

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 2006

BILLY WASHINGTON, JR.,

Appellant,

v.

Case No. 5D05-815

STATE OF FLORIDA,

Appellee.

Opinion filed August 18, 2006

Appeal from the Circuit Court
for Orange County,
Lisa T. Munyon, Judge.

F. Wesley Blankner, Jr., of Jaeger &
Blankner, Orlando, for Appellant.

Charles J. Crist, Jr., Attorney General,
Tallahassee, and Anthony J. Golden,
Assistant Attorney General, Daytona
Beach, for Appellee.

ORFINGER, J.

Billy Washington, Jr. appeals his conviction for manslaughter with a firearm. Mr. Washington argues that his conviction should be reversed due to prosecutorial misconduct during his trial. Specifically, Mr. Washington alleges that the prosecutor improperly shifted the burden of proof to him, and alluded to personal knowledge of evidence relating to the case that would be unavailable to the jury. We conclude that while some of the statements made by the prosecutor were arguably improper, none

were objected to by defense counsel, and none rise to the level of fundamental error. We, therefore, affirm.

“[A]llegedly improper prosecutorial remarks cannot be appealed unless a contemporaneous objection is recorded. The exception to this general rule is the situation where the allegedly improper comments constitute fundamental error.” Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996) (citing Gibson v. State, 351 So. 2d 948, 950 (Fla. 1977)). Since Mr. Washington’s counsel¹ did not object to the statements at issue, he can succeed only if the statements constituted fundamental error. Error is fundamental when it “reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.” State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991) (quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960)). This Court has held that “[w]hen the prejudicial conduct in this collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and merits of the jury, fundamental error can override the failure of defense counsel to make timely objections.” Sempier v. State, 907 So. 2d 1277, 1279 (Fla. 5th DCA 2005).

Having carefully reviewed the record, we conclude that the prosecutor’s arguments, to the extent they may have been improper, were not so prejudicial as to constitute fundamental error. Accordingly, Mr. Washington’s conviction is affirmed.

AFFIRMED.

SAWAYA and LAWSON, JJ., concur.

¹ Appellate counsel did not serve as Mr. Washington’s trial counsel.