

Case Summary

Ryan Grosswiler appeals his convictions for three counts of Class C felony child molesting and one count of Class A misdemeanor invasion of privacy. We affirm.

Issues

The issues before us are:

- I. whether Grosswiler received ineffective assistance of trial counsel;
- II. whether the prosecutor committed misconduct during trial; and
- III. whether the trial court properly denied Grosswiler's motion for judgment on the evidence.

Facts

The evidence most favorable to the convictions reveals that Grosswiler married Angela Caudill in August 2006. At that time, the couple lived in a house at 1604 First Street in Marion ("First Street residence"). Caudill had children from another relationship living with her, including M.W., who was born in March 1995. In October 2007, Grosswiler, Caudill, and the children moved to a different house in Marion located at 1502 West Factory Street in Marion ("Factory Street residence").

While still residing at the First Street residence, Grosswiler began going into M.W.'s bedroom at night. Initially, Grosswiler would rub her back and shoulders as she lay in bed. Later, however, he began to fondle her breasts; still later, he also began fondling her vagina. These fondling incidents occurred frequently, up to three or four

times a week, and continued after the move to the Factory Street residence. M.W. was afraid to tell Caudill what was happening.

At one point shortly after moving to the Factory Street residence, M.W. noticed Grosswiler watching her bathe through a crack between the bathroom door and wall. M.W. did tell Caudill about this incident shortly after it happened, and Grosswiler claimed that it was “an accident.” Tr. p. 77. In March 2008, Grosswiler admitted to Caudill that he had gone into M.W.’s room at night and looked at her. At this time, Caudill was troubled by Grosswiler’s behavior but was hopeful that they could reconcile if he underwent counseling.

Later, M.W. awoke at night and saw Grosswiler rubbing the back of one of her younger sisters who shared a bedroom with M.W. This prompted M.W. to write a note to Caudill describing in some additional detail what Grosswiler had been doing to her, including that “he’s put his hand inside my shirt before, if you know what I mean.” Ex. 1. After M.W. returned from spring break visitation with her father in March 2009, she gave Caudill the note. Caudill gave the note to the local child protection services office, who in turn notified the police. Grosswiler later wrote a note addressed to M.W., saying “I’m sorry for what I put you through.” Ex. 2. Grosswiler also confessed to Caudill “that he had done things to her, that he had touched her,” and also “that it had gone on for two years” Tr. pp. 84, 98.

Caudill kicked Grosswiler out of the Factory Street residence, and initiated divorce proceedings against him in April 2009. On June 4, 2009, Caudill obtained a protective

order against Grosswiler, barring him from contact with Caudill and M.W. and also directing him to stay away from M.W.'s bus stop and the home of Caudill's sister, who often babysat Caudill's children. On June 10, 2009, a sheriff's deputy personally served a copy of the protective order on Grosswiler. During the fall of 2009, Grosswiler on one occasion walked across a parking lot where M.W.'s bus stop was located while she was there waiting for the bus, and on another occasion drove past Caudill's sister's house while M.W. was there.

The State charged Grosswiler with three counts of Class C felony child molesting and one count of Class A misdemeanor invasion of privacy. The molesting charges alleged that the incidents occurred "on or about 2007 through March, 2009" App. p. 90. A jury trial was held on January 11-12, 2011. Grosswiler moved for judgment on the evidence with respect to the invasion of privacy count, which the trial court denied. The jury found Grosswiler guilty as charged, and the trial court convicted and sentenced him accordingly. Grosswiler now appeals.

Analysis

I. Ineffective Assistance of Counsel

Grosswiler first claims that he received ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that his or her counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)), cert.

denied. An attorney's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

For the most part, as the State notes, Grosswiler takes a "shotgun" approach to challenging counsel's performance, noting numerous instances in which counsel allegedly should have lodged an objection of some kind to questions by the prosecutor or testimony by the witnesses, but failing to develop cogent argument as to what prejudice resulted from counsel's performance. For instance, Grosswiler repeatedly claims that the prosecutor improperly asked leading questions of witnesses during direct examination, in violation of Indiana Evidence Rule 611(c). He fails to note, however, that leading questions are not strictly prohibited and may be allowed, pursuant to the trial court's discretion. See Thompson v. State, 674 N.E.2d 1307, 1309 (Ind. 1996). Also, trial counsel's lodging of an objection to an allegedly leading question arguably would merely lead to a re-phrasing of the question and solicitation of the same answer from the witness, thereby potentially emphasizing the testimony to the jury, something trial counsel may

wish to avoid. Additionally, it is not reversible error for a prosecutor to ask a leading question that merely reiterates the substance of earlier testimony already given. See id. It appears that several of the allegedly leading questions that Grosswiler claims trial counsel should have objected to were of this kind. Grosswiler has not established that he received ineffective assistance of counsel with respect to failing to object to allegedly leading questions.

