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ATTORNEY FOR APPELLANT:

PATRICIA CARESS MCMATH
Marion County Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CARL BROWN,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A04-1007-CR-448

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
Cause No. 49G22-0905-FB-51836

April 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Carl Brown (“Brown”) appeals his convictions for Robbery, as a Class B felony,¹ Intimidation,² as a Class C felony, and Possession of a Firearm as a Serious Violent Felon (“SVF”), a Class B felony.³ We affirm.

Issues

Brown presents two issues for review:

- I. Whether the trial court abused its discretion by refusing Brown’s proffered instruction on reasonable doubt and extrinsic misconduct; and
- II. Whether statements in the prosecutor’s closing argument amounted to fundamental error.

Facts and Procedural History

On May 27, 2009, at around 9:00 p.m., Brown and Danny Robinson (“Robinson”) went together to the home of Ralph Munden (“Munden”), who is married to Brown’s niece. When Munden answered the door, Brown requested the use of a tire jack. Munden led Brown to the garage, while Robinson followed uninvited. Once inside the garage, Robinson grabbed Munden, wrestled him to the ground, and held a butcher knife to his neck. Brown demanded Munden’s money and “the K,” which Munden took to mean his AK-47 rifle. (Tr. 70.) Munden disclosed the location of the rifle but not the money.

Brown came back to the garage holding the AK-47. He pointed the gun at Munden and told him “to take it as a loss” because Brown had “goons or guns” and would come back.

¹ Ind. Code § 35-42-5-1.

² Ind. Code § 35-45-2-1.

³ Ind. Code § 35-47-4-5.

(Tr. 73.) Robinson inquired about killing Munden, to which Brown replied, “nah, cuz he’s family.” (Tr. 73.) Brown and Robinson then left the garage. Munden ran to check on his son, then grabbed a handgun and went to the front door. Brown and Robinson were inside a blue Chevy Avalanche parked in front of Munden’s house. Munden shouted something and Brown turned with the AK-47 in his hand. Munden then fired his gun eight or nine times.

Munden discovered that, in addition to his AK-47, he was missing approximately \$600 and his red suede sneakers. Some of his wife’s jewelry was also missing. Police were given a description of the Chevy Avalanche. It was located, with bullet holes and a flat tire, in front of a liquor store. The registration led police to an address on Hoyt Street in Indianapolis. A search of Robinson’s bedroom at the premises yielded an AK-47 rifle. Brown was wearing shoes that matched the description of Munden’s stolen shoes.

On June 14 and 15, 2010, Brown was brought to trial before a jury on charges of Robbery, Criminal Confinement, Intimidation, and Pointing a Firearm. He was found guilty of the first three charges and acquitted of the latter. Brown then pled guilty to Possession of a Firearm as a SVF. On July 1, 2010, the trial court sentenced Brown for Robbery, Intimidation, and Possession of a Firearm as a SVF.⁴ Brown received twenty-year sentences for each of the Class B felonies and an eight-year sentence for the Class C felony, all to be served concurrently. He now appeals.

⁴ Due to Double Jeopardy concerns, the trial court did not enter a judgment of conviction upon the verdict for Criminal Confinement.

Discussion and Decision

I. Jury Instruction

Brown claims that the trial court abused its discretion when it refused his proffered instruction on reasonable doubt and extraneous misconduct, which provided:

If, after considering all of the evidence, the argument of counsel, and the instruction given you by the court, you should entertain any reasonable doubt of guilt of the defendant as charged in or covered by the information it would be your duty to acquit him even if you should believe from the evidence, that he has been shown to be guilty of wrong doing, or, of other offenses not charged in or covered by the information.

(App. 99.) The manner of instructing a jury lies largely within the discretion of the trial court. Mayes v. State, 744 N.E.2d 390, 394 (Ind. 2001). In reviewing the exercise of the trial court's discretion to refuse a proffered instruction, we consider (1) whether the proposed instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the proposed instruction is covered by other instructions that were given. Rector v. State, 826 N.E.2d 12, 21 (Ind. Ct. App. 2005). A defendant is only entitled to reversal if he affirmatively demonstrates that the instructional error prejudiced his substantial rights. Hall v. State, 769 N.E.2d 250, 253 (Ind. Ct. App. 2002).

