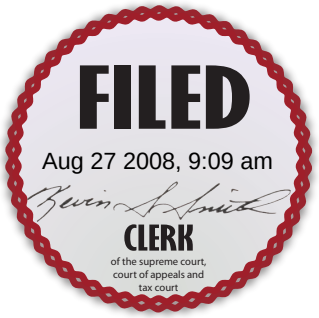

ATTORNEY FOR APPELLANT:

STANLEY L. CAMPBELL
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANTUAN M. LEANYEAR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0806-CR-268
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0706-FD-513

August 27, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Antuan Leanyear appeals his conviction for Class D felony strangulation. We affirm.

Issues

Leanyear raises two issues on appeal, which we restate as:

I. whether sufficient evidence existed to support the Class D felony strangulation conviction; and

II. whether the State's attempts to impeach two witnesses amounted to prosecutorial misconduct.

Facts

On June 16, 2007, sixteen-year-old Janee McGown was visiting the Leanyear household. Nineteen-year-old Antuan was home, along with his mother Tammy and two teenage sisters, Iesha and Tamisha. McGown, Iesha, and Tamisha were close friends. Leanyear and McGown began to wrestle around or "horse play" on the front porch. Tr. p. 70. At some point, McGown felt restricted by Leanyear and "it turned serious." Id. at 72. Leanyear was holding McGown with his arm around her neck. McGown told Leanyear to stop and he did not. She testified, "I felt restricted like I couldn't move. He was on top of me, and I could turn my head a little bit and I was like 'Iesha, Iesha,' you know, 'tell him to quit.'" Id.

Leanyear's mother, Tammy, came from inside the house and told him to stop, but he did not. Tammy then grabbed him in an attempt to pull the pair apart, but as Tammy did so, McGown felt "his grip around me get tighter." Id. at 74. Tammy did eventually "pry his hand off [McGown]." Id. at 124. McGown went back inside the house to call

for a ride home. Meanwhile, the disagreement between Leanyear and his mother escalated. His sisters became involved and at some point Iesha stabbed or cut Leanyear, apparently in self-defense. The police were called, but she was not charged. Leanyear was taken to the hospital. Lab results indicated a blood alcohol content of .04 percent and Leanyear admitted to drinking a beer and smoking marijuana that day.

The State charged Leanyear with Class C misdemeanor possession, consumption or transportation of alcohol by a minor, Class D felony strangulation, and with being an habitual offender. A jury convicted Leanyear of both counts on November 20, 2007. He stipulated to his prior offenses and was found to be an habitual offender. The trial court sentenced Leanyear to one and one-half years for the strangulation, with 180 days executed, and sixty days executed for the minor consumption, to be served concurrently. An additional one and one-half years was to be served consecutively for the habitual offender finding. This appeal followed.

Analysis

I. Sufficiency of the Evidence

Leanyear argues the State presented insufficient evidence to support his conviction for Class D felony strangulation. Upon a challenge to the sufficiency of evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses, and we respect the trier of fact's exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We must consider only the probative evidence and reasonable inferences supporting the verdict. Id. If the probative evidence and reasonable inferences drawn therefrom could have allowed a

reasonable trier of fact to find the defendant guilty beyond a reasonable doubt, we must affirm the conviction. Id.

The statutory elements of strangulation are:

> A person who, in a rude, angry, or insolent manner, knowingly or intentionally:
>
> (1) applies pressure to the throat or neck of another person; or
>
> (2) obstructs the nose or mouth of another person;
>
> in a manner that impedes the normal breathing or blood circulation of the other person commits strangulation, a Class D felony.

Ind. Code § 35-42-2-9(b).

Leanyear contends that the evidence is not sufficient to prove the elements of strangulation. He contends that he: 1) did not apply pressure to McGown's throat or neck; 2) did not impede her normal breathing; and 3) did not do it in a rude, angry, or insolent manner. As to the first element, Leanyear contends that although McGown testified that he was holding her so she could not move and had his arm around her neck, nothing indicated that he applied any pressure to her neck or throat. Iesha testified that Leanyear had his arms around McGown's neck, but not tightly. However, Detective Renee Davis testified that immediately following the incident Iesha told her that her brother had McGown in a chokehold and starting choking her. Tamisha testified that she saw Leanyear put his hands around McGown's throat, but "because they [were] playing." Tr. p. 144. McGown testified that it became harder for her to breathe. Together, this testimony establishes that at some point Leanyear's arms and/or hands were on

McGown's neck with enough pressure to affect her breathing.[1] The jury was in the best position to observe these witnesses and assess their credibility. There was sufficient evidence to conclude that Leanyear applied pressure to McGown's throat or neck.

As to the breathing element, after being asked if there was a point when she could not breathe McGown testified: "Not that I can remember, like it got harder to breathe, but there was never a point where I just stopped breathing." Id. at 73. The statute requires that the pressure on the neck or throat be applied "in a manner that impedes the normal breathing or blood circulation of the other person . . . ." I.C. § 35-42-2-9(b). Impede is defined as "to retard or obstruct the progress of." The American Heritage College Dictionary, 681 (3rd ed. 2000). The fact that breathing became obstructed or slowed is implicit in the victim's own testimony that it was "harder" for her to breathe. The statute does not require that breathing must completely stop.

