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IN THE
COURT OF APPEALS OF INDIANA

JUAN FLAGG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0903-CR-278
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G06-0712-MR-273246
49G06-0806-FA-135127

December 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Juan Flagg appeals his convictions for murder, Class C felony robbery, Class A felony attempted murder, and Class B felony aggravated battery. We affirm.

Issues

Flagg raises four issues, which we reorder and restate as:

I. whether the admission of a witness's testimony regarding the witness's marijuana use was fundamental error;

II. whether the admission of an autopsy report was fundamental error;

III. whether the admission of contaminated DNA evidence was fundamental error; and

IV. whether there is sufficient evidence to support his convictions.

Facts

During the early morning hours of December 16, 2007, Lamonica Radford and Anthony Graves were sleeping on their living room couch in their Indianapolis home. Six children and Lamonica's uncle, Kevin Radford, were sleeping in the home's two bedrooms. At approximately 6:30 a.m., Flagg, whose nickname is "Boy Boy," and another man kicked in the door of the home. Flagg was wearing a mask over part of his face and carrying a gun. Flagg shot Graves in the chest, killing him. Flag also shot Lamonica in the knee. Flagg said to Lamonica, "B****, give me the s*** or I'm going to kill you." Tr. p. 107. Lamonica thought Flagg was referring to money from several paychecks that Graves had recently cashed. Lamonica ran from the living room to one of

the bedrooms, where her daughter had been sleeping. Lamonica and her daughter held the door shut. Flagg threatened to shoot Lamonica's nephew if she did not open the door. Flagg shot through the bedroom door and struck Kevin, who had been sleeping on the bedroom floor, in the leg. During the incident, Flagg said to Lamonica, "Remember Boy Boy did this." Id. at 120.

On December 19, 2007, Flagg was arrested outside of his girlfriend's apartment.[1] During a search of Flagg's girlfriend's apartment, a 9 mm handgun was discovered under a mattress. This handgun was later determined to be the weapon used in the shooting.

On December 21, 2007, the State charged Flagg with murder, felony murder, Class A felony robbery, Class A felony attempted murder, Class B felony aggravated battery, Class B felony criminal confinement, three counts of Class D felony criminal recklessness, and Class A misdemeanor carrying a handgun without a license. The State also alleged that Flagg's criminal history supported a Class C felony enhancement for the carrying a handgun without a license charge. The State eventually moved to dismiss the criminal confinement and three criminal recklessness charges. A jury found Flagg guilty of the murder and felony murder charges, the Class A felony robbery charge, the Class A felony attempted murder charge, the Class B felony aggravated battery charge, and the Class A misdemeanor handgun charge. Because of double jeopardy concerns, the trial

[1] When Flagg was arrested, he had twenty-seven grams of cocaine and another handgun in his possession. In a separate charging information, Flagg was charged with Class A felony dealing in cocaine, Class A felony possession of cocaine, Class C felony possession of cocaine and a firearm, and Class A misdemeanor carrying a handgun without a license, which was enhanced to a Class C felony based on Flagg's criminal history. Flagg was tried on these allegations along with the December 16, 2007 allegations and was convicted of the Class A felony dealing charge. Flagg does not challenge the drug-related conviction in this appeal.

court entered only convictions for murder, Class C felony robbery, Class A felony attempted murder, and Class B felony aggravated battery. Flagg now appeals.

Analysis

I. Lamonica's Testimony

Pointing to an inconsistency between Lamonica's trial testimony and her statement to medical personnel after the shooting, Flagg claims that his conviction is based on a lie that the State failed to correct. Specifically, Lamonica testified that, at around 2:30 a.m. on December 16, 2007, she went to a party at her aunt's house. The following exchange took place between defense counsel and Lamonica:

> Q: Okay. Can you tell the jury what you had to drink that evening?
>
> A: Some Crown.
>
> Q: Some Crown Royal?
>
> A: Uh-huh.
>
> Q. And . . .
>
> A. And beer.
>
> Q. Did you smoke any marijuana?
>
> A. No.
>
> Q. Okay. So you had Crown Royal and beer?
>
> A. Yeah.
>
> Q. All right. And when did you start drinking?
>
> A. Uh, I started drinking at about 11:30, 12:00 that evening.

