MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Paul Ross,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 20, 2021

Court of Appeals Case No. 21A-CR-898

Appeal from the St. Joseph Superior Court

The Honorable Jeffrey L. Sanford, Judge

Trial Court Cause No. 71D03-1910-F1-18

Brown, Judge.

[1] Paul Ross appeals his convictions for child molesting as level 4 felonies. He raises two issues which we revise and restate as:

I. Whether the trial court erred in allowing E.C. to testify on three separate occasions; and

II. Whether the prosecutor committed misconduct during closing argument which resulted in fundamental error.

We affirm.

Facts and Procedural History

[2] E.C.'s mother met Ross when E.C. was two years old and moved in with him in December 2017. In December 2018, E.C.'s mother began working nights and left E.C. home with Ross while she was at work. At some point, Ross raised the issue of E.C. masturbating and mentioned "something about buying [E.C.] a vibrator," and E.C.'s mother did not want to discuss those topics because E.C. was so young. Transcript Volume II at 111. At some point E.C.'s mother decided to leave Ross. When she explained to E.C. that she and E.C. would be leaving, E.C. was "very quiet" and "very worried" and made statements concerning behaviors that occurred between her and Ross. *Id.* at 105. E.C.'s mother was "in shock" and made an appointment with E.C.'s pediatrician. *Id.*

[3] On October 9, 2019, Dr. Peggy Su Choo Chang, a pediatrician, saw E.C. who told her a "special secret." *Id.* at 147. E.C. disclosed that a "penis was tried to be put into her body." *Id.* at 153. Dr. Chang asked E.C. which part of her

body, and E.C. pointed to her vaginal area and said she had four secrets. On October 11, 2019, Steven Richmond, the Assistant Commander at the St. Joseph County Special Victims Unit, received an assignment of the case, interviewed E.C. and her mother, and spoke to Ross. On October 21, 2019, Janet Brooks, a forensic interviewer and employee of the CASIE Center, a child advocate center, conducted an interview with four-year-old E.C. On October 25, 2019, the State charged Ross with two counts of child molesting as level 1 felonies as Counts I and II and two counts of child molesting as level 4 felonies as Counts III and IV.[1]

[4] In March 2021, the court held a jury trial. E.C. testified that she was five years old and that she and her mother lived with Ross at one time. She stated that Ross made a "bad decision" in his bed and in her room. *Id.* at 64. She testified that Ross touched her "pee-pee and [her] butt" with his finger on the outside of her body but under her clothes. *Id.* at 68. When asked how many times that happened, she answered: "A lot." *Id.* at 69.

[5] She indicated she remembered talking to a lady about Ross but could not "quite remember all" of the things she told the lady. *Id.* She testified that Ross's mouth touched her "pee-pee." *Id.* at 77. When asked if there were any other

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[1] Count I alleged Ross placed his penis into "VICTIM 1's vagina." Appellant's Appendix Volume II at 17. Count II alleged Ross placed his penis into "VICTIM 1's anus." *Id.* Count III alleged Ross touched "VICTIM 1's vagina." *Id.* at 18. Count IV alleged Ross had "VICTIM 1 touch his penis." *Id.* During jury instructions, the court stated: "Just for you [sic] information, members of the jury, Victim 1 refers to E.C. just in case you had any question." Transcript Volume 2 at 245.

parts of Ross that touched her, she answered in the negative. When asked if she remembered talking to the lady "on a few more things," she answered in the negative. *Id.* at 78. She indicated that she remembered talking to a doctor about Ross. When asked if she thought watching the video of her and the lady would help her remember, she answered in the negative. When asked if she remembered better back when she talked to her mother, the doctor, and the lady, or if she remembered better today, she answered: "Today." *Id.* at 80. She indicated again that she did not remember all of the things that she told the lady.

[6] During a sidebar conference, the prosecutor asked for an opportunity to show E.C. the CASIE video outside the presence of the jury to refresh her memory. Ross's counsel asserted that E.C. stated that it would not refresh her memory, it was highly suggestive to a witness her age, and a foundation had not been laid. The court allowed the prosecutor to ask E.C. further questions.

[7] E.C. indicated that "these things with" Ross were hard to talk about, she did not like to remember or talk about them, she told the lady what had happened, and she told her what she remembered at that time. *Id.* at 83. When asked if she thought watching what she told the lady would help her remember, she answered in the negative. She also indicated that Ross touched her with only his mouth and finger.

