



## STATEMENT OF THE CASE

Defendant-Appellant Donald Smith appeals his conviction of two counts of child molesting, both as B felonies. Ind. Code § 35-42-4-3.

We affirm.

## ISSUES

Smith presents two issues for our review, which we restate as:

- I. Whether there was sufficient evidence to sustain Smith's convictions.
- II. Whether the deputy prosecutor's remarks during closing argument constitute prosecutorial misconduct.

## FACTS AND PROCEDURAL HISTORY

When A.C. was three and four years old, she lived with her mother, her brother, her mother's boyfriend, Smith, Smith's sister, Smith's sister's baby, and Smith's sister's boyfriend. While A.C.'s mother worked, Smith and his sister babysat for A.C. and her brother. On at least two occasions, Smith stuck his penis in A.C.'s mouth and "peed." Tr. at 35. A.C. told her grandmother and her mother about these acts.

Based upon these incidents, Smith was charged with three counts of B felony child molesting and two counts of C felony child molesting. Following a jury trial, Smith was found guilty of all five counts. At sentencing, the trial court vacated Smith's convictions on the two C felonies and one of the B felonies. Smith was sentenced for the remaining two counts of B felony child molesting to an aggregate sentence of twenty (20) years. It is from these convictions that Smith now appeals.

## DISCUSSION AND DECISION

### I. SUFFICIENCY OF THE EVIDENCE

Smith first contends that the evidence is insufficient to support his convictions. As the basis of this contention, Smith claims that A.C.'s testimony was incredibly dubious because it was inconsistent and uncorroborated.

Our standard of review with regard to sufficiency claims is well settled. We neither weigh the evidence nor judge the credibility of the witnesses, and we consider only the evidence favorable to the verdict and all reasonable inferences which can be drawn therefrom. *Newman v. State*, 677 N.E.2d 590, 593 (Ind. Ct. App. 1997). If there is substantial evidence of probative value from which a trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. *Id.* Moreover, we are mindful that the trier of fact is entitled to determine which version of the incident to credit. *Barton v. State*, 490 N.E.2d 317, 318 (Ind. 1986), *reh'g denied*.

However, appellate courts may apply the incredible dubiousity rule to impinge upon a jury's function to judge the credibility of a witness. *Fancher v. State*, 918 N.E.2d 16, 22 (Ind. Ct. App. 2009). The incredible dubiousity doctrine applies "where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt." *Thompson v. State*, 765 N.E.2d 1273, 1274 (Ind. 2002). This Court has observed that application of this doctrine is rare, but, when used, the applicable standard is whether the testimony is

so incredibly dubious or inherently improbable that no reasonable person could believe it. *Fancher*, 918 N.E.2d at 22.

At trial, A.C. testified that on at least two occasions Smith stuck his penis in A.C.'s mouth and "peed" in her mouth. She testified that, at the direction of Smith, she spit the fluid into Smith's hand, and Smith wiped it on the carpet. Tr. at 36-37 and 41. A.C. was asked by the prosecuting attorney if she ever spit the fluid into a toilet, and A.C. responded, "No." Tr. at 76.

During direct examination of the forensic child interviewer at trial, the prosecuting attorney asked the interviewer if A.C. had told the interviewer that she had spit the fluid into a toilet. The interviewer answered affirmatively. It is this pre-trial, out-of-court statement of A.C. to which Smith points to sustain his argument that A.C.'s testimony is incredibly dubious because it is inconsistent. Yet, the rule of incredible dubiousity concerns courtroom testimony, not statements made outside of trial or the courtroom. *Reyburn v. State*, 737 N.E.2d 1169, 1171 (Ind. Ct. App. 2000); *see also Holeton v. State*, 853 N.E.2d 539, 541-42 (Ind. Ct. App. 2006) (holding that discrepancies between statements made to police and trial testimony goes only to weight of testimony and witness credibility and does not render testimony inherently contradictory). Thus, this prior statement of A.C. does not render her trial testimony incredibly dubious.

