MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Tyron D. Pearson,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

March 27, 2024

Court of Appeals Case No.
23A-CR-1491

Appeal from the Porter Superior Court

The Honorable Jeffrey W. Clymer, Judge

Trial Court Cause No.
64D02-1710-F4-009434

Memorandum Decision by Judge Felix
Judges Bailey and May concur.

Felix, Judge.

Statement of the Case

[1] In 2022, a jury found Tyron Pearson guilty of one count of child molesting for acts involving A.W., his stepdaughter, that allegedly occurred during the late summer and early fall of 2017. Pearson now appeals his conviction and presents two issues for our review:

1. Whether it was fundamental error for the trial court not to give an unanimity instruction; and
2. Whether the State committed acts of prosecutorial misconduct that cumulatively constitute fundamental error.

[2] We affirm.

Facts and Procedural History

[3] A.W. was born on May 3, 2005, to Dante Williams and Roxanne Bravo ("Mother"). In 2017, Mother was married to Pearson, and A.W. was living between her parents' homes. At that time, Mother resided in Portage, Indiana, with Pearson and their four children.

[4] One night in the late summer of 2017, while at Mother and Pearson's house, A.W. and her half-siblings had returned from a party and were in the living room watching a movie with Pearson. Pearson eventually told A.W.'s half-siblings to go to bed. According to A.W., the oldest of the four half-siblings had fallen asleep on the couch; Pearson picked her up and carried her to her brother's bedroom. A.W. remained on the couch. While A.W. was half-asleep,

Pearson lifted her shirt and sucked on her breast for approximately 20 minutes. The contact was painful, but A.W. remained silent because she was confused by Pearson's actions. A.W. finally asked if she could go to bed, and Pearson walked her to her bedroom. Just outside A.W.'s bedroom, Pearson knelt and asked A.W. for a hug. Pearson then lifted A.W.'s shirt and sucked on her breasts for 10 to 15 minutes. Afterward, A.W. went to bed.

[5] A couple of weeks later, A.W. was sleeping on the couch at Mother and Pearson's house when she woke up to Pearson sucking on her breasts. This lasted for approximately 10 to 15 minutes. Then, in late August 2017 shortly after school resumed, A.W. was sleeping alone in her room at Mother and Pearson's house when Pearson woke her up at approximately 10:00 or 11:00 p.m. to purportedly tell her something about school. Once A.W. was awake, Pearson asked A.W. to open her hand and then placed his penis in her open hand for approximately 10 seconds. After that, Pearson told A.W. to get up from her bed, he lifted her shirt and sucked on her breasts. Pearson then pulled down A.W.'s pants and underwear and started "twirling the hair with his finger." Tr. Vol. II at 161–62. A.W. asked to go to bed, and once she lay down, Pearson rubbed her buttocks for approximately 10 minutes before leaving the room.

[6] About a day after this last incident, A.W. told a friend about Pearson's actions. That friend persuaded A.W. to talk to the school counselor who notified law enforcement. On August 25, 2017, Janis Crafton, who was then a sergeant with the Portage Police Department, conducted a forensic interview of A.W.

In that interview, A.W. identified on anatomical body diagrams the places Pearson had touched her during the incidents, as well as the places Pearson had A.W. touch him. Crafton also interviewed Mother and A.W.'s four half-siblings.

[7] Also on August 25, 2017, Crafton interviewed Pearson. Pearson denied doing anything inappropriate with A.W. and opined that A.W. made the allegations against him to get attention. Throughout the interview, Pearson described himself as the disciplinarian in his house and the various ways he believed A.W. had been acting out recently, including complaining about her chores and engaging in inappropriate behavior on social media. In addition, Pearson told Crafton that A.W. had previously made an allegation against a sibling and that DCS had determined that allegation was unsubstantiated. Pearson also claimed that he was wholly unaware of allegations that older men inappropriately touch or molest children; he insinuated he has only heard of such conduct occurring between young children but never between adults and young children. Ex. 3 at 17:52–18:54.

[8] On October 5, 2017, the State charged Pearson with one count of child molesting as a Level 4 felony[1]. Pearson's trial commenced on September 13, 2022. During voir dire, the State questioned potential jurors in part about their reactions to delays in disclosing criminal activity, how they would react to

[1] Ind. Code § 35-42-4-3(b).

testifying about an event they witnessed, and whether they believed a child's reactions to similar circumstances would be comparable to their own. Pearson questioned potential jurors in part about how they would react to being falsely accused of criminal activity, if they would be able to remain calm in the face of false accusations while in a courtroom, how they would react to experiencing or witnessing bullying during jury deliberations, and their experiences as step-parents and step-children.

