31A01-1703-PC-547

IN THE

COURT OF APPEALS OF INDIANA

CAUSE NO. 31A01-0902-CR-00088

LAWRENCE E. NUNLEY,

Appellant (Defendant below),

v.

STATE OF INDIANA,

Appellee (Plaintiff below).

Appeal from Superior Court of Harrison County

Cause No. 31D01-0805-FA-389

Hon. Roger D. Davis, Judge

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE ISSUES

I. Whether the trial court properly excluded or admitted evidence, specifically:

(a) Did the court properly exclude extrinsic evidence proffered to impeach a witness?

(b) Did the court properly admit evidence under Indiana's Protected Person Statute?

II. Whether Defendant preserved his claim that the State's closing argument constituted prosecutorial misconduct.

III. Whether the trial court abused its discretion by denying Defendant's motion for mistrial.

STATEMENT OF THE CASE

Nature of the Case

Lawrence Edward "Eddie" Nunley ("Defendant") appeals from his multiple convictions for child molestation,[1] and dissemination of matter harmful to minors,[2] a class D felony (App. 622).

Course of the Proceedings

On May 19, 2008, the State charged Defendant with Count I: child molesting, a class A felony; Count II: child molesting, a class A felony; Count III: child molesting, a class A felony; Count IV: child molesting, a class C felony; and Count V: dissemination of matter harmful to minors, a class D felony (App. 9-13). On October 8, 2008, the State filed a notice of intent to introduce 404(b) evidence at trial (App. 42-43). On November 5th and 6th, 2008, the State filed a notice to introduce the victim's statements under Indiana's Protected Person Statute[3] ("PPS") (App. 49–52). At a hearing on November 14, 2008, the trial court ruled that the evidence pursuant to the PPS was admissible (Tr. 175, 66). The court began jury selection for trial on November 18, 2008 (App. 4, 65). On November 19, 2008, the court denied the State's motion to introduce 404(b) evidence (App. 5, 65). On November 21, 2008, a jury found Defendant guilty on all counts (App. 71-75).

On January 15, 2008, the trial court sentenced Defendant to thirty-five years each on Counts I–III, four years and eight months on Count V, and twenty-one months on Count V (App. 83). The court ordered Counts I, II, IV, and V to be served consecutively and Count III to be

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[1] Ind. Code § 35-42-4-3.

[2] I.C. § 35-49-3-3.

[3] I.C. § 35-37-4-6.

served concurrently with Counts I and II (App. 83). On February 16, 2009, Defendant filed his Notice of Appeal (Docket). On March 6, 2009, the clerk filed the Notice of Completion of Clerk's Record (Docket). The clerk filed the Notice of Completion of Transcript on May 26, 2009 (Docket). Defendant's Brief of Appellant was deemed timely filed on June 25, 2009 (Docket).

STATEMENT OF THE FACTS

On April 13, 2007, six year old A.Y. asked her mother Tonya Caves if she could spend the night at Defendant's house with "Kiki," who was Defendant's son's girlfriend (Tr. 532–35). Kiki occasionally watched A.Y. for Tonya (Tr. 534). A.Y., who was still in kindergarten at the time, enjoyed visiting Kiki and "loved her to death" (Tr. 534). A.Y. would often play video games with Kiki (Tr. 426). When Tonya arrived at Defendant's house, Kiki was not there but Defendant said that she would be there shortly (Tr. 535). After Tonya left, Defendant took A.Y. into his bedroom and played a movie on a portable DVD player (Tr. 431; State's Exh. 1). Kiki and Defendant's son K.N. were not at home (Tr. 457). On the movie, "boys and girls were doing bad stuff to each other" (Tr. 431; State's Exh. 2). A.Y. used the word "pee-pee" to refer to the vagina and "weenie-bob" to refer to the penis (Tr. 424–25). While watching the five-hour pornographic movie, Defendant "made [A.Y.] suck on his weenie-bob" (Tr. 450). Defendant threatened to hurt A.Y.'s mom and dad if she did not comply (Tr. 500). Defendant also "licked [A.Y.'s] pee-pee" and touched her pee-pee with his weenie-bob and hand (Tr. 449, 613; State's Exh. 9 (Hrg. Exh. 2); Suppl. Tr. 1–36). A.Y. described Defendant's weenie-bob as peach, "squishy," and ten "inches" long (Tr. 488–89, 688; *see* Joint Exh. 3).

