



## Case Summary and Issue

Following a jury trial, Kerwin Cole appeals his convictions for confinement and unlawful possession of a firearm by a serious violent felon, both Class B felonies, and intimidation, a Class D felony, contending that he was denied a fair trial due to allegedly improper comments by the State during closing argument. He also appeals his aggregate sentence of forty years, contending that the sentence is inappropriate.<sup>1</sup> Concluding that the State did not commit fundamental error during its closing argument and that Cole's sentence is not inappropriate, we affirm.

## Facts and Procedural History

Cole was arrested and charged with multiple crimes following an altercation with his girlfriend, Rashana McCloud, at her house. Cole arrived at McCloud's house in the early hours of the morning. McCloud's oldest daughter, Lakeidra, was awake and let him in. McCloud's two younger daughters were upstairs asleep. Cole went into McCloud's bedroom and asked her to make him something to eat. He left his jacket in the bedroom. While they were in the kitchen, Cole became upset and accused McCloud of seeing another man. He stated that he was going to get his gun and left the kitchen. He returned with a handgun, pointed it in McCloud's face, and threatened to shoot her if she did not tell him about the other man. Lakeidra was going up and down the stairs during this time, and she saw a gun on the kitchen table. McCloud told Lakeidra to go upstairs. Cole told McCloud to tell her

---

<sup>1</sup> In Cole v. State, No. 48A02-0603-CR-178 (Ind. Ct. App., Oct. 20, 2006), we dismissed Kerwin Cole's appeal as untimely. In an order dated March 9, 2007, our supreme court granted Cole's petition for transfer and remanded the case to us for consideration on the merits.

children to stay upstairs, so McCloud went upstairs, crying, and told Lakeidra that Cole had a gun and she should stay upstairs. McCloud returned to the kitchen, where Cole again threatened her with the gun. Lakeidra took the home's cordless phone and went outside to call the police. When the police arrived and entered the home, they heard a woman screaming for help. They found Cole and McCloud in McCloud's bedroom, with McCloud on the bed and Cole sitting on top of her. Cole complied when police told him to get on the floor and show his hands. A jacket was on the bed within an arm's length of where Cole had been. Police retrieved a handgun from the jacket pocket.

Prior to trial, Cole deposed McCloud. During the deposition, McCloud denied seeing a gun, denied that Cole had threatened her, and denied that she was afraid of him. At Cole's jury trial, however, she testified to the facts as set forth above, and stated that she had lied during her deposition. Lakeidra testified at trial that she had seen the gun on the kitchen table. One of McCloud's other daughters testified that she never saw a gun, and the other daughter testified that she saw the gun after the police arrived while they were videotaping the scene. Cole did not testify at his trial. During closing argument, the State summarized several key points of evidence and stated each time that the evidence was uncontradicted. The State also made some comments that were not supported by evidence adduced at trial. In the bifurcated proceeding, the jury found Cole guilty of intimidation, criminal confinement, and unlawful possession of a firearm by a serious violent felon.<sup>2</sup> On March 16, 2005, Cole was sentenced to forty years, with twenty-five years to be executed and fifteen years

---

<sup>2</sup> The jury found Cole not guilty of battery, a Class A misdemeanor.

suspended to probation. Cole appeals his convictions and his sentence. Additional facts will be provided as necessary.

## Discussion and Decision

### I. Prosecutorial Misconduct

Cole contends that he was denied a fair trial because, during closing argument, the State improperly commented on his failure to testify and improperly referred to facts not in evidence in order to bolster McCloud's credibility.

#### A. Standard of Review

Cole made no objection to the prosecutor's allegedly improper remarks during the trial.<sup>3</sup> Our supreme court has held that where there is no contemporaneous objection, the appellant must establish not only the grounds for prosecutorial misconduct but also the additional grounds for fundamental error. Booher v. State, 773 N.E.2d 814, 818 (Ind. 2002).

