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IN THE
COURT OF APPEALS OF INDIANA

DEVIN M. LIGHTFOOT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0801-CR-31
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0608-FB-343

June 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Devin M. Lightfoot ("Lightfoot") appeals his conviction and sentence for Armed Robbery, as a Class B felony.[1] We affirm the Armed Robbery conviction, but remand with instruction to vacate the conviction for Pointing a Firearm, as a Class D felony.

Issues

Lightfoot raises three issues on appeal, which we re-order and re-state as:

I. Whether the State's closing argument violated Lightfoot's Fifth Amendment right to remain silent and made a fair trial impossible;

II. Whether Lightfoot's trial counsel was ineffective by failing to object to testimony from a police officer that he found the victim to be credible; and

III. Whether Lightfoot's sentence is inappropriate.

Facts and Procedural History

At approximately 10:00 p.m. on July 8, 2006, Sean Sayers ("Sayers") drove to a restaurant. In the parking lot, he heard someone call, "Hey, Sayers." Transcript at 58. It was Lightfoot, whom Sayers had met the year before. Lightfoot got out of a car, approached Sayers, and stated that the woman in the car needed to leave. He asked Sayers to drive him somewhere nearby. Sayers agreed. After Sayers had driven three to five blocks, Lightfoot directed Sayers to turn and indicated that they were "getting close." Id. at 61. Sayers stopped his pickup truck. Lightfoot cocked a gun, pointed it at Sayer's head, and said, "Give me all your f****** money right now." Id. Sayers was so frightened that he urinated; he gave Lightfoot fifty dollars. Lightfoot fled. After attempting to telephone Lightfoot for

[1] Ind. Code § 35-42-5-1(2).

approximately one hour, Sayers reported the incident to police.

The State charged Lightfoot with Armed Robbery, as a Class B felony, and Pointing a Firearm, as a Class D felony. At the conclusion of trial, the trial court instructed the jury that it could not consider the fact that Lightfoot did not testify. The jury found Lightfoot guilty as charged.

The trial court found one aggravating circumstance (criminal history) and one mitigating circumstance (being a good father to two daughters); and found that the aggravator outweighed the mitigator. The trial court sentenced Lightfoot to the maximum, twenty-year term of imprisonment, to be fully executed.[2] He now appeals.

Discussion and Decision

I. Prosecutor Misconduct

A. Standard of Review

Lightfoot asserts that the State's closing argument was improper. When reviewing claims of prosecutor misconduct, we analyze "(1) whether the prosecutor engaged in misconduct, and if so, (2) whether that misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected." Coleman v. State, 750 N.E.2d 370, 374 (Ind. 2001). A defendant bears the burden of proving that the State's argument penalized his exercise of the right to remain silent. Moore v. State, 669 N.E.2d 733, 736 (Ind. 1996).

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[2] The trial court entered judgments of conviction on both counts, but merged them for purposes of sentencing. We remand this matter for purposes of vacating the judgment of conviction for Pointing a Firearm, as a Class D felony. See Green v. State, 856 N.E.2d 703, 704 (Ind. 2006).

Lightfoot did not object to the State's closing argument. "[A]n appellate claim of prosecutorial misconduct presented on appeal in the absence of contemporaneous trial objection will not succeed unless the defendant establishes not only the grounds for prosecutorial misconduct but also the additional grounds for fundamental error." Booher v. State, 773 N.E.2d 814, 818 (Ind. 2002). For prosecutorial misconduct to constitute fundamental error, it must make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process and present an undeniable and substantial potential for harm. Id. at 817. The mere fact that an alleged error implicates constitutional issues does not establish that fundamental error has occurred. Schmidt v. State, 816 N.E.2d 925, 945 (Ind. Ct. App. 2004), trans. denied.

B. Analysis

The State argued that the victim's testimony was not contradicted. The parties agree that only Lightfoot himself could have contradicted the State's case because Lightfoot and Sayers were the only witnesses to the alleged incident.

The State may not comment on the accused's silence. Griffin v. California, 380 U.S. 609, 615 (1965) (citing the Fifth Amendment). Arguments which focus on the uncontradicted nature of the State's case do not violate the defendant's right to remain silent. Boatright v. State, 759 N.E.2d 1038, 1043 (Ind. 2001). Direct or indirect references to a defendant's failure to testify are not, per se, improper. Ben-Yisrayl v. State, 690 N.E.2d 1141, 1149 (Ind. 1997). A defendant's right to remain silent is violated only when the jury may reasonably interpret the State's argument as an invitation to draw an adverse inference

from the defendant's silence. Moore, 669 N.E.2d at 739. Where, however, only the defendant could contradict the State's evidence, it is improper for the State to emphasize that its case is uncontradicted. See Williams v. State, 426 N.E.2d 662, 666 (Ind. 1981).

Here, the State argued that no evidence contradicted Sayers' testimony. However, the State's arguments did not make a fair trial impossible. While Sayers was the only State witness to the incident, the jury observed his testimony, as well as two videotapes in which he was interviewed by police. As a result, the jury had an opportunity to assess Sayers' credibility within the context of three different accounts of the incident, made at three different times – soon after the incident, ten days later, and at trial. Furthermore, in its final instructions, the trial court clearly directed the jury to avoid interpreting Lightfoot's silence as evidence of guilt.

> The defendant is not required to present any evidence to prove his innocence or to prove or explain anything.
>
> An accused has an absolute right not to testify. The fact that the accused did not testify cannot be considered by you in any way. Do not speculate about why the accused did not testify. Do not even discuss it in your deliberations.

