

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Narkeen Altamirano,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 21, 2021

Court of Appeals Case No.
20A-CR-1606

Appeal from the Marion Superior
Court

The Honorable Sheila A. Carlisle,
Judge

Trial Court Cause No.
49G03-1808-MR-27802

Brown, Judge.

[1] Narkeen Altamirano appeals his convictions and sentence for murder and carrying a handgun without a license. He raises two issues which we restate as:

- I. Whether prosecutorial misconduct occurred which resulted in fundamental error; and
- II. Whether his sentence is inappropriate.

We affirm.

Facts and Procedural History

[2] On August 18, 2018, Vianka Velasquez had a birthday party at her house in Indianapolis at which Vianka, her boyfriend Pedro Membreno, Pedro's sister Olga, Jonny Orozco, Bergman Velasquez, Juan Zeledon, Elyin Tinoco, Oscar Rivas, and Altamirano were present. According to Olga, Altamirano was "very insistent" that people drink and was "[v]ery aggressive." Transcript Volume II at 126. At one point, Pedro told Jonny that Altamirano "continues to be disrespectful to all the people," Altamirano "charged at Pedro," the two fell to the ground, and Jonny and Elyin separated them. *Id.* at 151. Altamirano went inside the house and then to the garage. About five or ten minutes later, Altamirano returned to the yard, walked quickly to approximately three or four feet from Pedro, raised a gun, and shot Pedro in the chest. Pedro screamed and fell to the ground. Altamirano stood over Pedro, shot him several more times, and ran away. Pedro said "Olga, help me." *Id.* at 121. Pedro suffered numerous gunshot injuries, including to his forearm, armpit area, cheek, and

back, and died on the way to the hospital. Altamirano was later apprehended in Mexico and transported to Indiana.

[3] The State charged Altamirano with murder and carrying a handgun without a license as a class A misdemeanor. It also alleged a firearm was used in the commission of the offense. At trial, the State presented the testimony of, among others, Olga, Jonny, Vianka, Zeledon, Bergman, Elyin, and Dr. Christopher Poulos, a forensic pathologist. Zeledon testified that he observed Altamirano enter the yard, walk “a bit fast towards” Pedro, “raise his gun against him,” and fire the gun. *Id.* at 226-227. He testified Altamirano fired more than two or three shots and then ran. Elyin testified that he heard detonations, ran to the yard, and saw sparks coming from Altamirano’s hand. He testified that he observed Altamirano shoot Pedro twice in the chest, that Pedro screamed and fell to the ground, and Altamirano continued to shoot several more times. Olga testified that she heard two or three sounds which she thought were fireworks, went to the patio door, saw Altamirano standing up and pointing downwards, observed “a lot of sparks coming out of his hand,” heard “[a] lot” of noises, and saw Altamirano run away. *Id.* at 119-120. Dr. Poulos testified regarding the gunshot injuries sustained by Pedro, the trajectories of the shots, and the evidence of the range from which he was shot.

[4] The defense presented the testimony of Rivas. Rivas testified there was an altercation between Altamirano and Pedro, they were separated, Altamirano left the yard, and he supposed Altamirano went to his car. He testified he saw Altamirano return to the yard carrying a weapon and that “[f]irst, he fired at

Pedro like this on the ground” and “[f]irst, it was in the direction of the ground.” Transcript Volume III at 118. He testified that, at that point, Pedro jumped on Altamirano to try to take the gun away from him, they struggled a lot, he heard multiple shots while they were struggling, Pedro fell to the ground, and Altamirano ran away. Rivas further indicated that he had known Altamirano for a long time, knew his family, and had visited him in Kentucky. He also indicated that he had spoken to Altamirano several times since the case was pending including two days prior to the trial.

[5] During closing argument, the prosecutor argued the evidence supported the elements of murder and all of the witnesses testified that Altamirano shot Pedro. He summarized portions of the testimony of some of the witnesses including Olga, Zeledon, Elyin, Rivas, Vianka, and Dr. Poulos. He argued “we all know what the central question is of this trial, and that’s how did [Altamirano] kill Pedro Membreno. Was it after a struggle, the way Oscar Rivas described it, or was it as all the State’s evidence showed it to be?” *Id.* at 165. He argued Zeledon and Elyin observed Altamirano enter the yard, walk up to Pedro, and shoot him. He argued that Altamirano was the aggressor and that two eyewitnesses saw Altamirano walk up to Pedro, shoot him multiple times, and then shoot him again once he was on the ground. Without objection, the prosecutor argued:

So the eyewitnesses are consistent with each other. And as I’ve just shown you, they’re consistent with the physical evidence that was recovered from the crime scene, from the vehicle and from the backyard.

Let's talk about Oscar Rivas. His version certainly is inconsistent. So what do we do with Oscar Rivas? We don't believe Oscar Rivas.

Here is why you should not believe Oscar Rivas' testimony; right? First, he's biased towards the defendant. How is he biased? Let's run through the list.

