

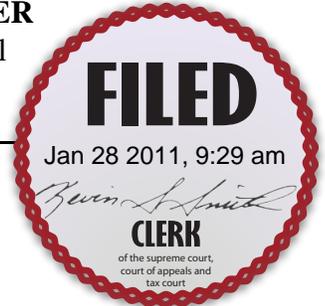
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**IN THE  
COURT OF APPEALS OF INDIANA**

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NIKOL HUTNIK, )

Appellant-Defendant, )

vs. )

No. 30A04-1005-CR-298

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE HANCOCK SUPERIOR COURT  
The Honorable Terry Snow, Judge  
Cause No. 30D01-0904-FB-77

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**January 28, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Nikol Hutnik appeals her conviction for Dealing in a Schedule II Controlled Substance,<sup>1</sup> a class B felony. She presents the following restated issues for review:

1. Did the State present sufficient evidence to support her conviction?
2. Did the trial court improperly instruct the jury regarding accomplice liability?

We affirm.

The facts favorable to the conviction follow. At the end of March 2009, the Fortville Police Department arranged for Ernie Craft to act as a confidential informant and conduct controlled buys from Kevin Krull. Over that past month, Craft had become acquainted with Krull through Hutnik, who was Krull's current girlfriend and a past girlfriend of Craft's. Craft informed officers that he believed he could purchase controlled substances from Krull.

After making arrangements with Krull, Craft went to Hutnik's residence to purchase OxyContin pills from Krull on the night of March 30, 2009. Craft carried \$100 in recorded buy money, as well as a recording device, and officers monitored the buy from outside the residence. Hutnik answered the door and, after greeting Craft, Hutnik proceeded to pat him down and have him lift his shirt and pant legs. This was the first time she had ever searched her friend, despite numerous prior visits. Hutnik waited in the living room while Craft gave the buy money to Krull in the bedroom in exchange for five OxyContin pills. Craft and Krull briefly discussed another potential drug deal, and then Craft left. As he was leaving, Craft said goodbye to Hutnik and her young son, expressing his love for the child.

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<sup>1</sup> Ind. Code Ann. § 35-48-4-2 (West, Westlaw through 2010 2nd Regular Sess.).

After several phone calls over the next two days, Craft and Krull arranged for a much larger drug transaction on the evening of April 1. For this controlled buy, Craft brought \$1600 to Hutnik's home. Once again, Hutnik greeted Craft at the door and patted him down. Hutnik then went into the kitchen while Craft met Krull in the bedroom and exchanged the buy money for approximately eighty OxyContin pills. When Craft left, Hutnik came into the bedroom as Krull was counting the cash. Within minutes, police officers executed a search warrant at the residence. Krull threw the cash from the transaction out the bedroom window.

Krull testified that Hutnik had significant "cash needs" and that she had encouraged him to sell his prescription pain pills to Craft. *Transcript* at 243. In fact, according to Krull, he and Hutnik had specifically talked about selling pills to Craft prior to both controlled buys. Krull expressed concern prior to the first transaction that Craft might be acting as a confidential informant and, before the second buy, also inquired as to whether Hutnik thought Craft (Hutnik's good friend) would be armed. On both occasions, Krull was worried that Craft might be wearing a wire, a fear he had expressly discussed with Hutnik.

The State charged both Hutnik and Krull with two counts of class B felony dealing in a schedule II controlled substance. Krull pleaded guilty to one count (the one involving the April 1 buy) on November 19, 2009, and the remaining count was dismissed. At the conclusion of her March 2010 jury trial, Hutnik was found guilty of the count related to the April 1 buy and not guilty of the count related to the March 30 buy. The trial court subsequently sentenced her to six years in prison with four of those years suspended to probation. Hutnik now appeals.

Hutnik initially challenges the sufficiency of the evidence. She claims the entire drug transaction was initiated, negotiated, arranged, and consummated by Craft and Krull without her involvement. Hutnik argues that at most the evidence indicates she committed the crime of maintaining a common nuisance<sup>2</sup> by knowingly or intentionally allowing Krull to deal drugs out of her residence.

