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IN THE
COURT OF APPEALS OF INDIANA

DONALD LEE VACENDAK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A04-0812-CR-726
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0707-FD-60

October 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Donald Lee Vacendak appeals his convictions and sentences, following a jury trial, for two counts of class D felony criminal recklessness[1]; one count of class A misdemeanor criminal trespass[2]; and for his adjudication as an habitual offender.[3]

We affirm in part, reverse in part, and remand.

ISSUES

1. Whether sufficient evidence exists to support Vacendak's convictions.

2. Whether the trial court committed reversible error when it granted the State's motion to amend the charging information to add a new charge on the day of trial.

3. Whether the trial court erred in ruling that should Vacendak testify, the State could impeach his testimony with evidence of two criminal convictions that were over ten years old.

4. Whether the trial court erred in allowing the State to introduce evidence of a prior altercation between Vacendak and the complaining witness.

5. Whether the trial court erred in instructing the jury that it was permitted to disregard the testimony of a witness it found to be not credible.

6. Whether Vacendak's aggregate sentence of five years exceeds the limits set by Indiana Code section 35-50-1-2(c).

7. Whether the above alleged errors constitute cumulative error sufficient to warrant reversal.

FACTS

[1] Ind. Code § 35-42-2-2.

[2] I.C. § 35-43-2-2.

[3] I.C. § 35-50-2-8.

The evidence most favorable to the verdict is as follows: Frederick Congress is the owner of Congress Enterprises, a three-acre car lot consisting of several garages, located near the boundary between Gary and Lake Station, Indiana. In 2006, Congress and Vacendak entered into an oral leasing agreement, wherein Congress permitted Vacendak to cut scrap metal for his aluminum recycling business on Congress' lot. The relationship soured when a vehicle owned by Congress' son was damaged by debris ejected from Vacendak's equipment. Thereafter, Congress retained possession of Vacendak's excavating machine ("payloader") until Vacendak and his son resolved their dispute.

Randy Heider worked as an independent contractor on the lot, pursuant to a lease agreement with Congress. He had initially worked on the lot as a mechanic for Vacendak; however, after a bitter disagreement, Heider went to work for Congress. Heider performed automotive repairs for his own customers as well as Congress'. Congress subsequently terminated Heider's services for his customers after accusing him of mistreating them and stealing tools; however, Congress allowed Heider to continue to serve his private clients on the premises.

In February of 2007, Vacendak confronted Heider with an axe in one of Congress' garages. Heider called the police, and Vacendak was issued a no-trespass warning ticket. Approximately five months later, on July 17, 2007, Heider was working inside his garage when he heard the sound of vehicle tires on the gravel parking lot and saw Vacendak's Ford F-150 pickup truck entering the property. On seeing Vacendak, he froze and watched from his garage as Vacendak stopped briefly at Congress' office trailer before

leaving the lot. Heider was outside his garage approximately fifteen minutes later, when Vacendak returned. He "was kind of wary of the guy so [he] took off running and hid" behind a parked car. (Tr. 74). Vacendak "dr[ove] slowly" past the bay doors of Heider's garage and stared inside intently. (Tr. 74). Heider eventually lost sight of Vacendak's truck and when he emerged from his hiding place, he observed that Vacendak's truck was approximately one hundred feet away from him. Vacendak saw Heider and "all at once he pushed the gas pedal down, and his truck spins around and he c[a]me[ ] back at [him]." (Tr. 78). Heider ran toward the office trailer and just "made it into the trailer" as Vacendak's truck skidded to an abrupt stop. The truck had stopped just short of hitting the steps to the trailer and left skid marks and "tire grooves" in the gravel. (Tr. 226).

Heider locked the trailer doors and watched from the window as Vacendak exited his truck holding an axe. Vacendak's two passengers also exited. Heider telephoned the police and remained on the line with the dispatcher as Vacendak stood outside the door holding the axe. The men shouted at one another. Heider feared that Vacendak might hit the door with the axe; however, Vacendak never threatened, raised, or attempted to swing the axe to strike the door. During the ensuing angry exchange of words, Heider told Vacendak that the police were en route. Within moments, Vacendak heard police sirens and hurried to his truck with his passengers. He then drove to the opposite end of the lot to his payloader, exited, and stood next to it until the police approached him.

