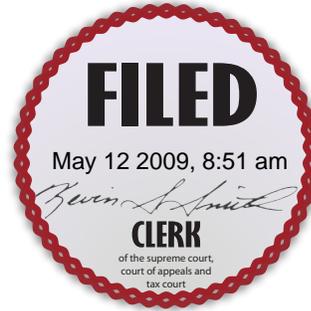


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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EDWARD BRANT, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 06A01-0809-CR-441  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE BOONE SUPERIOR COURT  
The Honorable Matthew C. Kincaid, Judge  
Cause No. 06D01-0710-FC-102

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**May 12, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## STATEMENT OF THE CASE

Edward Brant appeals his conviction for Child Molesting, as a Class C felony, following a jury trial. He presents the following issues for review:

1. Whether the prosecutor committed prosecutorial misconduct when he informed the court, outside of the jury's presence, that he intended to ask Brant about an Illinois arrest warrant for child solicitation if Brant testified.
2. Whether the trial court abused its discretion when it allowed the State to reopen its case after the State had rested and Brant had moved for a directed verdict.
3. Whether the evidence is sufficient to support Brant's conviction.

We affirm.

## FACTS AND PROCEDURAL HISTORY

On the evening of September 28, 2007, eleven-year-old C.P. was spending the night with her friend A.H. At that time, A.H. and her mother, Diedra H., shared a two-bedroom apartment with several other people. Stephanie H., Stephanie's five- or six-year-old daughter, and A.H. slept in one bedroom; John K., his infant, and his girlfriend Tiffany M. slept in the other bedroom; and Diedra H. slept in the living room.

Sometime after eleven on the the night in question, C.P., A.H., and Stephanie's daughter were asleep in one bed in Stephanie's bedroom when Stephanie arrived home from work tending bar. Diedra arrived home between three-thirty and four in the morning, "when the bars closed[,]” with Chuck Glasson, her boyfriend, Brant, and possibly another man.<sup>1</sup> Transcript at 291. The three had been drinking at bars in town and were intoxicated. Brant arrived first, carrying a pint or half-pint liquor bottle. When

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<sup>1</sup> C.P. testified that Diedra, Chuck, Brant, and another man arrived in the apartment in the early morning hours of September 29, but Stephanie's testimony did not mention the unidentified man.

Diedra and Chuck arrived thirty minutes later, they were arguing loudly. Stephanie left thirty minutes after Diedra and Chuck arrived.

At approximately five forty-five, C.P. and A.H. woke up due to the noise from Diedra, Chuck, and Grant arguing in the living room. Once awake, the girls watched cartoons on a television in the bedroom. Brant went to the bedroom and asked the girls if they were okay, then left. Brant repeated the act twice more, entering the bedroom, asking if the girls were okay, then leaving. Each time the girls were watching television. On Brant's fourth entry, he set a bottle down outside the bedroom door as he entered the room. Then he turned off the television and lay down beside Stephanie's daughter, who was sleeping next to C.P. Brant put his arm around Stephanie's daughter and tried to put his arm under C.P.'s blanket. A.H. and C.P. got out of bed and went to the restroom, where C.P. told A.H. what Brant had tried to do. A.H. went to the living room and relayed the information to Diedra, who went to Stephanie's bedroom, turned on the light, and told "Eddie" to get out. Id. at 334. Diedra then pulled a twin mattress from that bedroom out into the living room and told Brant to sleep on that mattress.

After Brant left, the girls fell asleep, with C.P. lying on her stomach in between the other two girls. C.P. awoke when she felt someone touching her vagina. She rolled over onto her back, kicked the perpetrator, and told him to "stop and get away[.]" Id. at 337. C.P. and A.H. went to the bathroom, where C.P. told A.H. what had happened. A.H. told Diedra, who did nothing in response. C.P. then called her mother to say she was coming home and to ask her to unlock the door. Once home, C.P. told her mother what had happened, and her mother telephoned police.

The State charged Brant with child molesting, as a Class C felony. A jury trial was held on June 17 and 18, 2008. In his opening statement, defense counsel told the jury that a drunk Brant had entered the darkened bedroom because he had thought Stephanie was there and had hoped to have sex with her. Brant's counsel explained further that when Brant grabbed the leg of the person he thought was Stephanie, he realized it was C.P. The jury found Brant guilty as charged, and the trial court entered judgment of conviction accordingly. On July 24, 2008, the court sentenced Brant to six years at the Indiana Department of Correction with five years to be executed and one year suspended to supervised probation. Brant now appeals.

