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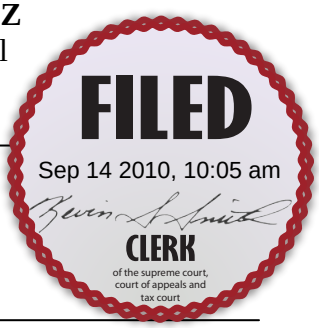

IN THE COURT OF APPEALS OF INDIANA

QUINTEZ MOTLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-0912-CR-1222
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT CIRCUIT COURT
The Honorable Mark E. Spitzer, Judge
Cause No. 27C01-0806-FB-102

September 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Quintez Motley[1] appeals his convictions for armed robbery as a class B felony,[2] criminal confinement as a class B felony,[3] carjacking as a class B felony,[4] two counts of burglary as class B felonies,[5] and theft as a class D felony.[6] Motley raises three issues, which we revise and restate as:

I. Whether the juvenile court abused its discretion when it waived jurisdiction to the adult criminal court; and

II. Whether the prosecutor committed prosecutorial misconduct.

We affirm.

The relevant facts follow. In the early morning hours of June 27, 2007, Motley, along with Dexter Jones, Charles Miller, Roshene Hinkle, L.H., and J.E.,[7] drove from Indianapolis to Marion, Indiana. Motley was fourteen years old and six feet, two inches tall, and the oldest of the six individuals was eighteen years old. At around 6:45 a.m., Brad Robinson observed a vehicle drive past his home and one individual in the vehicle looked at Robinson "dead in the face." Transcript at 202. Robinson left his home for

[1] There is a conflict in the record as to the spelling of Motley's first name. The transcript spells Motley's first name "Quintesz" throughout, and in her deposition, Motley's adoptive mother Michelle Clay-Jones spelled Motley's first name the same way. See, e.g., Transcript at 21; Exhibit A at 5. Nevertheless, the docket lists Motley's name as "Quintez."

[2] Ind. Code § 35-42-5-1(1) (2004).

[3] Ind. Code § 35-42-3-3(a)(1) (Supp. 2006).

[4] Ind. Code § 35-42-5-2(1) (2004).

[5] Ind. Code § 35-43-2-1 (2004).

[6] Ind. Code § 35-43-4-2(a) (2004) (subsequently amended by Pub. L. No. 158-2009, § 8 (eff. July 1, 2009)).

[7] L.H. and J.E. are juveniles.

work, but less than a half-hour later his neighbor called Robinson and told him that the police were at his home and someone had kicked in his door. Robinson's neighbor also called the police after observing six "young men" carrying items away including a television, a satchel, and "a player." Id. at 176. The neighbor yelled at the teens to stop, and they ran towards their car and drove off. Inside, the police discovered that Robinson's home had been "ransacked." Id. at 196.

After leaving the area, the teens drove about "eight to ten blocks" and came upon another home. Id. at 224. Inside, Amie Turney was changing the diaper of her ten-month-old daughter. Turney had left her back door ajar to let her babysitter in while she was tending to her daughter. Turney noticed a car pull closer to her home and assumed it was the babysitter, but soon after "someone burst through the kitchen door[] with a gun." Id. at 234. The person with the gun asked Turney: "Where's the money? Where's the money? Where's the stuff? Where's the S---?" Id. at 234. Another person with a gun also appeared, as well as four others. Some of the teens went through Turney's house. One individual ordered Turney into the bedroom and wanted to know where her jewelry was. When she showed them her jewelry box, one of the teens said "[y]ou're f------ kidding?" Id.at 237. Some of the teens were pointing and laughing at her, and one said: "She's lying. Knock her around or rough her up." Id. At one point, one of the individuals with a gun asked Turney, "[d]o you think I'm playing?", and moved the gun towards her daughter, whom she was holding throughout the incident, and Turney knocked the gun away. Id. The teens left, taking Turney's two phones, her car which

was a black 2005 Hyundai Santa Fe, and other items from her home. Turney flagged down a motorist who allowed her to call 911 from her phone.