Sergeant James Lamprecht, Corporal David Johnson, Officer Timothy Pochrun and Officer Gerardo Baldazo of Lake Station Police Department responded to the scene. Officer Pochrun observed skid marks and tire grooves in the gravel, indicating where a

vehicle had accelerated and "sp[un] out." (Tr. 226). He ran a search in the police department's computer database and learned that Vacendak had been issued a no-trespass warning ticket five months earlier pertaining to the Congress lot. Congress arrived at the scene shortly after the police responded and told Sergeant Lamprecht that Vacendak had abandoned his payloader on the property a year earlier and was not allowed to be on his lot. When Officer Pochrun advised Sergeant Lamprecht that Vacendak had previously received a no-trespass warning ticket, he was instructed to arrest Vacendak for criminal trespass. Officer Pochrun handcuffed and arrested Vacendak in Congress' presence, without any protest or intervention from Congress.

Corporal Johnson had issued Vacendak the no-trespass warning ticket in February 2007. When he interviewed Heider in July, Heider alleged that Vacendak again had threatened him with an axe. Corporal Johnson looked inside Vacendak's truck, observed the axe lying in plain view on the passenger floorboard, and confiscated it.

On July 19, 2007, the State charged Vacendak with count I, class D felony criminal recklessness involving his truck and count II, class A misdemeanor criminal trespass. On September 10, 2007, in a separate information, the State filed count III, alleging that Vacendak was an habitual offender.[4]

On Friday, August 3, 2008, the State filed the following: a Notice of State's Rule 609 Intent; a Notice of State Rule 404(b) Evidence; and a Motion of State's Offer of Proof to Admit Prior Bad Act of the Defendant of Chasing Randy Gene Heider with an

[4] The record reveals that Vacendak's criminal history includes convictions for class B felony burglary, and resisting law enforcement and auto theft as class D felonies.

Ax on 02-10-07. The State also filed a motion for Leave to File Second Amended Information to charge Vacendak with an additional count of class D felony criminal recklessness, pertaining to the axe. On Monday, August 4, 2008, before the presentation of evidence, the trial court granted the motion to amend the charging information. The matter then proceeded to trial from August 4-7, 2008.

At the outset of trial, the trial court heard argument on the State's pretrial motions. First, as to the State's motion to amend the charging information to add count IV, criminal recklessness with an axe, the prosecutor argued,

> [W]e could not add that count [earlier] because, when I asked the officers to provide me with the axe, they couldn't locate it initially, so I didn't think it made any sense to add [an] amended information talking about [an] axe and go before the jury, the jury would say, "Where's the axe," and we can't produce it, so until [the police] produce[d], I was able to find the axe, that was when I added the second amended.

(Tr. 4). The prosecutor also argued that "because the probable cause affidavit was quite clear [regarding] the use of the axe by the defendant, …I'm sure [Vacendak and defense counsel] were aware of it." (Tr. 4). Defense counsel objected to the State's attempt to add a new count "two or three days before trial," noting that approximately thirteen months had elapsed since the State had initially filed charges. (Tr. 5). The trial court overruled defense counsel's objection, and granted the State's motion to amend the charging information.

Next, as to the State's intent pursuant to Evidence Rule 609(b) to introduce certified records of Vacendak's prior convictions for class B felony burglary (1980) and class D felony auto theft (1993), the prosecutor argued that in the event that Vacendak

elected to testify, the State should be able to impeach his testimony with evidence of these crimes of dishonesty. Defense counsel objected, admitting that he didn't "anticipate at th[at] point in time" that Vacendak would testify, but insisting that "those convictions [we]re just too old and too prejudicial to be allowed into evidence." (Tr. 7). The trial court overruled defense counsel's objection and granted the State's motion to be able to use such evidence, should Vacendak elect to testify.

