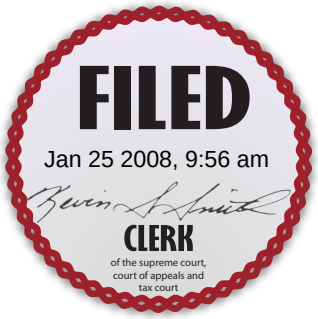

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IN THE
COURT OF APPEALS OF INDIANA

JAMES D. ROBERSON III,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A04-0705-CR-289
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable John Feick, Judge
Cause No. 18C04-0603-MR-1

January 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

James D. Roberson III appeals his conviction for murder.[1] Roberson raises two issues, which we restate as:

I. Whether the prosecutor committed misconduct during the closing arguments; and

II. Whether the evidence is sufficient to sustain Roberson's conviction.

We affirm.[2]

The relevant facts follow. In the early morning hours of March 18, 2006, both Roberson and Antron Dushaun Young were at the Platinum Club in Muncie, Indiana, where they got into an argument. After leaving the club, Roberson, Young, and many of their friends stopped at the Village Pantry. In the parking lot, Roberson and two other

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[1] Ind. Code § 35-42-1-1 (2004) (subsequently amended by Pub. L. No. 151-2006, § 16 (eff. July 1, 2006); Pub. L. No. 173-2006, § 51 (eff. July 1, 2007); Pub. L. No. 1-2007, § 230 (eff. Mar. 30, 2007)).

[2] Roberson included a copy of the presentence investigation report on white paper in his appendix. See Appellant's Appendix at 158. We remind Roberson that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
>
> (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

men fought over a gun, and Roberson obtained the gun. Roberson was heard saying that he was going to "merk a nigga," which means kill a man. Transcript at 261, 272.

As Young was leaving the Village Pantry, Roberson was standing just outside the door. Young suddenly hit Roberson in the face. Roberson said something to Young, pulled out the gun from his waistband, and shot the gun six or seven times. Young was shot in the head and the chest. Roberson stood over Young's body and said, "die mother fucker, die." Id. at 236.

The State charged Roberson with murder. During Roberson's closing argument at the jury trial, his counsel argued that Roberson shot Young in self defense. During the State's rebuttal closing argument, the deputy prosecutor stated, in part:

> In the years that this country's developed, we've developed laws to live together. We're no longer frontiersmen. But, you know, even when they fought and went out in the street, it wasn't one guy with a gun and the other guy was standing like this. Because even back then with the frontiersmen, society, whatever there was, civilized society, didn't find that when one guy's going like this, and the other guy has a gun, that that was a fair fight. You're going to decide that today. You're going to decide whether or not, in Delaware County, his penalty for punching someone in the face one time, is the penalty for that going to be public execution?

Id. at 441. Roberson objected to the deputy prosecutor's statement, but the trial court overruled the objection. Later, during the rebuttal closing argument, the deputy prosecutor stated:

> What you have to decide, again, is whether or not, in this community, the standard is going to be, if I punch you in the face one time, you have the right to shoot me in self defense. The State picked you as jurors because we thought you had the common sense and reason and you would take that back into the jury room with you. Please discuss that.

Id. at 447-448. Roberson did not object to this statement. The jury found Roberson guilty as charged. The trial court sentenced him to sixty years in the Indiana Department of Correction with five years suspended to probation.

I.

The first issue is whether the prosecutor committed misconduct during the closing arguments. Roberson argues that the prosecutor's comments during closing argument were misconduct because the prosecutor's comments invited the jury to decide the case based upon community standards rather than the facts of the case. 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 would 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.

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 he or she should move for mistrial. Id. Failure to request an admonishment or to move for mistrial results in waiver. Id. Here, Roberson objected to part of the prosecutor's closing argument but did not request an admonishment or a mistrial. Thus, he has waived the issue.

Where, as here, a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. Id. More specifically, 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 constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm." Id.

Here, the prosecutor was merely responding to Roberson's self defense argument. "Prosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." Dumas v. State, 803 N.E.2d 1113, 1118 (Ind. 2004). Moreover, the State correctly argues that the prosecutor's comments were a variation on the "moral conscience of our society" instruction, which was approved by the Indiana Supreme Court in Wilson v. State, 697 N.E.2d 466, 477-478 (Ind. 1998), reh'g denied. We conclude that the prosecutor did not commit misconduct, and Roberson's argument fails. See, e.g., Hand v. State, 863 N.E.2d 386, 395 (Ind. Ct. App. 2007) (finding no prosecutorial misconduct where the prosecutor stated during closing argument that the jury was the "moral conscience of the community and must take into account all of the facts and circumstances in this case").

II.

The next issue is whether the evidence is sufficient to sustain Roberson's conviction for murder. When reviewing claims of insufficiency of the evidence, we do

not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

The State was required to prove that Roberson "knowingly or intentionally kill[ed]" Young. Ind. Code § 35-42-1-1; Appellant's Appendix at 125. On appeal, Roberson argues that he did not "knowingly" kill Young because the shooting was an immediate "reaction" to being struck in the face by Young. Appellant's Brief at 11. The jury here was instructed regarding self defense, voluntary manslaughter, involuntary manslaughter, and reckless homicide, and the jury was unpersuaded that Roberson acted in self defense or with a lesser culpability. Roberson's argument is, in effect, a request that we reweigh the evidence and judge the credibility of the witnesses regarding his actions, which we cannot do. Jordan, 656 N.E.2d at 817.

The jury heard evidence that Roberson and Young had argued earlier in the evening and met again at the Village Pantry. In the parking lot of the Village Pantry, Roberson obtained a gun and said that he was going to "merk a nigga," or kill a man. Transcript at 261, 272. As Young was leaving the Village Pantry, Roberson was standing just outside the door. Young suddenly hit Roberson in the face. Roberson then said something to Young, pulled out the gun from his waistband, and shot six or seven times. Young was shot in the head and the chest. Roberson stood over Young's body and said, "die mother fucker, die." Id. at 236. From this evidence, we conclude that the State

presented evidence of probative value from which the jury could have found that Roberson acted knowingly and that he was guilty beyond a reasonable doubt. See, e.g., Fisher v. State, 671 N.E.2d 119, 121 (Ind. 1996) (holding that the evidence was sufficient to sustain the defendant's convictions for murder where the defendant argued that he was provoked and disclaimed any intent to harm the young men), reh'g denied; Cooper, 854 N.E.2d at 838 (noting that "firing multiple shots [at a victim] undercuts a claim of self-defense"); McKinney v. State, 873 N.E.2d 630, 643 (Ind. Ct. App. 2007) (holding that the jury could have reasonably concluded that the deadly force used by McKinney was not proportionate to the requirements of the situation), trans. denied.

For the foregoing reasons, we affirm Roberson's conviction for murder.

Affirmed.

BARNES, J. and VAIDIK, J. concur