

Appellant-defendant James D. Boyd appeals following his conviction for Child Molesting,¹ a class A felony. Boyd argues that the prosecutor committed reversible misconduct and that the trial court erred by permitting the State to impeach Boyd with evidence of a prior burglary conviction. Additionally, Boyd argues that the trial court found improper aggravators and failed to find certain mitigators, and that the fifty-year sentence is inappropriate in light of the nature of the offense and his character. We find that the sentence is inappropriate but find no other reversible error. Thus, we affirm in part, reverse in part, and remand with instructions to revise Boyd's sentence to forty years imprisonment.

FACTS

In July 2001, nine-year-old S.M. was at the home of her babysitter, Alicia Jarrett. Twenty-three-year-old Boyd was a friend of Jarrett, and was also at her home on the day in question. Boyd was playing a computer game when S.M. entered the room he was in. He finished playing, turned around, and kissed her. He then pulled her pants down and performed oral sex on her. Boyd asked her if she “like[d] that,” and she put her pants back on without responding. Tr. p. 94. Boyd then took S.M. to the bathroom, where he removed her pants and underwear and got on top of her, penetrating her vagina with his penis. S.M. “felt ripping” and told Boyd that it hurt, to which Boyd responded, “it’s okay baby.” Id. Boyd continued until he ejaculated. He told S.M., “don’t tell nobody or I will do it to you again.” Id. Boyd placed S.M. on his lap, telling her that “what he did to

¹ Ind. Code § 35-42-4-3.

[her] was child molestation” and that he would go to jail if she took “him to Court.” Id. at 93. Several years later, S.M. told employees at her school what Boyd had done to her. In April 2006, S.M.’s mother contacted the police.

On May 16, 2006, the State charged Boyd with class A felony child molesting. Boyd’s jury trial took place on October 15 and 16, 2009,² after which the jury convicted Boyd as charged. At Boyd’s December 4, 2009, sentencing hearing, the trial court found no mitigating circumstances and found Boyd’s criminal history to be an aggravating factor. At the conclusion of the hearing, the trial court imposed a fully executed sentence of fifty years imprisonment. Boyd now appeals.

DISCUSSION AND DECISION

I. Prosecutorial Misconduct

Boyd first argues that the prosecutor made several statements that rise to the level of prosecutorial misconduct. We must first consider whether the comment constituted misconduct, and second, whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected. Baer v. State, 866 N.E.2d 752, 756 (Ind. 2007). The gravity of the 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. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006).

² Boyd sought and received three continuances, resulting in a nearly two-year delay of the trial.

Boyd first directs our attention to the following statement made by the prosecutor during opening statements: “If you believe [S.M.] though and you will hear [S.M.] testify there is no[] motive for her to fabricate this story, she’s truthful and we believe that” Tr. p. 86-87. Boyd, however, neglected to object to this statement at trial. Therefore, to prevail he must establish that the prosecutor committed misconduct and that the alleged misconduct constituted fundamental error. To constitute fundamental error, prosecutorial 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. Lainhart v. State, 916 N.E.2d 924, 931 (Ind. Ct. App. 2009).

Turning to the statement highlighted by Boyd, we observe that it is well established, and the State concedes, that it is improper for the prosecutor to personally vouch for the credibility of a witness. Id. at 938. Opening statements, however, are not evidence, McIntyre v. State, 717 N.E.2d 114, 123 (Ind. 1999), and the jury here was instructed accordingly during preliminary and final jury instructions. The law presumes that the jury follows the trial court’s instructions. Morgan v. State, 903 N.E.2d 1010, 1020-21 (Ind. Ct. App. 2009), trans. denied. Given the content of the jury instructions and the brevity of the remark in the context of the trial as a whole, we decline to find that this statement rose to the level of fundamental error.

