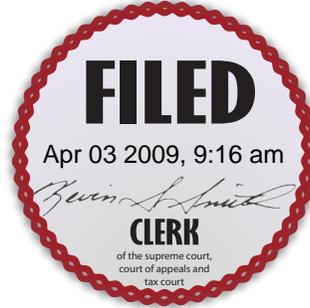


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

STEVEN E. RIPSTRA
Ripstra Law Office
Jasper, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ERIC L. BLISSETT,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 74A01-0806-CR-276

APPEAL FROM THE SPENCER CIRCUIT COURT
The Honorable Wayne A. Roell, Judge
Cause No. 74C01-0605-FC-158

April 3, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Eric L. Blissett (“Blissett”) appeals his convictions for Child Molesting, as a Class C felony,¹ Intimidation, as a Class D felony,² Resisting Law Enforcement, as a Class A misdemeanor,³ and Illegal Possession of Alcohol by a Minor, a Class C misdemeanor.⁴ We affirm.

Issues

Blissett raises four issues on appeal, which we consolidate and restate as:

- I. Whether the trial court erred in denying Blissett’s request to present legal argument outside the presence of the jury regarding the prosecutor’s alleged misconduct during the State’s closing argument;
- II. Whether the State’s closing argument constituted prosecutorial misconduct; and
- III. Whether there was sufficient evidence that Blissett committed Child Molesting and Intimidation.

Facts and Procedural History

The following are the facts most favorable to the verdicts. As of May 2006, Danielle and Jamie Weedman (“Danielle” and “Jamie”) were married and had a daughter, four-year-old D.W. They lived with Danielle’s mother, Phyllis Gunter, and Danielle’s brother, Mark Hamilton (“Hamilton”).

¹ Ind. Code § 35-42-4-3(b).

² Ind. Code § 35-45-2-1.

³ Ind. Code § 35-44-3-3(a)(1).

⁴ Ind. Code § 7.1-5-7-7(a).

Between 9:00 and 9:30 p.m. on May 13, 2006, Hamilton arrived with five friends, including Blissett. Most or all of them were drinking alcohol. At one point, Danielle heard someone speaking with D.W. in her room. Danielle inquired and Blissett identified himself, as Danielle had not previously met him. Hamilton and his guests left later, except Blissett, who stayed and talked with Danielle's mother. After some time, Danielle agreed to give Blissett a ride and briefly left the room to retrieve her purse. When she returned, she saw Blissett's hand in her daughter's pants. She confronted him and forced him from the house.

Rockport City Police Department Sergeant Dale Meredith ("Sgt. Meredith") found Blissett passed out and transported him to the jail. After assisting Blissett to a padded cell, Sgt. Meredith and another officer began a pat-down search. Blissett spun away from them, backed into a corner, refused to cooperate, and continued to forcefully resist them. As Sgt. Meredith had Blissett in a restraining hold, he said that he knew Sgt. Meredith had two children and stated "wait until I get out." Transcript at 446. Sgt. Meredith understood the comment to be a threat.

The State charged Blissett with Child Molesting, Sexual Battery, Intimidation, Resisting Law Enforcement, Disorderly Conduct, and Illegal Possession of Alcohol by a Minor. After a jury found Blissett guilty of Child Molesting, Intimidation, Resisting Law Enforcement, and Illegal Possession of Alcohol by a Minor, the trial court entered judgments of conviction on the four verdicts.

Blissett now appeals.⁵

Discussion and Decision

I. Denial of Argument Outside the Presence of the Jury

Blissett argues that the trial court erred in denying his request to present legal argument outside the presence of the jury regarding the prosecutor's alleged misconduct during the State's closing argument. In closing, the prosecutor referred to Blissett's "right to bring witnesses" and the fact that none of Blissett's family or friends had testified. Tr. at 582. Blissett's attorney stated, "Judge, I'm going to object and I'd ask leave to address you and I'd like to cite case law of how inappropriate this is." Id. The trial court overruled the objection, effectively denying Blissett's request to present further argument.

As support for Blissett's suggestion that he should have been allowed the opportunity to present additional legal argument outside the presence of the jury, he cites a series of cases regarding offers of proof, in camera reviews of evidentiary issues, and allocution. He concedes, however, that he "has been unable to find a specific case holding that Blissett is entitled to make his record on a constitutional objection outside the jury's presence." Appellant's Brief at 8. He also acknowledges that the right to make an offer of proof "does not exist, currently, with respect to [his] circumstance," which we understand him to mean closing argument. Id. at 9.