[9] At trial, A.W. testified about all three alleged incidents as described above. On cross-examination, Pearson vigorously questioned A.W. in part about a video a friend of hers posted to Snapchat in 2017 in which A.W. stuck her tongue out, had her middle finger up, and rapped certain explicit lyrics of a song. A.W. testified that she did not remember making the video but agreed with Pearson that the song contains "vulgar lyrics," including the words "pussy" and "dick." Tr. Vol. II at 180.

[10] Crafton testified about her interviews with A.W., Pearson, and other family members, and the State played the entire video recording of Crafton's August 25, 2017, interview with Pearson.[2] Pearson did not testify but instead called three of his and Mother's four children to testify regarding their recollection of July 4, 2017, which is the date Pearson assigned to the first alleged incident. These three children were Pearson's only witnesses.

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[2] Except for the video recording of Pearson's interview, the exhibits admitted at trial were not provided to us.

[11] The oldest child, who was 9 years old when the alleged incidents occurred and 14 years old at the time of trial, testified that she did not personally witness any of the alleged incidents. According to this child, on July 4, 2017—the date Pearson believed the first incident to have occurred—instead of watching a movie with Pearson, A.W., and her siblings, she recalled that she went to a drive-in movie with a friend in Valparaiso, Indiana, while the rest of her family went to a party, and she did not return home until the next day. Although, this child testified that her memory of events occurring in 2017 was not "fuzzy," she also testified that she did not remember speaking with Crafton—which she did do—in 2017. Tr. Vol. III at 45.

[12] The other two younger children both testified to not having seen the alleged incident that Pearson believed occurred on July 4, 2017. However, they both recalled watching a movie as A.W. had described. Neither of them remembered whether the oldest child was with them watching the movie although one of the children thought the oldest child may have been present.

[13] In its closing argument, the State discussed A.W.'s testimony about the three alleged incidents and noted that A.W.'s demeanor indicated testifying was difficult for her and was not something she wanted to do. Additionally, the State discussed the video recording of Pearson's interview in which he attempted to discredit A.W.

[14] In his closing argument, Pearson highlighted the differences between A.W.'s account of the first alleged incident and the testimony of her three half-siblings'

recollections about the events of July 4, 2017. Pearson described A.W. as "a kid that's fighting for attention, a child that feels invisible, a child that wishes she had her own mother, and not these other siblings. She felt almost like Cinderella; overworked, unappreciated, unseen." Tr. Vol. III at 80. Pearson argued the video A.W. made in 2017 with her friend demonstrated that she was familiar with sexual terminology and not naïve.

[15] Pearson also discussed his interview during his closing argument; specifically, Pearson argued that the interview proved the State had prejudged his guilt and did not adequately investigate A.W.'s allegations. Pearson also referenced the portion of the interview in which he told Crafton about A.W.'s prior allegation against a sibling:

> And this isn't the first time that [A.W.]'s made a false allegation. You heard in the video that there was an allegation unsub --
>
> . . .
>
> Unsubstantiated. . . . I'm not going to play the game that because DCS may have unsubstantiated something means it didn't happen. But I will tell you this, DCS has a lower burden.

Tr. Vol. III at 80. Shortly before concluding his closing argument, Pearson made the following statement: "I don't know why people lie. I don't know why [A.W.] told the stories that she did. One would only hope that she gets help for whatever she's experienced. That said, can't operate off sympathy." Tr. Vol. III at 85.

[16] During its rebuttal closing argument, the State responded to many of Pearson's arguments, including the prior unsubstantiated allegation and the implications of A.W.'s 2017 video. The State again discussed Pearson's interview and highlighted some of his answers to Crafton's questions, such as his assertion that he had not heard of a 33-year-old molesting children. The State also encouraged the jury to consider A.W.'s demeanor while testifying and "[g]auge that on what we talked about during jury selection of how you gauge credibility." Tr. Vol. III at 91. Finally, the State pointed out that Pearson's defense centered around the first alleged incident only.

[17] The jury found Pearson guilty as charged. The trial court entered judgment of conviction accordingly and imposed a six-year sentence, with three years to be served on home detention and three years suspended to probation. This appeal ensued.[3]

Discussion and Decision

Standard of Review

[18] Pearson argues that the trial court should have given the jury an unanimity instruction and that some of the State's remarks during trial amount to prosecutorial misconduct. However, Pearson acknowledges that he did not

[3] Pearson fails to support with citations to the record several statements of fact, including quoted material, in the Argument section of his brief in violation of Indiana Appellate Rule 46(A)(8)(a). Appellant's Br. at 23, 33–38. Pearson's noncompliance with Appellate Rule 46 does not substantially impede our review of his claims, so we choose to address the merits thereof. *See Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015).

object to the lack of an unanimity instruction (or offer one himself) nor to the alleged instances of prosecutorial misconduct. We therefore review Pearson's claims for fundamental error.