Lastly, the trial court heard the State's Rule 404(b) motion to introduce evidence of the February altercation between Vacendak and Heider, during which Vacendak allegedly confronted Heider with an axe on Congress' lot and was subsequently issued a no-trespass warning ticket. The State argued that "we're going to use that to show [Vacendak's] motive to threaten" Heider. (Tr. 9). Defense counsel objected on grounds that the State was improperly attempting to use the February incident to show Vacendak's bad conduct and that he acted in conformity therewith on the day of the July incident. The trial court overruled defense counsel's objection and granted the motion.

During the State's case-in-chief, Heider and the State's law enforcement witnesses testified to the foregoing facts. Heider also testified that on the day of the incident, he had known that Vacendak might be on the lot because "Congress [had] told [him] to kind of stay in [his] garage and stay up close to the office because [Vacendak] was supposed to bring a flat-bed semi trailer in later on that day to pick up his pay loader." (Tr. 108). He testified further that "Mr. Congress told me to try to just stay away from him, avoid him, just stay up by the office." (Tr. 108).

Congress testified as Vacendak's defense witness at the trial. He denied that he had personally barred Vacendak from his property, but acknowledged that "we had orders, I guess, and I'm not sure just how these orders came about, but the orders were presented to me that said that Mr. Vacendak should not be on the property." (Tr. 268). Congress testified that he was not on the lot at the time of the incident, and had learned of the incident from a "distraught" Heider upon his return. (Tr. 277). He testified that earlier that day, Vacendak had telephoned him and asked his permission to enter the lot to pick up his payloader. Congress testified that he "gave [Vacendak] permission to come and pick up the equipment." (Tr. 272).

Vacendak's passenger, Vickie Williamson, also testified for the defense. She testified that on the day of the incident, Vacendak had asked her to accompany him to Congress' lot to pick up the payloader and his canning machines. She testified that when they entered the lot, Vacendak's canning machines were not where he expected them to be on the lot, so he approached the office trailer. She testified that "the door was open and some guy comes out, he's on the phone, cordless phone, he comes out on the step, closes the office door and locked it, and he's in the office." (Tr. 351). She testified that Vacendak identified the man as Heider, "the little snitch that likes to call the cops on me." (Tr. 370).

Williamson testified further that Vacendak had then telephoned Congress to tell him that he was on the lot and had driven to the location of his payloader and exited his truck. She testified that within approximately five to ten minutes of their arrival, the police arrived at the scene, questioned Vacendak, and subsequently arrested him. She

testified that Heider remained inside the trailer and that Vacendak never chased him with the truck or threatened him with an axe.

The jury convicted Vacendak on all counts. In the second phase of the bifurcated trial, the jury also found him to be an habitual offender (count III). At the sentencing hearing on November 13, 2008, the trial court found no mitigating circumstances and identified Vacendak's criminal history as the sole aggravating circumstance. It then imposed the following sentences to be served consecutively: count I, two years; count II, one year; and count IV, two years. As to count III, the habitual offender count, the trial court ordered "[Vacendak]'s sentence [to be] enhanced by a term of eighteen (18) months" to be served "consecutively to the sentences imposed in Counts I, II and IV," for a total executed sentence of six and one-half years. (App. 111). Vacendak now appeals.

DECISION

1. Sufficiency of Evidence

Vacendak argues that the evidence was not sufficient to sustain his convictions. Our standard of review for sufficiency of the evidence is well settled. We neither reweigh the evidence nor judge the credibility of witnesses. *Whitlow v. State,* 901 N.E.2d 659, 660 (Ind. Ct. App. 2009). Rather, we consider the evidence most favorable to the verdict and draw all reasonable inferences that support the ruling below. *Id.* We affirm the conviction if there is probative evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.*

Vacendak argues that the evidence was not sufficient to convict him of either count of criminal recklessness because the State did not prove that he performed an act

which created a substantial risk of bodily injury to Heider with his truck or with an axe, which claims we will address respectively.

a. Criminal Recklessness (Truck)

First, Vacendak argues that the State failed to prove that his truck was a deadly weapon or that he used it in a manner that created a substantial risk of injury to Heider. We disagree.