The teens then drove both vehicles back to Indianapolis and went swimming at a hotel. A construction worker spotted Turney's vehicle and thought it looked suspicious because it had a paper license plate that was upside down and had "eighty-nine Cadillac" written on it. Id. at 302. The worker called Indianapolis Metropolitan Police Officer Ronald Gray, who was a personal friend, who came on the scene to investigate. After a check of the car's vehicle identification number "came back as stolen," Officer Gray "contacted some uniform police cars and had them meet [him] on another location right next door." Id. at 302, 304. After the teens came out of the hotel and began walking toward the vehicle, the officers approached and ordered them to put their hands up. Most of the teens attempted to flee, but five of the six including Motley were apprehended at the scene, and the sixth was later arrested.

On August 10, 2007, the State filed a Petition Alleging Delinquency as well as a Motion For Waiver of Juvenile Jurisdiction. On February 6, 2008, the juvenile court held a waiver hearing, and Turney and Officer Benjamin Caudell testified to facts consistent with the foregoing. Turney testified that Motley resembled "the man who was laughing when the gun was pointed at [her] daughter." Id. at 9. Officer Caudell testified that Motley had told him that he served as "the lookout man" for the burglary of Robinson's home, and that he had been present at the robbery of Turney's residence. Id. at 30. Officer Caudell testified that Motley also told him that there had been incidents in Indianapolis on the same day after returning from Marion. Motley said that they were

"messing with people," and that there had been "at least one other robbery . . . but they were unsuccessful in obtaining property . . . ." Id. at 31. Also, another of the teens told Officer Caudell that Motley presented a stolen credit card at a Footlocker in a mall in Indianapolis, but it was declined "because he did not have I.D. corresponding to it." Id. at 33. Officer Caudell testified that a mall security officer "observed the license plate to their vehicle after . . . attempting to use the credit card," and that "[t]he license plate was then changed" after Motley took a plate off of another vehicle and placed it on Turney's vehicle. Id. at 33.

Also, Karen Newell, a juvenile correctional officer in Grant County, testified that on November 6, 2007, Motley refused to go to his room and said "[i]f you ever put your mother f-----' hands on me again, I will hit you," and "[n]ext time I will hit your old a--." Id. at 22. Newell called for backup, and when backup arrived Motley "ran into the room and shut the door." Id.

On April 28, 2008, the juvenile court held another waiver hearing. Officer Caudell testified that another of the teens, Dexter Jones, indicated to him at an interview that the teens drove to Marion "to get some 'new money,'" meaning that they were "going to rob someone." Id. at 58. Officer Caudell also testified that Motley was the only one of the three teens originally charged as juveniles to have the State seek waiver into adult criminal court.

Motley admitted into evidence a deposition of Michelle Clay-Jones, his adoptive mother, who testified that Motley's biological parents were deceased and that she had adopted him in 2003. Motley's grandmother, Delores Motley, also testified at the hearing

regarding Motley's upbringing, and said on cross examination that Motley had spent time at "Lutherwood" and at "Resource." Id. at 71.

The State admitted "substantial records from [Motley's] past services and issues" which it summarized for the juvenile court as follows:

