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IN THE
COURT OF APPEALS OF INDIANA

NATHANIEL SELBY BRADLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0809-CR-442
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0702-FC-00015

JUNE 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Nathaniel Selby Bradley appeals his conviction of burglary, a Class C felony (Ind. Code § 35-43-2-1). We affirm.

ISSUES

Bradley raises two issues for our review, which we restate as:

I. Whether the trial court's instruction on accomplice liability constituted reversible error.

II. Whether the trial court's evidentiary rulings constituted reversible error.

FACTS AND PROCEDURAL HISTORY

On the afternoon of February 4, 2007, an alarm sounded at L&S Electric, a Hammond business. The Hammond Police Department contacted Ronald Lubas, the owner of the company, and both Lubas and several police officers proceeded to the business location.

Officer Tom Dillner, who had been dispatched to the area, drove by the business location and saw a van with its engine running and headlights on. He also saw a man run along the business' fence and jump into the van. Officer Dillner stopped the van and ordered Bradley and the van's driver, Henry Sistrunk, to exit the vehicle. Officer Dillner determined that the man who had been running along the fence was Bradley, as he exhibited signs of having recently been in cold weather.

A search of the property disclosed that the back door had been forced open, that the windows of business vans had been broken, and that there were tools located in a nearby milk crate. A boot print was found in the snow and was photographed by a police

officer. Bradley's boots and the photographs were sent to the Indiana State forensic laboratory, where a technician confirmed that the print was consistent with Bradley's boot. However, the technician could not state that the print could be conclusively linked to Bradley.

Bradley was charged and convicted by a jury of burglary. He now appeals.

DISCUSSION AND DECISION

I. ACCOMPLICE LIABILITY INSTRUCTION

Bradley contends that the trial court's accomplice liability instruction misstates the law, misleads the jury, and does not help the jury reach a proper verdict. Recognizing that he failed to object to the instruction on this ground, Bradley cites *Ringham v. State*, 768 N.E.2d 893, 898 (Ind. 2002) for the proposition that when jury instructions taken as a whole "are not adequate on the theory surrounding accomplice liability, the giving of the flawed instruction is fundamental error." (Appellant's Brief at 10).

The fundamental error doctrine is extremely narrow, and it 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. *Staley v. State* 895 N.E.2d 1245, 1248 (Ind. Ct. App. 2002), *trans. denied*. When determining whether a defendant suffered a due process violation based on an incorrect jury instruction, this court looks at the instruction in the context of all relevant information given to the jury, including closing argument and other instructions. *Id*.

The trial court has broad discretion in instructing the jury, and this court will review the trial court's decision only for an abuse of that discretion. *Snell v. State*, 866

N.E.2d 392, 395 (Ind. Ct. App. 2007). The trial court's ruling will not be reversed unless the instructions, when taken as a whole, misstate the law or mislead the jury. *Kelly v. State*, 813 N.E.2d 1179, 1185 (Ind. Ct. App. 2004), *trans. denied.* Before a defendant is entitled to reversal, he must affirmatively show that the erroneous instruction prejudiced his substantial rights. *Stringer v. State*, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006).

In reviewing a challenge to a jury instruction, we will consider whether the instruction is a correct statement of the law; whether there was evidence in the record to support giving the instruction; and whether the substance of the instruction is covered by other instructions given by the trial court. *Hubbard v. State*, 742 N.E.2d 919, 921 (Ind. 2001), *cert. denied*, 543 U.S. 869, 122 S.Ct. 160, 151 L.Ed.2d 109 (2001). "The purpose of the instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." *Snell*, 866 N.E.2d at 396.

