

IN THE
INDIANA SUPREME COURT

No. 87S00-0612-CR-499

DAVID R. CAMM,
Appellant (Defendant Below),

v.

STATE OF INDIANA,
Appellee (Plaintiff Below).

Appeal from the
Warrick Superior Court 2,

Lower Court Cause
No. 87D02-0506-MR-54

Hon. Robert R. Aylsworth,
Judge.

PETITION FOR REHEARING

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SUMMARY

The Court should grant rehearing to address several errors and oversights in the majority opinion that lead the Court to improperly adjudicate some of Camm's claims. First, in its discussion of the molest evidence, the Court combined two separate issues—the admission of evidence on one hand and the propriety of counsel's arguments on the other—into one claim that not only lacks legal definition, but unnecessarily confuses these issues for the lower courts. Second, the Court should amend the majority's opinion to delete any reference to a newspaper article that impeached the jury's verdict, thereby abrogating well-established prohibitions on courts using jurors to impeach verdicts and encouraging the future harassment and manipulation of jurors by unsuccessful litigants. Finally, the Court overlooked several parts of the record, failed to address all of the State's arguments, and misinterpreted others, leaving the discussion of the issues incomplete and misleading. Rehearing is necessary to address these concerns and, in doing so, the Court should affirm Camm's convictions.

REASONS TO GRANT REHEARING

I. The Court's discussion of the molest issues was confusing and incomplete.

The Court should grant rehearing to clarify a confusing and inexact discussion of the molest issues. Presently, it is not possible to confidently identify the basis upon which the Court determined that Camm's convictions should be reversed insofar as it involves the molestation evidence. The Court took the two issues raised by Camm, that the trial court erroneously admitted evidence that some of Jill's injuries were likely caused by molestation and that the State improperly argued that Camm's likely motive in the murders was to cover up his molestation of Jill, and combined them into a single ill-defined claim. As a result of the Court not addressing these claims as the separate claims of error that they are, neither issue was properly evaluated

under the well-established body of law that applies to each claim and readers are unable to determine precisely what the legal error or errors the trial court committed.

No other case identified by the State has approached these sorts of issue in this fashion. The trial court below examined these arguments as discrete claims consistent with the example set in all other cases. The Court's new approach leaves a confusing precedent for the lower courts to follow and instead of providing guidance for counsel to follow in the future, muddies the framework under which counsel decide how to conduct themselves.

The State believes that the Court should re-evaluate Camm's argument as two claims of error that, while related, require separate inquiries to determine the legality of the trial court's and prosecutor's actions. In doing so, together with the facts discussed below and previously presented by the State but overlooked by the majority opinion, the State believes the Court will conclude that Camm's convictions for murder are proper and should be affirmed.

A. The fact and cause of Jill's injuries were admissible.

1. Camm agreed that the molest evidence was admissible.

Camm has conceded that he waived any objection, including a Rule 404(b) objection, to the testimony regarding Jill's injuries and the expert opinion that they were caused by molestation, and the record belies any theory that it was preserved for appeal. Although the Court recognized Camm's waiver of any objection to the actual evidence of Jill's injuries (and presumably their cause as being from molestation), *Camm v. State*, No. 87S00-0612-CR-499, slip op. at 4 n. 3 (Ind. June 26, 2009) (*Camm II*), the Court's discussion suggests that Camm barely preserved an objection to some other type of evidence. There is no other evidence; Camm has never cited to any other potentially objectionable evidence and the State offered none at trial.

Nevertheless, the Court should have no doubt that Camm failed to preserve any arguments for appeal on the admissibility of any molestation evidence because Camm's lead counsel expressly told the trial court that Camm not only had no objection to the admission of the molest evidence, she affirmatively agreed with the State that the evidence was in fact admissible, relevant, and probative. In the preliminary hearing held on October 26, 2005, Camm's attorney informed the trial court and the State as follows:

The fact that Jill Camm had blunt force trauma to her genitalia is widely known to everybody in this room, and in this regard, we are not asking for preclusion of the fact that the experts have seen these injuries to Jill Camm's genitalia. We absolutely believe that's relevant and the jury should hear about it.

(Tr. Prelim. Hrg. 10-26-05, 8). Camm not only did not object, he affirmatively urged the trial court to allow the evidence to be permitted. This was part of Camm's multi-pronged defense, one prong of which was to argue that Charles Boney must have molested Jill; agreeing to its admission was a calculated strategic decision.

