

Danny R. Smith appeals his convictions for burglary as a class B felony,¹ driving with a suspended license as a class A misdemeanor,² and his adjudication as an habitual offender.³ Smith raises one issue, which we revise and restate as whether the trial court committed fundamental error in not giving an alibi instruction. We affirm.

The relevant facts follow. On December 7, 2006, Robert L. Smith⁴ left his house located in Brown County, Indiana, sometime in the early afternoon. When he left his house, Robert closed the door.⁵ As Robert returned to his house approximately one-half hour later and pulled into his driveway, he noticed a maroon Ford Explorer which he did not recognize parked near the front door of the house. Robert noted the license plate number of the Explorer. As Robert drove his vehicle closer to the house, Smith exited the front door of the house with a coat over his head. Smith got into the Explorer, backed up a short distance, and then “kind of just took off down the yard” toward the road. Transcript at 298. Robert initially attempted to cut off the Explorer with his own vehicle, and when the Explorer got to the road, Robert stopped his vehicle, took out his gun, and shot at the Explorer.

¹ Ind. Code 35-43-2-1 (2004).

² Ind. Code 9-24-19-2 (2004).

³ Ind. Code 35-50-2-8 (Supp. 2005).

⁴ Robert L. Smith is not related to Smith.

⁵ During Smith’s trial, when asked if he could say with certainty that he had locked the door when he left, Robert testified: “I cannot say with certainty that I had locked it. And I have no reason to believe that I didn’t. But I cannot swear that that door . . . that I did lock it. I mean, I just can’t remember that much detail.” Transcript at 326.

After the Explorer drove away, Robert reloaded his gun and stayed behind a cedar tree in the front lawn of his house because he thought that there may have been another person in his house. Robert eventually checked around the outside of the house and woods and in each room of his house to make sure that no other person remained in the area or in the house. Robert discovered that the house “was trashed.” Id. at 301. At 2:42 p.m., Robert contacted law enforcement and provided a description of the Explorer and its license plate number. At some point, Robert discovered that a camcorder was missing from his house.

Information related to the burglary and a description of the Explorer was dispatched to officers in Brown County and its surrounding counties. Indiana State Police Trooper Justin Butler received the dispatch information at approximately 3:00 p.m. and “positioned [him]self near the 52 mile marker in the area” along Interstate 65 (“I-65”) near an overpass. Id. at 409. A few minutes later, Trooper Butler observed a Ford Explorer matching the description provided by dispatch traveling southbound on I-65. Trooper Butler followed the Explorer and verified that the license plate of the Explorer matched the dispatch information. The Explorer exited I-65 at Exit 50, traveled westward about three-fourths of one mile, and then pulled into a gas station.

Trooper Butler activated the emergency lights of his police vehicle and initiated a traffic stop. After he approached the Explorer and asked Smith for his driver’s license and registration, Smith stated that his driver’s license was suspended and that he did not have any identification on him. Trooper Butler returned to his vehicle and verified that

Smith's driver's license was indeed suspended with a prior conviction. Trooper Butler and another officer who had arrived at the scene then placed Smith in custody and gave him a Miranda advisement. Smith stated that he had been in Franklin, Indiana, with a friend. An inventory of the Explorer included a black sweatshirt.

At some point, Detective Steve Brahaum of the Brown County Sheriff's Department arrived at the gas station. Detective Brahaum took custody of Smith, placed him in his police vehicle, and relayed through the dispatcher to have someone pick up the Explorer. Detective Brahaum then transported Smith to the Brown County Sheriff's Department located in Nashville, Indiana. During the trip to the Sheriff's Department, Smith asked Detective Brahaum how he could get his vehicle back and whether the case was about a burglary. Detective Brahaum then read Smith his Miranda rights and Smith indicated that he understood. Smith then initiated a conversation and asked Detective Brahaum several other questions, including questions related to the time frame of the burglary, if anything had been taken in the burglary, and how he was identified.

At the jail in Nashville, Detective Brahaum and another law enforcement officer interviewed Smith. During the interview, Smith stated that he was at "West Washington School Road until 12:30," that "at 12:30 [he] received [his] check," and then he "drove to Palmyra, Indiana." Id. at 599. Smith stated: "I'd say I was at Palmyra Bank at 1:30." Id. at 600. Smith stated that he visited a gas station in Palmyra where he "put money in gas and bought a Five dollar lottery ticket." Id. at 602. Smith also stated that he then "dropped off" a co-worker by the name of Ivan Coats at his house on "Delaney Park

Road” at “let’s say 2:15, 2:00 o’clock, probably 2:30 arrived at his house.” Id. Smith said that he then “[g]ot on the Interstate . . . 65” and “drove to 465, up in Indianapolis” to “see a co-worker, not a co-worker, but an ex-boss,” that the person was not home, so he “come back to 65” and “was going home” when he exited I-65 “[b]ecause the cop was following.” Id. at 604-606. A subsequent investigation by the detectives at the Brown County Sheriff’s Department revealed that tire tracks in the yard in front of Robert’s house matched the tires of the Explorer driven by Smith.

