MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Lamar Fuqua,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 26, 2024

Court of Appeals Case No.
23A-CR-1011

Appeal from the Madison Circuit Court

The Honorable Andrew R. Hopper, Judge

Trial Court Cause No.
48C03-2009-F1-2098

Memorandum Decision by Judge May
Judges Bailey and Felix concur.

May, Judge.

[1] Lamar Fuqua appeals following his convictions of Level 1 felony child molesting[1] and Level 4 felony child molesting.[2] Fuqua raises three issues, which we revise and restate as:

> Whether fundamental error occurred when:
>
> 1. J.F. and J.F.'s mother testified about J.F.'s participation in an in-patient mental health treatment program during which J.F. first disclosed the full nature of Fuqua's abuse;
>
> 2. a sexual assault nurse examiner ("SANE") testified regarding behaviors of child sex abuse victims; and
>
> 3. the State referred to the above-challenged testimony during its closing argument.

We affirm.

Facts and Procedural History

[2] Fuqua is J.F.'s grandfather. J.F. was born in January 2009, and she lived with her mother and her brother Ja.F. in Louisville, Kentucky. Fuqua lived in Pendleton, Indiana, and J.F. and Ja.F. would routinely visit him during the

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[1] Ind. Code § 35-42-4-3(a)(1) (2014).

[2] Ind. Code § 35-42-4-3(b) (2014).

summers and around Christmas. Beginning when J.F. was three or four years old, Fuqua would offer her candy or money if she kissed him.

[3] At one point when J.F. was six years old, Fuqua, J.F., and Ja.F. were sitting in the "theatre room" in Fuqua's house watching a movie. (Tr. Vol. II at 230.) After Ja.F. fell asleep, Fuqua told J.F. to come over and sit on his lap. Fuqua then unbuckled his pants and directed J.F. "to put [her] hand in his pants and to squeeze his penis." (*Id.*) After J.F. did so, Fuqua told her to get up and go to bed, and J.F. followed Fuqua's instructions.

[4] When J.F. was eight years old, J.F. and Ja.F. were in Fuqua's den inside his house in Pendleton when J.F. told Fuqua "that sometimes [she] felt that he didn't love [her] when he got mad at [her]." (*Id.* at 232.) Fuqua then grabbed her by the arm and "got mad." (*Id.* at 233.) Fuqua led J.F. to J.F.'s grandmother, and he made J.F. repeat what she had said to him in front of her grandmother. Fuqua "said that he doesn't know why [J.F.] would ever say that because he loves [her]." (*Id.*) Fuqua then told J.F. to go to bed. Later that night, Fuqua went into the room where J.F. and Ja.F. were sleeping and woke J.F. up. He took her into his den and locked his den's door. Fuqua told J.F. "he does love [her]. And that he wouldn't do the things he do[es] for [her] if he didn't love [her]." (*Id.*) Fuqua then took J.F.'s pants off and had intercourse with her. J.F. began to cry because the intercourse hurt her, and Fuqua put his hand over her mouth and told her to be quiet. Fuqua directed J.F. to go back to sleep and to not tell anyone about what he had done to her. At approximately this same age, J.F. began taking nude photographs and videos of herself and

sending them to adult men over the internet. J.F. also began bedwetting and having nightmares about what Fuqua had done to her.

[5] J.F., J.F.'s mother, J.F.'s mother's fiancé, and J.F.'s siblings visited Fuqua in Pendleton over the July 4th weekend in 2020. On the morning of July 5, 2020, J.F.'s mother and her mother's fiancé left Fuqua's house to go to the grocery store to get items for breakfast, and Fuqua woke J.F. up. He then led J.F. into the guest bedroom and took off her clothes. Fuqua then "told [J.F.] that he can do what he want. And he had intercourse with [her]." (*Id*. at 242.)

[6] Later that day, J.F. and Ja.F. decided to go swimming. When J.F. and Ja.F. returned to Fuqua's house from the swimming pool, J.F. decided to change out of her swimsuit, and she walked past Fuqua in her swimsuit to retrieve extra clothes from her bag. Fuqua grabbed J.F.'s buttocks as she walked past. J.F. told Fuqua to stop and went into a nearby bathroom to change her clothes. When she came out of the bathroom, Fuqua grabbed her arm and said, "Don't tell me what to do." (*Id*. at 239.) Fuqua said that "he can do whatever he wants" because he had given J.F. money earlier. (*Id*.) J.F. told her mother about Fuqua touching her buttocks, but J.F. did not tell her mother about the intercourse.

