

STATEMENT OF THE CASE

Stephen R. Thomas appeals his conviction, after a jury trial, of battery resulting in serious bodily injury, a class C felony, and the sentence imposed thereon.

We affirm.

ISSUES

1. Whether the prosecutor committed misconduct that constitutes fundamental error and requires reversal of Thomas' conviction.
2. Whether there was juror misconduct that constitutes fundamental error and requires reversal of the conviction.
3. Whether the sentence is inappropriate.

FACTS

In 2006, Thomas, Dave Engle, and Doug Jackson each owned property in a rural area approximately twenty-five minutes by curvy, narrow country roads from Madison. A number of incidents had given rise to hard feelings between Jackson and the other men. In the late afternoon of September 30, 2006, Jackson was finishing work on a project in Madison when his wife, Linda, stopped by. He indicated that he would be leaving shortly and that he would buy gas before driving home; she indicated her intention to buy groceries and then drive home.

When Jackson saw Engle's truck at the gas station, he parked at the pump farthest away. As Jackson was pumping gas, Thomas emerged from inside the station and yelled, "Dickhead. Hey dickhead. Your name is dickhead." (Tr. 349). Thomas then walked to within five feet of Jackson, spat at him, and said, "I hear you're leaving." (Tr. 351). Jackson asked him what he meant, and Thomas said, "You're going to move." *Id.*

Jackson told him he was not going anywhere. Thomas walked away and got in Engle's truck. Jackson went inside the station and paid for his gas. When he came out, Engle's truck was gone.

Jackson started driving toward his home. Linda called and asked whether he had seen Engle's truck at the gas station; he said that he had, and that there had been a confrontation. He told his wife that he was on the way home, and she said that she would be following shortly.

Approximately fifteen minutes outside of Madison, Jackson saw Engle's truck ahead of him on the roadway, and he purposefully stayed quite a distance behind. At the intersection with the gravel roadway on which all three men lived, Engle's truck stopped. Jackson stopped a short distance behind. After several minutes, Engle's truck began moving on the roadway toward their respective properties. A minute or so later, when Engle's truck was out of sight, Jackson drove down the same roadway. When Jackson next saw the truck, it had slowed at a narrow rise of roadway, when suddenly Engle "locked his brakes and . . . slid the vehicle sideways and blocked" the left side of the roadway. Jackson stopped in the middle of the roadway, waited momentarily, and then decided to try to drive his truck past Engle's on the right side of the roadway.

As Jackson pulled his truck off the right edge of the roadway, he saw Thomas emerge from the passenger side of Engle's truck with "his hand behind him as he got out." (Tr. 386). As Thomas moved "toward [his]'s vehicle," Jackson instinctively turned the wheel to the right – dropping his wheel into the ditch. *Id.* When Jackson turned to look toward the ditch, Thomas opened Jackson's driver's-side door and struck him on the

side of his face. Thomas continued to pummel Jackson in the head and face, and he lost consciousness.

When Jackson regained consciousness, he was alone. He realized that he was badly injured and needed medical attention, and managed to get to the closest residence – that of Kevin O’Connor. O’Connor called the police, at Jackson’s request, and had a visiting friend stop Linda as she drove by. Linda spoke with the sheriff’s department by telephone, and arranged to transport Jackson to the Madison hospital and meet officers there.

At the Madison hospital, the Jacksons were informed that the serious nature of Jackson’s injuries required treatment at a Louisville hospital. Linda drove Jackson to the Louisville hospital, where his injuries were initially treated, and he was referred to a specialist. According to Dr. William Nunery, an ocular facial plastic surgeon, Jackson had sustained a left tripod (cheek bone) fracture, left orbital fractures, and nasal fractures, injuries that “would have caused a collapsed cheek, . . . a facial deformity” and “would also have caused double vision” without surgical repair. (Tr. 311). The injury resulted in such swelling that surgery to repair the damage could not be performed for a week. In the surgery, Dr. Nunery placed five metal plates, more than thirty screws, and a synthetic eye socket in Jackson’s face. Jackson’s vision was permanently impaired as a result of his injuries.¹

¹ The Statement of Facts in Thomas’ brief relies solely on the probable cause affidavit, which was not entered into evidence. We admonish counsel that the Statement of Facts should be stated in accordance with the standard of review appropriate to the judgment being appealed. Ind. Appellate Rule 46(A)(6)(b). Thomas appeals his conviction; therefore, the Statement of Facts should reflect those facts *heard by the*

On October 2, 2006, the State charged Thomas with battery resulting in serious bodily injury, a class C felony.² At his jury trial on August 12 – 15, 2008, he asserted self-defense. The jury found Thomas guilty as charged.

