

STATEMENT OF THE CASE

Lanell T. Ayers appeals his conviction, after a jury trial, of robbery, a class B felony.

We affirm.

ISSUES

1. Whether his conviction must be reversed because the jury returned inconsistent verdicts.
2. Whether the trial court abused its discretion in admitting evidence.

FACTS

In 2007, Jere Wilchar was the owner/employee of a landscape company. In frequenting a Speedway gas station near his home, he had met an employee there named Casey. On September 14, 2007, Casey invited Wilchar to visit with her. Because she had recently moved, she was providing him with directions to her new residence on his cell phone. She directed him to an alley behind some buildings, where he parked in a parking lot. Still on his phone, Wilchar walked toward a specified doorway, which Casey told him that she would open.

Standing outside the door, Wilchar was confronted by Ayers and another man. When Wilchar saw Ayers' "drawn" handgun, he "gave . . . up to them" his own gun -- putting it down. (Tr. 153). The two men ordered Wilchar to walk to his vehicle in the illuminated parking lot, and to empty his pockets and give them his phone. Wilchar gave them \$200.00 from his right pocket and his phone. Ayers, holding the gun, was within two to three feet of Wilchar while the second man rummaged through the trunk and

interior of his vehicle. Ayers ordered Wilchar into the vehicle to assist the second man remove the stereo. Wilchar started the vehicle, put it in reverse, “backed up and then tried to run them over.” *Id.* at 155. Ayers “pointed his gun at [Wilchar’s] car and shot a round.” *Id.* at 156. The men fled, and Wilchar went to a nearby business and called the police.

When the police arrived. Wilchar reported that he had been robbed, at gunpoint, of money, his gun, his phone, and some personal items; and he gave a general description of the robbers. An immediate search was unproductive. Subsequently, Wilchar reported to his cellular service provider that his phone had been stolen.

Approximately a week after the robbery, the cellular service provider notified Wilchar that it had recovered his phone. When Wilchar retrieved his phone, he found that it contained “a lot of pictures” – some of which depicted “the gunman” who had robbed him. *Id.* at 160, 161. Wilchar turned the phone over to the investigating officer.

When the police retrieved the pictures from the phone, an officer recognized Ayers. A photo array was created and presented to Wilchar. Wilchar identified Ayers as the man who had robbed him at gunpoint.

On February 26, 2008, the State charged Ayers with robbery, as a class B felony, and criminal recklessness, a class D felony. The latter charge alleged that “while armed with a deadly weapon, to wit: a firearm,” Ayers had “recklessly, knowingly, or intentionally perform[ed] an act which create[d] a substantial risk of bodily injury” to Wilchar “by discharging said firearm at and/or in the direction of” Wilchar. (App. 17).

On June 30 and July 1, 2009, a jury trial was held. Wilchar testified to the facts above, and he expressly identified Ayers in court as the man who had robbed him at gunpoint. Twenty-three pictures taken on Wilchar's phone were admitted into evidence. Ayers testified that his half-brother, Tony Martin, had sold him the phone on September 17th, after which he had taken the twenty-three pictures with it. Ayers further testified that he had made no phone calls because "you couldn't make any phone calls" on it. (Tr. 297). A police forensic expert testified that his examination of the phone revealed that it had been used to make calls on September 18th and 22nd. The jury found Ayers guilty of the robbery offense, as a class B felony, but it acquitted him of the criminal recklessness offense.

DECISION

1. Inconsistent Verdicts

Ayers argues that the jury's verdicts – that he was guilty of armed robbery but not guilty of criminal recklessness – are "extremely contradictory and defy reconciliation." Ayers' Br. at 9. Specifically, Ayers asserts that his sole defense was that Wilchar "had misidentified him as the perpetrator," and "the evidence supporting identification relating to the robbery charge was the identical evidence supporting identification as to the criminal reckless charge." *Id.* at 9, 10.

When an appellate court considers a claim of inconsistent jury verdicts, "we will take corrective action only when the verdicts are extremely contradictory and irreconcilable." *Powell v. State*, 769 N.E.2d 1128, 1131 (Ind. 2002)." A jury's verdict

may be inconsistent or even illogical but is “nevertheless permissible if it is supported by sufficient evidence.” *Id.*

As noted above, the criminal recklessneww charge alleged that “while armed with a deadly weapon, to wit: a firearm,” Ayers had “recklessly, knowingly, or intentionally perform[ed] an act which create[d] a substantial risk of bodily injury” to Wilchar “by discharging said firearm at and/or in the direction of” Wilchar. (App. 17). Hence, to convict him of this offense, the State was required to prove not only that it was Ayers who brandished the gun at Wilchar, *i.e.*, identity, but also that his discharge of the gun in Wilchar’s direction (1) was done recklessly, knowingly, or intentionally, and (2) created a substantial risk of bodily injury to Wilchar. According to Wilchar’s testimony, Ayers fired the gun when Wilchar was attempting to run over him; facts which support the reasonable inference that the gun may have accidentally discharged when Ayers was scrambling to avoid injury. Moreover, Wilchar testified that neither he nor his vehicle were struck by a bullet; facts which support the reasonable inference that the shot created no substantial risk of bodily injury to Wilchar. Finally, an officer testified that no shell casing was found in the search of the crime scene; facts which support the reasonable inference that the traumatic experience of having a gun pointed at him led Wilchar to have mistakenly believed that Ayers had discharged the gun.

