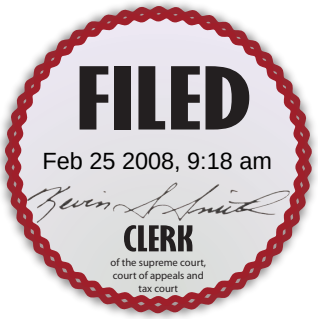

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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER SWARTZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0707-CR-393
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jeffrey Marchal, Master Commissioner
Cause No. 49G06-0606-MR-116078

February 25, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Christopher Swartz appeals his conviction and sixty-year sentence for Murder,[1] a felony. Specifically, Swartz argues that (1) the trial court erred by admitting into evidence photographs of Swartz's upper torso displaying his tattoos and a contested portion of a 911 audiotape; (2) the prosecutor committed misconduct by introducing testimony that Swartz had used a racial slur earlier on the day of the murder and commenting on the remark during closing arguments; (3) the State presented insufficient evidence to sustain Swartz's conviction; and (4) Swartz's sentence is inappropriate in light of the nature of his offense and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

Seventeen-year-old José Hernandez was walking toward his aunt's house on the southeast side of Indianapolis at approximately 1:30 a.m. on June 24, 2006. Ken Julian and Tanya Bright were sitting on their front porch talking to Joe Culvahouse when they observed three white men approach a neighboring convenience store. One of the men, Matt Miller, entered the store and purchased beer. Swartz and Wilburn Barnard remained outside. Miller returned with the beer and the three men began walking on the sidewalk.

Thirty seconds later, Hernandez began crossing the street when Swartz, Barnard, and Miller began heckling him and shouting racial epithets. Hernandez shrugged his shoulders. At that point, Swartz walked away from Miller and Barnard and began taunting Hernandez. Eventually, Hernandez removed his shirt and approached Swartz.

[1] Ind. Code § 35-42-1-1.

Swartz swung his right fist at Hernandez and Hernandez ducked. Swartz told Hernandez that he was going to "f*** [him] up." Tr. p. 55, 60. Swartz and Hernandez began sparring, although neither landed punches. Miller and Barnard egged Swartz on by telling him to "f*** him up." Id. at 115. Swartz eventually lifted his shirt and asked Hernandez, "What you got?" Id. at 122. Hernandez looked down, saw a knife, and jumped back. At that point, Swartz lunged forward and stabbed Hernandez in the chest with the knife. Hernandez staggered away and Swartz turned and ran. Hernandez stumbled to his aunt's front porch, where he collapsed. He later died at Wishard Hospital from a stab wound that punctured his lung and heart.

The State charged Swartz with murder on June 27, 2006. Before trial, Swartz filed two motions in limine seeking to exclude (1) a portion of a 911 audiotape in which the caller referred to Swartz as a "wannabe white boy" and (2) photographs of Swartz's upper torso depicting his tattoos "South," "Side," and "Crazy White Boy." Appellant's App. p. 111, 114. The trial court denied both motions after a hearing.

A three-day jury trial began on May 7, 2007. Swartz renewed his pretrial objections when the photographs and the objectionable portion of the 911 audiotape were admitted into evidence at trial. The jury ultimately found Swartz guilty as charged. The trial court held a sentencing hearing on June 14, 2007, and sentenced Swartz to sixty years imprisonment.[2] Swartz now appeals.

[2] Commissioner Marchal conducted the jury trial and sentencing hearing and ultimately imposed the sixty-year sentence. We note that "commissioners . . . have the power in a criminal trial to enter a final

DISCUSSION AND DECISION

I. Admitted Evidence

Swartz argues that the trial court abused its discretion when it admitted (1) a portion of a 911 audiotape in which a witness referred to him as a "wannabe white boy" and (2) photographs of his upper torso that contained images of his tattoos "Crazy White Boy," "South," and "Side." State's Ex. 32, 33, 37. Specifically, Swartz argues that the prejudicial effect of this evidence greatly outweighs its probative value because the evidence implies that he was involved in gang-related activity.

We review the trial court's decision to admit or exclude evidence for an abuse of discretion. Johnson v. State, 845 N.E.2d 147, 149-50 (Ind. Ct. App. 2006). A trial court abuses its discretion when the ruling is clearly against the logic and effect of the facts and circumstances before the court. Farris v. State, 818 N.E.2d 63, 67 (Ind. Ct. App. 2004). We do not reweigh the evidence and we consider conflicting evidence in a light most favorable to the trial court's ruling. Marlowe v. State, 786 N.E.2d 751, 753 (Ind. Ct. App. 2003).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Ind. Evidence Rule 401. "Generally speaking, relevant evidence is admissible, and irrelevant evidence is inadmissible." Southern v. State, 878 N.E.2d 315, 321 (Ind. Ct. App. 2007). Relevant evidence may nevertheless be excluded

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order, conduct a sentencing hearing, or impose a sentence." Capehart v. Capehart, 771 N.E.2d 657, 662 (Ind. Ct. App. 2002).

if its probative value is substantially outweighed by the danger of unfair prejudice. Ind. Evidence Rule 403.