After urging the trial court to permit the State to present evidence of Jill's molestation, Camm's counsel continued,

What we are asking to be excluded is any inference, speculation, or innuendo that David Camm molested his daughter... We are not asking for this Court to preclude the jury from hearing that Jill suffered from blunt force trauma to her genitalia as found by the medical examiner and other experts... The jury should hear that. It's part of what happened. It's part of their findings of that night.

(Tr. Prelim. Hrg. 10-26-05, 8, 17-18). Later, Camm's counsel argued, "Now, what [the State] want[s] to say, that that was molest, blunt force trauma, um—caused whatever manner, I think that they have the right to do it, but they can't say that Dave Camm did it." (Tr. Prelim. Hrg. 10-26-05, 84). Camm asked the trial court for what he referred to as a "narrow ruling...that [the State] can talk about the injuries to Jill, but they cannot say that Dave Camm committed those injuries..." (Tr. Prelim. Hrg. 10-26-05, 85-86).

Additionally, at trial, Camm continued to press the evidence/argument distinction to the trial court and insisted only that the State be restricted from asking the jury to infer Camm committed the molest of Jill. (Tr. W8, V1, 1-6, 96). In this appeal, Camm noted his failure to object to the admission of the molest evidence. *See* Br. of Appellant at 21.

The Court should not have confused objections to argument by counsel with the admission of the evidence. By doing so here, the majority analyzed an improper argument claim under the Rules of Evidence. But at no time did the State present testimony or other evidence opining that Camm committed the molest, so there was no evidence to exclude under Rule 404(b). Rule 404(b), by its own definition, applies to evidence and not argument. While the State agrees that in certain circumstances a prosecutor's closing argument can improperly misuse evidence to suggest impermissible inferences, such an error has long been treated as a claim of prosecutorial misconduct and should be analyzed on appeal as such. *See, e.g., Hale v. State*, 547 N.E.2d 240 (Ind. 1989).

Under this record, finding waiver of the Rule 404(b) claim does not "risk absurdity," *Camm II*, slip op. at 7. Rather, it accurately describes the knowing and intentional actions of counsel. There is no basis in law or fact for faulting the trial court for admitting evidence that Jill had been molested.

2. The evidence of Jill's molestation was admissible and not prejudicial.

Even if the Court were to overlook Camm's explicit invitation for the trial court to admit the evidence of Jill's molestation, the trial court did not err in admitting it. As discussed immediately above, this evidence was not evidence of Camm's prior crimes, wrongs or bad acts, so Rule 404(b) is not implicated. Nor is this evidence problematic under Rule 403 because the fact that Jill was molested does not in and of itself prejudice Camm. The possible prejudice is

with the use put to the evidence in argument, a separate issue which the law of prosecutorial misconduct adequately and more appropriately addresses.

Rather, as explained fully in the State's brief, the medical examiner's and other experts' medical opinions about Jill's injuries and the proximate cause of them was admissible. Br. of Appellee at 19. For these same reasons, and for the substantial evidence—especially scientific evidence showing Camm's presence at the scene at the time of the killings, any error in the admission of the evidence must be harmless. *Id.* at 3-5, 38-39.

B. The State's rebuttal argument regarding the molestation was proper.

Although the Court couched its holding in terms of Rule 404(b), it may be more precise to characterize the Court's concerns as regarding the use to which prosecutors put that evidence in argument and whether they impermissibly overreached in suggesting to the jury in argument that Camm molested Jill and that the motive for the murders was to cover that up. In the Court's words, "[t]he State's theory, that the defendant murdered his family to conceal the molestation, pervaded the trial from the State's opening statement to its closing argument." *Camm II*, slip op. at 10. The Court overlooked critical portions of the record in reaching that conclusion.

1. Camm waived this claim by promising the trial court he would object and ask for admonishments during the State's closing argument but then failed to do so.

The Court correctly observed that the trial court was aware of the general dispute between the State and Camm over the proper scope of closing argument and whether the State could accuse Camm of molesting Jill as a motive for the murders. However, that dispute played out *prior* to the closing arguments themselves and so the trial court had no specific statement or line of argument before it to consider. So, the trial court informed the parties that it would not limit argument in advance but cautioned counsel that the evidence must support the arguments. Indeed, that is the most reasonable and efficient manner for a trial court to mediate such disputes

between counsel. Camm then told the trial court that he would lodge a specific objection to any objectionable argument. (Tr. W8, V1, 197). Had Camm actually followed his promise, he would have given the trial court the opportunity to judge whether the argument actually made and the words spoken were appropriate given the evidence presented. Camm, however, decided not to lodge those objections and deprived the trial court a fair opportunity to consider the specifics of his complaints. Br. of Appellee at 27, 28-29. The Court was incorrect to permit Camm to manipulate the trial in this manner; it should correct this oversight on rehearing and find the objection waived.