[19] "Fundamental error is an exception to the general rule that a party's failure to object at trial results in a waiver of the issue on appeal." *Strack v. State*, 186 N.E.3d 99, 103 (Ind. 2022) (citing *Kelly v. State*, 122 N.E.3d 803, 805 (Ind. 2019)). The fundamental error doctrine is "very narrow and includes only errors so blatant that the trial judge should have acted independently to correct the situation." *Kelly*, 122 N.E.3d at 805 (citing *Durden v. State*, 99 N.E.3d 645 (Ind. 2018)). "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, 667–68 (Ind. 2014) (citing *Baer v. State*, 942 N.E.2d 80, 99 (Ind. 2011); *Stevens v. State*, 691 N.E.2d 412, 420 n.2 (Ind. 1997); *Wilson v. State*, 222 Ind. 63, 83, 51 N.E.2d 848, 856 (1943)).

[20] On appeal, the defendant bears the "heavy burden" of demonstrating fundamental error. *Strack*, 186 N.E.3d at 103 (citing *Isom v. State*, 170 N.E.3d 623, 651 (Ind. 2021)). To carry this burden,

> the defendant must show that, under the circumstances, the trial judge erred in not *sua sponte* raising the issue because alleged errors (a) constitute clearly blatant violations of basic and elementary principles of due process and (b) present an undeniable and substantial potential for harm. The element of

> such harm is not established by the fact of ultimate conviction but rather depends upon whether [the defendant's] right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he otherwise would have been entitled.

Ryan, 9 N.E.3d at 667–68 (internal quotation marks and citations omitted); *see also Strack*, 186 N.E.3d at 103 (quoting *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009)).

1. The Lack of an Unanimity Jury Instruction Did Not Constitute Fundamental Error

[21] Pearson contends that the trial court did not give an unanimity instruction at trial and this failure denied him a fair trial. As we have previously explained:

> In Indiana, a guilty verdict in a criminal case "must be unanimous." *Fisher v. State*, 259 Ind. 633, 291 N.E.2d 76, 82 (1973). We require unanimity "as to the defendant's guilt" but "it is not required as to the theory of the defendant's culpability." *Taylor v. State*, 840 N.E.2d 324, 333 (Ind. 2006).

Benson v. State, 73 N.E.3d 198, 201–02 (Ind. Ct. App. 2017).

[22] In its 2011 decision in *Baker v. State*, 948 N.E.2d 1169 (Ind. 2011), our Supreme Court recognized that jury unanimity presents problems in certain types of cases. For instance, "[i]t is difficult for children to remember specific dates, particularly when the incident is not immediately reported as is often the situation in child molesting cases." *Id.* at 1174 (quoting *Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992)). Therefore, "[d]epending on the facts of a

particular case, applying the rule of jury unanimity can present difficult challenges in charges of child molestation." *Id.*

[23] To address these problems, our Supreme Court held in *Baker* that the State may, in its discretion, designate a specific act or acts on which it relies to prove a particular charge; if the State does not so designate, "then the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts that the defendant committed all of the acts described by the victim and included within the time period charged." 948 N.E.2d at 1176–78 (citing *People v. Jones*, 51 Cal.3d 294, 270 Cal.Rptr. 611, 792 P.2d 643, 649 (1990)). Therefore, when the State does make the designation described above and the jury is "presented with evidence 'of a greater number of separate criminal offenses' than charged," an unanimity instruction is required. *Benson*, 73 N.E.3d at 203 (quoting *Baker*, 948 N.E.2d at 1175).

[24] In other words, it is error if, in a case where evidence is presented "'of a greater number of separate criminal offenses' than charged," the State does not make the designation *and* the jury is not given a proper unanimity instruction. *Baker*, 948 N.E.2d at 1175, 1178. However, such error is not *fundamental* error in a child molesting case if the only issue was the credibility of the alleged victim or victims because "[u]ltimately the jury resolved the basic credibility dispute against [the defendant] and would have convicted the defendant of *any* of the various offenses shown by the evidence to have been committed." *Id.* at 1179 (quoting *State v. Muhm*, 775 N.W.2d 508, 521 (S.D. 2009)).

[25] For example, in *Baker*, the State charged Baker with three counts of child molesting, one count for each of the three victims. 948 N.E.2d at 1178. At trial, all three victims and Baker testified. *Id.* at 1172–73. The victims testified to multiple instances of Baker engaging in sexual activity with them. *Id.* "Baker denied engaging in any sexual activity" with the victims and testified that they lied on the stand. *Id.* at 1173. The trial court instructed the jury in relevant part as follows regarding the unanimity requirement:

> Your verdicts must represent the considered judgment of each juror. In order to return a verdict of guilty or innocence you must all agree. . . . Upon retiring to the jury room the Foreperson will preside over your deliberations and must sign and date the verdicts to which you agree. Each verdict must be unanimous . . . ."

Id. at 1178.

