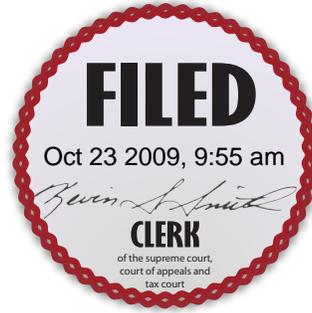


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KENNETH FELDER,)
)
Appellant-Defendant,)
)
vs.) No. 45A03-0906-CR-286
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Julie N. Cantrell, Judge
The Honorable R. Jeffrey Boling, Judge Pro Tempore
Cause No. 45D09-0808-CM-1072

October 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Kenneth Felder appeals his conviction for operating while intoxicated, a Class C misdemeanor, and the judgment that he failed to use a turn signal, a Class C infraction. We affirm.

Issues

Felder raises two issues, which we restate as:

- I. whether the trial court properly admitted mug shots into evidence; and
- II. whether the jury was properly instructed.

Facts

On November 19, 2007, East Chicago Police Officer Miguel Pena initiated a traffic stop after he observed Felder turn without signaling. During the stop, Officer Pena gave Felder a verbal warning because he had heard gunshots and needed to investigate. At approximately 3:30 a.m. the next morning, Officer Pena again observed Felder turn without signaling and initiated another traffic stop. This time, as Officer Pena approached the car, he smelled the odor of alcohol. Officer Pena also noticed that Felder's eyes were bloodshot and watery, his speech was mumbled, his clothes were in disarray, and his reactions were dull and slow. Felder had to pull himself out of his car. Officer Pena conducted three field sobriety tests, and Felder failed all three. Officer Pena took Felder to the police station to conduct a breathalyzer test, but Felder gave insufficient breath samples.

The State charged Felder with Class C misdemeanor operating while intoxicated and alleged that he failed to signal a lane change. A bench trial was conducted in East Chicago City Court, and Felder was found guilty of the allegations. Following the bench trial, Felder demanded a trial in Lake Superior Court. A jury trial was conducted, and Felder was again found guilty of the allegations. The trial court sentenced Felder to sixty days suspended and twelve months probation for the operating while intoxicated conviction. The trial court also fined Felder \$1.00 for the failure to use a turn signal. Felder now appeals.

Analysis

I. Admission of Mug Shots

Felder argues that the trial court abused its discretion by admitting into evidence mug shots that were taken of him on the morning of his arrest. Felder argues that the mug shots were highly prejudicial because they imply he had a prior criminal history. During the trial, however, Felder only argued that there was an insufficient foundation to support the admission of the mug shots. “A defendant may not argue one ground for an objection at trial and then raise new grounds upon appeal.” Bradley v. State, 770 N.E.2d 382, 385-86 (Ind. Ct. App. 2002). Therefore, Felder has waived his claim that the photographs were improperly admitted because they were mug shots. See id. at 386 (holding that defendant waived claim regarding the use of mug shots in a photo array where he did not object to the use of the mug shots at trial).

Citing Tucker v. State, 646 N.E.2d 972 (Ind. Ct. App. 1995), Felder argues that his limited objection is “irrelevant.” Appellant’s Br. p. 7. Even if we construe this as a

fundamental error argument, Tucker does not stand for the proposition that the admission of mug shots always amounts to fundamental error. Instead, we concluded that Tucker received ineffective assistance of counsel where trial counsel failed to object to the admission of evidence relating to a prior child molesting conviction and a mug shot, that the evidence was not overwhelming, and that the identification evidence was especially tenuous. Tucker, 646 N.E.2d at 977-78. Those circumstances are not present here. Without more, Felder has not established fundamental error.

II. Jury Instructions

Felder also argues that the jury was improperly instructed. He points to one instruction in which the trial court stated, “If the State did prove each of the elements beyond a reasonable doubt, you should find the defendant guilty of operating while intoxicated as a Class ‘C’ misdemeanor.” Tr. p. 379; App. pp. 64, 86. Felder contends the trial court should have instructed the jury that it “may” find him guilty. Felder also points to what he categorizes as a scrivener’s error in another instruction. As given, the instruction provided, “It is necessary for you to conclude that the accused is factually innocent in order to return a not guilty verdict.” Tr. p. 386; App. pp. 77, 100. Felder claims that the instruction should have included a “not” between “is” and “necessary” to read, “It is not necessary for you to conclude that the accused is factually innocent in order to return a not guilty verdict.”

The record, however, contains no objections to these alleged errors. Where a defendant does not object to an instruction, he or she waives the right to appeal the issue.

Dickenson v. State, 835 N.E.2d 542, 548 (Ind. Ct. App. 2005). Thus, this issue is waived.

Further, Felder argues, “Since it is impossible to know how the jury interpreted the Court’s instructions, the only possible remedy is reversal and remand for new trial.” Appellant’s Br. p. 8. This bare assertion is not enough to establish fundamental error. Hopkins v. State, 759 N.E.2d 633, 638 (Ind. 2001) (“Fundamental error is a substantial, blatant violation of due process. It must be so prejudicial to the rights of a defendant as to make a fair trial impossible.” (citations omitted)).

Conclusion

Felder’s arguments regarding the admission of the mug shots and the instruction of the jury are waived. We affirm.

Affirmed.

NAJAM, J., and KIRSCH, J., concur.