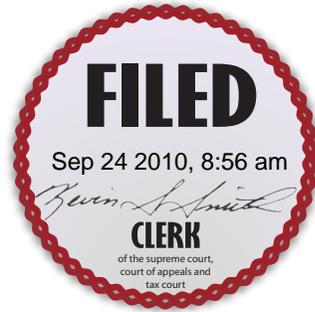


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT D. MERZ,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 24A05-1002-CR-173

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0809-FB-626

September 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Repo agents came to the residence of Robert D. Merz with the intent of repossessing a truck that belonged to Merz's girlfriend. After the repo agents had secured the truck to their repossession vehicle, Merz threatened to kill the agents with both a handgun and a shotgun. Merz used a knife to detach the truck from the repossession vehicle and then drove away in the truck. A jury convicted Merz of class B felony robbery. On appeal, Merz challenges the sufficiency of the evidence to establish that the taking was the result of the use or threat of the use of force. Merz also argues that the prosecutor engaged in misconduct during closing argument by referring to facts not in evidence and that such misconduct constituted fundamental error. Finding the evidence sufficient and that no fundamental error occurred, we affirm.

Facts and Procedural History

Richard and Barbara Moore are the owners of a repossession company called ABC Recovery. On September 10, 2008, the Moores and their employee, Zachary Love, went to the Brookville residence of Anna Buckler in order to repossess Buckler's 2003 Ford Ranger truck. Buckler shared her residence with her boyfriend, Merz, and their two young children. Mainsource Bank had issued the order for ABC Recovery to repossess the truck because Buckler's loan payments were more than sixty days delinquent. Merz had no ownership interest in the truck.

When the Moores and Love arrived at Buckler's residence, they observed the Ford Ranger in the driveway. Richard Moore backed his repossession vehicle into the driveway so

that they could attach the Ford Ranger to their “Dynamic Quick Snatch Unit,” a piece of equipment installed on their vehicle designed for repossessions. Tr. at 127. While Richard backed up, Love verified the vehicle identification number on the Ford Ranger. Barbara Moore got out of the repossession vehicle and approached the front door of the residence to let Buckler know that the Ford Ranger was being repossessed. Barbara routinely did this as a courtesy so that personal possessions could be retrieved prior to a vehicle being taken. Before Barbara reached the front door, Buckler came out of the residence to see what was going on. Barbara was beginning to explain the situation to Buckler when Merz emerged from the home.

Merz began screaming and cussing at the Moores and Love, telling them that they were not going to take the truck and that he would kill them by shooting them. Buckler told the repossession agents to go ahead and take the truck and urged Merz to calm down while simultaneously apologizing for his behavior. Merz retrieved both a handgun and then a shotgun, pointing the guns at the Moores and Love and threatening to kill them if they tried to take the truck. Merz shoved Barbara trying to gain entry into the Ford Ranger, but Barbara blocked him, informing him that she would only deal with Buckler. Merz then telephoned someone named “Bill” or “Billy” and said, “You need to get about forty red necks down here to come whip some ass. They’re taking my truck.” *Id.* at 139. Merz also instructed one of his young children to shoot the repo agents with the BB gun the child was holding. When the Moores refused to release the Ford Ranger, Merz got into his Chevy Blazer and parked it

against the bumper of the repossession vehicle, blocking it in. Barbara called 911 to report the incident and gain the aid of law enforcement.

Merz then retrieved a knife and cut the strap holding the Ford Ranger to the repossession vehicle. Merz got in the Ford Ranger, drove the truck off the snatcher unit, and exited the property in the vehicle. Barbara again called 911, this time to report that Merz had taken the Ford Ranger. The State charged Merz with class B felony robbery. Following a trial held on October 13 and 14, 2009, the jury found Merz guilty as charged. This appeal ensued.

Discussion and Decision

I. Sufficiency of the Evidence

Merz first contends that the evidence is insufficient to support his conviction for class B felony robbery. Specifically, Merz claims that the evidence does not establish that he used or threatened the use of force or put any person in fear in order to take the Ford Ranger truck. We disagree.

Upon review of a claim of insufficient evidence, we neither reweigh the evidence nor reassess the credibility of the witnesses. *Stokes v. State*, 922 N.E.2d 758, 763 (Ind. Ct. App. 2010), *trans. denied*. We consider only the probative evidence and reasonable inferences that support the verdict. *Jackson v. State*, 925 N.E.2d 369, 375 (Ind. 2010). We will affirm a conviction unless, considering only the evidence and reasonable inferences favorable to the jury's verdict, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Stokes*, 922 N.E.2d at 763.

