

STATEMENT OF THE CASE

Curtis E. Cash appeals his convictions and sentence, after a jury trial, for class B felony attempted burglary, class C felony attempted burglary, and being an habitual offender.

We affirm.

ISSUES

1. Whether the trial court erred in admitting certain testimony.
2. Whether the trial court committed fundamental error by giving an inadequate jury instruction during the habitual offender phase of Cash's trial.

FACTS

On November 5, 2009, Cash instructed his girlfriend, Arron Kimbrell, to drive him to Deborah Ashby's ("Mrs. Ashby") private Putnam County home, which he intended to rob to fund his drug habit. Kimbrell drove Cash to Mrs. Ashby's home, parked near her barn, and watched from her blue-gray Oldsmobile as Cash tried to kick down the service door of the barn. Unsuccessful, Cash then approached the residence.

Inside the home, Mrs. Ashby heard someone attempting to open the back screen door. She looked through a window and saw Cash running across her back deck toward the front of her house. Cash then kicked Mrs. Ashby's front door three times, denting the door and splitting the door jamb. Mrs. Ashby screamed, and Cash stopped kicking the door. Mrs. Ashby opened her front door in time to see Cash -- dressed in a distinctive leather trench coat -- running to a light gray or light blue four-door sedan. She shouted at

him, and as Cash entered the car, “he looked at [Mrs. Ashby] directly and said shut up, very loud.” (Tr. 51). Mrs. Ashby called 9-1-1 and provided a detailed physical description of Cash to police.

During the ensuing police investigation, Detective Pat McFadden of the Putnam County Sheriff’s Department was notified of a bizarre encounter between Ashby’s neighbors and the occupants of a silver or blue four-door sedan on the day before the attempted Ashby break-in. Ashby’s neighbors recounted that a man in a dark leather trench coat was acting suspiciously in the vicinity of the Ashby home. Ashby’s neighbors had noted the license plate number of the suspicious vehicle, and they provided that information to investigators. State records revealed that the vehicle was registered to Kimbrell. At Kimbrell’s registered address, police observed her 1996 light blue, four-door Oldsmobile sedan parked in front of the Bainbridge apartment that she shared with Cash. A search of the apartment yielded Cash’s black leather trench coat. Kimbrell cooperated with investigators and identified Cash as the perpetrator of the crime(s).

On November 23, 2009, the State charged Cash with count 1, class B felony attempted burglary; count 2, class B felony burglary; count 3, class D felony theft; and count 4, being an habitual offender. On February 19, 2010, the State filed count 5, class C felony attempted burglary. On April 14, 2010, the State conducted phase one of a bifurcated jury trial on counts 1 and 5 (renumbered as counts 1 and 2).¹ Kimbrell

¹ Upon Cash’s motion, counts 2 and 3 -- involving a different burglary and victim -- were severed from the underlying trial pursuant to the trial court’s order of April 13, 2010.

testified on behalf of the State. During her cross examination, the following exchange occurred between Kimbrell and defense counsel:

Q: [H]ow did the conversation come . . . up about going to the Ashby residence?

A: * * * That day we was [sic] at home and uh, [Cash] was just about . . . out of his dope and wanted more so he wanted me to drive him around to go find a house.

Q: When . . . you dr[o]ve him, so you knew what was going on?

A: Yes.

Q: Okay, and assisted him?

A: I did what he told me to do.

(Tr. 130). Subsequently, on re-direct, the following testimony was presented:

Q: [Ms. Kimbrell,] why did you do what [Cash] wanted to do that day?

A: Because he, if he didn't he was either emotional or physically abusive to me.

[Defense counsel]: Objection your honor.

COURT: You need to state a reason.

[Defense counsel]: That any probative value far outweigh, or is outweighed by any prejudicial effect on [Cash].

COURT: Objection overruled.

Q: Has he physically abused you?

A: Yes.

Q: To the point of marks?

A: Yes.

Q: I think bruises where at?

A: Yes. He kicked me and I had a bruise this big on [sic].

(Tr. 132-33).

At the close of the evidence, the jury found Cash guilty of class B felony attempted burglary and class C felony attempted burglary. Subsequently, during the habitual offender phase, the trial court instructed the jury as to the applicable law. The jury thereafter found Cash to be an habitual offender. On May 19, 2010, the trial court sentenced Cash as follows: count 1, fifteen years, plus a twelve-year habitual offender enhancement; and count two, six years, to be served concurrently for an aggregate sentence of twenty-seven years. Cash now appeals.

DECISION

Cash argues that the trial court erred in the admission of evidence. He also alleges fundamental error from an inadequate jury instruction during the habitual offender phase.