Turning first to the portion of the 911 audiotape in which the caller refers to Swartz as a "wannabe white boy," Swartz argues that the State should have admitted a redacted version of the audiotape because "the indicated portion of the conversation is suggestive that Mr. Swartz is either gang affiliated or maintains that interest." Appellant's App. p. 114. Because evidence of gang-related activity can have a prejudicial effect, Daniels v. State, 683 N.E.2d 557, 559 (Ind. 1997), Swartz argues that the contested portion of the audiotape is more prejudicial than probative and should not have been admitted.

While Swartz insists that the "wannabe white boy" comment is extremely prejudicial, we fail to see how it implies gang-related activity. Because Swartz is, in fact, white, we agree with the State that the comment "is a benign statement at best [that] does not indicate anything other than [the witness's] ability to identify the race of the Defendant." Tr. p. 64. Furthermore, the trial court concluded that the contested comment was probative evidence because it "help[s] show the identification process, which leads to the subsequent apprehension of [Swartz]." Id. at 65. Because we conclude that any danger of prejudice from the contested portion of the audiotape was, at most, minimal, we reject Swartz's contention that the trial court erred by admitting that portion of the audiotape.

Turning to the photographs of Swartz's torso, Swartz argues that the tattoos reading "Crazy White Boy," "South," and "Side" suggest gang activity and should not

have been admitted at trial. Appellant's Br. p. 11. However, as the State argues, the photographs were not introduced to show Swartz's tattoos. Instead, the photographs of Swartz's torso were admitted to rebut Swartz's self-defense claim and show that he did not have visible injuries on his torso after the altercation with Hernandez.

Furthermore, the tattoos are not the central focus of the photographs and two of the photographs must be viewed in conjunction with each other to discern that the words "South" and "Side" are portions of the same tattoo. Moreover, the trial court admonished the jury that

> the State's sole purpose is to . . . in showing you this evidence is to try and determine whether or not [Swartz] had any wounds on him. So when you look at those photographs you can only consider it for that purpose. I will tell you in advance that there . . . it appears that [Swartz] does have some tattoos. Now I know in this day and age having a tattoo maybe doesn't carry the stigma that it did in years gone by. But some people just don't like tattoos and they don't like people who have tattoos. I don't want that to factor in your decision making at all.

Tr. p. 311. Because we do not believe that the photographs clearly indicate gang-related activity, we do not find the minimal resulting prejudice to render the photographs inadmissible in light of the immense probative value in admitting the evidence to rebut Swartz's self-defense claim by showing that he did not have any visible injuries after the altercation.

Finally, even if the photographs and contested portion of the audiotape were erroneously admitted, any error will be deemed harmless when the verdict is supported by independent evidence of guilt such that there is no substantial likelihood that the evidence in question played a part in the conviction. Boatright v. State, 759 N.E.2d 1038,

1042 (Ind. 2001). At trial, the State presented evidence from three eyewitnesses stating that Swartz was the aggressor in the altercation with Hernandez. Tr. p. 59-60, 121-22, 193. Two of the witnesses testified that they saw Swartz lunge at Hernandez and Hernandez grab his chest after the contact. Id. at 60-62, 122-24. One of the witnesses saw Swartz holding a knife. Id. at 61. In light of this evidence, any error resulting from the allegedly erroneous admission of the contested evidence was harmless.

II. Prosecutorial Misconduct

Swartz argues that there were multiple instances of prosecutorial misconduct that, collectively, constitute fundamental error. Specifically, Swartz argues that the prosecutor committed misconduct by (1) eliciting testimony that he used a racial slur and expressed dislike for black people on the night of Hernandez's murder and (2) improperly referring to that testimony during closing arguments.

When reviewing a claim of prosecutorial misconduct, we must first consider whether the prosecutor engaged in misconduct. Williams v. State, 724 N.E.2d 1070, 1080 (Ind. 2000). We must then consider whether the alleged misconduct placed Swartz in a position of grave peril to which he should not have been subjected. Id. In judging the propriety of the prosecutor's remarks, we consider the statement in the context of the argument as whole. Hollowell v. State, 707 N.E.2d 1014, 1024 (Ind. Ct. App. 1999). It is proper for a prosecutor to argue both law and fact during final argument and propound conclusions based upon his analysis of the evidence. Id. A prosecutor is entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable. Lopez v. State, 527 N.E.2d 1119, 1125 (Ind.

