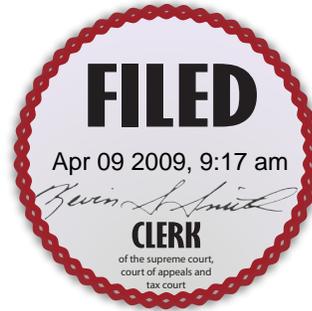


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JARVIS TOLBERT,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 71A04-0810-CR-576

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable R.W. Chamblee, Jr., Judge
Cause No. 71D08-0706-FD-722

April 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Jarvis Tolbert (“Tolbert”) appeals his conviction of Intimidation, as a Class D felony.¹

We affirm.

Issues

Tolbert raises two issues on appeal which we reorder and restate as follows:

- I. Whether there was insufficient evidence to find Tolbert guilty beyond a reasonable doubt of Intimidation; and
- II. Whether the prosecutor’s misconduct constituted fundamental error.

Facts and Procedural History

Tolbert was convicted based upon his conduct during the jury trial of one of his friends, Marco Washington (“Washington”). Washington was on trial for criminal recklessness and possessing a handgun without a license, arising out of an altercation during which a gun was fired. The lead prosecutor on the case was deputy prosecuting attorney Amy Cressy (“Cressy”). The State’s table was closer to the jury than the defense table. Seated at the State’s table were deputy prosecuting attorney Ken Cotter (closest to the jury), Cressy (in the middle of the State’s table), and Special Agent Jason Gore (“Agent Gore”).

Tolbert was called as a defense witness. On direct examination, Tolbert testified that neither he nor Washington had a gun during the incident. As Cressy cross-examined Tolbert regarding his credibility, he became increasingly agitated. After testifying, Tolbert walked past the State’s table and said “bitch” and “you ought to get blasted.” Transcript at 131, 218.

¹ Ind. Code § 35-45-2-1.

Agent Gore sprang from his chair and followed Tolbert out of the courtroom.

The State charged Tolbert with Intimidation, as a Class D felony. A jury found him guilty as charged, and the trial court entered judgment. Tolbert now appeals his conviction.

Discussion and Decision

I. Sufficiency of the Evidence

Tolbert challenges the sufficiency of the evidence that he committed Intimidation, as a Class D felony. In reviewing a challenge to the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict, even when confronted with conflicting evidence. Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007). We do not assess witness credibility or reweigh the evidence, affirming a conviction unless no reasonable factfinder could find the elements proven beyond a reasonable doubt. Id. “It is therefore not necessary that the evidence ‘overcome every reasonable hypothesis of innocence.’” Id. at 147 (quoting Moore v. State, 652 N.E.2d 53, 55 (Ind. 1995)).

Intimidation is communicating a threat to another person, with the intent “that the other person be placed in fear of retaliation for a prior lawful act.” Ind. Code § 35-45-2-1. The offense is a Class D felony if the threat is communicated to a “law enforcement officer,” including deputy prosecutors. Id.; and Ind. Code § 35-41-1-17. Among other things, a “threat” is an expression of an intent to commit a crime or “unlawfully injure the person threatened.” I.C. § 35-45-2-1.

The evidence clearly supported a finding that Tolbert communicated something to a deputy prosecuting attorney, and that he did so in reaction to her cross-examination of him, a

prior lawful act. Accordingly, we analyze whether the evidence also supported a finding that Tolbert threatened her with the intent that she “be placed in fear of retaliation.” I.C. § 35-45-2-1. We review objectively, not subjectively, whether the communication was a threat. Owens v. State, 659 N.E.2d 466, 474 (Ind. 1995) (rejecting defendant’s argument that his threat was “neither serious nor taken seriously”).

Agent Gore testified that Tolbert became “more and more agitated” during Cressy’s cross-examination of him. Tr. at 128. Tolbert left the witness box and walked with his head down, looking toward the State’s table. As Tolbert passed the table, he said, “you ought to get blasted.” Tr. at 131. Agent Gore testified that there was “no question” what Tolbert had said. Tr. at 132. The officer sprang from his chair, followed Tolbert out of the courtroom, and later arrested him. On cross-examination, Agent Gore testified regarding his understanding of Tolbert’s comment:

Q: Blasted was the key term you recall?

A: Blasted, yes.

Q: That was as an ATF agent explosions, blast, that kind of caught your attention?

A: Yes.

Q: Because in your business ATF Alcohol, Tobacco and Firearms you’re involved in explosives and that kind of thing, is that correct?

A: Yes, sir.

Q: So you hear the term blast that has a particular meaning to you, blast, explode?

A: That and I’m a police officer.

Q: . . . So as a police officer the term blast does have an explosion or a dangerous connotation, correct?

