

STATEMENT OF THE CASE

Defendant-Appellant James M. Mrozinski appeals his convictions of robbery, a Class B felony, Indiana Code section 35-42-5-1 (1984), and burglary, a Class B felony, Indiana Code section 35-43-2-1 (1999). We affirm.

ISSUES

Mrozinski raises two issues, which we restate as:

- I. Whether the trial court abused its discretion by admitting evidence of Mrozinski's past criminal conduct.
- II. Whether, as a matter of fundamental error, the trial court erred by admitting evidence obtained through a probation officer's search of Mrozinski's apartment.

FACTS AND PROCEDURAL HISTORY

On June 9, 2009, Beatrice Baker awoke in her home at around four a.m. A man shined a light in her face, pointed a gun at her, and told her not to move. The man took forty-five or fifty dollars from Baker's purse, as well as her ATM card and the PIN number for the card. Next, the man took Baker's cell phone. He had already cut the phone line for the house, and before he left he took Baker's cell phone apart. After the man left, Baker located another cell phone and called her family, who called the police. When the police arrived, they discovered that Baker's car was missing. Furthermore, her back door had been pried open. In addition, Baker's ladder had been placed against the side of her house to reach a window. Baker had not placed the ladder there.

The police began a search for Baker's car. Approximately twenty minutes after the police were called to Baker's house, an officer located Baker's car at a supermarket

and began to search the area. The officer encountered Mrozinski nearby and questioned him. Mrozinski said that he was on his way to buy coffee, and the officer did not detain him. Mrozinski entered a convenience store, where he told the clerk he had just been questioned about a robbery. The officer had not told Mrozinski the nature of the crime he was investigating. At the store, Mrozinski displayed a “wad of money.” Tr. p. 213. Next, Larina Taylor arrived at the convenience store, having given two acquaintances a ride there. Taylor and Mrozinski knew each other, and he approached her in the store’s parking lot. Mrozinski asked Taylor to give him a ride in exchange for \$10, but she refused. After that, one of Taylor’s passengers got out of Taylor’s car to talk with Mrozinski, and the two men walked away.

At the time the crimes were committed, Mrozinski was on probation. On June 12, 2009, police officers contacted Mrozinski’s probation officer, Rebecca Fistel, and told her that, based on viewing surveillance video from the convenience store and talking with Taylor, they believed that Mrozinski had been involved in a drug buy. Fistel went to Mrozinski’s home with two officers to test Mrozinski for drugs and to look for contraband. Mrozinski lived with his parents. When the officers arrived at Mrozinski’s home, he gave Fistel permission to search his room. Fistel searched the room while police officers watched. Mrozinski conceded that he had recently used cocaine, but Fistel did not find any drugs in his room. Based on their observations during Fistel’s search, the police officers sought and obtained a search warrant for the house. When they executed the warrant, the officers photographed some items, confiscated others, and arrested Mrozinski.

The State charged Mrozinski with robbery, burglary, and other offenses not at issue in this appeal. Mrozinski's first trial ended in a mistrial. Mrozinski was tried again on the robbery and burglary charges, and a jury found him guilty on both charges. The trial court sentenced Mrozinski accordingly, and he now appeals.

DISCUSSION AND DECISION

I. ADMISSION OF EVIDENCE OF PAST CRIMINAL CONDUCT

Mrozinski argues that the trial court violated Indiana Evidence Rule 404(b) by admitting at trial evidence of his prior criminal conduct. The decision to admit evidence is within the sound discretion of the trial court and is afforded a great deal of deference on appeal. *Hauk v. State*, 729 N.E.2d 994, 1001 (Ind. 2000). We review evidentiary determinations for abuse of discretion and will not reverse such decisions unless the decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

Indiana Evidence Rule 404(b) provides, in relevant part,

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,

The list of "other purposes" set forth in the rule is illustrative, not exhaustive. *Hicks v. State*, 690 N.E.2d 215, 219 (Ind. 1997).

Evidence is excluded under Indiana Evidence Rule 404(b) when it is introduced to prove the "forbidden inference" of demonstrating the defendant's propensity to commit the charged crime. *Clark v. State*, 915 N.E.2d 126, 129-30 (Ind. 2009). When addressing

the admissibility of evidence under Rule 404(b), a trial court must: (1) assess whether the evidence has some relevancy to a matter at issue other than the defendant's propensity to commit the charged act; and (2) weigh the probative value of the evidence against its prejudicial effect, pursuant to Indiana Evidence Rule 403. *Scalissi v. State*, 759 N.E.2d 618, 623 (Ind. 2001).