[8] After further discussion, Ross's counsel argued that the issue was covered by the protected person statute, a protected person hearing had not been held, and

allowing the State to play the out-of-court statement as direct evidence would be erroneous. The court stated that it would not allow the prosecutor to play the tape "at least at this point." *Id.* at 95. The prosecutor stated: "Okay. Not at this exact moment, but would the Court allow the State to recall E.C.?" *Id.* at 96. The court answered affirmatively. The prosecutor stated that a coworker would be showing E.C. the CASIE interview while the next witness testified. Without objection, the court stated: "We'll deal with that when she comes back and testifies." *Id.*

[9] On cross-examination, E.C.'s mother testified that Ross eventually told her that he wanted to start seeing other women, which she did not like; however she agreed that they could see other people while E.C. was not in the home. She also stated that she found Ross in bed with another woman while E.C. was asleep in her bedroom, and she was upset Ross had broken the rule. On redirect examination, when asked if all of her statements were "to get back at [Ross] for cheating on you," she answered in the negative. *Id.* at 122.

[10] The prosecutor recalled E.C., Ross's counsel objected, and the court allowed the prosecutor to ask some questions. E.C. indicated that she watched a video before entering the courtroom in which she was talking to a lady and that what she told the lady was the truth. The prosecutor indicated she had no further questions.

[11] Outside the presence of the jury, the prosecutor indicated she wanted to play the CASIE interview. Ross's counsel argued that the recording did not

accurately reflect E.C.'s knowledge, it was inconsistent with her testimony, and it would be an improper admission of hearsay. The court stated, "before we go forward and play that tape, I think you need to ask her about things that she said on the tape." *Id.* at 133. The court also stated: "I don't think she's faking not remembering. I just don't think she's comfortable talking about it. That's what I get from her demeanor. And if she doesn't recall what happened, then that's one thing in regards to the tape." *Id.* at 135.

[12] After the jury entered the courtroom and E.C. was escorted into the courtroom, the court stated: "E.C., sorry to make you come back again. I'm the one making you come back for a third time." *Id.* at 137. E.C. indicated that Ross's penis touched her "pee-pee," and it touched her on the skin and stayed outside of her body. *Id.* at 139. She also testified that she touched Ross's penis with her hands more than one time. When asked to show how she touched Ross's penis using just her hands, she performed "a back and forth motion with [her] hands together." *Id.* at 141.

[13] After Assistant Commander Richmond testified, the prosecutor renewed her request to play the CASIE interview "under recorded recollection" and asserted that "[t]here are specific details that would go directly to the gratification of Paul Ross that are disclosed in the CASIE." *Id.* at 204. Ross's counsel objected, and the court denied the request to play the recording. After the parties rested, Ross's counsel moved for judgment on the evidence. The court granted the motion for Count II and denied it with respect to the remaining counts.

[14] During closing argument, the prosecutor stated: "Now [E.C.] disclosed multiple other touchings that have not been charged. We could have added those. The State chose to narrow in on very specific – ." *Id.* at 222. Ross's counsel objected, argued that it was an improper argument to talk about "out of the goodness of their heart that they didn't just charge him with more things that [sic] they could have," asserted it was prejudicial, and asked for an admonishment based upon a violation of Ind. Evidence Rule 404(b). After the sidebar concluded, the court stated:

> Hey, folks, first I want you to remember that closings are not evidence. It's what the attorneys think the – that they're trying to persuade you to a particular verdict.
>
> We are only concerned with what happened in this case not alleged uncharged misconduct. So you're to disregard what the State just said in regard to, hey, we picked certain things and we didn't pursue other things. You're to disregard that.

Id. at 223.

[15] The jury found Ross not guilty of Count I and guilty of Counts III and IV. The court sentenced Ross to consecutive terms of six years with three years suspended on each count.

Discussion

I.

[16] The first issue is whether the trial court erred in allowing E.C. to testify three times. Ross argues that there was no reason to have E.C. watch the CASIE

interview and that E.C. did not reference his penis until her third time on the witness stand. He asserts E.C. should not have been allowed to testify multiple times under Ind. Evidence Rule 403's prohibition against appealing to a jury's sympathies. Specifically, he contends that "[h]aving E.C. repeatedly take the witness stand multiple times to testify must have been trying and stressful to her" and "[t]he jury's sympathies for the child required to take the stand and testify multiple times had an enormous prejudicial impact" on him. Appellant's Brief at 14-15. He argues that, "[w]hile it is not a 'drumbeat repetition' of multiple witnesses vouching for E.C.'s credibility, it has the same effect on the jury." *Id.* at 15.

