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IN THE
COURT OF APPEALS OF INDIANA

MYRON LARRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0612-CR-1085
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William Menges, Judge
Cause No. 34D01-0603-FD-198

November 8, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Myron Larry appeals his conviction, after a jury trial, of one count of possession of cocaine, a class D felony.

We affirm.

ISSUE

Whether Larry's conviction must be reversed because the prosecutor improperly commented on the fact that Larry did not testify at trial, constituting fundamental error.

FACTS

During the afternoon of March 3, 2006, Larry entered the lobby of the Comfort Inn in Kokomo accompanied by a young woman. Larry approached the counter and inquired of the manager about the price of a room. Larry pulled out money from his pocket, put it on the counter, and filled out a registration card. The manager gave Larry the key for a room, and Larry and the young woman walked toward the room; they were then joined by another couple.

While Larry was at the front desk, a housekeeper was seated in the lobby awaiting a ride. She saw that when Larry "got in his pocket . . . to get the money for the room, . . . he dropped a Baggie of white stuff," which "fell out of his right pocket." (Tr. 71). The housekeeper did not mention this to Larry "because [she] knew what it was . . . that it was drugs." (Tr. 80). After Larry had left the counter, the housekeeper brought the Baggie on the floor to the manager's attention. The manager retrieved it and called the police.

Officer Hunt of the Kokomo Police Department arrived and collected the Baggie and its contents. The manager also gave him the registration card in Larry's name, along

with a description and the license number of the vehicle he was driving. When Larry drove his vehicle away from the inn, Officer Hunt followed. Observing Larry fail to yield at a stop sign and fail to signal a turn, the officer initiated a traffic stop.

On March 6, 2006, the State charged Larry with possession of cocaine, a class D felony. At his initial hearing on March 30, 2006, counsel was appointed for Larry at his request. On July 20, 2006, Larry asked to represent himself. The trial court confirmed that Larry understood the standards and rules to which he would be held and that Larry had substantial post-secondary education. The trial court then granted Larry's request to proceed pro se; however, it appointed stand-by counsel to be available to answer questions by Larry during trial.

A jury trial took place August 4 and 7, 2006. The manager and housekeeper testified. Both identified Larry as the man who registered at the motel with the young woman on that afternoon. Both also testified that immediately before Larry's entrance, the lobby floor had been mopped by the maintenance man, and the housekeeper testified that there "wasn't anything on the floor . . . before [Larry] came in." (Tr. 73). The housekeeper testified that she was "behind [Larry]" when she saw "a Baggie with white stuff fall" from Larry's "right pocket" to "the floor by [his] feet." (Tr. 82, 80, 91). The young woman who accompanied Larry when he registered testified that after they arrived in the room, Larry "left the room," saying "he had dropped something." (Tr. 116). Testimony also confirmed that the Baggie contained cocaine.

During trial, Larry was advised not to "be arguing with the witnesses" or "testifying," but to only "ask questions." (Tr. 63). The State rested its case, and the defense rested. The jury found Larry guilty as charged.[1]

DECISION

Larry argues that his conviction must be reversed because fundamental error occurred when the prosecutor "commented during the final arguments on Larry's failure to testify himself at trial." Larry's Br. at 5. Larry concedes that he "did not object" to what he now characterizes as the prosecutor's "reference" to the fact that he did not testify at trial. *Id.* at 12. Thus, because he "did not properly preserve this issue for reserve," he asserts that it is fundamental error. *Id.*

In support of his argument, Larry cites *Davis v. State*, 685 N.E.2d 1095 (Ind. Ct. App. 1997), and *Carter v. State*, 686 N.E.2d 1254 (Ind. Ct. App. 1997). In both *Davis* and *Carter*, the statements at issue were made by the prosecutor during the prosecutor's closing arguments.

Here, it was Larry who was making his own pro se closing argument when objections were made by the State. Initially, Larry argued for several pages of transcript as to what the evidence showed and what witnesses said. He then stated, "I had a problem with that because I actually did lose some money on that given day." (Tr. 190).

[1] We note that Larry provided the verbatim statement of the trial court's sentencing order "pursuant to Appellate Rule 8.3(A)(4)." Larry's Br. at 6. The cited appellate rule was replaced effective February 4, 2000. Further, as did the former rule, the current rule requires that the brief include the sentencing statement only when the appellant's "sentence is at issue." Ind. App. R. 46(A)(10). Larry does not appeal his sentence.