[26] According to our Supreme Court, this instruction was erroneous because it did not properly advise the jury "that in order to convict Baker the jury must either unanimously agree that he committed the same act or acts or that he committed all of the acts described by the victim and included within the time period charged." *Baker*, 948 N.E.2d at 1178. However, because Baker did not object to this instruction and did not offer his own instruction, and because Baker's "only defense was to undermine the young women's credibility," our Supreme Court determined that Baker did "not demonstrate[] that the instructional error in this case so prejudiced him that he was denied a fair trial." *Id.* at 1178–79.

That is, under the circumstances, the instruction error did not amount to fundamental error. *Id.*

[27] Here, like in *Baker*, the State charged Pearson with and tried him on one count of child molesting but presented evidence of three incidents of Pearson allegedly molesting A.W. The trial court instructed the jury in relevant part as follows: "To return a verdict, each of you must agree to it. . . . The foreperson should sign the verdicts to which you all agree. Do not sign any verdict form for which there is not unanimous agreement." Appellant's App. Vol. II at 144. As in *Baker*, Pearson did not object to the lack of an unanimity instruction, nor did he proffer an instruction of his own.

[28] Pearson argues that his defense "was not the sort of generic attack on credibility described in *Baker*," Appellant's Br. at 23 (citing *Baker*, 948 N.E.2d at 1179), because he challenged A.W.'s testimony regarding the first of the three incidents "by producing witnesses that A.W. had conceded were in proximity to the first alleged act" and who "contradict[ed] her testimony regarding who was there, when they were there, and what they would have had an opportunity to observe," *id.* In contrast to Pearson's contention, it appears to us that this defense is one primarily raised to undermine A.W.'s credibility. While Pearson's defense may have been more specific as to one particular incident than was the defense in *Baker*, this case, like *Baker*, "is about whether or not [the victim] will lie about [the defendant] and make stuff up about him." *See Baker*, 948 N.E.2d at 1179 (citing *Muhm*, 775 N.W.2d at 521). The jury here resolved this basic credibility dispute against Pearson.

[29] Pearson also argues that the State made two statements—to which he did not object—during rebuttal closing argument that were erroneous because they essentially amounted to a disjunctive instruction. Appellant's Br. at 22. A disjunctive instruction "allows the jury to find a defendant guilty if he commits either of two or more underlying acts, either of which is in itself a separate offense." *Baker*, 948 N.E.2d at 1175 (citing *Lainhart v.* State, 916 N.E.2d 924, 942 (Ind. Ct. App. 2009); *Castillo v. State*, 734 N.E.2d 299, 304 (Ind. Ct. App. 2000), *summarily aff'd on trans.* 741 N.E.2d 1196 (Ind. 2001)). Such an instruction "is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." *Id.* (citing *Lainhart*, 916 N.E.2d at 943; *Castillo*, 734 N.E.2d at 304).

[30] For example, in *Lainhart v. State*, another panel of this court determined that the lack of an unanimity instruction constituted fundamental error where the State charged the defendant with one count of intimidation but alleged multiple victims in the disjunctive. 916 N.E.2d at 941–42. "[B]y arguing alternative victims—who were allegedly threatened at distinct periods of time on the night in question—the State actually charged [the defendant] with several alternative crimes." *Id.* at 942 (citing *Schad v. Arizona*, 501 U.S. 624, 651 (Scalia, J., concurring)). Similarly, in *Castillo v. State*, another panel of this court concluded that a prosecutor's comments constituted a disjunctive instruction where the State charged the defendant with one count of dealing in cocaine but presented evidence the defendant committed two separate acts of such dealing. 734 N.E.2d at 304. The prosecutor told the jury during closing argument it "had 'a

choice'" in convicting the defendant, and "[t]he trial court did not instruct the jurors that they were required to render a unanimous verdict regarding which dealing crime [the defendant] committed." *Id.* Notably, the *Castillo* Court did not conduct a fundamental error analysis because the defendant objected to the State presenting evidence of both instances of dealing. *Id.*

[31] Here, during rebuttal closing argument, the State said,

> As I reminded you the[] first time I was up here with you, any one of these three separate instances would qualify on its own. But we have three separate and distinct. The State could have charged three times. We charge it as one. But any one of these on its own is enough to result in a conviction here.

Tr. Vol. III at 89–90. Shortly thereafter, the State said, "Anyone of these three would qualify. The State believes all three of these happened and that this is what is left for you to decide and that you find the Defendant guilty of the charge of child molesting as a Level 4 Felony." *Id.* at 92.