Bradley contends the instruction in the current case is defective because it confuses the jury by failing to focus on Bradley's voluntary conduct in committing the burglary. Bradley points to a sentence in the instruction that states, "To be guilty, the person does not have to personally participate in the crime nor does he/she have to be present when the crime is committed." (Final Instruction 11; Appellant's Appendix at 82). Bradley argues that this statement "relieves the jury of its duty to first find that Bradley had to perform some voluntary conduct in order to convict him of aiding in the burglary." (Appellant's Brief at 8). He further argues that the jury could have determined "that Bradley remained in the van the entire time Sistrunk was on L&S Electric's property, that

Bradley did not do anything in support of the crime, yet still find him guilty because they were instructed that Bradley did not 'have to personally participate in the crime.'" *Id.*

The disputed instruction informs the jury that a person "*who knowingly or intentionally aids, induces or causes another person to commit Burglary, a Class C felony*, is guilty of Burglary, a Class C felony, even though he/she does not personally participate in each act constituting the Burglary, Class C felony." (Appellant's App. at 82). (Emphasis added). In pertinent part, the remainder of the instruction states:

> In order to commit Burglary, a Class C felony, by aiding inducing or causing another to commit Burglary, a Class C felony, a person must have knowledge that he/she is aiding, inducing or causing the commission of the Burglary, a Class C felony. To be guilty, the person does not have to personally participate in the crime nor does he/she have to be present when the crime is committed. Merely being present at the scene of the crime is not sufficient to prove that he/she aided, induced or caused the crime. Failure to oppose the commission of the crime is also insufficient to prove aiding, inducing or causing another to commit the crime. Presence at the scene of the crime and/or failure to oppose the crime's commission are factors which may be considered in determining whether there was aiding, inducing or causing another to commit the crime.
>
> Before you may convict [Bradley], the State must have proved each of the following elements beyond a reasonable doubt:
>
> 1. [Bradley]
>
> 2. *knowingly or intentionally*
>
> 3. *aided, induced or caused*
>
> 4. [Sistrunk] to commit the offense of Burglary, a Class C felony, as previously defined
>
> 5. *by aiding, inducing or causing the offense of Burglary, a Class C felony*.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you must find [Bradley] not guilty.

Id. (Emphasis added). When read in context and as a whole, the disputed instruction causes none of the problems argued by Bradley. Although the instruction is not a picture of clarity, it neither states nor confuses a jury into believing that Bradley could be found guilty without him performing some voluntary conduct in aiding, inducing, or causing Sistrunk to commit the burglary. *See Boney v. State*, 880 N.E.2d 279, 294 (Ind. Ct. App. 2008), *trans. denied* (noting that a similarly worded instruction was not defective as it "repeatedly used the terms 'aid' and 'participate,' which are words that denote affirmative conduct or action"). *See also Brooks v. State*, 895 N.E.2d 130, 132-33 (Ind. 2008) (upholding a similar instruction). The trial court committed no error here, fundamental or otherwise.

II. EVIDENTIARY RULINGS

Bradley contends that the trial court committed reversible error in two of its evidentiary rulings. First, Bradley contends that the trial court abused its discretion in allowing Hammond Police Officer Gabriel Malave to testify as to what Officer Dillner had told him about why Officer Dillner had stopped the van. Bradley objected on the basis that the question asked for hearsay. Second, Bradley contends that the trial court abused its discretion in allowing Corporal Gregory Adkins to answer the question, "Is it your understanding, opinion as an evidence technician photographing prints that an impression of a boot may have more longevity than the print of a flat, solid tennis shoe [the type of shoe worn by Sistrunk]?" (Tr. at 173). Bradley objected to this question on the basis that it was leading.

A. Hearsay

The decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal. *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). An abuse of discretion occurs where the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before it or when the decision demonstrates a misinterpretation of the law. *Id.* at 703. Hearsay is an out-of-court statement that is offered to prove the substance of the statement itself. Ind. Evidence Rule 801(c). Hearsay is generally inadmissible; however, it may be admitted if it falls within one of the exceptions to the rule. *See* Evid.R. 802.