The next day, Tonya and her husband Richard[4] drove to Defendant's trailer to pick up A.Y. from the sleepover (Tr. 507). When A.Y. came out of the trailer, Richard could tell that she was scared and looked like she was going to be in trouble (Tr. 516–17). After driving a few minutes, A.Y. told Tonya and Richard that "me and Ed has a secret" (Tr. 508). A.Y. was too scared to tell her parents the secret, but she wrote it on an envelope after asking Richard how to spell "weenie-bob" (Tr. 478–80, 508, 538). Tonya continued driving for a few minutes, then turned around and drove back to Defendant's trailer (Tr. 539). Tonya confronted Defendant in the driveway, smashing his motorcycle and truck with a baseball bat while accusing him of molesting her daughter (Tr. 540–42).

Tonya and Richard drove A.Y. to the "police officer place" in Salem where they spoke to Indiana State Trooper Kevin Bowling (Tr. 484, 512). Tonya gave Trooper Bowling the note (Tr. 546). Initially, Tonya did not want to follow-up with the report because she did not want to put A.Y. through any additional trauma (Tr. 549). Later, Tonya decided she wanted to pursue the matter with the help of another police officer (Tr. 550). On April 18, 2008, Donna Black, a forensic interviewer with the Comfort House, interviewed A.Y. (Tr. 586, 590; State's Exh. 9 (Hrg. Exh. 2); Suppl. Tr. 1–36). Before trial, the State sought to admit evidence of other acts involving a second victim under Rule 404(b) and sought to admit A.Y.'s statements under Indiana's PPS (App. 42–43, 49-52). The court admitted the latter, but excluded the former (Tr. 175; App. 4–5, 65–66). The jury found Defendant guilty as charged (Tr. 841–42; App. 71-75). Additional facts from the record will be incorporated as necessary and cited accordingly.

[4] Richard is A.Y.'s step-father (Tr. 506).

SUMMARY OF ARGUMENT

I. The court properly excluded extrinsic evidence proffered to impeach the victim. Rule 608(b) states that specific instances of conduct may neither be inquired into nor proven by extrinsic evidence. Though a defendant has a right to present a defense, it is not absolute and must follow established rules of evidence. The victim's prior false statement to police about an unrelated matter (that did not involve a sexual assault) is exactly the type of evidence the rule was designed to preclude. Therefore, the court acted within its discretion to exclude Defendant's evidence. Moreover, Defendant squarely placed credibility at issue by effective cross-examination, direct examination, and closing argument.

The court also properly admitted evidence under Indiana's Protected Person Statute. Prior to trial, the court conducted a hearing on the evidence the State sought to admit. The court concluded that the statements were reliable. The victim in this case testified at trial and was available for cross-examination, which was extensive. Moreover, any admission of cumulative evidence was harmless.

II. The prosecutor's closing argument did not rise to the level of misconduct. The prosecutor's statement was a fair comment on the evidence. Even so, the court instructed the jury regarding the credibility of the witnesses with no objection from defense counsel. Therefore, the error has not been properly preserved, assuming the statement was misconduct. Nor was there fundamental error. Defendant was not subjected to grave peril in light of the court's detailed instruction on the credibility of witnesses.

III. The trial court properly denied Defendant's motion for mistrial. Mistrial is an extreme remedy. When asked a question by the jury, the witness referred to "other allegations" – which was contrary to the court's instructions to the witness. However, as the court reasoned,

the "other allegations" were vague, did not implicate child molestation or other victims. The court admonished the jury to disregard the witness's answer. The admonishment cured any error with the witness's statement and Defendant failed to request a mistrial after the admonishment, which he should have done if he thought the admonishment did not cure the error.

ARGUMENT

I. THE COURT PROPERLY EXCLUDED EXTRINSIC CHARACTER EVIDENCE AND PROPERLY ADMITTED HEARSAY UNDER THE PROTECTED PERSONS STATUTE.

