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IN THE COURT OF APPEALS OF INDIANA

ADRIAN COLLINS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 49A02-1106-CR-523
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
The Honorable Amy J. Barbar, Magistrate
Cause No. 49G02-1007-FB-56295

December 28, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Adrian Collins ("Collins") was convicted in Marion Superior Court of Class C felony battery. Collins appeals and argues that statements made during the State's closing argument constituted prosecutorial misconduct rising to the level of fundamental error. We affirm.

Facts and Procedural History

On the morning of June 20, 2010, Collins and Oscar Sanchez ("Sanchez") beat Jonathan Turner ("Turner"), leaving him with a severely broken jaw. As a result of the attack, Turner had to have his mouth wired shut and undergo surgery to place a metal plate and screws in his jaw.

Collins was subsequently charged with Class C felony battery. A jury trial was held on March 21, 2011, and Collins was found guilty as charged. On May 20, 2011, the trial court sentenced Collins to a three-year suspended sentence and placed him on probation for two years. Collins now appeals.

Discussion and Decision

Collins contends that the State engaged in prosecutorial misconduct in its closing argument by (1) stating that Collins could receive a suspended sentence if convicted, and (2) asserting that defense witnesses were lying. To preserve a claim of prosecutorial misconduct, the defendant must object and request an admonishment. Nunley v. State, 916 N.E.2d 712, 721 (Ind. Ct. App. 2009), trans. denied. If the party is not satisfied with the admonishment, the proper procedure is to move for a mistrial. Id. Failure to request an admonishment or move for a mistrial results in waiver of the issue on appeal. Id.

Because Collins did not object to the statements at trial, request an admonishment, or move for a mistrial, his claims of prosecutorial misconduct are waived.

In an attempt to avoid waiver, Collins asserts that the allegedly improper statements constituted fundamental error. Where a claim of prosecutorial misconduct has been properly preserved, the reviewing court 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 should not have been subjected. Coleman v. State, 946 N.E.2d 1160, 1166 (Ind. 2011). But 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 of fundamental error. Id. "The fundamental error exception 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 the resulting error denies the defendant fundamental due process." Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010) (quotations omitted). To be deemed fundamental, "[t]he error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process." Id. (quotations omitted).

Collins first takes issue with the State's reference to the possibility that Collins could receive a suspended sentence if convicted. In its closing argument, the State made the following statement:

> [Defense counsel] in his opening statement said something about jail time, that's improper, totally inappropriate. You're about to get an instruction

> that says don't consider that just like we talked about in voir dire. C Felony battery is a suspendable offense that means jail time is not mandatory. Judge Barbar has all the discretion in the world to craft an appropriate sentence based on what happened here, so don't be swayed by that story about sentencing.

Tr. pp. 163-64. The State made the foregoing statement in response to remarks made by defense counsel in its opening statement. Specifically, after outlining the defense's theory of self-defense, Collins's counsel asked, "Is this the type of conduct that warrants jail time for someone whose [sic] trying to safe [sic] their own life?" Tr. p. 212.

As an initial matter, we observe that "[i]t is error for the prosecutor to disclose statutory penalties for the crimes under consideration." Brown v. State, 799 N.E.2d 1064, 1067 (Ind. 2003). However, "[p]rosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." Dumas v. State, 803 N.E.2d 1113, 1118 (Ind. 2004). Here, the State only made reference to the possibility that Collins could receive a suspended sentence after defense counsel implied that Collins would receive jail time if convicted. But even assuming that the statement was improper, we cannot conclude that it placed Collins in a position of grave peril. Indeed, in making the statement, the State told the jury *not* to consider the possible sentence. Moreover, the jury received an instruction informing it that "[t]he judge is solely responsible for assessing the penalty within a broad range of possibilities" and that "the law has been written so that you may make your decisions without being influenced by the apparent severity or leniency of the sentence." Appellant's App. p. 214. Under these facts and circumstances, we cannot conclude that

Collins has established that the State's reference to the possibility that Collins could receive a suspended sentence amounted to prosecutorial misconduct, much less prosecutorial misconduct rising to the level of fundamental error.