The sentencing hearing was held on November 14, 2008. Therein, it was disclosed that two of the trial witnesses -- Engle's wife, Jean, and Jackson's wife, Linda - - worked at the same company as juror George Jordan. The trial court determined that there were no mitigating factors, and it found three aggravating factors: Thomas' criminal history; that the crime followed a pattern of intimidation and harassment by Thomas; and that "past efforts by [Thomas] to treat his anger and alcohol related problems short of incarceration ha[d] not been successful." (App. 266). It sentenced Thomas to the statutory maximum eight-year term, all executed. *See* Ind. Code § 35-50-2-6.

DECISION

1. Prosecutorial Misconduct

When we consider a claim of prosecutorial misconduct, we first consider whether the prosecutor engaged in misconduct. *Hand v. State*, 863 N.E.2d 386, 393 (Ind. Ct. App. 2007) (citing *Williams v. State*, 724 N.E.2d 1070, 1080 (Ind. 2000), *cert. denied* 531 U.S. 1128). We then consider whether the alleged misconduct placed Thomas in a position of grave peril to which he should not have been subjected. *Id.* at 394. In judging the

jury in the light most favorable to the conviction. *See, e.g., Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007).

² The State's October 16, 2007, motion for joinder, states that Engle was also charged on October 2, 2006 – with one count of aiding battery, as a class C offense. Engle opposed the motion, and on November 21, 2007, the trial court denied it.

propriety of the prosecutor's remarks, we consider the statement in the context of the argument as a whole. *Id.*

When an improper argument is alleged to have been made, however, the correct procedure is to request the trial court to admonish the jury. *Id.* (citing *Dumas v. State*, 803 N.E.2d 1113, 1117 (Ind. 2004)). If the party is not satisfied with the admonishment, then he or she should move for mistrial. *Id.* Failure to move for mistrial results in waiver. *Id.*

Where a claim of prosecutorial misconduct has not been properly preserved, our standard of review is different than that of a properly preserved claim. *Id.* Specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. *Id.* (citing *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2004)). Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of issue. *Id.* It 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.” *Id.* (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)).

Thomas “argues that there were two instances of prosecutorial misconduct” -- “improper comments regarding the veracity” of several witnesses, and “improper[] comments on Thomas’ failure to respond to a civil complaint involving these same facts[,] resulting in a *Doyle* violation.” Thomas’ Br. at 8. Thomas neither requested an admonishment nor moved for a mistrial as to either instance. Hence, he “must show that

any misconduct resulted in fundamental error” in order to prevail on appeal. *Hand*, 863 N.E.2d at 394.

Thomas argues that the prosecutor committed misconduct when he made the following statement in his initial closing argument:

If you choose to believe Engle,³ Thomas willingly participated. Thomas did not have a reasonable fear of death or great bodily harm, and Thomas used a degree of force that was excessive. That’s even if you want to believe what Mr. Engle said. Well the fact is that Mr. Engle is not credible. He is untruthful. He was not honest with you under oath in front of this court and in front of you.

(Tr. 752). The cited statement follow a series of references by the prosecutor that began with the phrase, “if you choose to believe, Engle . . . ,” and then reviewed various evidence supporting an inference contrary to Engle’s testimony in that regard. (Tr. 744, 747, 748, 750, 752). Therefore, the statement quoted by Thomas -- which on its face may appear to improperly impugn Engle’s credibility -- simply summarized the numerous arguments already made, arguments that properly referenced the evidence. *See Warren v. State*, 725 N.E.2d 828, 834 (Ind. 2000) (prosecutor’s permissible closing argument includes “stat[ing] and discuss[ing] the evidence and reasonable inferences derivable therefrom”).

³ The jury was advised that Engle had also been charged with battery, as a class C felony, and that he had been granted immunity for his testimony.

