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IN THE
COURT OF APPEALS OF INDIANA

FRED E. GORDON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A04-0905-CR-280
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
CRIMINAL DIVISION, ROOM IV
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0809-MR-6

December 22, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Fred E. Gordon (Gordon), appeals his conviction for murder, a felony, Ind. Code § 35-42-1-1.

We affirm.

ISSUES

Gordon raises three issues on appeal, which we restate as follows:

(1) Whether the admission of a detective's testimony that the detective had never been previously accused of fabricating an individual's statement constituted impermissible vouching testimony;

(2) Whether the State committed fundamental error during closing argument by stating that the evidence showed that the bullet found in the victim had been fired from the weapon found at the scene; and

(3) Whether the State presented sufficient evidence to prove beyond a reasonable doubt that Gordon committed murder.

FACTS AND PROCEDURAL HISTORY

Sometime before September 24, 1982, Gordon purchased a truck from Roger Hilton (Hilton), who owned a car dealership. During the week preceding September 24, Gordon, who still owed money on the truck, arrived at Hilton's trailer, located in the Black Oak neighborhood, in Gary, Indiana, and offered to pay Hilton with a gun. Hilton rejected the offer because the weapon was "a piece of junk." (Transcript p. 360).

At approximately 8 p.m. on September 24, 1982, Gordon met Hilton at the home of a mutual friend. Hilton became angry when Gordon offered him a small amount of money as payment for the truck. Hilton told Gordon to "[b]ring the truck back and we'll call it even, we'll be even and we can start over." (Tr. p. 357). After Hilton left, Gordon consumed an alcoholic beverage and became "lightly inebriated." (Tr. p. 353). He became upset about his encounter with Hilton and announced that Hilton could not speak to him like he had and that he was going to dump the truck at Hilton's home that night. Gordon returned to his home that night at around 9:30 p.m. He went about his usual routine and did not tell his wife about his encounter with Hilton.

At approximately 1 a.m. on September 25, 1982, Hilton's girlfriend, Kathryn Weller (Weller), returned to Hilton's trailer where she lived with Hilton. She noticed that a glass syrup bottle in the kitchen had shattered and observed, near the shattered bottle, a bullet hole in the wall. Weller also smelled an odor similar to that of exploded firecrackers in the trailer.

Eventually, Hilton was found dead in his yard. Although he never left his house without his shoes on, Hilton was wearing only his socks. A coroner's report determined that he had died as a result of a hemorrhage from a gunshot wound to the hip that had severed his iliac artery. There were no injuries consistent with a struggle and no marks on his skin that would indicate that he was shot at close range.

A .45 caliber, semi-automatic carbine Volunteer Enterprises gun was located at approximately fifty feet from Hilton's body. On the kitchen floor of Hilton's trailer, detectives found two unfired .45 caliber rounds, as well as a spent .45 shell casing that had

been fired from the gun. Although detectives with the Lake County Sheriff's Department found numerous weapons in Hilton's trailer, they found no other .45 caliber weapon. Because detectives found a second spent .45 caliber shell casing nearby Hilton's body, they determined that Hilton had been shot outside. This spent shell had also been fired from the suspected murder weapon. After further investigation, law enforcement identified Gordon as a suspect in Hilton's killing but, at that time, the State declined to file charges against him.

In June of 2008, a cold case investigator with the Lake County Sheriff's Department reviewed Hilton's case and determined that one witness, Jack Burkholder (Burkholder), had never been interviewed. In August of 2008, detectives interviewed Burkholder. Burkholder told the detectives that several months after Hilton's killing, Gordon had told him that he had "shot and killed somebody" over a "car and money." (Tr. p. 648).

On September 15, 2008, the State filed an Information charging Gordon with murder, a felony, I.C. § 35-42-1-1. When first interviewed after his arrest, Gordon initially denied any involvement. On September 15, 2008, Gordon gave another statement after waiving his *Miranda* rights in which he admitted going to Hilton's trailer in order to trade a gun for the truck he had previously purchased from Hilton. According to Gordon, Hilton rejected the offer and they became involved in a fight, struggling to gain control over the gun. Gordon stated that

> [Hilton] got pissed[,] we had words and he started hitting me with the stock of the gun. I fell down and I grabbed the stock of the gun[.] [Hilton] had the barrel like a ball bat[.] . . . While we were fighting I was on the ground holding the stock of the rifle[,] [Hilton] had the barrel and the gun went off and [Hilton] got shot. [Hilton] threw the gun after he was shot then [Hilton] passed out and fell to the ground[.] I went home and went to bed.

(State's Exh. 38).

On March 9 through March 12, 2009, the trial court conducted a jury trial. During the trial, Gordon's counsel presented a theory that Gordon accidentally shot Hilton. After presentation of the evidence, the jury found Gordon guilty as charged. On April 14, 2009, during the sentencing hearing, the trial court sentenced Gordon to forty years.

Gordon now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Impermissible Vouching Testimony*

First, Gordon contends that the trial court abused its discretion when it admitted a detective's testimony that he had never been accused of falsifying an individual's statement. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Iqbal v. State*, 805 N.E.2d 401, 406 (Ind. Ct. App. 2004). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*.

Here, during the direct testimony of one of the detectives who took Burkholder's statement, the State inquired how many times during his twenty-seven year career the detective had been accused of falsifying an individual's testimony. Gordon's counsel objected based on relevancy and the trial court overruled that objection. On appeal, Gordon asserts that the State's question amounted to impermissible vouching testimony pursuant to Indiana Evidence Rule 607 because it permitted "the State to bolster the credibility of the

officer before it was attacked." (Appellant's Br. p. 11). However, a defendant is limited to the specific grounds argued to the trial court and cannot assert new bases for admissibility of statements for the first time on appeal. *Taylor v. State*, 710 N.E.2d 921, 923 (Ind. 1999). As such, we find that Gordon waived this argument.