Similarly, Grosswiler claims that witnesses gave unresponsive answers on several occasions and trial counsel failed to move to have those answers stricken, thereby placing “evidentiary harpoons” before the jury. It is not enough to point to an unresponsive answer and claim that it was a “harpoon”; Grosswiler, for the most part, fails to explain what it was about the answers that made them unfairly prejudicial to him.

We will focus our attention upon a few substantive evidentiary issues raised by Grosswiler where the potential for prejudice is more apparent, if indeed the evidence was improperly admitted without objection by counsel. First, Grosswiler seems to challenge M.W.’s testimony relating numerous acts of molestation by fondling that occurred over a two-year period, claiming that such testimony, at least insofar as it related more than three acts of molestation, violated Indiana Evidence Rule 404(b). That rule precludes the admission of “Evidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith.” However, where a child testifies to repeated acts of molestation that fall within the time period alleged in a charging information for child molestation, such evidence is intrinsic to the charge and is not

evidence of “other crimes, wrongs, or acts” under Rule 404(b). See Marshall v. State, 893 N.E.2d 1170, 1175 (Ind. Ct. App. 2008). All three charging informations here listed an alleged commission date of 2007 (in its entirety) through March 2009. M.W.’s testimony relating numerous acts of molestation during that two-year time frame are direct evidence supporting the child molesting charges as filed by the State. See id. There was nothing objectionable in M.W.’s testimony on this point.

Grosswiler also contends it was improper, under Rule 404(b), for the State to mention during argument and for M.W. to testify that she saw Grosswiler rubbing her sister’s back one night. Such conduct, however, is not by itself criminal or otherwise “wrong.” Admittedly, in the context of this case, rubbing a young girl’s back could give rise to an inference of misconduct, but “evidence which creates a mere inference of prior bad conduct does not fall within the purview of Rule 404(b).” Rogers v. State, 897 N.E.2d 955, 960 n.3 (Ind. Ct. App. 2008) (holding that evidence defendant had previously been seen in possession of steak knife similar to that used to murder victim was not governed by Rule 404(b)), trans. denied. The trial court would not have erred in overruling a 404(b) objection to this evidence.

Grosswiler also claims that trial counsel should have objected to the introduction into evidence of the “apology” letter that he wrote to M.W. for an alleged lack of foundation. The letter was introduced through Caudill’s testimony, who testified that she had been with Grosswiler for several years and that she recognized the writing and signature on it as belonging to Grosswiler. This was a sufficient foundation to introduce

the letter pursuant to Indiana Evidence Rule 901(b)(2), which permits introduction of a handwritten document based upon “[n]onexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.” Counsel was not ineffective for failing to object on this basis.

Finally, we address Grosswiler’s contention that trial counsel should have objected to introduction of the letter M.W. gave to Caudill in March 2009 on hearsay grounds. Even if such an objection should have been made and would have been sustained, we cannot conclude that Grosswiler was so prejudiced by its introduction that he received ineffective assistance of counsel. The letter provides little detail as to Grosswiler’s conduct. It describes Grosswiler as “nasty,” tells of him rubbing the back of M.W.’s sister while she slept, and relates that he had done the same to M.W. before moving on to putting his hand inside her shirt and undoing her bra. Ex. 1. M.W.’s in-court testimony was much more detailed and descriptive as to what Grosswiler had done to her, and the letter does not relate any facts that M.W. did not relate directly during her testimony. Thus, the letter is merely cumulative of that testimony. As noted, there also was the properly-admitted “apology” letter by Grosswiler and Grosswiler’s statements to Caudill admitting that he had touched M.W. supporting his convictions. Under the circumstances, we cannot conclude there is a reasonable probability that the result of Grosswiler’s trial would have been different if M.W.’s letter had been excluded from

evidence and, therefore, he did not receive ineffective assistance of trial counsel. See French, 778 N.E.2d at 824.¹

II. Prosecutorial Misconduct

Next, Grosswiler contends the prosecutor committed numerous acts of misconduct. When reviewing a properly preserved claim of prosecutorial misconduct, a court must 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, 835 (Ind. 2006). Grosswiler, however, did not object to the cited instances of alleged misconduct and, therefore, did not properly preserve his claims. See Johnson v. State, 725 N.E.2d 864, 867 (Ind. 2000). If a claim of prosecutorial misconduct is not properly preserved, a defendant must establish not only the grounds for misconduct but also the additional grounds for fundamental error. Cooper, 854 N.E.2d at 835. Fundamental error is an error that is so egregious that it makes a fair trial impossible or constitutes a clearly blatant violation of basic and elementary principles of due process, thus presenting an undeniable and substantial potential for harm. Id.

