

Appellant/Defendant Michael Nordman appeals his conviction for Class C felony Intimidation.¹ Specifically, Nordman contends that the evidence is insufficient to support his conviction and that the trial court abused its discretion in instructing the jury. We affirm.

FACTS AND PROCEDURAL HISTORY

At all times relevant to this appeal, Leonard (“Lenny”) and Kathryn² Moore (“collectively, the Moores”) lived in an apartment with their children, S.M. and T.M., and family friend Ronzo Crumley. On May 9, 2010, Kathryn’s son from a prior relationship, Thomas Stuth, stayed at the Moores’ home with his two young children. Nordman lived in a house with his mother, his daughter, Sarah, and his daughter’s husband Chad Cissom.

At approximately 8:00 a.m. on May 10, 2010, the Moores awoke suddenly to find Cissom and Cyrus Arrowood standing in their bedroom screaming. Either Cissom or Arrowood opened an outside door and let Nordman into the Moores’ bedroom. Cissom was holding what appeared to be “a little old German Ruger pistol.” Tr. p. 130. Arrowood was holding a “claw hammer.” Tr. p. 133. Cissom pointed his gun at Kathryn’s chest and indicated that he had just loaded the weapon. Cissom threatened to kill Kathryn and repeatedly asked Kathryn and Lenny where their “f-in n[*****] son was.^[3]” Tr. pp. 130-31. Cissom indicated that he believed that Stuth was responsible for the late night or early morning theft of a computer and a Playstation gaming system that belonged to Cissom.

¹ Ind. Code § 35-45-2-1 (2008).

² The record misspells Mrs. Moore’s first name as “Katherine.”

³ Thomas Stuth is biracial.

Lenny and Kathryn responded that they did not know what Cissom was talking about and indicated that Stuth had been at their home with his children since the previous evening. Throughout the confrontation, Nordman yelled “Kill ‘em, kill ‘em, kill the f-[i]n kids. Kill them all[,]” and instructed Arrowood to “bash the f[-]in kids[’] heads in with the claw hammer.” Tr. pp. 131, 133.

At some point, Cissom “spun the gun around” in Lenny’s face, and Lenny noticed that the gun was actually a “BB gun.” Tr. p. 132. Lenny yelled, “You stupid mother f-er, that’s a BB gun.” Tr. p. 132. Arrowood, Cissom, and Nordman “took off running” when Lenny grabbed an Italian broad sword that was hung from the wall. Tr. p. 132. Arrowood and Nordman fled the Moore residence, “jump[ed]” in a vehicle, and drove off. Tr. p. 136. Cissom remained on the Moores’ front porch where he admitted that he had made a mistake and apologized to them. Cissom called his wife from the Moores’ phone and left with her a few minutes later. About fifteen minutes after Cissom left, the Moores walked to the police station and reported the incident to the police. Cissom’s belongings were later recovered from a different individual.

On June 12, 2010, the State charged Nordman with Class B felony burglary, Class B felony confinement, and Class C felony intimidation. A jury subsequently found Nordman guilty of the Class C felony intimidation charge but not guilty of the Class B felony burglary and Class B felony confinement charges. On May 19, 2010, the trial court imposed a five-year sentence with two years suspended to probation. This appeal follows.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Nordman contends that the evidence is insufficient to support his intimidation conviction because the State failed to prove that either he, Cissom, or Arrowood communicated a threat that placed the Moores in fear of retaliation for a prior lawful act.

The standard for reviewing sufficiency of the evidence claims is well settled. We do not reweigh the evidence or assess the credibility of the witnesses. Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict and will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt.

Stewart v. State, 768 N.E.2d 433, 435 (Ind. 2002) (citations omitted). “[I]t is for the trier of fact to reject a defendant’s version of what happened, to determine all inferences arising from the evidence, and to decide which witnesses to believe.” *Holeton v. State*, 853 N.E.2d 539, 541 (Ind. Ct. App. 2006).

In order to convict Nordman of Class C felony intimidation, the State was required to prove that Nordman: (1) communicated a threat; (2) to another person; (3) with the intent that the other person (a) engage in conduct against the other person’s will, or (b) be placed in fear of retaliation for a prior lawful act; and (4) drew or used a deadly weapon while committing the crime. Ind. Code § 35-45-2-1. Under a theory of accomplice liability, Nordman may be found guilty if he: (1) knowingly or intentionally; (2) aided, induced, or caused another person; (3) to commit an offense, even if the other person has not been prosecuted for or convicted of the offense or has been acquitted of the offense. Ind. Code § 35-41-2-4 (2008). In Indiana there is no distinction between the responsibility of a principal and an accomplice.