Q. Okay. And when did you stop drinking?

A. Probably right before I went to bed.

Q. And you testified that you went to bed around 3:30, 4:00?

A. About 4:00 something.

Tr. pp. 138-39. Later during the trial, a stipulation describing Lamonica's injuries was admitted into evidence. The stipulation provided, "At the time of Lamonica Radford's admission to Wishard Hospital, she did report the use of alcohol and marijuana the previous night." Exhibit 118.

Flagg concedes that he did not object to the "State's failure to correct Ms. Radford's testimony and point her lie out to the jury." Appellant's Br. p. 11. Therefore, he argues that this alleged error amounts to fundamental error. "Fundamental error is an error that 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." Clark v. State, 915 N.E.2d 126, 131 (Ind. 2009). "Fundamental error applies only when the actual or potential harm 'cannot be denied.'" Id. (citation omitted).

Flagg argues, "The State had an affirmative duty to inform the jury that [Lamonica] lied when giving her testimony and it failed in its duty." Appellant's Br. p. 12. Flagg's argument is based on Napue v. Illinois, 360 U.S. 264, 265, 79 S. Ct. 1173, 1175 (1959), in which:

> At the murder trial of petitioner the principal state witness, then serving a 199-year sentence for the same murder, testified in response to a question by the Assistant

> State's Attorney that he had received no promise of consideration in return for his testimony. The Assistant State's Attorney had in fact promised him consideration, but did nothing to correct the witness' false testimony. The jury was apprised, however, that a public defender had promised "to do what he could" for the witness. The question presented is whether on these facts the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

In addressing Napue's claim that his Due Process rights had been violated, the Supreme Court observed:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Napue, 360 U.S. at 269, 79 S. Ct. at 1177. The Court also reasoned that the fact that the jury was apprised of other grounds for believing that the witness may have had an interest in testifying against petitioner did not turn what was otherwise a tainted trial into a fair one. Id. at 270, 79 S. Ct. at 1177.

The facts before us are distinguishable from those in Napue. First, it is not clear that Lamonica actually lied. Although her statements appear inconsistent, her testimony is not developed enough to show whether she was referring to not smoking marijuana on the evening of December 15, 2007, or not smoking marijuana in the early morning hours of December 16, 2007. It is also unclear whether she was referring to not smoking

marijuana while at her aunt's house or whether she was referring to not smoking marijuana at her house. Moreover, in this case, the jury was apprised of the specific inconsistency by the stipulation that Lamonica informed medical personal she had used marijuana. Thus, this is not a case in which the State failed to correct testimony it knew to be false.

Without more, we cannot conclude that the State was required to "point out that one of its own witnesses lied under oath." Appellant's Br. p. 12. For these reasons, Flagg has not established that the State violated his Due Process rights, let alone that the admission of Lamonica's testimony amounted to fundamental error.

II. Autopsy

Dr. Utz, the forensic pathologist who performed Graves's autopsy, retired sometime after he conducted the autopsy and before the trial. Dr. Harshbarger, another forensic pathologist, testified for the State regarding the autopsy. Flagg argues that the admission of an autopsy report without the accompanying testimony of the doctor, Dr. Utz violated his Sixth Amendment right to confrontation. See Crawford v. Washington, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 1374 (2004) ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."); see also Melendez-Diaz v. Massachusetts, --U.S.--, --, 129 S. Ct. 2527, 2537 (2009) ("Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination."). Again, however, because Flagg did not object to the admission of this report, he argues fundamental error.

Even if Dr. Utz's failure to testify implicated Flagg's Sixth Amendment confrontation right, we cannot conclude that Dr. Utz's lack of testimony resulted in fundamental error. Flagg argues that the ability to cross-examine the doctor who conducted the autopsy was of critical importance in determining whether a gunshot killed Graves. Flagg attempts to make an issue where there is none. In fact, in making this argument regarding the cause of death, Flagg relies on the same autopsy report he contests to suggest that the methamphetamine, ecstasy, marijuana, and alcohol found in Graves's system may have killed him. Although Graves had ingested drugs prior to his death, Flagg points to no evidence suggesting that Graves's drug use might have been fatal.