Grosswiler wholly fails to make any argument that any of the alleged instances of prosecutorial misconduct constituted fundamental error. In the absence of any cogent

¹ We have not expressly mentioned every single instance of alleged ineffective assistance of counsel raised by Grosswiler. It suffices to say that any claims we have not expressly mentioned were not supported by cogent argument sufficiently explaining how counsel's performance prejudiced Grosswiler on those points. See Barrett v. State, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005) (citing Ind. Appellate Rule 46(A)(8)(a)), trans. denied.

argument that there were instances of prosecutorial misconduct that amounted to fundamental error, Grosswiler has waived his claims on this issue. See Barrett v. State, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005) (citing Ind. Appellate Rule 46(A)(8)(a)), trans. denied. Additionally, a number of Grosswiler's claims of prosecutorial misconduct overlap his claims of ineffective assistance of trial counsel, such as with respect to alleged improper introduction of evidence in violation of Evidence Rule 404(b) and the asking of leading questions. Having already concluded that such evidence was either not objectionable or not unfairly prejudicial to Grosswiler in the context of his ineffective assistance claims, we deem it unnecessary to readdress those claims in the context of alleged prosecutorial misconduct, particularly since Grosswiler would have to establish fundamental error. See Benefield v. State, 945 N.E.2d 791, 804-05 (Ind. Ct. App. 2011) (holding that claim of fundamental error requires a greater showing of prejudice than a claim of ineffective assistance of counsel and that rejection of ineffective assistance claim precludes a finding of fundamental error).

III. Judgment on the Evidence

Grosswiler's final argument is that the trial court erred in denying his motion for judgment on the evidence with respect to the invasion of privacy charge. To survive a motion for a directed verdict or judgment on the evidence, the State must present a prima facie case. State v. Boadi, 905 N.E.2d 1069, 1071 (Ind. Ct. App. 2009). In ruling on such a motion, the trial court cannot weigh the evidence or judge the credibility of the witnesses. Id. The motion may be granted only if there is a total absence of evidence

upon an essential issue, or there is no conflict in the evidence and it susceptible only of an inference in favor of the defendant. Id. On appeal, our review of the denial of a motion for directed verdict or judgment on the evidence is essentially the same as a standard claim of insufficient evidence. Edwards v. State, 862 N.E.2d 1254, 1262 (Ind. Ct. App. 2007), trans. denied. We will not reweigh evidence or judge witness credibility, and will consider only the evidence that supports the conviction and the reasonable inferences to be drawn therefrom in order to determine whether there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Id.

In order to convict Grosswiler of invasion of privacy as charged, the State had to establish that he knowingly or intentionally violated a protective order issued against him. See Ind. Code § 35-46-1-15.1(2). Grosswiler first asserts in his brief, “At no time [was] the service of the protective order upon Mr. Grosswiler established.” Appellant’s Br. p. 23. This is incorrect. The protective order was introduced into evidence. Although the order was issued ex parte, it bears a sheriff’s return indicating that the order was personally served upon Grosswiler by a sheriff’s deputy on June 10, 2009. Such service was also recorded on a chronological case summary, which was introduced into evidence at trial along with the protective order. The jury certainly could have found from this evidence that Grosswiler knew of the protective order and its requirements.

Grosswiler also asserts that the State failed to prove that he violated the order, claiming the testimony of M.W. and Caudill’s sister that he was near M.W.’s bus stop

and Caudill's sister's house was unclear as to the date of those incidents. Although neither M.W. nor Caudill's sister could provide a precise date on which the incidents occurred, M.W. plainly testified that both incidents occurred after June 2009. See Tr. p. 156. M.W. in particular indicated that the incident at Caudill's sister's house occurred during her fall break from school in the fall of 2009. There was sufficient evidence from which the jury reasonably could have concluded that Grosswiler knowingly violated the protective order against him; thus, the trial court properly denied Grosswiler's motion for judgment on the evidence.

Conclusion

Grosswiler has failed to establish that he received ineffective assistance of counsel or that the prosecutor committed misconduct. Additionally, the trial court properly denied his motion for judgment on the evidence with respect to the invasion of privacy charge. We affirm.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.