1988).

When an improper argument 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 to move for a mistrial results in waiver. Id. Where a claim of prosecutorial misconduct has not been properly preserved, our standard of review is different from that of a properly preserved claim. More specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Booher v. State, 773 N.E.2d 814, 817 (Ind. 2002). Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. It is error that makes "a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm." Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002).

Swartz did not object to the alleged error he now challenges. Thus, he must establish not only the grounds for misconduct but also the grounds for fundamental error. When the State cross-examined Miller—one of the men who had been with Swartz during the confrontation with Hernandez—he testified as follows:

> Q. [Prosecutor] So you were watching the fight?
> A. [Miller] Yes, sir.
> Q. Now you said that the Hispanic boy [Hernandez] said, "We got beef," to you guys across the street, is that right?
> A. Yes, sir.
> Q. Earlier in the night when you came into contact with Chris Swartz . . .
> A. Yes, sir.

> Q. . . . didn't he tell you , "We got beef?"
> A. Yes, sir. But it wasn't in the same manner. It was more in a joking sense.
> Q. Okay. So Chris Swartz, the Defendant, earlier in the night . . . where were you guys located when Chris Swartz . . . says, "We got beef?"
> A. At Mr. Mullin's house . . . .
> Q. Okay. Now when Mr. Swartz came up to you on East Street, besides saying, "You got beef?" what else did he say to you?
> A. Asked me to go buy him some beer.
> Q. Did he say anything else?
> A. No, not as far as I can recollect.
> Q. Okay. I'm going to turn your attention to page 7 of your statement on June 24, 2006, at 5:20 AM. . . . The middle of the page here. . . . Go ahead and read that to yourself. . . .
> A. I know what it says.
> Q. And what did you tell the police that he said to you?
> A. I said he, uh, he must of said he was looking for n*****.
> Q. Well, what did you say specifically that he said to you?
> A. That he didn't want to fight me.
> Q. Okay. Well, let me just read it for you. "You know, I don't want to fight you[, Miller.] And you're a white boy and I don't like n*****."

Tr. p. 426-29. During closing arguments, the prosecutor directed the jury's attention to the comment:

> What did [Swartz] do next? He goes to Matt Miller's house and what is the very first thing he says to Matt Miller? "Do you want to fight? Oh, wait a minute. No. You are a white boy." . . . I'm going to say exactly what he said. "I don't like n*****." That is what he said. He's got this mentality, he knowingly gets a knife, he knowingly is out looking for minorities. These are all knowing actions, Ladies and Gentlemen.

Id. at 479-80.

Swartz contends that the prosecutor's "blatant, calculated injection of race into the trial so as to prejudice [his] rights" constitutes fundamental error. Appellant's Br. p. 8. While it is misconduct for a prosecutor to request a jury to convict a defendant for any reason other than his guilt, any error in this regard is harmless if there is overwhelming

independent evidence of the defendant's guilt. Coleman v. State, 750 N.E.2d 370, 357 (Ind. 2001). Therefore, even assuming for the sake of the argument that the prosecutor's comments constituted misconduct, they do not amount to fundamental error in light of the substantial independent evidence of Swartz's guilt that we have previously summarized. Thus, Swartz's argument fails.

III. Sufficiency of the Evidence

Swartz argues that the State presented insufficient evidence to support his murder conviction. Specifically, he argues that the evidence was insufficient to show that he had the requisite intent and the State did not disprove his self-defense claim. When reviewing challenges to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Vasquez v. State, 741 N.E.2d 1214, 1216 (Ind. 2001). Rather, we will examine the evidence and the reasonable inferences that may be drawn therefrom that support the verdict and will affirm a conviction if there is probative evidence based on which a jury could find the defendant guilty beyond a reasonable doubt. Id. Put another way, we will affirm unless "no rational fact-finder" could have found the defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000).

A person who knowingly or intentionally kills another human being commits murder. I.C. § 35-42-1-1. Swartz does not challenge the evidence that he stabbed Hernandez or that Hernandez died as a result of the wounds. Appellant's Br. p. 14. Instead, Swartz argues that he did not possess the requisite mens rea to commit murder

and, consequently, he should have been convicted of reckless homicide or voluntary manslaughter.

A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so. Ind. Code § 35-41-2-2(b). Thus, to sustain the murder conviction, the evidence must show that Swartz was aware of a high probability that Hernandez's death would result from his actions. Young v. State, 761 N.E.2d 387, 389 (Ind. 2002). Because knowledge is a mental state, the trier of fact must resort to reasonable inferences of its existence. Id.