"A trial court has broad discretion in ruling on the admissibility of evidence." *Gado v. State*, 882 N.E.2d 827, 831 (Ind. Ct. App. 2008), *trans. denied* (quoting *Bentley v. State*, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006)) (internal quotations omitted). This Court reviews a trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *Pitts v. State*, 904 N.E.2d 313, 318 (Ind. Ct. App. 2009), *trans. denied*; *but see U.S. v. Holt*, 486 F.3d 997, 1000–01 (7th Cir. 2007) (applying a *de novo* standard to Federal Rule 608(b) when the Sixth Amendment right to confrontation is directly implicated); *Saunders v. State*, 848 N.E.2d 1117, 1222 n.4 (Ind. Ct. App. 2006) (discussing and rejecting *de novo* standard of review). "Absent a requisite showing of abuse, the trial court's decision will not be disturbed." *Goodner v. State*, 685 N.E.2d 1058, 1060 (Ind. 1997). "An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court." *Fry v. State*, 885 N.E.2d 742, 746 (Ind. Ct. App. 2008), *trans. denied*. The reviewing court will not reweigh the evidence and will consider conflicting evidence in favor of the trial court's ruling. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005).

A. Exclusion of extrinsic evidence to impeach a witness was proper.

The trial court properly excluded extrinsic evidence. Although a defendant has a right to present a defense, that right is not absolute. *See Roach v. State*, 695 N.E.2d 934, 939 (Ind.

1998). In exercising this right, a defendant, just as the State, must comply with established rules of procedure and evidence that are designed to assure both fairness and reliability. *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)). Defendant's argument is identical to one this Court rejected in *Saunders*.[5] The witness in *Saunders* used a false Social Security number and was fired from her job, which prevented her from obtaining other employment. *Saunders*, 848 N.E.2d at 1122. The *Saunders* panel held that Rule 608(b) precluded such extrinsic evidence and did not prevent Saunders from presenting a defense. *Id.* Rule 608(b) provides in relevant part:

> For the purpose of attacking or supporting the witness's credibility, other than conviction of a crime as provided in Rule 609, specific instances may not be inquired into or proven by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

"Rule 608(b) specifically states that specific instances of conduct may neither be inquired into nor proven by extrinsic evidence." *Beaty v. State*, 856 N.E.2d 1264, 1269 (Ind. Ct. App. 2006), *trans. denied*. Similar to *Beaty*, "the limited exception mentioned in the last sentence of Rule 608(b) is inapplicable here because [A.Y.] did not testify regarding the truthfulness of another witness." *Id.*

The court excluded evidence that A.Y. had previously lied to the police about an unrelated physical attack by another man, Eddie Foreman, on her mother (Tr. 377; App. 202–03). A.Y. had told the police that Foreman hit her, which was not true–Foreman had only

[5] Defendant's argument is also strikingly similar to one this Court rejected in *Wells v. State*, 904 N.E.2d 265 (Ind. Ct. App. 2009) (concluding that Rule 404(b) applies equally to defendants as well as witnesses and rejecting defendant's claim he was denied his Sixth Amendment right to present a defense).

attacked Tonya (App. 202–03). The State argued, and the court agreed, that Rule 608(b) prohibited extrinsic evidence to attack the credibility of a witness (Tr. 378, 384). There was nothing arbitrary or irrational about the court's application of this straightforward rule in Defendant's case. The court's fair and even-handed application of this evidentiary rule did not prevent Defendant from being able to present a defense. During her opening, counsel stated that she was not sure what A.Y. was going to say on the witness stand (Tr. 412–13). Defendant was able to question A.Y.'s credibility on cross-examination by eliciting inconsistencies in her statements. Defendant's counsel focused on credibility during the closing argument and pointed out inconsistencies with other evidence and with A.Y.'s own statements (Tr. 801–02, 804–06). Just as in *Saunders* and *Wells*, where the exclusion of the witness's testimony was pursuant to a well-established rule of evidence, Defendant was not denied his right to present a defense and place credibility squarely before the jury. Therefore, the court did not abuse its discretion in applying Rule 608(b) to exclude extrinsic evidence to attack A.Y.'s credibility.