[7] J.F.'s mother initially contacted the Louisville police, and the Louisville police directed her to the Madison County Sheriff's Office. On August 7, 2020, forensic interviewer Rebecca League interviewed J.F. at the Family and Children's Child Advocacy Center in Louisville. During that interview, J.F.

described Fuqua inserting his finger up her anus while giving her a bath when she was three or four years old. She also discussed Fuqua grabbing her buttocks on July 5, 2020.

[8] On September 8, 2020, the State charged Fuqua with two counts of Level 1 felony child molesting, four counts of Level 4 felony child molesting, one count of Class A felony child molesting,[3] and one count of Class C felony child molesting.[4] From December 3, 2021, to September 8, 2022, J.F. resided at a mental health hospital in Kentucky and participated in an extensive in-patient program "for young girls who have been through trauma and . . . ways to help them cope with it." (Tr. Vol. 3 at 10.) J.F. first disclosed the two incidents of sexual intercourse and the incident where Fuqua made her squeeze his penis during her participation in the in-patient program.

[9] The State amended the charges against Fuqua several times. At the time of Fuqua's trial, the amended charging information alleged one count each of Class A felony child molesting, Level 1 felony child molesting, Class C felony child molesting, and Level 4 felony child molesting. The trial court held Fuqua's jury trial beginning on March 13, 2023. During his opening statement, Fuqua explained:

> What I ask is that you pay close attention to the details. Because like so many of these cases, it's the details. It's the stories, it's the

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[3] Ind. Code § 35-42-4-3(a)(1) (2007).

[4] Ind. Code § 35-42-4-3(b) (2007).

> changing of the stories. It's the evolution of basically what brought us here today . . . And this thing started as a small story and just kept growing as time progressed forward.

(Tr. Vol. 2 at 213.)

[10] J.F. testified regarding Fuqua's acts against her, and her subsequent acts of self-harm, including cutting her own wrists and attempting to hang herself. J.F. also discussed her participation in the nine-month in-patient program. J.F. described her initial anger about being sent to the program and her isolation from her family due to Covid-related visitation restrictions, and she also explained how she eventually became more comfortable talking about Fuqua's abuse while participating in the program. She said she benefited from the lessons she learned while in the program:

> It helped me . . . by now day-to-day I don't . . . really think about what other people think of me. Um, I learned better ways to feel better about myself rather than talking to grown men on the internet. I learned how to take care of myself without feeling the need for attention all the time. And I learned like in, I learned more about who really loves me and what's best for me in life.

(Tr. Vol. 3 at 16.) J.F. testified at trial that she did not remember Fuqua inserting his finger into her anus while giving her a bath even though she described that incident in her forensic interview. Following J.F.'s testimony, the State dismissed the charges of Class A felony child molesting and Class C felony child molesting.

[11] The State also called SANE Holly Renz, the former program director of the Sexual Assault Treatment Center at Community Hospital in Anderson, to testify as a skilled witness. Nurse Renz explained that she had not examined J.F. or reviewed any information related to the specific allegations against Fuqua. Her testimony centered on her education and experience as a clinician treating child sex abuse victims. She explained the concept of "grooming" whereby perpetrators of sexual abuse convince their intended victims to trust and be comfortable around them. (*Id*. at 135.) In addition, Nurse Renz testified that while not every victim of sex abuse responds in the same way, certain "red flags" a victim might exhibit include "regressive behavior such as bed wetting [and] nightmares." (*Id*.) She also described falling grades, self-harm, suicide attempts, and "hyper sexualized behavior" as additional red flag behaviors. (*Id*. at 136.) During its closing argument, the State drew comparisons between the red flag behaviors Nurse Renz described and J.F.'s actions. The State explained:

> [Nurse Renz] talked about some of the red flags that you might see and some of them are age dependent but changes in the child's behavior. Nightmares, depression, self-harm, suicidal ideation, we heard about several of these things. About the night terrors, about the self-harm, about trying to commit suicide when she was in the program and talking about suicide. These are all behaviors J.F. exhibited and they are all consistent with what Holly Renz told you some of these red flags are. Again, no kid is identical. No kid is going to exhibit all of these. However, these are all the typical red flags and J.F. through her behavior exhibited those red flags that she had been molested.

(*Id*. at 171.)

