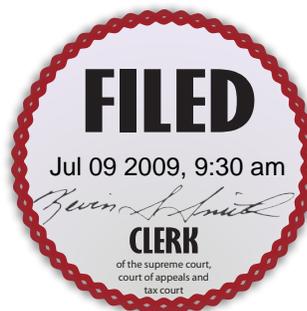


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JERRY EMERSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0809-CR-848

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton-Pratt, Judge
Cause No. 49G01-0805-MR-107649

July 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Following a jury trial, Jerry Emerson was convicted of murder, attempted murder, criminal confinement, and carrying a handgun without a license. In this direct appeal, Emerson makes a number of fundamental error claims: the jury instructions failed to inform the jury that, to be guilty of attempted murder as an accomplice, Emerson had to have the specific intent to kill the attempted murder victim, the prosecution improperly commented upon his exercise of the right to a speedy trial and his failure to testify, and the trial court improperly admitted into evidence a handgun, evidence of prior bad acts, and evidence that a witness was reluctant to testify. Finding no reversible error, we affirm.

Facts and Procedural History

On July 30, 2007, Emerson and Samuel “Buddha” Fancher were driving in an Indianapolis neighborhood and spotted seventeen-year-old Leroy Moorman and sixteen-year-old Ryan Sampson. Emerson and Fancher recognized the teenagers as people who had previously broken into their house. The two men forced Moorman and Sampson into their car at gunpoint and drove them to a vacant residence. Once there, they took Moorman and Sampson to a bathroom and shot them. Sampson was shot multiple times, including in the head, and died at the scene. Moorman was shot in both arms and lay on the floor with his eyes closed until Emerson and Fancher left. He then went to a nearby residence for help. Moorman survived the shooting.

Later, Emerson told Curtis Williams about the shooting. Williams testified at trial that Emerson described the shooting as follows:

As soon as I got to the mother f***ing house, I shot that mother f***er dead in the head. This little b**** [Fancher] was gonna do the same d*** thing, but he wanna give mother f***ers body shots. I told him that body shots don't work, and [Fancher] said, he thought he was dead, too.

Tr. p. 206-07. After Williams subsequently learned that he was distantly related to Sampson,¹ he told an uncle and later the police what he knew.

The State charged Emerson with murder,² attempted murder,³ Class B felony criminal confinement,⁴ and Class A misdemeanor carrying a handgun without a license.⁵ The case proceeded to a jury trial. At the conclusion of trial, Emerson was convicted as charged. Appellant's App. p. 130-33. Emerson now appeals.

Discussion and Decision

On appeal, Emerson makes the following claims of error: (1) the jury instructions failed to inform the jury that, to be guilty of attempted murder as an accomplice, Emerson had to have the specific intent to kill the attempted murder victim, (2) the prosecution improperly commented upon Emerson's exercise of his right to a speedy trial, (3) the prosecution improperly commented upon Emerson's failure to testify, (4) the trial court improperly admitted into evidence a handgun, (5) the trial court improperly admitted

¹ Williams and Sampson were not related by blood. However, Williams's uncle has two children with Sampson's mother. Tr. p. 32.

² Ind. Code § 35-42-1-1.

³ Ind. Code § 35-41-5-1; I.C. § 35-42-1-1.

⁴ Ind. Code § 35-42-3-3(b)(2)(A).

⁵ Ind. Code § 35-47-2-1. The charging information contains a second charge of carrying a handgun without a license, but this additional charge pertains only to another defendant. Appellant's App. p. 27.

evidence of Emerson's prior bad acts, and (6) the trial court improperly admitted evidence that a witness was reluctant to testify.

I. Jury Instruction on Attempted Murder

Emerson argues that the trial court erred by failing to properly instruct the jury regarding the *mens rea* necessary to find him guilty of attempted murder under a theory of accomplice liability. His argument is two-fold. First, he briefly argues that the trial court erred by instructing the jury that it could convict him of attempted murder if it found that he acted knowingly. Second, he contends that the trial court failed to instruct the jury that it had to find that he acted with the specific intent to kill Moorman in order to find him guilty of attempted murder under a theory of accomplice liability.

