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IN THE COURT OF APPEALS OF INDIANA

SABAH KASHKOUL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 36A05-0908-CR-478
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JACKSON CIRCUIT COURT
The Honorable William E. Vance, Judge
Cause No. 36C01-0812-FD-431

April 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Sabah Kashkoul was convicted of Intimidation[1] as a class D felony and Criminal Mischief[2] as a class A misdemeanor. Kashkoul raises the following two restated issues for review:

1. Did the prosecutor's comments during closing argument constitute fundamental error?

2. Was the evidence sufficient to support Kashkoul's conviction for intimidation?

We affirm.[3]

The facts most favorable to the convictions follow.[4] Sabah Kashkoul and Judy Broshears had dated for over a year and were living together in Kashkoul's house in November 2008. On November 28, 2008, Broshears, who had a new boyfriend, ended her relationship with Kashkoul and took some of her property from Kashkoul's house. At some point that evening, Kashkoul and Broshears had an altercation that resulted in Kashkoul being arrested for domestic battery.[5]

While Kashkoul was in jail, Broshears, with assistance from her new boyfriend, made several trips to Kashkoul's house to remove her belongings.[6] Kashkoul spent approximately

[1] Ind. Code Ann. § 35-45-2-1 (West, Westlaw through 2009 1st Special Sess.).

[2] I.C. § 35-43-1-2 (West, Westlaw through 2009 1st Special Sess.).

[3] We direct Kashkoul's attention to Appellate Rule 46(A), which provides that the contents of an appellant's brief should contain a summary of argument section and to Appellate Rule 49(B)(1), which provides that an appellant's appendix in a criminal appeal shall contain the clerk's record.

[4] We note that the Exhibit Volume indicates that Defendant's Exhibit A—a taped conversation between Rhonda Fugett and Officer Ernie Davidson—is part of the Exhibit Volume; this exhibit, however, is not contained in the Exhibit Volume. It is unclear whether the trial court reporter failed to insert Defendant's Exhibit A in the Exhibit Volume folder or if one of the parties failed to return it to the folder.

[5] The domestic battery charge was not part of the trial and is not part of this appeal.

[6] At trial, Kashkoul disputed whether the property Broshears removed was her own property or joint property.

twelve hours in jail and was released the following day around noon. Kashkoul's friend, Rhonda Fugett, who had been at Kashkoul's house when Broshears removed her property, drove Kashkoul's car and picked him up at the jail. As Kashkoul was in the car with Fugett, he received a cell phone call from Broshears. Broshears, "mentioned to him that [she] would get the rest of [her] things out" and that "it would just all be over", and Kashkoul responded, "if you take anything else, I'll kill you". *Transcript* at 57. When Broshears told Kashkoul that she would bring a police officer to assist her, Kashkoul said, "then I [sic] kill you and then I'll kill the officer." *Id.* After Broshears hung up, Kashkoul drove Fugett to her own house. Kashkoul then drove to Broshears's new residence and threw a concrete block into her truck's windshield.

The State charged Kashkoul with class D felony intimidation and class A misdemeanor criminal mischief. During opening argument of the jury trial, Kashkoul's attorney referenced the fact that Kashkoul was born in Iraq, explained that Kashkoul was going to have a thick accent when he testified, and stated that Kashkoul, who was trying to become a United States citizen, had gone to Iraq to work with U.S. troops as a translator and interrogator. When Kashkoul testified, he stated that he had come to the United States in 1997 and explained how he volunteered to work as a translator for U.S. troops in Iraq. During the closing argument, the prosecutor referenced Kashkoul's immigrant status and contrasted Iraq from the United States as the latter being a rule-of-law nation while the former was not. Kashkoul did not object to the prosecutor's closing argument. The jury found Kashkoul guilty as charged. The trial court sentenced Kashkoul to concurrent terms of

one year on each of his convictions and suspended both sentences to probation. Kashkoul now appeals.

1.

Kashkoul argues that the prosecutor engaged in prosecutorial misconduct during closing argument. Specifically, Kashkoul claims the prosecutor asked the jury to convict Kashkoul based, in part, on the fact he was from Iraq and used his national origin as evidence of his guilt. The State contends that the prosecutor was not asking the jury to convict Kashkoul based on his immigrant status but reminding the jury that everyone, regardless of national origin or service to country, has the responsibility to obey the law.