[32] Read together and in the context of the State's entire rebuttal closing argument, these statements were intended to rebut Pearson's closing argument in which he argued that A.W. was a proven liar and fabricated at least one of the three incidents. Tr. Vol. III at 80–81. Based on the record in this case, we do not believe these comments by the State amounted to a disjunctive instruction. To the extent they can be read in that manner, the ultimate and only issue in this case was whether the jury believed A.W. or Pearson. *See Baker*, 948 N.E.2d at 1179. The jury believed A.W. Therefore, in accordance with our Supreme

Court's decision in *Baker*, we conclude that Pearson has not shown that the lack of an unanimity instruction so prejudiced him that he was denied a fair trial. Pearson has not carried his heavy burden of establishing fundamental error on this issue.

2. The Prosecutor's Allegedly Improper Statements during Voir Dire, Closing Argument, and Rebuttal Closing Argument Do Not Cumulatively Constitute Fundamental Error

[33] Pearson alleges that the State made numerous statements throughout the trial that amount to prosecutorial misconduct and cumulatively constitute fundamental error. When reviewing a claim of fundamental error premised on prosecutorial misconduct, we

> look at the alleged misconduct in the context of all that happened and all relevant information given to the jury—including evidence admitted at trial, closing argument, and jury instructions—to determine whether the misconduct had such *an undeniable and substantial effect on the jury's decision* that a fair trial was impossible.

Ryan, 9 N.E.3d at 668 (emphasis in original) (citing *Boesch v. State*, 778 N.E.2d 1276 (Ind. 2002); *Townsend v. State*, 632 N.E.2d 727 (Ind. 1994)).

[34] Notably, counsels' arguments are not evidence, *Gibson v. State*, 133 N.E.3d 673, 694 (Ind. 2019) (quoting *Piatek v. Beale*, 999 N.E.2d 68, 69 (Ind. Ct. App. 2013)), and an "admonishment to the jury to disregard inappropriate statements is generally presumed to cure any error," *TRW Vehicle Safety Sys., Inc. v. Moore*, 936 N.E.2d 201, 221 (Ind. 2010) (citing *Wright v. State*, 690 N.E.2d 1098, 1111

(Ind. 1997); *Chapman v. State*, 556 N.E.2d 927, 929 (Ind. 1990); *Barnes v. State*, 435 N.E.2d 235, 238 (Ind. 1982)).

[35] The statements Pearson now challenges fall into four broad categories: (a) sympathy as a basis for conviction, (b) vouching, (c) failure to testify, and (d) facts not in evidence. We address each argument in turn.

a. Sympathy as a Basis for Conviction

[36] Pearson claims that the State attempted to improperly condition the jury and invoke sympathy for A.W. as a basis for conviction. Potential jurors may be asked questions during voir dire to eliminate bias but may not be asked questions meant "to condition them to be receptive to the questioner's position." *Von Almen v. State*, 496 N.E.2d 55, 59 (Ind. 1986). "Questions that seek to shape a favorable jury by deliberate exposure to the substantive issues in the case are therefore improper." *Id.* Furthermore, the State may not request a jury convict a defendant for any reason other than the defendant's guilt. *Cooper*, 854 N.E.2d at 837–38. Thus, it is improper for the State "to invoke sympathy for a victim as a basis for a conviction." *Thornton v. State*, 25 N.E.3d 800, 806 (Ind. Ct. App. 2015) (citing *Woolston v. State*, 453 N.E.2d 965, 970 (Ind. 1983)). However, the State may question potential jurors during voir dire to expose potential jury bias against or for child witnesses so long as the prosecutor does not tie those lines of inquiry to the facts of the case. *Walden v. State*, 216 N.E.3d 1165, 1174 (Ind. Ct. App.), *trans. denied*, 222 N.E.3d 929 (Ind. 2023).

[37] In particular, Pearson challenges the State's line of questioning during voir dire that focused on how potential jurors would react to testifying about an event they witnessed or not being believed by someone whom they told about an event they witnessed. For instance, Pearson points to the following exchange as an example of the State's improper attempt to condition the jury and invoke sympathy for A.W., which occurred while the State was discussing reasonable doubt and testimonial evidence with potential jurors:

> [State]: . . . How would you feel just making the same statement, whatever it may be, in a courtroom under oath?
>
> [Juror 1]: Well, I think anytime you're speaking in front of a group, it's very nerve-racking and you would be very nervous about doing it and it would be even more nerve-racking if no one believed you but really if you know it's true, you know it's true.
>
> [State]: [Juror 2]?
>
> [Juror 2]: I would agree with that. There's pressure in the situation. It's different than speaking to a peer.
>
> * * *
>
> [State]: How about you, [Juror 3]?
>
> [Juror 3]: I think it depends on how long between the event and when I had to go to court. I would start to doubt my memory.
>
> [State]: Okay. So are you saying that as time goes on, you may not be able to remember things as clearly as you have before?

[Juror 3]: Absolutely.

[State]: Now what you do then testify to, would that make it any less truthful coming out of you? The events -- the parts of it that you did remember?

[Juror 3]: No.

[State]: [Juror 4], how about you?