It is well-established that the law requires an instruction setting forth the elements of attempted murder to include "that the defendant, with the intent to kill the victim, engaged in conduct which was a substantial step toward such killing." *Spradlin v. State*, 569 N.E.2d 948, 950 (Ind. 1991). Where the State seeks a conviction for attempted murder under an accomplice liability theory, our Supreme Court has held that the State is required to prove: "(1) that the accomplice, acting with the specific intent to kill, took a substantial step toward the commission of murder, and (2) that the defendant, acting with the specific intent that the killing occur, knowingly or intentionally aided, induced, or caused the accomplice to commit the crime of attempted murder." *Hopkins v. State*, 759 N.E.2d 633, 637 (Ind. 2001) (citing *Bethel v. State*, 730 N.E.2d 1242, 1246 (Ind. 2000)).

Emerson acknowledges that he did not object to the challenged instruction at trial, and his argument regarding the jury instruction must therefore be based upon a theory of

fundamental error. *Id.* at 638. Fundamental error is a “substantial, blatant violation of due process.” *Id.* In order for error to be deemed fundamental and warrant reversal, the error must be so prejudicial to the rights of a defendant to make a fair trial impossible. *Id.* Where the defendant’s intent was vigorously contested or the trial court’s instructions did not sufficiently inform the jury regarding specific intent, a *Spradlin* error may rise to the level of fundamental error and warrant reversal. *Jones v. State*, 868 N.E.2d 1205, 1210 (Ind. Ct. App. 2007) (citing *Williams v. State*, 737 N.E.2d 734, 737 (Ind. 2000)), *trans. denied*.

Here, the trial court instructed the jury on attempted murder, in relevant part:

The crime of Attempt Murder is defined as follows:

“A person who knowingly or intentionally kills another human being, commits Murder, a Felony.

A person attempts to commit Murder when, acting with the culpability required for commission of the Murder, he engages in conduct that constitutes a substantial step toward commission of the Murder. The crime of Attempt Murder is a Class A Felony.”

To convict the defendant of Attempt Murder, the State must have proved each of the following elements;

That the defendant Jerry Emerson, on or about July 30, 2007,

1. did attempt to commit the crime of Murder,
2. which is to intentionally kill another human being, namely: Leroy Moorman, by engaging in conduct, that is: shooting a deadly weapon, that is: a handgun, at and against the person of Leroy Moorman,
3. with the specific intent to kill Leroy Moorman, resulting in serious bodily injury, that is: two (2) gunshot wounds,
4. which conduct constituted a substantial step toward the commission of said crime of Murder.

Appellant’s App. p. 89. The trial court instructed the jury regarding accomplice liability as follows:

A person who knowingly or intentionally aids another person in committing or induces another person to commit or causes another person

to commit a crime, is guilty of the crime, even though he does not personally participate in each act constituting the crime.

A person may be convicted of a crime by aiding, inducing, or causing another to commit a crime even if the other person:

1. has not been prosecuted for the offense
2. has not been convicted of the offense; or
3. has been acquitted of the offense[.]

In order to commit a crime by aiding, inducing or causing another to commit a crime, a person must have knowledge that he is aiding, inducing or causing the commission of the crime. To be guilty, one does not have to personally participate in the crime nor does he have to be present when the crime is committed. Merely being present at the scene of the crime is not sufficient to prove that he aided, induced or caused the crime. Failure to oppose the commission of the crime is also insufficient to prove aiding, inducing or causing another to commit the crime. But presence at the scene of the crime and or failure to oppose the crime's commission are factors which may be considered in determining whether there was aiding, inducing or causing another to commit the crime.

Id. at 117.