1. Evidence

Cash asserts that the trial court committed reversible error² when it allowed the State, over his objection, to elicit testimony from Kimbrell that she had participated in

² Cash also claims that Kimbrell's testimony as to why she drove him to the Ashby home should have been excluded as irrelevant under Indiana Evidence Rule 404(b). He has, however, waived his claim of error because he did not object on that basis at trial. *See Gill v. State*, 730 N.E.2d 709, 711 (Ind. 2000) ("It is well-settled law in Indiana that a defendant may not argue one ground for objection at trial then raise new grounds on appeal."); *see also Warren v. State*, 757 N.E.2d 995, 998 (Ind. 2001) ("Because the defendant did not object on these grounds when the evidence was presented at trial, he may not raise them for the first time on appeal.").

Cash's crimes only because Cash had previously abused her physically and/or emotionally. He argues that Kimbrell's statements (1) were not relevant to proving his guilt; (2) should have been excluded as highly prejudicial; and (3) poisoned the jurors' minds against him, resulting in his conviction. We disagree.

The trial court has broad discretion when ruling on the admissibility of evidence and when determining its relevancy. *Kirby v. State*, 774 N.E.2d 523, 533 (Ind. Ct. App. 2002), *trans. denied*. We will disturb its ruling only upon a showing of an abuse of discretion. *Id.* A trial court abuses its discretion when its evidentiary ruling is clearly against the logic, facts, and circumstances presented. *Id.*

Indiana Evidence Rule 401 defines "relevant evidence" as evidence having 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. Evidence, though relevant, may be excluded, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Ind. Evid. R. 403.

To determine whether a defendant's substantial rights were prejudiced, we must assess the probable impact of the improperly admitted evidence upon the jury. *Taylor v. State*, 735 N.E.2d 308, 312 (Ind. Ct. App. 2000), *trans. denied*. The improper admission of evidence is harmless error when the conviction is supported by such substantial evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood

that the questioned evidence was likely to have had a prejudicial impact upon the mind of the average juror, thereby contributing to the conviction. *Simmons v. State*, 717 N.E.2d 635, 638 (Ind. Ct. App. 1999). *See* Indiana Trial Rule 61; *see also Jacobs v. State*, 802 N.E.2d 995, 998 (Ind. Ct. App. 2004) (even if trial court abused its discretion in admitting evidence, we will not reverse a conviction if error is harmless).

Here, the State presented the following evidence of Cash's guilt to the jury: First, Mrs. Ashby identified Cash as the distinctly-attired man who tried to kick down her front door before fleeing in a blue-gray four-door sedan. Next, the getaway vehicle -- as described by Mrs. Ashby and her neighbors -- was traced to Cash's girlfriend, Kimbrell; and, the ensuing search of the apartment that Cash shared with Kimbrell yielded the distinctive leather trench coat that Mrs. Ashby had described to police. Lastly, Kimbrell testified that she had driven Cash to the Ashby residence so that he could rob it, and that she had seen Cash attempting to kick down the service door of the Ashby's barn.

Based upon the foregoing "substantial evidence" of Cash's guilt, we are satisfied that there is no substantial likelihood that Kimbrell's statement had a prejudicial impact upon the mind of the average juror, and, thereby, contributed to Cash's conviction. *See Simmons*, 717 N.E.2d at 638.

2. Jury Instruction

Next, Cash argues that his habitual offender enhancement should be vacated because the trial court committed fundamental error³ in failing to instruct the jury “on the required time sequence of the [prior unrelated] felonies.” Cash’s Br. at 8. We disagree.

The purpose of an instruction is to inform the jury of the applicable law without misleading the jury and to enable the jury to understand the case and arrive at a just, fair, and correct verdict. *Buckner v. State*, 857 N.E.2d 1011, 1015 (Ind. Ct. App. 2006). Instructing the jury lies within the sound discretion of the trial court and is reviewed only for an abuse of that discretion. *Id.* A trial court abuses its discretion in the giving of a jury instruction when the instruction misstates the law, such that it “so affects the entire charge that the jury was misled as to the law in the case.” *Davis v. State*, 892 N.E.2d 156, 163 (Ind. Ct. App. 2008).

Here, the trial court instructed the jury as follows:

The status of habitual offender is defined by statute as follows:

The State may seek to have a person sentenced as an habitual offender for any felon[y] by proving that the person has accumulated two (2) prior unrelated felony convictions.