According to Engle’s testimony, Jackson had tailgated his truck throughout the drive that afternoon; Engle had simply pulled to the side to allow Jackson to pass; Jackson had stopped his truck alongside Engle’s, stepped from it, and attempted to open the passenger-side door of Engle’s truck, a door that did not open from the outside and the window of which was also inoperably closed; Jackson opened the door, and “shoved on” Thomas; Thomas stepped out of the truck, and Jackson “swung on him.” (Tr. 496, 497); nevertheless, because of his position, Engle did not observe the ensuing fight but merely “heard” punches exchanged “like two people fighting.” (Tr. 496, 497, 500). Jackson, with no injuries that Engle could see, then “got in his truck and started backing up,” at which time Thomas got back in Engle’s truck (with blood on his hand), and Engle drove away. (Tr. 500).

Thomas also asserts as improper the prosecutor's statement that "Kevin O'Connor, one of the State's witnesses[,] was truthful and that the alleged victim, Doug Jackson[,] was being truthful." Thomas' Br. at 10. He does not, however, quote the statements in this regard. The prosecutor argued that the juror should "[t]hink about Mr. O'Connor's testimony, . . . the reasonableness of Doug Jackson's testimony considering other evidence"; asked whether jurors "hear[d] anything to suggest that Kevin O'Connor is not credible" or was biased; and then asserted that the evidence showed O'Connor was "being truthful" about what Jackson "told him as he stumbled up to his house." (Tr. 762, 763). The prosecutor next stated that "evidence indicates [Jackson] is truthful," and proceeded to specify such evidence. (Tr. 763). Again, such is proper closing argument. *See Warren*, 725 N.E.2d at 834.

Further, in his ultimate closing argument, the prosecutor reminded the jury that his statements and those of defense counsel were "not evidence, . . . not testimony under oath," and that the jurors' decision must be based "on the evidence." (Tr. 813). In addition, in both preliminary and final instructions, the trial court instructed the jury that they were "the exclusive judges of the evidence, the credibility of the witnesses, and of the weight to be given to the testimony of each of them" and that "final arguments are not evidence." (App. 203, 209; 234, 236). We presume that the jury follows the trial court's instructions. *Scalissi v. State*, 759 N.E.2d 618, 623 (Ind. 2001). We find no fundamental error in the prosecutor's comments concerning witness credibility.

Thomas also argues that the prosecutor committed misconduct in the form of a *Doyle* violation, constituting fundamental error. "In *Doyle* [*v. Ohio*, 426 U.S. 610,

(1976)], the United States Supreme Court held that using a defendant's post-arrest silence to impeach an exculpatory story told for the first time at trial violated the defendant's due process rights." *Wentz v. State*, 766 N.E.2d 351, 362 (Ind. 2002).

During cross-examination of Jackson, Thomas' counsel asked whether he had "a pretty big interest in this case" in the form of "a lawsuit," and proceeded to confirm that Jackson had filed a civil action against Thomas and Engle, and that he had received a default judgment for more than \$1 million in July of 2008. On redirect, the State offered the default judgment, which the trial court admitted into evidence. The State had Jackson read the contents of the judgment, and it asked Jackson whether there had been "any allegations of self-defense made in the civil case," to which he answered "no allegations from the other side whatsoever . . . they didn't" respond. (Tr. 446-447).

We note that Thomas' counsel opened the door and elicited the matter of Jackson's civil action against him. In *Wentz*, our Supreme Court stated that although "evidence of a defendant's post-Miranda silence is generally not admissible, the defendant may open the door to admission." 766 N.E.2d at 362. Arguably, Thomas did so when he raised the civil lawsuit matter. Further, in closing argument, Thomas' counsel referred to Jackson's "million dollar lawsuit" and asserted that Jackson's desire "to be a big millionaire" rendered him "biased" and gave him "a motive in this case." (Tr. 790).

Thomas acknowledges that there is no authority for the proposition that a default judgment in a civil trial is inadmissible to controvert his defense in a criminal trial. However, he asks that we "extend" *Doyle* to prohibit a prosecutor from "mak[ing] a

statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence." Reply at 5-6. We find no such statement by the prosecutor here. Thomas opened the door and elicited the fact of a civil lawsuit and the resulting default judgment in an amount of more than \$1 million. The State did not mention Thomas' failure to respond in the civil lawsuit during its closing argument; however, Thomas vigorously argued it. We do not find that these circumstances made a fair trial impossible or constituted clearly blatant violations of basic and elementary principles of due process, so as to present an undeniable and substantial potential for harm to Thomas. *Hand*, 863 N.E.2d at 393. Accordingly, we find no fundamental error here.