Defendant seemingly equates A.Y.'s false accusation that another man hit her to a prior false accusation of a sexual assault, which is admissible. *See, e.g., Fugett v. State*, 812 N.E.2d 846, 848–49 (Ind. Ct. App. 2004) (discussing common law exception to rape shield law when alleged victim made prior false accusation of rape). However, the exception is limited only to prior false allegations of rape. *Saunders*, 848 N.E.2d at 1122 (citing *State v. Walton*, 715 N.E.2d 824, 827 (Ind. 1999)). Moreover, Defendant's claim that the State opened the door to A.Y.'s credibility during closing argument is without merit. Br. of Appellant at 12–13. Referring to A.Y. in closing argument, the deputy prosecutor stated: "She's six years old. I submit she hasn't even been taught how to lie" (Tr. 797). The prosecutor's statement did not open the door and was merely a comment on the evidence as it was presented.

Defendant also seems to imply that Rule 608(b)'s prohibition against using extrinsic evidence to attack the credibility of witnesses should not apply to children. *See* Br. of Appellant at 13. Rule 608(b) applies to witnesses period. A.Y. was a competent witness. The plain text of the Rule does not carve out any exceptions for children. Counsel adequately and competently attacked A.Y.'s credibility the same as any other witness, e.g., *Saunders*, by thorough cross-examination, presentation of direct evidence, and closing argument. The jury chose to believe A.Y., not Defendant. If Rule 608(b) permitted such evidence, it would serve no purpose as the exception would swallow the rule itself and the *Saunders* panel would have reached the opposite conclusion.

B. A.Y.'s statements were admissible pursuant to Indiana's PPS.

A.Y.'s statements to others, including a videotaped interview, were admissible. Indiana's PPS statute provides in relevant part that:

> (d) A statement or videotape that:
>
> (1) is made by a person who at the time of trial is a protected person;
> (2) concerns an act that is a material element of [child molesting] that was allegedly committed against the person; and
> (3) is not otherwise admissible in evidence;
>
> is admissible in evidence in a criminal action for [child molesting] if the requirements of subsection (e) are met.
>
> (e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action [for child molesting] if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:
>
> (1) The court finds, in a hearing:
> (A) conducted outside the presence of the jury; and
> (B) attended by the protected person;
>
> that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:
(A) testifies at the trial; or

I.C. § 35-37-4-6(d) & (e). A.Y., who was six at the time of the offense, testified at trial and was a protected person by definition. I.C. § 35-37-4-6(c). The court conducted an extensive hearing to determine whether the evidence was admissible (Tr. 6–188).

Defendant's claim that the "trial court's conclusion is not supported by the evidence" is wholly without merit. The court properly considered several factors when it found A.Y.'s statements admissible. Such factors include:

> (1) the time and circumstances of the statement, (2) whether there was significant opportunity for coaching, (3) the nature of the questioning, (4) whether there was a motive to fabricate, (5) use of age appropriate terminology, and (6) spontaneity and repetition.

Surber v. State, 884 N.E.2d 856, 862 (Ind. Ct. App. 2008), *trans. denied.* The court found that there was no evidence of any motive for A.Y. to fabricate her story (Tr. 176). A.Y. used age-appropriate terms "weenie-bob" and "pee-pee" (Tr. 18, 19, 176). A.Y. spontaneously told Tonya and Richard about the "secret" within minutes of riding in the car (Tr. 36–37, 176). There was no evidence of coaching by Tonya or Richard (Tr. 107, 176). Richard helped A.Y. spell the word "weenie-bob" but did not help her spell anything else or suggest she write anything (Tr. 38, 106). After reviewing the recording of the interview at Comfort House, the court found no evidence of coaching by Donna Black (Tr. 176; Hrg. Exh. 2).

Moreover, A.Y.'s statements are consistent from beginning to end. A.Y.'s statement from the day of the molestation was very simple: While watching a movie where "boys and girls were doing bad stuff" to each other, Defendant "licked [A.Y.'s] pee-pee" and made her "suck on his weenie-bob." This was the story A.Y. told Trooper Bowling. A.Y. did not initially tell her mother about the pornographic movie. A.Y.'s story over a year later to Donna Black was the

same. There were no allegations about other incidents of molestation or detailed elaborations about the incident in question. The record simply belies Defendant's bald assertion that the court's conclusion was unsupported by the evidence. Each of the *Surber* factors, more than adequately supported by the record, weighs in favor of the court's ruling finding the statements reliable.