2. The State referenced the molest evidence in a restrained and proper manner throughout trial.

Waiver notwithstanding, prosecutors did not permeate its argument or presentation of evidence with accusations that Camm molested Jill. Such statements were limited to rebuttal closing argument, made in direct response to Camm's own argument, and limited in duration and scope. The court should correct its misapprehensions of the record on rehearing.

The State's opening statement was 262 lines long and consisted of 3,853 words. But only two of those lines, or 31 words, even touched upon the molestation issue and none of it alleged or suggested that Camm was the molester. As a percentage of the opening statement, the molestation topic consumed less than eight-tenths of a percent. That sentence was, "And you'll hear also from Drs. Merk and Spivak that within 24 hours of little Jill's death, from her blood being sprayed upon her dad's shirt, that she was sexually molested." (Tr. W2, VA, 13). This is an entirely proper, unobjected-to, summary of the expected testimony of the doctors.

In contrast, Camm was the only party at opening statement to argue at length about the molestation evidence and openly argue that Boney molested Jill. "While Dave was playing

basketball, Kim, Bradley and Jill were ambushed; they were violated; and they were murdered by this man, Charles Darnell Boney.” (Tr. W2, V1, 22). Camm also went into detail about Jill’s molestation and how Boney must have been the molester. (Tr. W2, V1, 43-45). Camm’s counsel also told the jury that this has been Camm’s theory of the crime ever since the murders took place:

So whatever caused these injuries to Jill Camm, whether as horrific as child molesting or as benign as itching, they happened near or at the time of her death. So when David Camm heard about these injuries to Jill and he heard that the State Police thought she was molested, he was beside himself. He said, that the moster who killed my family. Whoever molested by kittle girl killed my family.

(Tr. W2, V1, 44-45). Such an argument was, at a minimum, equally as improper as the State’s eventual argument on rebuttal closing argument because there is no evidence linking Boney to Jill’s molest other than his own circular reasoning. As explained below, however, the State’s response to this improper argument was appropriate under the circumstances.

Moreover, Camm’s detailed opening argument shows that this prong of his defense strategy was not merely a response to the State’s allegation (the State had not made that allegation yet), rather it was wholly independent of it. This did not surprise the trial court because Camm had notified it that he planned to argue and present evidence that Jill was molested by the killer at the time of the murders:

Not only is there no evidence—none—that Dave Camm caused that trauma [the molestation injuries], but there is evidence that Jill’s injuries occurred at or near the time of death. When Dave, let’s not forget, was playing basketball with eleven solid, good citizens of the community. Jill had a perfectly normal day. She was a normal little girl. One can infer from the evidence, real evidence before this Court, that those injuries occurred—they were fresh and occurred very close to or at the time of death, right prior to death, when Dave was playing basketball.

(Tr. Prelim. Hrg 10-26-05, 84). The Court incorrectly stated that this argument was merely a response to the State’s allegations regarding Camm; it was a well-planned and orchestrated

prong of the defense strategy that would have been—and was—presented to the jury regardless of whether the State ever informed the jury of its motive theory. The transcript fails to bear out the Court’s belief that Camm’s reference to the molestation was merely in response to the State’s pressing of the motive theory and not of critical importance to his defense. Rehearing is necessary to correct that supposition.

The record demonstrates that the State did not saturate the trial with suggestions that Camm molested Jill during the presentation of evidence, as the Court asserted. The State’s case-in-chief consisted of 49 witnesses and nearly 859,200 words. Only three of those witnesses, Drs. Corey, Spivack, and Merk, remarked upon Jill’s injuries and her molestation. The total of their testimony (only a small portion of which involved the molestation evidence) constituted 25,170 words, or just 2.9 percent of the testimony presented by the State. In that evidence, the State never identified Camm as the possible molester; in fact, Dr. Spivak specifically testified that the doctors could not opine on the perpetrator’s identity. (Tr. W6, V1, 20).

