

Case Summary and Issues

Corey Smith appeals his convictions, following a jury trial, of murder, a felony, two counts of attempted murder, Class A felonies, and two counts of aggravated battery, Class B felonies. He raises three issues for our review, which we restate as: 1) whether the trial court committed fundamental error in permitting the State to inquire about Smith's gang affiliation, 2) whether it was prosecutorial misconduct to ask a witness if he had been threatened with harm for testifying against Smith, and 3) whether the cumulative effect of improper questions by the State denied Smith a fair trial. Concluding in the negative as to all three issues, we affirm.

Facts and Procedural History

In the early morning hours of April 13, 2007, Tiara King, a teenager, snuck out of her home to meet Anthony Jolly, who was parked just outside. As she neared Jolly's car, she saw another car nearby that she recognized as belonging to Brandon Hunter. King entered Jolly's car, Jolly introduced her to the only other passenger, Nicholas Hall, and they drove away.

As the trio arrived at their destination but while still in the car, King saw Hunter's car again, this time approaching Jolly's car. Hunter was driving and "a dark heavy set guy [with] gold teeth" was the only passenger. Transcript at 54. King saw the heavy-set male point a gun out the window and begin firing. King ducked. King survived seven gunshot wounds; Hall survived two gunshot wounds; and Jolly was killed by the gunfire. Smith was charged for the murder of Jolly, attempted murder of Hall, attempted murder of King, aggravated battery of Hall, and aggravated battery of King.

At Smith's trial, Hunter testified that because of a deformity of his arms, he could not physically fire a gun and that Smith was the sole shooter. Smith called his own cousin, Matthew Smith, to impeach Hunter with testimony that Matthew had known Hunter for many years and had seen him fire a gun. Prior to Matthew testifying and outside the presence of the jury, the trial court and counsel for Smith and the State discussed the State possibly questioning Matthew as to his and Smith's gang affiliation.

The trial court stated:

[W]hile it is prejudicial against [Corey Smith] to bring in gang affiliation in a trial, it would be allowed for the purpose of establishing the extent of the relationship between Corey Smith and [Matthew Smith]. And any potential bias [Matthew] may then have to fabricate.

It is not being admitted to show that in some way [Corey Smith] is a bad man or bad character because of his gang affiliation. And I would give the jury the admonishment, if you [(the State)] do, in fact, insist on questioning in that regard.

Id. at 481. The State questioned Matthew as follows about his and Smith's gang affiliation:

Q: And how long have you known Corey?

A: I have known Corey all of my life.

Q: Would you guys say you had a good relationship with each other?

A: Yeah.

Q: He is like a big brother to you?

A: Yes.

Q: Always help you out?

A: Yeah.

Q: And you guys are both in the Vice Lords together, too, right?

A: No, I don't know what you are talking about.

Q: You don't know what I am talking about?

A: No.

Q: You have never heard the [sic] gang Vice Lords?

A: I heard of lots of gangs. I heard the [sic] Vice Lords, but I am not a member of the Vice Lords.

Q: What about Corey, is he a member of the Vice Lords?

A: No, he isn't.

Q: So if Corey was on – bragging to the Lake County Jail that he is a Vice Lord, he takes care of his brothers, that wouldn't apply to you?

A: It wouldn't apply to me at all.

Q: Never been a member?

A: No, sir.

Id. at 511-12. Smith's counsel did not timely object to this line of questioning at the bench conference or during Matthew's testimony, and the trial court did not admonish the jury.

The State also questioned Hunter as to whether he had been threatened, in the following exchange:

Q: Did you ever receive any threats that if you testified today, that something bad would happen to you?

A: Well, I didn't get any from [Smith] or didn't receive any letters or anything, but the prosecutors told me that. The prosecutor that was on this case before you or after you.

Court: Next question?

Q: Are you afraid to testify here today?

A: I mean, I'm here now, so –

Id. at 412. Again, Smith did not timely object to this line of questioning. A jury found Smith guilty of all five charges.¹ Smith now appeals.

Discussion and Decision

I. Gang Affiliation

A. Standard of Review

Failure to timely object to an alleged error at trial constitutes waiver of that issue on appeal unless the error fits the "extremely narrow exception" of fundamental error.

Hand v. State, 863 N.E.2d 386, 394 (Ind. Ct. App. 2007). "To rise to the level of

¹ Because Smith's convictions for aggravated battery of Hall and King were lesser included offenses of his convictions for attempted murder, they were not reduced to convictions and Smith was not sentenced for those crimes.

fundamental error, the error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.” Maul v. State, 731 N.E.2d 438, 440 (Ind. 2000) (quotation omitted). “The standard for fundamental error is whether the error was so prejudicial to the rights of the defendant that a fair trial was impossible.” Boatright v. State, 759 N.E.2d 1038, 1042 (Ind. 2001).