> [Motley] was a CHINS . . . . Due to mother's neglect. He was placed in three foster homes . . . . And one foster home after placement with grandma failed. Um, DAWN Projects Services were ordered in July of 2000, and [Motley] was placed at Resource in Indianapolis, October 18th, of 2001. . . . DAWN Projects Services continued while he was at Resource. He was transferred from Resource [] to Lutherwood, September 20th, of 2002. Had continued problems with aggression while at Lutherwood. He had to be restrained numerous times while there. Engaged in individual and family group sessions at Lutherwood, and counseling at Mid-Town Family Growth Center. . . . His diagnosis [in March 2003] was conduct disorder, depression, Attention Deficit Disorder, [and] borderline intellectual functioning. He was provided home based services from Lutherwood during a transition period. . . . He was adopted by [Michelle] in November of 2003. The DAWN Project Case was closed December of 2003. But he did receive DAWN Project Services later in June of '04, through June of 2005. . . . [Motley has] been suspended for fighting, disrespect, disruptive behavior. . . . [His] history with the juvenile system began . . . with [a] case being rejected in 2001. Followed by a battery . . . and disorderly conduct, two counts . . . for an issue at Rhodes Elementary School, where he ransacked a room . . . damaged property . . . and violently pushed an assistant principal. . . . In 2004 . . . [Motley] had a battery, B Misdemeanor, disorderly conduct, B Misdemeanor, and battery, A Misdemeanor. . . . On the way to the bus, he passed a victim who he thought got him suspended and punched that person in the face . . . . Then, in May, of 2004, a couple of months later, he was charged with robbery, as a Class C Felony, battery, a Class A misdemeanor, and theft as a Class D Felony. On that date, he punched a victim in the private area and took his bicycle. . . . [H]e said that . . . he took the bike because it was there. . . . The probation officer noted that he showed no remorse for his actions. Wanted to do what he pleased without thinking about possible consequences. . . . In June 2004, a month later, there was a runaway. . . . And then we get to these offenses in 2007 . . . . [Motley] has received multiple services.

Id. at 74-77. On May 30, 2008, the juvenile court waived Motley's case into the Grant Circuit Court. Appellant's Appendix at 14. The juvenile court noted in its order that "[f]ollowing the crimes . . . [Motley] and his co-defendants took steps to hide incriminating evidence, and engaged in enjoyable recreational activities, i.e., swimming and shopping. Such conduct suggests a callousness and complete disregard for the lives of the victims in this case." Id. at 12.

On June 9, 2008, the State charged Motley with Count I, armed robbery as a class B felony; Count II, criminal confinement as a class B felony; Count III, carjacking as a class B felony; Count IV, burglary as a class B felony; Count V, burglary as a class B felony; and Count VI, theft as a class D felony. On February 4, 2009, the State filed a motion in limine regarding "[a]llegations and/or statements that [Motley] was wrongfully waived to adult court," and "[s]tatements pertaining to [Motley's] prior life experiences or circumstances designed to illicit sympathy . . . ." Id. at 26. On February 13, 2009, the trial court ruled on the State's motion, stating with regard to waiver that "the parties may mention [Motley's] age and that the case is in adult court due to a waiver from juvenile court, but may not refer to the details of the basis of the waiver, or argue that the jury should find the waiver illegal, impermissible, or unjust." Id. at 28. With regard to Motley's life circumstances, the court granted the State's motion "as to any mention of the circumstances surrounding the death of the parents of [Motley], or his subsequent adoption." Id. at 29.

On September 21, 2009, a jury trial commenced. On September 23, the parties gave closing argument. During Motley's closing argument, Motley's attorney argued to the jury:

> You're not allowed to buy a car at fourteen. You've got to be at least eighteen. And your mom has to get your cell phone contract for you, because you can't sign a cell phone contract. Because you don't know what you're doing. And that's why kids are treated differently than adults. That's why we have a Juvenile System. . . . [T]hey don't know what they're doing in the way that adults know. And so there is a serious difference in the level of blame worthiness and culpability that goes through this group. . . . Quintesz Motley, bad boy though he may have been, was a boy, and he was victimized by Charles Miller, Roshene Hinkle, and Dexter Jones, and put in that chair. *The State put 'em there*. They didn't put [J.E., L.H.]. They must think there's something different about [Motley], and his involvement in this case. And the case utterly fails to show that. *This prosecution on a policy level, though legal, is insane. You have the power to rectify that*. And I ask you to acquit, Quintesz Motley. Not because he's innocent, but because this isn't right.

Transcript at 447, 450 (emphasis added).

The State argued in rebuttal:

> Quintesz Motley is sitting here today, because a Judge made that determination. And, Judge Spitzer, told you that. That is not to be considered. . . . [Motley's attorney's] whole argument is about the age and that is not for you to determine. That's not your job. That's been determined. He wants you to totally disregard the law. And as jurors you can't do that.