2. Juror Misconduct

We have held that it "is misconduct for a juror to make false statements in response to questions on *voir dire* examination." *Dickenson v. State*, 732 N.E.2d 238, 241 (Ind. Ct. App. 2000), *trans. denied*. Generally, proof that a juror "was biased or lied on *voir dire* entitles the defendant to a new trial." *Id.* (citing *Lopez v. State*, 527 N.E.2d 1119, 1130 (Ind. 1988)).

Unlike in *Dickenson*, however, there was no post-verdict motion to the trial court by Thomas for a hearing on juror misconduct. Nor did he file a motion to correct error in this regard. *See Roberts v. State*, 894 N.E.2d 1018 (Ind. Ct. App. 2008), *trans. denied*. Either motion would have required Thomas to "present some specific, substantial evidence showing a juror was possibly biased." *Dickenson*, 732 N.E.2d at 238; *Roberts*, 894 N.E.2d at 1022. Further, in order to warrant a new trial, there must be a showing that

the juror misconduct “was gross, and that it probably harmed the defendant.” *Id.* The issue of juror misconduct is a matter within the trial court’s discretion. *Id.*

At the sentencing hearing, Linda testified that she had been an employee of Grote Industries for 32 years; that Jean Engle had worked there approximately ten years; and that she had never heard of a Grote employee named George Jordan. She acknowledged that there was a Grote employee known to her as Allen Jordan, and that he had been a juror. Linda testified that she did not know Jordan “personally” but simply “kn[e]w who he” was; she had never been under Jordan’s supervision or worked in the same department as him, but Jean had been Jordan’s clerk at one time. (Tr. 1087). She estimated that “600 people . . . work at Grote.” (Tr. 1091).

During *voir dire*, potential jurors were asked if they knew various people, including whether any had “heard of a person named Linda Jackson.” (Tr. 13). No potential jurors indicated that they knew Linda. There was no inquiry about whether potential jurors knew Jean Engle.

When the first twelve names were called as potential jurors, the third name was “George Jordan.” (Tr. 7). When asked his occupation on *voir dire*, he answered that he “work[ed] at a factory,” but there was no follow-up asking which factory. (Tr. 30). After these first twelve persons were questioned extensively by both the prosecutor and defense counsel, four were retained – including Jordan.

The record establishes that in a workplace with approximately 600 employees, Jordan had never worked with Linda. There is no evidence that he knew Linda, and no evidence that he remembered Jean. As the State’s brief correctly notes, the record does

not indicate how many years had passed since Jean was his clerk; and there is no evidence as to whether that employment relationship necessarily included frequent personal interaction. Essentially, the record is entirely devoid of “specific, substantial evidence showing” that juror Jordan “was possibly biased,” and it fails to show “gross” juror misconduct “that . . . probably harmed the defendant.” *Id.* *Dickenson*, 732 N.E.2d at 238; *Roberts*, 894 N.E.2d 1022.

Thomas argues that “he never had an opportunity to inquire of the juror regarding” Linda and Jean, “his bias for or against these witnesses or his relationship with them and ultimately to exert a challenge if he so chose.” Thomas’ Br. at 17. As already noted, however, this lack of opportunity is a result of Thomas’ failure to engage in extensive *voir dire*, or seek a hearing in this regard, or file a motion to correct error; and he acknowledges that this failure leads to the requirement that he show fundamental error. The record before us does not establish juror misconduct that made a fair trial impossible or constituted clearly blatant violations of basic and elementary principles of due process, so as to present an undeniable and substantial potential for harm to Thomas. *Hand*, 863 N.E.2d at 393. Accordingly, we find no fundamental error here.

3. Sentence

The Indiana Constitution authorizes independent appellate review and revision of a sentence, authority implemented through Appellate Rule 7(B). *Anglemyer v. State*, 868 N.E.2d, 482, 491, *clarified on reh’g on other grounds*, 875 N.E.2d 218 (Ind. 2007). The Rule provides that a court “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is

inappropriate in light of the nature of the offense and the character of the offender.” *Id.* (quoting Ind. Appellate Rule 7(B)). “The burden is on the defendant to persuade” the appellate court that his or her sentence is inappropriate. *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006)).

