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FILED
Jul 14 2009, 9:11 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

JACOB I. POWELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 24A01-0811-CR-546
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0601-FB-072

JULY 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Jacob Powell appeals his conviction by jury of burglary as a class B felony as well as his twenty-year sentence thereon. We affirm.

Powell raises the following issues for our review:

I. Whether fundamental error occurred at trial; and

II. Whether his sentence is inappropriate.

The facts most favorable to the verdict reveal that on December 1, 2005, as Leah McCool was leaving her rural Franklin County home to run errands, she noticed an unfamiliar car being driven past her home. When she returned home about an hour later with two of her four children, McCool noticed that the back door of the house had been forcibly opened. The interior of the house was in a shambles. Cupboards were open, baskets were flipped over, and drawers were pulled out and dumped upside down. McCool subsequently realized that audio and video equipment, computers, clothing, jewelry, collectible items, and wrapped Christmas presents had been stolen from the home.

One month later, forty-five-year-old Larry Ailes was arrested for a drug offense in Ohio. As a result of the arrest, Ailes "came to his senses, and . . . wanted to get [his criminal history] all behind [him]," so he contacted authorities in Franklin, Rush, and Union Counties in Indiana and confessed to multiple burglaries. Tr. at 147. As part of his cooperation with authorities, Ailes took Franklin County Sheriff's Department Detective Doug Baker on a tour of Franklin County houses that he had burglarized. One of these houses was McCool's home. Ailes told Detective Baker that he had burglarized the home with twenty-year-old Powell and his brother, Joshua, the two sons of Ailes'

friend, Mike Powell. Ailes explained that Mike and Joshua were involved in several Franklin County burglaries with him, but that the burglary of the McCool home was the only one in which Powell participated.

Powell was charged with one count of class B felony burglary. At trial, Ailes testified that the day of the McCool burglary, the three men met at Joshua's house in Connersville and drove to Franklin County looking for homes to burglarize. When the men saw McCool leaving her house, they decided to further investigate it to see whether anyone was at home. After knocking at the front door and getting no response, Joshua broke down the door and Ailes and Powell went into the house. The three men quickly ransacked the house looking for items to take and then loaded them into the car. As the three men were driving away from the house, Joshua became angry because Powell had forgotten to bring a large plastic bag of prescription medication when the men left the house. McCool found such a bag in her bedroom. It contained her husband's prescription medication, which was usually kept in the kitchen cabinet.

Ailes further testified that he and Joshua were together almost every day, but that this was the first time Powell had accompanied them to a burglary in Franklin County. Ailes also testified that in the past, he and the Powell brothers had bought and used crack cocaine together, and that the purpose of the burglaries was to fund the men's drug habits.

At the time of Powell's trial, Ailes had been convicted of various offenses and was serving time at the Department of Correction. He had not been promised anything in

exchange for his testimony at Powell's trial, though he did not receive the maximum penalties for the burglaries he had detailed in his police statements.

Powell testified that he was not with his brother or Ailes when they burglarized the McCool's home. He did not, however, remember where he had been that day. The jury convicted him of class B felony burglary, and the trial court sentenced him to twenty years with ten years suspended. Powell appeals his conviction and sentence. Our discussion of the issues includes additional facts.

Powell argues that fundamental error occurred at trial. Specifically, he claims three errors that occurred without objection during 1) voir dire; 2) the presentation of evidence; and 3) the State's closing argument, individually and collectively deprived him of a fair trial.

Failure to object at trial customarily means that a party has not preserved any claim for appeal. *Goodwin v. State*, 783 N.E.2d 686, 687 (Ind. 2003). The fundamental error exception to this 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. *Purifoy v. State*, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005), *trans. denied*. Fundamental error must be of such magnitude that the defendant could not possibly have received a fair trial or that the verdict is clearly wrong or of such dubious validity that justice cannot permit it to stand. *Brown v. State*, 799 N.E.2d 1064, 1068 (Ind. 2003). The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule.

Purifoy, 821 N.E.2d at 412. Fundamental error, therefore, requires a defendant to show greater prejudice than ordinary reversible error because no objection has been made. *Id*.