[Juror 4]: I guess I would agree with that memories do not change but become less clear, but the total of what you remember is generally --

[State]: How would you feel about testifying to whatever the event you have pictured in your head right now[?] [H]ow would you feel testifying in court?

[Juror 4]: I guess it would be nerve-racking because it's not something I do every day but if it's true, it's true.

[State]: Imagine if it was something more personal, something like one of the most personal things to ever happen in your life; how would that make you feel, [Juror 5]?

[Juror 5]: I had to speak about it?

[State]: Yeah. If you had to speak about whatever the most personal thing you can possibly think of, how would that make you feel?

[Juror 5]: I guess it would be dependent on why I'm telling the story. Some stories are empowering, some stories are sad. So obviously, in this situation, it would be a very terrifying situation.

* * *

[State]: [Juror 6], how about you? . . .

[Juror 6]: Kind of feel the same way about it.

[State]: Same way? We've heard a couple different --

[Juror 6]: As her.

[State]: As [Juror 5]? The kind of nervous, little bit of fear going on there?

[Juror 6]: Yeah.

[State]: And, [Juror 7], how about you?

[Juror 7]: Be about the same, very emotional and very difficult -- what you were actually saying.

[State]: Now, take that event and imagine you were a teenager saying the same thing. How would you feel different?

[Juror 7]: If I was a teenager, I would feel embarrassed saying those things.

* * *

[State]: [Juror 8]?

[Juror 8]: Exposed, nervous, overwhelmed.

Tr. Vol. II at 47–50.

[38] Similarly, Pearson challenges the following line of questioning by the State during voir dire:

> [State]: . . . How would you feel -- and the hypothetic[al] that if you had to in front of a courtroom of people and tell a -- just recall a set of events, [Juror 9]?
>
> [Juror 9]: I wouldn't feel comfortable doing it. That would be about it.
>
> [State]: Feel a little nervous?
>
> [Juror 9]: Embarrassed.
>
> [State]: Embarrassed. Okay. And the more personal -- you would agree, the more personal it is, the more pressure you're having on you?
>
> [Juror 9]: Yes.
>
> [State]: And that would be harder for you to spit it out so to speak?
>
> [Juror 9]: Yes.

> [State]: How about you, [Juror 10], walking through that kind of --
>
> [Juror 10]: I think it would be traumatizing.
>
> [State]: Not something easy?
>
> [Juror 10]: Yeah.
>
> [State]: And how about you, [Juror 11]?
>
> [Juror 11]: Testifying or?
>
> [State]: Testifying, yeah. The whole thing where I went down testifying where -- it's one thing to testify about a traffic thing, something low level. But it's a whole []other the more personal detail it is.
>
> [Juror 11]: Yeah. It would be difficult.

Tr. Vol. II at 97–98.

[39] Reviewed in a vacuum, it may appear that the State focused too much on how jurors would feel testifying to events like the ones to which A.W. was about to testify. While voir dire is intended to determine whether a potential juror is biased for or prejudiced against certain evidence, not how the juror would feel as the evidence is presented, here, we cannot agree with Pearson that these exchanges, among others, were meant solely to "induce sympathy for A.W. in advance of her testimony and indoctrinate and condition the jury to perceive

A.W. as more credible by discounting any flaws in her testimony as a product of her difficult situation." Appellant's Br. at 27. Rather, reading the entirety of voir dire, the State's questions and comments to potential jurors were meant to determine the potential jurors' ability to assess witness credibility and if they had any bias for or against child witnesses. *See Walden*, 216 N.E.3d at 1174.

[40] Even if the State's line of questioning during voir dire could be considered improper conditioning or invocation of sympathy, any such misconduct was cured by the preliminary and final jury instructions informing the jury to "keep an open mind," Appellant's App. Vol. II at 116, and that its "verdict should be based on the law and the facts [and] should not be based on sympathy or bias," *id.* at 140. *See Weisheit v. State*, 109 N.E.3d 978, 989 (Ind. 2018) (concluding jury is presumed to follow trial court's instructions). We therefore conclude that the prosecutor's statements did not improperly condition the jury or invoke sympathy as a basis for a conviction.

b. Vouching

[41] Pearson also alleges the State improperly vouched for A.W.'s credibility. A prosecutor may not personally vouch for a witness. *Schlomer v. State*, 580 N.E.2d 950, 957 (Ind. 1991). However, a prosecutor may "comment on the credibility of the witnesses as long as the assertions are based on reasons which arise from the evidence." *Cooper*, 854 N.E.2d at 836 (quoting *Lopez v. State*, 527 N.E.2d 1119, 1127 (Ind. 1988)). That evidence includes witnesses' demeanor while testifying. *C.B. v. B.W.*, 985 N.E.2d 340, 348 (Ind. Ct. App. 2013); *Simpson v. State*, 165 Ind. App. 619, 622, 333 N.E.2d 303, 304 (1975).