## **DISCUSSION AND DECISION**

### **Issue One: Prosecutorial Misconduct**

Brant first contends that a statement made by the prosecutor outside the presence of the jury and alleging the existence of an Illinois arrest warrant constituted prosecutorial misconduct. In reviewing a properly preserved claim of prosecutorial misconduct, we determine (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. Cooper v. State, 854 N.E.2d 831, 836 (Ind. 2006) (citation omitted). Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct. Id. 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.

At the start of the second day of trial, before the jury had returned to the courtroom, the prosecutor stated to the trial court:

[D]uring [defense counsel’s opening] argument he expressed [a] mistake of fact defense. This is the first time we’ve ever heard that, this mistaken identity. That was never disclosed to the prosecution. It has recently come to my attention that the Defendant is being held on a warrant for an arrest that’s pending in Champaign, Illinois for child solicitation.<sup>2]</sup> If he intends to put the Defendant on the stand and if they intend to put evidence on that the Defendant mistook [C.P.] for Stephanie [H.] then the State has every right to cross[-]examine him on the fact that this was no mistake at all that you have sexual attraction towards children and in fact you’ve done this before and in fact there’s an arrest warrant for you in Champaign, Illinois for child solicitation.

Transcript at 307-08. Following the prosecutor’s statement, Brant’s counsel objected as follows:

Judge, if I might respond to that, that is absolutely false. I, I have not in my opening statement said a mistake of fact and not through any testimony will say a mistake of fact. It is not a mistake of fact that allows 404(B) evidence to come in. Just because he mistook [C.P.] for Stephanie, the mistake of fact was that I touched this person in the, in the vaginal area and I didn’t mean to, I didn’t realize I was doin’ it. I, I had—I can show the Court case law on that specifically the individual said he touched the leg but not the private parts of the individual.

Id. at 308-09.

Brant contends that, because of the prosecutor’s threat to question him about an Illinois arrest warrant, he was “precluded from taking the stand on his own behalf . . . for fear that the State would present evidence to the jury of a pending child solicitation case against him, which case did not exist.” Appellant’s Brief at 9. He argues that the prosecutor’s false statement placed him in grave peril and “effectively denied [him] a fair

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<sup>2</sup> The prosecutor’s reference to Brant being “held on” an Illinois arrest warrant is a misstatement. Brant was not being “held on” an Illinois arrest warrant at the time of trial because he was attending the trial.

trial.” Id. The State counters that Brant waived the argument because he did not object on the ground of prosecutorial misconduct to the trial court. We must agree.

A claim of prosecutorial misconduct is waived if there is no objection. Johnson v. State, 725 N.E.2d 864, 867 (Ind. 2000) (citing Stevens v. State, 691 N.E.2d 412 (Ind. 1997), cert. denied, 525 U.S. 1021 (1998)). This is so even if the prosecutorial misconduct is alleged to have resulted in a violation of the defendant’s due process rights. See Baer v. State, 866 N.E.2d 752, 761 (Ind. 2007), cert. denied, 128 S. Ct. 1869 (2008). Defense counsel’s objection did not refer, either explicitly or implicitly, to prosecutorial misconduct. As such, Brant has failed to preserve the issue for review. See Johnson v. State, 725 N.E.2d at 867.

### **Issue Two: Reopening the Case**

Brant next contends that the trial court abused its discretion when it allowed the State to reopen its case after resting and after Brant had moved for a directed verdict. We have described our standard for reviewing such a claim as follows:

A party should generally be afforded the opportunity to reopen its case to submit evidence that could have been part of its case in chief. Whether to grant a party’s motion to reopen its case after having rested is a matter committed to the sound discretion of the trial judge. The factors that weigh in the exercise of discretion include whether there is prejudice to the opposing party, whether the party seeking to reopen appears to have rested inadvertently or purposely, the stage of the proceedings at which the request is made, and whether any real confusion or inconvenience would result from granting the request.

Saunders v. State, 807 N.E.2d 122, 126 (Ind. Ct. App. 2004) (citations omitted).