The totality of the circumstances presented to the jury allowed it to find beyond a reasonable doubt that Ayers committed the offense of robbery, as a class B felony, while also finding that the evidence did not establish beyond a reasonable doubt that he committed the offense of criminal recklessness. Accordingly, we conclude that the

verdicts are not “extremely contradictory and irreconcilable,” and Ayers’ first argument fails. *Powell*, 769 N.E.2d at 1131.

2. Admission of Evidence

The trial court has inherent discretionary power in the admission of evidence. *McManur v. State*, 814 N.E.2d 253, 264 (Ind. 2004), *cert. denied*. The trial court’s decision regarding the admissibility of evidence is reviewed only for an abuse of that discretion. *Id.* However, “[e]rrors in the admission of evidence are to be disregarded as harmless error unless they affect the substantial rights of the party.” *Turben v. State*, 726 N.E.2d 1245, 1247 (Ind. 2000). To determine whether an error in the admission of evidence affected the appellant’s substantial rights, we assess the probable impact of that evidence upon the jury. *Id.* The erroneous admission of evidence is harmless -- *i.e.*, it “does not affect [the defendant]’s substantial rights,” and “does not warrant reversal” -- when “the probable impact of the error on the jury, in light of all the evidence,” was minor, and the admissible evidence “was sufficiently strong.” *Bald v. State*, 766 N.E.2d 1170, 1173 (Ind. 2002) (citing *Hauk v. State*, 729 N.E.2d 994, 1002 (Ind. 2000)).

Ayers argues that the trial court abused its discretion when it admitted eighteen of the twenty-three pictures retrieved from the phone. Specifically, Ayers cites to the following pictures: a handgun and a number of magazines; the handgun, magazines, and “an assault rifle”; “closeup[s] of . . . hollow point rounds”; “a closeup of a magazine holding rounds for a larger caliber automatic weapon”; “this magazine with the corresponding assault rifle”; “closeups of a single round from the magazine”; the collected display of the foregoing items; four depictions of Ayers with the handgun or

assault rifle; a hand “holding a hand rolled cigarette that many might recognize as a ‘blunt’”; and “a small baggy containing chunky, off-white objects” that might “be characterized as rock cocaine.” Ayers’ Br. at 10, 11. He reminds us that he had “recorded a number of objections, including that of relevance, lack of connection linking them to the defendant and that any probative value would be outweighed by prejudicial impact.” *Id.* at 11.

Ayers cites to Evidence Rule 401 and 402 concerning “relevant evidence,” but cites to no law in that regard, and simply asserts that the “admission of firearms photos bore no relevance to the case.” *Id.* Wilchar testified that Ayers held a handgun (not a rifle) on him during the robbery, but he expressly testified that the robbery handgun was not the handgun shown in the picture retrieved from the phone. Hence, the pictures of weaponry are not relevant to the facts of the charged offense. Although it was error for the trial court to admit them into evidence, we find it unlikely that the pictures had significant impact on the jury.

The jury heard Wilchar’s testimony that he immediately recognized Ayers as the armed robber when he retrieved his stolen phone and viewed new pictures thereon, and that he subsequently identified Ayers as the robber on the photo array shown to him by the police. Wilchar also testified at trial that Ayers was the man who held the gun on him during the robbery, and that along with money and his own gun, his cell phone was taken from him. Ayers admitted to the jury that on September 17th and thereafter, he possessed and used the phone taken from Wilchar. A forensic expert testified that the phone was used to place calls after the date of Ayers’ admitted possession; the calls were placed to

an occupant of the residence where his half-brother was staying. This evidence supporting Ayers' conviction is "sufficiently strong" that we find error in the admission of pictures did not affect his substantial rights and was, therefore, harmless. *Bald*, 766 N.E.2d at 1173.

Ayers also cites to Evidence Rule 404(b), providing "that evidence of other crimes, wrongs or acts is not admissible to prove the character of the person in order to show action in conformity therewith." *Id.* at 12. He argues that the various pictures "did just what" Rule 404(b) prohibits. *Id.* As the State properly responds, however, Ayers did not object to the trial court that the pictures were inadmissible pursuant to Rule 404(b). A defendant may not object on one ground at trial and raise another on appeal; "any such claim is waived." *Houser v. State*, 823 N.E.2d 693, 698 (Ind. 2005).¹

Affirmed.

MAY, J., and KIRSCH, J., concur.

¹ Regarding Alvey's assertion that two pictures show "drug materials," Alvey's Br. at 12, such is purely speculative -- given the record before us. There was no testimony regarding either the depicted cigarette or the white chunky substance in the plastic bag.