"The purpose of an offer to prove is to preserve for appeal the trial court's allegedly

⁵ Blissett does not challenge his sentence.

erroneous exclusion of evidence.” Duso v. State, 866 N.E.2d 321, 324 (Ind. Ct. App. 2007) (citing Nelson v. State, 792 N.E.2d 588, 595 (Ind. Ct. App. 2003), trans. denied). Here, however, Blissett did not try to show that the trial court erroneously excluded evidence; the issue arose during the State’s closing argument. Thus, the cases cited by Blissett are inapposite. As the appellant bears the burden of establishing error and supporting his argument with authority, we conclude that the trial court did not err in denying Blissett’s request. See Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006); and Ind. Appellate Rule 46(A)(8)(a).

II. Prosecutorial Misconduct

Blissett argues that the State made an improper argument. In analyzing such a claim, we determine whether the prosecutor engaged in misconduct, and if so, whether the misconduct placed the defendant in a position of grave peril to which he or she should not have been subjected. Cooper, 854 N.E.2d at 835. “The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury’s decision rather than the degree of impropriety of the conduct.” Id.

To preserve the claim, the correct procedure is to request the trial court to admonish the jury, then, if not satisfied with the admonishment, to move for mistrial. Id. Absent doing so, the defendant must show fundamental error. Id. Fundamental error is error that makes “a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm.” Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002)).

Although Blissett objected to the State's comments, he did not immediately request an admonishment or move for a mistrial. (He filed a written motion for mistrial after the jury retired.) Thus, Blissett must establish that the State's argument constituted fundamental error. See, e.g., Dumas v. State, 803 N.E.2d 1113, 1117 (Ind. 2004).

The accused shall not "be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. It is a violation of this right "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." Moore v. State, 669 N.E.2d 733, 739 (Ind. 1996). "If in its totality, however, the prosecutor's comment is addressed to other evidence rather than the defendant's failure to testify, it is not grounds for reversal." Boatright v. State, 759 N.E.2d 1038, 1043 (Ind. 2001). "Arguments which focus on the uncontradicted nature of the State's case do not violate the defendant's right not to testify." Hopkins v. State, 582 N.E.2d 345, 348 (Ind. 1991).

During the State's presentation of evidence, Danielle testified that Blissett, D.W., and Gunter were in the living room when Danielle left to retrieve her keys and also when she returned to the room. Blissett did not testify. He called only one witness, Phyllis Gunter ("Gunter"), D.W.'s grandmother. Gunter testified as follows:

Q: During that evening did you ever see your granddaughter lay on the couch that Eric Blissett was sitting on?

A: No.

Q: That never happened did it?

A: That I know of, no. I was drinking; I don't remember a whole lot of nothing.

Tr. at 492. Blissett emphasized this testimony in his closing argument.

Not one (1) time did she see Eric Blissett and her grandbaby, [D.W.], on the couch together. Not one (1) time. There was only one (1) person in this entire proceeding that was in the room the entire time.

Tr. at 570. In closing, the State then argued,

[Y]ou never heard any testimony during the trial that the defendant was anywhere else than the victim's home when [D.W.] was molested. None of the people the defendant was with that night have come and testified on his behalf. No one from his family came and testified on his behalf.

Tr. at 580. The trial court overruled Blissett's objection. The State then repeated, almost verbatim, the last two sentences of the above argument. When Blissett again objected, the trial court showed the objection to be continuing. The prosecutor then said,

The State has the burden of proof and we gladly accept the burden of proof. We have to prove to you that these matters happened beyond a reasonable doubt. We have to firmly convince you that we have the right person charged for this crime. But the defense has a right to bring witnesses before you that they want to and they have not done that. Why?

Id. at 582. The trial court overruled Blissett's third objection. Thus, the prosecutor made three series of arguments regarding witnesses not called by Blissett, including the emphasis that "the defense has a right to bring witnesses before you that they want to and they have not done that." Tr. at 582.

"[C]omment on the lack of defense evidence is proper so long as the State focuses on the absence of any evidence to contradict the State's evidence and not on the accused's failure to testify." Dumas, 803 N.E.2d at 1117. Furthermore, regarding a prosecutor's

reference to the accused's power to subpoena witnesses, the Seventh Circuit has held,

We therefore overrule Pollard and Wheeler to the extent they forbid the prosecutor to observe that the defense could produce a witness if it wishes. . . . The comment does not alter the burden of proof or penalize the exercise of a constitutional right. Unless the prosecutor indirectly invites an inference based on the defendant's own silence, he may pursue evidentiary inferences for what they are worth. . . . The jury is entitled to know that the defendant may compel people to testify; this legitimately affects the jury's assessment of the strategy and evidence.

