



Edward L. Weaver (“Weaver”) was convicted in Marion Superior Court of Class B felony burglary. Weaver appeals and claims that the evidence was insufficient to support his conviction and that the trial court erred in instructing the jury. We affirm.

### **Facts and Procedural History**

On the afternoon of January 19, 2010, Howard Hendricks (“Hendricks”) observed two men sitting in a blue car in his neighborhood in Marion County. The neighborhood had recently experienced several burglaries and break-ins, and the parked car aroused Hendricks’s suspicions. Hendricks therefore followed the car, which drove around the neighborhood and eventually parked in front of a home owned by Hendricks’s neighbor, Michael Wright (“Wright”). Hendricks observed the two men in the car, later identified as defendant Weaver and Damon Swift (“Swift”), get out of the car and knock on the front door. When no one answered the door, the two men walked to the back of the house. Hendricks then drove to a position where he could see the back of his neighbor’s garage. There, he noticed that the back garage door, which had earlier been closed, was now open. After seeing this, Hendricks telephoned the police. Hendricks watched the home until the police arrived.

The police arrived at the scene soon thereafter with a canine unit and set up a perimeter around the house. They saw that the back garage door had been forced open and found Swift hiding in the attic above the garage. When the police searched Swift, they found a screwdriver and \$600 in cash. The police then went into the residence and noticed that the house had been ransacked. They found Weaver hiding in the basement, where he initially refused to surrender. The police were able to apprehend Weaver,

however, when the canine officer released his police dog. When the police searched Weaver, they found several two-dollar bills.

Wright, the owner of the burglarized home, had locked his doors before leaving for work that morning. When he surveyed the damage done to his home, he noticed that a lockbox where he had kept a collection of two-dollar bills had been opened and that most of his bills had been taken. Wright did not know either Swift or Weaver and did not give either of them permission to enter his home.

The State subsequently charged Weaver with Class B felony burglary, Class D felony theft, and Class D felony attempted theft. At the conclusion of a July 14, 2010 trial, the jury acquitted Weaver of the two Class D felony counts but found him guilty of Class B felony burglary. On August 6, 2010, the trial court sentenced Weaver to fourteen years, with ten years executed and four years suspended. Weaver now appeals.

### **I. Sufficiency of the Evidence**

Weaver first claims that the evidence is insufficient to support his conviction for Class B felony robbery and that we should remand for entry of a conviction for the lesser-included offense of residential entry. Upon a challenge to the sufficiency of evidence, we neither reweigh the evidence or judge the credibility of the witnesses; instead, we respect the exclusive province of the trier of fact to weigh any conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and we will affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

To convict Weaver of Class B felony burglary as charged, the State was required to prove that he: (1) broke and entered (2) a building or structure which was the dwelling of another person (3) with the intent to commit theft in it. See Appellant's App. p. 31; Ind. Code § 35-43-2-1(1)(B)(i) (2004).

*A. Breaking and Entering*

With regard to the element of breaking and entering, the State presented evidence that Wright, the victim, had locked the doors to his home before he left for work on the day of the burglary, and his neighbor testified that the back garage door had been shut earlier in the day. After the neighbor saw Swift and Weaver go to the back of the house, he noticed that the back garage door was opened. When the police arrived, they saw that the back door had been forced open. Both Swift and Weaver were later found hiding inside the house. From this evidence the jury could reasonably conclude that Weaver broke and entered Wright's home. That Swift and Weaver testified that Weaver remained in the car while Swift broke into the home is of no moment, as this is evidence which does not support the jury's verdict, and we will not consider it on appeal. See McHenry, 820 N.E.2d at 126.

Furthermore, it does not matter whether Swift actually broke the door down or whether Weaver did so, because the jury could have concluded that Weaver was guilty via accomplice liability. An accomplice is criminally responsible for all acts committed by a confederate which are the natural and probable consequence of their concerted action. Alvies v. State, 905 N.E.2d 57, 61 (Ind. Ct. App. 2009). The accomplice need not participate in each and every element of the crime to be convicted of it. Id. Although

mere presence at the scene of the crime is insufficient to establish accomplice liability, presence may be considered along with the defendant's relation to the one engaged in the crime and the defendant's actions before, during, and after the commission of the crime. Id.