Emerson's first contention is that "[t]he references to the word 'knowingly' [in these instructions] are improper. They indicate that a 'knowing' mental state is sufficient to prove attempted murder." Appellant's Br. p. 15. Emerson concedes, however, that the inclusion of the word "knowingly" in the instructions "by itself, might not be grounds for appellate relief." *Id.* We agree. It is not. The instructions presented to the jury, taken as a whole, sufficiently informed the jury that, in order to convict Emerson of attempted murder, it had to find that he acted with the specific intent to kill Moorman. Here, although the trial court's instruction contained language that might have, by itself, misled the jury to believe that it could convict Emerson of attempted murder if he acted "knowingly" rather than with specific intent, *see Ramsey v. State*, 723 N.E.2d 869, 872 (Ind. 2000) (describing the presence of "knowingly" language in an attempted murder instruction as "highly problematic"), we do not read segments of a trial court's jury

instructions in isolation, *Price v. State*, 765 N.E.2d 1245, 1252 (Ind. 2002). Rather, we consider the instructions as a whole. *Price*, 765 N.E.2d at 1252. Even if one portion of the instruction is erroneous, “[i]f some other instruction adequately inform[ed] the jury that [it] must find that [the] defendant had the ‘intent to kill’ then there is no fundamental error.” *Yerden v. State*, 682 N.E.2d 1283, 1286 (Ind. 1997) (citing *Beasley v. State*, 643 N.E.2d 346 (Ind. 1994)). In this case, the trial court instructed the jury that, in order to convict Emerson of attempted murder, the State had to prove that Emerson acted “with the specific intent to kill Leroy Moorman[.]” Appellant’s App. p. 89. There is no fundamental error in this regard.

Emerson next contends that the “instructions fail to inform the jury that in order to find Emerson guilty of attempted murder under a theory of accomplice liability, they must find that both Emerson and Fancher had the specific intent to kill Leroy Moorman.” Appellant’s Br. p. 16. Again, we read the instructions as a whole, and the trial court *did* instruct the jury that it had to find that Emerson acted with the specific intent to kill Moorman in order to convict him of Moorman’s attempted murder. Appellant’s App. p. 89. The trial court did not err in this regard.

II. Prosecutorial Misconduct

Emerson next argues that the prosecutor committed misconduct (1) by asking a witness about Emerson’s exercise of his right to a speedy trial and (2) by commenting during closing argument upon Emerson’s failure to testify. Our Supreme Court has explained that

[i]n reviewing a properly preserved claim of prosecutorial misconduct, we determine (1) whether the prosecutor engaged in misconduct, and if so, (2)

whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected. *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2002). Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct. *See Mahla v. State*, 496 N.E.2d 568, 572 (Ind. 1986). The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. *Coleman v. State*, 750 N.E.2d 370, 374 (Ind. 2001).

Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). Emerson did not object contemporaneously to either of the instances of alleged misconduct. A party's failure to present a contemporaneous objection asserting prosecutorial misconduct precludes appellate review of the claim. *Booher*, 773 N.E.2d at 817. However, we may review such claims for fundamental error. *See id.* In order to constitute fundamental error, an incident of prosecutorial misconduct must "make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process [and] present an undeniable and substantial potential for harm." *Id.* (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)).

A. Comment Upon Emerson's Speedy Trial Demand

Emerson argues that the prosecution improperly commented upon his exercise of his constitutional right to a speedy trial. The Sixth Amendment to the United States Constitution and Article 1, §12, of the Indiana Constitution guarantee a criminal defendant the right to a speedy trial. Our Supreme Court has described the right to a speedy trial as "fundamental to our system of justice." *Crawford v. State*, 669 N.E.2d 141, 145 (Ind. 1996). It follows that a defendant should not be penalized for exercising this right.

Emerson complains that the State improperly drew the jury's attention to the fact that he requested a speedy trial. Specifically, he points to the following line of questioning by the State on redirect examination of a witness and argues that it constitutes prosecutorial misconduct:

Q. Now you are aware, are you not, detective, that the defendant in the case asked for a speedy trial?

A. Yes, I'm aware.

Q. And does that limit the time that the State has to bring somebody to trial?

A. It certainly can.

Q. And with your knowledge of the Crime Lab and the backlog of DNA, is there sufficient time, or was there sufficient time between now and then to get results back if we even had anything to look at?