Rather, A.C. testified unequivocally at trial that Smith put his penis in her mouth and "peed" in her mouth. This testimony establishes the elements of the offenses as charged in this case:

### COUNT I

Donald Zachary Smith, on or about or between September 3, 2007 and December 15, 2007, did perform or submit to deviate sexual conduct, an act involving a sex organ, that is: penis of Donald Zachary Smith and the mouth of A.C., with A.C., a child who was then under the age of fourteen (14) years, that is: four (4) years of age[.]

### COUNT III

Donald Zachary Smith, on or about or between September 3, 2006 and September 2, 2007, did perform or submit to deviate sexual conduct, an act involving a sex organ, that is: penis of Donald Zachary Smith and the mouth of A.C., with A.C., a child who was then under the age of fourteen (14) years, that is: three (3) years of age[.]

Appellant's Appendix at 27 and 28.

In support of his argument of inconsistency, Smith also asserts that A.C. reported another act of molestation by him to which she did not testify at trial. However, the trial court recognized this fact and vacated Smith's conviction with regard to that offense.

Further, Smith claims that A.C.'s testimony was inconsistent with her mother's testimony regarding whether they got along with Zach. Inconsistent statements of two different witnesses do not lead to an issue of incredible dubiousity. Rather, it is an issue of determining the credibility of the witnesses and resolving conflicts in witness testimony, which are jobs of the jury. *See K.D. v. State*, 754 N.E.2d 36, 39 (Ind. Ct. App. 2001) (stating that it is function of trier of fact to resolve conflicts in testimony and to determine weight of evidence and credibility of the witnesses). We will not disturb the jury's determination in this regard.

Additionally, apparently to call into question A.C.'s credibility, Smith mentions A.C.'s affirmative response to defense counsel's question whether she sometimes acted

sick in order to get attention, as well as her admission that at a prior hearing she did not tell the truth about what happened because she did not want to say it in front of the judge. Smith is merely inviting this Court to invade the province of the jury by reassessing witness credibility. Witness credibility is a determination left to the jury. *See K.D.*, 754 N.E.2d at 39. We must decline Smith's invitation.

Finally, Smith avers that A.C.'s testimony is uncorroborated, and therefore incredibly dubious, because no one witnessed the alleged acts of molestation. However, a conviction for child molesting may rest solely upon the uncorroborated testimony of the victim. *Turner v. State*, 720 N.E.2d 440, 447 (Ind. Ct. App. 1999). Again, Smith's argument is nothing more than a request for this Court to re-evaluate witness credibility. The jury heard the testimony and made its credibility determinations which we will not disturb. *See Newman*, 677 N.E.2d at 593. Thus, we cannot say that A.C.'s testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

## II. PROSECUTORIAL MISCONDUCT

For his second allegation of error, Smith asserts that the deputy prosecutor's comments during the State's rebuttal closing argument amounted to prosecutorial misconduct. In her rebuttal closing argument, the deputy prosecuting attorney argued:

STATE: [W]hat do you do when you're accused of child molest? Well, you deny it, then you freak out because you know the mom's probably going [to] call the police so you try to keep coming back around to see if she's done it yet.

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And what do you do if you represent a man who's accused of child molest? Well, you start off by you throw the kid under the bus, you call them, essentially in a nice way a liar.

DEFENSE COUNSEL: Judge, I'm going to object. I mean, it seems like a personal attack. I mean, if they want to talk about the story, that's great, I mean that's what I think's more appropriate here.

COURT: Again, ladies and gentlemen, what the lawyers state here in closing argument is not evidence. They are allowed to characterize the evidence, discuss the evidence with you and attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit. If you'll continue, [Deputy Prosecuting Attorney].