In this case, during opening arguments Mrozinski did not dispute that Baker had been robbed, but he denied that he was responsible. Mrozinski also asserted that it was impossible for him to have committed the crimes in the time frame established by the State. During the presentation of evidence, Baker testified that after the burglary and robbery, someone told her that her ladder had been placed against the side of her house near a window. That information caused Baker to recall an incident in 1997 when Mrozinski was working on her roof. When Mrozinski was working on the roof, Baker left an upstairs window open so that Mrozinski could place a ladder at the window and come in to use the restroom or get a drink. Later, Baker discovered that someone had stolen checks from her home. She also discovered damage to the window through which Mrozinski had entered the house when he was working on the roof. Subsequently, Baker's missing checks were cashed, and Baker learned that all of the stolen checks were payable to Mrozinski. Immediately following Baker's testimony on the 1997 incident, the following colloquy occurred:

[DEFENSE]: Your honor, at this time the defendant would request a limiting instruction regarding the 1997 conduct?

[COURT]: The 1997 conduct testimony that you've heard cannot be used to directly determine the guilt of the defendant

in the instant case. It can be only used for the prop— for the purposes of establishing the identification through what you may have heard of as an MO or an opportunity. It’s a fine distinction and you cannot – and, and you can only use it for those limiting purposes – limited purposes.

[STATE]: Thank you?

[COURT]: You happy with that?

[DEFENSE]: Not evidence of guilt?

[COURT]: Right.

[STATE]: In this case?

[COURT]: Right.

Tr. pp. 80-81.

Pursuant to Indiana Evidence Rule 401, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. We conclude that Baker’s testimony as to the 1997 theft was relevant to establish Mrozinski’s opportunity to commit the crimes and to establish his method of operation. Mrozinski disputed that he could have committed the burglary and robbery in the time allowed, which opened the door for the State to show that Mrozinski was familiar with the layout of the house and the best means of ingress. In addition, evidence of the 1997 incident has probative value to demonstrate that Mrozinski was aware that an upstairs window was accessible by ladder, which tends to show a method of operation. *See Pickens v. State*, 764 N.E.2d 295, 300 (Ind. Ct. App. 2002), *trans. denied* (determining that evidence that the

defendant had an assault rifle in 1996 was relevant to show that the defendant had access to the type of weapon that was used in a 1998 murder).

Next, we weigh the probative value of the 1997 incident against its prejudicial effect on Mrozinski. Mrozinski argues that the evidence was highly prejudicial because its only purpose was to establish his propensity to commit crimes. We disagree. As we have determined, the evidence in question is relevant to establish that Mrozinski had the opportunity to commit robbery and burglary and had a method of operation. Furthermore, the trial court specifically instructed the jury not to consider the evidence of the 1997 incident as proof of guilt for the charges at trial. Our Supreme Court has long held that when a jury is properly instructed by the trial court, the jury is presumed to have followed such instructions. *Scalissi*, 759 N.E.2d at 623. Considering these factors, any prejudice arising from the evidence did not outweigh its probative value.

Mrozinski contends that the State failed to present sufficient evidence to establish that Mrozinski committed the 1997 theft of Baker's checks, which, he contends, renders the evidence inadmissible. When a party seeks to admit evidence of a prior crime, wrong or act pursuant to Indiana Evidence Rule 404(b), there must be sufficient evidence at trial to support a finding by the jury that the accused committed the similar act. *Clemens v. State*, 610 N.E.2d 236, 242 (Ind. 1993). "Substantial circumstantial evidence of probative value is sufficient." *Id.*

In this case, Baker testified that in 1997, Mrozinski had access to her house through an upstairs window when he was working on her roof. After Baker returned from a vacation, she learned that checks had been stolen from her house, and the window

that Mrozinski had used to enter her home was broken. Some or all of the stolen checks were cashed, and they were payable to Mrozinski. This circumstantial evidence is of sufficient probative value to support a finding that Mrozinski entered Baker's house and took Baker's checks. For these reasons, the trial court did not abuse its discretion by admitting evidence regarding the 1997 incident.

II. ADMISSION OF EVIDENCE OBTAINED THROUGH A PROBATION SEARCH

Mrozinski alleges that the trial court erred by admitting at trial evidence related to “[a] ski mask, stocking caps, a brown jacket, a Crossman Handgun, wire cutters and screwdrivers” found at Mrozinski's home. Appellant's Br. p. 15. Mrozinski claims the evidence was obtained through an illegal search because Fistel's search of his home was, in substance, a criminal investigation rather than a probation search and violated his protections under the federal and state constitutions against illegal search and seizure.