We now turn to Powell's specific allegations of fundamental error. Powell first argues that fundamental error occurred during voir dire when the State questioned the prospective jurors about the credibility they would give to a witness who had already pleaded guilty to the same burglary with which Powell was charged. In support of his argument, Powell directs us to *Underwood v. State*, 535 N.E.2d 507, 513 (Ind. 1989), *cert. denied*, 493 N.E.2d 900 (1989), wherein the Indiana Supreme Court explained that it is improper to question prospective jurors about the credibility they would give to a witness who had received a plea bargain in exchange for his or her testimony because such questioning would allow a party to predetermine the weight and credibility jurors would give to a witness. Here, however, Ailes, the witness to which the State was referring, received nothing in exchange for his testimony. Further, even if the State's questions were improper, Powell has failed to show greater prejudice than ordinary reversible error. *See Purifoy*, 821 N.E.2d at 412.

Powell next argues that fundamental error occurred when the prosecutor asked the jury during closing argument to convict Powell for being part of a "burglary ring feeding a crack cocaine addiction." Appellant's Br. at 6. Specifically, the State argued as follows:

> This is a group of friends, the Powell family and Larry Ailes. The old saying 'thicker than thieves" that's exactly what these guys are. (Inaudible) what I mean you haven't heard the whole story, you heard about this county, that county, that burglary, that burglary. Lucky for all of us we're not here for all of them or we'd be here for literally months. You're here

> for one home. And the old saying that drugs those are victimless crimes, nothing could be father from the truth. What was going on here was a crack cocaine addiction by friends who (inaudible) in the homes throughout Franklin County. . . . This is a group from Connersville, Indiana who really have no reason to be down in this area. . . .

Tr. at 209-210.

We disagree with Powell's characterization of the State's comments. Our review of the transcript reveals evidence that Ailes, Joshua and Mike participated together in numerous burglaries in Franklin County, and that Ailes used crack cocaine every day. The prosecutor's comments in closing argument were merely fair comments characterizing this evidence. *See Etienne v. State*, 716 N.E.2d 457, 462 (Ind. 1999) (stating that even improper comments in closing argument might not be egregious enough to constitute fundamental error). Ailes was also very clear that Powell participated only in the burglary at the McCool home, and that Powell occasionally purchased and used crack cocaine with Ailes. We find no fundamental error.

Powell also contends that fundamental error occurred when Ailes testified that after he implicated the Powells in the burglaries, the Powells threatened him and arranged for another inmate to stab him with an ink pen when he was in jail. Specifically, Powell complains that Ailes' testimony constitutes fundamental error because there is no evidence that Powell was responsible for the threat or even had any knowledge of it. In support of his contention, Powell directs us to *Cox v. State*, 422 N.E.2d 357, 362 (Ind. Ct. App. 1981), wherein this court found error in the admission of similar testimony because there was no shown connection between the defendant and the threat. There, we found the admission of such evidence was prejudicial error requiring reversal and a new trial.

Id. at 363. We did not, however, find that it was fundamental error. Here, even if this testimony was erroneously admitted, Powell has failed to show greater prejudice than ordinary reversible error. *See Purifoy,* 821 N.E.2d at 412.

Lastly, Powell argues that even if none of his alleged errors constituted fundamental error, the collective impact of the errors deprived him of a fair and impartial trial. However, because we have found that none of the individual issues raised any question of fundamental error, we do not find that they cumulatively rise to that level. *See Didio v. State,* 471 N.E.2d 1117, 123-24 (Ind. 1984) (stating that where none of the defendant's individual issues raised any question of prejudicial error that merited reversal, the alleged errors did not cumulatively rise to that level).

Powell further argues that his twenty-year sentence is inappropriate. When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(b).

Here, with regard to the character of the offender, Powell has a prior criminal history that includes three misdemeanor and three felony convictions. Two of the felony convictions were for theft. Powell also violated a term of probation. His prior contacts with the law have not caused him to reform himself.

With regard to the nature of the offense, Powell ransacked the home of a family with four children and stole wrapped Christmas presents. He also stole the children's clothing and jewelry, as well as one of the boy's Nike gym bag and coin collection.

Powell's prior convictions show a pattern of crimes indicating a disregard for other persons and their property. *See Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004) (holding that the significance of prior criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the current offense).

Based upon our review of the evidence, we see nothing in the character of this offender or in the nature of this offense that would suggest that Powell's sentence is inappropriate.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.