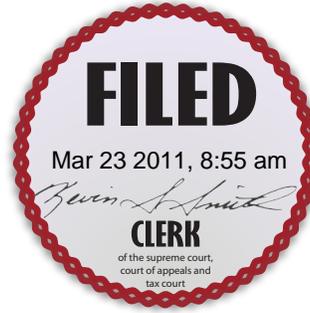


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DEANGELO BANKS,)
)
Appellant- Defendant,)
)
vs.) No. 49A02-1006-CR-689
)
STATE OF INDIANA,)
)
Appellee- Plaintiff,)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Judge
Cause No. 49G02-0912-FA-097864

March 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Following a jury trial, Deangelo Banks appeals his convictions for rape, a Class A felony, criminal deviate conduct, a Class A felony, and strangulation, a Class D felony. For our review he raises two issues, which we restate as whether the trial court committed fundamental error in admitting Nurse Pemberton's testimony regarding victim Sandra McWilliams's narrative or in permitting the State's comments during its closing argument regarding Banks's demeanor during trial. Concluding neither the admission of Nurse Pemberton's testimony nor the State's comments during closing argument constituted fundamental error, we affirm.

Facts and Procedural History

On the evening of September 17, 2009, Sandra McWilliams and her husband got in their car and drove in search of crack cocaine for McWilliams. After purchasing and smoking some crack cocaine from a friend, McWilliams separated from her husband in search of more. Following another purchase at an apartment complex that evening, someone grabbed McWilliams's neck from behind. McWilliams fell unconscious, and awoke naked on the bedroom floor of a second-story apartment looking up at a naked man whom she did not know on top of her and attempting to penetrate her. She screamed and struggled, and the man threatened to kill her. Throughout the struggle, the man repeatedly choked her so that she lost and regained consciousness at least three times, and he was able to force his penis into her mouth and vagina.

At some point, another unfamiliar man kicked in the door disrupting the assault, and McWilliams quickly dressed, left, and called 911. Soon after, Certified Sexual Assault Nurse Examiner Tamara Pemberton interviewed and examined McWilliams, and

gathered forensic samples for a rape kit. McWilliams selected – although with some uncertainty – Banks’s photo from a photo array. In addition, Banks was linked to the crime by a DNA analysis and comparison of evidence from the scene, McWilliams, and Banks.

A jury found Banks guilty of rape, criminal deviate conduct, and strangulation, and the trial court entered judgments of conviction and sentenced Banks to a total of sixty-three years in prison. Banks now appeals. Additional facts will be supplied as necessary.

Discussion and Decision

I. Inadmissible Hearsay

A. Standard of Review

We review a trial court’s decision to admit evidence for an abuse of discretion. Collins v. State, 826 N.E.2d 671, 677 (Ind. Ct. App. 2005), trans. denied, cert. denied, 546 U.S. 1108 (2006). However, failure to timely object to an alleged error at trial – as is the case here – constitutes waiver of that issue on appeal unless the error fits the “extremely narrow exception” of fundamental error. Hand v. State, 863 N.E.2d 386, 394 (Ind. Ct. App. 2007). “To rise to the level of fundamental error, the error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.” Maul v. State, 731 N.E.2d 438, 440 (Ind. 2000) (quotation omitted). “The standard for fundamental error is whether the error was so prejudicial to the rights of the defendant that a fair trial was impossible.” Boatright v. State, 759 N.E.2d 1038, 1042 (Ind. 2001).

B. Statements for Purposes of Medical Diagnosis or Treatment

Banks argues the trial court erred by admitting a hearsay narrative McWilliams made to Nurse Pemberton of how the crimes occurred. The State responds that this narrative was proper under Indiana Evidence Rule 803(4), which provides an exception for the admission of hearsay “[s]tatements made for purposes of medical diagnosis or treatment and describing . . . the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” Ind. Evidence Rule 803(4). Because Banks did not object to this testimony during trial, he alleges and we address whether the admission of such testimony constituted fundamental error.¹

We agree with Banks that part of Nurse Pemberton’s testimony was improper as beyond the scope of Evidence Rule 803(4). In particular, we find improper Nurse Pemberton’s reiteration of McWilliams’s statements that she “had gone with a friend to the Oak Tree Apartments to purchase some cocaine and when she was leaving she was grabbed by an unknown black male” Transcript at 188. This portion of Nurse Pemberton’s testimony was not “reasonably pertinent to diagnosis or treatment,” and therefore was improperly admitted hearsay. Evid. R. 803(4).

