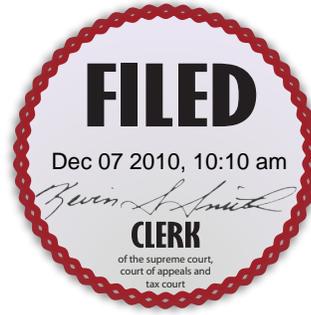


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ANN SUTTON
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

WADE JAMES HORNBACHER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JOSE CABALLERO,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-1003-CR-367

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0909-FB-80615

December 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Jose Caballero appeals his convictions for Class B felony criminal confinement, Class C felony battery, and Class A misdemeanor battery. We affirm.

Issue

Caballero raises one issue, which we restate as whether the prosecutor's references during closing argument to people seated in the gallery amounted to fundamental error.

Facts

On July 29, 2009, Jerome Warren confronted seventeen-year-old Desmond Williams about a stolen gun.¹ The two began arguing, and eventually Warren, Caballero, and Williams were involved in a physical altercation. Williams was forced into a van and taken to a nearby apartment complex. During the incident, Williams was repeatedly burned with a cigarette and suffered injuries to his head.

The State eventually charged Caballero, Warren, and two others, who were in the van, with Class B felony criminal confinement, Class C felony criminal confinement, Class C felony battery, and Class A misdemeanor battery. Warren's family apparently attended Caballero's jury trial. During the closing arguments the prosecutor made the following statement regarding Williams's reluctant trial testimony:

We also know he's scared and we know he has reason to be scared. And you saw as well as I did when he walked in here and sat in that witness stand and he took a look at who was here to watch the trial and he thought about the fact that he has to go home when this is over, and he thought about the

¹ At the time of the trial, Williams was eighteen.

fact that people associated with [Caballero] and [Warren's] family were out there in the gallery—[Warren's] family in the gallery for [Caballero's] trial. When he thought about that he decided he didn't want to talk about this, that again he didn't want to talk about it. And had to be confronted with his own prior statements where he gave details about being beaten and burned by [Warren] and [Caballero]. So my question to you is, What do we do with that, because he doesn't want to talk about it, do we turn away? Well, if he's not going to talk about it then, just forget it, is that what we do? Do they win? Because they scared this kid, because he knows what they're capable of and he doesn't want to testify against them, he doesn't want to talk about it, do they win, is that the decision that remained, that's a decision, ladies and gentlemen, that you cannot, that you should not have. . . .

Tr. pp. 194-95. Defense counsel did not object and, during closing argument, defense counsel stated, "Obviously I don't agree with everything [the prosecutor] just said to you or we wouldn't be here. I do agree, however, that I don't know why [Warren's] family is out there, but I can tell you that it's not to support Mr. Caballero. He wouldn't ask them here." Id. at 205.

The jury found Caballero guilty as charged. The trial court entered convictions on the Class B felony confinement, Class C felony battery, and Class A misdemeanor battery charges.² Caballero now appeals.

Analysis

Caballero argues that the prosecutor's reference to Warren's family members' presence at trial amounted to prosecutorial misconduct because he was asking the jury to infer that they were there to corrupt the trial and encouraging the jury to find Caballero

² At the sentencing hearing, the trial court merged the Class C felony confinement charge into the Class B felony confinement conviction.

guilty on something other than the evidence. Caballero argues that asking the jury to base a conviction “on conjecture and fear of extra-judicial matters is not only unfair, but extremely prejudicial and against all tenets of our judicial system.” Appellant’s Br. p. 10.

In reviewing a properly preserved claim of prosecutorial misconduct, we must determine whether the prosecutor engaged in misconduct and, if so, 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). “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, he or she should move for mistrial. Id. The failure to request an admonishment or move for mistrial results in waiver. Id.

If a claim of prosecutorial misconduct has not been properly preserved, our standard of review is different from that of a properly preserved claim. Id. The defendant must establish the grounds for the misconduct and the additional grounds for fundamental error. Id. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue because the error makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm. Id.

Because Caballero did not object, request an admonishment, or move for a mistrial, this issue is waived. To avoid waiver, Caballero argues that the prosecutor’s closing argument amounted to fundamental error. Even if we were to agree with

Caballero that the prosecutor committed misconduct, we do not agree that the argument amounted to fundamental error.

The evidence against Caballero was overwhelming. First, Williams testified at trial that he and Caballero were fighting, that he blacked out, and that while he was in the van Caballero burned him with a cigarette. Although Williams's testimony was reluctant to say the least, it was consistent with all of the other evidence at trial. Specifically, one of Williams's younger brothers testified that he observed Williams and Warren fighting, that Caballero walked up and punched Williams, and that he went inside to call the police and when he came back outside the van was driving away. Williams's other brother testified that Williams and Warren were outside arguing, that Caballero walked up and began fighting with Williams, that Warren "choked Desmond out," and that they threw Williams in the van and drove off. Tr. p. 88. Williams's brother stated that, when Williams returned home, he had a knot on his head, and he learned of the cigarette burns on Williams's back a week or two later. Caballero's statement to police was also admitted into evidence. In the statement Caballero admitted to hitting Williams on the jaw, to being there when Warren put Williams in the van, and to burning Williams with cigarettes while in the van. Given this undisputed evidence, any error in the closing argument was not fundamental error.

Conclusion

The prosecutor's closing argument did not amount to fundamental error. We affirm.

Affirmed.

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