't hear the history, can you still follow your oath based upon the evidence presented?

Id. Cummings objected and moved for mistrial. The trial court denied the motion and offered to admonish the jury to disregard the prosecutor's statement. Cummings agreed. Prior to opening statements, Cummings renewed his motion for mistrial, which the trial court denied.

Cummings asserts that the trial court improperly denied his motion for mistrial. In reviewing Cummings' claim, we observe that

> [w]hether to grant or deny a motion for mistrial is a decision left to the sound discretion of the trial court. We will reverse the trial court's ruling only upon an abuse of that discretion. We afford the trial court such deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. To prevail on appeal from the denial of a motion for mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. We determine the gravity of the peril based upon the probable persuasive effect of the misconduct on the jury's decision rather than upon the degree of impropriety of the conduct.
>
> We have recognized that a mistrial is an extreme sanction warranted only when no other cure can be expected to rectify the situation. *Reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a*

> *defendant's rights and remove any error created by the objectionable statement.*

Agilera v. State, 862 N.E. 2d 298, 307-08 (Ind. Ct. App. 2007) (citations omitted), *trans. denied*.

Specifically, Cummings argues that the prosecutor's comment "leads to the inescapable conclusion that the jury would not be receiving all the facts at the prosecutor's disposal" and that the "admonition, although timely, was not enough to erase the intriguing issue of past history from the mind of the prospective jurors." Appellant's Br. at 7. We disagree.

The prosecutor's comment was offered in response to a consideration raised by the prospective juror. The comment can reasonably be interpreted to describe the law as it applies to all cases. To the extent that it could be interpreted to suggest that the jury would not be privy to Cummings' past history, we find that the admonishment was sufficient to remove any possible error. Therefore, we conclude that the trial court did not abuse its discretion in denying Cummings' motion for mistrial.

II. Prosecutorial Misconduct

During closing argument, defense counsel made the following statement regarding Elliot's and J.F.'s testimony:

> Shannon doesn't know [whether Cummings actually had sexual intercourse with J.F.]. J.F. alleges it; says it, but she doesn't allege it or say it when Shannon and she are in the safety of Shannon's vehicle, driving out of Goshen, heading to Tennessee. Not once over those eight hours, driving to Tennessee, does J.F. say, "Sis, he raped me. He had sexual intercourse." Common sense says that's not– [a] 15-year-old girl–she's not going to say something. But over those eight hours if she couldn't say it, write it out. Over the several days they were there, say it or write it out to somebody. Or, "hey

> Sis, we're–we're away from the house now. Take me to the police." Why? Or, "Hey Sis, we're out of the house. Take me to the hospital." Why? Common sense tells you reasonable doubt. I submit, I'm not gonna ask her questions. I'm not gonna dignify it. It didn't happen. It just didn't happen.

Tr. II. at 103.[3]

In her rebuttal, the prosecutor stated,

> defense counsel has expressed his opinion as to his client's guilt or innocence. I would like to do the same. Mr. Shane Cummings is guilty as hell. It's pure and simple. There must be a play book out there that the court does not know about. There must be a play book of common sense, of how you react as a victim of child molestation. There must be a play book, because apparently, J.F. did not follow that format[.]

Id. at 107. A few minutes later, the prosecutor said,

> if you're going to discount this whole girl's testimony because of this one little inconsistency [between Elliot's and J.F.'s testimony regarding the frequency of J.F. and Elliot's trips], then I'm going to have to suggest to you that we should never even start coming into these courts to begin with for these types of cases. You can't remember every single detail, you don't want to remember every single detail, and you sure as heck don't want to setting up in the court in front of 12 strangers talking about your pants down.

Id. at 110-11. Cummings did not object to either of these comments.

Cummings contends that the prosecutor's two statements constitute misconduct and fundamental error. When reviewing a charge of prosecutorial misconduct, first, we consider whether the prosecutor engaged in misconduct; second, we consider all the circumstances of the case to determine whether such misconduct placed the defendant in a position of grave peril to which he should not have been subjected. *Ratliff v. State*, 741 N.E.2d 424, 428 (Ind. Ct. App. 2000), *trans. denied* (2001). "The latter is measured not by the degree of

[3] Defense counsel did not cross-examine either Elliot or J.F.

impropriety of the misconduct, but by the probable persuasive effect of the misconduct on the jury's decision and whether there were repeated examples of misconduct that would evince a deliberate attempt to unfairly prejudice the defendant." *Id.* at 429.

"A party's failure to present a contemporaneous trial objection asserting prosecutorial misconduct precludes appellate review of the claim." *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2002). "Such default may be avoided if the prosecutorial misconduct amounts to fundamental error." *Id*. To constitute fundamental error, the prosecutorial 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." *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002). Hence, a lack of fundamental error is dispositive. *Booher*, 773 N.E.2d at 818.

As to the prosecutor's comment that he was "guilty as hell," Cummings contends that the prosecutor impermissibly expressed her personal opinion in violation of Section 3.4(e) of the Indiana Code of Professional Responsibility, which states:

> A lawyer shall not ... in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of the accused[.]

Indiana Professional Conduct Rule 3.4(e) "is violated when the prosecutor's comment suggests that he or she has personal or special knowledge, beyond the evidence presented to the jury, which proves that the defendant is guilty." *Roller v. State*, 602 N.E.2d 165, 168 (Ind. Ct. App. 1992) (citing *Wallace v. State*, 553 N.E.2d 456, 471 (Ind. 1990), *cert. denied*),

trans. denied.

We acknowledge that "final summation is restricted by law to the evidence presented at the trial and must not be based upon implied personal knowledge." *Butrum v. State*, 469 N.E.2d 1174, 1178 (Ind. 1984). Further, it is misconduct "to phrase final arguments in a manner calculated to inflame the passions or prejudices of the jury." *Remsen v. State*, 428 N.E.2d 241, 245 (Ind. 1981).

Here, the prosecutor's comment, while possibly constituting misconduct and certainly falling far short of what we would consider an appropriate line of argument, does not suggest that she had personal or special knowledge that the jury did not have.[4] As such, we cannot say that the comment constituted fundamental error.

As for the prosecutor's statement that "if you're going to discount this whole girl's testimony because of this one little inconsistency, then I'm going to have to suggest to you that we should never even start coming into these courts to begin with for these types of cases[,]" Cummings asserts that it asks the jury to convict for reasons other than guilt. We disagree. After making the comment, the prosecutor went on to discuss how difficult it is for witnesses to remember every single detail. Viewed in the context of the prosecutor's entire argument, the comment may reasonably be interpreted as one addressing the credibility of the witnesses and the weight of their testimony. Cummings has failed to establish misconduct, let alone fundamental error. *See Wisehart v. State*, 693 N.E.2d 23, 59 (Ind. 1998) (holding

[4] In *Swope v. State*, 263 Ind. 148, 325 N.E.2d 193 (1975), our supreme court explained that "[f]orbidden expressions of personal belief are easily avoided by insisting that lawyers restrict themselves to statements which take the form, 'The evidence shows … or some similar form.'" *Id*. at 155, 325 N.E.2d at 196 (quoting ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Standards relating to the Prosecution Function and the Defense Function, The Prosecution Functions* § 5.8(b), at 128 (1971)).

that prosecutor's request to jury to convict Wisehart so he does not commit rape was within bounds of permissible advocacy where Wisehart's letter referring to rape was admitted into evidence), *cert. denied*. Accordingly, we affirm Cummings' conviction.

Affirmed.

ROBB, J., and BROWN, J., concur.