A. Probably not.

Tr. p. 430. We need not determine whether this reference to Emerson's speedy trial request was improper because, even if it was, Emerson has failed to show any substantial harm from this exchange. Emerson singles out the above questions in an attempt to argue that the State "left the jury with the impression that Emerson's request for a speedy trial forced the State to cut its investigation short." Appellant's Br. p. 20. However, Emerson ignores that the State also elicited testimony from the same witness indicating that there was no DNA evidence from the perpetrators left at the scene of the shooting to test:

Q. . . . I just want to ask you a few questions about [DNA]. In order for somebody's DNA to be found at a scene, isn't it true that there has to be some transfer of something that would leave DNA?

A. That's my understanding of DNA, yes.

Q. So somebody has to bleed?

A. You can bleed, yes.

Q. It has to somehow leave something of themselves at the scene in order to find their DNA, correct?

A. Correct.

Q. If nothing is left of themselves at the scene, you're not going to find their DNA; is that correct?

A. That's correct.

Q. *And in the course of your investigation have you any information that either of the suspects in the bathroom other than our victims bled?*

A. *No.*

Tr. p. 429-30 (emphasis added). When we read the challenged exchange in context, it is apparent that the jury was *not* left with an inference that Emerson's speedy trial request thwarted the State's efforts to conduct DNA testing. Instead, the jury was told that the State lacked DNA evidence connecting Emerson to the crime scene because no one other than the victims bled at the scene. *Id.* at 430. And no evidence was presented to the jury that any other kinds of biological material susceptible to DNA testing were left at the scene. Any error created by the State's mention of Emerson's exercise of his speedy trial right did not create a substantial potential for harm. There is no fundamental error in this regard.

B. Comment Upon Emerson's Failure to Testify

Emerson also argues that the prosecution implicitly commented upon his failure to testify, warranting reversal. As our Supreme Court has long recognized, comment by the prosecutor upon a defendant's refusal to testify is prohibited by the Fifth Amendment to the United States Constitution. *Williams v. State*, 426 N.E.2d 662, 666 (Ind. 1981) (citing *Griffin v. California*, 380 U.S. 609 (1965)). "The Fifth Amendment privilege against compulsory self-incrimination is violated when a prosecutor makes a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence." *Moore v. State*, 669 N.E.2d 733, 739 (Ind. 1996), *reh'g denied*.

Emerson contends that the following comment made during closing argument by the State was an improper comment upon his silence:

We're not asking you to believe [Williams], we're asking you to believe [Emerson]. He's the one that told you what happened. He told you through [Williams], and [Williams] knows things he could not have known. . . . We're not asking you to believe Curtis Williams. Believe [Emerson]. He's the one that told you what happened through Curtis Williams.

Tr. p. 518. Emerson argues that because he “did not tell the jury anything, and the jurors knew it[,] [t]he State’s comments could have reasonably been interpreted as a [sic] invitation to draw an adverse inference from Emerson’s failure to testify.” Appellant’s Br. p. 28. In support of his position, he points to *Davis v. State*, 685 N.E.2d 1095 (Ind. Ct. App. 1997). In *Davis*, a police officer testified that the defendant admitted, “I took the car,” when he was arrested for auto theft. *Id.* at 1097. During closing argument, the State argued, “[Davis] said he took the car. There is nothing to controvert that. There is no evidence saying that isn’t so. There’s not even an argument that he didn’t say that.”

Id. Concluding that this comment was improper, we reasoned:

By calling attention to the defendant’s alleged admission *and pointing out that there was no claim to the contrary*, the prosecutor indirectly brings to the jury’s attention the fact that Davis did not deny this allegation. Davis was the only one who could have denied that this statement was made since only he and Officer Kaszas were present at the time. Thus, a reasonable jury could have taken that comment as an invitation to consider Davis’ failure to testify as an inference of guilt.

Id. at 1098 (emphasis added). Emerson contends that the State’s comment in the instant case is improper because it is similar to the comment we found improper in *Davis*. However, *Davis* is wholly distinguishable from the case before us. In *Davis*, the State drew attention to the defendant’s silence by pointing out that the defendant failed to

present a defense to the police officer's claim. *Id.* at 1097. Here, the State did no such thing. Tr. p. 518.

