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ATTORNEY FOR APPELLANT:

CHRIS P. FRAZIER
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

AUGUST TROTTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0811-CR-1033
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather A. Welch, Judge
Cause No. 49F09-0808-FD-197132

June 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

August Trotter ("Trotter") appeals his convictions of Theft, as a Class D felony,[1] and Criminal Mischief, as a Class A misdemeanor.[2] We affirm.

Issues

Trotter challenges three amendments made to the charges against him. For reasons addressed below, we review one for an abuse of discretion and the other two for fundamental error.

Facts and Procedural History

Before dawn on August 21, 2008, Larry Eakle ("Eakle") looked out a second-floor window of his home and saw Trotter bicycling down the street.[3] Trotter stopped at a parked car, looked in, and attempted to gain entry. He then placed the bicycle against a street light and again attempted to enter the car. Eakle called 9-1-1, while continuing to watch Trotter. According to Eakle,

> [H]e just kept working to get in . . . it took him some time to get into the car. He literally pulled the top of the car door, and got it away from the roof of the car, far enough, to stick him [sic] arm down into the car, and release the locking mechanism some way. And he opened the door, plopped into the driver's seat, just rummaged all through everything. I don't know how long he was in there. He was busy as he could be.
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> . . .

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[1] Ind. Code § 35-43-4-2.

[2] Ind. Code § 35-43-1-2.

[3] All dates herein refer to 2008.

> [T]hen he popped the trunk of the car. Got out of it. It seemed to me like he had something in his hand that he didn't have when he went into the car. Because when he went into it, he had his hands free to work. So, he - uh - came out with something.

Transcript at 17. After searching the car, Trotter bicycled down the street. He was apprehended while Eakle was still on the phone with 9-1-1.

That day, the State charged Trotter with Theft, as a Class D felony, and Criminal Mischief, as a Class A misdemeanor. Specifically, it alleged that:

> "at 1241 [street name]" Trotter exerted unauthorized control over "U.S. CURRENCY LOOSE CHANGE" and
>
> Trotter damaged a 1995 Chevrolet by "prying at it with a tool."

Appendix at 18-19.

On September 22, the State filed a notice of discovery compliance, stating that it had emailed photographs to defense counsel. On October 1, the State moved to amend both charges. As to Theft, the State sought to change the controlled property from loose change to "U.S. currency <u>and/or a padlock</u>." <u>Id.</u> at 42 (emphasis added to identify amendment). Meanwhile, for the Criminal Mischief charge, it proposed to revise the means of entry to include "prying at it with a tool <u>and/or prying at it with his hands</u>." <u>Id.</u> (emphasis added to identify amendment). Trotter objected in writing to the State's proposed amendment of the Theft charge, but not to the proposed change to the Criminal Mischief charge.

On October 6, the trial court heard argument and granted the State's motion to amend. While the appellate record does not include a transcript of this hearing, the Chronological Case Summary states, "Granted OVER DEF'S OBJECTION AS TO CT. I [Theft]." <u>Id.</u> at 9.

That day, the State filed its final list of exhibits, including twenty-one photographs, as well as a "purple padlock and any other property found on the Defendant's person on the night in question." Id. at 51.

On October 22, the day of the jury trial, the State moved, in writing, to amend the Theft charge from "at 1241 [street name]" to "at or near" that address. Id. at 56. Trotter's attorney told the trial court that his client had no objection to this amendment. The trial court granted the motion. The charges, including all three amendments that Trotter now challenges, were attached to preliminary jury instruction number three.

During the State's case in chief, Indianapolis Metropolitan Police Department Officer Joshua Taylor ("Officer Taylor") testified that he searched Trotter incident to the arrest. The State offered a photograph, Exhibit three, which Officer Taylor described as depicting items in Trotter's possession at the time of his arrest, including a screwdriver, coins, and a padlock.

The owner of the 1995 Chevrolet testified that he left the car locked and that coins and a purple padlock were inside the car. Reviewing the photograph marked as Exhibit three, the witness stated that the change "could be anyone's," but that he could identify the padlock based upon its purple color and the fact that the key was attached to a key chain. Tr. at 76.

Trotter presented no evidence. In closing, defense counsel emphasized that the evidence did not establish Trotter as the perpetrator, noting, for example, that it was "pitch dark" and that the State had not offered a unique hat that Trotter had worn.[4] Id. at 93. Trotter also criticized the State's failure to offer the 9-1-1 tape, the coins, and the padlock. Finally,

[4] The appellate record does not include the parties' opening statements.

he asserted that it was incredible that a person could bend the molding or post of a car door enough to reach in and unlock the door.

The final instructions reiterated the applicability of the preliminary instructions, including the revised charges. The jury found Trotter guilty, and the trial court entered judgments of conviction of Theft and Criminal Mischief. Trotter now appeals his convictions based upon the three above-referenced amendments to the State's charges.[5]

Discussion and Decision

I. Abuse of Discretion Standard

Trotter argues that the trial court abused its discretion in allowing the State to amend its charges. While Trotter now challenges three amendments, he preserved error with respect to only one. Therefore, we analyze the amendments pursuant to two different standards of review.

The State's written motions to amend were filed pursuant to Indiana Code Section 35-34-1-5(b) ("Subsection (b)").[6] For such motions, the court must give the parties "adequate notice of the intended amendment and an opportunity to be heard." Ind. Code § 35-34-1-5(d). Upon giving written notice to the defendant at any time before commencement of the trial, the State may amend the information "if the amendment does not prejudice the substantial rights of the defendant." Subsection (b). If the amendment does not affect any

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[5] Trotter does not object to certain other amendments, including the State's allegation that he was a habitual offender.

