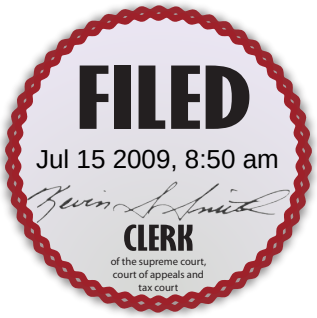
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

PHILIP R. SKODINSKI
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JOSEPH ROBERT DELAMATER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY B. BROWN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-0812-CR-688
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable R. W. Chamblee, Jr., Judge
Cause No. 71D08-0710-FB-140

July 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Timothy B. Brown appeals his conviction for class B felony burglary[1] and class B felony robbery.[2]

We affirm.

ISSUE

Whether the trial court abused its discretion in refusing a tendered jury instruction.

FACTS

During the last week of September of 2007, Linda Klein cashed a check in the amount of $327.00 for her elderly mother, Leona Berkey. By October 20, 2007, Berkey had "about 200 to 180" of the original $327.00 remaining. (Tr. 225).

During the late afternoon of October 20, 2007, a "black, probably about five six, five seven, skinny" male knocked on the door of Matt Truex's home on Beech Road—less than two miles south of New Road—in Wakarusa. (Tr. 207). The man, who was driving a white pick-up truck, asked for directions to Elkhart. He explained to Truex that he was from Elkhart, but "the country roads messed [him] all up." (Tr. 207). After getting directions, he proceeded to drive north.

At about the same time, Rick Brock, who lived across the street from Truex, arrived home and noticed a "little white truck" pull into Truex's driveway. (Tr. 213). He observed that the driver was a black male wearing a ball cap and light-colored shirt.

---

[1] Ind. Code § 35-43-2-1.
[2] I.C. § 35-42-5-1.

At approximately 4:00 p.m. that same afternoon, Brown knocked on the door of Berkey's residence, located on New Road in Wakarusa. He told Berkey that he needed money to buy some gasoline. After Berkey told him that she did not have any money and went back into her house, she heard the sound of Brown breaking through her door. He entered her home"; "threw [her] down on the floor"; held a box cutter close to her face; and "said he was going to kill [her]." (Tr. 264). After she told him that she would "have to get up to go get" her money, he pulled her to her feet. (Tr. 265-66). She then went to her bedroom and retrieved an envelope containing her remaining cash and a bank statement. Brown took the envelope and left in a white pick-up truck.

At 4:30 p.m., St. Joseph County reserve officer, Joseph Nania, received a call that there had been a home invasion and robbery on New Road. The dispatch described the suspect as a black male, wearing a black hat, white shirt, and dark pants. It also described the suspect's vehicle as a white truck. As Officer Nania stopped at the intersection of Beech Road and Lincoln Way, he observed "a vehicle and a suspect matching [the] description that was given." (Tr. 287). He followed the vehicle until the driver stopped at a car lot on Lincoln Way. He then approached the driver, who identified himself as Brown.

Brown admitted that his license was suspended; that the truck did not belong to him; and that there were "traffic warrants out for him in Elkhart County." (Tr. 289). Given Brown's statements, Officer Nania handcuffed him and conducted a search of Brown, whereupon he discovered "$180 in $20 bills" and a "CD bank statement in his right pocket[.]" (Tr. 290). A subsequent inventory search of the truck revealed a box

cutter. Another officer later determined that the account number on the bank statement found on Brown's person was that of Berkey.

Approximately thirty to forty minutes after Brown had left the Truex residence, Brock left his residence. As he was driving on Lincoln Way, he noticed that some police officers had pulled over "that little white truck" he had seen earlier. (Tr. 215). Brock stopped and informed the officers that he had seen the truck in his neighborhood. Brock recognized the driver as the man who had asked Truex for directions.

On October 23, 2007, the State charged Brown with Count 1, class B felony burglary; and Count 2, class B felony robbery. A jury trial commenced on August 11, 2008, after which the jury found Brown guilty as charged. The trial court held a sentencing hearing on September 17, 2008, and sentenced Brown to concurrent sentences of twenty years on each count.

Additional facts will be provided as necessary.

DECISION

Brown asserts that the trial court erred in refusing a tendered jury instruction.