Brown's proffered instruction in part addressed reasonable doubt, a matter which was adequately covered by the trial court's Final Instruction 12:

The burden is upon the state to prove beyond a reasonable doubt that the defendant is guilty of the crime(s) charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt. But it does not mean that a defendant's guilt must be proved beyond all possible doubt.

A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you have weighed and considered all the evidence.

A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt.

The state must prove each element of the crime(s) by evidence that firmly convinces each of you and leaves no reasonable doubt. The evidence must be such that it would convince you of the truth of it to such a degree of certainty that you would feel safe to act upon such conviction, without hesitation, in a matter of the highest concern and importance to you.

(App. 114-15.)

Additionally, Brown's proffered instruction concerned "wrong doing" or "offenses not charged." (App. 99.) However, the giving of an instruction on uncharged misconduct was not warranted by the evidence. Brown's attorney argued that there had been a drug deal gone bad, leaving Munden feeling "ripped off." (Tr. 215.) However, there was no actual evidence in this regard. Having instructed the jury on reasonable doubt, the trial court did not abuse its discretion by refusing a proffered instruction with irrelevant, superfluous language.

II. Closing Argument

Brown contends that the prosecutor committed misconduct in his closing argument. After the defense argued in closing argument that no robbery had occurred, but rather there had been a drug deal leaving Munden feeling cheated, the prosecutor responded in rebuttal: "What evidence, what evidence of the theory of the drugs were presented? None. Zero.

Zilch. Nada.” (Tr. 225.) Brown acknowledges that his trial counsel did not contemporaneously object during the State’s closing argument, and thus frames his argument in terms of fundamental error.

A party’s failure to present a contemporaneous trial objection contending prosecutorial misconduct precludes appellate review of the claim. Booher v. State, 773 N.E.2d 814, 817 (Ind. 2002). However, such default may be avoided if the alleged misconduct amounts to fundamental error. Id. To prevail on his claim, the defendant must establish not only the grounds for prosecutorial misconduct but also the additional grounds for fundamental error. Id. at 818. In reviewing a claim of prosecutorial misconduct, a court determines: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct had a probable persuasive effect on the jury. Ritchie v. State, 809 N.E.2d 258, 268 (Ind. 2004), cert. denied, 546 U.S. 828 (2005). Although normally referred to as “grave peril,” a claim of improper argument to the jury is measured by the probable persuasive effect of any misconduct on the jury’s decision and whether there were repeated occurrences of misconduct, which would evidence a deliberate attempt to improperly prejudice the defendant. Id. at 269. For a claim of prosecutorial misconduct to rise to the level of fundamental error, the defendant must also demonstrate that the misconduct made a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process and presents an undeniable and substantial potential for harm. Booher, 773 N.E.2d at 817.

Brown claims that the prosecutor improperly suggested that Brown had the burden of

proving a defense to the jury. Although the State may argue to the jury the uncontradicted nature of its own case, the State may not suggest that the defendant has the burden of proof by inquiring in closing argument why the defendant did not call a witness to testify on his behalf. Wright v. State, 690 N.E.2d 1098, 1112 (Ind. 1997). Here, the prosecutor reminded the jury that no evidence had been presented on the theory of a drug deal. The argument focused upon the uncontradicted nature of the State's case and did not inquire why the defendant or another witness had not testified. Moreover, even where a prosecutor has improperly suggested a defendant's failure to present witnesses, error may be cured by the trial court's advisement to the jury that the defendant was not required to prove his innocence or to present any evidence. Stephenson v. State, 742 N.E.2d 463, 483 (Ind. 2001), cert. denied, 534 U.S. 1105 (2002). Here, the jury was instructed that Brown was presumed innocent until the State had proven him guilty beyond a reasonable doubt, and that Brown was not required to testify. The prosecutor's comment did not place Brown in a position of grave peril. No fundamental error is demonstrated.

Conclusion

Brown has demonstrated no abuse of discretion in the trial court's instruction of the jury. Moreover, he has demonstrated no fundamental error in the prosecutor's closing argument.

Affirmed.

NAJAM, J., and DARDEN, J., concur.