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FILED
Nov 12 2010, 9:41 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

DONIELLE S. SIMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-1003-CR-140
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Natalie Bokota, Judge
Cause No. 45G02-0812-FA-45

November 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Donielle Sims appeals his convictions and sentence for one count of Class A felony attempted robbery. We affirm.

Issues

The issues before us are:

I. whether the prosecutor committed misconduct during closing argument; and

II. whether the trial court abused its discretion by sentencing Sims to a term of forty-five years.

Facts

The evidence most favorable to the conviction is that on December 17, 2008, as Tamicka Smith returned to her apartment in Gary, she was approached by Sims, who was holding a gun and told her to hurry up and open her door. When Smith was unable to open her door quickly, Sims threatened to shoot her and punched her in the temple. After Smith opened the door, Sims pushed her down onto a couch and began asking her where her gun was. Sims apparently knew that Smith was employed as a security guard, and she was carrying a handgun in a holster on her right hip. She withdrew the gun from her holster as if she was going to give it to Sims, but she shot him instead. Smith and Sims then exchanged several shots, each hitting the other. Sims eventually fled from the apartment, screaming.

Smith was transported to a hospital. Before undergoing surgery, she told police that she knew and had recognized her attacker from the way he talked and that his name

was Donny, but she could not remember his last name. Smith later positively identified Sims as her attacker. Smith's surgery required the removal of part of her intestine, and she spent three weeks recovering from her wounds.

Sims, meanwhile, sought treatment for his gunshot wounds at a different hospital. When police asked him how he had sustained his wounds, Sims claimed he had been shot by two Hispanic men. Police managed to recover DNA from blood stains and a cap left in Smith's apartment, and the DNA matched Sims's.[1] In March 2009, Sims wrote Smith a letter in which he asked her to forgive him for shooting her.

The State charged Sims with Class A felony attempted robbery, Class A felony burglary, Class B felony criminal confinement, Class B felony aggravated battery, and Class C felony battery. A jury trial was conducted on January 11-13, 2010. Sims testified that he had agreed to be Smith's boyfriend in exchange for $500, but he decided he did not want to be her boyfriend, which led to a confrontation in Smith's apartment. Sims essentially claimed he shot Smith in self-defense after she shot him first. Sims was found guilty of all charges except the criminal confinement charge. The trial court subsequently entered judgment of conviction only for Class A felony attempted robbery and sentenced Sims to an executed term of forty-five years. Sims now appeals.

Analysis

I. Prosecutorial Misconduct

[1] Sims has an identical twin brother, Lonny, who was incarcerated in the Indiana State Prison at the time of this incident.

Sims first contends the prosecutor committed misconduct during closing argument. When reviewing a properly preserved claim of prosecutorial misconduct, we must 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 should not have been subjected. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). We measure whether a prosecutor's argument constitutes misconduct 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.

Sims, however, did not object to the prosecutor's argument. Where, as here, a claim of prosecutorial misconduct has not been properly preserved, "the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error." Id. The "fundamental error" rule "'applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.'" Purifoy v. State, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005) (quoting Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002)), trans. denied. "The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule." Id. In other words, fundamental error requires a defendant to show greater prejudice than ordinary reversible error. Id.

During Sims's trial testimony, he stated that because of a prior felony conviction, he had had difficulty finding a job, which led to his supposed plan to be Smith's boyfriend in exchange for $500. During closing argument, the prosecutor stated:

> Mr. Sims' view of the world is that it's everybody else's fault but his own. He can't get a job because he's a convicted felon. Well, Mr. Sims, you got the conviction, that's on you. It's not society's fault. It's not your fault as part of the society here. We talked to all of you. You all have worked, you all have jobs. Why is it that it's a bad thing that you, as an employee, you go to work and you don't want to work next to somebody who's a convicted felony [sic]? Why is that a bad think [sic]? Why does that deserve your sympathy? You, as an employer, why should you employee [sic] a convicted felon? Where do you come up with a line of thinking that you are entitled to sympathy because of that? And the court's going to give you another instruction, sympathy can't play into your decisions here and it shouldn't, but that's what he's asking you. He's asking you to feel sorry for him, feel sorry for me because I was left with no choice but to shoot Tamicka. So, it's Tamicka's fault. Nothing is ever Donny Sims' fault, it's always somebody else's and it's time for that to stop.