U.S. v. Sblendorio, 830 F.2d 1382, 1393-94 (7th Cir. 1987) (citations omitted), cert. denied.

In U.S. v. Knox, the Seventh Circuit relied on Sblendorio as dispositive authority. "As in Sblendorio, the prosecutor in this case noted that the defendants had no burden of proof, but commented that they, like the government, had subpoena power. Under Sblendorio, that remark was not improper." U.S. v. Knox, 68 F.3d 990, 1000 (7th Cir. 1995), cert. denied. See also U.S. v. King, 150 F.3d 644, 648 n.1 (7th Cir. 1998).

Based upon the above authority, we conclude that the State's argument did not constitute prosecutorial misconduct. Regardless, in light of the testimony by Danielle and D.W. (see below), the State's argument did not make a fair trial impossible or create an undeniable and substantial potential for harm. See Murphy v. State, 747 N.E.2d 557, 560 (Ind. 2001).

III. Sufficiency of the Evidence

Finally, Blissett argues that the State failed to present sufficient evidence regarding two of his four convictions: Child Molesting and Intimidation. Our standard of review when considering the sufficiency of the evidence is well settled. We will not reweigh the evidence

or assess the credibility of witnesses. Robinson v. State, 699 N.E.2d 1146, 1148 (Ind. 1998).

Rather, we consider only the evidence that supports the verdict and draw all reasonable inferences from that evidence. Id. We will uphold a conviction if there is substantial evidence of probative value from which a jury could have found the defendant guilty beyond a reasonable doubt. Id.

A. Child Molesting

A person who, with a child under age fourteen, touches or fondles the child with the intent to arouse or satisfy the sexual desires of the child or himself, commits Child Molesting, as a Class C felony. Ind. Code § 35-42-3-3(b).

Except where noted, the following account is based upon Danielle's testimony at the jury trial. Danielle, her daughter, and her mother were in the residence when Hamilton arrived with Blissett and his other friends. From Blissett's speech, actions, and smell, he appeared to have been drinking alcohol. Danielle heard someone speaking with D.W. in her room. When she inquired, Blissett identified himself.

After a time, Hamilton and four of his friends left. Blissett remained, talking with Danielle's mother. After 10:30 p.m., Blissett asked Danielle to give him a ride home. She agreed, saying that she would retrieve her purse from the bathroom. At that time, Blissett and D.W. were on a couch; her head was on a pillow and approximately one foot from him. When Danielle returned a couple of minutes later, D.W.'s head and her pillow were resting against Blissett's leg. It did not appear that Blissett noticed Danielle return. She saw that Blissett's entire left hand, except his thumb, was under D.W.'s pants. D.W. was moaning.

When Blissett removed his left hand from under D.W.'s pants, Danielle heard the snap of elastic – either from D.W.'s pants or underwear. Blissett placed three of his left-hand fingers in his mouth. He then reached again toward D.W. Yelling, Danielle told D.W. to go to her room. She confronted Blissett, who denied wrongdoing.

Blissett refused to leave. Danielle forced him out of the residence and locked the door behind her. After they argued on the porch, Blissett walked across the street and sat on a bench. It took Danielle ten to fifteen minutes to remove Blissett. He was slurring his speech and he swayed as he walked.

According to Rockport City Police Department Captain David Hall (“Captain Hall”), he responded to a 911 call to find “chaos, screaming, hollering, and crying.” Tr. at 390. Captain Hall interviewed D.W. that night. She told him that the perpetrator “put his hand on my butt, put his hand on my peepee on my poopy hole and in my peepee.” Id. at 396. The next afternoon, Captain Hall showed a photo array of six white males to D.W., without her mother present. She identified Blissett as the perpetrator. Then Danielle also identified Blissett from the same photo array. At trial, Danielle identified the defendant as Blissett.

D.W. testified that “that boy stook [sic] him hand in my pants.” Id. at 374. In addition, she testified as follows:

Q: Did he put his hand inside your pants?

A: Yeah and then in my underwear.

Q: He put his hands inside your underwear?

A: Yeah, first in my pants and then my underwear.

Q: And what did he touch?

A: My butt and my peepee.

Id. at 379.

Blissett references, without citing authority or developing an argument, the term “incredible dubiousity.” Appellant’s Brief at 16. However, the incredible dubiousity rule “is implicated only where a sole witness presents inherently contradictory testimony.” Carpenter v. State, 786 N.E.2d 696, 705 (Ind. 2003). Danielle’s testimony supported her daughter’s. Thus, the rule would not apply here, even if Blissett had developed the argument.

