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**IN THE  
COURT OF APPEALS OF INDIANA**

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DUSTIN J. BAUMBARGER,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 02A04-0912-CR-675

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Kenneth R. Scheibenberger, Judge  
Cause No. 02D04-0904-FD-338

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**August 27, 2010**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Dustin J. Baumbarger (“Baumbarger”) was convicted in Allen Superior Court of Class D felony theft. The trial court sentenced Baumbarger to a term of two years. Baumbarger appeals and raises one issue, which we restate as whether the trial court committed fundamental error when it allowed a witness to make an alleged legal conclusion during his testimony.

We affirm.

### **Facts and Procedural History**

On the morning of March 31, 2009, a car with two men inside was seen parked in the parking lot of Huth Tool Machine Corporation (“Huth Tool”). The men exited the vehicle and walked to Spy Run Creek which separates the Huth Tool property from the American Electric Power (“AEP”) property. The men crossed the creek using an old trestle bridge and went on AEP’s property into an area where wire and parts were stored. A Huth Tool employee observed two men drag black wire across the bridge from the AEP property, place the wire in the car, and drive away.

A short while later, the men returned, parked, and exited their car. Carrying a bolt cutter, the men walked down to the creek. Two employees saw the men coming back from the creek and loading pieces of black wire into the trunk of their car. At this point, the police were called.

Detective Joel Squadrito (“Detective Squadrito”) was dispatched to a theft in progress. Detective Squadrito arrived and observed two men, identified as Baumbarger and Christopher Deardorff, loading pieces of black wire into the trunk of their vehicle. The two men were arrested, handcuffed and placed in separate police vehicles. Detective

Squadrito and Detective Joseph Lyon (“Detective Lyon”) observed several pieces of black insulated heavy gauge copper wire of the type used by power companies in the trunk of Baumbarger’s vehicle. Detective Lyon recognized the two men involved.

An AEP supervisor was called to the scene. He identified the wire in the trunk of Baumbarger’s vehicle as the type used by AEP. The supervisor went with Detective Squadrito to the AEP property where that type of wire was stored. A wire reel of the type used to store insulated copper wire of the type found in Baumgartner’s trunk was found lying empty on the ground. The two men also noted damage to the barbed wire fencing and black marks on the wall where wire had been pulled out between the wall and the fence. The supervisor identified the wire in the trunk of the vehicle as wire belonging to AEP and valued the wire at approximately \$2,000. The supervisor also noted that no one had permission to take the wire. Based on the investigation, Detective Squadrito believed that the wire in the vehicle had come from AEP and that Baumbarger and Deardorff had loaded that wire into the vehicle.

On April 19, 2009, the State charged Baumbarger with Class D felony theft. On September 22, 2009, Baumbarger was found guilty as charged following a jury trial. On October 19, 2009, the trial court sentenced Baumbarger to a term of two years. Baumbarger now appeals.

### **Discussion and Decision**

As an initial matter, Baumbarger argues that the trial court erred when it allowed Detective Lyon to testify that he believed a theft had occurred, contrary to Indiana

Evidence Rule 704(b).<sup>1</sup> Indiana Evidence Rule 704(b) states: “Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.” During the trial, the State asked Detective Lyon, “Now based on your training, experience and observations of the crime scene, what do you believe happened in and around AEP and Huth Tool on March 31, 2009?” *Id.* at 107. Baumbarger objected to this question because it called for Detective Lyon to speculate. After the trial court overruled this objection, Detective Lyon stated that “I believe there was a theft of wire from AEP that ended at Huth Tool.” *Tr.* p. 108.

Baumbarger claims that trial counsel made a valid, contemporaneous objection to Detective Lyon’s statement. At trial, Baumbarger objection to the State’s question was that the question called for speculation; he did not object to either the State’s question or Detective Lyon’s answer on the ground that it violated Indiana Evidence Rule 704(b).

“It is well-settled that in order to properly preserve an issue for appellate review, one must state with reasonable specificity the grounds for his objection while before the trial court.” *Yurina v. State*, 474 N.E.2d 93, 99 (Ind. 1985). Because of Baumbarger’s failure to contemporaneously object at trial, he has waived that issue for appellate review. On appeal, Baumbarger may only argue that reversal is warranted because of fundamental error, which is an exception to waiver. *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002).

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<sup>1</sup> Although Baumbarger claims that trial counsel made a timely objection, he does not argue that the trial court abused its discretion when it admitted Detective Lyon’s testimony. Instead, Baumbarger contends that the trial court committed reversible error.

However, the fundamental error exception is extremely narrow. Jewell v. State, 887 N.E.2d 939, 942 (Ind. 2008). Fundamental error is a substantial, blatant violation of basic principles rendering the trial unfair to the defendant and, thereby, depriving the defendant of fundamental due process. Carter v. State, 738 N.E.2d 665, 677 (Ind. 2000). The error must be so prejudicial to the rights of a defendant as to make a fair trial impossible. Id.

Baumbarger asserts that Detective Lyon's statement violated Indiana Evidence Rule 704(b). He believes that the statement, made in the context of the trial, could have led the jury to assume that the detective was inferring that Baumbarger had committed the theft of wire from AEP. We disagree. Detective Lyon's short statement that he believed a theft had occurred is not error, much less a fundamental error. See Scisney v. State, 690 N.E.2d 342, 346 (Ind. Ct. App. 1997), trans. granted, summarily aff'd in relevant part, vacated in part, 701 N.E.2d 847 (Ind. 1998).

Baumbarger has failed to establish that the trial court committed fundamental error when it allowed Detective Lyon to state that he believed that a theft had occurred during his testimony.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.