Here, the jury was instructed on the issue of accomplice liability and Weaver was clearly more than merely present at the scene of the crime. He entered the home and was found with two-dollar bills in his possession, which the jury could reasonably infer he took from the lockbox where Wright kept his collection of two-dollar bills. Thus, even if Swift was the one who forcibly opened the door, the jury could still have found Weaver guilty as Swift's accomplice.

*B. Intent to Commit a Felony*

With regard to the intent element of burglary, the intent to commit a felony may not be inferred from proof of breaking and entering alone. Freshwater v. State, 853 N.E.2d 941, 943 (Ind. 2006). Instead, the intent to commit a given felony may be inferred from the circumstances, but some fact in evidence must point to an intent to commit a specific felony. Id. “[E]vidence of flight alone may not be used to infer intent, though other factors, such as the removal of property from the premises, may combine with flight to prove the requisite intent for burglary.” Id. Thus, “in order to sustain a burglary charge, the State must prove a specific fact that provides a solid basis to support a reasonable inference that the defendant had the specific intent to commit a felony.” Id.

In Freshwater, there was no such proof. Instead, the time and method by which the defendant entered the building suggested nothing more than that he broke in. Id. at

944. There was no evidence that the defendant was near or approaching anything valuable; instead, he was apprehended outside the building, and the owner of the building testified that nothing was missing from the building and the office had been undisturbed. Id. at 944-45. Therefore, our supreme court held that the State failed to prove that the defendant had intended to commit any specific felony when he broken into the building. Id.

The facts of the present case are easily distinguishable from Freshwater. Weaver was apprehended inside the home, not outside the building. The owner of the home testified that objects in his house had been moved. In fact, his lockbox had been opened and several two-dollar bills had been taken, and Weaver was found in possession of several two-dollar bills. From this the jury could reasonably conclude that Weaver had the intent to commit a specific felony, i.e. theft, when he and Swift broke and entered into Wright's home. Weaver's arguments to the contrary are simply an invitation for us to consider evidence not favorable to the jury's verdict, reweigh the evidence, and come to a conclusion contrary to the jury's conclusion. This we will not do.<sup>1</sup>

## **II. Jury Instruction**

Weaver next claims that the trial court erred in instructing the jury. In reviewing this claim, we are mindful that the manner of instructing the jury is left to the sound

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<sup>1</sup> Weaver also makes reference to the fact that the jury acquitted him of the charges of theft and attempted theft. However, to prove Weaver guilty of burglary, the State was not required to prove that he actually committed theft but only that he *intended* to commit theft in the home when he broke and entered into it. Moreover, to the extent Weaver's argument is that the jury's verdict finding him not guilty of theft but guilty of burglary was inconsistent, our supreme court has recently held that "[j]ury verdicts in criminal cases are not subject to appellate review on grounds that they are inconsistent, contradictory, or irreconcilable. Beattie v. State, 924 N.E.2d 643, 649 (Ind. 2010).

discretion of the trial court. Rogers v. State, 897 N.E.2d 955, 962 (Ind. Ct. App. 2008), trans. denied. We will not reverse the trial court's ruling unless the instructional error is such that the charge to the jury misstates the law or otherwise misleads the jury. Id. Jury instructions must be considered as a whole and in reference to each other, and even an erroneous instruction will not constitute reversible error if the instructions, taken as a whole, do not misstate the law or otherwise mislead the jury. Id. In reviewing a trial court's decision to give or refuse a tendered instruction, we consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other given instructions. Id.

Weaver claims that the trial court's instruction on accomplice liability was improper. This instruction read:

A person is responsible for the actions of another person when, either before or during the commission of a crime, he knowingly aids, induces, or causes the other person to commit a crime, even if the other person

1. Has not been prosecuted for the offense
2. Has not been convicted of the offense; or
3. Has been acquitted of the offense.

To aid is to knowingly support, help, or assist in the commission of a crime.

In order to be held responsible for the actions of another, he need only have knowledge that he his helping in the commission of the charged crime. He does not have to personally participate in the crime nor does he have to be present when the crime is committed.

Proof of the Defendant's failure to oppose the commission of a crime, companionship with the person committing the offense, and conduct before and after the offense may be considered in determining whether aiding may be inferred.

Mere presence at the scene of an alleged crime or failure to oppose the crime is not, in itself, aiding inducing or causing the commission of a

crime. Neither is negative acquiescence sufficient standing alone. There must be some conduct of an affirmative nature on the part of a defendant in order for that defendant to be criminally liable as an accessory. It must be proven beyond a reasonable doubt that a defendant had knowledge of and participated in the commission of a crime.