[12] At the conclusion of the trial, the jury returned verdicts finding Fuqua guilty of both Level 1 felony child molesting and Level 4 felony child molesting. The trial court subsequently sentenced Fuqua to a term of thirty-two years for his conviction of Level 1 felony child molesting and a term of eight years for his conviction of Level 4 felony child molesting. The trial court ordered Fuqua to serve the terms consecutively for an aggregate sentence of forty years in the Indiana Department of Correction.

Discussion and Decision

[13] Fuqua contends the trial court should not have allowed testimony about the mental health treatment J.F. received after Fuqua abused her. He also asserts the trial court should have barred Nurse Renz's testimony about the behaviors of child sex abuse victims. Lastly, Fuqua contends the State committed prosecutorial misconduct by eliciting the testimony and referring to it during the State's closing argument.

[14] Normally, we review a trial court's decision on the admission of evidence for an abuse of discretion. *Weed v. State*, 192 N.E.3d 247, 249 (Ind. Ct. App. 2022). "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id*. We analyze a properly preserved claim of prosecutorial misconduct by determining "(1) whether misconduct occurred, and if so, (2) 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 otherwise." *Ryan v. State, 9 N.E.3d 663, 667 (Ind. 2014), reh'g denied*.

[15] However, Fuqua did not object at trial to the testimony he challenges on appeal, nor did he object during the State's closing argument. "The failure to make a contemporaneous objection to the admission of evidence at trial results in waiver of the error on appeal. A contemporaneous objection affords the trial court the opportunity to make a final ruling on the matter in the context in which the evidence is introduced." *Jackson v. State*, 735 N.E.2d 1146, 1152 (Ind. 2000) (internal citations omitted). Likewise, "[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." *Ryan*, 9 N.E.3d at 667.

[16] Nevertheless, even if a claim of error is waived because of the defendant's failure to make a contemporaneous objection, we still review the claim to see if it rises to the level of fundamental error. *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010), *reh'g denied*. "The fundamental error exception is 'extremely narrow, 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.'" *Id*. (quoting *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006)). The claim must be so egregious as to "either 'make a fair trial impossible' or constitute 'clearly blatant violations of basic and elementary principles of due process.'" *Id*. (quoting *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009)). "A finding of fundamental error essentially means that

the trial judge erred either by not acting when he or she should have or by acting in a manner that grossly exceeded the role of an impartial judge." *Whiting v. State*, 969 N.E.2d 24, 34 (Ind. 2012) (internal citation omitted).

1. Testimony Regarding J.F.'s Treatment

[17] Fuqua asserts the testimony of J.F. and J.F.'s mother regarding J.F.'s in-patient mental health treatment "had no relevance, and little, if any, probative value." (Appellant's Br. at 12.) He contends the testimony "was elicited for the purposes of vouching and bolstering the validity of the allegations and J.F.'s testimony, and the manner in which it was done certainly aroused and inflamed the passions and sympathies of the jury." (*Id*. at 14.) However, the standard for establishing relevance is "a low bar." *Snow v. State*, 77 N.E.3d 173, 177 (Ind. 2007). 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." Ind. Evid. R. 401. Relevant evidence is generally admissible unless "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." Ind. Evid. R. 403. "The determination of whether there is a risk of unfair prejudice depends on the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence to suggest decision on an improper basis." *Rivera v. State, 132 N.E.3d 5, 12 (Ind. Ct. App. 2019) (internal quotation marks omitted), reh'g denied*, *trans. denied*.

[18] Here, testimony regarding J.F.'s in-patient treatment program was relevant because it was while J.F. was receiving that treatment that she first disclosed that Fuqua twice penetrated her vagina with his penis and that Fuqua made her squeeze his penis. In addition, the testimony was not unfairly prejudicial because the State is not obliged to sanitize the nature and impact of a defendant's crimes. *See Eddy v. State*, 496 N.E.2d 24, 27 (Ind. 1986) ("In sum, the law does not require the result of defendant's acts to be sanitized when evidence of the crime is submitted to the jury."). We agree with the State that testimony about the mental health treatment J.F. received following Fuqua's abuse "was no more vouching than testimony that a person who suffered serious bodily injury had to go to the hospital and be treated for that serious bodily injury." (Appellee's Br. at 12.) Thus, admission of the evidence was not unfairly prejudicial or otherwise prohibited by Rule 403, and consequently, its admission does not rise to the level of fundamental error. *See*, *e.g.*, *Rolston v. State*, 81 N.E.3d 1097, 1103-04 (Ind. Ct. App. 2017) (holding trial court did not commit fundamental error in admitting autopsy photographs when photographs showed the extent of the victim's injuries and demonstrated doctor's testimony), *trans. denied*.