Contrary to Emerson's contention that the State's comment amounted to an invitation to draw a negative inference from his decision not to testify, the State's comment was merely an argument explaining to the jury why it should credit Williams's testimony: "[Williams] knows things he could not have known." *Id.* This was a proper comment upon the credibility of a witness and did not constitute prosecutorial misconduct.

III. Admission of Evidence

Emerson also argues that the trial court erred by admitting evidence of a handgun, prior bad acts by Emerson, and a witness's reluctance to testify. We review a trial court's determination as to the admissibility of evidence for an abuse of discretion. *Smith v. State*, 754 N.E.2d 502, 504 (Ind. 2001). We will reverse only if a trial court's decision is clearly against the logic and effect of the facts and circumstances. *Id.* We will not reweigh the evidence and will consider any conflicting evidence in favor of the trial court's ruling. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), *trans. denied*. Even if the decision was an abuse of discretion, we will not reverse if the admission of evidence constituted harmless error. *Hape v. State*, 903 N.E.2d 977, 991 (Ind. Ct. App. 2009), *trans. denied*. Error is harmless if "the conviction is supported by substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." *Cook v. State*, 734 N.E.2d 563, 569 (Ind. 2000), *reh'g denied*. A defendant's failure to object to the

admission of evidence at trial results in waiver and precludes appellate review unless the admission constitutes fundamental error. *Cutter v. State*, 725 N.E.2d 401, 406 (Ind. 2000), *reh'g denied*.

A. Handgun

Emerson asserts that the trial court abused its discretion by admitting a handgun into evidence. Emerson argues that the handgun is irrelevant and unduly prejudicial and should not have been admitted over his objection at trial. Indiana Evidence Rule 402 provides: “All relevant evidence is admissible, except as otherwise provided by the United States or Indiana constitutions, by statute not in conflict with these rules, by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.” Relevant evidence is “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.” Ind. Evidence Rule 401. However, pursuant to Indiana Evidence Rule 403, “[a]lthough relevant, evidence 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.”

Emerson contends that the handgun, which was found in a Bloomington hotel room occupied by Fancher and another individual, Coy Daniels, seven months after the instant offenses were committed, is irrelevant. Appellant’s Br. p. 44-46. He points out that the State could not connect the handgun to him or the instant offenses and that Daniels’ fingerprints were found on the gun. The State acknowledges that it is unable to

match the gun to the bullets recovered from the scene of the crimes but argues that the gun is nonetheless relevant because it is the “same class of gun” used to shoot the two victims. Appellee’s Br. p. 16.

Regardless of whether this tenuous connection between Emerson and the gun renders it relevant, any error from the admission of the handgun is harmless. The jury was presented with compelling evidence of Emerson’s guilt, including evidence that Emerson admitted to his role in these crimes to another individual.⁶ Tr. p. 107, 206. Given this evidence, we cannot say that the admission of the handgun, if in error, affected Emerson’s substantial rights.

B. Prior Bad Acts

Emerson next argues that the trial court erred by admitting evidence of prior bad acts in contravention of Indiana Evidence Rule 404(b). “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” Ind. Evidence Rule 404(b). The rationale behind this rule is that “the jury is precluded from making the forbidden inference that the defendant had a criminal propensity and therefore engaged in the charged conduct.” *Monegan v. State*, 721 N.E.2d 243, 248 (Ind. 1999) (quotation omitted). When a defendant objects to the admission of

⁶ We disagree with the State that, “[i]f the court abused its discretion by admitting the handgun, which it did not, the resulting error was likely not harmless as related to the carrying a handgun conviction.” Appellee’s Br. p. 17. The State reasons that “the jury found Defendant guilty of carrying a handgun without a license and likely considered the .38 was the weapon used in the crime.” *Id.* at 18. To the contrary, we think it likely that the jury convicted Emerson of the handgun offense based upon evidence that he shot Sampson with a weapon that the State’s firearms expert determined was a .38 caliber handgun.

evidence on the basis of Indiana Evidence Rule 404(b), the trial court: “(1) determine[s] whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant’s propensity to commit the charged act; and (2) balance[s] the probative value of the evidence against its prejudicial effect pursuant to Evid[ence] R[ule] 403.” *Id.* On appeal, we review the determinations regarding relevance and balancing for an abuse of discretion. *Id.* However, where a defendant failed to object to the admission of evidence, we may only review the introduction of the evidence for fundamental error. *Cutter*, 725 N.E.2d at 406.