Our standard of review when considering a challenge to the sufficiency of the evidence is well settled.

When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). “We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence.” *Id.* We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

*Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009).

The evidence favorable to the conviction reveals that Hutnik not only knew about the drug deal but also encouraged Krull to sell his prescription medication to Craft in order to satisfy her financial needs. Prior to the drug transaction on April 1, the two discussed Krull’s concerns that Craft might be a confidential informant wearing a wire or that he might be armed. Apparently as a result of these concerns, Hutnik patted down Craft upon his arrival, immediately before the drug transaction. Other than the transaction two days earlier, Hutnik had never before searched her good friend in this manner.

Though her role was minor in comparison, the State presented ample evidence that Hutnik knowingly or intentionally aided her boyfriend in committing the crime of dealing in

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<sup>2</sup> Ind. Code Ann. § 35-48-4-13(b) (West, Westlaw through 2010 2nd Regular Sess.).

a schedule II controlled substance. *See* Ind. Code Ann. § 35-41-2-4 (West, Westlaw through 2010 2nd Regular Sess.) (“[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense”). Contrary to her assertions on appeal, Hutnik went beyond merely acquiescing in the crime and providing a site for the drug transaction. To be sure, Hutnik affirmatively assisted Krull by searching Craft for a wire and/or weapons prior to the drug transaction. From this evidence, along with Krull’s testimony regarding his discussions with Hutnik prior to each of the drug transactions, the jury could reasonably infer a common design or purpose. *See Berry v. State*, 819 N.E.2d 443, 450 (Ind. Ct. App. 2004) (“to sustain a conviction as an accomplice, there must be evidence of the defendant’s affirmative conduct...from which an inference of a common design or purpose to effect the commission of a crime may be reasonably drawn”), *trans. denied*.

2.

Hutnik also argues that the trial court incorrectly instructed the jury on accomplice liability. She claims that the instruction, which was given over her objection, is “not a correct statement of accomplice liability law because it failed to instruct the jury that Hutnik must have engaged in some affirmative conduct to aid or induce the crime in order for accomplice liability to attach.” *Appellant’s Brief* at 18 (citing *Peterson v. State*, 699 N.E.2d 701 (Ind. Ct. App. 1998)). On appeal, the State does not dispute that the instruction as given was incomplete but, rather, argues that Hutnik waived this issue below.

“Generally, a defendant waives a claim of instructional omission if [s]he fails to object and tender a competing instruction at trial”. *Wrinkles v. State*, 690 N.E.2d 1156, 1171 (Ind.

1997). In this case, unlike in *Peterson*, Hutnik failed to offer a competing instruction. To be sure, the (faulty) basis of her objection below was that the jury should not be instructed at all on accomplice liability because the State had not charged her as an accomplice.<sup>3</sup> Thus, her objection had nothing to do with the precise wording of the instruction or any alleged omissions. She cannot now raise a different claim of error on appeal. *See Haak v. State*, 695 N.E.2d 944, 947 (Ind. 1998) (“Haak cannot change course and assert a different objection on appeal”); *Patton v. State*, 837 N.E.2d 576 (Ind. Ct. App. 2005) (“defendant may not argue one ground for objection at trial and then raise new grounds on appeal...[n]or may a defendant appeal the giving of an instruction on grounds not distinctly presented at trial”). Therefore, this claimed error is waived.<sup>4</sup>

Judgment affirmed.

MAY, J., and MATHIAS, J., concur.

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<sup>3</sup> It is well established that an instruction regarding accomplice liability may be proper even where the defendant has been charged only as a principle. *See Hampton v. State*, 719 N.E.2d 803 (Ind. 1999).

<sup>4</sup> In an attempt to avoid waiver, Hutnik presents a claim of fundamental error in her reply brief. We, however, will not address an issue raised for the first time in a reply brief. *See Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968 (Ind. 2005).