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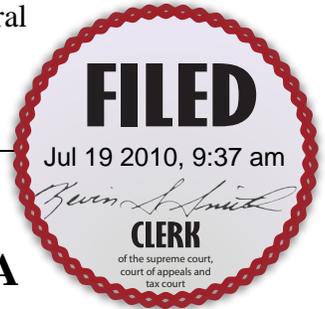
ATTORNEY FOR APPELLANT:

**DONALD W. PAGOS**  
Michigan City, Indiana

ATTORNEYS FOR APPELLEE:

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

**JODI KATHRYN STEIN**  
Deputy Attorney General  
Indianapolis, Indiana



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JEFFREY A. ROWE,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 46A03-0907-CR-344

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APPEAL FROM THE LAPORTE SUPERIOR COURT  
The Honorable Kathleen B. Lang, Judge  
Cause No. 46D01-0701-FA-10

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**July 19, 2010**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Jeffrey A. Rowe (“Rowe”) was originally convicted in LaPorte Superior Court of Class A felony robbery and Class A felony burglary and found to be a habitual offender. He was sentenced to concurrent forty-year sentences for each Class A felony conviction with an additional thirty-year enhancement for an aggregate seventy-year sentence. Rowe’s first appeal resulted in a reduction of the Class A felony burglary conviction to a Class B felony conviction.

On remand, the trial court resentenced Rowe to an aggregate term of seventy years, attaching the habitual offender enhancement to the Class A felony robbery conviction. Rowe appeals and raises one issue, which we restate as whether Rowe’s habitual charging information was defective because the habitual offender statute requires that the State determine which offense is to be enhanced at the time the habitual offender information is filed.

We affirm.

### **Facts and Procedural History**

On January 21, 2007, Rowe went to Robert Toutloff’s apartment. He knocked at the door and, as Robert Toutloff opened the door, Rowe pushed open the door, attacked him, and demanded money. After Toutloff gave Rowe money, Rowe fled the apartment.

Following an investigation, Rowe was charged by the State with Class A felony robbery and Class A felony burglary. The State also alleged that Rowe was a habitual offender. Following a jury trial, Rowe was found guilty as charged and subsequently sentenced to concurrent forty-year sentences for each Class A felony conviction with the

sentence enhanced by thirty years for an aggregate sentence of seventy years. Rowe appealed.

On April 30, 2009, in a memorandum decision, we affirmed Rowe's convictions for Class A felony robbery and Class A felony burglary on sufficiency grounds but reduced the Class A felony burglary conviction to Class B felony burglary based on a double jeopardy violation. Rowe v. State, No. 46D01-0701-FA-10 (Ind. Ct. App. April 30, 2009). Also, we noted that the trial court had not attached the habitual offender violation to a specific conviction as required. We therefore remanded for resentencing on the Class B felony burglary conviction and the habitual offender enhancement.

Following remand, the trial court re-sentenced Rowe to forty years for the Class A felony robbery, a concurrent fifteen-year sentence for the Class B felony burglary, and enhanced the Class A felony robbery conviction by thirty years based on the habitual offender finding, for an aggregate seventy-year term. Rowe now appeals.

### **Discussion and Decision**

Rowe argues that the habitual offender allegation was defective because it did not specify to which felony the habitual offender enhancement would attach. The proper method of challenging deficiencies in a charging information is to file a motion to dismiss no later than twenty days before the omnibus date. Ind. Code § 35-34-1-4(b)(1); Miller v. State, 634 N.E.2d 57 (Ind. Ct. App. 1994). Failure to timely challenge an alleged defective charging information results in waiver unless fundamental error has occurred. Id. In this case, the record shows that Rowe never filed a motion to dismiss, and in fact did not raise this issue until this, his second appeal. Nor does Rowe assert on

appeal that the alleged defective information resulted in fundamental error. Generally, when an issue is known and available but not raised on direct appeal, it is waived. Taylor v. State, 840 N.E.2d 324 (Ind. 2006). For the reasons stated above, this issue has been waived. But waiver notwithstanding, Rowe still cannot prevail.

Rowe contends that the information that contained the habitual offender allegation did not specify which felony would be enhanced. He argues that Indiana Code section 35-50-2-8(a) requires that the State must specify the felony to be enhanced by the habitual offender adjudication in the original charging information and that the trial court is without authority to make that decision during sentencing. Under Indiana Code section 35-50-2-8(a), “the state may seek to have a person sentenced as a habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions.”

Rowe’s position lacks any support in case law or in the statute he cites. The habitual offender statute does not require the State to specify which felony the habitual offender enhancement would be attached if the defendant is determined to be a habitual offender. No case law stands for such a proposition, either. Indiana Code section 35-50-2-8(a) merely allows the State to seek the sentencing of a person as a habitual offender, no more and no less.

In this case, the State properly filed the charging information seeking a habitual offender enhancement. Rowe was determined to be a habitual offender. The trial court sentenced Rowe as a habitual offender but simply failed to attach the habitual offender enhancement to either of the two felonies. In Rowe’s first appeal we remanded for

resentencing with instructions to attach the habitual offender enhancement to one of Rowe's convictions. On remand, the trial court chose to attach the enhancement to the Class A felony robbery conviction.

Rowe waived the issue of a defective charging information by failing to file a motion to dismiss prior to trial, failing to allege fundamental error during either of his appeals, and failing to raise the issue during his first direct appeal. Waiver notwithstanding, the habitual offender statute does not require that the State specify the felony to be enhanced by the habitual offender adjudication in the original charging information, and the trial court acted within its discretion when it made that decision during sentencing.

Affirmed.

RILEY, J., and BRADFORD, J., concur.