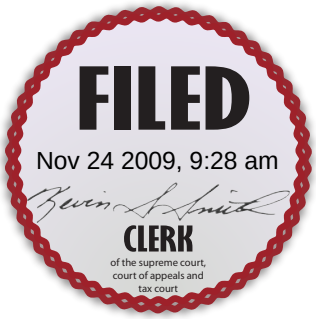

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IN THE
COURT OF APPEALS OF INDIANA

KEITH MCCANTS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0903-CR-268
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Jones, Judge Pro-Tempore
Cause No. 49G05-0712-MR-276900

NOVEMBER 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Keith McCants appeals his convictions of murder and robbery, as well as his adjudication as a habitual offender.

We affirm.

McCants presents three issues for our review, which we restate as:

I. Whether there was sufficient evidence to support McCants' adjudication as a habitual offender.

II. Whether the trial court erred in instructing the jury.

III. Whether there was sufficient evidence to support McCants' convictions.

On December 21, 2007, Tawana Wright and Cindy Jones met the victim, Juan Palacios. The three made plans to meet later in the day. Wright and Jones then met up with McCants, and the idea of a robbery was hatched. Wright and Jones left their meeting with McCants and picked up Roxanne Byrd. Eventually, Wright, Jones and Byrd met up again with Palacios and two of his friends at a vacant apartment. Later, McCants and two other men arrived at the apartment armed with guns. The three men and Wright, with guns drawn, ordered Palacios and his friends to the ground. Palacios and his friends were duct taped, and the apartment was searched for cocaine. During the robbery, wallets, cell phones and keys were taken from the men. After questioning Palacios about the cocaine, McCants shot Palacios. As a result, Palacios died.

McCants first contends that the evidence was insufficient to support the habitual offender finding. Specifically, he asserts that the information charging him as a habitual

offender was defective and, because of that, the State did not prove beyond a reasonable doubt that he is a habitual offender.

We do not weigh the evidence, and we consider only the evidence favorable to the verdict and all reasonable inferences which can be drawn therefrom. *Newman v. State*, 677 N.E.2d 590, 593 (Ind. Ct. App. 1997). If there is substantial evidence of probative value from which a trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. *Id*.

Pursuant to Indiana Code § 35-50-2-8(g), a person is a habitual offender if the jury or the court finds that the State has proven beyond a reasonable doubt that the person has accumulated two prior unrelated felony convictions. A person has accumulated two prior unrelated felony convictions only if the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction and the offense for which the State seeks to have the person sentenced as a habitual offender was committed after sentencing for the second prior unrelated felony conviction. Ind. Code § 35-50-2-8(c).

Here, the evidence shows that McCants had accumulated the following prior felony convictions:

	Committed	Sentenced
#1 Robbery	December 7, 1991	July 15, 1992
#2 Criminal Confinement	August 12, 1995	July 24, 1998
Current Offenses	December 21, 2007	

State's Exhibits 84-87. The information for the habitual offender charge alleged that McCants was sentenced on felony #2 on July 24, 1998. The Chronological Case Summary (CCS), admitted as State's Exhibit 87, shows that McCants was originally sentenced on felony #2 on March 8, 1996. The CCS also shows that McCants filed a motion to correct erroneous sentence, and the State, by agreement, dismissed two counts and added two new counts, upon all of which, McCants was re-sentenced on July 24, 1998. Thus, while we recognize a variance between the sentencing date alleged in the information and the proof at trial, it is an insubstantial and immaterial variance.

Reversible error exists only where the defendant was misled and thereby prejudiced in the preparation and maintenance of his defense. *Martin v. State*, 528 N.E.2d 461, 465 (Ind. 1988). In his brief, McCants claims that the variance between the charging information and the evidence at trial misled and prejudiced him because he "could not have reasonably anticipated" the evidence used by the State at trial to show he is a habitual offender. Appellant's Brief at 12. We find this argument to be completely implausible. The habitual offender information informed McCants of the charge, the court, and one of several sentencing dates of the previous felony. McCants has failed to establish how he would have benefited from notice of the earlier sentencing date, if in fact he did not have such notice. He has not alleged that any new evidence could have been found or that any new defense strategy would have been employed had he received notice of the earlier sentencing date.

