

STATEMENT OF THE CASE

Robert Webber appeals his conviction for conspiracy to commit burglary, as a Class B felony, following a jury trial. He presents a single issue for our review, namely, whether the prosecutor made remarks during closing argument that constitute fundamental error.

We affirm.

FACTS AND PROCEDURAL HISTORY

In November 2009, Webber was employed by a company hired by Jeff Sanford and Andrea Halpin to clean their house (“the house”) following a fire. After the work was completed, Webber stole a key to the house. Webber told his friends David Garcia and Joseph Fuentes that he had a key to the house and that there were valuables located inside. Webber showed the house to Garcia and Fuentes, who subsequently enlisted their friends Aaron and Luther Briones to try to enter the house. But the Brioneses were unable to get into the house using the key.¹

Thereafter, Garcia and Fuentes told Billie Jo Schultz and Amber Blakely that Webber had given them a key to the house, that there were valuables inside, and that Webber had promised to share in the proceeds if someone ended up burglarizing the house. Garcia drove Fuentes, Schultz, and Blakely to the house, and Garcia and Fuentes stayed in the car while Schultz and Blakely broke into the house.² Once inside, the women searched for a file cabinet that Webber had described as containing money or

¹ Sanford or Halpin had changed the locks.

² Schultz and Blakely were unable to enter the house using the key, so Schultz broke a window to gain entry.

jewelry, but they could not find it. Then the women took televisions, computers, jewelry, and other items, loaded them into the car with Garcia and Fuentes waiting outside, and drove to a friend's house. Garcia subsequently met with Webber and told him about the burglary.

The State charged Webber with conspiracy to commit burglary, as a Class B felony. At trial, all four co-conspirators testified that Webber had provided the key to the house, along with information regarding valuables located inside. Webber did not testify, but defense counsel argued that Garcia, Fuentes, Schultz, and Blakely had not been directed to the house by Webber. The defense theory was that Luis Briones had been represented by Sanford, a criminal defense attorney, and that it was Briones who had planned the burglary. At the close of trial, the jury found Webber guilty as charged. The trial court entered judgment and sentence accordingly. This appeal ensued.

DISCUSSION AND DECISION

Webber contends that the prosecutor made improper comments during his closing argument and that those comments constitute fundamental error. Webber maintains that the comments improperly referenced his Fifth Amendment right to remain silent. In addition, Webber asserts that the comments impermissibly suggested that he had the burden to prove his innocence. We address each contention in turn.

The prosecutor stated the following during his closing argument at trial:

Defense wants you to think, well, it's probably this Briones guy [Sanford's client]. He's the link somehow. They didn't put up a bit of evidence on that. They just threw it out there.

* * *

No, it's not on [the defense] to produce any evidence or to provide an explanation. However, when they start dabbling with the evidence or have an opportunity to put on evidence, which is also their right, or start to provide some explanations or arguments, you get to decide whether any of that is credible and makes sense, or whether it's a, "hey-look-over-here" type of smoke screen, a wave and a flag. And still, for all of that, for all of taking pot shots at the details that, of course, aren't going to match from a couple of crack heads and professional crooks a year later, they take a couple of pot shots at that, but they still have not offered either an explanation, an argument, or pointed to any evidence that was produced during trial, because there wasn't any, to explain why and how this house got targeted or why and how Robert Webber is the one getting pointed at by four different people. For all of the blustering, for all of the pot shots at the details, there still hasn't been an answer or even an offer to answer those basic questions. If not Robert Webber, then how did this happen?

Transcript at 437, 463 (emphases added). On appeal, Webber characterizes those remarks as "an invitation for the jury to draw an adverse inference from the defendant's silence[.]" Brief of Appellant at 9.

The Fifth Amendment prohibits the prosecutor from commenting at trial on the defendant's decision not to testify. Owens v. State, 937 N.E.2d 880, 893 (Ind. Ct. App. 2010), trans. denied. "Such a comment violates a defendant's privilege against compulsory self-incrimination if the statement 'is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence.'" Ziebell v. State, 788 N.E.2d 902, 913 (Ind. Ct. App. 2003) (quoting Boatright v. State, 759 N.E.2d 1038, 1043 (Ind. 2001)). However, our supreme court has explained that if the prosecutor's comment in its totality is addressed to other evidence rather than the defendant's failure to testify, it is not grounds for reversal. Boatright, 759 N.E.2d at 1043; see also Hopkins v. State, 582 N.E.2d 345, 348 (Ind. 1991). The prosecutor may in fact comment on the uncontradicted nature of the State's evidence without running afoul

of the Fifth Amendment. Martinez v. State, 549 N.E.2d 1026, 1028 (Ind. 1990). The defendant bears the burden of showing that a comment improperly penalized the exercise of the right to remain silent. Moore v. State, 669 N.E.2d 733, 739 (Ind. 1996).