In Saunders, the defendant was tried on two counts of sexual misconduct with a minor, as Class B and Class C felonies. At trial, after the State rested, defendant moved

for judgment on the evidence on the ground that the State had not identified the defendant as the person accused. The trial court denied the defense motion and allowed the State to reopen its case so the victim could identify the defendant.

On appeal the defendant argued that the trial court abused its discretion in allowing the State to reopen its case. We affirmed the trial court, reasoning:

The identification evidence offered after the case was reopened was evidence that could have been part of the State's case-in-chief. Even though T.S. was not the State's last witness, she had been recalled to the stand at least once after her initial direct and cross examination in order to answer a juror's question. As a result, it is not apparent that undue emphasis could have been placed on her return to the stand to identify Saunders. The trial court's grant of the State's motion to reopen its case was not an abuse of discretion.

Id. at 126.

Here, after the State rested its case, Brant moved for a directed verdict on the ground that the State had not proved that Brant was older than C.P.<sup>3</sup> In response, the State first asked the court to take judicial notice of Brant's birth date and then moved to reopen its case to offer evidence on that fact. The trial court denied defendant's motion for a directed verdict and allowed the State to reopen its case. The State then recalled one of the police officers involved in the investigation. That officer testified that, in running Brant's information, he had learned that Brant's birth date was November 30, 1967.

Brant argues that the trial court should not have allowed the State to reopen its case because the State had purposefully rested its case, "the evidence was clearly available to the State during the evidentiary stages of the proceeding[.]" Brant was clearly

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<sup>3</sup> Brant was charged with child molesting under Indiana Code Section 35-42-4-3(b), under which the State was required to show that Brant did "perform[] or submit[] to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person[.]" (Emphasis added).

prejudiced by the admission of additional evidence after the case was reopened, and the reopening of the case resulted in confusion to the jury. We cannot agree.

On appeal the State does not contest that it rested its case purposefully or that the evidence could have been offered in its case-in-chief. But the State argues that the reopening of the case did not prejudice Brant because there was already evidence before the jury showing that Brant was older than C.P. Brant's birth date was listed on State's Exhibit 5, the voluntary statement that Brant had completed and signed during the investigation. In addition, any juror could tell by seeing Brant and C.P. that Brant, a forty-year-old man, was obviously older than his eleven-year-old victim. See Stanton v. State, 853 N.E.2d 470, 475 (Ind. 2006) (holding that jury may use own knowledge, experience, and common sense in weighing evidence regarding defendant's age where age is element of offense). We agree with the State that the additional evidence offered after the case was reopened did not prejudice Brant because it was cumulative. Further, Brant does not show that the jury was confused by the reopening of the case for the admission of additional evidence or that undue emphasis was placed on that evidence by the timing of its admission.

The facts of this case are nearly identical to those in Saunders. In each case the State had purposefully rested its case when the defendant moved for a directed verdict on the ground that the State had not proved a necessary element of its case. In response, the trial court allowed the State to reopen its case to offer evidence, in this case merely additional evidence, on that element. Just as we found that the trial court had not abused its discretion in reopening the case in Saunders, here, too, we cannot say that the trial

court abused its discretion when it granted the State's request to offer additional evidence on Brant's birth date. See id.

### **Issue Three: Sufficiency of Evidence**

Brant also contends that the evidence is insufficient to support his conviction for child molesting, as a Class C felony. Specifically, he argues that the State failed to prove that Brant was the perpetrator. We must disagree.

When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Here, C.P. identified "Eddie" as the perpetrator. Although C.P. could not identify Brant by face at trial, she testified that A.H. had told her Brant's name before the incident, that she saw him leave a bottle outside the bedroom door, and that she recognized him by the clothes he was wearing at the time of the offense as the same man who had come in the bedroom earlier. Diedra had called Brant by his name when she had previously ordered him out of the bedroom. And Stephanie testified that she had seen Brant enter the apartment with a liquor bottle, that she had found a liquor bottle by the bedroom door where C.P. had seen Brant set a bottle down, and that she had found Brant's shoes by the girls' bed. Brant's argument amounts to a request that we reweigh

the evidence, which we cannot do. Jones, 783 N.E.2d at 1139. We conclude that the evidence is sufficient to support his conviction.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.