Finally, Leanyear contends his contact with McGown was not in a rude, insolent, or angry manner because testimony indicated the teens were involved in "horse play." See Tr. pp. 70, 71, 142. He argues that such a description of the interactions that day make it impossible to find he was engaging in angry, rude, or insolent behavior. Although we acknowledge that the witnesses used terms like "horse play" and "playing" around, testimony also indicated the play fighting dramatically escalated. The victim, Leanyear's sister Iesha, and his mother all asked him to stop and he did not comply.

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[1] Our problem in reviewing the transcript is that the witnesses describe how Leanyear held McGown as "like this" or "like right there." See Tr. pp. 74, 123, 148. We presume they are actually using gestures to demonstrate the manner of holding to the trial court and jury; however, we do not have the benefit of any detailed description of these visual demonstrations.

McGown also testified that "I was done playing and he wouldn't stop." Tr. p. 73. Tamisha noted that when her mother came onto the porch "it got real serious." Id. at 145. The probative evidence and reasonable inferences provide sufficient support for the guilty verdict.

II. Prosecutorial Misconduct

Leanyear also contends the prosecutor engaged in misconduct that improperly prejudiced him. His argument centers around the prosecutor's attempts to impeach Iesha and Tammy by asking the women if they recalled specific things they said to detectives on the day of the incident. According to Leanyear, the prosecutor used words and phrases that suggested strangulation, but were apparently not used specifically by Iesha or Tammy.[2] The following exchanges between the prosecutor and two witnesses are cited as problematic.

> [State]: Ms. Leanyear, when you went out to the porch to separate the two, did you have a difficult time pulling the Defendant off Janee?
>
> [Tammy]: No.
>
> [State]: Do you recall stating to the detective that you had to pry his hands from around her neck?
>
> [Tammy]: I don't recall.
>
> * * * * *

[2] Reviewing the prosecutor's word choice and allegedly suggestive questions is difficult without the benefit of the officers' reports and the parties' statements, which are not part of the record on appeal. The transcript includes bench conferences that shed some light on the subject, but we do not have a clear idea of how far the prosecutor's word choices may have strayed from the officers' reports.

> [State]: And do you recall telling her that he was squeezing her neck, causing sufficient difficulty for her to breathe?
>
> [Ieasha]: No. I don't recall.
>
> [State]: Is it possible you could have said that?
>
> [Iesha]: It's possible, but I don't recall.

Tr. pp. 118, 125.

Leanyear argues that these questions were suggestive and implied to the jury that he was squeezing the victim's neck and witnesses were attempting to lie about what happened. The State argues that any claims of prosecutorial misconduct are waived, and if not, that the prosecutor was properly confronting witnesses about prior inconsistencies in their statements to police.

We consider whether the prosecutor engaged in misconduct, and if so, whether it placed Leanyear in a position of grave peril to which he should not have been subjected. See Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). "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. Our supreme court instructs that:

> [w]hen an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. If the party is not satisfied with the admonishment, then he or she should move for mistrial. Failure to request an admonishment or to move for mistrial results in waiver.

Id. (internal citations omitted).

As evidenced by the transcript, Leanyear's prosecutorial misconduct claim was not properly preserved. Although Leanyear's counsel made numerous relevancy objections to other questions, counsel did not object to the above passages or request an admonishment. During a bench conference, counsel openly debated whether to move for a mistrial, but ultimately did not do so. The claim of prosecutorial misconduct for the two exchanges cited by Leanyear was not properly preserved.

When a claim of prosecutorial misconduct is not properly preserved, a defendant must establish the misconduct and additional grounds for fundamental error. Id. Leanyear makes no mention or claim of fundamental error in his appellate argument. A party waives an issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record. Smith v. State, 822 N.E.2d 193, 202-3 (Ind. Ct. App. 2005), trans. denied.; see also Ind. Appellate Rule 46(A)(8)(a). Leanyear's claim of prosecutorial misconduct is waived.

Waiver notwithstanding, we note that any effect of the prosecutor's questions on the jury was counterbalanced or even eliminated by follow-up testimony elicited from other witnesses by Leanyear's counsel. On cross-examination of Iesha it was cleared up that she never told the detective she saw her brother "squeezing [McGown's] throat." Tr. p. 138. Detective Davis testified on cross that her report said nothing about Tammy reporting prying hands "off of a neck" or anything about a "neck." Id. 181. The prosecutor's questions here did not put Leanyear in grave peril and the exchanges do not amount to prosecutorial misconduct.

Conclusion

Sufficient evidence existed to support Leanyear's conviction for Class D felony strangulation. Leanyear did not properly preserve his claims of prosecutorial misconduct, but even so, the prosecutor's statements did not amount to misconduct. We affirm.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.