However, we also conclude that the trial court did not commit fundamental error in allowing such inadmissible testimony in the absence of an objection by Banks. Other admissible evidence – namely, McWilliams’s testimony – supported the objectionable and otherwise improperly admitted portion of Nurse Pemberton’s testimony. And although Banks invites us to consider McWilliams to be not credible, “determining the

¹ At the outset, we decline Banks’s repeated invitations to reweigh the evidence and assess the credibility of witnesses. Although Banks states that this trial centered on whether the acts took place as part of “either a brutal sex crime or consensual sex in exchange for drugs,” Appellant’s Brief at 13, we do not opine on either theory of the case.

credibility of the witnesses is a task which is properly within the province of the jury, not this court.” Winbush v. State, 776 N.E.2d 1219, 1224 (Ind. Ct. App. 2002), trans. denied. Because other admissible evidence already presented the narrative to the jury, Nurse Pemberton’s brief summary repetition – to the extent it was improper – was harmless. See Dygert v. State, 569 N.E.2d 375, 378 (Ind. Ct. App. 1991) (stating “[t]he admission of hearsay evidence is not grounds for reversal when it is merely cumulative of other admitted evidence”). Further, the harmless admission of Nurse Pemberton’s testimony did not constitute fundamental error.

II. Prosecutorial Misconduct

A. Standard of Review

Banks next argues the State committed prosecutorial misconduct, but again, because Banks did not timely object, the allegedly improper comments rise to the level of reversible prosecutorial misconduct only if they constitute fundamental error. See Lainhart v. State, 916 N.E.2d 924, 931 (Ind. Ct. App. 2009). To constitute fundamental error, the alleged misconduct “must constitute a clearly blatant violation of basic and elementary principles of due process, present an undeniable and substantial potential for harm, . . . make a fair trial impossible[,] . . . have subjected the defendant to grave peril[,] and had a probable persuasive effect on the jury’s decision.” Id. at 931-32. “The gravity of the peril turns on the probable persuasive effect of the misconduct on the jury’s decision, not on the degree of impropriety of the conduct. In judging the propriety of a prosecutor’s remarks, the [appellate] court considers the statements in the context of the argument as a whole.” Id. at 932.

B. Alleged Misconduct

Banks argues the following portion of the State's closing argument was improper and that for the trial court to allow it was fundamental error:

[D]uring the course of this trial, I hope you had an opportunity to watch Mr. Banks/Mr. Pinkston,^[2] especially when the victim was on the stand. You notice how he smiled. Notice how he smiled when she went up there and he smirked during the trial. And he smirked because he enjoyed it. That's what he likes. That's what he did. And he wanted to hear her again. He loved to have her sit up there and tell it. He loved that everybody got to listen to his exploits. And he took advantage of a victim who he knew would issues [sic] with credibility. He knows what she was going to do in that area and he took advantage of her. He took advantage of that hoping that you will look at this and say, she's just some crackhead, who cares. . . .

Tr. at 306.

Upon our review of the record, we conclude that these comments – although probably improper – did not subject Banks to grave peril because it is unlikely they had a persuasive effect on the jury's decision. See Lainhart, 916 N.E.2d at 932 (“The gravity of the peril turns on the probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the conduct.”). The record does not support Banks's appellate argument that the State's comments during closing argument caused him to be convicted “upon bad character and fear and emotion.” Appellant's Br. at 16. Rather, the record includes substantial evidence of his guilt, including robust DNA evidence and McWilliams's testimony. Further, the State's remarks that Banks now challenges were merely part of its closing argument which focused on restating the evidence presented and arguing that the evidence proves Banks to be guilty beyond a reasonable doubt. The State's remarks did not make a fair trial impossible, and did not

² The State's amended charging information explains “Deangelo Pinkston” is an alias of “Deangelo Banks.” Appellant's Appendix at 31.

“present an undeniable and substantial potential for harm.” Id. at 931. Consequently, Banks has not satisfied his burden to demonstrate that the State’s comments in its closing argument constituted fundamental error.

Conclusion

Neither Nurse Pemberton’s testimony regarding McWilliams’s narrative, nor the State’s remarks in its closing argument regarding Banks’s demeanor during trial constituted fundamental error. Accordingly, we affirm his convictions.

Affirmed.

RILEY, J., and BROWN, J., concur.