Next, Boyd directs our attention to a colloquy that occurred during closing arguments. Part of Boyd’s defense was that he was working out of state during the month in which the offense occurred. In Boyd’s closing argument, his attorney explained

that Boyd “has no burden of proof, we don’t have to all of a sudden prove to you exactly where he was or what he did. He told you what he was doing that month. The burden of proof was entirely on the State of Indiana.” Tr. p. 155. During the State’s rebuttal, the following discussion occurred:

Let’s talk about Defendant’s story more. He says I was on the road the entire month of July and I packed up my car and I drove to Idaho His employer didn’t come in here and say yeah, James Boyd was working a job site . . . that whole month of July, he would remember that, where is he at, where’s the time card at? His employer would have those. Where’s his co-workers at? There’s lots of evidence he could have proven if he wanted to establish his innocence, lots of it and he didn’t.

DEFENDANT: Your honor, I’m going to object. I think the jury is aware of it, but he doesn’t have to prove his innocence, that’s not what this is about.

STATE: It’s argument.

DEFENDANT: Well it’s still not an appropriate comment. He has no obligation to prove anything.

COURT: You’ll get an instruction on that and I think the jury knows that [Boyd has] no obligation to prove anything.

STATE: And certainly Your Honor or ladies and gentlemen, he has no obligation that’s right, but wouldn’t you want that put in there, if that evidence is there, absolutely, I did not do this. Here so and so can say I wasn’t there, so and so can say I wasn’t there, so and so can say I wasn’t there, none of that. Again, whose testimony makes the most sense.

Id. at 157-58.

It is well established, and the State concedes, that “the State may not suggest that the defendant has the burden of proof by inquiring in closing argument why the defendant did not call witnesses to testify on his behalf.” Lainhart, 916 N.E.2d at 936. Again, however, the trial court instructed the jury to that effect during preliminary and final instructions. Furthermore, following Boyd’s objection, the trial court emphasized that “the jury knows that [Boyd has] no obligation to prove anything.” Tr. p. 157. Inasmuch as the law presumes that the jury follows the trial court’s instructions, we decline to find that the prosecutor’s statements during closing argument had a probable persuasive effect on the jury.

II. Impeachment Evidence

Boyd next argues that the trial court erred by admitting evidence of a past burglary conviction as impeachment evidence. We review the trial court’s decision to admit or exclude evidence for an abuse of discretion. Whiteside v. State, 853 N.E.2d 1021, 1025 (Ind. Ct. App. 2006). Errors in the admission or exclusion of evidence are considered harmless unless they affect the substantial rights of a party. Id.

Although Boyd filed a pretrial motion in limine seeking to prohibit the introduction of this evidence—which the trial court denied—he failed to object during trial when the State asked questions regarding the conviction. Thus, he has waived the issue. See Raess v. Doescher, 883 N.E.2d 790, 796-97 (Ind. 2008) (holding that “[o]nly trial objections, not motions in limine, are effective to preserve claims of error for appellate review”). To prove that he is entitled to relief on this basis, therefore, Boyd must establish that any error was fundamental. Under this standard, we may reverse only

“when there has been a ‘blatant violation of basic principles’ that denies a defendant ‘fundamental due process.’” Goodwin v. State, 783 N.E.2d 686, 687 (Ind. 2003) (quoting Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987)).

Indiana Rule of Evidence 609 provides, in relevant part, as follows:

- (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime . . . shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.
- (b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or, if the conviction resulted in confinement of the witness then the date of the release of the witness from the confinement unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. . . .

(Emphases added). Here, it is undisputed that Boyd was convicted of burglary in December 1996. He was sentenced to ten years imprisonment, with four years suspended and six months of probation. Boyd testified in the instant trial on October 16, 2009, which is more than ten years after he was convicted of burglary. See Whiteside, 853 N.E.2d at 1028 (holding that the termination point of the ten-year period in Rule 609(b) is the date on which the witness testifies).