A: Yes, sir.

Tr. at 141. On re-direct, Agent Gore stated that “[t]here was no doubt” what Tolbert meant when he used the word “blasted.” Tr. at 149.

Cotter testified that Cressy did a “very impressive job” in impeaching Tolbert’s testimony and that Tolbert “was visibly upset. . . . [A]s she went through that he got more and more angry and curt.” Tr. at 159. When Tolbert was excused, Cressy and Cotter were “whispering or writing a note” regarding whether Cotter should cross-examine the next defense witness. Tr. at 160. Cotter testified that he heard Tolbert say “bitch” as he was walking toward the State’s table. Tr. at 162. Tolbert was looking at Cressy and “was mumbling as he was going by,” but Cotter “couldn’t make out all of the rest of the words.” Tr. at 162. Cotter later conferred with Agent Gore to understand the officer’s sudden departure from the courtroom. According to Cotter, Agent Gore “said he is going to blast her or she ought to be blasted. I know blasted was in that phrase, meaning she should be shot.” Tr. at 164.

Deputy prosecuting attorney Anthony Rose (“Rose”) was in the back row of the courtroom observing the jury trial of Washington. According to Rose, “it was a real heated cross-examination”; “one of those times where you could feel the tension in the courtroom between him and Amy Cressy.” Tr. at 183. Rose testified that he heard Tolbert say “something along the lines of needs to get blasted.” Tr. at 181. The State also called

Washington's defense counsel, Dianne Tillman-Reed, who testified that Tolbert said "[t]hey should be blasted." Tr. at 193. Finally, according to Cressy, "I just momentarily looked up and I made eye contact with Mr. Tolbert and he made eye contact with me, and at that point I heard him call me a bitch." Tr. at 218. Tolbert did not present any evidence.

A jury may make reasonable inferences regarding the meaning of words. For example, in Stewart v. State, Stewart was found guilty of Child Molesting despite the witnesses' use of the terms "private area," "private part," and "private spot," rather than "penis." Our Supreme Court affirmed the conviction, reasoning that "the jury very easily could have reached the conclusion that [the witnesses] knew that 'private area' or 'private part' referred to 'penis.'" Stewart v. State, 768 N.E.2d 433, 436-37 (Ind. 2002), cert. denied, 537 U.S. 1004 (2002).

Here, Agent Gore and three prosecutors testified that Cressy's cross-examination of Tolbert was very tense and that Tolbert reacted angrily during his testimony. The jury clearly believed Cotter's and Agent Gore's interpretation that Tolbert used the word "blasted" to mean shooting with a gun. Based upon the testimony of the State's witnesses and the reasonable inferences favorable to the verdict, there was sufficient evidence to find that Tolbert left the witness box, walked near the State's table, made eye contact with the prosecutor who had just cross-examined him, called her a "bitch," and said "you ought to get blasted" – implying that she should be shot – in retaliation for her lawful conduct. Tr. at 131, 218. There was sufficient evidence to find Tolbert guilty beyond a reasonable doubt of Intimidation.

II. Prosecutorial Misconduct

Tolbert also argues that the prosecutor committed misconduct in eliciting testimony regarding Tolbert's gang membership. Specifically, Tolbert challenges eight of the State's questions; four posed to Agent Gore and four posed to Cressy.

In analyzing such a claim, we determine whether the prosecutor engaged in misconduct, and if so, whether the misconduct 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). "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.

To preserve the claim, the correct procedure is to request the trial court to admonish the jury, then, if not satisfied with the admonishment, to move for mistrial. Id. Absent doing so, the defendant must show fundamental error. Id. Fundamental error 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." Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002).

Tolbert did not seek an admonishment or move for mistrial within the context of any of the eight challenged questions. Furthermore, none of his objections addressed prosecutorial misconduct.² During two sidebar arguments, Tolbert's counsel said absolutely nothing. The failure to present a contemporaneous trial objection asserting prosecutorial

² For the first two, Tolbert's counsel simply said, "objection." Tr. at 123-24. The other six addressed relevance.

misconduct results in waiver of appellate review. Johnson v. State, 725 N.E.2d 864, 867 (Ind. 2000); see also Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). Accordingly, Tolbert must establish fundamental error.

Immediately before trial, the trial court heard argument regarding whether the State could offer testimony that Tolbert was a member of a gang. The trial court granted Tolbert's motion in limine to exclude such testimony, but noted that it was not a final ruling and asked counsel to show "the courtesy of coming up here when you start going into that area." Tr. at 108.

