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IN THE
COURT OF APPEALS OF INDIANA

GARY A. KAIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 04A03-0801-CR-20
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BENTON CIRCUIT COURT
The Honorable Rex W. Kepner, Judge
Cause No. 04C01-0703-FD-27

October 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Gary Kain appeals his conviction for Class D felony criminal recklessness with a deadly weapon. We affirm.

Issues

The combined and restated issues before us are:

I. whether the trial court erroneously allowed certain testimony; and

II. whether there is sufficient evidence to support Kain's conviction.

Facts

On March 5, 2007, in Raub, Kain came to Christine McPeters's house and asked if she had two dogs that were running loose around town. McPeters said she did not and that her dog was chained up. Kain said that these dogs had been bothering his wife and that if he saw them, he was going to shoot them. While Kain and McPeters were talking outside, two dogs ran into McPeters's yard. Kain then went to his truck and retrieved a rifle. McPeters yelled, "Get out of here," then ran inside her house. Tr. p. 26. While McPeters was standing next to a window by the front door, Kain shot one of the dogs twice, killing it. The dog was less than ten feet away from McPeters's front porch when Kain shot it. The second dog ran away from McPeters's house, across State Road 71. Kain shot across the highway from McPeters's driveway and killed the second dog.

The State charged Kain with one count of Class D felony criminal recklessness with a deadly weapon. After a jury trial, Kain was convicted as charged. He now appeals.

Analysis

I. Admission of Testimony

The first issue is whether the trial court erroneously allowed certain testimony by Benton County Sheriff's Deputy Jason Dexter. At trial, counsel objected to Deputy Dexter testifying to what McPeters had told him about the shooting on hearsay grounds, and that objection was sustained. Deputy Dexter then testified, without objection, that he believed, based on unspecified information relayed to him by McPeters, that when Kain shot the first dog he was shooting "roughly towards the house . . . ." Tr. p. 63. It is about this unobjected-to testimony that Kain now complains.

Failure to object at trial constitutes waiver of review unless an error is so fundamental that it denied the accused a fair trial. Absher v. State, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007). The doctrine of fundamental error is only available in egregious circumstances. Id. "The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule." Id. To be fundamental error, "an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible" and 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." Benson v. State, 762 N.E.2d 748, 755 (Ind. 2002).

Here, because of trial counsel's hearsay objection, Deputy Dexter did not directly relate to the jury any statements McPeters made to him. Rather, he indicated that he formed an opinion on the direction of Kain's gunshot based on what McPeters told him about the shooting. It appears to us that any potentially proper objection to Deputy

Dexter's testimony on this point would have to rest upon a claim that he was offering an opinion on the direction that Kain fired, but that he lacked specialized knowledge to offer such an opinion.

Unlike lay witnesses, witnesses with "specialized knowledge" may testify in the form of an opinion.[1] See Ind. Evidence Rule 702(a). Evidence Rule 703 allows a witness with specialized knowledge to rely on inadmissible hearsay in forming the basis of his or her opinion. Schmidt v. State, 816 N.E.2d 925, 940 (Ind. Ct. App. 2004), trans. denied (quoting Faulkner v. Markkay of Indiana, Inc., 663 N.E.2d 798, 800 (Ind. Ct. App. 1996), trans. denied)). If Kain or his attorney believed Deputy Decker should not have been permitted to offer an opinion based on what McPeters told him, they should have objected on that basis, thus allowing the State an opportunity to prove otherwise. See Purifoy v. State, 821 N.E.2d 409, 412-13 (Ind. Ct. App. 2005), trans. denied. We see no blatant violation of basic principles in the admission of this evidence and, therefore, no fundamental error.

II. Sufficiency of Evidence

Kain also contends there is insufficient evidence to support his conviction.[2] When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. Henley v. State, 881 N.E.2d 639,

[1] "Specialized knowledge" is not equivalent to scientific expertise. Malinski v. State, 794 N.E.2d 1071, 1085 (Ind. 2003).

[2] Kain also makes a separate argument that the trial court erred in denying his motion for a directed verdict at the conclusion of the State's case-in-chief. He waived this argument by presenting his own evidence after the trial court denied the motion. See Snow v. State, 560 N.E.2d 69, 74 (Ind. Ct. App. 1990), trans. denied.

652 (Ind. 2008). "We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence." Id. We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. Id.

In order to convict Kain of Class D felony criminal recklessness, the State was required to prove that he recklessly, knowingly, or intentionally performed an act that created a substantial risk of bodily injury to another person while armed with a deadly weapon. See Ind. Code § 35-42-2-2(b)(1), (c)(2)(A). The minimum mens rea that would support Kain's conviction is recklessness, which means acting "in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct." I.C. § 35-41-2-2(c). Kain contends that his shooting of the dogs was not reckless and did not pose a substantial threat to human safety.

Kain contends this case should be controlled by our decisions in Elliott v. State, 560 N.E.2d 1266 (Ind. Ct. App. 1990), and Boushehry v. State, 648 N.E.2d 1174 (Ind. Ct. App. 1995). In Elliott, we reversed a criminal recklessness conviction where the defendant had fired a gun into uninhabited fields and woodlands while persons were behind him. We stated, "while Elliott's conduct was reckless at best and deplorable at worst, it did not create a substantial risk of bodily injury to another person because there were no people in or near his line of fire." Elliott, 560 N.E.2d at 1267. We rejected the State's argument that there might have been hunters in the nearby fields and woodlands as mere conjecture. Id. Similarly, in Boushehry, we reversed a criminal recklessness

conviction where the defendant fired a gun across a vacant lot. Even though the defendant fired the gun in the direction of Shelbyville Road in Indianapolis, we noted that the evidence in the record failed to demonstrate that anyone actually was in or near the line of fire. Boushehry, 648 N.E.2d at 1177.

By contrast, in Smith v. State, 688 N.E.2d 1289 (Ind. Ct. App. 1997), we affirmed a criminal recklessness conviction after distinguishing Elliott and Boushehry. In Smith, the defendant had fired his gun several times at an old car in his backyard. There were ten houses within fifty yards of the car, one of which was in the direct line of the gunfire and appeared to be occupied at the time of the shooting. Also, a number of people were outside on a street near the defendant's home at the time. We held, "Unlike in Boushehry and Elliott, the evidence and reasonable inferences to be drawn therefrom indicate that there were individuals in or near Smith's line of fire." Smith, 688 N.E.2d at 1291. Thus, "the jury could reasonably infer that Smith's conduct created an actual and substantial risk of bodily injury to another person." Id.

We conclude this case is much more akin to Smith than Elliott or Boushehry. Deciding to use a gun to summarily kill an animal approximately ten feet from a residence where a person had just run inside qualifies as criminally reckless behavior. Although there was no evidence of groups of people on the street nearby at the time Kain fired his rifle, unlike in Smith, Kain fired his rifle when he was much closer to a clearly occupied house than was the defendant in Smith. Kain in part seems to be arguing that he is a good shot, and that because he was aiming to hit the dog and did in fact hit the dog

there was no threat of harm to McPeters and her family.[3] That was evidence for the jury to consider in deciding whether Kain was reckless; it clearly rejected that line of argument, and we will not second-guess its decision. There is sufficient evidence from which the jury reasonably could have concluded that Kain recklessly created a substantial risk of bodily harm to another person when he shot the first dog.

Conclusion

The trial court did not commit fundamental error in allowing testimony and there is sufficient evidence to support Kain's conviction. We affirm.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.

[3] Because Kain was convicted of only count of criminal recklessness, we need only consider whether his shooting of the first dog was sufficient to support that conviction; we need not consider the shooting of the second dog.