The State, however, points out that Rule 609(b) provides that where, as here, the conviction resulted in confinement, then the starting point of the ten-year period is the date of the release from confinement rather than the date of the conviction. At trial, the

prosecutor noted that Boyd was sentenced to ten years with four years suspended, arguing that if we assume that Boyd

had good time credit and he served that time under, so [the confinement] would have been three years generally speaking which would put his release date from prison approximately 12-16-1999, so therefore we are within the ten year limit of when he was released, just barely, but we are within that ten year limitation.

Tr. p. 138.

Boyd argues that the State has failed to offer any actual evidence of the date of his release from confinement and that a mere assumption that the release date must have been around December 16, 1999, is insufficient. We will assume solely for argument's sake that Boyd is correct. We also note that the State concedes that the trial court failed to weigh the probative value of the conviction with its prejudicial effect, which is required for the admission of evidence of a prior conviction that does not fall within the ten-year limit provided by Rule 609.

Even if we conclude that the trial court erred by permitting this line of questioning, we do not find this error to be fundamental. The sole evidence of the past burglary conviction occurred in the midst of the State's cross-examination of Boyd:

STATE: Mr. Boyd, back in 1996, you were convicted of burglary in this Court is that correct?

BOYD: Yes, sir.

STATE: A [class] B felony burglary?

BOYD: Yes.

Tr. p. 142. The State then moved on to other lines of questioning. Thus, the State's questioning regarding the prior conviction was very brief. Furthermore, the lack of

similarity between the prior burglary conviction and the present child molesting charge decreases the possibility that the jurors impermissibly inferred Boyd's guilt based on the past conviction. Given the brevity of the State's questioning regarding the past conviction, we cannot conclude that the admission of this evidence constituted a blatant violation of basic and elementary principles that prevented Boyd from receiving a fair trial. Thus, any error was not fundamental and we decline to reverse on this basis.

III. Sentencing

A. Blakely Violation

Boyd next argues that the trial court's sentencing order ran afoul of the rule announced in Blakely v. Washington, 542 U.S. 296 (2004), because it found an aggravator without the assistance of a jury. Although the Indiana General Assembly has since amended the criminal sentencing statutes to an advisory sentencing scheme, the older, presumptive scheme applies to Boyd because he committed the crime in 2001, when the older sentencing scheme was in place. Gutermuth v. State, 868 N.E.2d 427, 432 n.4 (Ind. 2007). Thus, Boyd is correct that Blakely applies, so any aggravating factors should have been found by a jury rather than the trial court. Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005).

That said, Boyd did not raise a contemporaneous objection on these grounds. Given that he was sentenced in December 2009, years after Blakely and Smylie were

decided, he should have raised this objection and has waived the argument as the result of his failure to do so.³

B. Sentencing Statement

Under the presumptive sentencing scheme, sentencing decisions are left to the trial court's sound discretion and will be reversed only upon a showing of manifest abuse of that discretion. Klein v. State, 698 N.E.2d 296, 300 (Ind. 1998). The trial court must balance the aggravators and mitigators and provide a statement of its reasons for selecting the sentence imposed. Id. A trial court is not obligated to accord the same weight to a factor that the defendant considers mitigating or to find mitigators simply because they are urged by the defendant. Id. Here, the trial court sentenced Boyd to fifty years imprisonment, twenty years above the presumptive thirty-year term for a class A felony. Ind. Code § 35-50-2-4.

In imposing Boyd's sentence, the trial court relied primarily on Boyd's criminal history as an aggravator:

I find [an] aggravating factor of your previous criminal record . . . the Defendant has a significant prior legal history which consists of 8 misdemeanors and 2 felony convictions. He has had a term of probation revoked on 3 occasions and has served time at the Indiana Department of Correction[] on at least 2 occasions. His driver's license was suspended and he is considered a habitual traffic offender. . . . Based upon that significant aggravating factor and the seriousness of this offense and the harm done to the victim in this case it's going to be the decision and judgment of the Court Mr. Boyd that you be sentenced to the Indiana Department of

³ We express no opinion about the performance of Boyd's counsel in this regard, but note that even in the absence of an objection, the most significant aggravator—Boyd's criminal history—remains and warrants an enhanced sentence.