Indiana Code Section 35-42-5-1 defines the crime of robbery and provides:

A person who knowingly or intentionally takes property from another person or from the presence of another person:

- (1) by using or threatening the use of force on any person; or
- (2) by putting any person in fear;

commits robbery, a class C felony. However, the offense is a class B felony if it is committed while armed with a deadly weapon

Merz argues that he merely threatened to kill the Moores and Love to prevent them from taking the Ford Ranger, and that he did not use or threaten to use force so that he himself could take the Ford Ranger. Merz is clearly splitting hairs, and we wholly disagree with his argument that “[n]either violence nor intimidation were necessary for [him] to take the Ford Ranger.” Appellants Br. at 9. There is ample evidence in the record that Merz threatened to kill the repo agents while pointing guns at them. He then retrieved a knife and cut the strap that held the Ford Ranger to the repossession vehicle before ultimately driving off in the Ford Ranger. Any reasonable fact-finder could conclude that Merz’s threatened use of force while armed with a deadly weapon caused the repo agents not to resist Merz’s taking of the vehicle. To insinuate that the agents merely “let” Merz take the truck and that the use of force or threat of force was unnecessary is merely an invitation for us to reweigh the evidence, a task we will not engage in on appeal. The evidence was sufficient to support Merz’s conviction for class B felony robbery.

II. Prosecutorial Misconduct

Merz next contends that the prosecutor committed misconduct during closing argument by referring to facts not in evidence. When reviewing a claim of prosecutorial misconduct, we first consider whether the prosecutor engaged in misconduct. *Williams v. State*, 724 N.E.2d 1070, 1080 (Ind. 2000). We then consider whether the alleged misconduct placed the defendant in a position of grave peril to which he should not have been subjected. *Id.* The gravity of peril turns on the probable persuasive effect of the misconduct on the jury's verdict, not on the degree of impropriety of the conduct. *Gasper v. State*, 833 N.E.2d 1036, 1042 (Ind. Ct. App. 2005), *trans. denied*. However, to properly preserve an issue regarding the propriety of a closing argument for appeal, a defendant must do more than merely make a prompt objection to the argument. *Id.* "The defendant must also request an admonishment, and if further relief is desired, defendant must move for a mistrial. Failure to request an admonishment results in a waiver of the issue for appellate review." *Flowers v. State*, 738 N.E.2d 1051, 1058 (Ind. 2000).

Merz concedes that he made no objection, no request for admonishment, and no motion for mistrial in the instant case. Nevertheless, he attempts to avoid waiver by claiming that the statements made by the prosecutor during closing argument amounted to fundamental error. "Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue." *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). "For prosecutorial misconduct to constitute fundamental error, it must 'make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process [and] present an undeniable and substantial potential for harm.'" *Booher v. State*, 773 N.E.2d 814, 817 (Ind.

2002) (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)). A claim for prosecutorial misconduct presented on appeal in the absence of a contemporaneous trial objection will not succeed unless the defendant establishes not only the grounds for prosecutorial misconduct, but also the additional grounds for fundamental error. *Id.* at 818.

Here, during closing argument, the prosecutor argued to the jury that Merz threatened the repo agents by telling them that if they took the truck someone would need “to send a meat wagon down here to pick up the bodies.” Tr. at 337. However, no witness testified as to that specific threat. Also during closing argument, the prosecutor mentioned that Merz had called a man named “Bill” to recruit some rednecks to beat up the agents. The prosecutor then asked, “Is that the same Bill Conn that [Anna Buckler] lied for?” Tr. at 337. Although this was an attempt to call Buckler’s credibility in question, the jury never heard evidence regarding a specific person named Bill Conn that Buckler may have lied for in the past to get him out of trouble.

Even assuming for argument’s sake that these statements constituted prosecutorial misconduct, Merz has not demonstrated that the harm or potential for harm done by the prosecutor’s statements was undeniable and substantial. Any improper inference made by the jury from these statements was inconsequential in light of the overwhelming evidence presented against Merz. Moreover, the jury was specifically instructed that the unsworn statements or comments by counsel should not be considered as evidence, as it is the jury’s duty to determine the facts from the testimony and evidence admitted by the court. Appellant’s App. at 72. Thus, any resulting error from the prosecutor’s statements did not

make a fair trial impossible or constitute the denial of due process. Merz has not established fundamental error. Therefore, we affirm his conviction.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.