

Appellant/Defendant Oscar Delatorre appeals following his conviction for Class B felony Robbery.¹ Specifically, Delatorre contends that the trial court committed fundamental error in allowing the State to summarize witness testimony relating to each of the State's exhibits upon publishing the exhibits to the jury and in allowing certain testimony by the investigating officer during trial. Concluding that the alleged trial errors did not amount to fundamental error, we affirm.

FACTS AND PROCEDURAL HISTORY

At approximately 9:30 p.m. on September 27, 2007, sixteen-year-old Molly Cessna entered an Arby's restaurant in Speedway. Cessna had just finished her shift at a nearby retail store and was waiting for her mother to pick her up and drive her home. Cessna decided not to order anything to eat and went outside to wait for her mother.

While waiting, Cessna noticed a green Jeep Cherokee in the restaurant parking lot. The vehicle stopped near Cessna. Cessna notice that the vehicle was being driven by a Caucasian male and that a Hispanic male was sitting in the front passenger seat. After the vehicle stopped, a second Hispanic male got out of the backseat of the vehicle. This man began walking toward Cessna before breaking into a run. Cessna saw the man running toward her and turned to face him. The man grabbed her left arm hard enough to cause pain, marks, and bruising that lasted for several days. Cessna was afraid that the man was going to force her into the vehicle. Cessna struggled with the man and punched him in the face. Eventually, the man let go of her arm, took her purse, and then retreated to the vehicle,

¹ Ind. Code § 35-42-5-1 (2007).

closing the rear passenger door behind him. Once the man had returned to the vehicle, the Caucasian male drove away from the restaurant.

After the attack, Cessna took refuge in the restaurant until her mother arrived. Her mother reported the incident to the police who came and took a statement from Cessna. Cessna described all three men, including the individual who actually took her purse. Cessna later recalled being very frightened because the man took her purse, which contained her identification, address, and cell phone.

Cessna subsequently identified the driver of the vehicle, through a photo array, as Steven Rosicato. Cessna later identified, through subsequent photo arrays, the front-seat passenger as Daniel Soto and the back seat passenger who grabbed her arm and took her purse as Oscar Delatorre.

On March 4, 2008, Delatorre was charged with Class B felony robbery. After several continuances, a two-day jury trial was held on June 28 and 29, 2010. At the conclusion of trial, the jury found Delatorre guilty as charged. On July 13, 2010, the trial court sentenced Delatorre to twelve years of incarceration, with four years suspended to probation.

DISCUSSION AND DECISION

On appeal, Delatorre contends that the trial court committed fundamental error in allowing certain statements by the State regarding its exhibits and certain testimony by the investigating officer during trial. Specifically, Delatorre claims that the trial court committed fundamental error by allowing: (1) the deputy prosecutor to summarize the witness testimony relating to each of the State's exhibits upon publishing the exhibits to the jury at the

conclusion of the State's case-in-chief, (2) the investigating officer, Lieutenant Ralph Theobald to testify that he was informed of Delatorre's potential involvement in the robbery by another witness, Jair Coroa, and (3) Lieutenant Theobald to testify that he pulled the picture used in the photo arrays to identify Delatorre from the police computer system. Delatorre concedes that he did not object to either the summations or Lieutenant Theobald's challenged testimony at trial, and acknowledges that his failure to raise the challenged issues at trial resulted in waiver of these issues on appeal. *See Wilson v. State*, 931 N.E.2d 914, 919 (Ind. Ct. App. 2010) (providing that the failure to raise an objection or challenge an issue at trial results in waiver of the issue on appeal), *trans. denied*. Delatorre, however, attempts to circumvent waiver by arguing that the challenged summations and the challenged testimony resulted in fundamental error.

A reviewing court may disregard the defendant's waiver of a particular issue for appellate review and reverse the defendant's conviction only if he has demonstrated the existence of fundamental error. The fundamental error rule, however, is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. Fundamental error is defined as error so prejudicial to the rights of a defendant that a fair trial is rendered impossible. The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule. Fundamental error, therefore, requires a defendant to show greater prejudice than ordinary reversible error because no objection has been made.

Id. (citations and quotation omitted).

I. Summation of Witness Testimony Relating to the State's Exhibits

Delatorre claims that fundamental error occurred when the trial court allowed the deputy prosecutor to summarize the witness testimony relating to each of the State's exhibits

upon publishing the exhibits to the jury at the conclusion of the State's case-in-chief. Delatorre does not contest the accuracy of the deputy prosecutor's summations, but rather argues that the deputy prosecutor's summation of each of the State's exhibits amounted to an improper presentation of the State's case to the jury because it essentially allowed the State to present its case twice. Delatorre further argues that the deputy prosecutor's summation of each of the State's exhibits amounted to fundamental error because the jury was not instructed that the deputy prosecutor's comments outside opening and closing arguments were not evidence. The record, however, indicates otherwise.

The record indicates that the deputy prosecutor merely summarized the prior witness testimony relating to each of the State's exhibits as each exhibit was published to the jury. Nothing in the record indicates that the deputy prosecutor presented any new testimony or misstated any of the prior testimony in giving the summation for each exhibit, and Delatorre has not shown how he was prejudiced by any of the deputy prosecutor's summations. Moreover, the jury was specifically instructed that "the remarks of counsel in opening statement, *during the trial*, or in final arguments, or the remarks of the Court should not be considered by you as evidence in this case." Appellant's App. p. 87 (emphasis added).