Camm, on the other hand, used witnesses, including his own expert, to press his theory that Boney molested Jill immediately prior to her murder, possibly with a gun muzzle. He persisted with this theory despite it being, at the most, no stronger than the not-yet pressed argument that Camm committed the molest. Camm’s strategy, openly acknowledged on the record, was to continually beat the Boney-molested-Jill drum at every opportunity while throughout the trial prior to closing arguments, the State refrained from accusing Camm of molesting Jill. By the time the State did offer an alternative motive at closing argument, the molestation theory of Camm’s multi-pronged defense was well engrained in the jury’s mind.

Closing argument was the first time the State ever suggested to the jury that Camm, and not Boney, molested Jill. But even then the State did not focus on it in a substantial way. The

initial closing argument consisted of 869 lines of transcript, with 40 of those discussing the molestation. In the rebuttal argument, only six of the 263 lines of transcript involve the molestation issue. The State discussed Jill's molestation and Camm's possible role in it for approximately four percent of the closing argument.

In its initial closing argument, the State briefly alluded to Jill's molestation as being a possible cause of the well-established discord in the household, but the State carefully and deliberately avoided alleging that Camm was the likely molester. Unsurprisingly, however, Camm used his closing argument to continue to accuse Boney of molesting Jill at the time of the murder. (Tr. W8, V1, 143-44, 146-50, 171, 181-82). In its rebuttal, the State responded simply and briefly, "Camm couldn't tell his police buddies why he was getting divorced, because he molested his five year old daughter, and he watched them die, and he watched his son die." (Tr. W8, V1, 197). Furthermore, the State insisted to the jury that Camm was not on trial for molestation, but for murder. (Tr. W8, V1, 194). That responsive argument was limited in scope and properly responsive to Camm's baseless allegations offered throughout the trial, but especially at closing. The Court should grant rehearing and correct its erroneous judgment.

3. The State's closing rebuttal argument was a proper and limited response to Camm's improper argument.

Given Camm's improper arguments that Boney molested Jill, the State suggested that the jury consider the equally-plausible theory that Camm molested Jill. Such a limited and passing response to this part of Camm's proffered defense was proper under the circumstances of this case. Indiana law does not permit defendant to make such unabashedly improper allegations without inviting a proportional responsive argument from the prosecution. *Cooper v. State*, 854 N.E.2d 831, 836 (Ind. 2006) ("Prosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable."). *See*

also Br. of Appellee at 26-31. The Court should acknowledge the limited, proper role that the State's argument played in the state's prosecution of Camm and affirm his convictions.

II. The Court Should Delete its Reference to a Juror's Impeachment of the Verdict.

Additionally, the Court should grant rehearing to amend its opinion to remove its citation to a newspaper article reporting on an interview of a single juror. *Camm II*, slip op. at 10 & n. 4. This Court's rules of evidence prohibit Indiana courts from considering any evidence from a juror that impeaches the verdict. Ind. Evid. R. 606(b). This rule is consistent with the Federal Rules of Evidence and the common law evidence rules. The exceptions, which relate to extraneous influences coming to bear on the jury's deliberations, are not implicated here. *See Mattox v. United States*, 146 U.S. 140, 149 (1892); *Fox v. State*, 457 N.E.2d 1088, 1093 (Ind. 1984). This opinion is inconsistent with those rules and has the potential to cause substantial damage to the fair administration of justice and protecting the sanctity of jury deliberations.

This article¹, containing a mix of quotations and paraphrased accounts of a juror's statements to the media, is inadmissible in every court in the State, every federal court, and the courts of most of our sister States. The statements by this juror are not even sworn or otherwise carry indicia of reliability. This article was never admitted into evidence, although Camm improperly attached it to his motion to correct errors. App. at 1050-51. By considering this article, the Court has invited—albeit unintentionally—counsel for unsuccessful litigants to harass and manipulate jurors in an attempt to obtain statements impeaching their verdicts. Even if the

¹ Although equally improper for the Court to consider when resolving Camm's claims, the State notes that media outlets have reported this juror's thoughts on this Court's decision. Marisela Burgos, "Camm Jury Foreman Reacts to Overturned Verdict", WAVE (June 28, 2009, updated July 16, 2009), <http://www.wave3.com/Global/story.asp?S=10609090>. In this article, he explains how the Court erroneously interpreted the jury's deliberations. This subsequent article further illustrates the danger of relying on such media reports to adjudicate claims before a court.

lower courts decline to consider such statements despite this decision, the damage caused by such incidents will persist.