B. Questioning Regarding Gang Affiliation

Smith argues the State’s questioning of Matthew as to his and Smith’s gang affiliation violates Indiana Evidence Rule 404(b), which states: “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Smith concedes trial counsel did not timely object to this testimony, and therefore argues this alleged error amounts to fundamental error.

Rule 404(b) is “designed to prevent the jury from assessing a defendant’s present guilt on the basis of his past propensities,” thereby precluding a “forbidden inference.” Hicks v. State, 690 N.E.2d 215, 218-19 (Ind. 1997). Indiana courts adhere to a two-part test when assessing admissibility of 404(b) evidence. First, “the court must determine that the evidence [at issue] is relevant to a matter at issue other than the defendant’s propensity to commit the charged act.” Id. at 221. Second, “the court must balance the probative value of the evidence against its prejudicial effect pursuant to [Evidence] Rule 403.” Id.

As to the first part, the trial court determined the separate, proper purpose to be “establishing the extent of the relationship between Corey Smith and [Matthew Smith]. And any potential bias [Matthew] may then have to fabricate.” Tr. at 481. Smith contends that the facts in his case are comparable to Cline v. State, 726 N.E.2d 1249 (Ind. 2000), in which the supreme court affirmed a trial court’s exclusion of evidence of a defendant’s gang affiliation precisely because it was intended to invite the “forbidden inference” – that “because [the defendant] had acted violently in the past, he likely acted in conformity with those acts and harmed [the victim].” Id. at 1252. We disagree because unlike Cline, the State’s questioning as to Smith’s possible gang affiliation was not intended to invite the forbidden inference, but for proper purposes – to show a close relationship, bias, and a reason to fabricate testimony. We conclude the questions as to Smith’s gang affiliation were relevant to a matter other than Smith’s propensity to commit the crimes.

As to the second part of the analysis under Rule 403, we must determine if the probative value of this exposure of the relationship between Smith and Matthew and potential bias is “substantially outweighed by the danger of unfair prejudice.” Hicks, 690 N.E.2d at 223. “[T]he inquiry is not whether [the] evidence is prejudicial; rather, the inquiry is whether the evidence is unfairly prejudicial since all relevant evidence is inherently prejudicial.” Cadiz v. State, 683 N.E.2d 597, 600 (Ind. Ct. App. 1997).

In weighing probative value and unfair prejudice, we first point out that the potential probative value was high. In Cadiz, we determined that evidence of the defendant’s gang affiliation was “very probative in that it provided a motive for an

otherwise completely senseless act of violence.” Id. While in Cadiz, the probative value of showing gang affiliation lay in motive for the offense, here the probative value for the questioning lies in the testifying witness’s bias and motive to fabricate testimony.

Further, we disagree with Smith’s narrow reading of Robinson v. State, 682 N.E.2d 806 (Ind. Ct. App. 1997), in which we held admission of evidence of a defendant’s gang membership to show bias was proper. Smith argues Robinson is distinguishable because in Robinson there was actual evidence of gang affiliation, while here there was none. Essentially, Smith argues that unlike Robinson, the probative value was slight without supporting evidence. We disagree with this distinction primarily because Matthew denied his own and Smith’s gang affiliation clearly and repeatedly. Therefore, the danger of unfair prejudice does not outweigh the probative value.

We find the present case comparable to Head v. State, 443 N.E.2d 44 (Ind. 1982), in which our supreme court faced a defendant’s appellate challenge to the propriety of a prosecutor’s cross-examination of various defense witnesses, asking each “whether the ‘Nightriders’ was a ‘gang,’ sometimes referring to the group as a ‘gang . . . called the Nightriders.’” Id. at 60. In Head, “[e]ach of the witnesses steadfastly denied that the ‘Nightriders’ was a ‘gang’; they explained that the group was organized solely for the purpose of basketball and that [a] local basketball star . . . had appended the name ‘Nightriders’ to the group because of their penchant for night basketball.” Id.

This case is similar to Head in three key respects: 1) a defendant alleged as improper a prosecutor’s questions that explicitly indicated a defendant was affiliated with a gang; 2) the responding witnesses outright denied the affiliation; and 3) the defendant

did not timely object to this line of questioning. In Head, our supreme court concluded that “in light of the witnesses’ repeated statements that the group concerned itself with basketball and was not, in any negative sense, a ‘gang,’ the prosecutor’s comments could not have placed defendant in such grave peril that a new trial was warranted.” Id. Similar to Head, Matthew’s outright and repeated denial of gang affiliation reduced the prejudice such that any error could not be deemed fundamental error.

In any event, this error would be harmless and not reversible because its probable impact on the jury is minor, especially in comparison to all the other evidence and testimony. See Lambert v. State, 675 N.E.2d 1060, 1065 (Ind. 1996) (“An evidentiary error is harmless if the reviewing court determines that the probable impact [of the improperly admitted evidence] on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.”) (quotation and citation omitted), cert. denied, 520 U.S. 1255 (1997).