Because Webber did not object to the prosecutor's remarks at trial, request an admonishment, or move for a mistrial, he alleges fundamental error on appeal. The failure to raise a claim of error generally waives that issue for appeal. Caruthers v. State, 926 N.E.2d 1016, 1020 (Ind. 2010). We nevertheless sometimes entertain such claims under fundamental error, meaning an error that makes a fair trial impossible or that constitutes a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm. Id.

In Hopkins, 582 N.E.2d at 345, our supreme court considered a defendant's challenge to statements made by the prosecutor in closing arguments. In particular, in Hopkins, the prosecutor remarked on "the array of witnesses for the State who had related [the defendant's] admissions to perpetrating the crime" and he stated, "it is certainly worthy of comment that you never heard any testimony during this trial that the defendant was anywhere else [other than the victim's house at the time of the murder]." Id. at 347. Thereafter, the prosecutor "repeatedly referred" to the State's evidence as "the only evidence in this case." Id. at 347-48. On appeal, the defendant argued that "because the jury reasonably could have interpreted the prosecutor's comments as going to his failure to testify," the trial court erred when it denied the defendant's request for an admonishment and motion for mistrial. Id. at 348.

Our supreme court disagreed with the defendant and held, “the prosecutor’s remarks . . . were focused not on the absence of testimony from the defendant, but rather on the evidence from five different witnesses to whom appellant made admissions concerning the crime.” Id. And the court reiterated that arguments which focus on the uncontradicted nature of the State’s case do not violate the defendant’s right not to testify. Id. Accordingly, the court held that the challenged remarks did not impinge on the defendant’s right to remain silent. Id.

In contrast, in Owens, 937 N.E.2d at 894, the prosecutor stated during closing argument, “Ultimately, you can rely on [C.R.]’s testimony. And in all honesty, in large part, if not exclusively, that’s what you have to rely on. Because the reality is, other than Mr. Owens [the defendant], [C.R.] is the only one who knows what happened to her that night.” This court held that because the prosecutor “explicitly referred to Owens by name and directly compared his knowledge to C.R.’s[.]” the jury reasonably could have interpreted the comment as an invitation to draw an adverse inference from Owens’s failure to testify. Id. Put another way, our supreme court recognizes a difference between a direct comment on a defendant’s failure to testify and the right of the prosecuting attorney to summarize the evidence pointing out that certain evidence was uncontradicted. See Brooks v. State, 598 N.E.2d 519, 520 (Ind. 1992).

Here, we hold that the challenged statements in the prosecutor’s closing argument are akin to those in Hopkins and did not impinge on Webber’s right to remain silent. The prosecutor did not name Webber with respect to a failure to testify. The prosecutor only named Webber as the person whom the four witnesses identified as responsible for

targeting Sanford and Halpin's house for the burglary. The rest of the comments focused on the uncontradicted nature of the State's evidence and do not constitute error, and certainly not fundamental error.

Still, Webber maintains that the prosecutor's comments impermissibly suggested that Webber had the burden to prove his innocence. In support of that contention, Webber cites Flowers v. State, 738 N.E.2d 1051 (Ind. 2000). But in Flowers, our supreme court, citing its holding in Pettiford v. State, 506 N.E.2d 1088, 1089-90 (Ind. 1987), held that

the impropriety of a prosecutor's comments during closing argument inferring that the burden of proof shifted from the State to the defendant was "de minimus" and cured by the court's preliminary and final instructions which advised the jury that the defendant was not required to present any evidence or prove his innocence.

Id. at 1059. Likewise, here, to the extent that the prosecutor's remarks might be construed as having shifted the burden of proof, the impropriety was de minimus. And, as Webber acknowledges, the trial court properly instructed the jury "that he was presumed to be innocent, not required to prove his innocence, and [that] the State was required to prove him guilty of each essential element of the crime charged beyond a reasonable doubt." Brief of Appellant at 9. Again, Webber has not demonstrated fundamental error.

Affirmed.

ROBB, C.J., and CRONE, J., concur.