Should the Court decline this invitation to amend its opinion, the State asks that it reconsider the import of the juror's comments. This report does not support the Court's conclusion that the State's argument was highly prejudicial, rather it shows that the jury viewed the molestation-as-motive theory as being primarily Camm's theory (that Boney molested Jill at the time of her murder). "But, he said, it was proved to the jury's satisfaction that Camm's daughter, Jill, was abused before the night of the murders—and that Camm co-defendant Charles Boney didn't do it. And so, Crowell said, the jurors concluded that Camm did." (App. 1050-51) (emphasis added). That view of the evidence is in accord with the transcript, which shows that Camm was the sole party to evoke the molestation theory at each logical opportunity and that the jury viewed the molestation argument as one of Camm's doing and not the State's. In any event, the proper course would be to remove all reference and consideration of the article from the Court's opinion, perhaps coupled with an admonition to lower courts and counsel to refrain from relying on such materials in violation of Rule 606(b) in the future.

III. The Court overlooked Camm's waiver of any hearsay objection to Kim's statement to Cindy Mattingly and substantial other evidence when assessing prejudice.

The Court should grant rehearing because it did not address the State's contentions that Camm waived review of the claim when he failed to request an admonishment or limiting instruction, or consider all of the relevant evidence when assessing the prejudice from admitting Kim's statement.

Camm waived his objection by not asking for an admonishment to prevent possible misuse of this evidence. Br. of Appellee at 31-32. Cindy Mattingly's discussion with Kim was about the rigors of a normal day in the life of a mother and wife with young children and

involved Kim's use of phrasing that is normal in everyday conversation. The Court recognized that Kim's statement could be used by the jury to show that she went home at 7:30 p.m. or to infer that Camm intended to be home at 7:30 p.m. Even if the statement was relevant to show the former, the Court observed that "common sense shows too high a risk" that the jury would use, or rather misuse, the statement to show the latter. To be sure, Mattingly "interpreted" Kim's statement as meaning, "that she was going to be home after she got done with, you know, the dance class and swimming class." (Tr. W5, V2, 276). Mattingly also "assume[ed]" that Camm would be home as well. (Tr. W5, V2, 277). Thus, the interpretation of this statement, and what may be assumed or inferred from the statement, is open to debate and reasonable people can disagree as is also demonstrated by the discussions the parties had with the trial court over the admissibility of the statement. If Camm were concerned about possible misuse of this statement, he should have requested a limiting admonishment or instruction to the jury, but Camm did not. In failing to do so, he waived his right to complain of the trial court's error on appeal.

The Court compared this case to *Carter*, where the Court found to be proper the admission of an out-of-court statement made by the victim that she was going to go to the defendant's home and that she was not afraid even though the defendant had beaten her the week before. *Carter v. State*, 490 N.E.2d 288, 291-92 (Ind. 1986). In *Carter*, the trial court gave an admonishment to the jury that the statement could only be used to assess the victim's state of mind. *Id.* In this case, the trial court did not give an admonishment in this case to explain the proper use of the statement because Camm did not want one. The ambiguities in the interpretation of this statement as recognized above are precisely why Camm's failure to request an admonishment to the jury was imperative and waives this issue for appellate review.

Moreover, in evaluating the relative prejudice the admission of this evidence caused, the Court overlooked the substantial evidence of guilt, including multiple forms of scientific evidence, placing Camm at the scene of the crime in determining whether the admission of this single statement was harmless error. *See* Br. of Appellee at 3-5, 38-39. Respectfully, it strains credulity to believe that Camm's conviction hinged on this single statement in spite of weeks of testimony and the substantial breadth of scientific and other evidence supporting his convictions. The Court should grant rehearing and find that Camm waived review of this claim and, in any event, the error was harmless.

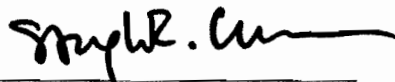
CONCLUSION

The Court should grant rehearing and affirm the trial court.

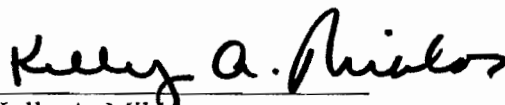
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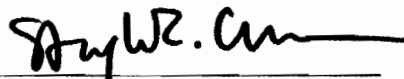


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CERTIFICATE OF WORD COUNT

I certify pursuant to Appellate Rule 43(E) that this brief contains less than 4,200 words.



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CERTIFICATE OF SERVICE


I certify that I served the foregoing on counsel by U.S. Mail at the following addresses on

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