STATE: Thank you, Judge. Again, what you do if you represent somebody who's accused of child molest is you throw the kid under the bus, first and foremost. Then you throw the family under the bus because apparently they've all got to be in on it and it's all one giant lie. Then you throw the prosecutor under the bus and say, "The State has designed this case to make it look shiny and it's a really bad case and what the prosecutor wants you to do is not look at the evidence, just convict because it's a cute little girl." You do that second. Then, finally you throw the police officers under the bus and you say, "Well, I don't even know why the State called the police officer. She didn't have anything to say."

Tr. at 210-212.

Appellate review of a claim of prosecutorial misconduct is a two-step process. First, we consider whether the prosecutor engaged in misconduct. *Hand v. State*, 863 N.E.2d 386, 393 (Ind. Ct. App. 2007). If so, we then consider whether the misconduct placed the defendant in a position of grave peril to which he should not have been subjected. *Id.* at 394. Whether a prosecutor's argument amounts to misconduct is measured by reference to case law and the Rules of Professional Conduct. *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). The gravity of peril is measured by the probable

persuasive effect of the misconduct on the jury's verdict rather than the degree of impropriety of the conduct. *Id.*

Yet, in order to properly preserve a claim of prosecutorial misconduct, the defendant is required to object and request an admonition. *Nunley v. State*, 916 N.E.2d 712, 721 (Ind. Ct. App. 2009), *trans. denied*. If, after an admonition, the defendant is still not satisfied, he must move for a mistrial. *Id.* A defendant's failure to request an admonition or move for mistrial results in waiver of the issue on appeal. *Id.*

Here, Smith objected to only the first comment of the deputy prosecutor. Although Smith objected, he neither requested an admonishment nor moved for mistrial. Therefore, this issue is waived for appellate review. *See Dumas v. State*, 803 N.E.2d 1113, 1117 (Ind. 2004) (holding issue waived on appeal where defendant objected to prosecutor's statements at trial but failed to request admonishment or move for mistrial). Moreover, Smith failed to object later in the State's rebuttal when the deputy prosecutor continued with the same type of argument. Accordingly, Smith has waived the issue of prosecutorial misconduct with respect to all of the allegedly improper comments. *See Robinson v. State*, 693 N.E.2d 548, 552 (Ind. 1998) (holding that claim of prosecutorial misconduct based on allegedly improper argument was waived where defendant objected to only some of prosecutor's allegedly improper remarks and, where he did object, he failed to request admonishment).

Waiver notwithstanding, a defendant may still bring a claim for prosecutorial misconduct on appeal if he asserts fundamental error. *Washington v. State*, 902 N.E.2d

280, 290 (Ind. Ct. App. 2009), *trans. denied*. However, in the present case, Smith does not assert fundamental error. Nevertheless, we analyze this situation under the fundamental error standard.

In order for prosecutorial misconduct to constitute fundamental error, the misconduct must constitute a clearly blatant violation of basic and elementary principles of due process, present an undeniable and substantial potential for harm, and make a fair trial impossible. *Washington*, 902 N.E.2d at 290. In addition, the alleged misconduct must have subjected the defendant to grave peril and had a probable persuasive effect on the jury's verdict. *Id.*

Here, Smith made no showing that the deputy prosecutor's comments likely had any prejudicial effect on the jury and that he was subjected to grave peril. Moreover, the trial court specifically instructed the jury, "When the evidence is completed, the attorneys may make final arguments. These final arguments are not evidence. The attorneys are permitted to characterize the evidence, discuss the law and attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit." Appellant's App. at 67. The trial court also instructed the jury, "Statements made by the attorneys are not evidence." Appellant's App. at 78. And, when Smith objected to the comment by the deputy prosecutor, the trial court reiterated that statements made by the attorneys in closing argument are not evidence. Tr. at 211. The deputy prosecutor's statements did not deprive Smith of a fair trial, and therefore do not constitute fundamental error.

#### CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that there was sufficient evidence to support Smith's convictions and the deputy prosecutor's comments during the State's rebuttal closing argument did not constitute fundamental error.

Affirmed.

CRONE, J., and BRADFORD, J., concur.