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.

ATTORNEY FOR APPELLANT:

JOSEPH M. CLEARY
Collignon & Dietrick
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JANINE STECK HUFFMAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

COY DANIELS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0912-CR-1277
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt Eisgruber, Judge
Cause No. 49G01-0805-MR-106844

September 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Coy Daniels appeals his convictions for murder, robbery as a Class B felony, and battery as a Class C felony. We affirm.

Issues

Daniels raises two issues, which we restate as:

I. whether fundamental error occurred as a result of the prosecutor's statements during closing argument; and

II. whether the evidence is sufficient to sustain Daniels's convictions.

Facts

On November 17, 2007, James Compton met with Daniels, Sam Fancher, Lawaine Smith, and Larry Neal. They were driving a dark blue Dodge Magnum, which Paul Jordan had rented and loaned to Daniels. Compton had previously seen Daniels and Jordan in the same vehicle. Daniels told Compton that he "had a lick," which means that he had a robbery or burglary he wanted to carry out. Tr. p. 87. Daniels asked Compton if he had any guns. During the conversation, Compton saw that Daniels had three 0.40 caliber Glocks and a "mini AKA" in the car. Id. at 90. Compton heard Lawaine talking to his father, Lanthern Smith, on the cell phone about the robbery and heard that Lanthern was supposed to open the door of the place to be robbed for them. Lawaine asked Lanthern if they had "any guns on them," and Lanthern responded that they did not. Id. at 92.

Curtis Williams also saw Daniels, Neal, Fancher, and Lawaine in a dark-colored Magnum. Daniels was wearing a leather coat with fur around the collar and had a 0.40

caliber gun. Williams heard them say that they were waiting on Compton and saw Compton get in the Magnum.

On the same day, Melvin Fitzgerald had agreed to host a dice game at his residence on West 10th Street in Indianapolis. Approximately nine men participated in the dice game, including Arnold Fitzgerald, Lanthern, and Terrance Williams. Arnold was Melvin's nephew and had lost his right eye. Melvin did not allow the participants to have weapons, and he patted everyone down. The dice game involved about $1,000 total. During the game, Melvin saw Lanthern talking on his cell phone. Shortly thereafter, Lanthern told Melvin that he needed to talk to him, and they went into Melvin's bedroom. Melvin heard a knock on the door and told Lanthern to answer the door. Melvin heard "a big commotion" and shooting, and everyone "scattered." Id. at 59-60. Participants in the dice game tried to hide or escape the residence.

Williams was playing dice with the other men when he heard a knock on the door. Lanthern answered the door, and Williams saw a man wearing a jacket with fur on it come into the house. The man was holding a gun, and Williams heard someone say, "freeze." State's Exhibit 66. Williams heard gun shots and was shot in the right hand. Everyone started running, and Williams, his brother, and Arnold ran toward the basement. Williams and his brother went into the basement, while Arnold tried to run out the back door. Williams later saw Arnold on the floor near the back door, and Arnold was not moving. Arnold died of a gunshot wound to his back that damaged his heart. A 0.40 caliber bullet was removed from his chest. Williams later identified Neal in a photo array as a person involved in the shooting.

Melvin's neighbor heard shots fired, called 911, saw a "black Magnum" sitting on 10th Street, and saw the vehicle drive away. Tr. p. 108.

Later that day, Compton heard Lawaine, Fancher, and Daniels arguing about who shot first. Fancher was making fun of Daniels for shooting into the basement. They also discussed the money they had taken.

The next day, Williams was at Fancher's residence with several other people. Fancher said, "guess what this motherf***er had us do?" Id. at 163. Pointing at Lawaine, Fancher said that Lawaine had them "run in the house with about 12 motherf***ers in there." Id. Fancher then said that Compton ran back to the car before they walked into the house. Fancher said that a "one-eyed dude kept on moving." Id. They said that Daniels was following men toward the basement, and Daniels said that he fired shots through the basement door. Daniels complained that he could not hear out of one of his ears due to the shooting. The men argued about which one of them shot first. They also said that they had picked up money off the floor at Melvin's house.

The State charged Daniels with murder, felony murder, robbery as a Class A felony, and battery as a Class C felony.[1] His first jury trial ended in a mistrial. At his second trial, the jury found Daniels guilty as charged. The trial court sentenced him to an aggregate sentence of fifty-five years for murder, Class B felony robbery, and Class C felony battery.

[1] Lawaine was found guilty of robbery as a Class A felony, and we affirmed his conviction. Smith v. State, No. 49A02-0811-CR-990 (Ind. Ct. App. June 30, 2010).

Analysis

I. Statements During Closing Argument

The first issue is whether fundamental error occurred as a result of the prosecutor's statements during closing argument. At the jury trial, the prosecutor stated during closing argument:

> [Defense attorney] talked about people who are not here and who we didn't call. Why do you think? Look around this room. Why do you think people aren't here to testify? Why do you think [Compton] was so afraid? Ladies and gentlemen, use your common sense. That's why the people that [defense attorney] pointed out are not here to testify.

Tr. p. 314. Daniels objected, and the trial court instructed the jury "not to pay attention or to speculate as to why people are or are not here. You're admonished to ignore that." Id. at 314-15.