He knew the defendant from a young age. Remember he said they'd been friends for forever. He said he used to be friends with the defendant. He went to visit the defendant in another state before this whole incident happened. He said that he was in contact or has been in contact with the defendant's family. And he has spoken to the defendant repeatedly since the start of this case. This is an old friend. This is a friend that would do anything for each other. That's the kind of friends that they were and that they are.

But more importantly than that, if he's already biased towards [Altamirano], there's no evidence whatsoever to corroborate Oscar's testimony. He said some things that are true. He puts [Altamirano] at the scene. He says [Altamirano] has the gun. He says [Altamirano] goes into the house and gets the gun. But the other parts of his story, where is the evidence that backs up that? . . .

Now, Oscar's testimony also is not backed up by the testimony of Dr. Chris Poulos. Dr. Poulos testified there were 12 different wounds on Pedro's body, and 6 of those wounds were on the back of Pedro. . . . And if there is a struggle, the way Oscar described, and there is a struggle over the gun and that's when Pedro gets shot, how does he get not one, not two, not three, four or five, but six separate shots in his back? . . .

We found out that he's had 20 different phone calls . . . from the defendant in the last two months. . . .

The Court: That's 25 minutes.

[Prosecutor]: Four calls this month alone. And the last call was completed on Sunday, the day before the trial.

Why are there so many phone calls recently, Ladies and Gentlemen? Because the defendant knows that Oscar is his only chance, and so they're cooking up testimony.

Further, Oscar made no attempt to contact the police. He didn't stay on scene. . . .

So, Ladies and Gentlemen, in light of the evidence, we know what happened. . . . [Altamirano] got into a verbal altercation with Pedro. That altercation turned physical. They were separated.

And for five to ten minutes, [Altamirano] sat and simmered. He simmered, and he got angrier and he got angrier. He felt disrespected. And what do you do when you're an angry, aggressive person like [Altamirano] and you feel like you're disrespected? You go into the house. You go into the garage. You go to your car, where you know that you have a gun.

You get that gun. You open up the garage door. You come around the side of the house where no one can see you, certainly fewer people than if you walked back through the house. You walk straight up to the person who offended you, and you shoot him not once, not twice, multiple times in two separate sets. . . .

We know that he killed Pedro Membreno. And we know that he did it at least knowingly, if not intentionally. . . .

Id. at 171-176. Following defense counsel's argument, the prosecutor argued in part:

How do you tell when somebody is telling the truth? You look at what everybody says together. You take everything and look at it together. And then you compare it to the physical evidence.

And that physical evidence corroborates everything these six people who walked in here and told you what happened.

Guess what. Elyin goes and chases [Altamirano]. By the time he comes back, the police are there. What do the police do? Separate everybody.

Who gives statements to police that night? Vianka, Bergman, Elyin, [Zeledon], all of them. When did [Zeledon] and Elyin have time to figure out their stories, to make sure their stories matched up? They didn't. Because what they told police that night and what they came in here and told you today is the truth, the truth about what happened.

Id. at 190-191.

- [6] The jury found Altamirano guilty of murder and carrying a handgun without a license as a class A misdemeanor. The court found the State had shown beyond a reasonable doubt that Altamirano knowingly or intentionally used a firearm when he committed the murder. The court sentenced Altamirano to concurrent terms of fifty-five years for murder, enhanced by ten years for using a firearm to commit the offense, and one year for carrying a handgun without a license as a class A misdemeanor.

Discussion

I.

- [7] The first issue is whether prosecutorial misconduct occurred which resulted in fundamental error. Altamirano requests a new trial and argues that “the prosecution claimed that [he] and defense witness [] Rivas were ‘cooking up

testimony’ when they spoke on the phone prior to trial,” the State “then compounded the misconducted [sic] by claiming” that all of the State’s witnesses told the truth, and that “[t]his misconduct placed [him] in a position of grave peril” and denied him a fair trial. Appellant’s Brief at 12 (citing Transcript Volume III at 175). He argues the fact that he and Rivas were speaking prior to trial, even frequently, was not evidence they were fabricating Rivas’s testimony, Rivas was the only defense witness and his credibility was critical to his defense, and the prosecution vouched for the State’s witnesses by telling the jury they were telling the truth about what happened.

[8] The State responds that Altamirano waived his claim because he did not request an admonishment or mistrial and that the prosecutor’s remarks were proper and did not place Altamirano in grave peril. It asserts the prosecutor was simply arguing the State’s theory of the case based on the evidence and did not vouch for the witnesses but explained the reasons the jury should believe one version of the events over the other.

[9] In reviewing a properly preserved claim of prosecutorial misconduct, we determine whether the prosecutor engaged in misconduct and, if so, 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.*

[10] When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. *Id.* If the party is not satisfied with the admonishment, then the party should move for mistrial. *Id.* Failure to request an admonishment or to move for mistrial results in waiver. *Id.* Where a claim of prosecutorial misconduct has not been properly preserved, 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 constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm. *Id.*

[11] A prosecutor may comment on the credibility of the witnesses as long as the assertions are based on reasons which arise from the evidence. *Id.* at 836. We presume the jury followed the trial court's instructions and applied the law to the evidence. *See Fox v. State*, 997 N.E.2d 384, 390 (Ind. Ct. App. 2013), *trans. denied*.

