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IN THE
COURT OF APPEALS OF INDIANA

DAVID HOOKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-0703-CR-126
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable David D. Kiely, Magistrate
Cause No. 82C01-0606-FA-608

NOVEMBER 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Defendant Appellant David Hooker ("Hooker") is appealing from his conviction by a jury of the Class A felony of robbery and the Class C felony of battery. Hooker was also found to be a habitual offender. The trial court merged the robbery and battery convictions and sentenced Hooker to thirty years. The sentence was enhanced by another thirty years as a result of the habitual offender determination.

We affirm.

ISSUES

Hooker states the issues as:

I. "Whether the State failed to establish Mr. Hooker's identity as the perpetrator beyond a reasonable doubt?"
II. "Whether the trial court erred by permitting the admission of hearsay evidence that violated Mr. Hooker's right of confrontation?"

FACTS

To preserve the first issue Hooker's brief refers to the perpetrator instead of his name. In this opinion we will refer to Hooker by name.

Asghar Ali owned a Kwik Wash Laundromat. At about 9:15 a.m. Robin Wade placed a load of clothes in a washer and then left while her clothes were being washed. Ali was the only other person there at the time. Hooker, wearing a camouflage jacket, entered the Laundromat at about 9:30 a.m. Wade returned at about 10:00 a.m. and placed her clothes in a dryer. She saw that Ali and another customer were in the Laundromat, and the customer was a black man wearing a fatigue jacket and a black or navy blue stocking cap. Wade then left while her clothes were drying and went home.

Ali checked the moneychanger and went to his desk in the storage room. Ali then walked over to Hooker. Hooker drew a gun, pointed it at Ali's head, and told Ali to get the key for the snack machine. The two walked back to Ali's desk. Ali removed cash and placed the money in a bag. Ali took the key for the snack machine, and while Hooker held the gun to his head Ali tried, but could not open the machine. Wade returned about this time and saw the customer holding the gun to Ali's head. Hooker ordered Wade to get on the floor, which she did. While Ali was looking for the key to the snack machine, the storage room door closed leaving Ali on one side and Hooker on the other. Hooker fired two shots at the door and it opened. Hooker then shot Ali in the shoulder. Hooker then fled.

When the police arrived they found clothes in only one washing machine. The washing machine had a can of Mello Yello sitting on it. The Laundromat had a vending machine that sold Mello Yello. No other beverage cans were found sitting out in the Laundromat. The can was almost full; it was cool and had no condensation on it. A detective swabbed the can where a person's mouth would have been. The DNA sample matched Hooker's profile.

Additional facts will be added as needed.

DISCUSSION AND DECISION

Issue I.

When reviewing a claim of insufficient evidence, we will not reweigh the evidence or judge witnesses' credibility. *Ware v. State*, 859 N.E.2d 708, 724 (Ind. Ct. App. 2007). We will consider only the evidence favorable to the judgment and the

reasonable inferences drawn therefrom. *Id.* We will affirm a conviction if the lower court's finding is supported by substantial evidence of probative value. *Id.* When a defendant is convicted on circumstantial evidence, we will not reverse if the trier of fact could reasonably infer from the evidence presented that the defendant is guilty beyond a reasonable doubt. *Id.* To affirm, we need not find the circumstantial evidence overcomes every reasonable hypothesis of innocence. *Id.* Instead, we must be able to say that an inference may reasonably be drawn from the circumstantial evidence to support the verdict. *Id.*

Hooker directs us to the case of *Marrow v. State*, 699 N.E.2d 675, 677 (Ind. Ct. App. 1998) for the proposition that the presence of the defendant's keys at the crime scene was, by itself, insufficient to sustain defendant's conviction. So it is, Hooker argues, that the Mello Yello soft drink can and the inconsistencies of Ali's and Wade's pretrial and trial identification testimony fail to prove that Hooker was the perpetrator.

Identification testimony need not necessarily be unequivocal to sustain a conviction. *Heeter v. State*, 661 N.E.2d 612, 616 (Ind. Ct. App. 1996). Elements of offenses and identity may be established entirely by circumstantial evidence and the logical inferences drawn therefrom. *Bustamante v. State*, 557 N.E.2d 1313, 1317 (Ind. 1990). The unequivocal identification of the defendant by a witness in court, despite discrepancies between his description of the perpetrator and the appearance of the defendant, is sufficient to support a conviction. *Emerson v. State*, 724 N.E.2d 605, 610 (Ind. 2000).

Inconsistencies in identification testimony impact only the weight of that testimony, because it is the jury's task to weigh the evidence and determine the credibility of the witnesses. *Gleaves v. State*, 859 N.E.2d 766, 770 (Ind. Ct. App. 2007). As with other sufficiency matters, we will not weigh the evidence or resolve questions of credibility when determining whether the identification evidence is sufficient to sustain a conviction. *Id.* Rather, we examine the evidence and the reasonable inferences therefrom that support the verdict. *Id.*

The State points to evidence which shows that Wade testified that the same person who drank from the Mello Yello can is also the same person who robbed Ali; that the saliva swabbed from the top of the Mello Yello can had DNA that was Hooker's; and, that when the police officer arrived the Mello Yello can was almost full and cool to the touch. Ali also testified:

> STATE: You see the defendant here, right?
> ALI: Yes Sir.
> STATE: Does he bear any resemblance to the robber? Does he look like the robber at all?
> ALI: Looks to me the same.
> STATE: He does?
> ALI: Yeah.
> STATE: Are you kinda sure or really sure?
> ALI: Yeah, I'm sure.

Tr. at 281.

We are of the opinion that the foregoing trial evidence is sufficient to identify Hooker as the robber.

Issue II.