The first challenged question was clearly not improper. The prosecutor asked Agent Gore whether Cressy asked "questions of Mr. Tolbert that he demonstrated any kind of dissatisfaction with answering if you can remember." Tr. at 123. Agent Gore responded that the "subject came up about the Wild Boys." Tr. at 123. The trial court sustained Tolbert's objection, and admonished Agent Gore to answer "yes or no as opposed to what the subject matter was." Tr. at 123. As Tolbert acknowledges on appeal, the answer was simply non-responsive. Appellant's Brief at 4. There was nothing improper about the question.

Soon thereafter, the State approached the subject of gang membership.

Pros: Were there other people in the courtroom similarly dressed to him the way he was dressed that day when he sat in the witness box?

Def: Objection, Your Honor.

Court: Sustained at this point. If you would like to come up and talk we can, Mr. Dvorak.

[Sidebar conference held.]

. . .

Pros: I won't use gangs. I will talk about friends and these were people he was talking with all the time and in front of them.

Court: I don't need you to answer, [defense counsel]. If I need I will ask for your input. I'm going to sustain his objection.

You know why the order in limine is a preliminary determination. If he asks questions you find objectionable, you will object and I deal with them. If you don't object, it comes in. That's the way the rules go.

Tr. at 123-25. The prosecutor then questioned Agent Gore regarding "people of [Tolbert's] age seated in back of the courtroom" and "young people that became rowdy and had to be removed from the courtroom." Tr. at 125, 127. The trial court overruled Tolbert's objections to these questions.³

The prosecutor pursued the same line of questioning with Cressy, asking her whether the people in the courtroom were "supporters" of Washington, "what those people were doing in the courtroom," and what "behavior they engaged in the courtroom that the judge had them removed." Tr. at 210-11. The trial court sustained Tolbert's objections to these three questions. In a sidebar conference, the prosecutor argued,

[Y]ou told me not to go into gangs and I'm not mentioning gangs. I'm not talking about gangs. I'm talking about the contention in the courtroom, what was going on, the atmosphere of the courtroom that makes the intent. . . . It has to do with the violence being threatened by the other people in the courtroom.

³ As to the two sentences in Tolbert's brief asserting that the trial court "erred" in admitting this testimony, he fails to develop a cogent argument. Appellant's Brief at 4, 5. The issue is therefore waived. See Ind. Appellate Rule 46(A)(8)(a); and Wentz v. State, 766 N.E.2d 351, 362 (Ind. 2002).

Tr. at 211-12.

Finally, the prosecutor asked Cressy “what kind of shirt” Tolbert wore. Tr. at 214. Cressy’s answer addressed Tolbert’s attire on all three days of the trial. Tolbert objected to the relevance of what he wore “any other days of the trial,” but not to what he wore the day he testified. Tr. at 214.

In its order in limine and during the first sidebar conference, the trial court noted that the order in limine was a preliminary determination. After the first sidebar conference, the prosecutor’s questions addressed, with one exception that we address below, the age of the people in the gallery, what they did to be removed from the courtroom, and whether they were supporters of Washington. These questions did not pertain to gangs and thereby complied with the spirit of the trial court’s evidentiary rulings during the testimony of Agent Gore. Accordingly, we conclude that the prosecutor did not commit misconduct by asking these questions.

Of the eight questions Tolbert challenges on appeal, only the final question was improper. During argument on Tolbert’s motion in limine, the prosecutor repeatedly referred to the fact that Tolbert and a number of young men in the back of the courtroom wore white, baggy t-shirts and that the t-shirts were “all part of the uniform if you will of that group the Wild Boys with whom the defendant admitted an affiliation.” Tr. at 98-99, 101, and 106. In two sidebar conferences during the jury trial, the prosecutor told the trial court that he would not elicit testimony regarding

gang membership. (“I won’t use gangs.” Tr. at 125. “I assure you we will stay away from gangs.” Tr. at 212.) But moments after the second sidebar conference, the prosecutor asked Cressy “[w]hat kind of shirt” Tolbert wore. Tr. at 214. As made clear from the argument on Tolbert’s motion in limine, the prosecutor asked this question to begin establishing gang membership – the very subject he had just promised the trial court that he would not approach. Asking this question was prosecutorial misconduct.

The effect of the question, however, was limited. Tolbert directs us to no evidence of the attire worn by the young people in the gallery. In light of the testimony of the State’s witnesses, Tolbert has not established that the prosecutor’s misconduct made a fair trial impossible or presented an undeniable and substantial potential for harm. See Benson, 762 N.E.2d at 752-53, 756 (concluding prosecutor’s questions were “improper” and “particularly questionable,” but did not constitute fundamental error).

Conclusion

There was sufficient evidence to find Tolbert guilty beyond a reasonable doubt of Intimidation. The prosecutor’s misconduct did not constitute fundamental error.

Affirmed.

DARDEN, J., and ROBB, J., concur.