In order to prove that Vacendak committed class D felony criminal recklessness with his truck, the State was required to show that he recklessly, knowingly, or intentionally performed an act that created a substantial risk of bodily injury, while armed with a deadly weapon. I.C. § 35-42-2-2. Thus, the State was required to prove beyond a reasonable doubt that Vacendak's truck was a deadly weapon and that he recklessly, knowingly, or intentionally chased Heider with it in a manner wherein it created a substantial risk of bodily injury to Heider.

Indiana Code section 35-41-1-6(a)(2) defines "deadly weapon" as "equipment ... or other material that in the manner it is used, or could ordinarily be used, or is intended to be used, is readily capable of causing serious bodily injury." We have previously held that an automobile can be a deadly weapon "if used or intended to be used in a manner readily capable of causing serious bodily harm even though it is not particularly defined as a deadly weapon in the criminal code." *DeWhitt v. State,* 829 N.E.2d 1055, 1064 (Ind. Ct. App. 2005).

The evidence revealed that from a distance of approximately one hundred feet from Heider, Vacendak spun his truck around and accelerated toward him. Vacendak

then chased Heider at a considerable rate of speed. Heider testified that he had "t[aken] off running" towards the trailer for safety, and Vacendak drove all the way up to the trailer, stopping "just in time, just before he hit the steps," as evidenced by the tire grooves and skid marks. (Tr. 78, 79). Heider further testified, "[A]s I ma[d]e it up to the office, he [wa]s not even that far from me at that time," apparently indicating to the jury some reference point as to how close Vacendak's truck was to him, which was supported by the skid marks at the base of the steps. (Tr. 105). But for Heider's proactive efforts to escape Vacendak's truck, he might have been struck and suffered serious bodily injury. Said evidence established that Vacendak used his truck in a manner such that it was readily capable of causing serious bodily injury to Heider. We conclude that the truck was a deadly weapon in the manner in which Vacendak used it. Thus, the evidence is sufficient to sustain his conviction of criminal recklessness with the truck.

b. Criminal Recklessness (Axe)

Next, Vacendak argues that the evidence did not show that he created a substantial risk of bodily injury to Heider with the axe because the State presented no evidence that he had swung or otherwise threatened Heider with the axe. We agree.

At trial, Heider testified that he had locked himself inside the office trailer and watched from the window as Vacendak got out of his truck and strode up the trailer steps with the axe. Heider testified that Vacendak stood outside the door which made him fearful that Vacendak might strike the door with the axe. Vacendak, however, never threatened, raised, or attempted to swing the axe to strike the door. He further testified

that he told Vacendak that the police were en route, and that Vacendak immediately "spun on his heels back towards his truck." (Tr. 107).

The record does not support a finding that Vacendak made a direct threat in a manner wherein he was capable of causing serious bodily injury to Heider. Heider's account of a perceived threat is not sufficient to prove that he faced a substantial risk of bodily injury from the axe. *See Boushehry v. State*, 648 N.E.2d 1174, 1177 (Ind. Ct. App. 1995) ("[S]ubstantial risk of bodily injury may not be proven by mere speculation for which there has been no evidence presented at trial.").

Although we do not approve of Vacendak's conduct with the axe, we do not find that it endangered Heider; thus, the State's evidence is not sufficient to prove the requisite elements of criminal recklessness as to the axe because no direct threat of any specific physical harm to Heider was caused by Vacendak's actions.

The State did not present sufficient evidence to support Vacendak's conviction for criminal recklessness with the axe; accordingly, we reverse this conviction and remand to the trial court with instructions to vacate the judgment of conviction as to count IV (criminal recklessness with the axe).

c. Criminal Trespass

Vacendak argues that the evidence is insufficient to sustain his conviction for criminal trespass because the State failed to prove that Congress denied him entry to the premises. Specifically, he cites Heider and Congress' testimony at trial that he had entered the Congress lot with permission.