1. The “Crack House”

Emerson first argues that he suffered fundamental error when Williams testified that he and Fancher ran a “crack house.” Appellant’s Br. p. 38. He concedes that he did not object to Williams’s testimony in this regard and that his claim is only reviewable for fundamental error. *Id.* at 42.

During trial, Williams testified as follows:

A. I was coming through the neighborhood, and I seen [Fancher] and [Emerson]^[7] over at Tiff house. So I stopped. You know, just normal thing, just stopped. Got out briefly. You know. We got to talking, and I said - -

We got to talking, and I said, I heard somebody broke into y’all track. And [Fancher] started talking. He like, yeah, some b*****es had broke in there. You know what I mean.

Q. Now when you said I heard something broke into your track, what does that mean?

A. Track is a crack house where we hustle out of, stuff like that.

Q. A crack house?

A. Yeah.

⁷ Williams referred to Emerson at trial by his nickname, “Oody.”

Q. It's a drug house?

A. Yeah.

Q. Okay. So you heard somebody broke into whose drug house?

A. [Fancher] and [Emerson]'s.

Tr. p. 202-03. Williams further testified that Emerson learned that Moorman and Sampson were the burglars because the break-in was captured on camera. *Id.* at 205, 208. Emerson contends that “[t]he State’s theory at trial was that Emerson and Fancher shot Moorman and Sampson in retaliation for burglarizing a house” and that “the manner in which the house was allegedly being used was not relevant to the motive for the shooting.” Appellant’s Br. p. 38. The State responds that evidence of the burglary of the “crack house” was relevant to prove motive, which is a permissible use under Indiana Evidence Rule 404(b).

We agree with the State. The use of the house as a “track” goes to the heart of why Emerson was so angry about the break-in. Evidence that this house and its contents were used for Emerson’s unlawful financial gain explains a motive for the crimes and is therefore admissible under Indiana Evidence Rule 404(b) as long as it is not unduly prejudicial. We cannot say that the probative value of this evidence is outweighed by its prejudicial effect. While evidence that Emerson ran a drug house was, of course, prejudicial, that does not outweigh the highly probative value of the testimony in regard to Emerson’s motive to kill both victims rather than report the burglary to police and seek legal redress as one might be reasonably expected to do. The admission of this evidence is not error.

2. Battery of Two Women

Emerson also contends that the trial court erred by permitting Williams to testify that Emerson and Fancher battered two women who they believed had burglarized the house before becoming suspicious that the two victims in this case were the actual burglars.⁸ As an initial matter, we observe that Emerson failed to lodge a contemporaneous objection to this testimony from Williams. While he did object to similar testimony from an earlier witness, Tr. p. 152, the earlier objection was not sufficient to preserve an objection to later evidence regarding the battery of the women because Emerson did not request a continuing objection. *See Hayworth v. State*, 904 N.E.2d 684, 692 (Ind. Ct. App. 2009). As such, we review Emerson’s claim only for fundamental error.

At trial, Williams testified that, after someone burglarized Emerson and Fancher’s house, Emerson and Fancher initially believed that two women had committed the burglary. Williams testified in relevant part:

Q. [Fancher] said what?

A. Some b****es had broke in there. Said they beat them b****es up. He said we later found out it was some little dudes broke in there. . .

Q. If I understand you correctly, what [Fancher] was saying initially is they thought it was two women who broke into the house?