Tr. pp. 502-03.

Sims contends the prosecutor improperly focused upon his prior felony conviction as a basis for the jury to convict him on the basis of his past conduct and poor character, in violation of the principles of Indiana Evidence Rule 404(b).[2] As authority for this argument, Sims cites Giles v. State, 699 N.E.2d 294 (Ind. Ct. App. 1998), and Bowen v. State, 680 N.E.2d 536 (Ind. 1997). Both cases are easily distinguishable, in that the

[2] This Rule states in part, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ."

prosecutor in each case argued to the jury that a defendant's prior convictions indicated a "pattern of behavior," Giles, 699 N.E.2d at 299, or that "a person's behavior or conduct in the past indicates how they're gonna act in the present and in the future . . . ." Bowen, 680 N.E.2d at 539. Thus, the prosecutors in both cases were explicitly asking the jury to convict a defendant based on his character.

Here, the prosecutor discussed Sims's prior conviction only after Sims had mentioned it during his testimony to try to explain why he purportedly requested $500 from Smith, i.e. he was having difficulty finding work because of his conviction. Additionally, the prosecutor did not urge the jury to convict Sims on the basis of his character; rather, she was urging the jury to reject what she perceived as self-pity on Sims's part. We also note that in Bowen, our supreme court held that defense counsel's failure to object to clearly inappropriate argument by the prosecutor did not constitute ineffective assistance of counsel. Id. at 540. Here, where the argument by the prosecutor was not so obviously objectionable, we decline to find that it constituted fundamental error.

II. Sentence

Next, we address Sims's challenge to his forty-five year sentence. We engage in a four-step process when evaluating a sentence under the current "advisory" sentencing scheme. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third,

the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

Here, Sims claims only that the trial court abused its discretion in failing to find two mitigating circumstances: the fact that he was injured in the shootout with Smith, and that he allegedly expressed remorse for his actions. An abuse of discretion in identifying or not identifying aggravators and mitigators occurs if it is "'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" Id. at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Id. at 490-91. "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to show that the mitigating evidence is both significant and clearly supported by the record." Storey v. State, 875 N.E.2d 243, 252 (Ind. Ct. App. 2007), trans. denied.

With respect to Sims's claim that the injuries he sustained during the incident ought to have constituted a mitigating circumstance, the trial court considered this

argument and rejected it because, "It was self induced based on his own actions. The only reason he was shot is because he was committing a crime." Tr. p. 581. We cannot say the trial court abused its discretion in rejecting this proposed mitigator. This court previously has upheld a rejection of poor health as a mitigating circumstance where the defendant caused those health issues through his long-time illegal drug abuse and the defendant was convicted of drug-related charges. See Storey, 875 N.E.2d at 252. Similarly, we see no reason why the trial court here should have been required to find Sims's gunshot injuries to be a mitigating circumstance, where he would not have sustained them but for his forcing his way into Smith's apartment at gunpoint.

As for Sims's alleged remorse, we note that Sims did not express any such remorse at his sentencing hearing, nor did his attorney ask the trial court to find any alleged remorse as a mitigating circumstance. As a general proposition, with the exception of guilty pleas, a defendant waives any claim that a trial court abused its discretion in failing to consider a mitigator unless that mitigator was raised at sentencing. See Anglemyer v. State, 875 N.E.2d 218, 220 (Ind. 2007). In particular, finding remorse, or lack thereof, is a highly fact-sensitive determination requiring direct observation of a defendant by the trial court. See Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). The trial court here had no opportunity to gauge the sincerity of any alleged remorse by Sims. Sims has waived his argument that the trial court abused its discretion in failing to identify his alleged remorse as a mitigating circumstance.

Waiver notwithstanding, to the extent Sims contends his remorse was self-evident in the letter he wrote to Smith after the shooting, we reject that assertion. Although Sims

said in the letter that he wanted Smith "to forgive me for hurting you," he also stated, "The only reason I shot was to protect myself from you killing me." Tr. p. 346. In other words, Sims was not taking responsibility for his own actions in this letter. Rather, it reasonably can be construed as attempting to shift the blame for Smith's shooting onto the victim herself. The letter is not definitive proof of Sims's remorse.

Conclusion

The prosecutor's closing argument did not constitute fundamental error, and the trial court did not abuse its discretion in sentencing Sims. We affirm.

Affirmed.

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