[17] At trial, Ross did not object on the basis of Rule 403, jury sympathy, or a drumbeat repetition. Accordingly, he has waived his arguments. *Saunders v. State*, 848 N.E.2d 1117, 1122 (Ind. Ct. App. 2006) (observing a defendant may not object on one ground at trial and raise another on appeal and that any such claim is waived), *trans. denied*.

[18] Waiver notwithstanding, we cannot say that reversal is warranted. Generally, the trial court has wide discretion in ordering the manner in which evidence is presented to the jury during trial. *James v. State*, 613 N.E.2d 15, 23 (Ind. 1993). Ind. Evidence Rule 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." "[T]his balancing is committed to the trial court's discretion." *Snow v. State*, 77 N.E.3d

173, 179 (Ind. 2017). The Indiana Supreme Court has "emphasized that the relevant inquiry is not merely whether the matter is prejudicial to the defendant's interests, but whether 'it is *unfairly* prejudicial.'" *Baer v. State*, 866 N.E.2d 752, 763 (Ind. 2007) (quoting *Steward v. State*, 652 N.E.2d 490, 499 (Ind. 1995), *reh'g denied*), *reh'g denied*, *cert. denied*, 552 U.S. 1313, 128 S. Ct. 1869 (2008). All relevant evidence necessarily is "prejudicial" in a criminal prosecution, and the danger of unfair prejudicial impact "arises from the potential for a jury to substantially overestimate the value of the evidence, or its potential to arouse or inflame the passions or sympathies of the jury." *Wages v. State*, 863 N.E.2d 408, 412 (Ind. Ct. App. 2007), *reh'g denied*, *trans. denied*. Errors in the admission of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party. *McClain v. State*, 675 N.E.2d 329, 331 (Ind. 1996); Ind. Trial Rule 61.

[19] The record reveals that the State was attempting to lay a foundation for the admission of the recording of the forensic interview. The first time E.C. was recalled, her testimony consisted of less than three pages of the transcript. During the third time E.C. testified, the judge indicated he was "the one making [her] come back for a third time," and her testimony consisted of about eight pages of the transcript. Transcript Volume 2 at 137. The record also reflects the jury had been made aware that E.C. had reviewed the video in the interim. We conclude under these circumstances that any danger of unfair prejudicial impact to Ross was minimal. Based upon the record, reversal is not warranted on this basis.

II.

[20] The next issue is whether the prosecutor committed misconduct which resulted in fundamental error. In reviewing a properly preserved claim of prosecutorial misconduct, we 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 should not have been subjected. *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). Whether a prosecutor's argument constitutes misconduct is measured by reference to caselaw and the Rules of Professional Conduct. *Id.* The gravity of 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. *Id.*

[21] Ross states that his claim of prosecutorial misconduct must withstand a review for fundamental error because he did not ask for a mistrial. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. *Id.* It is error that makes "a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm." *Id.* "This exception is available only in 'egregious circumstances.'" *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) (quoting *Brown v. State*, 799 N.E.2d 1064, 1068 (Ind. 2003)), *reh'g denied*. "Fundamental error is meant to permit appellate courts a means to correct the most egregious and blatant trial errors that otherwise would have been procedurally barred, not to provide a second bite at

the apple for defense counsel who ignorantly, carelessly, or strategically fail to preserve an error." *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014), *reh'g denied*.

[22] Ross contends that he was placed in grave peril, there was no physical evidence, and the jury found him not guilty of Count I and had obvious concerns regarding the State's case and E.C.'s testimony. He also argues that allowing the jury to believe they had not heard everything was a violation of his due process rights and the evidence would seem to suggest that E.C.'s mother had a motive to have him convicted.

[23] After the prosecutor's comment, the trial court reminded the jury that closing arguments were not evidence, stated "[w]e are only concerned with what happened in this case not alleged uncharged misconduct," and ordered the jury to disregard the prosecutor's comment. Transcript Volume 2 at 223. The record also reveals the jury was informed in the preliminary instructions that closing arguments "are not evidence but are given to help you evaluate the evidence," "attorneys are permitted to characterize the evidence and to try to persuade you to a particular verdict," and "[y]ou may accept or reject those arguments as you see fit." *Id.* at 16. The court gave a similar final instruction after the parties' closing arguments and also instructed the jury: "You should consider each count independently based on the law and the evidence relating to that count." Transcript Volume 3 at 4. Under the circumstances, we cannot say that Ross has demonstrated fundamental error.

[24] For the foregoing reasons, we affirm Ross's convictions.

[25] Affirmed.

Najam, J., and Riley, J., concur.