A. Yeah.

Q. And they did what to those two women?

A. They beat ‘em up.

Tr. p. 204-05. Emerson contends that “[t]he only purpose served by the testimony about the battery was to malign Emerson’s character and make him look like a violent person

⁸ Emerson also argues that evidence that he called these two women “b****es” constituted fundamental error. However, the testimony to which he points for this proposition reveals only that *Fancher* used this terminology in reference to the women. Appellant’s Br. p. 37 (quoting Tr. p. 202-03).

who battered women” Appellant’s Br. p. 39. We disagree. Rather, this evidence is probative of Emerson’s motive for the offenses committed against Moorman and Sampson. As the State argues, “[t]he evidence proved that Defendant and Fancher sought to punish whoever had burglarized” their house, “and the beating of the two women Defendant and Fancher originally thought were responsible was highly relevant to Defendant’s motive to murder [Sampson] and attempt to murder [Moorman].” Appellee’s Br. p. 19-20. As such, this evidence falls within the parameters of evidence that may be admissible under Indiana Evidence Rule 404(b). Further, we cannot say that the probative value of this evidence outweighs its prejudicial effect. *See Pickens v. State*, 764 N.E.2d 295, 298-99 (Ind. Ct. App. 2002) (the prejudicial effect of evidence that defendant previously robbed and shot someone other than the victim did not outweigh the probative value of the evidence, which went to the defendant’s motive for shooting the victim), *trans. denied*. Thus, even if we were reviewing for an abuse of discretion, we would find no error in the admission of this evidence. The introduction of this evidence did not constitute fundamental error.

C. Reluctant Witness

Finally, Emerson argues that the trial court erred by admitting evidence that Moorman was scared to testify at trial. He acknowledges that he failed to object to the evidence about which he now complains. Appellant’s Br. p. 53. As such, we may only review the admission of this evidence for fundamental error.

At trial, the State elicited testimony from Moorman that he had been found in contempt for failing to appear for an earlier scheduled trial date and had been held in jail

until the trial so that he would testify. Tr. p. 63. A police officer later testified as follows regarding Moorman's response to his subpoena:

Q. What was [Moorman's] demeanor when he was given the subpoena and told that he had to appear for trial?

A. Very reluctant.

Q. Did you notice anything else about his demeanor as you and I were attempting to discuss with him the case?

A. He wouldn't have direct eye contact, looked at the ground like he was intimidated or just scared.

Q. Did he make any indication to you as to whether or not he wanted to cooperate any more?

A. No, he didn't. Did not want to.

Id. at 409. The State highlighted Moorman's reluctance to testify during its closing argument and characterized Moorman as "petrified" and "scared to death." *Id.* at 515, 516.⁹ "[T]estimony about threats made against a witness is admissible only where a proper foundation has been laid showing the threats were made either by the defendant or with the defendant's knowledge or authorization." *Smith v. State*, 765 N.E.2d 578, 587 (Ind. 2002) (citing *Cox v. State*, 422 N.E.2d 357 (Ind. Ct. App. 1981)), *reh'g denied*. Here, we do not have testimony that Moorman was actually threatened by Emerson. Rather, the testimony is merely that Moorman was compelled to testify and that he seemed intimidated or scared to the police officer who served his subpoena. Our Supreme Court has concluded in the past that where there is testimony that a witness fears harm if he or she testifies, admission of that testimony is error absent a showing that ties that fear to the defendant. *Id.* Here, assuming that the implication of Moorman's reluctance to testify was a fear of the defendant, admission of testimony about this reluctance was in error. Again, however, because Emerson failed to object, our review is

⁹ Emerson makes no claim that the State committed prosecutorial misconduct in this regard.

only for fundamental error, and we cannot conclude that the admission of this testimony rose to the level of affecting Emerson's substantial rights. First, the testimony regarding Moorman's reluctance to testify was vague and did not necessarily implicate that Moorman was afraid of the defendant. Further, the evidence presented against Emerson at trial was strong. Moorman admitted at trial that he initially identified Emerson as one of the people in the car that abducted him and Sampson, Tr. p. 88-89, and Williams testified about Emerson's confession to shooting one of the victims in the head and watching Fancher shoot the other victim, *id.* at 206-08. There was no fundamental error in this regard.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.