In order to convict Vacendak of class A misdemeanor criminal trespass, the State was required to prove that having no contractual interest in the Congress lot, Vacendak knowingly or intentionally entered the property after having been denied entry by Congress or Congress' agent. Ind. Code § 35-42-2-2.

At trial, Sergeant Lamprecht testified that he interviewed Congress at the scene and asked him whether Vacendak was "supposed to be on the property." (Tr. 151). He testified that "Congress advised me that [Vacendak was] not supposed to be there; [and that Vacendak had] abandoned the loader about a year ago." (Tr. 152). He testified that "Congress was sure about it, . . . it was a brief conversation, it was to the point, which is why I took the action to notify Officer Pochrun to take [Vacendak] into custody." (Tr. 154). He then testified that Congress made no mention of any agreement whereby Vacendak could enter the premises with his permission. He further testified that he ordered Vacendak's arrest within less than ten feet of Congress, and that Congress did not protest or otherwise intervene. Lastly, he testified that had Congress told him that Vacendak had permission to be on the premises, "the trespassing wouldn't have been an issue then, if he was allowed to be on the property, he was supposed to be there" and Vacendak would not have been arrested for criminal trespass. (Tr. 168)

Next, Corporal David Johnson testified that he "was right next to Sergeant Lamprecht . . . maybe shoulder to shoulder," when Lamprecht asked Congress "if [Vacendak] was supposed to be allowed on the grounds, [to] which [Congress] advised him he was not." (Tr. 215, 214). He testified that after Sergeant Lamprecht instructed him to arrest Vacendak, he handcuffed Vacendak, walked him to the police vehicle,

patted him down, and placed him inside the squad car – all without any objection from Congress.

Based upon the foregoing, we conclude that the State presented sufficient probative evidence from which a reasonable jury could conclude that Vacendak was guilty beyond a reasonable doubt of class A misdemeanor criminal trespass. It is for the fact-finder, and not the appellate courts, to assess witness credibility and weigh the evidence to determine whether the evidence is sufficient to support a conviction. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). After hearing testimony from Heider, Congress, Sergeant Lamprecht and Corporal Johnson, the jury assessed the credibility of the witnesses, weighed the evidence, and concluded that Vacendak had entered the premises without permission. We will not disturb the jury's judgment on the credibility of the witnesses. *See Prickett v. State*, 856 N.E.2d 1203, 1206 (Ind. 2006). Vacendak's argument that he entered the premises with Mr. Congress' permission amounts to nothing more than an invitation that we reweigh the evidence and assess the credibility of the witnesses, which we cannot do. The evidence is sufficient to sustain Vacendak's conviction for criminal trespass.

2. <u>Amendment of Charging Information</u>

Vacendak argues that the trial court committed reversible error when it granted the State leave to amend the charging information to add an additional count of class D felony criminal recklessness (axe) on the eve of trial. Specifically, he argues that the probable cause affidavit does not support the charge and that the late amendment

deprived him of the opportunity to prepare a defense. This issue is moot given our reversal above of Vacendak's criminal recklessness conviction as to the axe.

3. Impeachment

Vacendak argues that the trial court erred when it denied his motion in limine to exclude evidence of two prior criminal convictions that were over ten years old. The State sought to introduce evidence of these crimes of dishonesty to impeach Vacendak's testimony in the event that he elected to testify.

In general, "[t]he ruling on a motion in limine is not reviewable on appeal since the purpose of such a motion is not to obtain a final ruling upon the admissibility of evidence." *Collins v. State*, 464 N.E.2d 1286, 1290 (Ind. 1984). "The evidence sought to be excluded by the motion in limine must be objected to at the time of its introduction at trial for any error in the denial of the motion to be preserved." *Id*. Here, because the evidence was never offered and no contemporaneous objection was made, there is no trial ruling to review.

