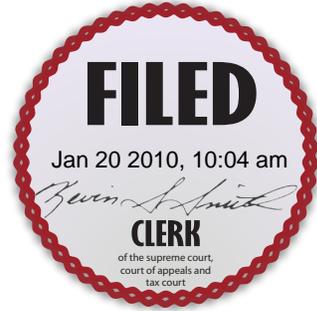


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT W. SMITH,)
)
Appellant/Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee/Plaintiff.)

No. 57A04-0908-CR-457

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Michael J. Kramer, Judge
Cause No. 57D02-0810-CM-1048

January 20, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Robert Smith appeals from his convictions for two counts of Class A misdemeanor Invasion of Privacy.¹ Smith contends that a fatal variance between the State's charging information and its proof requires reversal of his two convictions, that the charging information for Count II was insufficiently specific as to the charged conduct, and that the State failed to produce sufficient evidence to sustain his conviction for Count II. We affirm.

FACTS AND PROCEDURAL HISTORY

Smith is married to Margaret Smith and has two minor children with her. Smith is also stepfather to Robert Dollier, also Margaret's child. In October of 2008, Smith and Margaret were separated and Margaret was living with her three children at her mother's apartment in Kendallville. On October 6, 2008, Margaret received an *ex parte* protective order against Smith, prohibiting him from, *inter alia*, contacting her and their two children. Smith was aware of the order the day it was issued and was later served with a copy.

On October 8, 2008, Smith attempted to enter his daughter K.S.'s bedroom through a window, removing a screen in the process. K.S. alerted Dollier, who called police. Dollier observed Smith standing by the window before Smith walked away. On the evening of October 10, 2008, K.S. saw Smith approach the sliding door of the apartment and knock. Smith walked away as soon as K.S. and Dollier turned around.

On October 27, 2008, the State charged Smith with two counts of Class A misdemeanor invasion of privacy. In Count I, the State alleged that on or about October

¹ Ind. Code § 35-46-1-15.1 (2008).

8, 2008, Smith “went to the victim’s [sic] residence and tried to make contact with them [and] has looked through their windows, called by telephone, and had third parties call and make threats to the victims.” Appellant’s App. p. 7. In Count II, the State alleged that on or about October 10, 2008, Smith “commit[ed] further acts of abuse o[r] threats to [Margaret and that Smith] is restrained from any contact with [Margaret].” Appellant’s App. p. 9. Smith never objected to either information on any basis in the trial court, and presented an alibi defense at his bench trial on May 28, 2009. The trial court found Smith guilty as charged and sentenced him to thirty days of incarceration for Count I and 365 days for Count II, both sentences to be served concurrently.²

DISCUSSION AND DECISION

I. Whether the Variance Between the State’s Charging Information and its Proof at Trial Amounts to Fundamental Error

“A variance is an essential difference between proof and pleading.” *Childers v. State*, 813 N.E.2d 432, 436 (Ind. Ct. App. 2004). Not all variances, however, require reversal, and, as a general proposition, failure to make a specific objection at trial waives any material variance issue. *Hall v. State*, 791 N.E.2d 257, 261 (Ind. Ct. App. 2003). Nevertheless, a variance is deemed fatal if the defendant is misled by the charge in the “preparation and maintenance of his defense, [and if he was] harmed or prejudiced thereby” or if he would not be protected in a future criminal proceeding against double jeopardy. *Childers*, 813 N.E.2d at 436. Smith contends that the State specifically

² The trial court cited Count II as the more serious crime, saying that “count 2 ... was much more intensive with taking out a screen and trying to gain entry into a residence[,]” a reference to the facts that gave rise to the charge in Count I. Tr. p. 93. Smith, however, has not challenged his sentence for either count, and, as such, we need not address this apparent confusion any further.

charged him with violations of a protective order pursuant to Indiana Code subsection 35-46-1-15.1(1) while proving at trial that he violated an *ex parte* protective order pursuant to subsection (2).

Smith concedes that he did not object to this alleged variance and so has waived this issue for appellate review. Smith attempts to avoid the effects of his waiver by alleging that the alleged variance amounts to fundamental error. Fundamental error is “error so egregious that reversal of a criminal conviction is required even if no objection to the error is registered at trial.” *Hopkins v. State*, 782 N.E.2d 988, 991 (Ind. 2003). The standard for fundamental error is whether the error was so prejudicial to the rights of the defendant that a fair trial was impossible. *Krumm v. State*, 793 N.E.2d 1170, 1181-82 (Ind. Ct. App. 2003). Fundamental error requires prejudice to the defendant. *Hopkins*, 782 N.E.2d at 991.