Id. at 450, 452.

The jury found Motley guilty as charged. On October 23, 2009, the trial court sentenced Motley to ten years with eighteen months suspended on each of Counts I-V and eighteen months on Count VI. The court ordered Counts I-IV and Counts V-VI to be served concurrent with each other and ordered Counts I-IV to be served consecutive to

Counts V-VI. Thus, Motley received twenty years in the Department of Correction with three years suspended. Motley was also credited for 808 days.

I.

The first issue is whether the juvenile court abused its discretion when it waived jurisdiction to the adult criminal court. "We review a juvenile court's decision to waive jurisdiction only for an abuse of discretion. It is for the juvenile court judge, after weighing the effects of retaining or waiving jurisdiction, to determine which is the more desirable alternative." Vance v. State, 640 N.E.2d 51, 57 (Ind. 1994) (citations omitted). We do not reweigh the evidence or judge the credibility of witnesses. K.M. v. State, 804 N.E.2d 305, 308 (Ind. Ct. App. 2004), trans. denied. "We look only to the evidence most favorable to the State and the reasonable inferences to be drawn therefrom, considering both the waiver hearing and the findings of fact given by the court." Id. "Unlike criminal proceedings, juvenile proceedings are of a general civil nature, and the burden upon the State is to establish by a preponderance of the evidence that juvenile jurisdiction should be waived." Hall v. State, 870 N.E.2d 449, 455 (Ind. Ct. App. 2007) (citing K.M., 804 N.E.2d at 308), trans. denied.

The relevant statute for this order is Ind. Code § 31-30-3-2, which states:

> Upon motion of the prosecuting attorney and after full investigation and hearing, the juvenile court may waive jurisdiction if it finds that:
>
> (1) the child is charged with an act:
>
> (A) that is heinous or aggravated, with greater weight given to acts against the person than to acts against property; or

(B) that is a part of a repetitive pattern of delinquent acts, even though less serious;

(2) the child was at least fourteen (14) years of age when the act charged was allegedly committed;

(3) there is probable cause to believe that the child committed the act;

(4) the child is beyond rehabilitation under the juvenile justice system; and

(5) it is in the best interests of the safety and welfare of the community that the child stand trial as an adult.

Ind. Code § 31-30-3-2 (2004) (subsequently amended by Pub. L. No. 67-2008, § 3 (eff. July 1, 2008)).

Motley argues that "the State has failed to meet its burden that [Motley] is beyond rehabilitation under the juvenile justice system. When given an opportunity he has shown in the past he can be successful." Appellant's Brief at 19. Motley points out that "[m]ost likely his mother was on crack cocaine at the time of [his] birth," that he is "[b]orderline [i]ntellectual functioning," and as such he is "more susceptible to being a follower and not a leader." Id. at 17. Motley also notes that he "has been diagnosed with Post Traumatic Stress Disorder (PTSD), Oppositional Defiant Disorder (ODD), Attention Deficit Hyperactivity Disorder (ADHD) and Depression not otherwise specified (NOS)." Id. at 18. Motley argues that a report from the Dawn Project made on January 28, 2002 "showed he was making progress in dealing with a number of behavioral and emotional problems." Id. Motley also notes that "the Dawn Project team recommended [he] be

released from probation and the Dawn Project due to successful completion of his treatment goals and court orders." Id. at 19.

At the waiver hearing, the State argued that Motley is beyond rehabilitation in the juvenile justice system because:

> [Motley] is nearly sixteen. . . . [He] has been charged with multiple offenses. One of which, is a battery with injury and theft. Where he stole a bicycle from a boy because it was there. . . . [H]e had no remorse for his actions. Here the majority of options within the juvenile system are foreclosed because he's had those previously[:] foster home placements, counseling, residential placements, Resource and Lutherwood, DAWN Project Services, adoption, in patient hospitalization, special education, formal probation, and informal home detention. [Motley] has . . . had team, and teams of service providers, physicians and therapists, medications and case managers, mentors, foster parents, and [a] guardian who adopted him. All services were very intense and very involved, yet all have been unsuccessful. Juvenile probation has [been] another option. He has violated probation in the past. . . . The DOC adult system, offers many more treatment programs . . . .