[6] This statute was amended effective May 8, 2007, fifteen months prior to the instant offense. 2007 Ind. Acts, Pub. L. No. 178-2007, § 1.

particular defense or change the positions of either of the parties, then it does not prejudice the defendant's substantial rights. Stafford v. State, 890 N.E.2d 744, 752 (Ind. Ct. App. 2008). "Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges." Sides v. State, 693 N.E.2d 1310, 1312 (Ind. 1998), abrogated on other grounds by, Fajardo v. State, 859 N.E.2d 1201, 1206 (Ind. 2007), superseded by statute on other grounds by, I.C. § 35-34-1-5(b) (West Supp. 2008); and Hurst v. State, 890 N.E.2d 88, 95 (Ind. Ct. App. 2008), trans. denied. We review the trial court's decision for an abuse of discretion. See Ramon v. State, 888 N.E.2d 244, 253 (Ind. Ct. App. 2008).

Regarding the proposed amendment to include the phrase "and/or a padlock" in the Theft charge, the State emailed photographs to Trotter's attorney at least one month before trial. Exhibit three clearly depicted a purple or blue "Master" padlock. Trotter fails to assert that this photograph was not included in the email disclosure.

The State filed its motion to amend twenty-one days before the jury trial; the trial court heard argument on it sixteen days before trial. Therefore, there is no question that Trotter received written notice and an opportunity to be heard regarding the addition of a padlock as an allegedly stolen item. Also sixteen days prior to trial, the State filed its final list of exhibits, including twenty-one photographs and a "purple padlock and any other property found on the Defendant's person on the night in question." App. at 51.

The amendment did not alter the time, location, or offenses listed in the initial charges. Trotter was already on notice as to the State's basic allegations. Moreover, the addition of

the padlock as an allegedly stolen item was irrelevant to Trotter's main defense – that the State did not prove beyond a reasonable doubt his identity as the perpetrator. Nor was it relevant to Trotter's questioning whether a human being could bend the frame of a car door.

On appeal, Trotter emphasizes the difference between coins that "almost everyone possesses" and a padlock "as these often have serial numbers and a unique combination." Appellant's Brief at 8. However, the record established that the padlock had a key; Trotter fails to cite evidence that the padlock had a unique combination or serial number. Regardless, while Trotter asserts on appeal that "a defense [to taking coins] might no longer be available once the charge was amended [to include a unique item]," he fails to support this proposition with authority or to explain how this resulted in prejudice to his substantial rights. Id. Accordingly, this argument is unavailing.

In Beesley v. State, our Supreme Court concluded that three weeks was adequate time for the accused to prepare a defense to the addition of a habitual-offender allegation. Beesley v. State, 533 N.E.2d 112, 112-13 (Ind. 1989). Here, the initial Theft charge put Trotter on notice regarding the State's allegation. The amendment merely listed an additional stolen item. The State's motion to amend was filed three weeks before trial. Furthermore, it appears that Trotter had a digital photograph of the padlock at least a month before trial. Thus, Trotter had a reasonable opportunity to defend against the Theft charge. Based upon this record, Trotter has failed to establish that he suffered prejudice to his substantial rights from the amendment. The trial court did not abuse its discretion in granting the State's motion to amend.

II. Fundamental Error Standard

"The fundamental error doctrine is an exception to the general rule that the failure to object at trial constitutes a procedural default precluding consideration of an issue on appeal." Jewell v. State, 887 N.E.2d 939, 940 n.1 (Ind. 2008) (citing Benson v. State, 762 N.E.2d 748, 755 (Ind. 2002)). The fundamental error doctrine

> is extremely narrow and available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible.

Jewell, 887 N.E.2d at 942; see also Absher v. State, 866 N.E.2d 350, 354-55 (Ind. Ct. App. 2007) (applying the fundamental error doctrine to the accused's failure to object to amendment of the charges).

Trotter failed to preserve error with respect to the other two challenged amendments to the State's charges. First, while Trotter objected in writing to the amendment addressed above, his filing did not address the proposed amendment to the Criminal Mischief charge; namely, that he pried at the car door with a tool and/or his hands. He did not submit for our review a transcript of the October 6 hearing. The CCS, the only evidence of what occurred at that hearing, referenced only Trotter's objection to the proposed Theft amendment, but not the proposed Criminal Mischief amendment. On appeal, Trotter fails to direct us to anything in the appellate record establishing that he preserved error as to the Criminal Mischief amendment. Second, as evidenced by the trial transcript, Trotter told the trial court that he had "no objection" to changing "1241 [street name]" to "at or near 1241 [street name]" in the

Theft charge. Tr. at 9; App. at 19, 42, and 56. Having waived objection to these two amendments of the charges, Trotter must establish that any error was so prejudicial to his rights that it made a fair trial impossible.

To the contrary, the State alleged in the initial Criminal Mischief charge that Trotter pried open a car door at a particular time and place. Three weeks before trial, the State notified Trotter of its intent to prove that he used either a tool and/or his hands to pry the door open. The basic allegation did not change. Moreover, Trotter had three weeks to prepare a defense to the amended charge.

Finally, on the day of trial, the alleged location of the offense changed from a particular street address to "at or near" that address. This change had no practical significance. Accordingly, Trotter has failed to establish any error whatsoever and certainly not fundamental error.

Conclusion

The trial court neither abused its discretion nor committed fundamental error in allowing the State to amend its charges against Trotter.

Affirmed.

DARDEN, J., and ROBB, J., concur.