

STATEMENT OF THE CASE

Appellant-Defendant, Terry Wayne Nugent (Nugent), appeals his convictions for two counts of sexual misconduct with a minor, as Class B felonies, Ind. Code § 35-42-4-9, and one count of sexual misconduct with a minor, as a Class C felony, I.C. § 35-42-4-9.

We affirm in part, reverse in part, and remand with instructions.

ISSUES

Nugent raises two issues, which we restate as:

- (1) Whether the trial court committed fundamental error when it permitted the State to question him about his refusal to take a polygraph after he had already testified that he was willing to take a polygraph; and
- (2) Whether his separate convictions were for the same continuing criminal act.

FACTS AND PROCEDURAL HISTORY

Nugent lived in a trailer with fourteen-year-old J.S.F., who is mildly mentally handicapped, and her mother. One day when Nugent and J.S.F. were home alone, Nugent showed J.S.F. some pornography on his computer and then took her into her bedroom. Nugent had J.S.F. remove her clothing and then he removed his and began having sexual intercourse with her. Eventually, she complained that it hurt and he stopped. Nugent put his clothes on and began performing oral sex on J.S.F. He also touched her breast with his hand. J.S.F. did not tell anyone about the incident, initially, because Nugent told her it would make him mad. Early in June, 2008, J.S.F. told her younger sister, M.S., about the incident. She told M.S. to not tell anyone, but M.S. told their mother the next day. Mother contacted the

authorities, and Child Services interviewed J.S.F. A Huntington police detective interviewed M.S. and Nugent.

On July 24, 2008, the State filed an Information charging Nugent with three counts of child molesting. On October 1, 2008, the State amended that Information by adding three counts of sexual misconduct with a minor, two as Class B felonies, and one as a Class C felony. On October 8, 2008, the State dismissed the original three counts of child molesting.

On February 24 and 25, 2009, the trial court conducted a bench trial. During the trial, Nugent cross-examined Detective Mel Hunnicutt of the Huntington Police Department (Detective Hunnicutt). Nugent introduced the subject of polygraphs by asking Detective Hunnicutt about his request that Nugent submit to a polygraph. Later, on direct examination, Nugent testified that he had been willing to take a polygraph and was still willing to take a polygraph. Thereafter, the State questioned Nugent about his out of court statements that he was afraid to take a polygraph. Nugent objected on hearsay grounds, which was overruled. Nugent then admitted that he had told two people on separate occasions that he was afraid to take a polygraph examination.

At the conclusion of evidence and arguments, the trial court found Nugent guilty of all three counts of sexual misconduct with a minor. On March 23, 2009, the trial court conducted a sentencing hearing. The trial court sentenced Nugent as follows: Count IV, nineteen years, three of which are suspended to probation; Count V, nineteen years, three of which are suspended to probation; and for Count VI, seven years, two of which are

suspended to probation, all sentences to be served concurrently in the Department of Correction.

Nugent now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Polygraph

Despite the fact that Nugent first introduced evidence regarding his willingness to take a polygraph, he now contends that the State violated his fundamental rights by cross-examining him regarding that subject. He acknowledges that he did not object to the questions from the State on the grounds which he advances on appeal, which waives our consideration of the error on appeal. *See Tell City v. Ind. Util. Regulatory Com'n*, 558 N.E.2d 857, 863 (Ind. Ct. App. 1990). However, he requests that we perform fundamental error analysis. Where an error has not been properly preserved for appellate review, we may still reverse where an error is so prejudicial to the rights of the defendant as to make a fair trial impossible and constitutes a blatant violation of basic principles. *Absher v. State*, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007). The harm or potential for harm must be substantial, and the resulting error must deny the defendant of fundamental due process. *Id.*

Our supreme court has explicitly discouraged the admission of polygraph evidence because of the procedure's unreliability combined with its likelihood of undue influence upon a jury's decision. *Majors v. State*, 773 N.E.2d 231, 238 (Ind. 2002). This is why the "[p]roof of the fact that a polygraph examination was taken or refused is, in the absence of waiver or stipulation, inadmissible in a criminal prosecution." *Shriner v. State*, 829 N.E.2d