We need not determine whether there exists a variance between the State’s pleading and proof here, because Smith has not shown that any prejudice could have resulted from any such variance.³ Smith claims that he was charged with violating a certain kind of protective order but that the State only proved that he violated another kind. Smith’s only defense at trial, however, was an alibi defense, which he presented through testimony and argument. Any confusion regarding the specific type of protective order cannot have prejudiced Smith when his sole defense was that he could not have violated *any* kind of order because he was not there. Smith has failed to establish that he

³ Smith does not contend that the alleged variance between pleading and proof would subject him to double jeopardy in the future.

could have suffered any prejudice by a variance between the State's pleading and proof and so cannot show fundamental error.⁴

II. Whether the Charging Information for Count II Constitutes Fundamental Error for Failing to Specify the Particular Act Committed by Smith

Smith alleges that the charging information for Count II was insufficiently specific, but concedes that he did not object on this basis below. The proper method of challenging deficiencies in a charging information is to file a motion to dismiss no later than twenty days before the omnibus date. Ind. Code § 35-34-1-4(b)(1) (2008); *Miller v. State*, 634 N.E.2d 57, 61 (Ind. Ct. App. 1994). Failure to challenge timely an allegedly defective charging information results in waiver unless fundamental error has occurred. *Miller*, 634 N.E.2d at 61. As previously mentioned, fundamental error requires that prejudice be shown. *Hopkins*, 782 N.E.2d at 991.

“An information or indictment is intended to guarantee certain protections to the criminally accused.” *Wine v. State*, 637 N.E.2d 1369, 1374 (Ind. Ct. App. 1994). “First, the charging document must set forth the elements of the offense intended to be punished, thus apprising the defendant with reasonable certainty of the nature of the accusation against him.” *Id.* “Second, the offense charged must be described with sufficient particularity to permit a defense of double jeopardy in the event of a subsequent prosecution.” *Id.*

⁴ Smith also contends that the State produced insufficient evidence to sustain his convictions, arguing that the State charged him in both counts with violating a “protection” order but only proved, at most, that he violated an *ex parte* protective order. This argument, however, is merely a recasting of Smith's variance argument as a sufficiency argument, presumably in an attempt to avoid having to show prejudice. Whatever the deficiencies in the State's charging information, there is no question that the record contains sufficient evidence to prove that Smith committed invasion of privacy by knowingly or intentionally violating one of the court orders listed in Indiana Code section 35-46-1-15.1(a), namely an *ex parte* protective order.

The text of the charging information for Count II alleged that Smith violated a “protection order” on a specific date at Margaret’s residence. (Appellant’s App. 9). Standing alone, this language might not be sufficiently specific. Smith fails to acknowledge, however, that the attached probable cause affidavit specifically detailed the precise conduct that formed the basis of the charge, *i.e.*, that, at 11:12 p.m., Smith “was found standing on the patio area after knocking on the door.” Appellant’s App. p. 14; *see, e.g., Parahams v. State*, 908 N.E.2d 689, 693 (Ind. Ct. App. 2009) (concluding that charging information did not mislead defendant in preparing his defense when considered along with attached probable cause affidavit). We believe that the allegations in the charging information, when considered along with the attached probable cause affidavit, are more than sufficient to have apprised Smith of the charge against him and to provide him with a double jeopardy defense should the State attempt to prosecute him again for the same conduct. Smith has failed to establish fundamental error in this regard.

III. Whether the State Produced Sufficient Evidence to Sustain Smith’s Conviction in Count II

Our standard of review for challenges to the sufficiency of the evidence supporting a criminal conviction is well-settled:

In reviewing a sufficiency of the evidence claim, the Court neither reweighs the evidence nor assesses the credibility of the witnesses. We look to the evidence most favorable to the verdict and reasonable inferences drawn therefrom. We will affirm the conviction if there is probative evidence from which a reasonable jury could have found Defendant guilty beyond a reasonable doubt.

Vitek v. State, 750 N.E.2d 346, 352 (Ind. 2001) (citations omitted).

In Count II, the State alleged that on or about October 10, 2008, Smith knowingly or intentionally violated a “(see list in I.C. 35-46-1-15.1 (a)(1-10)) PROTECTION ORDER” when he “commit[ed] further acts of abuse o[r] threats to [Margaret and that Smith] is restrained from any contact with [Margaret].” Appellant’s App. p. 9. Smith contends that his conviction for Count II must be reversed as the State did not produce any evidence that he knocked on the door in a threatening or abusive manner.

It is well-settled that “facts which may be omitted from an information without affecting the sufficiency of the charge against the defendant are mere surplusage and do not need to be proved.” *Bonner v. State*, 789 N.E.2d 491, 493 (Ind. Ct. App. 2003) (citing *Mitchem v. State*, 685 N.E.2d 671, 676 (Ind. 1997)). In order to sustain a conviction for invasion of privacy, the State was required to prove only that Smith knowingly or intentionally violated one of several court orders, not that he did so in a threatening or abusive manner. Consequently, the State’s failure to prove that Smith knocked on the door in a threatening or abusive manner did not affect the sufficiency of Count II.

The judgment of the trial court is affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.