We are not moved by Vacendak's contention that the trial court's ruling "foreclosed him from taking the stand in his own defense," because "it would have been foolhardy to take the stand to rebut Heider and then have the prosecutor use the prior convictions against [him]." Vacendak's Br. at 29. Vacendak's decision not to testify was his decision alone. The risk of which he complains is inherent in testifying on one's own behalf and hardly constitutes prejudice. *See Anderson v. State*, 565 N.E.2d 336, 337 (Ind. 1991) ("While we realize that serious consequences flowed from this decision [not to take the stand], ultimately the client, not his attorney, must choose either to testify and

risk the dangers inherent in being cross-examined, or remain silent and thereby keep possibly damaging information from the jury."). This issue is waived.

4. Prior Bad Act

Vacendak argues that the trial court erred when it permitted the State, over his objection, to introduce evidence of the February incident between himself and Heider, during which he confronted Heider with an axe in a garage on the lot. He contends that the State improperly introduced evidence of the prior incident in order to show action in conformity therewith, leading jurors to make the forbidden inference that his "prior wrongful conduct . . . suggest[ed] present guilt." Vacendak's Br. at 30. Thus, he argues, the trial court's decision to admit evidence of the prior incident between himself and Heider was unduly prejudicial and "caused the jury to convict him on the second count of criminal recklessness because the jury heard Heider testify that he had earlier been 'cornered' by Vacendak with an axe." Vacendak's Br. at 31.

Arguably, we need not reach the merits of this claim because Vacendak's challenge pertains to his conviction for criminal recklessness with the axe, which we have vacated above. Regardless, we find no abuse of discretion by the trial court.

In reviewing the admissibility of 404(b) evidence, we determine whether the evidence is relevant to a matter at issue other than the defendant's propensity to commit the charged act, and we balance the probative value of the evidence against its prejudicial effect. *Smith v. State*, 891 N.E.2d 163, 171 (Ind. Ct. App. 2008). We review the admission of evidence for an abuse of discretion, which occurs if the ruling is against the logic and effect of the facts and circumstances before the court. *Id.*

Indiana Evidence Rule 404(b) provides:

> 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Our supreme court has held that this rule "is designed to prevent the jury from assessing a defendant's present guilt on the basis of his past propensities, the so-called 'forbidden inference.'" *Hicks v. State*, 690 N.E.2d 215, 218-19 (Ind. 1997). Pursuant to Indiana Evidence Rule 403, the trial court must determine whether the evidence is relevant and must balance the probative value against the prejudicial effect of the evidence.

Evidence of the February altercation between Vacendak and Heider is admissible for a number of permissible purposes. *See, e.g.*, *Smith v. State*, 891 N.E.2d 163, 171 (Ind. Ct. App. 2008) (finding that a defendant's prior bad acts are "usually admissible to show the relationship between the defendant and the victim"); *Iqbal v. State*, 805 N.E.2d 401, 408 (Ind. Ct. App. 2004) (holding that "where a relationship between parties is characterized by frequent conflict, evidence of the defendant's prior assaults and confrontations with the victim may be admitted to show the relationship between the parties and motive for committing the crime"); *Goldsberry v. State*, 821 N.E.2d 447, 456 (Ind. Ct. App. 2005) (finding that evidence of prior physical altercations between parties is admissible to prove lack of mistake or accident); *Pickens v. State*, 764 N.E.2d 295, 299 (Ind. Ct. App. 2002) (holding that evidence that the defendant had access to a weapon of

the type used in the crime is relevant to a matter at issue other than the defendant's propensity to commit the charged act).

We find that the evidence of the prior altercation between Heider and Vacendak was probative of the hostile relationship between the men, and was admissible to show motive and absence of mistake or accident. Further, given that the prior altercation occurred just five months before the instant incident, we find the evidence to be particularly probative. We find no abuse of discretion.

5. Jury Instruction

Vacendak argues that the trial court gave an erroneous jury instruction. It is well-established that instructing the jury is within the discretion of the trial court. *White v. State*, 846 N.E.2d 1026, 1032 (Ind. Ct. App. 2006). Jury instructions are to be considered as a whole and in reference to each other; error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. *Id.* Before a defendant is entitled to a reversal, he or she must affirmatively show that the erroneous instruction prejudiced his substantial rights. *Oatts v. State*, 899 N.E.2d 714, 727 (Ind. Ct. App. 2009). An error is to be disregarded as harmless unless it affects the substantial rights of a party. Ind. Trial Rule 61.

