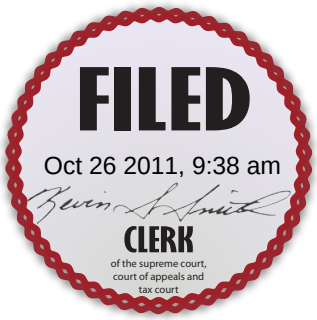

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IN THE
COURT OF APPEALS OF INDIANA

FLOYD McQUEEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A04-1103-CR-137
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Stephenie LeMay-Luken, Judge
Cause No. 32D05-1005-FC-12

October 26, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Floyd McQueen (McQueen), appeals his conviction for burglary, a Class C felony, Ind. Code § 35-43-2-1, and resisting law enforcement, a Class A misdemeanor, I.C. § 35-44-3-3(a)(3).

We affirm.

ISSUE

McQueen raises one issue for our review, which we restate as the following: Whether the State's attempted statement of the law on accomplice liability to the jury amounted to prosecutorial misconduct, making a fair trial impossible for McQueen.

FACTS AND PROCEDURAL HISTORY

On May 13, 2010, just after midnight, Plainfield Police Department Officer Brian Stewart (Officer Stewart) responded to a dispatch involving a disturbance at the maintenance building of Oak Tree Golf Course in Hendricks County, Indiana. When he arrived, Officer Stewart noticed that the gate to the building was open and that a black Chevy Tahoe was blocking the entrance to the building's driveway. Exiting his car, Officer Stewart then walked up the gravel road and moved towards the rear of the building where he saw five individuals who appeared to have just left the building. When these individuals saw Officer Stewart, they immediately ran from him. Officer Stewart yelled, "Stop! Police!" and then, "Stop, police, or I'll send my dog!" (Transcript p. 86). The individuals continued to run, causing Officer Stewart to deploy his dog to apprehend one of the suspects.

Officer Stewart's dog captured one suspect, later identified as Michael Childers (Childers). As Officer Stewart was removing the dog from Childers, Stewart noticed a second suspect lying on the ground on the opposite side of the embankment. Officer Stewart commanded the second suspect to stop, but the suspect fled. The second suspect was approximately ten feet away from Officer Stewart, who stated he got a "good look" at the suspect's face, which was illuminated by the outside lighting of the maintenance building. (Tr. p. 104).

The chain link fence surrounding the maintenance building had been cut with bolt cutters, which were found on the ground next to a piece of the fence and the lock. The door to the building showed heat marks caused by an acetylene torch that was found three feet from the door on the inside of the building. Weed eaters and leaf blowers that were usually stored inside the building had been moved outside, twenty feet from the door. Inside the building, the maintenance superintendent's desk had been opened and rummaged through.

Crime scene technician Rick Morphew (Morphew) impounded the Chevy Tahoe and discovered an Indiana driver's license belonging to McQueen. Morphew showed the driver's license to Officer Stewart who "immediately recognized" McQueen as the second suspect who had fled from him. (Tr. pp. 114-15). Later that same day, McQueen came to the station to retrieve his vehicle; he was read his *Miranda* rights and interviewed by Detective Brian Bugler. McQueen denied being present at the crime scene and stated that he had loaned the Chevy Tahoe to Childers prior to the burglary.

On May 13, 2010, the State filed an Information charging McQueen with burglary, a Class C felony, I.C. § 35-43-2-1; criminal mischief, a Class D felony, I.C. § 35-43-1-2; and resisting law enforcement, a Class A misdemeanor, I.C. § 35-44-3-3(a)(3). On November 15, 2010, the State dismissed the criminal mischief charge. On February 16, 2011, after a jury trial, McQueen was found guilty on all charges. On March 16, 2011, the trial court sentenced McQueen to 1,460 days for his burglary conviction and 363 days for his resisting law enforcement conviction, with the sentences to run concurrently. The trial court also awarded McQueen two days credit and ordered 1,458 days suspended.

McQueen now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

McQueen argues that the prosecutor committed misconduct when she attempted to describe accomplice liability in her closing remarks to the jury. The statement at issue went as follows:

> [T]here's something I want to talk about called accomplice liability. And that says that an accomplice is criminally liable for all of the acts of his confederates, which were the probable and natural cause of their common plan. The accomplice doesn't have to participate in each and every element of the crime in order to be convicted of it. And the case law on that is *McGee v. State* it's 699 N.E.2d 264 and it's an Indiana Supreme Court case from 1998; there are a whole line of cases. Officer Stewart does not have to see Floyd McQueen in that building. It was a group of people who broke into that building and accomplice liability says that if they broke in and he was involved, that shows us he was breaking into it. That's what accomplice liability is.