Prior to trial, Mrozinski filed a motion to suppress all evidence found in his home. The trial court denied Mrozinski's motion. At trial, Mrozinski did not object to admission of any of the evidence he now challenges on appeal. The failure to make a contemporaneous objection to the admission of evidence at trial, so as to provide the trial court an opportunity to make a final ruling on the matter in the context in which the evidence is introduced, results in waiver of the error on appeal. *Brown v. State*, 783 N.E.2d 1121, 1125 (Ind. 2003). A trial court's denial of a motion to suppress is not sufficient to preserve the error. *Tate v. State*, 835 N.E.2d 499, 505 (Ind. Ct. App. 2005), *trans. denied*. Consequently, Mrozinski has waived this claim of error.

In his Reply Brief, Mrozinski attempts to avoid waiver by arguing that the admission of the evidence was fundamental error. In general, a claim raised for the first time in a reply brief is waived. *See French v. State*, 778 N.E.2d 816, 825-26 (Ind. Ct. App. 2002) (determining that the appellant had waived a claim of ineffective assistance of counsel by presenting it in the reply brief for the first time). Nevertheless, we will consider whether the admission of the evidence obtained from Mrozinski's home constituted fundamental error.

The fundamental error exception 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. *Delarosa v. State*, 938 N.E.2d 690, 694 (Ind. 2010). The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process. *Id.* This exception is available only in egregious circumstances. *Id.*

In *Allen v. State*, 743 N.E.2d 1222, 1226 (Ind. Ct. App. 2001), *trans. denied*, officers investigating a series of burglaries discovered that Allen had displayed a pistol to a witness. Allen was on probation, and the officers learned from Allen's parole officer that he was forbidden to possess firearms as a condition of his parole. The probation officer, accompanied by the investigating officers, went to Allen's home. The probation officer searched the home and discovered stolen property. Allen contended that the admission of the stolen property at trial violated his protection under the Fourth

Amendment to the United States Constitution against illegal search and seizure. This Court noted that when a defendant challenges the propriety of a probation search,

a court should determine whether the search was indeed a parole or probation search. If the search was not conducted within the regulatory scheme of parole/probation enforcement, then it will be subject to the usual requirement that a warrant supported by probable cause be obtained. If the search is a true parole/probation search, then a court must determine whether the search was reasonable.

Id. at 1228. The *Allen* court concluded that Allen’s display of a pistol to a witness justified the search, and the probation officer testified that his main objective was to determine whether Allen was in violation of the terms of his parole. Thus, the court determined that the search was a proper probation search, and the search was reasonable. *See id.* at 1229.

In this case, the officers investigating the burglary and robbery at Baker’s house approached Mrozinski’s probation officer, Fistel, and told her that they had reason to believe Mrozinski had participated in a drug buy. Fistel, not the officers, decided to test Mrozinski for drugs. Fistel went to Mrozinski’s home with the officers. She was “in charge” of the home visit and did all of the talking. Tr. p. 565. Fistel conducted the search of Mrozinski’s room. An officer was present in the room and advised Fistel on the permissible scope of her search, but he otherwise did not participate in the search. The facts of this case are similar to those in *Allen*, and we conclude that the search was a true probation search and was reasonable in scope.¹ *See Allen*, 743 N.E.2d at 1229; *see also*

¹ Mrozinski notes that Fistel’s search of his residence was the first she had ever performed in fourteen years as a probation officer and contends that one of the officers directed Fistel’s search. This is a request to reweigh the evidence, which does not comply with our standard of review. *See Allen*, 743 N.E.2d at 1228 (viewing the facts in the light most favorable to the trial court’s ruling).

Bonner v. State, 776 N.E.2d 1244, 1250-51 (Ind. Ct. App. 2002), *trans. denied* (determining that a probation search of the defendant’s residence was reasonable within the meaning of the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Indiana Constitution). Because the probation search of Mrozinski’s residence follows our caselaw on the subject, the admission of the evidence obtained during the search does not constitute a blatant violation of basic principles that deprived Mrozinski of fundamental due process. We find no fundamental error. *See Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) (determining that the admission of evidence obtained through a search of the defendant’s home during a “knock and talk” investigation did not rise to the level of fundamental error).

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

MAY, J., and CRONE, J., concur.