[12] The record reveals that Altamirano did not object or request an admonishment or a mistrial and thus must establish fundamental error. At approximately twenty-five minutes through the State's closing argument, the prosecution addressed Rivas's testimony, asked why there were "so many phone calls

recently” between Altamirano and Rivas, and argued Altamirano “knows that [Rivas] is his only chance, and so they’re cooking up testimony.” Transcript Volume III at 175. Later, following defense counsel’s argument, the prosecution stated in rebuttal that the State’s witnesses “told you today . . . the truth about what happened.” *Id.* at 191. The prosecution’s argument focused on the elements of murder, the testimony of the witnesses, the extent to which the testimony was consistent or inconsistent, and the physical evidence. The challenged statements were part of the State’s argument that the jury should find the testimony of its witnesses to be credible and reliable and should not find Rivas’s testimony to be persuasive in light of the evidence.

- [13] Further, the jury was instructed that statements made by the attorneys were not evidence; it is the duty of the jury to evaluate the testimony and the jury may consider the witness’s ability and opportunity to observe, the behavior of the witness while testifying, any interest, bias or prejudice the witness may have, any relationship with people involved in the case, and the reasonableness of the testimony considering the other evidence. Further instructions were that if the jury finds conflicting testimony, it may decide which testimony it believes and which testimony it does not believe; the quantity of evidence or the number of witnesses need not control the jury’s determination and it should give the greatest value to the evidence it finds most convincing; the jury’s verdict should be based only on the evidence admitted and the instructions on the law; final arguments are not evidence; the attorneys are permitted to characterize the evidence, discuss the law and attempt to persuade the jury to a particular

verdict; and the jury may accept or reject those arguments as it sees fit. Under the circumstances and in light of the record, we cannot say Altamirano has demonstrated that prosecutorial misconduct occurred or that any prosecutorial misconduct resulted in fundamental error.

II.

[14] The next issue is whether Altamirano’s sentence is inappropriate in light of the nature of the offenses and his character. Ind. Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[15] Altamirano argues there was nothing about the circumstances surrounding the crime that made it more or less egregious than any other murder. He argues he had a horrific life as a child including being abused by his mother, has an alcohol addiction, had no prior convictions, and was remorseful.

[16] Ind. Code § 35-50-2-3 provides that a person who commits murder shall be imprisoned for a fixed term of between forty-five and sixty-five years with the advisory sentence being fifty-five years. Ind. Code § 35-50-3-2 provides that a person who commits a class A misdemeanor may be imprisoned for a term of not more than one year. Ind. Code § 35-50-2-11 provides that, if the court finds the State has proved beyond a reasonable doubt that the person knowingly or

intentionally used a firearm in the commission of the offense, the court may sentence the person to an additional fixed term of imprisonment of between five and twenty years. Altamirano received the advisory sentence for murder, enhanced by ten years for using a firearm to commit the offense, and a concurrent sentence of one year for carrying a handgun without a license.

[17] Our review of the nature of the offenses reveals that Altamirano had an altercation with Pedro, left the yard, returned to the yard approximately five to ten minutes later with his gun, walked quickly to about three or four feet from Pedro, raised his gun, shot him in the chest, and, after Pedro fell to the ground, stood over and shot him several more times. Altamirano ran away, and Pedro died on the way to the hospital. Altamirano was later apprehended in Mexico.

[18] Our review of Altamirano's character reveals a sentencing memorandum was filed indicating he had expressed remorse and "has verbalized regret at his reaction and the fact that 'he had a life ahead of him. I think of his parents, his family, and how much they are suffering.'" Appellant's Appendix Volume II at 233. The presentence investigation report ("PSI") states that Altamirano, who was born in Nicaragua in 1988, had no prior adult convictions, and had an active warrant under a cause for operating a vehicle while intoxicated in Texas in 2017. The PSI states Altamirano's mother hit him frequently with a cord out of anger, the abuse continued until he was thirteen years old and he moved out of the home and lived on the streets, and he later moved to El Salvador and Guatemala. Altamirano reported that he met the victim in Nicaragua when he was eighteen. Altamirano was stabbed in a fight when he was twenty. The PSI

states Altamirano first consumed alcohol at age ten, he was drinking rum to intoxication by age thirteen, his heavy use continued until he was twenty-seven when he slowed to two bottles of rum every other week, he admitted to blackouts and hangovers, and he has made prior attempts to stop his use with his longest sobriety lasting about four months. He first used methamphetamine when he was twenty-five and smoked about two grams daily until he was twenty-seven. He reported that he feels he has an alcohol problem, admitted using marijuana on the day of the offense, and has never been involved in substance abuse counseling. The PSI indicates his overall risk assessment score using the Indiana Risk Assessment System places him in the high risk to reoffend category.

[19] After due consideration, we conclude that Altamirano has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of the offenses and his character.

[20] For the foregoing reasons, we affirm Altamirano's convictions and sentence.

[21] Affirmed.

Bradford, C.J., and Vaidik, J., concur.