³ Acknowledging that no objection was raised in the trial court, Cash asserts that the trial court’s omission constituted fundamental error that is subject to review despite the lack of objection. “‘Fundamental error’ is error so egregious that reversal of a criminal conviction is required even if no objection to the error is registered at trial.” *Gamble v. State*, 831 N.E.2d 178, 185 (Ind. Ct. App. 2005), (quotation omitted) (citation omitted), *trans. denied*. “A claim of fundamental error is not viable absent a showing of grave peril and the possible effect on the jury’s decision.” *Dawson v. State*, 810 N.E.2d 1165, 1175 (Ind. Ct. App. 2004), (quotation omitted) (citation omitted), *trans. denied*.

Before you may convict the Defendant as an Habitual Offender, the State must have proven each of the following elements beyond a reasonable doubt:

The Defendant

1. committed and was convicted and sentenced for a felony, on or [sic] 17th day of July, 1992, in Marion County, State of Indiana, Curtis E. Cash was convicted of Burglary, a Class B Felony and Theft, a Class D Felony.
2. committed and was convicted and sentenced for a felony, on or [sic] 9th day of June, 1999, in Marion County, State of Indiana, Curtis E. Cash was convicted of Burglary, a class B Felony.
3. thereafter committed and was convicted of the crime charged in Phase I of this case.

If the State failed to prove each of these elements beyond a reasonable doubt, you cannot find the Defendant to be an habitual offender.

If the State did prove each of these elements beyond a reasonable doubt, you may find the Defendant to be an habitual offender.

(App. 109, 110).

Indiana Code section 35-50-2-8, the habitual offender statute, provides:

(a) Except as otherwise provided in this section, the state may seek to have a person sentenced as a habitual offender for any felony by alleging, . . . , that the person has accumulated two (2) prior unrelated felony convictions.

* * *

(c) A person has accumulated two (2) prior unrelated felony convictions for purposes of this section only if:

- (1) the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction; and

(2) the offense for which the state seeks to have the person sentenced as a habitual offender was committed after sentencing for the second prior unrelated felony conviction.

We are not persuaded by Cash's contention that the trial court's failure to define "prior unrelated felonies" was fundamental error. Our Supreme Court has previously held that an error in instructing the jury does not warrant reversal if the conviction is properly sustainable by the evidence and where the jury could not have found otherwise. *Burton v. State*, 526 N.E.2d 1163, 1165-66 (Ind. 1988). Such is the case here.

Cash argues that *Burton* is distinguishable because the certified court records presented to the jury therein showed the commission and sentencing dates for Burton's prior unrelated felony offenses. He posits that one can reasonably "infer[] [therefrom] that the relevant dates were pointed out to the [*Burton*] jury." Cash's Br. at 8. In the instant case, however, he argues that

[e]ven though both exhibits [certified court records of the prior felonies] contain the charging informations that allege a commission date, there is no evidence the jury's attention was drawn to that evidence and it is clear from the record that the jury was never told that the commission date of the second offense was relevant.

Cash's Br. at 8-9. We are not moved.

Here, the State provided the jury with certified court records which indicated that Cash committed his second prior unrelated offense after he had been convicted and sentenced for his first prior unrelated felony; and that he was subsequently convicted of

the instant offenses. Specifically, the State's admitted exhibits⁴ include charging informations and abstracts of judgment for Cash's prior convictions. These certified court records proved that on or about March 11, 1992, Cash was charged with committing class B felony burglary and class D felony theft/receiving stolen property. He was subsequently convicted; and on July 17, 1992, he was sentenced to a seven and one-half year term of imprisonment. The trial record further reveals that on or about February 1, 1999, Cash was charged with having committed class B felony burglary. Again, he was convicted; and on June 9, 1999, he was sentenced to a twenty-year term of imprisonment. Cash committed the instant offenses on November 5, 2009.

The foregoing evidence, therefore, established unequivocally that Cash's prior unrelated felonies occurred in the proper sequence required by Indiana Code section 35-50-2-8. Accordingly, we conclude that his convictions are sustained by the evidence and that the jury could not have found otherwise. *See Burton*, 526 N.E.2d at 1165-66. Because Cash has not carried his burden of demonstrating that the jury was misled as to the applicable law, we find no reversible error warranting reversal of his convictions. *See Lyons v. State*, 600 N.E.2d 560, 567 (Ind. Ct. App. 1992) (no fundamental error from trial court's failure to instruct jury regarding definition of "prior unrelated felony" where evidence "clearly show[ed] the proper sequence of conviction and sentence on the first prior felony before the commission of the second prior felony, so the jury could not have found that the sequence was other than proper").

⁴ The pages of the Admitted Exhibits volume are not numbered.

Affirmed.

BRADFORD, J., and BROWN, J., concur.