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IN THE
COURT OF APPEALS OF INDIANA

JUSTIN MOWRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 68A01-0703-CR-132
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RANDOLPH CIRCUIT COURT
The Honorable Jay L. Toney, Judge
Cause No. 68C01-0602-FB-12

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Justin Mowry appeals his conviction of Child Molesting[1] and Criminal Deviate Conduct,[2] both as class B felonies. Mowry presents the following restated issues for review:

1. Did the prosecutor's comments during closing argument constitute fundamental error necessitating reversal?

2. Did the trial court err in imposing consecutive sentences?

We affirm.

The facts favorable to the conviction are that in the summer of 2004, Mowry, who was sixteen years old at the time, worked as a counselor's helper at Camp Yale in rural Randolph County. Seven-year-old J.M. attended the camp that summer from June 28 through July 2. One morning, J.M. and Mowry went off by themselves to catch toads. They arrived at a spot where they could hear other people but could not see anyone. When they were thus alone, Mowry told J.M. to pull down his pants and J.M. complied. Thereafter, Mowry placed his mouth on J.M.'s exposed penis. Mowry then directed J.M. to lie down on a log that was lying on the ground. When J.M. complied, Mowry climbed on top of him and placed his erect penis in J.M.'s anus. J.M. screamed in pain and asked Mowry to stop, but Mowry refused and placed his hand over J.M.'s mouth. After several

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[1] Ind. Code Ann. § 35-42-4-2 (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007).

[2] I.C. § 35-42-4-3 (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007).

minutes, Mowry told J.M. to pull up his pants and warned him not to tell anyone what had happened. J.M. did not tell anyone what had happened until January 2006, at which time J.M. told his stepfather and pastor. J.M.'s claim was reported to the Randolph County Sheriff's Office (the Sheriff's Office).

On February 8, 2006, J.M. was interviewed by someone at the Sheriff's Office. Based upon that interview, Deputy Doug Fritz of the Sheriff's Office interviewed Mowry on February 14, 2006. Mowry, eighteen years old at the time, waived his *Miranda* rights and confessed that he had placed his mouth on J.M.'s penis and performed anal sex upon J.M. On February 16, 2006, Mowry was charged by information with one count of criminal deviate conduct and two counts of child molesting. One of the child molesting charges was dismissed before trial. A jury trial was conducted from November 20 – 22, 2006, after which the jury returned guilty verdicts on both counts.

At a February 22, 2007 sentencing hearing, the trial court found as mitigating circumstances that Mowry is mildly mentally handicapped and that he was sixteen years old at the time of the incident. Based upon those mitigators, the court imposed nine-year sentences for each conviction, which was one year less than the presumptive sentence for a class B felony.[3] The court then considered whether to impose the sentences

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[3] After the date Mowry committed theses offenses, the Legislature amended Indiana's sentencing statutes to provide for "advisory sentences" rather than "presumptive sentences." *See* Pub.L. No. 71-2005, § 5 (codified at Ind. Code Ann. § 35-50-2-1.3 (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007). Under the new scheme, a trial court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Pub.L. No. 71-2005, § 3 (codified at

consecutively or concurrently. On that question, the court found that Mowry occupied a position of trust with respect to the victim and that Mowry did not appear to feel remorse. The court found that the aggravators outweighed the mitigators and therefore imposed consecutive sentences. Further facts will be provided where necessary.

1.

Mowry contends certain remarks made by the prosecutor during closing argument constitute fundamental error and require reversal. Specifically, Mowry contends the prosecutor committed misconduct during closing argument by recounting two anecdotes drawn from his own personal experience. We will set out the substance of those anecdotes below.

Mowry frames this argument in terms of fundamental error because he failed to properly preserve the issue below by interposing a timely objection. *See Hornbostel v. State*, 757 N.E.2d 170 (Ind. Ct. App. 2001) (the failure to object at trial results in waiver of the issue on appeal unless appellant can establish fundamental error), *trans. denied*. The fundamental-error exception to the waiver rule is narrow. *Caron v. State*, 824 N.E.2d 745 (Ind. Ct. App. 2005), *trans. denied*. To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant that a fair trial is rendered

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Ind.Code Ann. § 35-38-1-7.1(d) (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007). The new scheme does not apply, however, to cases in which the offense was committed before the effective date of the amended statute, i.e., April 25, 2005. *Creekmore v. State*, 853 N.E.2d 523 (Ind. Ct. App. 2006), *clarified on reh'g*, 858 N.E.2d 230; *but see White v. State*, 849 N.E.2d 735 (Ind. Ct. App. 2006), *trans. denied*.