Next, Collins argues that the State committed prosecutorial misconduct by stating in its closing arguments that two defense witnesses, Sanchez and Hakim Pierce ("Pierce"), were lying. Specifically, after noting that Sanchez and Pierce both testified that Turner attacked Collins and that Collins acted in self-defense, the prosecutor commented, "Well, aren't they clever, they've been hanging out together in the lobby all afternoon, that's the route the [sic] decided to go. . . . [T]hey're lying. They are lying to your faces. . . . Liars, trying to fool you like you're a bunch of children, okay. Don't fall for that." Tr. p. 163. The prosecutor also stated that "in my experience the defendant's friends usually say their [sic] innocent, so we're not surprised that that's what the story is." Id. at 162.

As our supreme court has previously noted, a prosecutor is permitted in closing arguments to discuss the evidence and reasonable inferences derivable therefrom so long as there is no implication of personal knowledge that is independent of the evidence.[1] Hobson v. State, 675 N.E.2d 1090, 1096 (Ind. 1996). Thus, where the testimony of various witnesses is inconsistent, a prosecutor is "entitled to deduce that some of the

[1] Collins briefly argues that by "suggesting that the testimony was concocted while the witnesses were in the hallway, the prosecutor implied knowledge outside the record[.]" Reply Br. at 2. However, we do not believe that this statement implied any personal knowledge beyond the evidence presented at trial. Pierce testified that he had been speaking with Collins and Sanchez outside the courtroom on the day of trial. Thus, the prosecutor was simply pointing out the fact that Sanchez and Pierce had the opportunity to confer regarding their testimony, and discussing the reasonable inferences that could be drawn from that information.

witnesses must not have been testifying truthfully and invite the jury to determine which witnesses were telling the truth." Sanders v. State, 724 N.E.2d 1127, 1132 (Ind. Ct. App. 2000). Accordingly, in Sanders, this court concluded that the prosecutor did not commit misconduct when it called the defendant a liar because the evidence adduced at trial established that either the defendant or the State's witnesses were lying, and the prosecutor was permitted to argue in closing that the jury should conclude that the defendant was the one who was being untruthful. Id.

Here, Turner testified that he was attacked by Collins and Sanchez. Sanchez and Pierce testified that Turner attacked Collins and Collins only defended himself. Because the incongruities between Turner's and the defense witnesses' testimony established that either Turner or the defense witnesses were lying, the prosecutor was entitled to argue that Sanchez and Pierce were the ones who were not being truthful. Moreover, even assuming that the State's argument was improper, this court has noted that remarks concerning the prosecutor's belief that a defendant is a liar, "while not laudable, are of little persuasive effect to juries." Id. We believe this is equally true of a prosecutor's statement that a defense witness is a liar. Accordingly, we cannot conclude that the prosecutor's remarks concerning the testimony of Sanchez and Pierce placed Collins in a position of grave peril. Thus, Collins has not established that the prosecutor's statements amounted to prosecutorial misconduct rising to the level of fundamental error.[2]

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[2] Collins's reliance on Hossman v. State, 473 N.E.2d 1059 (Ind. Ct. App. 1985), amended on reh'g, 475 N.E.2d 1197, trans. denied, is misplaced. In Hossman, the State engaged in a pattern of misconduct throughout the course of the entire trial, all in pursuit of its "fabricated defense" theory. Id. at 1061-64. The prosecutor misrepresented the evidence, ignored the trial court's repeated rulings, and made multiple improper statements. Id. The alleged

Under these facts and circumstances, we cannot conclude that the State committed prosecutorial misconduct rising to the level of fundamental error.

Affirmed.

FRIEDLANDER, J., and RILEY, J., concur.

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misconduct in this case consisted of a few statements made in closing arguments, and it simply did not rise to the level of misconduct at issue in Hossman.