MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Douglass M. Howard,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 27, 2023

Court of Appeals Case No. 23A-CR-457

Appeal from the Delaware Circuit Court

The Honorable Thomas A. Cannon, Judge

Trial Court Cause No. 18C05-2005-F5-79

Memorandum Decision by Judge Crone
Judges Brown and Felix concur.

Crone, Judge.

Case Summary

[1] Douglass M. Howard appeals his conviction for level 5 felony child seduction. He contends that the trial court abused its discretion in admitting certain evidence and that the prosecutor twice committed misconduct during closing argument.[1] Finding that Howard has waived these claims for appeal, we affirm.

Facts and Procedural History

[2] J.H. was born on September 3, 2001. Howard adopted J.H. when he was three years old. Howard also adopted three other children. The family lived in a home on Wilson Road in Muncie for many years before briefly moving to Georgia when J.H. was approximately fifteen years old. While they were living in Georgia, the house on Wilson Road burned down, so the family moved back to Indiana in the summer of 2018.

[3] Once back in Indiana, Howard and J.H. began maintaining the property that remained on Wilson Road by mowing the yard and the field. One night, Howard and J.H. stayed at a nearby family rental property that was next door to Howard's mother's house. Howard and J.H. were staying in the same bedroom, and Howard was on the bed and J.H. was on a mattress on the floor. Neither Howard nor J.H. could fall asleep, so Howard "just yelled out" to J.H., "Do you want a blow job?" Tr. Vol. 2 at 201. J.H. said no. For the next couple

[1] In his statement of issues, Howard also claims "Insufficient evidence to convict defendant." Appellant's Br. at 4. However, he makes no further mention of this issue in his brief, so we decline to address it.

of months, Howard would routinely ask J.H. if he wanted oral sex. He would sometimes ask multiple times in one day. These remarks were always made when Howard and J.H. were face-to-face and when nobody else was around. J.H. continued to deny Howard what he wanted.

[4] At one point in October 2018, Howard promised then seventeen-year-old J.H. that he would buy him a truck. Howard took J.H. to a dealer to look at vehicles, and J.H. found one that he liked. Howard told J.H., "[Y]ou know what you have to do to get it." *Id.* at 204. A couple days later, Howard and J.H. were mowing the property on Wilson Road when the tractor that J.H. was using broke. When J.H. went to Howard to try to get help fixing the tractor, Howard asked J.H., "[Are] you ready?" *Id*. J.H. knew that this meant that Howard was questioning his willingness to engage in oral sex. After they had a conversation during which J.H. got "madder and madder," J.H. ended up "giving in" and telling Howard that he "would do it." *Id*. at 204, 206.

[5] J.H. took Howard's phone from him and went into a trailer on the property that was being used for storage. J.H. went into the bathroom and watched pornography on the phone because he "was afraid that [he] wouldn't be able to get an erection" if he did not. *Id*. at 206. Howard entered the bathroom a few minutes later, pulled down J.H.'s pants, and started performing oral sex on J.H. After just a couple of minutes, the whole experience "started to freak [J.H.] out" because he felt "sickened, mad, angry, [and] disappointed." *Id*. at 207. J.H. shoved Howard away and walked out of the trailer. Howard followed J.H. out and said, "[T]hank you." *Id*. Howard bought J.H. the truck a few days later.

[6] In December 2018, approximately two months after that encounter, the family moved to a house in New Castle. Howard continually reminded J.H. that "he did not get what he wanted" from J.H. during their encounter in the trailer because he wanted J.H. to "ejaculate in his mouth" and that did not happen. *Id.* at 212. Howard repeatedly asked J.H. for oral sex so that J.H. would "ejaculate in his mouth this time." *Id.* at 213. Although Howard initially began asking J.H. face-to-face, he eventually "discovered [S]nap[C]hat" and started texting J.H. about his desires. *Id.* at 214. In order to "put [Howard] off" and delay having to engage in another oral sex encounter, J.H., who was a high school wrestler, promised to send Howard pictures of himself wearing a wrestling singlet and also to wrestle with Howard. Howard took several pictures of J.H. and would tell J.H. how to pose. Howard continued to ask J.H. for oral sex and tell J.H. that it was something he "needed" and that "he always wanted." *Id.* at 222.

[7] In January 2020, J.H.'s younger sister K.H. logged into Howard's SnapChat account and saw some photographs and messages sent between Howard and J.H. that "concerned" her, so she reported it to police. Tr. Vol. 3 at 40. A Henry County Sheriff's Department deputy responded and spoke to both J.H. and K.H. at New Castle High School. Due to what J.H. reported had happened between himself and Howard, the deputy referred the investigation to Delaware County.

[8] The State charged Howard with two counts of level 5 felony child seduction, the first of which related to the October 2018 incident.[2] The State subsequently dismissed the second count. A jury trial began on December 13, 2022. J.H. testified in detail about what happened between himself and Howard. The jury found Howard guilty. Following a hearing, the trial court sentenced Howard to a three-year fully suspended term. This appeal ensued.

Discussion and Decision

Section 1 – Howard has waived his claim that the trial court abused its discretion in admitting certain evidence at trial.

[9] We first address Howard's challenge to the trial court's admission of State's Exhibit 19, which consisted of recorded conversations between Howard and J.H. We generally review the trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *Rogers v. State*, 130 N.E.3d 626, 629 (Ind. Ct. App. 2019). We will reverse a ruling on the admission of evidence for an

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[2] At the time of Howard's October 2018 encounter with J.H., Indiana Code Section 35-42-4-7(m) provided:

> If a person who:
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> (1) is at least eighteen (18) years of age; and
>
> (2) is the:
>
> (A) guardian, adoptive parent, adoptive grandparent, custodian, or stepparent of; or
>
> (B) child care worker for;
>
> a child at least sixteen (16) years of age but less than eighteen (18) years of age;
>
> engages with the child in sexual intercourse, other sexual conduct (as defined in IC 35-31.5-2-221.5), or any fondling or touching with the intent to arouse or satisfy the sexual desires of either the child or the adult, the person commits child seduction.