In light of Delatorre's failure to challenge the accuracy of the deputy prosecutor's summations of the witness testimony or show how he was prejudiced by said summations, in addition to the trial court's instruction to the jury that the remarks of counsel during the trial should not be considered as evidence, we conclude that Delatorre has failed to demonstrate any prejudice, let alone "greater prejudice than ordinary reversible error." *See Wilson*, 931

N.E.2d at 919. Delatorre has not shown that he was denied a fair trial, much less that a fair trial was impossible. Accordingly, Delatorre has failed to establish fundamental error in this regard.² *See id.*

II. Investigating Officer's Testimony Regarding His Discovery of Delatorre's Potential Involvement in the Robbery

Delatorre next claims that the trial court committed fundamental error by allowing Lieutenant Theobald to testify that he was alerted of Delatorre's potential involvement in the robbery by another witness. In making this claim, Delatorre argues that the trial court committed fundamental error by admitting Lieutenant Theobald's testimony because it contained inadmissible hearsay.

In general, the decision to admit or exclude evidence, including purported hearsay, is within the trial court's sound discretion and is afforded great deference on appeal. We will not reverse the trial court's decision unless it represents an abuse of discretion that results in the denial of a fair trial. An abuse of discretion in this context occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law.

Ballard v. State, 877 N.E.2d 860, 861-62 (Ind. Ct. App. 2007) (citations omitted).

Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. *Id.* Hearsay is generally inadmissible unless it falls within one of the exceptions enumerated in Indiana Evidence Rule 803. *Id.* However, an out-of-court statement introduced to explain why a particular course of action was taken during a criminal investigation is not hearsay because it is not offered to prove the truth of the matter asserted.

² While we find no prejudice in this case, we do not condone the practice because it is fraught with the potential for prejudicial comments.

Goodson v. State, 747 N.E.2d 1181, 1185 (Ind. Ct. App. 2001). “[W]e require a reasonable level of assurance that such testimony was neither offered by the proponent nor received by the trier of fact as evidence of the truth of the third party’s statement.” *Id.* That assurance may arise from an immediate limiting instruction or from the testimony itself. *Id.*

Here, Lieutenant Theobald was not an out-of-court declarant, and he did not testify as to the truth of any out-of-court statement; rather, he testified in court about an interview that he conducted during the course of an active investigation and the resulting course of action that he took following the interview. Specifically, Lieutenant Theobald testified that as a result of his interview with Coroa, during which Coroa implicated Delatorre in the robbery, he placed a picture of Delatorre, along with photos of five other individuals, in a photo array which he then showed to Cessna. Lieutenant Theobald further testified that upon seeing the photo array, Cessna immediately identified Delatorre as the perpetrator. Upon review of the record we are reasonably assured that Lieutenant Theobald’s testimony regarding his interview with Coroa, during which Coroa implicated Delatorre, was not offered to prove that Delatorre robbed Cessna, but rather to explain why Lieutenant Theobald took a particular course of action, *i.e.*, placing Delatorre’s picture in a photo array to show to Cessna. We are also reasonably assured that the jury did not receive Lieutenant Theobald’s testimony regarding why he included Delatorre’s picture in a photo array which he later showed to Cessna as proof of Delatorre’s guilt. Accordingly, Lieutenant Theobald’s testimony on this issue was not inadmissible hearsay. Delatorre has failed to establish fundamental error in this regard.

III. Investigating Officer's Testimony that he Pulled the Picture Used to Identify Delatorre in the Photo Array from the Police Computer System

Delatorre also claims that the trial court committed fundamental error by allowing Lieutenant Theobald to testify that he pulled the picture used to identify Delatorre in the photo arrays from the police computer system. In making this claim, Delatorre argues that the statement was prejudicial because it suggested that the picture of Delatorre used in the photo array was a mug shot, indicating that Delatorre had previously been arrested. It has been acknowledged that the admission of a photo array can lead jurors to conclude that a defendant has previously been arrested. *Boatright v. State*, 759 N.E.2d 1038, 1042 (Ind. 2001). However, the Indiana Supreme Court has previously held that “mug shots are not per se inadmissible and are admissible if (1) they are not unduly prejudicial and (2) they have substantial independent probative value.” *Id.* When the State has made an effort to disguise the nature of the photographs by redacting criminal information and any other information which obviously identifies the photograph as a “mug shot,” the photograph is not unduly prejudicial. *Jenkins v. State*, 677 N.E.2d 624, 626 (Ind. Ct. App. 1997). This court has previously concluded that the statement that a picture was taken from police files was not an unequivocal reference to “mug shots” such that it was likely to have a significant impact upon the jury. *Id.* at 626 n.3. In addition, when the perpetrator’s identification is at issue, the photographs have substantial probative value. *Id.* at 626.

Here, the State redacted all information which would have identified these photographs a “mug shots.” The photographs contained no name, identification number or

other indication of prior arrest. *See Stark v. State*, 489 N.E.2d 43, 46 (Ind. 1986) (providing that photos without name, identification, or indication of arrest do not fall within classic definition of “mug shot”). No witness explicitly testified that the photograph as a “mug shot” but merely that the picture was taken from police files. While the better practice would have been not to comment that the picture was taken from police files, under these circumstances, the trial court did not err by admitting the photographic array. *See Jenkins*, 677 N.E.2d at 626. Once more, Delatorre has failed to establish fundamental error in this regard.

The judgment of the trial court is affirmed.

KIRSCH, J., and CRONE, J., concur.