

Case Summary

Michael Scott appeals his habitual offender adjudication. Specifically, he contends that the habitual offender verdict form constitutes fundamental error because it did not allow the jury to determine whether his prior convictions were felonies. Because the trial court instructed the jury that Scott's prior convictions must be felonies and because the verdict form allowed the jury to find that Scott not was not a habitual offender even if it found that the State had proven beyond a reasonable doubt that he had accumulated two prior unrelated felonies, we find no fundamental error in the verdict form and therefore affirm the trial court.

Facts and Procedural History

Scott and John Miller were roommates in a halfway house in Fort Wayne, Indiana. On March 9, 2005, Scott entered the house and slammed his bedroom door. This woke up Miller, who complained about the noise. Scott, who had been smoking crack cocaine, became angry, retrieved an axe from the basement of the house, and struck Miller with the axe multiple times, killing him. Scott then changed his clothes, took Miller's car keys and credit card, and drove off in Miller's car. Scott ended up driving to Indianapolis, where he turned himself in at a local hospital. Scott later confessed to the police in a videotaped interview.

The State charged Scott with Count I: Murder; Count II: Felony Murder; Count III: Robbery as a Class A felony; Count IV: Auto Theft as a Class D felony; and Count V: Habitual Offender. During Phase I of trial, the jury found Scott guilty of Counts I-IV. During Phase II of trial, the jury found Scott to be a habitual offender. After merging

felony murder into murder and reducing Count III to a Class B felony, the trial court sentenced Scott to sixty-five years on Count I, enhanced by thirty years for the habitual offender adjudication; twenty years on Count III; and three years on Count IV. The court ordered Counts III and IV to run consecutive to Count I, for an aggregate sentence of 118 years. Scott now appeals his habitual offender adjudication.

Discussion and Decision

Scott challenges the habitual offender verdict form used during Phase II of his trial. Specifically, he alleges that the verdict form is erroneous because it “did not allow the jury to determine if [his] prior convictions were felonies.” Appellant’s Br. p. 5. Because defense counsel did not object to the verdict form at trial, Scott claims that the error is fundamental. The fundamental error exception is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006).

Here, Scott’s habitual offender verdict form provided:

VERDICT
Habitual Offender
Count V

(Put an “X” on the appropriate line.)

We, the Jury, find that the Defendant has the following prior convictions:

1. Theft and/or Confinement

_____ yes _____ no

2. Robbery

_____ yes _____ no

“We, the Jury, find the Defendant, Michael Scott,

_____ is

_____ is not

an Habitual Offender.”

DATE _____ FOREMAN: _____

Appellant’s App. p. 100. As Scott points out, his verdict form does not indicate whether theft and/or confinement or robbery are felonies. Despite this omission on the form, during Phase II of trial the trial court read Scott’s habitual offender charging information to the jury, which referred to the offenses as felonies. *See* Tr. p. 372. The court also instructed the jury during Phase II of trial as follows:

The status of Habitual Offender is defined by statute as follows: The State may seek to have a person sentenced as an habitual offender for any felony by proving that the person has accumulated two prior unrelated felony convictions. To convict the defendant, the State must prove each of the following elements: the defendant, Michael Scott, (1) committed and was convicted and sentenced for a felony, to-wit: Theft and/or Confinement, and (2) thereafter committed and was convicted and sentenced for a felony, to wit: Robbery, and (3) thereafter committed and was convicted of the crimes charged in Phase I of this case. If the State fails to prove each of these elements beyond a reasonable doubt, you can not find the defendant to be an habitual offender. If the State does prove each of these elements beyond a reasonable doubt, you may find the defendant to be an habitual offender.

Id. at 373. After reviewing the record, it is evident that the trial court explicitly instructed the jury that Scott’s prior convictions must be felonies in order for him to be found a habitual offender. The fact that the verdict form did not contain the word “felony” simply does not constitute fundamental error.

In addition, Scott relies on *Seay v. State*, 698 N.E.2d 732 (Ind. 1998), in order to prove that his habitual offender verdict form constitutes fundamental error. In *Seay*, the Indiana Supreme Court held that pursuant to Article I, Section 19 of the Indiana Constitution, a jury in a habitual offender proceeding is permitted to render a verdict that the defendant is not a habitual offender even if it finds that the State has proven beyond a reasonable doubt that the defendant has accumulated two prior unrelated felonies. *Id.* at 734. That is, “even where the jury finds the facts of the prerequisite prior felony convictions to be uncontroverted, the jury still has the unquestioned right to refuse to find the defendant to be a habitual offender at law.” *Id.*

Here, Scott’s verdict form fully complies with the mandate of *Seay*. According to the verdict form, even if the jury finds that Scott has accumulated two prior unrelated felonies, the jury still has the choice not to find him to be a habitual offender by putting an “X” next to the option “_____ is not an Habitual Offender.” *See* Appellant’s App. p. 100. In addition, the trial court instructed the jury during Phase II of trial, “If the State does prove each of these elements beyond a reasonable doubt, you *may* find the defendant to be an habitual offender.” Tr. p. 373 (emphasis added). There is no fundamental error in Scott’s habitual offender verdict form, and we therefore affirm the trial court.

Affirmed.

BAILEY, J., and BARNES, J., concur.