Transcript at 79-80.

The juvenile court in its order entered findings that Motley was beyond rehabilitation in the juvenile justice system:

> A. [Motley] has already received benefit of many services and programs available through the Juvenile Justice system, to wit: foster home placements, counseling, residential placements at Resource and Lutherwood, DAWN Project services, adoption, in-patient hospitalization, special education, formal probation and informal home detention. These services were very intensive, but have apparently been unsuccessful in rehabilitating [him].
>
> B. Based upon [Motley's] prior treatment history, his history of delinquent offenses – many of which were violent, and the seriousness of the current offenses, this Court believes that [Motley] is beyond rehabilitation in the juvenile justice system.

Appellant's Appendix at 12-13.

Here, the record and the juvenile court's order show that the court complied with Ind. Code § 31-30-3-2. Specifically, the juvenile court held a hearing to investigate whether Motley should be tried in adult court and found that probable cause existed that Motley committed acts, that the acts were "part of a repetitive pattern of delinquent acts," and that Motley had "previously been adjudicated delinquent" for three separate batteries, three counts of disorderly conduct, theft, and a probation violation. Id. at 12. The court also noted that Motley had been charged in Marion County with resisting law enforcement and theft in matters "related to the charges in this case." Id.

"[T]he determination of whether a juvenile is beyond rehabilitation is fact sensitive and can vary widely from individual to individual and circumstance to circumstance." K.M., 804 N.E.2d at 309. The State presented evidence that Motley had numerous previous encounters with the juvenile justice system which had failed to curb his unlawful and violent behavior, that Motley had received a multitude of services in an attempt to correct his antisocial behavior, including services through the DAWN Project, Lutherwood, Resource, and the Mid-Town Family Growth Center, and that services had been unsuccessful.

Despite his young age at the time of the instant offenses, Motley's juvenile record and the multitude of services he had been provided in the past in an effort to rehabilitate him provide ample support for the juvenile court's determination that he is beyond rehabilitation in the juvenile justice system and that waiver of jurisdiction was in the best interests of the safety and welfare of the community. Motley's claim amounts to a request to reweigh the evidence, which we will not do. Hall, 870 N.E.2d at 457.

Accordingly, we conclude that the juvenile court did not abuse its discretion when it waived Motley into adult court. See, e.g., K.M., 804 N.E.2d at 309 (holding that "for the reasons stated in the waiver order, [defendant] was beyond rehabilitation for the purposes of waiving him to adult court").

II.

The next issue is whether the prosecutor committed prosecutorial misconduct. Motley argues that the prosecutor made an impermissible statement in rebuttal and that the failure of Motley's counsel to object constituted ineffective assistance of counsel.

We note that Motley made no objection during the prosecutor's closing argument. In reviewing a properly preserved claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the 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. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct. Id. The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. Id.

Where, as here, a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. Id. More specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Id. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. Id.

It is error that makes "a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm." Id.

In his brief Motley highlights a portion of the State's rebuttal in which the prosecutor stated: "Quintesz Motley is sitting here today, because a Judge made that determination. And, Judge Spitzer, told you that. That is not to be considered." Appellant's Brief at 24. Motley argues that "[p]resumably the prosecutor was referring to the juvenile court's findings as to the wavier [sic]," and that "[t]he juvenile court hearing did not afford [Motley] a jury. . . . [T]he findings should have been limited to the juvenile proceedings. . . . [I]t was an improper remark and was a kiss of death to any chance [Motley] had of winning with the jury." Id.