612, 618 (Ind. Ct. App. 2005). “A defendant is prohibited from stating he offered to take a polygraph test and the State is equally prohibited from referring to such a test.” *Id.* (quoting *Couch v. State*, 527 N.E.2d 183, 185 (Ind. 1988)). However, a party may “open the door” to the admission of evidence regarding polygraphs in some narrow circumstances. *Id.*

We first note that Nugent’s claim of fundamental error is highly unlikely because he tried his case to the bench. “[W]hen a trial is before a bench and not a jury, we generally presume that the trial judge considers only relative and probative evidence in reaching its decision.” *Birdsong v. State*, 685 N.E.2d 42, 47 (Ind. 1997). We presume that evidence, which might be inadmissible and prejudicial when placed before a jury, is disregarded by the court when making its decision. *Id.* For this reason, we must presume that the trial court knew and understood the unreliability of polygraph tests and knew that it should not be overly influenced by either Nugent’s willingness or fear of taking such an examination.

Moreover, we conclude that Nugent’s statement that he was willing to take a polygraph examination opened the door for the State to present evidence that he may not have been as willing as he claimed. In *Shriner*, 829 N.E.2d at 618, we considered an argument by Shriner that a mistrial should have occurred upon his mention that he had offered to take a lie detector test. However, we concluded that because the testimony came from Shriner himself, he had presented no error that would justify granting a mistrial. *Id.* Furthermore, we concluded that once Shriner had opened the door, the trial court properly permitted the State to impeach him with a prior inconsistent statement. *Id.* at 621. Similarly, we conclude that, because Nugent first presented the testimony that he was willing to take a

polygraph examination, the State was fully justified to elicit an admission from Nugent that he had told two persons that he was afraid to take a polygraph examination.

Nugent also contends that the trial court should have put limits upon the State's ability to impeach him. However, since Nugent made no objection before the trial court, there was no reason for the trial court to utter a ruling on the boundaries of the State's ability to impeach. Furthermore, Nugent does not direct our attention to any portion of the record demonstrating that the State went too far when impeaching him. Rather, Nugent simply points out that during closing argument, "[w]hen attacking Nugent's credibility . . . the State relied in part on the testimony that it elicited from Nugent pertaining to polygraphs."

(Appellant's Br. p. 12). Specifically, the State argued in closing:

The defendant also wants the court to believe that somehow not only was he willing in the past but is still currently willing today to take a polygraph, but he's told at least two different people that he was afraid he couldn't get pas[t] the polygraph. He comes in here trying to have some air of veracity of truthfulness by setting forth that he would take a polygraph but we know in private, when he's had conversations with [one woman] and [another woman] he indicated he didn't think he could pass it.

(Tr. p. 462). The State did not argue that Nugent should not be trusted because he was unwilling to take a polygraph examination; rather, the State carefully attacked Nugent's credibility as a witness by reminding the trial court that it had impeached testimony that he had given under oath. Fact finders must determine the credibility of witnesses when reaching their verdict, and, therefore, credibility is an appropriate subject for closing arguments. *See Lyda v. State*, 272 Ind. 15, 20-21, 395 N.E.2d 776, 780 (Ind. 1979). Altogether, we conclude that Nugent has failed to demonstrate any error on the trial court's part when it permitted the

State to cross-examine Nugent on his willingness to take a polygraph examination and then make argument referring to the fact that he had contradicted himself.

II. *Continuous Crime*

Nugent argues that two of his convictions should be vacated because all three of his convictions were for the same continuing criminal act. Nugent concedes that his convictions do not violate the Indiana's double jeopardy prohibition.

Nugent contends that Indiana law contains a continuous crime doctrine that is separate and distinct from the constitutional prohibition against double jeopardy. Indiana Constitution Article 1, Section 14 provides, in pertinent part, that: "No person shall be put in jeopardy twice for the same offense." We apply a two part test when considering a claim under our double jeopardy clause:

two or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.