Furthermore, even if we were to exclude the autopsy report and Dr. Harshbarger's testimony, there is ample evidence to establish that Flagg shot and killed Graves. For example, autopsy photographs taken by a forensic evidence technician from the crime lab show a deceased Graves with what appears to be a bullet hole in his chest. Other photographs show several bullet holes and spent casings throughout the house, including in the living room where Graves's body was found. Further, the first police officer who arrived on the scene was responding to a "shots fired" call. Tr. p. 17. When she arrived at the house, she saw a naked man whose body was "contorted in an unnatural way." Id. at 29. The second officer to arrive at the scene testified that Graves was "laying face up" on a couch and "did not appear responsive at all." Id. at 66. Finally, Lamonica testified that she and Graves were asleep in the living room when she was awoken by the sound of

the front door being kicked in and gunshots. She stated that she saw Graves get shot in the chest. Lamonica also identified Flagg as the shooter.

Based on this evidence, it is clear that Flagg shot and killed Graves. The admission of the autopsy report in the absence of the Dr. Utz's testimony did not make a fair trial impossible. Flagg has not established fundamental error. See Clark, 915 N.E.2d at 131.

III. Contaminated DNA

Flagg asserts that the admission of the DNA evidence in this case resulted in fundamental error and warrants reversal. It is undisputed that some of the DNA evidence was contaminated by a crime lab employee. However, we cannot say, that this contamination amounted to fundamental error.

First, there is no indication that the contamination was intentional. Further, none of the DNA evidence offered was directly linked to Flagg. At most, some of the DNA evidence indicated that Flagg could not be eliminated as a contributor. The forensic scientist who conducted the DNA tests specifically testified that she could not say with any level of certainty that anything she tested had Flagg's DNA on it. Additionally, the jury was informed of the contamination of the DNA evidence and was free to weigh it accordingly.

More importantly, a forensic scientist specializing in the area of firearms and tool mark identification testified that the bullet recovered from Graves's body was fired from the 9 mm handgun discovered under a mattress in Flagg's girlfriend's apartment three days after the shooting. Based on this evidence and Lamonica's identification of Flagg as

the shooter, any error in the admission of the DNA evidence does not amount to fundamental error.

IV. Sufficiency of the Evidence

Flagg claims there is insufficient evidence to support his convictions. Upon such a challenge, we do not reweigh the evidence or judge the credibility of the witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We respect the jury's exclusive province to weigh conflicting evidence. Id. We must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

Flagg argues "this case warrants deviation from the Court's standard practice of refusing to reweigh the evidence because this Court is faced with new information of which the jury was not aware – that the State's key witness lied under oath on the witness stand." Appellant's Br. p. 19. Despite Flagg's request, we simply may not reweigh the evidence.

Lamonica, who had known Flagg her whole life, identified him as the shooter based on his eyes and his voice. Even if she is considered to have lied under oath about not using marijuana, the jury was aware of her statement to medical personnel in which she said she had used marijuana. The jury was also aware that Lamonica had consumed alcohol before the shooting. It was a task for the jury to weigh this evidence. Similarly, it was for the jury to consider the credibility of Quinton Dews, the man who was in jail with Flagg, who testified that Flagg went by the nickname "Boy Boy," that Flagg discussed the murder charges with him, and that Flagg stated he likes 9 mm handguns. In

addition to this evidence, the gun used in the shooting was found under a mattress in Flagg's girlfriend's apartment three days after the shooting. From this evidence, the jury could have reasonably inferred that Flagg committed the crimes. There is sufficient evidence to support the convictions.

Conclusion

The admission of Lamonica's statements regarding her marijuana use, the autopsy report, and the DNA evidence do not rise to the level of fundamental error. There is sufficient evidence to support Flagg's convictions. We affirm.

Affirmed.

MATHIAS, J., and BROWN, J., concur.