However, we find that the prosecutor's statement was merely a response to the arguments raised by Motley in his closing argument. "Prosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." Dumas v. State, 803 N.E.2d 1113, 1118 (Ind. 2004). As noted above, Motley argued to the jury: "That's why we have a Juvenile System. . . . [T]hey don't know what they're doing in the way that adults know." Transcript at 450. Motley argued that "Quintesz Motley, bad boy though he may have been, was a boy, and he was victimized by Charles Miller, Roshene Hinkle, and Dexter Jones, and put in that chair. *The State put 'em there*." Id. (emphasis added). Motley's closing concluded that "[t]his prosecution on a policy level, though legal, is insane. You have the power to

rectify that. And I ask you to acquit, Quintesz Motley. *Not because he's innocent, but because this isn't right*." Id. (emphasis added).

Motley argues that his counsel "never asked the jury to disregard the law, or ignore the law. He described the law as insane as it is applied to the facts in this case." Appellant's Brief at 24. We find that the record contravenes this argument. Indeed, we observe that the trial court made a ruling regarding the State's motion in limine on this issue ordering that "the parties may mention the Defendant's age *and that the case is in adult court due to a waiver from juvenile court*, but may not refer to the details of the basis of the waiver, *or argue that the jury should find the waiver illegal, impermissible, or unjust*." Appellant's Appendix at 28 (emphasis added). The prosecutor, after making the statement in question, continued that "[Motley's attorney's] whole argument is about the age and that is not for you to determine. That's not your job. That's been determined. He wants you to totally disregard the law. And as jurors you can't do that." Transcript at 452. Thus, we find that, contrary to Motley's contentions, if either party violated the trial court's order it was Motley's counsel when he argued that the jury had the "power to rectify that. . . . Not because he's innocent, but because this isn't right," and that the prosecutor's statements were not in violation of the court's order.

However, even assuming misconduct in this case, Motley has not demonstrated that the harm or potential harm of the prosecutor's comments was substantial and constitutes fundamental error. Indeed, the foregoing analysis, especially the statement by Motley's counsel at closing that the jury should acquit Motley "[n]ot because he's innocent, but because this isn't right" makes clear that Motley did not challenge the

sufficiency of the evidence presented and was merely asking for jury nullification. See, e.g., Cooper, 854 N.E.2d at 838 ("It strains credulity to believe that the jury found Cooper guilty of murder for any reason other than the evidence introduced at trial. Any harm done by the prosecutor's remark was de minimis, not substantial. And the resulting error if any did not result in denying Cooper fundamental due process."). Thus, we find nothing about the statements to be so egregious as to rise to the level of fundamental error.

Additionally, to the extent that Motley argues ineffective assistance, we note that, having found the prosecutor's statements to not be improper, an objection by Motley's counsel during the State's rebuttal would not have been sustained. Thus, Motley's counsel cannot be ineffective for not making an objection. Lowery v. State, 640 N.E.2d 1031, 1043 (Ind. 1994) (holding that trial counsel did not provide ineffective assistance of counsel for failure to object to statements made by the prosecutor in closing argument which did not constitute prosecutorial misconduct), reh'g denied, cert. denied, 516 U.S. 992, 116 S. Ct. 525 (1995). Furthermore, the failure to object could well have been a strategic decision by counsel. See Charlton v. State, 702 N.E.2d 1045, 1051 (Ind. 1998), reh'g denied. "Judicial scrutiny of counsel's performance is highly deferential; we eschew second-guessing the propriety of trial counsel's tactics." Id. (quoting Canaan v. State, 683 N.E.2d 227, 231 (Ind. 1997), reh'g denied, cert. denied, 524 U.S. 906, 118 S. Ct. 2064 (1998)). "Strategic decisions do not amount to ineffective assistance of counsel." Id. Accordingly, we conclude that the prosecutor's comments during closing argument did not constitute fundamental error and that trial counsel was not ineffective

for failing to object thereto. See, e.g., id. at 1052 (holding that "the prosecutor's comments during closing argument did not constitute fundamental error and that trial counsel was not ineffective for failing to object thereto").

For the foregoing reasons, we affirm Motley's convictions for armed robbery as a class B felony, criminal confinement as a class B felony, carjacking as a class B felony, two counts of burglary as class B felonies, and theft as a class D felony.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.