2. Nurse Renz's Skilled Witness Testimony

[19] Similarly, Fuqua protests that Nurse Renz's skilled witness testimony "was irrelevant, unreliable, misleading, and amounted to improper vouching for the victims [sic]." (Appellant's Br. at 11-12.) However, while testimony regarding the typical behaviors of child sex abuse victims is inadmissible to prove that

molestation occurred, the testimony "is generally admissible to rehabilitate a child complainant to rebut a claim by the defense that the child's behavior, such as delayed reporting, is inconsistent with abuse." *Ward v. State*, 203 N.E.3d 524, 530 (Ind. Ct. App. 2023). A defendant may call into question a child victim's credibility during the defendant's opening statement or through cross-examination of the victim. *Pierce v. State*, 135 N.E.3d 993, 1005 (Ind. Ct. App. 2019). Here, Fuqua put J.F.'s credibility at issue during his opening statement when he accused J.F. of embellishment by stating: "It's the stories, it's the changing of the stories. . . . And this thing started as a small story and just kept growing as time progressed forward." (Tr. Vol. 2 at 213.) Moreover, Fuqua challenged J.F.'s credibility on cross-examination by questioning her about her delay in reporting Fuqua's abuse. Fuqua also questioned J.F. regarding when she began sending sexually explicit images of herself to others over the internet. Thus, because Fuqua used J.F.'s delayed disclosure and early sexualized behavior to challenge J.F.'s credibility, Nurse Renz's testimony was admissible to explain that child sex abuse victims often delay reporting abuse and exhibit "non-age-appropriate" sexual knowledge and behavior. (Tr. Vol. 3 at 136.) *See*, *e.g.*, *Ward*, 203 N.E.3d at 531 (holding SANE nurse's testimony regarding how and why children delay disclosure of sexual abuse was admissible as rehabilitative evidence when defendant put victim's credibility at issue). Moreover, Nurse Renz's testimony did not constitute impermissible vouching because she did not offer an opinion regarding the truth of J.F.'s allegations. *See*, *e.g.*, *id.* at 531-32 (holding SANE nurse's testimony did not constitute impermissible vouching when nurse did not offer opinion regarding truthfulness

of victim's testimony). Given that the testimony was admissible, Fuqua's argument that the testimony resulted in fundamental error fails.

3. Prosecutorial Misconduct

[20] Finally, Fuqua contends the State committed prosecutorial misconduct by eliciting the above referenced testimony and referring to the testimony in its closing argument. One way the State can commit prosecutorial misconduct is by deliberately placing inadmissible evidence in front of the jury. *See Shaffer v. State*, 674 N.E.2d 1, 6 (Ind. Ct. App. 1996) ("An evidentiary harpoon occurs when the prosecution places inadmissible evidence before the jury for the deliberate purpose of prejudicing the jury against the defendant and his defense. In certain circumstances, the injection of an evidentiary harpoon by a prosecutor may constitute prosecutorial misconduct[.]") (internal citation omitted), *trans. denied*. However, as explained above, the evidence was not inadmissible. It also was admitted without objection. When presenting closing argument, the State "must confine closing argument to comments based only upon the evidence presented in the record." *Craft v. State*, 187 N.E.3d 340, 348 (Ind. Ct. App. 2022), *trans. denied*. That is what the State did here, and therefore, we reject Fuqua's claim that the State committed prosecutorial misconduct by doing so. *See*, *e.g.*, *Cooper v. State*, 854 N.E.2d 831, 837 (Ind. 2006) (holding prosecutor's statement during closing argument was a fair comment on the facts adduced at trial and not improper).

Conclusion

[21] Fuqua's claims of fundamental error fail. The testimony of both J.F. and her mother regarding the in-patient mental health treatment program J.F. attended after Fuqua abused her was both relevant and not unfairly prejudicial. Because Fuqua's trial strategy centered on challenging J.F.'s credibility, Nurse Renz's skilled witness testimony regarding typical behaviors of child sex abuse victims was not improper. Finally, the State did not commit prosecutorial misconduct. Therefore, we affirm the trial court.

[22] Affirmed.

Bailey, J., and Felix, J., concur.

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