"A knowing killing may be inferred from the use of a deadly weapon in a way likely to cause death." Barker v. State, 695 N.E.2d 925 (Ind. 1998). Swartz shouted racial epithets at Hernandez, picked a fight with him, and then stabbed him in the chest with a knife. This evidence was sufficient to sustain the jury's conclusion that Swartz was aware of a high probability that his actions would result in Hernandez's death.

Furthermore, the jury was also instructed regarding self-defense, voluntary intoxication, voluntary manslaughter, and reckless homicide. Swartz does not attack the validity of the jury instructions. In sum, the jury was instructed regarding applicable defenses and lesser-include offenses. However, the jury ultimately concluded that the evidence showed that Swartz had the requisite intent for murder. We find the jury's conclusion to be a reasonable in light of the evidence presented, and we decline Swartz's invitation to reweigh the evidence.

Swartz also argues that "the State has failed to disprove all of the elements of self-defense." Appellant's Br. p. 16. Self-defense is a valid justification for an otherwise

criminal act and is established if a defendant (1) was in a place where the defendant had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. Brown v. State, 738 N.E.2d 271, 273 (Ind. 2000). While the State carries the burden of disproving self-defense, contrary to Swartz's assertion, it must only disprove one of the elements beyond a reasonable doubt to rebut the defendant's claim. Brown v. State, 738 N.E.2d 271, 273 (Ind. 2000). The State may meet its burden of proof by "rebutting the defense directly, by affirmatively showing that the defendant did not act in self defense, or by simply relying upon the sufficiency of its evidence in chief." Id.

While Swartz claims that he acted in self-defense because Hernandez "had all of the physical advantages over him," appellant's br. p. 18, the State adequately refuted Swartz's claim with its evidence. Specifically, the evidence presented at trial established that Swartz shouted racial profanities at Hernandez, taunted him, and threw "the initial swing." Tr. p. 51-53, 55, 59-60. Additionally, Swartz escalated the violence by displaying the knife that he ultimately used to stab Hernandez in the chest. Id. at 122-23. Hernandez was unarmed. Id. at 322; State's Ex. 7, 42. This evidence was sufficient to disprove the second prong of self-defense—that Swartz did not provoke, instigate, or participate willingly in the violence. Therefore, we conclude that the evidence presented was sufficient for the jury to reasonably conclude that Swartz did not act in self-defense.

IV. Appropriateness

Swartz argues that his sixty-year sentence is inappropriate in light of the nature of the offense and his character. Swartz emphasizes that his actions were not premeditated

and that, although murder is always a serious crime, "[t]he offense was an impulsive drunken act." Appellant's Br. p. 22.

A person who commits murder shall be imprisoned for a fixed term between forty-five and sixty-five years, with the advisory sentencing being fifty-five years. Ind. Code § 35-50-2-3. Pursuant to Indiana Appellate Rule 7(B), our court has the constitutional authority to revise a sentence 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." We defer to the trial court during appropriateness review, Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007), and we refrain from merely substituting our judgment for that of the trial court, Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Swartz instigated an altercation by shouting racial epithets at an unsuspecting victim and taunting him to fight. Swartz escalated the violence by brandishing a knife and, ultimately, stabbing his unarmed victim in the chest. While Swartz posits that there was an "extremely low" chance that "one thrust of a knife would penetrate the rib cage and then the heart of the victim in such a fatal manner," appellant's br. p. 21, we do not find this argument persuasive because among the logical consequences of Swartz's decision to stab Hernandez in the chest was the likelihood that his victim would die from the nature and location of the wound. In sum, we do not find Swartz's sentence inappropriate in light of the nature of the offense.

Turning to his character, while Swartz acknowledges his criminal history, he

argues that he is not the worst offender and emphasizes the non-violent nature of his previous criminal history. The trial court found that Swartz, who was twenty-one years old at the time of sentencing, had multiple true findings as a juvenile, including what would have been criminal trespass, two counts of theft, and auto theft had they been committed by an adult. As an adult, Swartz has been convicted of six counts of theft, three counts of class A misdemeanor criminal mischief, and three counts of class A misdemeanor resisting law enforcement. Furthermore, Swartz was on probation at the time he committed the instant offense, a significant factor that "weigh[ed] very heavily on the Court's consideration of sentence." Tr. p. 509. While the trial court found that Swartz had a substance abuse problem and exhibited some remorse, it gave those factors limited mitigating weight. Instead of imposing the maximum sentence, the trial court imposed a sentence five years greater than the advisory term. After considering the nature of the offense and Swartz's character, we do not find the sixty-year sentence to be inappropriate.

The judgment of the trial court is affirmed.

DARDEN, J., and BRADFORD, J., concur.