Much of Defendant's argument in this regard attempts to focus the court on various red herrings, e.g., Tonya's decision to "destroy [Defendant's] property and create a potentially dangerous situation with their daughter in the car." Br. of Appellant at 21. A.Y. should not be punished because her mother smashed Defendant's property while accusing him of molesting her daughter. Nor should Defendant go "scot-free" because Tonya was reluctant to pursue the matter or because Tonya allegedly had a motive to fabricate. Tonya said she did not want to put A.Y. through additional trauma (Tr. 549). A.Y., as a child, had no choice in the matter. Also, Trooper Bowling testified he read the note, but that it no longer existed for some reason–again, irrelevant to whether A.Y.'s statements were admissible pursuant to the PPS. This Court should decline to pursue Defendant's red herrings.

Defendant also takes issue on appeal with the trial process and the examination of A.Y., claiming he was denied his right to confront his accusers. *See* Br. of Appellant at 29–30. This issue is waived because Defendant failed to object to taking breaks, the questioning, or A.Y.'s need to first write down what Defendant did to her and read it back to the court. A.Y. was clearly upset and was crying at several points during her direct examination (Tr. 432, 437). At first, A.Y. was unable to verbalize the atrocious acts Defendant did to her because it was "too scary" (Tr. 438). After taking a lunch break, where the judge instructed the deputy prosecutor to accompany A.Y. and her parents to avoid any coaching by anyone, A.Y. was able to write down

what happened and read it back to the jury (Tr. 446, 449). A.Y. was so scared she had to wear sunglasses to speak in court (Tr. 450, 456). Defense counsel extensively cross-examined A.Y. (Tr. 458–500). In fact, the cross-examination record is longer than the direct examination record (Tr. 417–458, 458–500). Defendant's reliance on *Howard v. State*, 853 N.E.2d 461, 467–68 (Ind. 2006) in this regard is misplaced because, unlike *Howard* where the witness was not unavailable at trial, A.Y. testified at trial and was subject to cross-examination at trial and during her deposition (Tr. 458; App. 194–243).

C. Admission of cumulative evidence was harmless.

Any error with the admission of the evidence was harmless. "Generally, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party." *Pitts*, 904 N.E.2d at 318; *see also Ashworth v. State*, 901 N.E.2d 567, 573 (Ind. Ct. App. 2009), *trans. denied* (citing Indiana Appellate Rule 66(A)). The erroneous admission of evidence is harmless if it is cumulative of other evidence. *Smith v. State*, 891 N.E.2d 163, 172 (Ind. Ct. App. 2008), *trans. denied* (quoting *Purvis v. State*, 829 N.E.2d 572, 585 (Ind. Ct. App. 2005), *trans. denied*)) (internal quotations omitted).

There was no drum beat repetition of evidence here overcoming the harmless error standard. In *Stone v. State*, 536 N.E.2d 534, 541 (Ind. Ct. App. 1989), *trans. denied*, a panel of this Court reversed a child molesting conviction where four adult witnesses testified to a child's statements, including where one adult testified before the child. *Id.* at 537. The child's story was repeated seven times. *Id.* The *Surber* panel addressed the same issue where three adult witnesses testified after the child, distinguishing *Stone*. *Surber*, 884 N.E.2d at 863–64. Our case is more like *Surber* than *Stone*. Richard, Tonya, Donna, and Trooper Bowling all testified briefly on direct exam regarding A.Y.'s statements (Tr. 508, 538, 592–609, 625–27). Much of

the testimony focused on their actions or background facts, not A.Y.'s accusations. A.Y. testified first and was subject to intense cross-examination (Tr. 417, 458). Similar to *Surber*, the testimony by the other witnesses was brief and did not elaborate on A.Y.'s statements. Therefore, any error in the admission of the cumulative evidence was harmless.