Wise v. State, 719 N.E.2d 1192, 1198 (Ind. 1999). Thus, one may be charged as a principal yet convicted on proof that he or she aided another in the commission of a crime. *Id.*

Nordman argues that the evidence at trial is insufficient to support his Class C felony intimidation conviction because the State failed to prove that he communicated a threat that placed the Moores in fear of retaliation for a prior lawful act. However, Nordman fails to recognize that both the charging information filed by the State and Indiana Code section 35-45-2-1 are written in the disjunctive, and, as a result, his conviction should be affirmed if we conclude that the State proved that he communicated a threat to the Moores with the intent that the Moores engage in conduct against their will *or* be placed in fear of retaliation for a prior lawful act. *See* Ind. Code § 35-45-2-1 (emphasis added).

Here, the record reveals that Nordman knowingly went with Cissom and Arrowood to the Moores' home at approximately 8:00 a.m. with the intent to recover property belonging to Cissom that Nordman believed that Stuth had taken. Cissom was armed with what appeared to be "a little old German Ruger pistol" and Arrowood was holding a "claw hammer." Tr. pp. 130, 133. Nordman was present while Cissom held a gun to Kathryn's chest, threatened Kathryn and told her that he would kill her if she didn't tell him where her "f-in n[*****] son was." Tr. pp. 130-31. In fact, Nordman was not only present, but encouraged Cissom and Arrowood to "Kill 'em, kill 'em, kill the f-[i]n kids. Kill them all[.]" and "bash the f[-]in kids['] heads in with the claw hammer." Tr. pp. 131, 133. Nordman only left the residence when Lenny chased after Arrowood, Cissom, and Nordman with a sword after he determined that Cissom's gun was a "BB gun." Tr. p. 132. Based on these facts, we conclude that the

State presented sufficient evidence from which a reasonable jury could have found that Nordman communicated a threat to the Moores with the intent that the Moores engage in conduct against their will, *i.e.*, sharing information that would give Arrowood, Cissom, and Nordman access to Stuth. Further, to the extent that Nordman's challenge on appeal amounts to an invitation to reweigh the evidence, we reiterate that we may not do so. *See Stewart*, 768 N.E.2d at 435.

II. Jury Instructions

Nordman also contends that the trial court abused its discretion in instructing the jury. Specifically, Nordman argues that the trial court abused its discretion because the tendered instructions failed to instruct the jury that it must find that Nordman engaged in voluntary conduct to aid, induce, or cause another to commit the crime of intimidation.

Jury instruction lies largely within the discretion of the trial court. On appeal, such issues are reviewed for abuse of discretion. To constitute an abuse of discretion, the instruction given must be erroneous, and the instructions taken as a whole must misstate the law or otherwise mislead the jury.

Benefiel v. State, 716 N.E.2d 906, 914 (Ind. 1999) (citations and quotation omitted).

Jury instructions must be considered as a whole and in reference to each other. *Patton v. State*, 837 N.E.2d 576, 579 (Ind. Ct. App. 2005). In reviewing a trial court's decision to give tendered jury instructions, we consider: "(1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given." *Brooks v. State*, 895 N.E.2d 130, 132 (Ind. Ct. App. 2008) (quoting *Chambers v.*

State, 734 N.E.2d 578, 580 (Ind.2000)). “Before a defendant is entitled to a reversal, he must affirmatively show the instructional error prejudiced his substantial rights.” *Patton*, 837 N.E.2d at 579.

At trial, Nordman objected to the tendered accomplice liability instructions only on the basis that the instructions should not have been tendered to the jury because he was not charged as an accomplice, but rather as a principal. However, on appeal, Nordman challenges the substance of the accomplice liability instructions, not whether they were properly tendered.⁴

A defendant may not argue one ground for objection at trial and then raise new grounds on appeal. Nor may a defendant appeal the giving of an instruction on grounds not distinctly presented at trial. Appellate review of a claim of error in the giving of a jury instruction requires a timely trial objection clearly identifying both the claimed objectionable matter and the grounds for the objection. A defendant must identify specific grounds in support of an objection to an incorrect jury instruction, particularly where the trial court focuses its attention on the language of a misleading or incomplete proposed instruction.

Id. (citations omitted). Accordingly, Nordman has waived this allegation of error on appeal.

See id.

Waiver notwithstanding, this court may still consider the alleged error if it believes the error is plain or fundamental. *Townsend v. State*, 632 N.E.2d 727, 730 (Ind. 1994).

⁴ To the extent that Nordman’s appeal does contain a challenge to the trial court’s decision to tender accomplice liability instructions to the jury, we conclude that Nordman’s challenge is without merit because there is sufficient evidence of Nordman’s possible involvement in the crimes at issue to warrant an instruction on accomplice liability in this case. Thus, the trial court properly instructed the jury on the theory of accomplice liability. *See Wise*, 719 N.E.2d at 1198 (providing that there is no distinction between the responsibility of a principal and an accomplice in Indiana, and, as a result, an instruction on accomplice liability is proper if there is some evidence that a second person was involved in the crime).

