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ATTORNEY FOR APPELLANT:

**MICHAEL C. ICE**  
Martinsville, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**ANN L. GOODWIN**  
Special Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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JOHN C. PICHANY, )

Appellant-Defendant, )

vs. )

No. 55A04-0901-CR-10

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE MORGAN CIRCUIT COURT  
The Honorable Matthew G. Hanson, Judge  
Cause No. 55C01-0806-FC-192

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**July 8, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

After John C. Pichany pled guilty pursuant to a plea agreement to burglary and theft but before sentencing, Pichany filed a motion to withdraw his guilty plea. After a hearing on the motion, at which Pichany argued that he falsely pled guilty and contended that he was innocent, the trial court denied the motion. Pichany now appeals, raising the following dispositive issue: whether he asserted that he was not guilty of burglary during his guilty plea hearing. We conclude that Pichany maintained his innocence of burglary during the guilty plea hearing such that the trial court abused its discretion by denying his motion to withdraw the guilty plea as to that charge. We therefore reverse Pichany's conviction for burglary. His conviction for theft remains.

## **Facts and Procedural History**

The facts established at Pichany's guilty plea hearing are as follows. On June 8, 2008, Pichany drove to the building site of the First United Methodist Church in Martinsville. A video recording shows Pichany pulling up to the building in his truck and exiting the truck. Without permission, Pichany then entered the church. His goal was to steal copper tubing and wiring from the building to sell it as scrap. Pichany cut some copper materials and stacked them outside of the church, but police officers appeared on the scene before Pichany removed anything from the site.

The State charged Pichany with Class C felony burglary,<sup>1</sup> Class D felony theft,<sup>2</sup> Class D felony attempted theft,<sup>3</sup> and Class A misdemeanor criminal trespass.<sup>4</sup>

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<sup>1</sup> Ind. Code § 35-43-2-1.

<sup>2</sup> Ind. Code § 35-43-4-2(a).

Appellant's App. p. 6. Pichany, represented by counsel, later pled guilty to burglary and theft under a plea agreement. Pursuant to the terms of the plea agreement, the State dismissed the other two charges, and Pichany agreed to executed sentences of six years for burglary and three years for theft. *Id.* at 28. Pichany also waived his right to appeal his sentence. *Id.* at 28-29. During the guilty plea hearing, the court asked the defense to lay a factual basis for the guilty plea. When defense counsel attempted to elicit from Pichany an admission that he broke into the church, the following exchange occurred:

[COUNSEL]: Okay. And that church, while not completed, required you, I think, to open a door or something to get into that area. Is that a fair way of putting it?

[PICHANY]: No sir, it's not. The doors were open.

[COUNSEL]: The doors – they were unlocked. Right?

[PICHANY]: They were unlocked . . .

[COUNSEL]: All right.

[PICHANY]: . . . and they were open.

Tr. p. 26. Pichany never admitted to unlocking or opening a church door.

After his guilty plea hearing but before sentencing, Pichany, *pro se*,<sup>5</sup> filed a written motion to withdraw his guilty plea. By the time the trial court held a hearing on Pichany's motion to withdraw the guilty plea, Pichany was proceeding *pro se*. The following took place during the trial court's inquiry into whether it should grant or deny Pichany's motion to withdraw his guilty plea:

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<sup>3</sup> Ind. Code §§ 35-41-5-1; 35-43-4-2(a).

<sup>4</sup> Ind. Code § 35-43-2-2.

<sup>5</sup> At the time of filing this motion, Pichany was represented by appointed counsel. However, he filed the motion to withdraw his guilty plea on the same day that he filed a motion entitled "Motion for Pro Se Counsel." At the hearing on the motions, the trial court addressed and granted the motion to proceed *pro se* before addressing the motion to withdraw the guilty plea.

THE COURT: What's your grounds or basis for overcoming the guilty plea that you've already given to this Court?

MR. PICHANY: 'Cause one, I did not commit the crime. . . .

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THE COURT: . . . [Y]ou wanted to plead guilty to that plea agreement, did you not?

MR. PICHANY: That, I did.

THE COURT: Okay. And then we also asked you to lay a factual basis I believe with your attorney's help and at that time he set out all of the elements of the crime to which you're offering to plead guilty and if I remember right, there wasn't any question – I'll go back and listen to it if you want me to – but there was no time where you said no, I didn't do that or no, that's not right or no, I didn't commit that crime or no, I disagree with that. Was there any of that at all 'cause I don't remember it?

MR. PICHANY: I believe there was a couple of times I made some corrections on that, Your Honor.

THE COURT: Okay. But were they corrections that would, that then did not allow me to find that you pled guilty?

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THE COURT: . . . Would you like to go back and listen to your – we can probably play that right now. Would you like to go back and listen to your factual basis?

MR. PICHANY: No sir. I remember what I said.

THE COURT: Okay. So you would agree in your factual basis that you laid all of the elements necessary down for the commission of these crimes?

MR. PICHANY: If you say so.

THE COURT: Well, I'm not saying so, sir. I'm asking do you want to go back – we can listen to it right now.

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THE COURT: Okay. Is, was there anything in there that would suggest that you did not commit these crimes?

MR. PICHANY: Your Honor, I know what I done. I did not commit the crimes.

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THE COURT: We're back on record. All right. We're back on record. We've listened to the tape from the October 22, 2008 laying of the factual basis for Burglary and Theft in this case and you heard it too, sir. I think, I hope you could hear it through there.

MR. PICHANY: Yes sir.