Vacendak attempts to frame this argument in terms of fundamental error because he failed to raise a timely and specific objection at trial. *See Hornbostel v. State*, 757 N.E.2d 170 (Ind. Ct. App. 2001) (the failure to object at trial results in waiver of the issue on appeal unless appellant can establish fundamental error).

> The fundamental error exception to the waiver rule is narrow. To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant that a fair trial is rendered impossible. We may reverse on this basis only when there has been a blatant violation of basic principles that denies a defendant fundamental due process.

Glotzbach v. State, 783 N.E.2d 1221, 1225-26 (Ind. Ct. App. 2003). To prevail on a claim of fundamental error, the defendant must prove a violation occurred that rendered the trial unfair. *Caron v. State*, 824 N.E.2d 745 (Ind. Ct. App. 2005).

Article 1, Section 19 of the Indiana Constitution provides, "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Thus, the jury is free to accept or reject any evidence. *Gantt v. State*, 825 N.E.2d 874, 878 (Ind. Ct. App. 2005). "In fact, '[i]t is the unique province of the jury to weigh trial testimony and to assess witness credibility.'" *Id*. Our supreme court has held that the court has no right to invade the province of the jury as the sole judge of the credibility of a witness. *Id*.

Before releasing the jury to deliberate, the trial court read the following instructions to the jury:

> Instruction No. 10
>
> You, the jurors, are the exclusive judges of the evidence, the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; the memory, manner and conduct of the witness while testifying; any interest, bias or prejudice the witness may have; any relationship with other witnesses or interested parties; and the reasonableness of the testimony of the witness considered in the light of all of the evidence in the case.
>
> You should attempt to fit the evidence to the presumption that the defendant is innocent and to the theory that every witness is telling the truth. You should not disregard the testimony of any witness without a reason and without careful consideration. However, if you find that the testimony of a witness is so unreasonable as to be unworthy of belief, or if you find so much conflict between the testimony of the witnesses that you

> can not believe all of them, then you must determine which of the witnesses you will believe and which of them you will disbelieve.
>
> In weighing the testimony to determine what or whom you will believe, you should use your own knowledge, experience and common sense gained from day to day living. You may find that the number of witnesses who testify to a particular fact, or one side or the other, or the quantity of evidence on a particular point does not control your determination of the truth. You should give the greatest weight to that evidence which convinces you most strongly of its truthfulness.
>
> Instruction No. 11
>
> Under the Constitution of Indiana you are given the right to determine both the law and the facts of the case, but it is your duty to administer the law in this case as you actually find it to be and you are not at liberty to set aside the law and disregard it for any reason. If you have no well defined opinion as to what the law is, then it is your duty to give the instructions of the Court your respectful consideration in determining what the law is.
>
> Instruction No. 12
>
> If the jury believes from the evidence in the case that any witness has willfully and knowingly sworn falsely to any material fact in the case, then you will have the right to disregard the entire testimony of such witness, except in such matters, if any, where his or her testimony is corroborated by other credible evidence or facts appearing in the case.

(App. 72-74).

Vacendak argues that "despite informing the jury that [it] could determine which witness to believe or disbelieve (final Instruction No. 10)," the trial court's instruction number twelve "directed them to disregard testimony unless it was corroborated," and therefore, invaded the province of the jury to determine the facts and credibility of the witnesses. Vacendak's Br. at 34. We disagree.

Instruction number twelve does not invade the province of the jury to determine either the facts of the case or the credibility of the witnesses. To the contrary, it affirms the jury's right to determine whether witness testimony is reliable. The instruction

provides that should *the jury* determine that a witness has "willfully and knowingly" lied on the witness stand, *the jury* is permitted to disregard the lying witness' testimony in its entirety, except where other evidence or facts, *deemed credible by the jury*, corroborate the witness' testimony. (App. 74). Instruction twelve is consistent with well-settled Indiana precedent holding that it is the "unique province" of the jury alone to decide what facts are accurate and to determine the credibility of the witnesses. *Gantt*, 825 N.E.2d at 878. At each turn, instruction number twelve leaves determinations of credibility and the facts of the case to the jury and does not dictate to the jury how it must weigh trial testimony and/or assess witness credibility.