Smith also argues it was fundamental error for the trial court to omit a limiting instruction to the jury on this issue although the trial court agreed to do so in the bench conference prior to Matthew’s testimony. However, the trial court only agreed to give a limiting instruction if the State admitted the evidence for an improper purpose, which we have concluded it did not do, thereby negating any need for a limiting instruction. Further, Smith did not object or request the limiting instruction at trial. Accordingly, we conclude the trial court did not commit fundamental error in permitting the State’s questions regarding Smith’s gang affiliation and by omitting a limiting instruction.

II. Prosecutorial Misconduct

A. Standard of Review

Smith next argues the State committed prosecutorial misconduct, but again, because Smith did not timely object to this line of questioning, the alleged improper comments may only be deemed reversible prosecutorial misconduct if they constitute fundamental error. Lainhart v. State, 916 N.E.2d 924, 931 (Ind. Ct. App. 2009). To constitute fundamental error, the alleged misconduct “must constitute a clearly blatant violation of basic and elementary principles of due process, present an undeniable and substantial potential for harm, . . . make a fair trial impossible[,] . . . have subjected the defendant to grave peril[,] and had a probable persuasive effect on the jury’s decision.” Id. at 931-32. “The gravity of the peril turns on the probable persuasive effect of the misconduct on the jury’s decision, not on the degree of impropriety of the conduct. In judging the propriety of a prosecutor’s remarks, the [appellate] court considers the statements in the context of the argument as a whole.” Id. at 932.

B. Alleged Misconduct

Smith contends the State’s questioning Hunter as to whether he was threatened with physical harm for testifying against Smith constitutes prosecutorial misconduct that amounts to fundamental error. Despite Hunter’s denial of such threats, Smith argues the State nonetheless committed misconduct by asking the questions without evidence and because the only source of knowledge of any threats was the prosecutor’s office. This appears to be a double accusation of misconduct – one, asking the questions without evidence of such threats, and two, propagating such threats from the prosecutor’s office.

In particular, Smith argues this line of questioning “plac[ed] inadmissible evidence before the jury with the deliberate purpose of prejudicing the jurors against [Smith].” Brief of Appellant at 12. Smith compares this to the State calling a witness to testify with knowledge that the witness will invoke his right to refuse to testify before the jury. See Reed v. State, 438 N.E.2d 704, 706-07 (Ind. 1982) (precluding similar action), remanded and aff’d on other grounds, 441 N.E.2d 441 (1982). We find Smith’s comparison appropriate as to the principle it develops, but inapplicable in the entirety here because we view the present line of questioning as far less prejudicial as it played out at trial. If the State did lack an evidentiary basis, and none is apparent, then the questions would have been inappropriate. However, considering the questions in the context of the trial as a whole, we do not view the questions as rising to the level of fundamental error. The questions were brief and the line of questioning was quickly abandoned. The witness’s nonchalant clear denial of threats minimized their potency and probable persuasive effect on the jury.

We agree the State’s line of questioning without supporting evidence is near the fine line that separates proper and improper prosecutorial conduct, but it did not “constitute a clearly blatant violation of basic and elementary principles of due process,” and probably did not have a persuasive effect on the jury’s decision. Lainhart, 916 N.E.2d at 931. Therefore, we conclude Smith has failed to show fundamental error in this allegation of prosecutorial misconduct.

III. Cumulative Effect

Smith next argues the cumulative effect of the State's allegedly improper inquiries discussed above "infected the trial with such unfairness so as to make Smith's convictions a denial of due process." Br. of Appellant at 13. Our supreme court has stated that "where [admission of] individual items of evidence do not constitute reversible error, we will not reverse based upon the cumulative effect of that evidence." Heck v. State, 552 N.E.2d 446, 451 (Ind. 1990). "Ordinarily, as a general rule, errors in their cumulative effect are not sufficient to constitute reversible error." Sherelis v. State, 498 N.E.2d 973, 978 (Ind. 1986).

Smith alleged evidentiary error as to testimony regarding his gang affiliation, but we determined the testimony was not improper nor was the trial court's omission of a jury instruction to limit the scope of the testimony. Smith next alleged prosecutorial misconduct for implying Smith threatened a witness with physical harm without evidence of such. We acknowledged this is a closer call, but given our standard of review, we concluded it was not fundamental error. Considering the other evidence and testimony at trial and our conclusions above, any prosecutorial misconduct that we already concluded was less than fundamental error did not deny Smith a fair trial in its cumulative effect. See Bixler v. State, 471 N.E.2d 1093, 1104 (Ind. 1984) (holding that where there was no error in any of the issues, the cumulative effect of the alleged errors did not "gain[] any

additional stature” warranting reversal), cert. denied, 474 U.S. 834 (1985).

Conclusion

The trial court did not commit fundamental error in permitting questions as to Smith’s gang affiliation. The State did not commit reversible prosecutorial misconduct, and the cumulative effect of the State’s allegedly inappropriate questions did not deny Smith a fair trial. We therefore affirm Smith’s convictions.

Affirmed.

RILEY, J., and BROWN, J., concur.