Additionally, "[p]rosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." *Dumas v. State*, 803 N.E.2d 1113, 1118 (Ind. 2004) (citing *Brown v. State*, 746 N.E.2d 63, 68 (Ind. 2001)).

[42] Pearson specifically challenges two of the prosecutors' statements. First, during closing argument, the State said, "You heard [A.W.] testify on the stand. You saw it was difficult for her. This was not something she wanted to be here to do, but she did it. She came up with the courage to sit there and tell you what happened to her." Tr. Vol. III at 71–72. This comment did not assert independent knowledge of A.W.'s truthfulness; instead, this comment was a logical conclusion drawn from the evidence, namely, A.W.'s demeanor while testifying.

[43] Second, during rebuttal closing argument, in reference to the three incidents of alleged child molesting to which A.W. testified, the State said, "The State believes all three of these happened . . . ." *Id.* at 92. This comment also did not assert independent knowledge of A.W.'s truthfulness but was instead a comment concerning A.W.'s credibility. Importantly, this statement from the prosecutor came after Pearson attempted to impugn A.W.'s credibility during his closing argument by referencing the prior unsubstantiated allegation. Based on the foregoing, we conclude that the two challenged statements did not improperly vouch for A.W. and therefore do not constitute prosecutorial misconduct.

c. Failure to Testify

[44] Pearson argues that in rebuttal closing argument, the State impermissibly commented on Pearson's failure to testify at trial. The Fifth Amendment to the United States Constitution "prohibits compelling a defendant to testify against himself." *Jenkins v. State*, 725 N.E.2d 66, 69 (Ind. 2000) (citing U.S. Const. amend. 5). This right to remain silent extends to the States through the Fourteenth Amendment, *Withrow v. Williams*, 507 U.S. 680, 689 (1993), and prohibits the prosecution from commenting on a defendant's decision not to testify at trial. *Jenkins*, 725 N.E.2d at 69 (citing *Griffin v. California*, 380 U.S. 609, 615 (1965)). Thus, a defendant's Fifth Amendment right "against compulsory self-incrimination is violated when a prosecutor makes a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence." *Boatright v. State*, 759 N.E.2d 1038, 1043 (Ind. 2001) (quoting *Moore v. State*, 669 N.E.2d 733, 739 (Ind. 1996)). The defendant bears the burden of demonstrating that a comment improperly penalized the exercise of the right to remain silent. *Moore*, 669 N.E.2d at 739.

[45] Pearson claims the following statement by the prosecutor during closing argument violated his Fifth Amendment right against self-incrimination: "And really at the end of the day, we only have two people who can say exactly what happened that day, either by their statements or otherwise." Tr. Vol. III at 73. In support of his argument that this comment constitutes prosecutorial misconduct, Pearson points to our decisions in *Owens v. State*, 937 N.E.2d 880

(Ind. Ct. App. 2010), *trans. denied*, and *Davis v. State*, 685 N.E.2d 1095 (Ind. Ct. App. 1997).

[46] In *Owens*, the defendant was charged with child molesting, and the victim, C.R., testified at trial. 937 N.E.2d at 881–82. The prosecutor stated in closing that "[u]ltimately, you can rely on [C.R.'s] testimony. And in all honesty, in large part, if not exclusively, that's what you have to rely on. Because the reality is, other than Mr. Owens, she is the only one who knows what happened to her that night." *Id.* at 894 (citation and quotation marks omitted). Another panel of this court determined that the prosecutor's statement could have reasonably been interpreted as an invitation to draw an adverse inference from the defendant's failure to testify. *Id.* However, this improper comment did not constitute fundamental error because it was an isolated statement in a trial in which the victim testified and was vigorously cross-examined and recross-examined and the investigating detective and victim's mother both testified and were vigorously cross-examined. *Id.*

[47] In *Davis*, a law enforcement officer testified that the defendant admitted, "I took the car," when he was arrested for auto theft. 685 N.E.2d at 1097. At trial, the law enforcement officer, but not Davis, testified. During closing argument and rebuttal, the prosecutor made several statements regarding the lack of evidence contradicting the law enforcement officer's testimony. *Id.* "[T]he most troubling comment was the following: '[Davis] said he took the car. There is nothing to controvert that. There is no evidence saying that isn't so. There's not even an argument that he didn't say that.'" *Id.* at 1098. Because Davis was

the only person who could have denied he made this statement to the law enforcement officer, another panel of this court concluded this comment by the prosecutor improperly called attention to Davis's decision not to testify. *Id.* However, the prosecutor's comments did not amount to fundamental error because they "emphasized the lack of contradictory evidence and made no direct mention of the defendant's failure to testify" and thus did not place Davis in "grave peril" and because it was "improbable that the prosecutor's comments, taken in context, would have had a persuasive effect on the jury's decision." *Id.* at 1099.