At trial, a police officer testified that Wade told him that the robber was drinking from the Mello Yello can. However, the officer retracted that statement, but maintained that Wade told him the Mello Yello can belonged to the perpetrator. Wade was questioned on cross-examination, and she testified that she had no memory of making the statement. The next day, and after the close of evidence, Hooker objected to the officer's testimony as hearsay. The trial court allowed that the testimony may have been hearsay, but ruled that the objection came too late.

Hooker now complains that the statement was not hearsay; that he was denied his right to confrontation; and, the ruling was fundamental error.

A contemporaneous objection is generally required to preserve an issue for appeal. *Rembusch v. State*, 836 N.E.2d 979, 982 (Ind. Ct. App.2005). The purpose of such a rule is to promote a fair trial by precluding a party from sitting idly by and appearing to assent to an offer of evidence or ruling by the court only to cry foul when the outcome goes against him. *Id.* at 983.

In any event the failure to object at trial constitutes waiver of review unless the error is so fundamental that it denied the accused of a fair trial. *Absher v. State*, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007). The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule. *Id*. To invoke the fundamental error doctrine, it is not enough to urge that a constitutional right is implicated by the trial court's unpreserved error. *Id.* To qualify as fundamental error, an unpreserved error must be so prejudicial to the rights of the defendant as to make a fair trial impossible and

must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. *Id.* The fundamental error doctrine serves only in exceptional circumstances. *Id*. at 356. The doctrine of fundamental error is not designed to be used as a safe harbor for a defendant who fails to raise a timely objection. *Id.*

We are of the opinion that Hooker has failed to show the necessary prejudice required to make the supposed error fundamental. First, there was evidence as recited above to show that Hooker was in fact the perpetrator, namely the testimony of Ali that Hooker was the robber, and the evidence of Hooker's DNA on the soft drink can. Even with the trial judge's opinion that the testimony was hearsay, we hold that error, if any, was harmless.

Hooker also argues that the police officer's testimony was an evidentiary harpoon. Hooker says the testimony was a surprise and that he was prevented from objecting until the next day. We do not understand why an objection was not immediately forthcoming, because the officer's testimony was no more surprising a day later than when it was offered. In any event, the proper procedure in such a situation is to request a continuance for the purpose of determining the accuracy of the proposed testimony. *O'Connell v. State*, 742 N.E.2d 943, 948 (Ind. 2001).

Hooker counters, however, with a citation to the case of *Outback Steakhouse of Florida, Inc. v. Markley*, 856 N.E.2d 65 (Ind. 2006), and argues that some situations do not require a continuance. We are of the opinion that *Outback* is not factually controlling in the current case. First, it does not overrule *O'Connell*. Second, the police officer was

not a surprise witness, and he had been deposed by the defense prior to trial. A timely motion for a continuance by Hooker would have been appropriate.

Outback is distinguishable from the case at bar. In *Outback*, the witness with the "surprise" testimony had provided two versions of testimony; the first occurring in a visit to the plaintiff's attorney, which was not disclosed to the defense; and, the second which was arguably favorable to the defense, and was given during a deposition. The witness retreated to her first version during her testimony at trial. The defense chose to cross-examine that witness, but she remained firmly attached to the first version. The defense was unaware of the previous flip-flop in testimony occurring between her visit to the plaintiff's attorney and her deposition. The supreme court found that Outback had not waived its objection to the witness' testimony by choosing to cross-examine her, instead of choosing another remedy, because Outback was unaware, due to its opponent's misconduct, of all of the relevant facts, i.e. the witness' previous flip-flop in testimony. 856 N.E.2d at 79. No waiver could be claimed in light of the attorney misconduct.

Here, both Wade and the officer had been deposed prior to trial. For the first time at trial, the officer referred to a statement purportedly made by Wade claiming to have seen the perpetrator drinking from the can of Mello Yello. Instead of objecting to the testimony, Hooker cross-examined the officer about the new statement. The officer pulled back from his testimony, and stated that he did not recall if Wade had said that the robber had taken a drink from the Mello Yello can. Hooker was allowed to recall Wade to the witness stand and question her about the purported statement. Wade testified that

she did not see the robber drink from the can and had not seen the robber obtain the soft drink can.

Therefore, Hooker has not made the requisite showing of prejudice in order to establish fundamental error. Any error which may have occurred was remedied by impeaching the officer's testimony during cross examination and by recalling Wade to the stand. Unlike in *Outback*, the witness here, the officer, backed down from the "surprise" testimony, and the declarant of the alleged statement did not corroborate the contents of the "surprise" testimony. Unlike in *Outback*, Hooker's cross-examination was effective and Wade established that she did not make the statement attributed to her. However, Wade's testimony that the person she had seen using the washing machine with the Mello Yello can on it was the same person who had robbed Ali remained.

Turning to the fundamental question to this issue, a reading of the appropriate portions of the transcript reveals no mention of a confrontation argument. It is well established that we may not consider evidence or arguments not properly presented to the trial court. *Gonser v. State*, 843 N.E.2d 947, 951 (Ind. Ct. App. 2006). Because of that the confrontational issue is waived. *Crafton v. State*, 821 N.E.2d 907, 912 (Ind. Ct. App. 2005).

Hooker's confrontation argument is also not applicable in that the case of *Crawford v. Washington*, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 541 U.S. 36, 59 n. 9 (2004), says that when the declarant (in this case Wade) appears for cross-examination at trial the confrontation clause does not apply to the use of prior testimonial statements.

As a consequence of waiver and the failure to make a contemporaneous objection we hold that Hooker cannot prevail on this issue.

CONCLUSION

The evidence is sufficient to support the verdict. We find no error in the trial court's ruling on the evidentiary issue.

Judgment affirmed.

MAY, J., and VAIDIK, J., concur.