impossible. *Id*. We may reverse on this basis only when there has been a blatant violation of basic principles that denies a defendant fundamental due process. *Id*. To prevail on a claim of fundamental error, the defendant must prove a violation occurred that rendered the trial unfair. *Id*. "In determining whether an alleged error rendered a trial unfair, we must consider whether the resulting harm or potential for harm is substantial. We look to the totality of the circumstances and decide whether the error had a substantial influence upon the outcome." *Id*. at 751 (internal citation omitted). For prosecutorial misconduct to amount to fundamental error, the prosecutor's conduct must have "'subjected the defendant to grave peril and had a probable persuasive effect on the jury's decision.'" *Charlton v. State*, 702 N.E.2d 1045, 1051 (Ind. 1998) (quoting *Carter v. State*, 686 N.E.2d 1254, 1262 (Ind.1997)).

Mowry's claim of prosecutorial misconduct involves two separate, allegedly improper comments during closing argument. The first claim involves the following comments:

> Folks, I am going to share with you a story I don't think that I have shared with anybody before. It is something that happened to me when I was twelve or thirteen years old. I was in a Boy Scout Troop and … [w]e took a trip up to Michigan and camped at [a state forest]. … On that trip, and this part I don't think that I have ever shared with anybody, there was a boy who was about three years old [sic] than me and took another kid who was in the same age as me and made that little boy suck his penis. No body [sic], I won't mention names, I don't think, I know that both people this day [sic], they both are grown, whatever happened was dealt with beyond them. But I can't imagine what effect that would have on that little boy. The thing is that no body [sic] knew about it until we got back. I think it was because the little boy was afraid to tell the adults but who confided in another boy who reported it.

Transcript of Evidence at 304-05. The foregoing comments were made in response to remarks made by defense counsel during his closing arguments in which he argued that J.M.'s claim of molestation was not credible in part because none of the other campers noticed anything amiss when J.M. and Mowry returned to the group after the molestations. Defense counsel's comments were as follows:

> The problem here is that you take away [Mowry's] confession, they are alleging that the victim and the Defendant walked between a hundred yards or one hundred fifty yards away, from all the rest of the campers and all the adults and all the helpers, they walked a hundred to one hundred fifty yards away, walked up a hill, they were up there long enough to engage in oral and anal sex and then they returned and no one noticed that anything happened. They returned, the testimony from the alleged victim, is that he was crying, that he had been hurt, he was still crying when he got back to the pond, but [no] one saw it happen. You heard the four people say that they didn't see anything happen. It is hard to believe that the little boy could have (inaudible) this traumatic and been able to return to the group and keep his composure without anyone noticing.

Id. at 303-04.

"Prosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." *Cooper v. State*, 854 N.E.2d 831, 836 (Ind. 2006). The prosecutor's comments in this instance were clearly intended to respond to defense counsel's claim that J.M.'s accusation of molestation did not ring true because the victim did not assert it immediately after the molestation occurred. In view of defense counsel's comments, the prosecutor was entitled to respond as he did. *See id.*

The second comment about which Mowry complains involved the prosecutor recounting his personal experience concerning an attorney discipline matter with him – the prosecutor – as the subject. In a nutshell, when he was notified by a member of the disciplinary committee that comments he made to a newspaper reporter about a case might have constituted misconduct, he responded with a letter in which he essentially admitted the actions upon which the inquiry was based. He then related that an attorney whom he later contacted about the disciplinary case informed him he should have consulted with an attorney before responding by admitting the actions. The prosecutor then explained to the jury the point of his story, which was a response to defense counsel's claim that Mowry's confession was not credible. Defense counsel stated:

> Because basically you have admitted and you are doing everything that they said that you did. Well folks I am sorry that is my nature. I confessed, if I screw up, I can confess. Well a lot of people are like that. Why do we confess to things? Because we did it and may be [sic] we feel bad about what we have done and that is exactly what is going on here when those officers talked to Justin Mowry. They didn't get a false confession. They didn't trick him. He knew what he did was wrong. Confessions go for the sole [sic] they say sometimes.

Transcript of Evidence at 311.

Even assuming for the sake of argument that the prosecutor's comments were improper, we fail to see how Mowry was prejudiced thereby. The prosecutor was merely illustrating his contention that a person might be driven by conscience to confess misconduct. Surely that is not a novel concept of which the jury otherwise would have been unaware.