In addition, the use of one of several sentencing dates by the State did not hinder it from fulfilling its burden of proof. State's Exhibit 87 is a certified copy of the complete CCS from the trial court with regard to felony #2. As such, it contains the trial court's entry of its sentencing activity on March 8, 1996 for McCants' felony #2, as well as his sentencing that occurred on July 24, 1998. We further note that, in arguing McCants' motion for directed verdict as to the habitual offender allegations, defense counsel acknowledged that the sentencing date for felony #2 was July 24, 1998. *See* Tr. at 882. Moreover, either date, March 8, 1996 or July 24, 1998, qualifies felony #2 as a second prior unrelated felony conviction in this case. *See* Ind. Code § 35-50-2-8(c). There was sufficient evidence of McCants' two prior unrelated felonies.

McCants next argues that the trial court committed error in instructing the jury. Particularly, he claims that the trial court's response to the jury's questions improperly emphasized a single instruction and provided an additional instruction to the jury.

Generally, instructing the jury lies within the discretion of the trial court. *Elliott v. State*, 786 N.E.2d 799, 801 (Ind. Ct. App. 2003). Before a defendant is entitled to a reversal, he must affirmatively demonstrate that the instructional error prejudiced his substantial rights. *Hero v. State*, 765 N.E.2d 599, 602 (Ind. Ct. App. 2002). Indiana Code § 34-36-1-6(2) provides that if, after the jury retires for deliberation, it "desires to be informed as to any point of law arising in the case, the jury may request the officer to conduct them into court, where the information shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties." When the jury question

coincides with an error or legal gap in the final instructions, a response other than rereading from the body of the instructions is permissible. *Powell v. State*, 769 N.E.2d 1128, 1133 (Ind. 2002).

After retiring to deliberate, the jury in the present case sent a note stating, "To be guilty of Count One do we have to find that the defendant actually shot (pulled the trigger) as opposed to being one of many?" In addition, the jury asked, "Are both Counts One and Two subject to the accomplice theory as in Instruction 21-J?" Tr. at 840. Over McCants' objection, the trial court responded, "All of the instructions apply to all of the counts. Please reread the instructions." Tr. at 844.

The jury's question demonstrates its belief that it had insufficient guidance as to the application of the accomplice theory contained in Instruction 21-J. The trial court's reply correctly stated the law, as well as addressing the apparent gap in the instructions. The court's reply was framed in a general manner such that it did not emphasize any particular instruction. This is unlike the situation in *Graves v. State*, 714 N.E.2d 724 (Ind. Ct. App. 1999), upon which McCants relies. The court in *Graves* read to the jury only an instruction on accomplice liability in response to a question by the jury after it had begun deliberating, thereby improperly emphasizing that instruction. In contrast, the court in the present case informed the jury generally that the instructions applied to all counts and directed the jury to reread all the instructions. In doing so, the court did not direct the jury's attention to any particular instruction or single out a lone instruction for rereading.

Moreover, we disagree with McCants' characterization of the trial court's response to the jury's question as adding a new instruction. The court did not give the jury an additional instruction. Rather, it merely responded to the jury's question in order to clarify an apparent gap in the instructions regarding application of the law of accomplice liability. Thus, the trial court's reply stating generally that all of the instructions apply to all of the counts and directing the jury to reread the instructions was not error.

For his third assertion of error, McCants maintains that the State failed to present evidence at trial sufficient to sustain his convictions. Our standard of review with regard to sufficiency claims is well settled. We neither weigh the evidence nor judge the credibility of the witnesses, and we consider only the evidence favorable to the verdict and all reasonable inferences which can be drawn therefrom. *Newman*, 677 N.E.2d at 593. We are mindful that the trier of fact is entitled to determine which version of the incident to credit. *Barton v. State*, 490 N.E.2d 317, 318 (Ind. 1986).

McCants argues that the evidence is insufficient to support his convictions because statements of certain State's witnesses were inconsistent. However, McCants is asking us to reweigh the evidence, which we will not do. During cross-examination, defense counsel clearly exposed what he believed to be inconsistencies between the pre-trial statements and trial testimony of these witnesses, as well as any discrepancies within each witness's trial testimony and between the testimony of the different witnesses. The jury heard all of this information and returned a verdict of guilty. It is the function of the

trier of fact to resolve conflicts in testimony and to determine the weight of the evidence and the credibility of the witnesses. *K.D. v. State*, 754 N.E.2d 36, 39 (Ind. Ct. App. 2001). We will not disturb the jury's determination.

Based upon the foregoing discussion and analysis, we conclude that there was sufficient evidence to support McCants' adjudication as a habitual offender, that the trial court properly instructed the jury, and that there existed sufficient evidence to sustain McCants' convictions.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.