In reviewing a properly preserved claim of prosecutorial misconduct, we determine first whether the prosecutor engaged in misconduct and if so, whether the statements had a probable persuasive effect on the jury. Brown v. State, 799 N.E.2d 1064, 1066 (Ind. 2003). Fundamental error 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

---

<sup>3</sup> Cole begins his argument on this issue by stating that "[t]he area in which the defendant's counsel was ineffective was failing to object to the improper closing argument of the prosecutor." Brief of Appellant at 5. Cole does not thereafter advance an ineffective assistance of counsel argument, however, and we therefore will consider this issue only under the fundamental error standard.

and substantial potential for harm.” Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006) (quoting Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002)).

### B. Closing Argument

Generally, when a prosecutor makes a comment that the jury could reasonably interpret as an invitation to draw an adverse inference from the defendant’s decision not to testify, the defendant’s Fifth Amendment privilege against self-incrimination is violated. Evans v. State, 855 N.E.2d 378, 384 (Ind. Ct. App. 2006), trans. denied. We will not reverse, however, if the prosecutor’s comment, in its totality, focuses on evidence other than the defendant’s failure to testify. Id. at 385. The defendant bears the burden of proving that the State’s remarks implicated the exercise of his right to remain silent. Schmidt v. State, 816 N.E.2d 925, 944 (Ind. Ct. App. 2004), trans. denied.

Cole points to three instances in which the State summarized the evidence and then stated that the evidence was uncontradicted. See Transcript at 268, 270. Our supreme court has held that statements made by the State as to the uncontradicted nature of the State’s evidence do not violate a defendant’s Fifth Amendment rights. Martinez v. State, 549 N.E.2d 1026, 1028 (Ind. 1990). Cole contends that because he was the only person who could have contradicted the evidence, however, the State’s comments were improper. The State may not “comment on the uncontradicted nature of [its] case . . . where the defendant alone could have contradicted the government’s case . . . .” Haycraft v. State, 760 N.E.2d 203, 208 (Ind. Ct. App. 2001), trans. denied (quoting Rowley v. State, 259 Ind. 209, 213, 285 N.E.2d 646, 648 (1972)). Although Cole asserts he was the only person who could have contradicted the

State's evidence, this is not a case where there were but two people present during the events in question. In addition to McCloud, McCloud's three children and police officers were present at various points during the incident, making it possible that someone other than Cole could have contradicted the State's case. See id. (holding that where two other people were often present when defendant was molesting victim, someone other than the defendant could have contradicted the State's case and State's comment that the evidence was uncontradicted was not misconduct). In their totality, the State's comments summarized the evidence and were not a comment on Cole's failure to testify. Cole cannot meet his initial burden of proving that the State's remarks were improper.

Even if the State's remarks were improper, Cole cannot demonstrate that fundamental error occurred. The mere fact that an alleged error implicates constitutional issues does not establish fundamental error. Schmidt, 816 N.E.2d at 945. The fundamental error exception to the waiver rule is "extremely narrow." Cooper, 854 N.E.2d at 835. Under all of the circumstances, we cannot say this case falls within that extremely narrow exception. The State's remarks were not a direct reference to Cole's failure to testify and there were but three brief references during closing argument. Cf. Pennycuff v. State, 727 N.E.2d 723, 733 (Ind. Ct. App. 2000) (holding no fundamental error occurred despite repeated references to defendant's post-Miranda silence throughout trial), rev'd on other grounds, 745 N.E.2d 804 (Ind. 2001). Any error was not so prejudicial to Cole's rights as to make a fair trial impossible.

Cole also points to two instances during closing argument in which the State

referenced facts outside the evidence. First, the State commented that the prosecutor's office has a "no drop policy" for domestic incidents. Tr. at 365. The prosecutor also commented that he had "been on SWAT entries." Id. at 280. The State on appeal concedes that closing argument must be confined to comments based upon the evidence presented in the record. See Gasper v. State, 833 N.E.2d 1036, 1042-43 (Ind. Ct. App. 2005), trans. denied. Although the State's comments were improper, and the trial court would have been justified in striking the comments and admonishing the jury if Cole had objected, we are not persuaded that they constituted fundamental error.