Moreover, we note that the trial court instructed the jury before trial and before the jury retired to deliberate that counsel's comments did not constitute evidence. Even assuming for the sake of argument the comments in question amounted to misconduct, after being so instructed, we presume the comments did not have a probable persuasive effect on the jury. *See Gamble v. State*, 831 N.E.2d 178 (Ind. Ct. App. 2005), *trans. denied*. Mowry has failed to establish fundamental error and the issue is waived.

2.

Mowry contends the trial court erred in imposing consecutive sentences. He advances this claim upon two rationales. First, he claims the trial court erred in failing to find undue hardship as a mitigating circumstance. Second, he claims our Supreme Court erred in concluding that *Blakely v. Washington*, 542 U.S. 296 (2004) does not implicate consecutive sentences.

With respect to the first argument, Mowry contends the trial court erred in failing to find as a mitigating circumstance that incarceration would pose an undue hardship on him. According to Mowry, "[h]is low IQ, his functioning at the level of an eight or nine year old and his jail victimization make him more susceptible to being sexually assaulted in prison." *Appellant's Brief* at 18. Mowry also claimed he could not readily attain necessary services in a penal institution.

The finding of mitigating circumstances is not mandatory and rests within the trial court's sound discretion. *Creekmore v. State*, 853 N.E.2d 523.

> A trial court need not regard or weigh a possible mitigating circumstance the same as urged by the defendant. When a defendant alleges that the trial court failed to identify or find a mitigating circumstance, the defendant must establish that the mitigating evidence is both significant and clearly supported by the record. The trial court is not required to make an affirmative finding expressly negating each potentially mitigating circumstance.

Corbett v. State, 764 N.E.2d 622, 630-31 (Ind. 2002) (citations omitted).

In this case, the trial court did not overlook Mowry's claim of undue hardship. On that subject, the court stated:

> The Court has considered all of the possible mitigating circumstances, but I would specifically mention two that were advanced in the Defendant's Sentencing Memorandum. Specifically, that imprisonment would result in undue hardship to the Defendant. I do not believe that imprisonment would result in undue hardship, it may be a hardship for the Defendant, but, uh, based upon the nature of these crimes, I do not believe there is any undue hardship that would be caused.

Transcript of Sentencing Hearing at 37. As the trial court indicated, imprisonment always poses a hardship on the person being imprisoned. *See Rose v. State*, 810 N.E.2d 361 (Ind. Ct. App. 2004). Mowry's claim that imprisonment would be an undue hardship on him is based upon his relative youth and his somewhat limited mental capacity. We note that the trial court took those two mitigating factors into account in imposing reduced sentences for each of Mowry's convictions. Thus, the court did extend mitigating weight to the factors from which Mowry's claim of undue hardship derives. Therefore, the trial court did not abuse its discretion in declining to find undue hardship as a separate mitigating factor.

Mowry also contends the trial court erred in imposing consecutive sentences upon the following rationale:

> The Indiana Supreme Court has erroneously interpreted [*Blakely v. Washington*, 542 U.S. 296 (2004)] as not applying to consecutive sentences. *Blakely* applies because the relevant statutory maximum is the sentence a judge my impose without any additional findings. See also *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 491 (2006) cert. denied, 127 S.Ct. 442 (2006), where the Ohio Supreme Court followed the minority position in holding *Blakely* applied to the imposition of consecutive sentences.

Appellant's Brief at 20. Mowry acknowledges this argument is contrary to established Indiana Supreme Court precedent, specifically with respect to that court's interpretation of *Blakely*. *See Smylie v. State*, 823 N.E.2d 679 (Ind. 2005) (the imposition of consecutive sentences does not implicate *Blakely*), *cert. denied*, 546 U.S. 976. Mowry asks us to reject the Supreme Court's decision and hold that consecutive sentences must comport with *Blakely*.

We remind Mowry that we are not free to disregard the decisions of our Supreme Court. *See Dragon v. State*, 774 N.E.2d 103 (Ind. Ct. App. 2002), *trans. denied*. Its decisions are binding upon us until they are changed either by the Supreme Court or by legislative enactment. *Id*. Although we are authorized under Ind. Appellate Rule 65(A) to criticize existing law, we may not "reconsider" Supreme Court decisions. In this case, our Supreme Court has held that consecutive sentences do not implicate *Blakely*, and that is the law we are obligated to apply here. Mowry is not entitled to reversal on this issue.

Judgment affirmed.

BAKER, C.J., concurs.

CRONE, J., concurs in result with no opinion.