THE COURT: It seemed to pretty much suggest you were answering his questions yes sir, no sir, and the few things you corrected really didn't have anything to do with the case. It had to do with a videotape that you had not seen but that was insignificant for laying a

factual [basis] and then it also had to do with a door, whether it was, you opened or closed it and you said it was open, I believe, and again, that doesn't matter as long as you entered the residence, did break and enter and a breaking can be going through a door, pushing open a door, and I think you said there were no locks on it is what I heard as well in that. . . . So do you have any other evidence that you could, that would vacate this – I've already asked once; I don't think that you do – but what else do you have?

MR. PICHANY: The evidence that I have is the State hasn't proved their case.

*Id.* at 39-46. The trial court then denied Pichany's motion to withdraw his guilty plea. He now appeals.

### **Discussion and Decision**

Pichany appeals the denial of his motion to withdraw his guilty plea to the charge of burglary.<sup>6</sup> In support of his position, he raises the following dispositive issue: whether he asserted that he was innocent of burglary during his guilty plea hearing.

Whether a trial court should grant a motion to withdraw a guilty plea is governed by Indiana Code § 35-35-1-4(b), which provides:

After entry of a plea of guilty . . . but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea . . . for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea . . . . The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea . . . whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

On appeal, a trial court's ruling on a motion to withdraw a guilty plea carries with it a presumption of validity, and we will only review it for an abuse of discretion. *Weatherford v. State*, 697 N.E.2d 32, 34 (Ind. 1998), *reh'g denied*.

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<sup>6</sup> Pichany makes no argument relating to his guilty plea to theft.

A trial court may not accept a guilty plea from a defendant who pleads guilty but simultaneously maintains his or her innocence. *Johnson v. State*, 734 N.E.2d 242, 245 (Ind. 2000) (citing *Ross v. State*, 456 N.E.2d 420, 423 (Ind. 1983)). Pichany argues that he maintained his innocence of the crime of burglary, even while pleading guilty to the charge, and that the trial court abused its discretion by denying his motion to withdraw his guilty plea. The State responds that (1) Pichany never presented this argument to the trial court, and it is now waived and (2) Pichany did not proclaim his innocence at the guilty plea hearing. Appellee's Br. p. 7. We disagree with the State on both counts.

First, the transcript from the hearing on Pichany's motion to withdraw his guilty plea reveals that Pichany *did* present this argument, albeit ineloquently, to the trial court during the hearing. Tr. p. 42 (Pichany pointing out to the trial court that he had asserted contradictory information during the laying of the factual basis for his guilty plea), 46 (Pichany arguing that the State failed to "prove their case" during the guilty plea hearing). Pichany's argument on appeal is not waived.

Second, Pichany asserted his innocence to the offense of burglary during his guilty plea hearing. Pursuant to Indiana Code § 35-35-1-3, the trial court may not "enter judgment upon a plea of guilty . . . unless it is satisfied from its examination of the defendant or the evidence presented that there is a factual basis for the plea." As our Supreme Court has explained, "[t]he factual basis requirement primarily ensures that when a plea is accepted there is sufficient evidence that a court can conclude that the defendant could have been convicted had he stood trial." *Butler v. State*, 658 N.E.2d 72, 76 (Ind. 1995). In order to convict a defendant of Class C felony burglary, the State must

prove that the “person . . . br[o]ke[] and enter[ed] the building or structure of another person, with intent to commit a felony in it[.]” I.C. § 35-43-2-1. In order to establish the “breaking” element of burglary, all that is necessary is evidence that the defendant “[u]s[ed] even the slightest force.” *Davis v. State*, 770 N.E.2d 319, 322 (Ind. 2002), *reh’g denied*. Here, no such evidence or admission by Pichany was provided during the guilty plea hearing. *See* Tr. p. 26 (Pichany testifying that the church doors were unlocked and open). As the State concedes, we have previously determined that where a defendant refuted an element of an offense during a guilty plea hearing, the defendant was claiming innocence while also pleading guilty. *Webster v. State*, 708 N.E.2d 610, 615 (Ind. Ct. App. 1999), *trans. denied*. Here, too, Pichany’s claim that “[t]he doors were open” and, thus, that he did nothing to open the church doors amounts to a refutation of an element of the crime of burglary and is, therefore, a claim of innocence to the charge. *See Cockerham v. State*, 246 Ind. 303, 204 N.E.2d 654, 657 (1965) (“Walking through an open door does not constitute a ‘breaking’ as such element is known in the crime of burglary.”).

Because Pichany maintained his innocence to the charge of burglary while simultaneously pleading guilty to it, the trial court should not have accepted his guilty plea to burglary, pursuant to Indiana Code § 35-35-1-3(b). Thus, the trial court abused its discretion by denying Pichany’s motion to withdraw the guilty plea to burglary. Pichany makes no argument about his theft conviction on appeal, and we affirm the trial court’s denial of his motion to withdraw his guilty plea to theft.

Finally, we observe that the prohibition against double jeopardy does not bar the State from re-prosecuting Pichany for burglary. “[A] defendant is not put in jeopardy by a void judgment and may be re-prosecuted on the charge.” *Niece v. State*, 456 N.E.2d 1081, 1084 (Ind. Ct. App. 1983) (citing *Slack v. Grigsby*, 229 Ind. 335, 97 N.E.2d 145 (1951)); *see also Boykin v. State*, 702 N.E.2d 1105, 1107 n.10 (Ind. Ct. App. 1998).

Affirmed in part and reversed in part.

NAJAM, J., and FRIEDLANDER, J., concur.