Generally, in order to properly preserve a claim of prosecutorial misconduct for appeal, a defendant must not only raise a contemporaneous objection, he must also request an admonishment and, if the admonishment is not given or is insufficient to cure the error, then he must request a mistrial. *Cooper v. State*, 854 N.E.2d 831 (Ind. 2006). Where a defendant fails to make an objection to the allegedly improper comments, he fails to preserve any claim of prosecutorial misconduct for appellate review. *Id.*

Kashkoul acknowledges that he has waived any such argument by not objecting to the prosecutor's comments but attempts to avoid waiver by claiming the prosecutor's closing argument comments constituted fundamental error. When reviewing such a claim, we are mindful of our Supreme Court's observation that fundamental error in this context is "an extremely narrow exception". *Cooper v. State*, 854 N.E.2d at 835. In order for prosecutorial misconduct to constitute fundamental error, the misconduct must constitute a clearly blatant

violation of basic and elementary principles of due process, present an undeniable and substantial potential for harm, and make a fair trial impossible. *Cooper v. State*, 854 N.E.2d 831.

During opening argument, Kashkoul's attorney referenced the fact that Kashkoul was born in Iraq and "grew up under Sadam Housan [sic], the murderous dictator", explained that Kashkoul was going to have a thick accent when he testified, and stated that Kashkoul, who was trying to become a United States citizen, had "answered a call to serve the United States" and gone to Iraq to help U.S. troops translate and interrogate terrorists. *Transcript* at 12. When Kashkoul testified, he stated he was born in Iraq and was a native Arabic speaker, and he explained how he had come to the United States in 1997. He testified that he had volunteered to work with U.S. troops in Iraq, obtained security clearance, worked with Navy Seals "to go after the High Value Target which is Al-Qaida [sic]", and had been twice exposed to roadside bombs. *Id.* at 88.

During closing argument, the prosecutor stated:

> Ladies and gentlemen[,] the evidence in this case from the State's point of few [sic], there is not reasonable doubt about what occurred here. Defendant was angry at the world. You know we're not attacking whether or not Defendant's a bad person, he served his country and that's great. He's an immigrant to this country. We're all immigrants to this country . . . but that doesn't give you the right to go commit a crime and take the law into your own hands. That's what separates us from the third world, the rule of law. We don't get to go hurt people because we're angry and that's what the Defendant did in this case.

Id. at 107. The prosecutor discussed the evidence relating to intimidation and criminal mischief and then stated:

> Now motive is important and that's why you heard about the prior arrest. Motive is important. Why does someone commit a crime? Because they're angry, that is the motive. The motive is is [sic] that he was hurt, he was angry at the world and he wanted vengeance. He was angry from the time he left the jail until he got the satisfaction of throwing a concrete block through her window. Then all of a sudden he felt like he had redeemed himself. You know what, this isn't Iraq. Maybe over there that's acceptable but it's not acceptable here. You don't get to damage people's property. You don't get to have the possibility of communicating threats to people because this is not Iraq, this is the United States, and we are a rule of law nation.

Id. at 109.

In *Samaniego v. State*, 679 N.E.2d 944, 951 (Ind. Ct. App. 1997), *trans. denied*, we reviewed whether a prosecutor's closing argument comments about the defendant's race and religion constituted fundamental error and explained:

> The constitutional principles of equal protection and due process forbid a prosecutor from attempting to gain a conviction on the basis of racial prejudice. *Smith v. Farley*, 59 F.3d 659, 663 (7th Cir. 1995), *cert. denied*, 516 U.S. 1123, 116 S.Ct. 935, 133 L.Ed.2d 861 (1996). In fact, the United States Supreme Court has declared that "[t]he Constitution prohibits racially-biased prosecutorial arguments," *McCleskey v. Kemp*, 481 U.S. 279, 309 n. 30, 107 S.Ct. 1756, 1776 n. 30, 95 L.Ed.2d 262, 289 n. 30 (1987), and that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 3000, 61 L.Ed.2d 739, 749 (1979). In Indiana, reviewing courts will closely scrutinize allegations concerning the wrongful injection of race into criminal proceedings. *Tompkins v. State*, 669 N.E.2d 394, 396 (Ind. 1996); *see also Gentry v. State*, 625 N.E.2d 1268, 1276 (Ind. Ct. App. 1993) ("The State must steadfastly remember that justice is blind and equally available to all, without regard to race, color, or creed."), *trans. denied* (1994).

In *Samaniego*, we held that the prosecutor's comments regarding Custer's Last Stand and various "gods" that were directed at the defendant's Native American heritage were "deplorable" and "reprehensible" but did not constitute fundamental error because they were

not likely to have unfairly prejudiced the defendant given the evidence presented supporting the defendant's conviction. *Samaniego v. State*, 679 N.E.2d at 951-52.

"Prosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." *Cooper v. State*, 854 N.E.2d at 836. As Kashkoul admits, his "national origin was unavoidably a part of the trial." *Reply Brief* at 3. A review of the record reveals that the prosecutor's mention of Kashkoul's Iraqi background was intended to respond to Kashkoul's focus on his heritage during his testimony and opening argument and was not a request for the jury to find Kashkoul guilty because he was from Iraq. It "strains credulity" to believe that the jury found Kashkoul guilty for any reason other than the evidence introduced at trial. *See Cooper v. State*, 854 N.E.2d at 838.

Nevertheless, even assuming misconduct in this case, Kashkoul has not demonstrated that the harm or potential harm done by the prosecutor's comments was substantial. As in *Samaniego*, because the evidence supports Kashkoul's convictions, we cannot say the prosecutor's comments fell within the extremely narrow exception of fundamental error.

2.

Kashkoul contends the evidence was not sufficient to support his conviction for intimidation.[7] Specifically, Kashkoul argues the State presented insufficient evidence that he communicated a threat to Broshears or that he intended to place Broshears in fear of retaliation for a prior lawful act.

[7] Kashkoul does not challenge his conviction for criminal mischief.

When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the conviction, and "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*. at 126 (*quoting Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

A defendant commits intimidation as a class D felony when he threatens to commit a forcible felony against another person with the intent that the person be placed in fear of retaliation for a prior lawful act. I.C. § 35-45-2-1. A defendant also commits intimidation as a class D felony if he threatens a witness in a pending criminal proceeding against the defendant. *Id.*

The State charged Kashkoul with intimidation as follows:

> [O]n or about November 29, 2008 in Jackson County, State of Indiana, Sabah Kashkoul did communicate a threat to commit a forcible felony to Judy Broshears, a witness in a pending criminal proceeding in which the [sic] Sabah Kashkoul is the defendant, with the intent that Judy Broshears be placed in fear of retaliation for a prior lawful act, to-wit: reporting to law enforcement that Sabah Kashkoul battered her, expressing her intention to end the relationship and/or expressing her intention to retrieve her person[al] items from their mutual residence. . . .

Appellant's Appendix at 4. Thus, in order to convict Kashkoul of class D felony intimidation, the State was required to prove beyond a reasonable doubt that Kashkoul communicated a threat to commit a forcible felony against Broshears with the intent that Broshears be placed

in fear of retaliation for the prior lawful act of expressing her intention to retrieve her personal items.[8]

We first address Kashkoul's argument that his communication that he would kill Broshears did not constitute a "threat" for purposes of intimidation because she did not take the threat seriously and testified that she did not really think Kashkoul would kill her.

The intimidation statute defines "threat" as an "expression, by words or action, of an intention to . . . unlawfully injure the person threatened or another person, or damage property". I.C. § 35-45-2-1(c)(1). Whether a particular communication constitutes a threat is an objective question for the trier of fact. *Owens v. State*, 659 N.E.2d 466 (Ind. 1995), *reh'g denied*. Thus, whether Kashkoul's communication to Broshears, objectively viewed, was a threat was a question of fact for the trial court to decide. *Id.*

Here, the State presented evidence that Broshears had once obtained a protective order against Kashkoul and that upon Broshears breaking up with Kashkoul and taking some of her personal items to her new boyfriend's house, Kashkoul ended up in jail for domestic battery against Broshears. Broshears removed some of her belongings from Kashkoul's house while he was in jail on the domestic battery charge and then informed him that she was going to remove the rest of her belongings. Kashkoul, who was admittedly angry about Broshears removing the property, told her he would kill her if she took anything else. Additionally, Fugett, who is Kashkoul's friend and was with him when he was talking to Broshears on the

8 Although charged in the alternative, we will focus our review on the prior lawful act element of expressing her intention to retrieve her personal items and the class D element of forcible felony because it was these alternative elements that were argued by the State during trial.

cell phone, testified that Kashkoul "made threats" against Broshears. *Transcript* at 37. The evidence supports the jury's determination that Kashkoul's statement to Broshears was a threat. Kashkoul's argument to the contrary is nothing more than a request to reweigh the evidence, which we cannot do. *McHenry v. State*, 820 N.E.2d 124.

Next, we turn to Kashkoul's argument that the evidence is insufficient to prove that he intended to place Broshears in fear of retaliation for a prior lawful act.