> The trial court has broad discretion in the manner of instructing the jury and we review its decision thereon only for an abuse of that discretion. We review the refusal of a tendered instruction by examining whether the tendered instruction correctly states the law, whether there is evidence in the record to support giving the instruction, and whether the substance of the tendered instruction is covered by other given instructions. Jury instructions are to be considered as a whole and in reference to each other. The ruling of the trial court will not be reversed unless the instructions, when taken as a whole, misstate the law or mislead the jury. Before a defendant is entitled to a reversal, he must affirmatively show that the erroneous instruction prejudiced his substantial rights.

* * *

> The purpose of an 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. In instructing a jury, the trial court has a statutory duty to state to the jury all matters of law that are necessary for its information in giving its verdict.

Snell v. State, 866 N.E.2d 392, 395-96 (Ind. Ct. App. 2007) (internal citations omitted).

Brown tendered the following jury instruction: "A reasonable doubt may arise from the evidence or from a lack of evidence or from a conflict in the evidence on or concerning a given fact or issue." (App. 14). It appears that the trial court gave the following instruction:[3]

> A "reasonable doubt" is a fair, actual and logical doubt. It is a doubt based upon reason and common sense, and not a doubt based upon imagination or speculation.
>
> If, after impartially considering all of the evidence and circumstances in the case, you reach such a firm belief in the Defendant's guilt that you would feel safe to act upon that belief, without hesitation, in a matter of the highest concern and importance to you when you are not required to act at all, then you will have reached that degree of certainty which excludes reasonable doubt and allows conviction.

(App. 15).

In *Winegeart v. State*, 665 N.E.2d 893 (Ind. 1996), the trial court instructed the jury as follows:

> A reasonable doubt is such doubt as you may have in your mind when having fairly considered all of the evidence, you do not feel satisfied to a moral certainty of the guilt of the defendant. <u>A reasonable doubt is a fair, actual and logical doubt that arises in the mind as an impartial consideration of all the evidence and the circumstances in the case</u>. It is not every doubt,

[3] The reading of the trial court's preliminary and final instructions was omitted from the transcript. Although Brown provides this instruction in his Appendix, it is not titled as a final instruction and is not provided in its entirety.

> however, it is a reasonable one. You are not warranted in considering as reasonable those doubts that may be merely speculative or products of the imagination, and you may not act upon mere whim, guess or surmise or upon the mere possibility of guilt. A reasonable doubt arises, or exists in the mind, naturally, as a result of the evidence or the lack of evidence. There is nothing in this that is mysterious or fanciful. It does not contemplate absolute or mathematical certainty. Despite every precaution that may be taken to prevent it, there may be in all matters depending upon human testimony for proof, a mere possibility of error.
>
> If, after considering all of the evidence, you have reached such a firm belief in the guilt of the defendant that you would feel safe to act upon that belief, without hesitation, in a matter of the highest concern and importance to you, then you have reached that degree of certainty which excludes reasonable doubt and authorizes conviction.

665 N.E.2d at 895 (citation omitted and emphasis added). Winegeart argued that the trial court's final instruction on reasonable doubt "blatantly violated constitutional principles and deprived his jury trial of fairness." *Id.* at 896.

While not recommending the given instruction, our Supreme Court nonetheless determined that the giving of the instruction did not constitute error because it was not reasonably likely "that the jurors who determined the defendant's guilt applied the instruction in a way that violated the Due Process Clause." *Id.* at 898.

Furthermore, in *Albrecht v. State*, 737 N.E.2d 719 (Ind. 2000), our Supreme Court approved the following jury instruction:

> A reasonable doubt is a fair, actual and logical doubt that arises in your mind after an impartial consideration of all the evidence and circumstances in the case. It should be a doubt based upon reason and common sense and not a doubt based upon imagination or speculation.
>
> To prove the defendant's guilt of the elements of the crime charged beyond a reasonable doubt, the evidence must be such that it should convince you of the truth of it, to such a degree of certainty that you would

> feel safe to act upon such conviction, without hesitation, in a matter of the highest concern and importance to you.

373 N.E.2d at 730. Namely, it rejected Albrecht's claim that the instruction was an incorrect statement of law or likely to confuse the jury as to the State's burden of proof. *See id.* at 731.

Given our Supreme Court's holdings, we cannot say that the trial court in this case committed reversible error in refusing Brown's tendered instruction in favor of the one given. The trial court's instruction "was constitutionally sufficient, a correct statement of law, and adequately covered the substance of [the] rejected instruction." *See Waibel v. State*, 808 N.E.2d 750, 760 (Ind. Ct. App. 2004) (discussing a jury instruction similar to the one given in this case), *trans. denied*. We therefore find no abuse of discretion.

Affirmed.

BAILEY, J., and ROBB, J., concur.