Blissett also asserts that the Child Molesting conviction “is based entirely upon D.W.’s account of an act that happened when she was four years old.” Appellant’s Br. at 16. That is not true. Again, Danielle’s testimony supported her daughter’s repeated and consistent descriptions of being molested.

The evidence most favorable to the verdict supported the finding that Blissett touched then-four-year-old D.W. Furthermore, the testimony supported the reasonable inference that Blissett did so intending to satisfy either his or D.W.’s sexual desires. Thus, there was sufficient evidence to support the verdict that Blissett touched a child under age fourteen with the intent to arouse or satisfy his or the child’s sexual desires.

B. Intimidation

Finally, Blissett asserts that the State failed to present sufficient evidence that he committed Intimidation. A person who communicates a threat to another, with the intent “that the other person be placed in fear of retaliation for a prior lawful act,” commits

Intimidation. Ind. Code § 35-45-2-1(a)(2). A “threat” is an expression, by words or action, of an intention to “commit a crime” or to “unlawfully injure the person threatened or another person.” I.C. § 35-45-2-1(c)(1, 3). The offense is a Class D felony if the person threatened is a law enforcement officer. I.C. § 35-45-2-1(b)(1)(B)(i).

Dale Meredith testified that he was employed by the Rockport Police Department as a sergeant. The officer stated that he had two children, a boy and a girl. While with his children, he had seen Blissett in their community. “It’s a small community and I’ve seen – I’ve had my children with me and have seen Eric Blissett.” Tr. at 447. Accordingly, Sgt. Meredith believed that Blissett knew that the officer had two children.

The following is based upon Sgt. Meredith’s testimony. On the night Blissett molested D.W., someone phoned the police department to state that Blissett had just “walked through his home and had passed out on his bed.” Id. at 432. Sgt. Meredith responded and found Blissett passed out. He and another officer transported Blissett to a jail and, assisting him to walk, placed him in a padded cell for his own protection. To that point, Blissett had not been very responsive. As the officers were performing a routine pat-down search, Blissett spun away from them and backed into a corner of the cell. Blissett refused to obey commands that he cooperate.

According to Sgt. Meredith, the officers completed the search by using force.

My position in this was I had Eric restrained and as a team effort we conducted the search and I’d roll him over and they’d pat him down one side, we’d roll over. . . . Once that was complete I gave the order to start peeling off and basically what that means is the officer closest to the door will disengage and back out the door and then once that person is out the next person will go. . . .

Myself being the last person means that I had control of the individual as the last person in the cell.

Id. at 437-38. Sgt. Meredith then instructed Blissett, “[d]o not rise, if you rise up it’s going to be considered an aggressive act. I’m going to defend myself. Do not do that.” Id. at 446. Sgt. Meredith testified that Blissett then “indicate[d] to me he knows I have two children and wait until I get out.” Id. When asked whether he took the comment seriously, he responded:

I took it very seriously, to the fact that when I was transferring I had to overcome my instincts. It put me – for the first time in this profession something was threatened where I realized I’m in a profession that affects other people around me.

Id. at 447. Officer David Moore also testified that Blissett said “something about two kids and wait until I get out.” Id. at 466.

Viewing this evidence and the reasonable inferences therefrom, Blissett made a statement to Sgt. Meredith. The statement was uttered toward the conclusion of the officer’s arresting, transporting, and physically securing Blissett; Sgt. Meredith had to roll and force Blissett into different positions to allow other officers to search different sides of the defendant’s body and to ensure the officer’s safety in leaving the cell. Thus, it appears that the statement was in response to the officer’s lawful use of force in achieving a pat-down search of an arrested person. Indeed, Blissett makes no argument that Sgt. Meredith’s actions were unlawful.

Furthermore, the evidence supported the reasonable inference that the statement was a threat or an expression of an intent to commit a crime and/or injure Sgt. Meredith’s children. Blissett had just molested a four-year-old girl. Being restrained by the officer and forced

into different positions, Blissett told him that he knew that the officer had children. “Wait until I get out” would seem to imply the intention to do something harmful to the children in retaliation for Sgt. Meredith’s lawful actions. Finally, it appears that the statement was intended to, and did, place the officer in fear of retaliation. For these reasons, we conclude that there was sufficient evidence to find Blissett guilty beyond a reasonable doubt of Intimidation.

Conclusion

The trial court did not err in denying Blissett’s request to present legal argument outside the presence of the jury regarding the prosecutor’s alleged misconduct during the State’s closing argument. The State’s closing argument did not constitute prosecutorial misconduct. There was sufficient evidence to support the verdicts finding Blissett guilty of Child Molesting and Intimidation.

Affirmed.

MATHIAS, J., and BARNES, J., concur.