II. *State's Closing Argument*

Next, Gordon claims that the State committed misconduct during closing argument by stating that the evidence presented at trial established that the bullet found inside Hilton's body was fired from the weapon that was found at the scene. When reviewing an allegation of prosecutorial misconduct, this court makes two inquiries. First, we determine by reference to case law and rules of conduct whether the prosecutor engaged in misconduct. *McBride v. State*, 785 N.E.2d 312, 319 (Ind. Ct. App. 2003), *trans. denied*. Second, we must determine whether the alleged misconduct placed the defendant in a position of grave peril to which he should not have been subjected or evidenced a deliberate attempt to improperly prejudice the defendant. *Id*. "Grave peril" is determined by analyzing the "probable persuasive effect of the misconduct on the jury's decision . . .." *Id*. (citing *Stevens v. State*, 691 N.E.2d 412, 420 (Ind. 1997)).

However, Gordon admits that he failed to object when the State made the statement at trial. Generally, a contemporaneous objection is required to preserve an issue for appeal. *Staley v. State*, 895 N.E.2d 1245, 1248 (Ind. Ct. App. 2008), *trans. denied*. Seeking to avoid procedural default, Gordon urges us that his claim is not foreclosed because the State's misconduct amounted to fundamental error. The fundamental error doctrine is extremely

narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and that the resulting error denies the defendant fundamental due process. *Id*.

Here, Gordon contends that the State misrepresented the evidence presented at trial during closing arguments. Specifically, he claims that no evidence supported the prosecutor's assertion that the bullet found in Hilton's body had been fired from the .45 caliber, semi-automatic carbine Volunteer Enterprises gun that was found approximately fifty feet from Hilton's body. We disagree.

The record indicates that the mutilated bullet and lead fragments removed from Hilton's body by the coroner was marked as Lab Item Number 34. The State's ballistics expert, Jay Gauthier (Gauthier), designated the spent bullet as his Item Number 3 and the mutilated lead as his Item Number 4. Both of these items were admitted at trial as part of the State's Exhibit 34f. At trial, Gauthier testified that his Item Number 4, the small piece of lead was "just too mutilated to be of any value for any further examination." (Tr. p. 568). However, with regard to his Item Number 3, the spent bullet, Gauthier stated that it "had been fired from the submitted weapon." (Tr. p. 568). Thus, as the State did not mischaracterize the evidence, we conclude that no error, let alone a fundamental error, occurred.

III. *Sufficiency of the Evidence*

Lastly, Gordon asserts that the State failed to present sufficient evidence to sustain his conviction for murder. In reviewing a sufficiency of the evidence claim, this court does not

reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. at 213. A murder conviction may be based entirely on circumstantial evidence. *Franklin v. State*, 715 N.E.2d 1237, 1241 (Ind. 1999). Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Perez*, 872 N.E.2d at 213.

Indiana Code section 35-42-1-1 defines murder as "knowingly or intentionally kill[ing] another human being[.]" Gordon specifically contends that he did not act intentionally or knowingly when he killed Hilton; rather he claims that the killing was an accident. A person engages in conduct "'intentionally' if when he engages in the conduct, it is his conscious objective to do so." I.C. § 35-41-2-2(a). A person acts "'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." I.C. § 35-41-2-2(b). Knowledge, like intent, is a mental state of the actor; therefore, the trier of fact must resort to reasonable inferences based on the examination of the surrounding circumstances to reasonably infer its existence. *Slone v. State*, 912 N.E.2d 875, 880 (Ind. Ct. App. 2009), *trans. denied*.

Here, the record disclosed that Gordon owed Hilton money for a truck he recently purchased from Hilton. However, instead of money, Gordon offered Hilton a gun to pay off the remainder of his debt. Hilton refused. Shortly before Hilton was found murdered, Hilton

and Gordon had an encounter that angered Gordon. After the encounter, Gordon became inebriated and declared that Hilton could not speak to him in that manner and that he was going to dump the truck at Hilton's residence. Gordon admitted to going to Hilton's trailer that night.

Furthermore, evidence presented at trial showed that there was a firecracker smell inside the trailer, a shattered syrup bottle, and a spent .45 caliber spent casing. In addition, Hilton, who never left his house without wearing his shoes, was found only in his socks. Hilton's body did not have any marks indicating that he was shot at short range during a struggle over the gun, as Gordon claimed.

After the killing, Gordon did not call for medical help even though he knew Hilton had been shot. Moreover, when Gordon talked to Burkholder, he did not mention that the shooting was an accident; rather, he stated that he had killed someone over a car and money.

In sum, it is clear that after his encounter with Hilton on September 24, 1982, Gordon became angered and voiced the intent to leave the truck at Gordon's residence. Based on the circumstantial evidence presented at trial, the jury could then make a reasonable inference that the shooting started inside the trailer. After Hilton fled outside, he received the deadly shot. Due to the absence of any marks on his body, the jury could reasonably infer that Hilton was not killed during a struggle over the weapon. After the killing, Gordon left the scene and did not summon any medical help for Hilton. As a result, we conclude that the

State presented sufficient evidence to support that Gordon intentionally or knowingly killed Hilton.

CONCLUSION

Based on the foregoing, we conclude that (1) Gordon waived his claim that the admission of a detective's partial testimony constituted impermissible vouching testimony; (2) the State did not commit error by stating during closing argument that the evidence showed that the bullet found in the victim had been fired from the weapon found at the scene; and (3) the State presented sufficient evidence to prove beyond a reasonable doubt that Gordon committed murder.

Affirmed.

VAIDIK, J., and CRONE, J., concur.