The intimidation statute, I.C. § 35-45-2-1, requires the State to prove that the victim engaged in a prior act that was not contrary to law and that the defendant intended to repay the victim for the prior lawful act. *Casey v. State*, 676 N.E.2d 1069 (Ind. Ct. App. 1997). Thus, the State must establish that the legal act occurred prior to the threat and that the defendant intended to place the victim in fear of retaliation for that act. *Id.*

Kashkoul acknowledges that he was angry because Broshears had been to his house and removed property and that the "words of the threat itself affirm that Kashkoul's anger was rooted in Broshears' removal of what he believed to be his property." *Appellant's Brief* at 17. Nevertheless, he contends the evidence was insufficient to support his conviction because, similar to *Ransley v. State*, the threat was aimed at keeping Broshears from coming on his property.[9]

[9] While not directly challenging it on appeal, Kashkoul hints that Broshears's act of removing property may not have been a "lawful" act. To the extent he is challenging it, the jury heard Broshears's and Kashkoul's testimonies regarding who owned the property removed and found Kashkoul guilty of intimidation. Kashkoul's suggestion that the property removal was not lawful is merely an invitation to reweigh the evidence and judge the credibility of witnesses, which is a task we will not undertake on appeal.

In *Ransley v. State*, 850 N.E.2d 443 (Ind. Ct. App. 2006), *trans. denied*, a property dispute arose between two neighbors that escalated from a verbal altercation to pulling a handgun. In that case, the State charged that the defendant had threatened the victim with the intent to keep the victim off the defendant's property and/or to place the victim in fear for the prior lawful act of arguing. We explained that the evidence was insufficient to sustain the defendant's conviction based on keeping the victim off the defendant's property because the alleged threat was aimed at future action and was, thus, not retaliation for a prior lawful act and because the victim entering upon the defendant's property without permission would have been an unlawful act of trespassing. Additionally, we determined the evidence was insufficient to support the defendant's conviction based on the prior act of arguing because there was no evidence linking the defendant's threat to the act of arguing and no testimony that the defendant had threatened to kill or harm the victim for the act of arguing. Thus, we held the defendant could not be found guilty of intimidation.

Unlike *Ransley*, here, there was evidence that Kashkoul threatened Broshears with intent to place her in fear of retaliation for a prior lawful act as contained in the charging information. There is evidence that Kashkoul's threat was not solely linked to keeping Broshears from his property but was in response to or in retaliation for Broshears's prior acts relating to the removal of property from Kashkoul's house.

Here, the evidence shows that when Broshears broke up with Kashkoul and removed some of her personal items, Kashkoul and Broshears ended up in some sort of altercation that resulted in Kashkoul being arrested and sent to jail for domestic battery. During the twelve

hours Kashkoul was in jail, Broshears removed her property from Kashkoul's house while Kashkoul's friend, Fugett, was there in the house. Fugett later picked Kashkoul up from jail, and while Kashkoul was in the car with Fugett, he received a cell phone call from Broshears. Broshears "mentioned to him that [she] would get the rest of [her] things out" and that "it would just all be over", and Kashkoul responded, "if you take anything else, I'll kill you". *Transcript* at 57. When Broshears told Kashkoul that she would bring a police officer to assist her, Kashkoul said, "then I [sic] kill you and then I'll kill the officer." *Id.*

Kashkoul threatened to kill Broshears after she told him that she was going to remove the rest of her property from his house. While the words of Kashkoul's threat may contain a reference to a future event, the threat itself was communicated in retaliation for Broshears's prior act of removing her property and telling Kashkoul that she would remove the rest of her property. The State presented sufficient evidence from which the jury could have reasonably inferred that Kashkoul threatened Broshears with the intent to place her in fear of retaliation for her prior lawful act of removing her property and telling Kashkoul that she was going to remove the remainder of her property. *See, e.g.*, *Griffith v. State*, 898 N.E.2d 412 (Ind. Ct. App. 2008) (holding evidence was sufficient to sustain intimidation conviction where defendant's threat to shoot victim if she did not leave was in retaliation for victim's prior act of being at her residence); *Graham v. State*, 713 N.E.2d 309 (Ind. Ct. App. 1999) (affirming defendant's intimidation conviction where evidence supported State's contention that defendant had threatened the victim to retaliate for the victim's prior and continuing legal act

of participating as a witness against defendant in a battery case), *trans. denied*. We, therefore, affirm Kashkoul's conviction for intimidation.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.