According to the sentencing order, the trial court found the following aggravating factors:

1. Mr. Thomas has a history of criminal conduct beginning in 1990 with Driving While Intoxicated. In 2000 he had another Operating While Intoxicated conviction which also included Resisting Law Enforcement. In 2004 he had a conviction for Battery Resulting in Bodily Injury. The same year he pled to the crime of Unlawful Possession of White Tail Deer and Wanton Waste. In 2005 he pled guilty to Disorderly Conduct. There are pending cases from 2007 of Domestic Battery and from 2008 of Intimidation and Battery. One of these pending charges involved his own 14 year old daughter.
2. The crime for which Mr. Thomas was found guilty was preceded by a pattern of harassment and intimidation of the victim and of other persons in the neighborhood where he owned property here in rural Jefferson County. As a result of the violence in this case, Mr. Jackson was knocked unconscious, suffered through serious medical procedures, and has permanent loss of some of his vision.
3. Past efforts by the defendant to treat his anger and alcohol related problems short of incarceration have not been successful.

(App. 266).

Although Thomas asserts that “the sentence ordered by the trial court was inappropriate in light of the nature of the offense and the character of the offender,” Thomas’ Br. at 24, his first arguments do not focus on that standard. He argues that the trial court improperly found “the victim’s injuries in this case” to be an aggravator inasmuch as such injury is inherent in and “a necessary element” of the offense of battery

causing bodily injury. *Id.* at 21. First, we cannot accept his premise that the bodily injury suffered by Jackson is not “any worse” than that contemplated by the definition of the crime. *Id.* at 20. Further, as indicated above, the trial court did not specify that it found Jackson’s injuries to be an aggravator as such but that the instant injuries followed Thomas’ pattern of harassment and intimidation, *i.e.*, that the attack was not an isolated incident but rather the most violent one of many.

Thomas next argues that his “prior criminal history should have held less weight than what it appears it was afforded.” *Id.* Thus, Thomas challenges the weight given by the trial court to his prior criminal history. However, because the trial court has no obligation “to ‘weigh’ aggravating and mitigating factors against each other when imposing sentence,” such a challenge cannot succeed. *Anglemyer*, 868 N.E.2d at 491. (2007).

Thomas also asserts that he had “only had misdemeanor convictions at the time of his sentencing.” Thomas’ Br. at 22. Yet the trial court’s recitation of his criminal history reflects a progression from driving-while-intoxicated, to that offense and resisting law enforcement, to battery resulting in bodily injury; and that these offenses were followed by the instant charge, which was then followed by subsequent charges of additional crimes of violence occurring after September 30, 2006. This criminal history reflects an escalation of Thomas’ willingness to engage in behavior that was not only unlawful but that was increasingly violent. The trial court’s finding that Thomas’ criminal history was an aggravating factor is well-supported by the record. *Anglemyer*, 868 N.E.2d at 490 (no abuse of discretion when record supports aggravating factor found by trial court).

Thomas also argues that the trial court “did not properly consider some of the mitigators that were presented,” such as that Jackson “provoked” the attack. Thomas’ Br. at 22. The trial court expressly found “no evidence that Mr. Jackson’s behavior in [sic] any could be used as an excuse for such a brutal attack.” (App. 266). The record supports the trial court’s finding. *Anglemyer*, 868 N.E.2d at 490.

As to the character of the offender, the record reflects that Thomas’ disregard for the requirements of the law continued over a period of years and that his actions became progressively more violent. Moreover, while at liberty during the pendency of the instant offense, Thomas was charged with additional violent criminal offenses – one of which alleged his battery of his own motherless fourteen-year-old daughter.

As to the nature of the offense, the record establishes that after Thomas had engaged in a pattern of harassment and intimidation of Jackson and other residents of the rural community, he escalated his aggression to physical violence. Without provocation, Thomas attacked Jackson in a place and position where Jackson was essentially helpless to defend himself and violently struck him with such force that the surgeon described the injuries as “more typical . . . of automobile injuries in which the face strikes the dashboard”. (Tr. 319). Further, Thomas struck Jackson repeatedly, rendering him unconscious, and then left him alone and bleeding in a truck with its wheel stuck in the ditch off the side of a country road in an isolated rural area.

Thomas has failed to persuade us that based upon his character and the nature of the offense, the sentence ordered is inappropriate.

Affirmed.

ROBB, J., and MATHIAS, J., concur.