The State objected "to what he says. He didn't testify in this case." *Id.* The trial court sustained the objection and admonished the jury to disregard Larry's "last remark." *Id.*

Larry then stated, "I'm the defendant is charged [sic] with Possession of Cocaine, which is a Class D felony, which is punishable by up to three years in the –," at which point the State objected "to any argument about what penalties are." *Id.* The trial court sustained the objection and admonished the jury to disregard Larry's last statement "regarding possible punishments." (Tr. 191).

Larry then argued that while the State was required to prove his knowing intentional possession, he "thought [he] was being stopped because of an infraction until the dogs and stuff arrived." *Id.* The State objected, noting the lack of testimony to "more than one dog." *Id.* The trial court sustained the objection and again admonished the jury to disregard Larry's last remark.

Next, Larry argued that there was reasonable doubt, noting the manager's testimony that he was "five-nine, when in fact [he was] five-five." (Tr. 192). The State objected, arguing that Larry "didn't testify what his height was, it never came out in this trial." *Id.* The trial court stated that there was "no evidence as to what [Larry's] actual height" was, sustained the objection, and admonished the jury. *Id.*

In his next argument, Larry stated that he "c[a]me from a large family and when we were home we --." (Tr. 193). The State objected that there had been no "testimony about his family. It's one thing to argue the facts of the case, it's something else to testify and he did not testify." *Id.* The trial court sustained the objection and admonished the jury to disregard Larry's last statement. It further admonished Larry "to not testify," to

only "comment on what witnesses said" but "not to interject your own experiences and beliefs in this case." *Id.*

Thereafter, Larry proceeded to make closing arguments for another five pages of transcript. When he then stated that he "had no intentions of doing anything wrong, none whatsoever. I had no involvement with any drugs --," (Tr. 198), the State simply stated that it objected. The trial court sustained the objection, admonished the jury, and instructed that "statements from Mr. Larry are not evidence and are not to be considered by you as evidence." (Tr. 199). Larry then continued his closing argument for another 2½ pages of transcript.

As already noted, the references made by the State to the fact that Larry did not testify were made in the course of its objections to arguments made by Larry in his pro se closing argument. A defendant who proceeds pro se accepts the burdens and hazards incident to his position. *Piper v. State*, 770 N.E.2d 880, 883 (Ind. Ct. App. 2002). The defendant who represents himself is held to the rules of trial procedure, is treated like an attorney, and is responsible for making objections and following procedural and evidentiary rules. *Id.* "A closing argument at the end of trial must be based upon the facts that were admitted into evidence in the course of the trial." 16B William Andrew Kerr, CRIMINAL PROCEDURE, INDIANA PRACTICE, § 22.8e(1) (1998). Thus, the State was making proper objections to arguments being made by Larry in his closing that were impermissibly based upon facts not admitted into evidence at trial.

Further, in the State's own closing arguments, it made no reference whatsoever to the fact that Larry did not testify. Moreover, if Larry had so requested, the trial court was

required to give an instruction concerning his right not to testify – advising "the jury that it should not consider the defendant's failure to testify." *Parker v. State*, 425 N.E.2d 628, 630 (Ind. 1981) (citing *Carter v. Kentucky*, 450 U.S. 288, 303-305 (1981)).

Where a claim of prosecutorial misconduct has not been properly preserved, the defendant must establish not only that the prosecutor engaged in misconduct and that the misconduct placed the defendant in a position of grave peril to which he should not have been subjected, but also "the additional grounds for fundamental error." *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). Fundamental error is "an extremely narrow exception," "error that makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process, presenting an undeniable and substantial potential for harm." *Id.* (citing *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002)). Given the extensive arguments by Larry that were made without objections in Larry's pro se closing argument, and the lack of any specific comments by the prosecutor in either of the prosecutor's own closing arguments on the fact that Larry did not testify, we do not find that the prosecutor's brief references to the fact that Larry did not testify – made in the context of proper objections to improper argument by Larry – so violated the principles of due process as to have made his fair trial impossible.

Affirmed.

MAY, J., and CRONE, J., concur.