[48] Like the victim in *Owens*, A.W. was vigorously cross-examined and recross-examined. However, the prosecutor's comment here is demonstrably different from the allegedly improper comments in *Owens* and *Davis*. Here, the State's comment that only A.W. and Pearson knew what happened was directly related to the evidence Pearson presented attempting to show that the first incident did not occur. That is, the State's comment was merely an argument explaining to the jury why it should not credit the testimony of A.W.'s three half-siblings. We conclude this was a proper comment on the credibility of witnesses and did not constitute prosecutorial misconduct.

d. Facts Not in Evidence

[49] Pearson contends that the State argued facts not in evidence.[4] At trial, the State "may argue both law and facts" as well as "offer conclusions based upon his analysis of the evidence," but the State must "confine closing argument to comments based upon the evidence presented in the record." *Fouts v. State*, 207 N.E.3d 1257, 1267 (Ind. Ct. App.) (citing *Lambert v. State*, 743 N.E.2d 719, 734 (Ind. 2001)), *opinion adhered to as modified on reh'g*, 210 N.E.3d 902 (Ind. Ct. App. 2023), *and trans. denied*, 215 N.E.3d 341 (Ind. 2023). As noted above, counsels' arguments are not evidence. *Gibson*, 133 N.E.3d at 694 (quoting *Piatek*, 999 N.E.2d at 69).

[50] In particular, Pearson argues the following statement by the prosecutor during rebuttal closing argument is improper:

> Another thing is just -- I want you to remember back to the video recorded statement, a 33-year[-]old responding, "I never heard of a 33-year[-]old molesting a kid before." Really? "I've never heard of a 33-year[-]old molesting a kid before." I want that to sit in for a second. Use your common sense. Does that even make sense? Can you turn on a TV today without watching something about a child molesting somewhere? Or a celebrity trial that's going on; R. Kelly, for example. There are a whole bunch of them out there. You can't tell me five years ago that that stuff wasn't on TV all the time. I think we've seen it. We've seen Michael Jackson. We've seen a ton of them. So this is not

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[4] In its brief, the State describes the authority Pearson cites in support of this argument as "weak sauce." Appellee's Br. at 22. This characterization is unappreciated and unprofessional. *See* Ind. Professional Conduct Rules Preamble, ¶¶ 1, 7.

> the first time. This is not unheard of. We've seen huge scandals involving child molesting. So to say you've never heard of a 33-year-old touching a child? That's a little absurd.

Tr. Vol. III at 90.

[51] There is no dispute that neither the State nor Pearson presented evidence at trial regarding media coverage of child molesting cases, including the accusations against and trials of R. Kelly and Michael Jackson. Nevertheless, the State argues that the purpose of this comment was "to discuss Pearson's credibility" in light of his pretrial statement to Crafton "that he was unaware of claims that adults improperly touch children." Appellee's Br. at 21–22 (citing Tr. Vol. III at 90–91; Ex. 3). The State did not introduce evidence to impeach Pearson's statements to Crafton. *See Gibson*, 133 N.E.3d at 694 (quoting *Piatek*, 999 N.E.2d at 69). Instead, the State merely commented on the credibility of Pearson's video-recorded statements. *See Fouts*, 207 N.E.3d at 1267 (citing *Lambert*, 743 N.E.2d at 734).

[52] Furthermore, the main thrust of the challenged statement was a request for the jurors to draw on their common sense and lived experience in evaluating Pearson's recorded statement, which is exactly what the trial court instructed the jurors to do. Appellant's App. Vol. II at 139. The trial court also instructed the jury that "[s]tatements made by the attorneys are not evidence." Appellant's App. Vol. II at 142. Any alleged misconduct here was cured by the preliminary and final instructions concerning how the jury was to weigh the evidence and that counsels' arguments were not evidence. *See Craig v. State*, 267

Ind. 359, 367, 370 N.E.2d 880, 884 (1977) (holding the defendant was not subjected to grave peril by the prosecutor's remarks about witness credibility where the jury was "given several instructions to the effect that they were the judges of credibility of witnesses").

e. Cumulative Error Analysis

[53] Even assuming prosecutorial misconduct in this case, Pearson has not demonstrated that the harm or potential harm done by the State's comments was substantial. It strains credulity to believe that the jury found Pearson guilty of child molesting for any reason other than the evidence introduced at trial. Any harm done by the prosecutor's comments was *de minimis* and did not result in denying Pearson fundamental due process.

Conclusion

[54] In sum, failure to give an unanimity instruction was not fundamental error, and the prosecutor's statements that Pearson challenges on appeal do not cumulatively constitute fundamental error. We therefore affirm Pearson's conviction.

[55] Affirmed.

Bailey, J., and May, J., concur.

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