Appendix at 46-47. On appeal, Lightfoot fails to address these instructions. Giving them was sufficient to cure any prosecutor misconduct. See Fox v. State, 520 N.E.2d 429, 431 (Ind. 1988). Meanwhile, multiple Indiana decisions have rejected claims of fundamental error for indirect references to the defendant's silence. See, e.g., Boatright, 759 N.E.2d at 1043 (Ind. 2001); Butler v. State, 724 N.E.2d 600, 605 (Ind. 2000); Schmidt, 816 N.E.2d at 945; and Redmon v. State, 734 N.E.2d 1088, 1093 (Ind. Ct. App. 2000). As in those cases,

the State's closing argument here did not rise to the level of fundamental error.

II. Ineffective Assistance of Trial Counsel

Lightfoot argues that his trial counsel was ineffective for failing to object to a police officer's testimony that he found Sayers to be credible. Our Supreme Court has described the analysis as follows:

> Ineffective assistance of counsel claims are governed by the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. When a claim for ineffective assistance of counsel is based on counsel's failure to object, the defendant also must show that a proper objection would have been sustained.

Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002) (internal citations omitted).

Lightfoot's argument is limited to two responses from the police officer who interviewed Sayers ten or eleven days after the incident. While the failure to object may have been a poor decision, the error was isolated and insufficient to overcome the strong

presumption of adequate assistance. It does not appear probable that timely objections to these two answers would have changed the result. See Grinstead v. State, 845 N.E.2d 1027, 1036 (Ind. 2006). Therefore, we conclude that Lightfoot failed to establish that his trial counsel was ineffective.

III. Trial Rule 7(B)

Finally, Lightfoot asserts that his maximum, twenty-year sentence is inappropriate.[3] Under Indiana Appellate Rule 7(B), this "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); see IND. CONST. art. VII, § 6. A defendant "'must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" Anglemyer v. State, 868 N.E.2d 482, 494 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As to the nature of the offense, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Childress, 848 N.E.2d at 1081. Here, Lightfoot led his victim to a secluded area, pointed a gun to his head, and cocked the gun. His victim was so frightened for his life that he lost control of his bladder.

[3] The Pre-Sentence Investigation Report was included in the Appellant's Appendix on white paper. Indiana Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Indiana Administrative Rule 9(G)(1)(b)(viii) excludes pre-sentence investigation reports from public access. Indiana Trial Rule 5(G) requires that "[w]hole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

As to Lightfoot's character, he was arrested twenty times prior to committing the instant offense and once after committing the instant offense. He has one felony conviction, six misdemeanor convictions, and four probation violations. Based upon our review, we are not persuaded that Lightfoot's sentence is inappropriate.

Conclusion

The State's closing argument did not violate Lightfoot's Fifth Amendment right to remain silent. Lightfoot failed to establish that his trial counsel was ineffective. Finally, his sentence is not inappropriate.

Affirmed but remanded with instructions to vacate Lightfoot's conviction of Pointing a Firearm, as a Class D felony.

KIRSCH, J., concurs.

FRIEDLANDER, J., concurs in part and concurs in result in part.

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	)	
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vs.	)	No. 48A02-0801-CR-31
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

FRIEDLANDER, Judge, **concurring in part, concurring in result in part**

I concur with the Majority in all respects, save one. I agree that the prosecutor's comments during closing argument do not warrant reversal, but do so upon different rationale than that adopted by my colleagues.

As the Majority notes, Lightfoot did not object to the comments at issue. Therefore, the issue is waived unless it is deemed to be fundamental error. The fundamental error exception is an "extremely narrow" one. Caron v. State, 824 N.E.2d 745, 751 (Ind. Ct. App. 2005), trans. denied. "To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." Id. We may reverse under this exception only when there has been a blatant violation of basic principles

that denies fundamental due process to a defendant. Caron v. State, 824 N.E.2d 745.

Where, as here, the challenged comment does not represent a direct comment on the defendant's failure to testify, we must determine whether it amounted to a summary of the evidence or an impermissible reference to the defendant's silence. Haycraft v. State, 760 N.E.2d 203 (Ind. Ct. App. 2001), trans. denied. The Majority concludes it was the latter based in large part upon consensus of the parties, i.e., "The parties agree that only Lightfoot himself could have contradicted the State's case because Lightfoot and Sayers were the only witnesses to the alleged incident." Slip op. at 4. I do not agree that the State's case was limited in this fashion.

In determining the meaning of the deputy prosecutor's comment, we do not focus on whether Lightfoot alone could have contradicted Sayers's account of what happened between them in Sayers's car on the evening of July 8. Instead, we focus on whether Lightfoot's testimony alone could have contradicted the State's *case against him*. See Haycraft v. State, 760 N.E.2d 203. That case was built upon Sayers's testimony, which included assertions that he initially encountered Lightfoot in a particular restaurant parking lot at a certain time on a certain day. Sayers claimed Lightfoot was in another car with a woman, got out of that car, approached Sayers, and asked for a ride, explaining that the woman needed to use the car. Sayers further asserted that Lightfoot shortly thereafter took money from him while brandishing a weapon. Sayers called police an hour later and reported the robbery. Given the condensed time-frame of the events alleged by Sayers and the fact that at least a portion of those events occurred in a public place where other people were present, there were

portions of Sayers's account that could have been verified or refuted by someone other than Lightfoot. This would include alibi evidence.

In summary, I believe the comment in question was a comment on the uncontradicted nature of Sayers's testimony, i.e., the State was pointing out to the jury that there was no evidence that Sayers was lying. Accordingly, I believe the prosecutor's comment was not error, much less fundamental error, and therefore that the issue was waived. Caron v. State, 824 N.E.2d 745. I concur with the majority in all other respects.