Appellant's App. p. 98.

On appeal, Weaver claims that this instruction was improper because it "did not specify or even mention the required specific intent of both the principal, Swift, and his alleged accomplice, Weaver." Appellant's Br. at 15. The State correctly notes that Weaver's trial objection to the instruction was not based on grounds that the instruction failed to mention specific intent. Instead, Weaver's objection was based on grounds that the instruction was "overly broad," "confusing to the jury," and "lowers the burden of proof for the State as to the accomplice's knowledge that the crime was going to be committed." Tr. pp. 223-24.

In order to preserve a claim of instructional error for appellate review, a defendant must specify at trial the specific grounds upon which he believes the instruction is improper. Orta v. State, 940 N.E.2d 370, 376 (Ind. Ct. App. 2011), trans. denied. The failure to make a contemporaneous objection to a jury instruction results in waiver, and a defendant may not argue one ground at trial and then raise a different ground on appeal. Id. Here, we conclude that Weaver failed to preserve his claim of instructional error because his objection to the trial court's instruction was not based on the grounds he now argues on appeal. See id.

Perhaps anticipating this conclusion, Weaver claims that the instruction at issue constituted fundamental error. The fundamental error exception to the waiver rule is an

extremely narrow one. Munford v. State, 923 N.E.2d 11, 13 (Ind. Ct. App. 2010). To constitute fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. Id. That is, the error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. Id. at 13-14. When we consider a claim of fundamental error in instructing the jury, we look to the jury instructions as a whole to determine if they were adequate. Id. at 14.

We disagree with Weaver that the trial court committed fundamental error in instructing the jury. First, Weaver acknowledges that the cases he cites in support of his argument involve the crime of attempted murder, not burglary. “Because of the stringent penalties for attempted murder and the ambiguity often involved in its proof,” our supreme court “has singled out attempted murder for special treatment.” Hopkins v. State, 759 N.E.2d 633, 637 (Ind. 2001). Specifically, our supreme court has held:

[A] conviction for attempted murder requires proof of specific intent to kill. And where . . . the State seeks a conviction for attempted murder on an accomplice liability theory, we have held that its burden of proof is as follows:

- (1) that the accomplice, acting with the specific intent to kill, took a substantial step toward the commission of murder, and
- (2) that the defendant, acting with the specific intent that the killing occur, knowingly or intentionally aided, induced, or caused the accomplice to commit the crime of attempted murder.

Id. (citing Spradlin v. State, 569 N.E.2d 948, 950 (Ind. 1991); Bethel v. State, 730 N.E.2d 1242, 1246 (Ind. 2000)).

But our supreme court has required this special treatment *only* for the crime of attempted murder. Indeed, in Richeson v. State, 704 N.E.2d 1008, 1010-11 (Ind. 1998),

the court expressly limited the Spradlin holding to attempted murder, concluding that “the special precautions we took in Spradlin are not warranted for lesser offenses.” Simply put, Spradlin does not apply to burglary.

Moreover, as explained in Richeson, the term “specific intent” has been used to explain differing concepts. “In an attempted murder prosecution, specific intent has meant that the defendant must have taken a substantial step toward the commission of a murder, with the intent to kill, not simply knowing a high probability of or reckless disregard for the fact that death may result.” Id. at 1010 n.1 (citing Spradlin, 569 N.E.2d at 950). In the context of burglary, specific intent “does not prescribe a requisite level of mens rea for the burglary itself, but rather requires that the defendant intended to commit the underlying felony once he broke into and entered onto the premises.” Id.

Here, the jury was informed of this requirement. In fact, the jury was repeatedly instructed that to convict Weaver of burglary, the State had to prove that he intended to commit theft when he broke into and entered onto the premises. See Appellant’s App. p. 77 (jury instruction recounting the charging information); Appellant’s App. p. 80 (jury instruction listing elements of burglary). That the accomplice instruction did not repeat the intent requirement does not constitute fundamental error under the facts and circumstances before us. See Munford, 923 N.E.2d at 14 (when considering claim of fundamental error in jury instruction, court on appeal looks to the instructions as a whole).

### **Conclusion**

The State presented evidence sufficient to support Weaver's conviction for burglary, and the trial court did not err in instructing the jury on the issue of accomplice liability. We therefore affirm Weaver's conviction.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.