Here, as noted above, Officer Dillner saw a person running near the business and he stopped the van into which the person had entered. Officer Malave, who arrived shortly thereafter, asked Officer Dillner about the stop. At trial, Bradley objected to Officer Malave's testimony concerning Officer Dillner's response to his question, and the trial court overruled the objection.

The trial court did not abuse its discretion, as the testimony of a police officer regarding statements made to him by another is not hearsay when offered to show that the officer received the information and not for the truth of the information. *Muday v. State*, 455 N.E.2d 984, 988 (Ind. Ct. App. 1983). More specifically, a statement is not hearsay if it goes to show the investigative steps that a police officer takes. *Spencer v. State*, 703 N.E.2d 1053, 1057 (Ind. 1999). Officer Malave's testimony explained his subsequent actions with regard to Bradley and Sistrunk; it was not offered to prove the substance of Officer Dillner's statement. As the State noted in response to the objection, "It [the

question and anticipated answer] goes to why he [Officer Malave] did what he did, why he responded the way he did . . . why he felt justified in doing what he did as an officer." (Tr. at 97-99).

On appeal, Bradley also argues that the trial court abused its discretion because Officer Malave's testimony improperly bolstered Officer Dillner's testimony. Specifically, he refers to Officer Malave's testimony that Officer Dillner observed "a male subject running from the business."

Initially, we note that Bradley failed to object to the question on the basis of improper bolstering or vouching of Officer Dillner's testimony; instead, he made a general hearsay objection. Such failure results in waiver of the issue. *See Pinkston v. State*, 836 N.E.2d 453, 456 (Ind. Ct. App. 2005), *trans. denied*. A party may not object on one ground at trial and raise a different ground on appeal. *Wentz v. State*, 766 N.E.2d 351, 358 (Ind. 2002).

Waiver notwithstanding, Bradley's argument is unavailing. The State did not use Officer Malave's testimony to prove that Bradley had been running along the fence or that Officer Dillner had made the stop. Officer Malave's testimony was used to explain why he took further action in the investigation. His testimony was not used to proved the substance of Officer Dillner's statements to Officer Malave. In short, the testimony was not used for improper bolstering or vouching.

B. Leading Question

Indiana Evidence Rule 611(c) provides, "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's

testimony." A leading question is one that suggests the desired answer to the witness. *Williams v. State*, 733 N.E.2d 919, 922 (Ind. 2000). The use of leading questions is limited in order to prevent the substitution of the attorney's language for the thoughts of the witness as to material facts in dispute. *Id*. The trial court is afforded wide discretion in allowing leading questions, and the trial court's decision will be reversed only for an abuse of discretion. *Bussey v. State*, 536 N.E.2d 1027, 1029 (Ind. 1989).

As noted above, the challenged question directed to Corporal Adkins was, "Is it your understanding, opinion as an evidence technician photographing prints that an impression of a boot may have more longevity than the print of a flat, solid tennis shoe?" (Tr. 173). The trial court ruled that the question did not suggest the answer and overruled Bradley's objection that it constituted a leading question. Corporal Adkins answered, "In my opinion, yes"; but he then followed up by explaining his answer, "In my opinion, a boot has a deeper tread so the actual pattern would probably stay longer, yes." (Tr. 173).

A leading question may be one which, embodying a material fact, admits of a conclusive answer in the form of a simple "yes" or "no." *Vance v. State*, 860 N.E.2d 617, 619 (Ind. Ct. App. 2007). However, the mention of a subject to which a witness is desired to direct his or her attention is not considered to be a suggestion of an answer. *Id.* Where a witness's testimony is not distorted to conform to the possibilities suggested by the question, any error resulting from the question is harmless. *Doerner v. State*, 500 N.E.2d 1178, 1183 (Ind. 1986).

Officer Adkins's testimony was not distorted in order to fit into the categories posed by the question. Accordingly, any error in allowing the question is harmless.

Affirmed.

MATHIAS, J., and BAILEY, J., concur.