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FILED
Nov 29 2011, 9:06 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

MAX RILEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-1105-CR-233
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben B. Hill, Judge
The Honorable Mary Ann Oldham, Commissioner
Cause No. 49F18-1004-FD-029032

November 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Max Riley ("Riley") appeals his conviction for Attempted Theft, as a Class D felony,[1] presenting the sole issue of whether the trial court erroneously allowed the State to amend the charging information. We affirm.

Facts and Procedural History

On April 9, 2010, Deborah Theaman ("Theaman") looked out the back window of her Indianapolis residence and saw a man crouching behind a vehicle that belonged to Theaman's neighbor, Dorene Wade ("Wade"). It appeared that the man was moving his hands and doing something to the license plate. Theaman alerted her brother, Donald Peavey ("Peavey") and they watched the man for a short while. Peavey then called Wade and inquired whether someone was supposed to be behind her vehicle. When Wade responded negatively, Peavey called the police.

Wade opened her kitchen window and called out, "If there is anyone behind my car, they better be moving before I move." (Tr. 47.) The man jumped up from behind the vehicle and ran into an alley. Peavey gave chase but stopped because he was without shoes. Indianapolis Metropolitan Police Department officers arrived shortly thereafter, and located a man lying in the grass next to a nearby house. Wade recognized the man, later identified as Riley, as the man who had been behind her vehicle.

Wade discovered that her license plate, which fastened to the vehicle by two bolts at the top of the plate, was newly scratched and had been bent upward at each of the lower

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[1] Ind. Code § 35-43-4-2, 35-41-5-1.

corners. A folding knife was discovered on the rear bumper, below the license plate.

On April 13, 2010, the State charged Riley with Attempted Theft, as follows:

> On or about April 9, 2010, in Marion County, State of Indiana, the following named defendant, Max Riley, did attempt to commit the crime of theft which is to knowingly exert unauthorized control over the property, to wit: a license plate, of another person, to wit: Dorene Wade, with the intent to deprive the person of any part of its value or use, by engaging in conduct which constitutes a substantial step toward the commission of said crime of Theft, that is: using a knife to pry the license plate from the vehicle.

(App. 18.) On the morning of trial, March 17, 2011, the State was permitted, over Riley's objection, to amend the charging information to substitute the word "instrument" for the word "knife." A jury found Riley guilty as charged, and he received a sentence of 545 days, with 365 days to be served in the Department of Correction. One hundred eighty days were to be served in home detention and 185 days were suspended to probation. He now appeals.

Discussion and Decision

Amendments to a charging information are governed by Indiana Code Section 35-34-1-5, which provides that an amendment may be made at any time prior to trial as long as such amendment does not prejudice the substantial rights of the defendant. Riley contends that "the amendment to the information in this matter affected the preparation and presentation of his defense to the charge of Attempted Theft." Appellant's Brief at 7.

If a court overrules a defendant's objection to a late amendment, he must request a continuance in order to preserve any argument that he was prejudiced by the late amendment. Suding v. State, 945 N.E.2d 731, 735 (Ind. Ct. App. 2011), (citing Haymaker v. State, 667 N.E.2d 1113, 1114 (Ind. 1996)), trans. denied. Because Riley did not request a continuance

after the trial court overruled his objection to the State's motion for amendment, Riley's allegation of error is waived.

Waiver notwithstanding, Riley did not show that his substantial rights were affected. Ultimately, a question of prejudice to substantial rights involves "whether the defendant had a reasonable opportunity to prepare for and defend against the charges." Sides v. State, 693 N.E.2d 1310, 1313 (Ind. 1998), abrogated on other grounds by Fajardo v. State, 859 N.E.2d 1201, 1206 (Ind. 2007)). The substantial rights of a defendant are not violated if the amendment does not affect a particular defense or change the positions of the parties. Suding, 945 N.E.2d at 736.

Here, the State alleged that Riley attempted to commit theft. Thus, the State was required to show that Riley took a "substantial step" toward "knowingly or intentionally exerting unauthorized control over [Wade's] property, with intent to deprive [Wade] of any part of its value or use." Ind. Code §§ 35-41-5-1, 35-43-4-2. The State need not have proven that the substantial step was accomplished by a specified instrument in order to convict Riley of Attempted Theft. As such, the amendment did not involve an element of the charged offense, and merely changed a descriptive phrase from specific to generic language.

Moreover, the amendment from "knife" to "instrument" was of no practical effect, inasmuch as all the evidence of an "instrument" concerned a knife. Indeed, Riley does not

explain in particular how his defense was hampered.[2] Riley has not shown that he was deprived of a reasonable opportunity to prepare for and defend the charge against him.

Affirmed.

BAKER, J., and DARDEN, J., concur.

[2] Riley did not present any defense witnesses. In closing argument, defense counsel suggested that the case involved mistaken identification, and observed that a knife was ineffectual for removal of a license plate when a special tool was required to loosen the bolts.