(Tr. p. 261).

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) (citing *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2002)). 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*.

When an improper remark is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. *Dumas v. State*, 803 N.E.2d 1113, 1117 (Ind. 2004). If the party is not satisfied with the admonishment, then he or she should move for a mistrial. *Id*. Failure to request an admonishment or move for a mistrial results in waiver of that claim. *Id*. McQueen did not take any of these steps with the trial court; therefore, the claim for prosecutorial misconduct was not properly preserved. Where a claim for prosecutorial misconduct is not properly preserved, our standard of review is different. *Cooper*, 854 N.E.2d at 835. In such cases, the defendant must establish not only the grounds for misconduct, but also additional grounds for fundamental error. *Id*. Fundamental error is error that makes "a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary due process . . . present[ing] an undeniable and substantial potential for harm." *Id*. (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)).

McQueen contends that "the prosecutor misled the jury by stating that McQueen's 'involvement' is sufficient for conviction and by not informing the jury that mere presence at the scene of the crime is insufficient to establish accomplice liability." (Appellant's Brief p.

9). We believe McQueen's contention is a poor illustration of the prosecutor's statements. The factors for consideration in accomplice liability crimes are: (1) presence at the scene of the crime, (2) companionship with another engaged in criminal activity, (3) failure to oppose the crime, and (4) defendant's conduct before, during, and after the occurrence of the crime. *Garland v. State*, 788 N.E.2d 425, 431 (Ind. 2003). Further, this court has previously used the term "involved." A "defendant may be convicted as an accomplice where he had merely a tangential involvement in the crime." *Green v. State*, 973 N.E.2d 923, 929 (Ind. Ct. App. 2010). Reading these factors, the prosecutor's statement of "It was a group of people who broke into that building, and accomplice liability says that if they broke in *and he was involved*, that shows us he was breaking into it. That's what accomplice liability is," is an appropriate statement of the law. (Tr. p. 61). Nowhere in the disputed statement did the prosecutor use the term "mere presence." McQueen takes the phrase "and he was involved" to mean "his mere presence." That is not the case. We conclude that the prosecutor's use of the term "involved" did not mischaracterize accomplice liability, and therefore, there was no prosecutorial misconduct.

Further, while the prosecutor argued that McQueen was present at the scene, she did not argue that his presence was sufficient for accomplice liability. It is proper for a prosecutor to argue both law and fact during closing arguments and to draw conclusions based on his or her analysis of the evidence. *Hand v. State*, 863 N.E.2d 386, 394 (Ind. Ct. App. 2007). Also, a prosecutor is entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable. *Id.* The

theory on which McQueen mounted his defense was that of mistaken identity, which he made clear in his opening statement by saying, "Ladies and gentlemen, this is a, a mistaken identification, clear, clear, clear-cut." (Tr. p. 68). Throughout the trial, McQueen insisted that his presence at the "time and place of the crime" was a key element to the crime, and that he was the victim of a mistaken identity. (Tr. p. 264). The prosecutor responded to this by presenting the eye-witness testimony of Officer Stewart, who established that McQueen was present at the crime scene and that he fled from the Officer. The prosecutor then responded to the mistaken identity defense in her closing argument with a statement on what accomplice liability is and what it means. Therefore, the act of informing the jury about accomplice liability during her closing argument was not prosecutorial misconduct.

McQueen also contends that the prosecutor's remarks constituted fundamental error because they "made it impossible for [him] to receive a fair trial because [his] presence at the scene of the crime was the only evidence of his guilt." (Appellant's Br. p. 9). However, the evidence that the State presented was enough that a reasonable jury could believe that McQueen took affirmative actions other than his mere presence. The State presented evidence that McQueen's truck was used, at minimum, to transport the individuals to the scene of the crime, that his truck was, at minimum, used to transport the tools used to commit the crime to the scene of the crime, that McQueen fled twice despite Officer Stewart's orders, and that McQueen's driver's license was found in his truck at the crime scene. Here, the jury reasonably concluded that the evidence of McQueen's presence along with the evidence of his extra involvement in the crime proved McQueen was guilty beyond a reasonable doubt.

Because the jury had sufficient evidence to reasonably conclude that McQueen was not simply present at the crime scene, the prosecutor's summary of accomplice liability law in her closing argument did not make it impossible for McQueen to receive a fair trial. Therefore, the prosecutor's statement was not fundamental error.

CONCLUSION

Based on the foregoing, we conclude that the prosecutor's statement did not constitute prosecutorial misconduct or fundamental error.

Affirmed.

NAJAM, J. and MAY, J. concur