Correction[] for a period of 30 years. I'm going to find because of that aggravating circumstance that you should have an additional 20 years for a total of 50 years at the Indiana Department of Correction[], no time suspended.

Sent. Tr. p. 6-7. The State concedes that if the trial court relied upon the seriousness of the offense and the harm done to the victim as aggravators, it ran afoul of the Blakely rules.

It is evident, however, that the trial court relied primarily on Boyd's extensive criminal history as the most significant—if not the only—aggravating factor herein. It is well recognized that a defendant's criminal history is explicitly excluded from the Blakely rule and need not be evaluated by a jury to constitute a proper aggravator. Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006). Thus, the trial court did not err by finding Boyd's criminal history to be an aggravator.

Boyd argues that the trial court abused its discretion by failing to find the facts that he obtained his GED and that he had been gainfully employed for almost ten years as mitigating circumstances. It is within the trial court's discretion, however, to determine whether facts such as these are significant mitigating circumstances. See Taylor v. State, 840 N.E.2d 324, 340 (Ind. 2006) (finding that the defendant's act of obtaining his GED as a mitigating circumstance was "sufficiently weak that there was no error in the trial court's failure to consider" it); Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003) (holding that "[m]any people are gainfully employed such that this would not require the trial court to note it as a mitigating factor"). Thus, we decline to find that the trial court abused its discretion by failing to find these proffered mitigators. Normally,

under the presumptive sentencing scheme, we would consider whether the trial court properly weighed the remaining aggravator—Boyd’s criminal history—against the lack of mitigating circumstances. Inasmuch as Boyd has also raised an argument pursuant to Indiana Appellate Rule 7(B), however, we will turn to that provision and analyze the sentence thereunder.

C. Appropriateness

Finally, Boyd contends that the fifty-year sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

As for the nature of Boyd’s offense, he performed oral sex and forced sexual intercourse on a nine-year-old girl. He threatened her that if she told anyone, he would do it again and also told her that she would be responsible for him going to jail. He ignored her cries of pain and continued the act of intercourse until he ejaculated. The nature of this offense is undeniably heinous. So, however, is the nature of every offense involving an adult forcing sexual intercourse on a child. Without meaning in any way to minimize the heinousness of the offense or its effects on S.M., we observe that the nature of this offense is not drastically worse than a “typical” child molesting offense.

As for Boyd’s character, he has an extensive criminal history. As a juvenile, he was placed on a program of informal adjustment for felony theft. As an adult, he has

been convicted of two felonies—class B burglary and class D felony possession of marijuana—and nine misdemeanors—two counts of conversion, operating a vehicle with a schedule I or II controlled substance, operating while intoxicated, possession of marijuana, driving while suspended, possession of marijuana, domestic battery, and invasion of privacy. He has also violated probation on three occasions. Although it is clear that Boyd has little respect for the rule of law and we agree with the trial court that significant weight should be given to his criminal history, we note that the majority of his convictions are misdemeanors and that none of his prior convictions are in any way related in nature to the instant offense. Additionally, we note that although Boyd did not finish high school, he earned his GED. Furthermore, he has been steadily employed for nearly ten years.

Under these circumstances, we cannot conclude that Boyd is the worst of offenders or that his crime was the worst of offenses. See Buchanan v. State, 767 N.E.2d 967, 974 (Ind. 2002) (holding that in general, the maximum possible sentences should be reserved for the worst offenders and offenses). We agree with the trial court, however, that some enhancement is warranted based upon Boyd's criminal history. Starting with the presumptive thirty-year term, we find that an additional ten years is warranted. Therefore, we direct the trial court to revise Boyd's sentence to an executed term of forty years imprisonment.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to revise Boyd's sentence to forty years imprisonment.

DARDEN, J., and CRONE, J., concur.