II. THERE WAS NO PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

To evaluate a *properly preserved* claim of prosecutorial misconduct, the reviewing court must first determine whether the prosecutor engaged in misconduct, and, if so, whether under all of the circumstances, the misconduct placed the defendant in a position of grave peril. *Wright v. State*, 690 N.E.2d 1098, 1110 (Ind. 1997). Grave peril is measured by the probable persuasive effect on the jury's decision, and whether there were repeated instances of misconduct to evidence a deliberate attempt to prejudice the defendant. *Id.* Our appellate courts have afforded great deference to the trial court's decision because it is in the best position to gauge the circumstances and the probable impact on the jury. *Schlomer v. State*, 580 N.E.2d 950, 955 (Ind. 1991). In addition to persuasiveness on the jury, the reviewing court should look to the strength of the State's case. *Oldham v. State*, 779 N.E.2d 1162, 1175 (Ind. Ct. App. 2002) (citing *Moore v. State*, 669 N.E.2d 733, 740 (Ind. 1996)).

Defendant failed to preserve his claim of misconduct. Following an allegation of a prosecutor's misconduct, a defendant is required to object and request an admonishment of the jury. *Flowers v. State*, 738 N.E.2d 1051, 1058–59 (Ind. 2000); *Watkins v. State*, 766 N.E.2d 18, 25 (Ind. Ct. App. 2002) (citations omitted); *Peterson v. State*, 699 N.E.2d 701, 704 (Ind. Ct. App. 1998). If the defendant is not satisfied with the admonishment, the defendant must move for a mistrial. *Flowers*, 738 N.E.2d at 1058; *Watkins*, 766 N.E.2d at 25; *Peterson*, 699 N.E.2d at 704. The failure by the defendant to object, request an admonishment, or move for mistrial results in

waiver of the issue for appellate review. *Flowers*, 738 N.E.2d at 1058; *Watkins*, 766 N.E.2d at 25; *Peterson*, 699 N.E.2d at 704.

Assuming *arguendo* that the prosecutor's argument rose to the level of misconduct, Defendant failed to preserve his claim. Here, in reference to A.Y., during closing argument, the State commented on the evidence before the court and stated: "She's six years old. I submit she hasn't even been taught how to lie" (Tr. 797). Defense counsel merely objected to the prosecutor's statement and made a record of her objection after Defendant's closing argument (Tr. 798–99, 816). However, the court stated that it would instruct the jury regarding the credibility of the witnesses (Tr. 817). Counsel had no objection to the court's instruction and did not request any further admonishment or mistrial after the court so instructed the jury (Tr. 817–18, 823–24). Thus, the issue was not properly preserved for appellate review and is waived. *See Lampitok v. State*, 817 N.E.2d 630, 641 (Ind. Ct. App. 2004); *Sanders v. State*, 428 N.E.2d 23 (Ind. 1981). Even so, the prosecutor's argument was a fair comment on the evidence, which does not constitute prosecutorial misconduct.

Waiver notwithstanding, a defendant may avoid waiver by demonstrating that the prosecutor's misconduct amounted to fundamental error. *Carter v. State*, 738 N.E.2d 665, 677 (Ind. 2000); *Rodriguez v. State*, 795 N.E.2d 1054, 1059 (Ind. Ct. App. 2003), *trans. denied*, 804 N.E.2d 753 (Ind. 2003) (citing *Reid v. State*, 719 N.E.2d 451, 458 (Ind. Ct. App. 1999)). "Fundamental error is a substantial blatant violation of basic principles rendering the trial unfair to the defendant and, thereby, depriving the defendant of fundamental due process. The error must be so prejudicial to the rights of a defendant as to make a fair trial impossible." *Charlton v. State*, 702 N.E.2d 1045, 1051 (Ind. 1998). "Fundamental error must be of such magnitude to persuade the reviewing court that the defendant could not possibly have received a fair trial or

that the verdict is clearly wrong or of such dubious validity that justice cannot permit it to stand." *Guy v. State*, 755 N.E.2d 248, 258 (Ind. Ct. App. 2001). The prosecutor's conduct must have subjected the defendant to grave peril and had a probable persuasive effect on the jury's decision. *Rodriguez*, 795 N.E.2d at 1059 (citations omitted). "The gravity of the peril turns on the probable persuasive effect of the misconduct on the jury's decision and not on the degree of impropriety of the conduct." *Id.*

The prosecutor's closing argument, commenting on the evidence, likely had little impact on the jury in light of the court's detailed instructions regarding the credibility of witnesses. During final jury instructions, the court acknowledged that there had been some discussion by the attorneys on the credibility of the witnesses (Tr. 823). The court instructed the jury: "you're the exclusive judges of the evidence, that it's your duty to decide the value you give to the exhibits you receive and the witnesses you hear" (Tr. 823). Further, the court informed the jury that the statements of counsel were not evidence and that it was for them to decide who was telling the truth (Tr. 824). Therefore, the prosecutor's argument did not rise to the level of fundamental error subjecting Defendant to grave peril.