Lee v. State, 892 NE.2d 1231, 1233 (Ind. 2008) (quoting *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999)).

Nugent correctly notes that the continuing crime doctrine is a distinct and separate analysis from this two-part double jeopardy analysis.

The continuing crime doctrine essentially provides that actions that are sufficient in themselves to constitute separate offenses may be so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction. [T]he continuous crime doctrine does not seek to reconcile the double jeopardy implications of two distinct chargeable crimes; rather, the doctrine defines those instances where a defendant's

conduct amounts only to a single chargeable crime. In doing so, the continuous crime doctrine prevents the State from charging a defendant twice for the same continuous offense.

Buchanan v. State, 913 N.E.2d 712, 720 (Ind. Ct. App. 2009), *trans. denied*.

Nugent encourages us to rely upon a comparative analysis to the facts in *Buchanan* to determine that his three convictions for sexual misconduct violate the continuing crime doctrine. Buchanan called in false bomb threats to schools from a payphone, drove home, switched cars, and then drove to a bank and robbed it while brandishing a shotgun. *Id.* Buchanan argued on appeal that his convictions for false reporting and intimidation must be vacated because they were part of his continuing crime. *Id.*¹ We concluded that the false bomb threat was a diversionary tactic to facilitate his robbery of the bank, and his use of the shotgun was to intimidate the bank’s employees so they would give him money. *Id.* Therefore, his actions “were ‘so compressed in terms of time place, singleness of purpose, and continuity of action as to constitute a single transaction,’” and vacated Buchanan’s false reporting and intimidation convictions. *Id.* at 720-21 (quoting *Riehle v. State*, 823 N.E.2d 287, 296 (Ind. Ct. App. 2005)).

However, we find more applicable guidance from our decision in *Firestone v. State*, 838 N.E.2d 468 (Ind. Ct. App. 2005). In *Firestone*, the defendant was convicted of rape and criminal deviate conduct. *Id.* at 472. The defendant had sexual intercourse with the victim while a co-perpetrator held her down, and then he moved position, held her down himself,

¹ The decision stated that the State conceded at the sentencing hearing that the convictions for false reporting and intimidation should be vacated at the sentencing hearing, but did not explain what grounds the State gave for that concession. *Id.*

and forced the victim to perform oral sex. *Id.* We held that the continuing crime doctrine did not apply despite the fact that the acts occurred at the same place over a relatively short period of time. *Id.*

After he finished raping [the victim], he took the time to switch places with [the co-perpetrator] by climbing on top of [the victim] and shoving his penis in her mouth. The continuity of actions does not negate the fact that they were completely different sexual acts committed at different times. It would be impossible for Firestone to have his penis inside [the victim's] vagina and in her mouth at the same time. Thus, because the rape was separate in time from the criminal deviate conduct, we cannot conclude that Firestone's actions fall within the continuing crime doctrine.

Id.

Here, Nugent had sexual intercourse with J.S.F. by placing his penis in her vagina, stopped when she complained that it hurt, and put his clothes on. Nugent then licked J.S.F.'s vagina, and touched her breasts with his hands. Nugent clearly committed two different crimes by placing his penis in J.S.F.'s vagina and then licking her vagina. However, the record is not clear as to whether his touching of J.S.F.'s breast was a separate and distinct act from either the sexual intercourse or the licking of her vagina. It was possible for Nugent to touch J.S.F.'s breast while performing intercourse or licking J.S.F.'s vagina. Therefore, we remand for the trial court to vacate his conviction for sexual misconduct with a minor, as a

Class C felony, but affirm Nugent's two convictions for sexual misconduct with a minor, as Class B felonies.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not commit fundamental error when it permitted the State to cross-examine Nugent on his statement regarding his willingness to take a polygraph examination and refer to his testimony in closing arguments. We also conclude that Nugent's acts of sexual intercourse and oral sex upon J.S.F., a minor, were separate acts, but that his touching of her breasts was part of a continuing crime.

Affirmed in part, reversed in part, and remanded with instructions.

BAKER, C.J., and FRIEDLANDER, J., concur.