On December 8, 2006, the State charged Smith with burglary as a class B felony and driving while suspended as a class A misdemeanor. On January 22, 2007, the State amended its charging information to add an allegation that Smith was an habitual offender.

On September 12, 2007, Smith’s original court-appointed counsel requested to withdraw his appearance, and the trial court granted the request. On November 13, 2007, Smith filed a pauper attorney affidavit and a motion for discovery and inspection, and the trial court appointed new counsel for Smith.

On January 11, 2008, Smith by counsel filed a Notice of Alibi, which stated that “at the alleged time of the offense [Smith] was outside Brown County, Indiana, on State Road I-65 between Indianapolis and Seymour, Indiana.” Appellant’s Appendix at 72. The Notice of Alibi indicated that Smith’s alibi would be supported by the testimony of “Ivan Cope”⁶ and “Map Quest printouts of the driving times between the location of the

⁶ The Notice of Alibi identified a person by the name of Ivan Cope. However, Ivan Coats

alleged crime, Ivan Cope's home, and the location of [Smith's] arrest." Id. The trial court set a deadline of April 15, 2008 for tendering jury instructions. On April 18, 2008, Smith tendered proposed jury instructions, including a proposed alibi instruction which stated:

You have heard evidence that at the time of the crime charged the accused was at a different place so remote or distant that he could not have committed the crime. The State must prove beyond a reasonable doubt the accused's presence at the time and place of the crime.

Appellant's Appendix at 150.

On April 21, 2008, Smith *pro se* filed a motion to dismiss counsel due to a conflict of interest, and on April 22, 2008, Smith's counsel filed a verified motion to withdraw his appearance and motion for continuance. After a hearing, the trial court granted the motions on April 23, 2008, and appointed attorney Kurt Young as Smith's counsel on April 29, 2008.

On May 15, 2008, Smith *pro se* filed a motion to subpoena state witnesses, which the trial court denied. On November 12, 2008, Young filed a motion to withdraw appearance which indicated that Smith intended to represent himself at trial. The trial court initially denied the motion to withdraw but indicated that the motion may be renewed upon voluntary waiver of counsel by Smith. On November 14, 2008, Young filed Defendant's Tender of Instructions, which did not include an instruction related to an alibi defense.⁷ At a preliminary hearing on November 19, Smith indicated that he

testified at trial that he was Smith's co-worker and with him on the morning of December 7, 2006.

⁷ The Defendant's Tender of Instructions filed by Young did, however, include an instruction that

wanted to represent himself at his trial, and Smith filed a motion to continue the trial date and a waiver of attorney. The trial court permitted Smith to proceed *pro se* and appointed Young as standby counsel.

Smith's trial commenced on November 19, 2008. During his opening statement, Smith indicated that he would need his attorney to represent him, and the court held a proceeding outside the presence of the jury regarding whether Smith would proceed without counsel. It was determined that Young would represent Smith for the remainder of the trial.

During the trial, Coats testified that he and Smith had worked together for part of the day on December 7, 2006, that they went to Palmyra to cash their checks, and that they then stopped at a gas station in Palmyra. Coats also testified that Smith dropped him off at his home in Salem, Indiana, at 1:15 p.m. During the last day of the trial and outside the presence of the jury, the court reviewed the proposed instructions tendered by the State and by Young and heard arguments regarding final instructions. During closing arguments before the jury, Young argued that the State's evidence was not sufficient to place Smith at the scene of the burglary. Young argued: "And I want you to remember, always, that nobody, nobody places this person at that scene, at that time on that date." Transcript at 794.

After the conclusion of the three-day trial, a jury found Smith guilty of burglary as a class B felony and driving with a suspended license as a class A misdemeanor. After

mere presence at a crime scene with the opportunity to commit the crime is not a sufficient basis on which to support a conviction.

the jury's verdict, Smith admitted to being an habitual offender. Smith was sentenced to eleven years for the burglary conviction, which was enhanced by twenty years for the habitual offender adjudication, and one year for driving while suspended, to be served concurrently with the burglary sentence.

The sole issue is whether the trial court committed fundamental error in not giving an alibi instruction.⁸ Smith argues that “[t]he trial Court committed fundamental error when it failed to instruct the jury on the defense of alibi.” Appellant’s Brief at 6. Specifically, Smith argues that “[t]he defense at trial was one of alibi, in which the defense argued that there was insufficient time for [Smith] to have committed the burglary due to his presence elsewhere.” Id. at 6.