In reviewing a properly preserved claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). "Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct." Id. "The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct." Id.

"When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury." Id. "If the party is not satisfied with

the admonishment, then he or she should move for mistrial." Id. The failure to request an admonishment or to move for mistrial results in waiver. Id. "Where a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim." Id. The defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Id. "Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue." Id. "It is error that makes 'a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process ... present[ing] an undeniable and substantial potential for harm.'" Id. (quoting Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002)).

Although Daniels objected to the prosecutor's statement during closing argument and the trial court admonished the jury, Daniels did not move for a mistrial and has waived this argument. Waiver notwithstanding, Daniels argues that fundamental error occurred because the prosecutor implied that Daniels's family and friends had intimidated people into not testifying or cooperating with the investigation. According to Daniels, the potential for harm was high because the State's case was "weak" and rested mainly on the testimony of Williams and Compton and both "had cut deals with the State." Appellant's Br. p. 6.

We cannot conclude that the prosecutor's statement resulted in an undeniable and substantial potential for harm. First, we do not agree that the State's evidence was weak. Rather, as noted below, the State presented substantial evidence that Daniels participated in the robbery and the shooting of Arnold and Williams. Further, the jury had already

been presented with evidence that witnesses were uncooperative with detectives investigating the murder and that the neighborhood involved was dangerous. Compton testified that he was scared to testify and that the general thought in the neighborhood at issue is anyone testifying for the State will be shot or killed. Although the prosecutor's statement may have been the basis for an admonishment, the statement did not rise to the level of fundamental error. Brown v. State, 799 N.E.2d 1064, 1068 (Ind. 2003). Given the evidence presented to the jury, we cannot say that the prosecutor's remark during closing argument resulted in fundamental error. See Cooper, 854 N.E.2d at 838 ("It strains credulity to believe that the jury found Cooper guilty of murder for any reason other than the evidence introduced at trial. Any harm done by the prosecutor's remark was de minimis, not substantial. And the resulting error if any did not result in denying Cooper fundamental due process.").

II. Sufficiency of the Evidence

The next issue is whether the evidence is sufficient to sustain Daniels's convictions. When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. Bailey v. State, 907 N.E.2d 1003, 1005 (Ind. 2009). "We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence." Id. We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. Id. It is well established that "circumstantial evidence will be deemed sufficient if

inferences may reasonably be drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt." Pratt v. State, 744 N.E.2d 434, 437 (Ind. 2001).

Daniels argues that the evidence is insufficient because no one in Melvin's house identified Daniels as one of the participants in the robbery and shooting, Compton and Williams's credibility was called into question because they received favorable plea agreements as a result of their testimony, neither Compton nor Williams testified that they were present during the robbery and shooting, and Compton's testimony conflicted with Williams's testimony. Daniels's argument is merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we will not do.

The State presented evidence that Daniels, Fancher, Neal, and Lawaine decided to carry out a robbery and asked Compton if he had any guns. Compton saw that they had three 0.40 caliber Glocks and a "mini AKA" in the car. Tr. p. 90. Compton heard Lawaine talking to his father, Lanthern, on the cell phone about the robbery and heard that Lanthern was supposed to open the door at the place to be robbed for them. Lawaine asked Lanthern if they had "any guns on them," and Lanthern responded that they did not. Id. at 92. At that time, Daniels was wearing a leather coat with fur on it.

At Melvin's house during the dice game, Melvin saw Lanthern talking on his cell phone. When someone knocked on the door and Lanthern answered the door, men came into the house, started shooting, and took money used in the dice game. One of the men was wearing a coat with fur on it. Arnold, who was missing one eye, was shot near the back door and basement stairs. Williams was shot in the right hand. Arnold died of a gunshot wound to his back that damaged his heart. A 0.40 caliber bullet was removed

from his chest. Williams later identified Neal in a photo array as a person involved in the shooting. Melvin's neighbor heard shots fired, called 911, saw a "black Magnum" sitting on 10th Street, and saw the vehicle drive away. Id. at 108.

Later that day, Compton heard Lawaine, Fancher, and Daniels arguing about who shot first. Fancher was making fun of Daniels for shooting into the basement. They also discussed the money they had taken. The next day, Williams heard Fancher, Daniels, and Lawaine discussing the robbery. Fancher said that a "one-eyed dude kept on moving" during the robbery. Id. at 163. They said that Daniels was following men toward the basement, and Daniels said that he fired shots through the basement door. Daniels complained that he could not hear out of one of his ears due to the shooting. The men again argued about which one of them shot first.

The jury was presented with evidence regarding Compton and Williams's plea agreements and inconsistencies between Compton and Williams's testimony. It was for the jury to judge their credibility. The State presented sufficient evidence that Daniels was a participant in the robbery and shooting of Arnold and Williams. We conclude that the evidence is sufficient to sustain Daniels's convictions for murder, Class B felony robbery, and Class C felony battery.

Conclusion

The prosecutor's statement during closing argument did not result in fundamental error, and the evidence is sufficient to sustain Daniels's convictions. We affirm.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.