Further, instructions ten, eleven and twelve – considered in whole and in reference to one other -- support a finding that the jury was not misled as to the law. We do not find that instruction number twelve was erroneous; nor has Vacendak demonstrated that he suffered prejudice to his substantial rights. He is not entitled to a reversal.

6. Consecutive Sentences

Vacendak argues that his five-year aggregate sentence exceeds the four-year advisory sentence for a class C felony, and therefore, his sentence is erroneous. He argues further that the trial court erred in failing to specify which of his three convictions was being enhanced with the habitual offender enhancement. Vacendak's Br. at 34.

Indiana Code section 35-50-1-2(c) provides, in pertinent part, as follows:

> The court may order terms of imprisonment to be served consecutively.... [E]xcept for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory

> sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

Here, the jury convicted Vacendak of two class D felonies and one class A misdemeanor. The trial court imposed two two-year sentences on the class D felonies and a one-year sentence for the class A misdemeanor, and ordered the sentences served consecutively, for an aggregate sentence of five years. The advisory sentence for a class C felony is four years.

We agree that Vacendak's sentence as originally imposed by the trial court was erroneous[5]; however, our vacation of count IV, Vacendak's criminal recklessness conviction (axe), has the effect of partially remedying the trial court's error. We hereby choose to correct Vacendak's sentence and remedy the trial court's failure to specify the conviction to be enhanced by the habitual offender penalty[6] as follows: on count I, two years, plus an habitual offender enhancement of eighteen months, for a total sentence of three and one-half years; and on count II, one year, consecutive to count I, for an

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[5] First, Vacendak was not convicted of a "crime of violence," as defined for sentencing purposes in Indiana Code section 35-50-1-2(a). *See Ballard v. State*, 715 N.E.2d 1276, 1280 (Ind. Ct. App. 1999) (offenses not included in that section are not "crimes of violence" for purposes of the limitation on length of consecutive sentences). Moreover, Vacendak's convictions arose from a single episode of criminal conduct, defined as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." I.C. § 35-50-1-2(b). Because Vacendak was not convicted of crimes of violence and because his convictions arose from a single episode of criminal conduct, the consecutive terms of his sentences should not have exceeded the four-year advisory sentence for a class C felony. We find that the trial court's imposition of two consecutive two-year sentences on the class D felonies and a consecutive one-year sentence for the class A misdemeanor, for a total sentence of five years was error.

[6] *See McIntire v. State*, 717 N.E.2d 96, 102 (Ind. 1999) ("[W]hen defendants are convicted of multiple offenses and found to be habitual offenders, trial courts must impose the resulting penalty enhancement upon only one of the convictions and must specify the conviction to be so enhanced.").

aggregate sentence of four and one-half years. We also remand to the trial court with instructions to issue a corrected commitment reflecting Vacendak's new sentence.

7. Cumulative Effect of Errors

Finally, Vacendak argues that the cumulative effect of the alleged errors deprived him of his right to a fair trial before an impartial jury. The Indiana Supreme Court has provided for the possibility that the cumulative effect of trial errors may warrant reversal. *Hubbell v. State*, 754 N.E.2d 884, 895 (Ind. 2001). Here, the trial court's errors did not deprive Vacendak of a fair trial and did not constitute reversible error. Moreover, having concluded that the trial court did not err when it (1) granted the State's motion to amend the charging information; (2) ruled that the State could introduce Vacendak's prior convictions for crimes of dishonesty if he testified; (3) allowed the State to introduce evidence of the February altercation between Vacendak and Heider; and (4) instructed the jury that it was permitted to disregard the testimony of a witness it found not to be credible, we decline Vacendak's claim that the cumulative effect of these alleged errors warrants relief.

Affirmed in part, reversed in part, and remanded with instructions.

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