The “fundamental error” rule 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. Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002), reh’g denied. The error must be so prejudicial to the defendant’s rights as to make a fair trial impossible. Ortiz v. State, 766 N.E.2d 370, 375 (Ind. 2002). In considering whether a claimed error denied the defendant a fair trial, we determine whether the resulting harm or potential for harm is substantial. Id. “[W]hen this Court considers a claim of fundamental error, we look to

⁸ As previously mentioned, Smith, by one of his previous defense attorneys, filed a proposed alibi instruction with the trial court on April 18, 2008, which was about seven months before his trial. The proposed alibi instruction filed on April 18, 2008 stated: “You have heard evidence that at the time of the crime charged the accused was at a different place so remote or distant that he could not have committed the crime. The State must prove beyond a reasonable doubt the accused’s presence at the time and place of the crime.” Appellant’s Appendix at 150. Smith does not argue that this proposed instruction preserved the issue. Rather, Smith argues only that the trial court committed fundamental error.

the jury instructions as a whole to determine if they were adequate.” Ringham v. State, 768 N.E.2d 893, 898 (Ind. 2002), reh’g denied. “[J]ustice can be best served by analyzing questions involving jury instructions based on the circumstances of each case to determine whether the defendant received a fair trial rather than summarily concluding that any omission is fundamental error.” Davis v. State, 835 N.E.2d 1102, 1109 (Ind. Ct. App. 2005), trans. denied.

Here, the jury was instructed that the State was required to prove each element of the crimes charged beyond a reasonable doubt, that Smith was presumed to be innocent, that Smith must not be convicted on suspicion or speculation, and that the jury had the duty to decide the value to give the exhibits and testimony.

During trial, the jury heard evidence from a number of witnesses and was presented with numerous exhibits. During Detective Brahaum’s testimony, a recording of the interview of Smith performed by Detective Brahaum was played for the jury. During the interview, Smith stated that he received his paycheck “at 12:30” and that he “was at Palmyra Bank at 1:30.” Transcript at 600. Smith also stated that he “dropped off” his co-worker Ivan Coats at Coats’s house at “say 2:15, 2:00 o’clock, probably 2:30” Id. Smith stated that he then “[g]ot on the Interstate and drove to 465, up in Indianapolis,” and that when the person he drove to Indianapolis to see was not at home, he “come back to 65” and “was going home” when he exited I-65 “[b]ecause the cop was following.” Id. at 604, 606. Smith did not testify at the trial.

During cross-examination, Coats testified that he was “positive” that Smith dropped him off at home at 1:15 p.m. because he had “a habit when [he] walk[ed] through the house [to] look on the stove at the clock” and that he “remember[ed] seeing it on the clock.” Id. at 519.

The dispatch supervisor for the Brown County Sheriff’s Department testified that the Department had received Robert’s call at 2:42 p.m. Trooper Butler testified that he received information related to the burglary at “approximately 3:00 p.m., give or take a few minutes” and it “wasn’t . . . more than a couple of minutes before [Smith’s] vehicle passed by” traveling southbound on I-65. Id. at 409, 412.

Further, Detective Brahaum testified that he drove several routes to estimate the length of time it would have taken Smith to travel from one location to another, that it took twenty-six minutes to travel from Palmyra to Coats’s house, and that it took him one hour and one minute to travel from Coats’s house to Robert’s house. Detective Brahaum also testified that he traveled the distance from Robert’s house to the location where Smith was observed by Trooper Butler three times using different routes; the first route took Detective Brahaum twenty-five minutes, the second route took twenty-eight minutes, and the third route took twenty-seven minutes. In addition, Detective Brahaum testified that he drove the route that Smith stated he had taken to Indianapolis and back to I-65 where Smith was observed and detained by Trooper Butler, and the trip took Detective Brahaum two hours and twenty-three minutes to complete.

During opening arguments before the jury, Young argued that Smith was “accused of being there at a certain time” and that “the evidence will show that timing is critical.” Id. at 287. During closing arguments, Young argued that the State’s evidence was not sufficient to place Smith at the scene of the burglary.

If the jury had believed the statements that Smith made during the interview with Detective Brahaum or the arguments of Smith’s counsel, it could have returned a verdict in his favor based upon the instructions that were given. Given the instructions as a whole and under the circumstances of this case, we conclude that the trial court’s failure to instruct the jury with an alibi instruction did not result in fundamental error. See Merrill v. State, 716 N.E.2d 902, 906 (Ind. 1999) (holding that the defendant’s trial counsel was not ineffective for failing to tender an alibi instruction because the instruction was unlikely to change the outcome of the trial where the “jury heard his alibi defense and if it had believed him, could have returned a verdict in his favor” and the “jury also heard Merrill’s alibi witness deny being in the restroom with him”); see also Davis, 835 N.E.2d at 1107-1110 (holding that the trial court did not commit fundamental error in failing to give an instruction in light of all of the relevant information provided to the jury).⁹

⁹ The State also argues that the Notice of Alibi filed by Smith on January 11, 2008 did not comply with the requirements of Ind. Code § 35-36-4-1 (2004). Because we conclude that the trial court’s failure to give an alibi instruction did not result in fundamental error, we need not address this issue.

For the foregoing reasons, we affirm Smith's convictions for burglary as a class B felony, driving with a suspended license as a class A misdemeanor, and his adjudication as an habitual offender.

Affirmed.

MATHIAS, J., and BARNES, J., concur.