The offense is a level 5 felony "if the person […] engaged in sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) with the child." Ind. Code § 35-42-4-7(q)(2).

abuse of discretion, which occurs only when the ruling is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights. *Clark v. State*, 994 N.E.2d 252, 260 (Ind. 2013).

[10] During trial, J.H. testified that he secretly recorded several conversations between himself and Howard on the same day in May 2019 while the family was living in New Castle. The State moved to admit the recordings, which were contained in Exhibit 19. Howard objected to the admission of the exhibit, claiming that the State failed to lay a sufficient foundation because J.H. could not remember whether he was age seventeen or eighteen when he made the recordings, that the conversations took place after the family had already moved from Delaware County to Henry County, and the recordings did not specifically reference the October 2018 incident. The trial court overruled the objection.[3]

[11] On appeal, Howard argues that the recordings should not have been admitted because they "were extremely prejudicial and had no probative value." Appellant's Br. at 19. However, it is well established that a party may not object on one ground at trial and raise a different ground on appeal. *White v. State*, 772 N.E.2d 408, 411 (Ind. 2002). Because Howard's trial objection was limited to foundational concerns and did not specifically reference any deficiency under

[3] After the recordings were played for the jury, J.H. explained that in the conversations, Howard was referring to the October 2018 incident and J.H.'s failure to "[e]jaculate in his mouth" when he repeatedly stated in the recordings that he had not gotten "what he wanted" from J.H. seven months prior. Tr. Vol. 2 at 229-30.

Indiana Evidence Rules 401 or 403, we conclude that he has waived this issue on appeal. *See Brittain v. State*, 68 N.E.3d 611, 619 (Ind. Ct. App. 2017) (finding waiver when defendant's appellate argument regarding evidence admissibility was different than trial objection, noting that "a party may not present an argument or issue to an appellate court unless the party raised the same argument or issue before the trial court."), *trans. denied*.[4]

Section 2 – Howard failed to preserve his prosecutorial misconduct claims and has waived a fundamental error claim.

[12] Howard also contends that the deputy prosecutor twice committed misconduct during the State's closing argument. Specifically, he claims that, during closing argument, the deputy prosecutor improperly commented on his decision not to testify and that, during rebuttal closing argument, the deputy prosecutor falsely accused defense counsel of calling the prosecutor a homophobe. It is well established that "[t]o preserve a claim of prosecutorial misconduct, the defendant must—at the time the alleged misconduct occurs—request an admonishment to the jury, and if further relief is desired, move for a mistrial."

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[4] Indiana Evidence Rule 401 provides that evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. Indiana Evidence Rule 403 permits the court to "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." A trial court's evidentiary rulings are presumptively correct, and the "defendant bears the burden on appeal of persuading us that the court erred in weighing prejudice and probative value under Evid. R. 403." *Rivera v. State*, 132 N.E.3d 5, 12 (Ind. Ct. App. 2019) (quoting *Anderson v. State*, 681 N.E.2d 703, 706 (Ind. 1997)), *trans. denied* (2020). By not making this specific objection, Howard did not give the trial court an opportunity to weigh prejudice and probative value and he therefore cannot now claim error in the trial court's evidentiary decision.

Ryan v. State, 9 N.E.3d 663, 667 (Ind. 2014). Regarding the first alleged instance of misconduct, Howard did not object, request an admonishment to the jury, or move for a mistrial. Regarding the second alleged instance of misconduct, Howard's counsel objected to the deputy prosecutor's comment, but he did not request an admonishment to the jury or move for a mistrial. Therefore, neither claim of prosecutorial misconduct has been properly preserved.

[13] Where a claim of prosecutorial misconduct has been procedurally defaulted for failure to properly raise the claim in the trial court, the defendant on appeal must establish not only the grounds for prosecutorial misconduct but must also establish that the prosecutorial misconduct constituted fundamental error. *Id*. at 667-68. "Fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to make a fair trial impossible." *Id*. at 668. To establish fundamental error, the defendant must show that, under the circumstances, the trial judge erred in not sua sponte raising the issue because the alleged error constituted a clearly blatant violation of basic and elementary principles of due process and presented an undeniable and substantial potential for harm. *Id*. In evaluating whether fundamental error occurred, we look at the alleged misconduct in the context of everything that happened—including the evidence admitted at trial, closing arguments, and jury instructions. *Id*. A defendant is "highly unlikely" to prevail on a claim of fundamental error relating to prosecutorial misconduct. *Id*.

[14] Here, Howard's appellate arguments presume properly preserved claims of prosecutorial misconduct. Although he makes cursory mention of the term "fundamental error," he does not set forth the standard of review for a claim of fundamental error or develop an argument under this standard. Indeed, Howard cites to no relevant legal authority and makes no attempt to demonstrate the extreme prejudice required for reversal under this narrow exception. Accordingly, any claim of fundamental error is waived for failure to present a cogent argument. *See Hollingsworth v. State*, 987 N.E.2d 1096, 1098-99 (Ind. Ct. App. 2013) (holding that defendant waived fundamental error claim where she failed to present cogent argument regarding fundamental error in her brief), *trans. denied*; *see also* Ind. Appellate Rule 46(A)(8)(a) (providing that appellant's contentions regarding issues presented on appeal must be supported by cogent reasoning and citation to authority). We affirm Howard's conviction.

[15] Affirmed.

Brown, J., and Felix, J., concur.