III. THE COURT PROPERLY DENIED DEFENDANT'S MOTION FOR MISTRIAL.

The court acted within its discretion to deny Defendant's motion for mistrial. "The decision to grant or deny a motion for a mistrial lies within the discretion of the trial court." *Pierce v. State*, 761 N.E.2d 821, 825 (Ind. 2002). "A mistrial is an extreme remedy that is granted only when no other method can rectify the situation." *Boney v. State*, 880 N.E.2d 279, 291 (Ind. Ct. App. 2008), *trans. denied* (citing *Heavrin v. State*, 675 N.E.2d 1075, 1083 (Ind. 1996)). "The trial court is in the best position to assess the impact of a particular event upon the jury." *Myers v. State*, 887 N.E.2d 170, 189 (Ind. Ct. App. 2008), *trans. denied.* "On appeal, in

order to succeed from the denial of a mistrial, the defendant must demonstrate that the conduct complained of was so prejudicial that it had a probable persuasive effect on the jury's decision." *Jackson v. State*, 728 N.E.2d 147, 151 (Ind. 2000). "Moreover, reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings." *Warren v. State*, 757 N.E.2d 995, 999 (Ind. 2001).

The trial court's admonishment here cured any effect of Tonya's statement. The court instructed Tonya prior to her testimony not to discuss any allegations accusing Defendant of molesting other children (Tr. 527). After direct and cross examination, the jury asked Tonya why it took so long before anything was done about A.Y.'s allegation (Tr. 568–69). Tonya acknowledged that she did not immediately follow-up with the police and stated: "It was brought up by other people. Uhm there were other allegations that I had heard about" (Tr. 569). Defendant objected and requested a mistrial (Tr. 570).

Defendant claims on appeal that the State's argument that the jury would not necessarily surmise that Tonya's "comment referred to other acts of molestation defies credulity." Br. of Appellant at 35. However, the court found the argument persuasive and denied the motion "for several reasons," including: Tonya's answer did not state that other girls had made any allegations or that the allegations were sexual in nature (Tr. 570–71). The court also reasoned that the allegations could have been by A.Y. (Tr. 570–71). After listening to Tonya's testimony outside the presence of the jury, the court simply denied the motion and instructed the jury to disregard the last answer (Tr. 571–72). Defense counsel had no other requests, motions, or instructions (Tr. 572).

Moreover, Defendant's reliance on several cases is misplaced. In *Udarbe v. State*, 749 N.E.2d 562 (Ind. Ct. App. 2001), a panel of this Court considered whether evidence of a previous

sexual assault against another victim was permissible under Indiana Evidence Rule 404(b). *Id.* at 564. The trial court admitted the evidence, which was reversible error. *Id.* at 567. In *Sundling v. State*, 679 N.E.2d 988 (Ind. Ct. App. 1997), the trial court permitted three witnesses to testify regarding other acts of sexual misconduct. *Id.* 992. Similarly in *Greenboam v. State*, 766 N.E.2d 1247 (Ind. Ct. App. 2002), the court reversed where multiple victims testified about unrelated molestations. *Id.* at 1255–56. Here, the court specifically ruled that no evidence of any other allegations would be admitted (App. 5, 66). Tonya's vague statement here was unlike any parade of witnesses before the juries in *Udarbe*, *Sundling*, and *Greenboam*. Moreover, the jury was instructed to disregard Tonya's answer and counsel had no further request or objection. Therefore, the court, which was in the best position to determine the impact of the brief, isolated answer on the jury, properly denied Defendant's motion for mistrial.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do solemnly affirm under the penalties for perjury that on July 28, 2009, I served upon the opposing counsel in the above-entitled cause two copies of the Brief of Appellee by causing the same to be deposited in the United States mail first-class postage prepaid, addressed as follows:

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