To qualify as ‘fundamental error,’ the error must be a substantial blatant violation of basic principles rendering the trial unfair to the defendant. The appellant bears the burden of proving that the alleged error occurred, and that the error was fundamental in nature. Not all errors a party fails to assert at trial are fundamental errors. Some uncontested errors may be harmless, or otherwise have no substantial impact on the verdict. Such errors are insufficient to overcome the bar of procedural default. In determining whether a claimed error denies the defendant a fair trial, we consider whether the resulting harm or potential for harm is substantial. The element of harm is not shown by the fact that a defendant was ultimately convicted; rather, it depends upon whether his right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he otherwise would have been entitled. Our task is to look at all that happened, including the erroneous action, and decide whether the error had substantial influence upon the verdict to determine whether the trial was unfair.

Id. (citations omitted).

Citing *Small v. State*, 531 N.E.2d 498 (Ind.1988), in support, Nordman contends that Final Instruction 8 fails to inform the jury that, to convict him as an accomplice, the evidence must show that he engaged in voluntary conduct to aid, induce, or cause the primary perpetrator to commit the crime of intimidation. In *Steele v. State*, the Indiana Supreme Court discussed its prior holding in *Small*, stating:

The instruction at issue in *Small* contained the following language: “It is also the law that a Defendant is responsible for the acts of his codefendants as well as his own acts. Any act of one is attributable to them all.” [531 N.E.2d 498, 499 (Ind.1988).] This Court found such instruction to be an erroneous statement of law because it permitted the defendant to “be found responsible for the shooting, without regard to whether that act occurred while he was acting in concert in carrying out the robbery. It requires only that appellant and the person who inflicted the gunshot would have the relationship of codefendants.” *Id.*

Steele v. State, 672 N.E.2d 1348, 1352 (Ind. 1996). The Supreme Court held that the instruction at issue in *Steele* did not have such a defect because while the instruction did not

explicitly contain the phrase “acting in concert,” it clearly required much more than merely the codefendant relationship. *Id.*

Again, jury instructions must be considered as a whole and in reference to each other. *Patton*, 837 N.E.2d at 579. Thus, we must consider the accomplice liability instructions in conjunction with one another. *See Townsend*, 632 N.E.2d at 730; *Patton*, 837 N.E.2d at 579.

Final Instruction 7 provides:

Aiding, inducing, or causing an offense

- (a) A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person:
- (1) Has not been prosecuted for the offense;
 - (2) Has not been convicted of the offense; or
 - (3) Has been acquitted of the offense.

Appellant’s App. p. 45 (emphasis in original). Final Instruction 8 provides:

Accessory

A person is responsible for the actions of another person when, either before or during the commission of a crime, he knowingly aids, induces, or causes the other person to commit a crime. To aid is to knowingly support, help, or assist in the commission of a crime.

It is not necessary that the evidence show that the Defendant personally participated in the commission of each element of the crime. Evidence that the Defendant acted in concert with those who actually physically committed the acts constituting the element of the crime is sufficient. He need only have knowledge that he is helping in the commission of a crime. He does not have to personally participate in the crime, nor does he have to be present when the crime is committed.

Proof of the Defendant’s failure to oppose the commission of a crime, companionship with the person committing the offense, and conduct before and after the offense may be considered in determining whether aiding may be inferred.

Appellant’s App. p. 46 (emphasis in original).

When read together, we conclude that unlike in *Small*, Final Instructions 7 and 8

contain the statement that voluntary conduct on the part of Nordman must be proved in order to find criminal liability. The instructions explain that in order to find Nordman guilty as an accomplice, the State must prove that he knowingly or intentionally aided, induced, or caused another person to commit the underlying offense. The instructions further instructed the jury that to “aid” is to knowingly support, help, or assist in the commission of a crime, and that it is not necessary that the evidence show that Nordman personally participated in the commission of each element of the crime, but rather that evidence that he *acted in concert with those* who actually physically committed the acts constituting the element of the crime is sufficient. The instructions stated that proof of Nordman’s failure to oppose the commission of a crime, his companionship with the person committing the offense, and his *conduct* before and after the offense may be considered in determining whether aiding may be inferred. When read together, we conclude that these instructions, like the instructions in *Steele*, and unlike the instructions in *Small*, inform the jury that some voluntary conduct by Nordman must be proved in order to find criminal liability. Accordingly, we conclude that the trial court did not abuse its discretion in instructing the jury with respect to accomplice liability.

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.