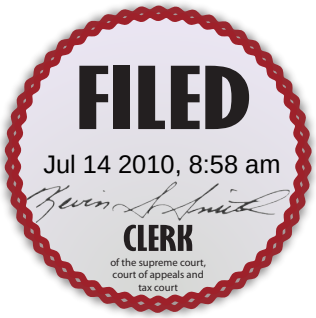

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL FURLONG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0911-CR-658
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey Marchal, Commissioner
Cause No. 49G06-0808-FB-169382

July 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Michael Furlong appeals his convictions for class B felony burglary and class D felony theft. The sole issue presented for our review is whether the trial court abused its discretion when it instructed the jury. We affirm.

Facts and Procedural History

In June 2008, William Hall was at the Major Taylor Velodrome in Indianapolis when he met Furlong. The two men talked for a couple of hours about their respective military backgrounds. Furlong asked Hall for some money, and Hall gave Furlong ten or twelve dollars. Approximately two weeks later, Hall returned to the Velodrome and again encountered Furlong. Hall offered Furlong some gardening work at his home in exchange for pay. They had dinner and returned to Hall's residence. The men were intimate and Furlong spent the night. Furlong then stayed with Hall for three days while he worked on the gardening. During the time he stayed with Hall, Furlong slept in his truck inside Hall's garage, did not have a key to the house, and was not permitted to be inside the home when Hall was not present.

On Friday, July, 4, 2008, Furlong left Hall's home stating that he would return the following Tuesday to do some additional work on the patio and trees. On Saturday, July, 5, 2008, Hall left for work around 7:30 a.m. While Hall was at work, his neighbor across the street, Mark Fuller, saw Furlong arrive at Hall's home. Fuller observed Furlong back his jeep up to Hall's garage and walk around behind Hall's house. Approximately fifteen minutes later, Fuller watched as Furlong loaded items into the jeep. Furlong then drove

away. Fuller did not observe anyone else enter or exit Hall's home that day while Hall was at work.

Hall returned home between 5:00 and 6:00 p.m. Hall immediately noticed that someone had been in his bedroom and that some of his jewelry was missing. When he checked the windows and doors, Hall discovered that his sliding glass door was unlocked, and he noticed a dirty footprint on the carpet under his patio window. Hall entered his office and discovered that his computer tower was also missing. Hall called 911. Hall went to talk to neighbors and Fuller informed him that Furlong had been at the house while Hall was at work. After police responded, both Hall and Fuller provided officers with information regarding Furlong. During subsequent police investigation, Detective Mary Horty of the Indianapolis Metropolitan Police Department, Pawn Unit, learned that Furlong pawned nine of Hall's rings at the Westside Loan pawn shop on July 9, 2008. Furlong sold Hall's rings to shop employee Drew Thompson and, as part of the sale, Furlong's thumbprint was stamped on a pawn card referencing the sales.

The State charged Furlong with class B felony burglary and class D felony theft. Following a jury trial, the jury found Furlong guilty as charged. This appeal ensued.

Discussion and Decision

Furlong contends that the trial court abused its discretion when it read to the jury certain preliminary and final jury instructions. Instructing the jury is within the sole discretion of the trial court, and we will reverse only upon an abuse of that discretion.

Schmid v. State, 804 N.E.2d 174, 182 (Ind. Ct. App. 2004), *trans. denied*. Jury instructions are to be considered as a whole and in reference to each other; error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. *White v. State*, 846 N.E.2d 1026, 1032-33 (Ind. Ct. App. 2006), *trans. denied*. Moreover, a defendant is only entitled to a reversal if he affirmatively demonstrates that the instructional error prejudiced his substantial rights. *Snell v. State*, 866 N.E.2d 392, 396 (Ind. Ct. App. 2007).

Furlong first alleges error in final jury instructions six and seven. Final instruction six defined the crime of burglary, and final instruction seven defined the crime of theft. In addition to providing the elements of those crimes, each instruction included the following language:

> If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty . . .. If the State did prove each of these elements beyond a reasonable doubt, you should find the defendant guilty. . ..

Appellant's App. at 98-99. Furlong objected to the instructions at trial, contending that the use of the word "should" in the instructions rather than the word "may" created an impermissible mandatory presumption that invaded the province of the jury by requiring the jury to return guilty verdicts on those charges. We disagree.

