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IN THE
COURT OF APPEALS OF INDIANA

JAMES EARL BROWN,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 02A04-0803-CR-161
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0711-FB-168

August 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following his convictions for Class B felony Burglary[1] and Class D felony Receiving Stolen Property[2] and the finding that he is a habitual offender, Appellant/Defendant James Earl Brown appeals from the finding that he is a habitual offender, contending that the trial court erroneously allowed the State to amend its charging information after the beginning of trial. We affirm.

FACTS

On the morning of November 19, 2007, Brown broke and entered the Fort Wayne home of David Jacobs, taking, *inter alia*, a jar of loose change and a .50 caliber muzzle-loaded firearm with him when he left. Brown was soon apprehended in a nearby park and discovered to be in possession of the change jar and firearm. On November 27, 2007, the State charged Brown with Class B felony burglary and Class D felony receiving stolen property.

On January 31, 2008, the State alleged that Brown was a habitual offender in a charging information that read, in relevant part, as follows:

> [T]he defendant did on or about the 23rd day of January, 1996, commit another unrelated felony criminal act, to wit: Resisting Law Enforcement, a Class D Felony and that said defendant was, in Cause No. 02D04-9601-DF-47, convicted and sentenced for the commission of said felony, on the 16th day of July, 1996, by the Allen Superior Court, Fort Wayne, Indiana, being contrary to the form of the statute in such case made and provided.

Appellant's App. p. 14.

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[1] Ind. Code § 35-43-2-1(1)(B)(i) (2006).

[2] Ind. Code § 35-43-4-2(b) (2006).

On February 5, 2008, the State amended the habitual offender information to delete one of the prior alleged felonies; the information still alleged that Brown had committed resisting law enforcement in 1996. During jury deliberations following the first phase of Brown's bifurcated trial, the State moved to amend the habitual offender information again, this time to allege that Brown had actually committed the crime of residential entry, not resisting law enforcement, in 1996. The prosecutor claimed that the error was a scrivener's error, most likely the result of confusion caused by the fact that he used the similar abbreviations "RLE" for resisting law enforcement and "RE" for residential entry. Brown admitted that he had received "copies of all the certified records in the discover[y,]" which records indicated that Brown had a 1996 conviction for residential entry. Tr. p. 260. The trial court, concluding that "it's perfectly clear that [the error] is a scrivener[']s error[,]" allowed the amendment over Brown's objection, and the jury found him guilty as charged and to be a habitual offender. Tr. p. 260. On March 3, 2008, the trial court sentenced Brown to ten years of incarceration for burglary, enhanced by thirty years by virtue of his status as a habitual offender.

DISCUSSION AND DECISION

Brown contends that the trial court erred in allowing the State to amend its habitual offender information during trial to reflect a prior conviction for residential entry rather than resisting law enforcement. Brown contends that the amendment was one of substance and therefore had to have been made prior to thirty days before the omnibus date or, at the very latest, before the beginning of trial. Indiana Code section 35-34-1-5 (2007) governs amendments to criminal indictments or informations and provides, in

relevant part, as follows:

> (a) An indictment or information which charges the commission of an offense may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect, including:
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> (1) any miswriting, misspelling, or grammatical error;
>
> (2) any misjoinder of parties defendant or offenses charged;
>
> (3) the presence of any unnecessary repugnant allegation;
>
> (4) the failure to negate any exception, excuse, or provision contained in the statute defining the offense;
>
> (5) the use of alternative or disjunctive allegations as to the acts, means, intents, or results charged;
>
> (6) any mistake in the name of the court or county in the title of the action, or the statutory provision alleged to have been violated;
>
> (7) the failure to state the time or place at which the offense was committed where the time or place is not of the essence of the offense;
>
> (8) the failure to state an amount of value or price of any matter where that value or price is not of the essence of the offense; or
>
> (9) any other defect which does not prejudice the substantial rights of the defendant.
>
> (b) The indictment or information may be amended in matters of substance and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant at any time:
>
> (1) up to:
>
> (A) thirty (30) days if the defendant is charged with a felony; or
>
> (B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;
>
> before the omnibus date; or
>
> (2) before the commencement of trial;
>
> if the amendment does not prejudice the substantial rights of the defendant. When the information or indictment is amended, it shall be signed by the prosecuting attorney or a deputy prosecuting attorney.
>
> (c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.

Brown contends that the amendment to the habitual offender information was one of substance because neither his defense that he had never been convicted of resisting law

enforcement nor the evidence he would have produced in response to the charge applied to the amended charge. The first step in evaluating the permissibility of amending an information is to determine whether the amendment was addressed to a matter of substance or one of form or immaterial defect. *Fajardo v. State*, 859 N.E.2d 1201, 1207 (Ind. 2007), *superseded in part on other grounds*, Ind. Code § 35-34-1-5, effective May 7, 2007. If the amendment was one of substance, the trial court was not permitted to allow it, regardless of prejudice or lack thereof, because it occurred after trial started. *See* Ind. Code § 35-34-1-5(b)(2).

"[A]n amendment is one of form, not substance, if both (a) a defense under the original information would be equally available after the amendment, and (b) the accused's evidence would apply equally to the information in either form." *Fajardo*, 859 N.E.2d at 1207. Even if the above two criteria are satisfied, however, the amendment may yet be one of form, because "an amendment is one of substance only if it is essential to making a valid charge of the crime." *Id.*

In this case, the amendment at issue satisfies the first two requirements in that it denied Brown the defense that he had never been convicted of resisting law enforcement, and evidence that he had never been convicted of resisting law enforcement did not apply to the amended information. The amendment, however, does not satisfy the final requirement, because the State was not required to prove that Brown committed any particular felonies, only that they be two in number and unrelated. *See* Ind. Code § 35-50-2-8(a) (2007) ("Except as otherwise provided in this section, the state may seek to have a person sentenced as a habitual offender for any felony by alleging, on a page

separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions."); *see also Souerdike v. State*, 230 Ind. 192, 195-96, 102 N.E.2d 367, 368 (1951) (concluding, in driving while under the influence of liquor case, that amendment of information to change location from State Highway "45" to "445" was one of form only because "[i]t is not essential to the charge of driving while under the influence of liquor to name the exact place within the county where the driving was done").

We also conclude that Brown's substantial rights were not affected by the amendment. "These substantial rights include a right to sufficient notice and an opportunity to be heard regarding the charge." *Sides v. State*, 693 N.E.2d 1310, 1312-13 (Ind. 1998) (citing *Hegg v. State*, 514 N.E.2d 1061, 1063 (Ind. 1987)), *abrogated in part on other grounds*, *Fajardo*, 859 N.E.2d at 1206. "Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges." *Id*. at 1313. Brown has not established that he was unfairly prejudiced by the amendment here. The cause number and date of conviction listed in the pre-amendment information were consistent with discovery materials that indicated a conviction for residential entry, not resisting law enforcement. Moreover, Brown admitted that the State had provided him with those discovery materials. Significantly, Brown does not claim to have been misled, surprised, or prejudiced by the amendment beyond noting that he could not make use of evidence or the defense that he had never been convicted of resisting law enforcement. As previously mentioned, however, this is not enough. We conclude that Brown's substantial rights were not affected by the amendment of form. *See id*.

(concluding, in case where trial court allowed State to amend habitual offender information to change "auto theft" to "theft" when discovery documents indicated that prior conviction was for theft, that defendant "was neither surprised nor substantively affected by the State's amendment, and we find no error in allowing it"). Consequently, the trial court did not err in allowing it.

The judgment of the trial court is affirmed.

RILEY, J., and BAILEY, J., concur.