Cole contends that the State's remark about its "no drop policy" somehow bolstered McCloud's credibility by diminishing the fact that she told a completely different story during her deposition than she did at the time of the incident or at trial. He also contends that the State's remark about SWAT entries undercut the differences in the testimony of the two officers who entered the house that night. In determining whether an alleged error rendered a judicial proceeding unfair, we must consider whether the resulting harm or potential for harm is substantial. Prewitt v. State, 761 N.E.2d 862, 871 (Ind. Ct. App. 2002). We look to the totality of the circumstances and decide whether the error had a substantial influence upon the outcome. Id. The fact that McCloud's deposition testimony differed greatly from her trial testimony was a well-developed point during the trial. The prosecutor's "no drop policy" for domestic offenses does not bolster McCloud's credibility more than her admission of lying during her deposition hurt it. As for the inconsistencies in police testimony, the testimony differed as to the specifics of what the officers heard and saw when

they entered the house, but their overall testimony was consistent and supported the verdicts. There was sufficient evidence from multiple witnesses to support Cole's convictions. The State's remarks, although improper, were not so prejudicial as to have a substantial influence upon the outcome of the trial.

## II. Inappropriate Sentence

Cole was sentenced to twenty years, with eight suspended, for his conviction of confinement, a Class B felony. The sentence for confinement was to be served consecutive to a twenty-year sentence, with seven years suspended, for unlawful possession of a firearm by a serious violent felon, a Class B felony. Cole was also sentenced to three years for his conviction of intimidation, a Class D felony. The sentence for intimidation was to be served concurrent with the other sentences, resulting in an aggregate sentence of forty years. The trial court cited Cole's criminal history and mentioned the circumstances of the crime in pronouncing sentence.

Cole does not challenge the trial court's finding of aggravators or mitigators; rather, he contends that his sentence is inappropriate because there is nothing egregious about his offense or his character. When reviewing a sentence imposed by the trial court, we "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." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).



When determining whether a sentence is inappropriate, we recognize that the presumptive sentence<sup>4</sup> “is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). The presumptive sentence for a Class B felony is ten years, with a maximum sentence of twenty years, and a minimum sentence of six years. See Ind. Code § 35-50-2-5 (now referring to the “advisory” sentence). The presumptive sentence for a Class D felony is one and one-half years, with a maximum sentence of three years, and a minimum sentence of six months. Ind. Code § 35-50-2-7(a). Here, the trial court gave Cole the maximum sentence for each of his convictions. The trial court also ordered the two B felony convictions to be served consecutively, but suspended eight years from one B felony sentence and seven years from the other B felony sentence. The length of the executed sentence Cole will actually serve is twenty-five years.

Regarding the nature of the offense, Cole contends that there “was nothing more egregious about [his] offenses . . . than other such offenses[.] The actions of a jealous boyfriend certainly do not fall in the category of the worst offense.” Brief of Appellant at 15. We cannot agree with Cole’s assessment. Not only did Cole confine his girlfriend in her own home and intimidate her while armed with a gun, but also, he did so knowing that her three young children were in the house. The oldest child, who was thirteen years old at the time, heard the arguing and saw the gun on her kitchen table. She had to call 911 and shepherd her younger sister out of the house while they waited for police to arrive.

---

<sup>4</sup> The presumptive sentencing scheme applies to Cole because he committed these offenses and was

Regarding the character of the offender, Cole argues that his criminal record “is rather limited as an adult, consisting of dealing in a look alike substance, an illegal possession consumption of alcohol and a robbery. He certainly does not fall in the category of worst offender.” Id. at 16. It is true that Cole has only three adult convictions on his record; however, Cole was just twenty-two years old at the time of this offense. Three adult convictions and a violation of probation is a fairly significant record to have accumulated at his age. In addition, Cole has a significant juvenile record that began when he was thirteen years old and includes adjudications for receiving stolen property, theft, false reporting, residential entry, and resisting arrest.

Considering the crimes Cole committed and his criminal history, we cannot say that his sentence is inappropriate in light of his offenses or his character.

### Conclusion

The State’s comments during its closing argument regarding the uncontradicted nature of the evidence were not improper and did not constitute fundamental error. Although the State’s comments on facts outside the record were improper, the comments did not rise to the level of fundamental error. Cole’s forty-year sentence is not inappropriate in light of his offenses and his character. Cole’s convictions and sentence are therefore affirmed.

Affirmed.

SULLIVAN, J., and BARNES, J., concur.