Article I, Section 19 of the Indiana Constitution provides that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts." A mandatory instruction that binds the minds and consciences of the jury to return a verdict of guilty upon

finding certain facts therefore invades the province of the jury. *White v. State*, 846 N.E.2d 1026, 1033 (Ind. Ct. App. 2006), *trans. denied.*[1] If a portion of the jury instruction, considered in isolation, could reasonably have been understood as creating a mandatory presumption, '"the potentially offending words must be considered in the context of the [instructions] as a whole. Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the [instruction] to have created an unconstitutional presumption."' *Walker v. State*, 769 N.E.2d 1162, 1168 (Ind. Ct. App. 2002) (quoting *Francis v. Franklin*, 471 U.S. 307, 314 (1985)), *opinion on reh'g.*, *trans. denied.* Indeed, it is well settled that "reversible error does not necessarily occur when [a mandatory instruction] is accompanied by another instruction informing the jury that it is the judge of the law and the facts." *Parker v. State*, 698 N.E.2d 737, 742 (Ind. 1998).

In the instant case, when the instructions are considered as a whole, the jury was more than thoroughly instructed on its province as well as the State's burden of proof such that a reasonable juror could not have considered any language to have created a mandatory presumption. Final instruction two specifically informed the jury that the jury "has the right to determine both the law and the facts." Appellant's App. at 94. Final instruction three provided that the defendant is presumed to be innocent and that it is the State's burden to overcome such presumption by proving each element of the crimes charged beyond a reasonable doubt. *Id*. at 95. As noted above, in addition to providing that the jury "should"

[1] Similarly, the Fourteenth Amendment to the United States Constitution requires the State to prove every material element of a criminal offense beyond a reasonable doubt, and a jury instruction that shifts the State's burden to the defendant is a Due Process violation. *Sandstrom v. Montana*, 442 U.S. 510 (1979)

find the defendant guilty if the State proved each element of the offenses beyond a reasonable doubt, final instructions six and seven each instructed the jury that if the State failed to prove each element of the offenses beyond a reasonable doubt then the jury "must" find the defendant not guilty. *Id.* at 98-99. Final instruction eight then reiterated and emphasized the State's burden of proof. Thus, while we discourage the use of mandatory language in jury instructions, contrary to Furlong's assertion, we cannot say that the language of the jury instructions here, when taken as a whole, created an impermissible mandatory presumption or otherwise invaded the province of the jury. The trial court did not abuse its discretion when it read to the jury final instructions six and seven.

Furlong next maintains that the trial court abused its discretion when it read to the jury preliminary instruction nine. Preliminary instruction nine provided:

> In order to constitute a breaking, it is not necessary to show forcible entry. It is necessary only to show that some physical act was used to gain entry. Even the opening of an unlocked door may be considered sufficient to constitute a breaking.

Id. at 79. First, we note that the instruction correctly states the law. *See Davis v. State*, 770 N.E.2d 319, 322 (Ind. 2002) (opening unlocked door sufficient to establish breaking element). In support of his argument that the instruction was improper, Furlong directs us to our opinion in *Higgins v. State*, 783 N.E.2d 1180 (Ind. Ct. App. 2003), *trans. denied*, wherein we disapproved of a jury instruction which instructed that the opening of an unlocked door or unlocked window "is" sufficient to constitute a breaking. *See also VanWanzeele v. State*, 910 N.E.2d 240, 246 (Ind. Ct. App. 2009) (cautioning against instructions stating that certain evidence "is" sufficient to establish element of crime). In *Higgins*, the defendant argued that

such instruction created an unconstitutional mandatory presumption. *Higgins*, 783 N.E.2d at 1185. While we rejected the defendant's argument in *Higgins*, we cautioned that instructions stating that certain evidence "is" sufficient to establish an element of a crime should not be given so as to avoid potential constitutional problems. *Id.* at 1186-87.

Unlike the instruction at issue in *Higgins*, which directed that certain evidence "is" sufficient to constitute a breaking, the instruction here provided that the opening of an unlocked door "may" be considered sufficient to constitute a breaking. This distinction is significant, and Furlong's reliance on our disapproval of the instruction in *Higgins* is wholly misplaced. Furlong has failed to otherwise establish error in the giving of preliminary instruction nine.

We conclude that the trial court in this case did not abuse its discretion when it instructed the jury. Even assuming we were to accept Furlong's assertions of error, any error in instructing the jury is subject to a harmless error analysis. *Bayes v. State*, 791 N.E.2d 263, 264 (Ind. Ct. App. 2003), *trans. denied*. Errors in giving instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise. *Buckner v. State*, 857 N.E.2d 1011, 1015 (Ind. Ct. App. 2006). The State here presented overwhelming evidence of Furlong's guilt. Hall's neighbor, Fuller, testified that he saw Furlong at Hall's house on the day of the burglary and witnessed Furlong loading items into his jeep. Hall testified that Furlong did not have permission to enter his house or to take his possessions. Furlong's thumbprint was on the pawn shop card which identified him as the individual who sold several of Hall's stolen rings. Furlong's convictions for

burglary and theft against Hall are clearly sustained by the evidence, and the jury could not properly have found otherwise. Furlong's convictions are affirmed.

Affirmed.

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