

James Gerald appeals his conviction for Class B felony burglary, Ind. Code § 35-43-2-1(1)(B)(i) (1999), and his adjudication as a habitual offender, Ind. Code § 35-50-2-8 (2005). He contends that his right to a speedy trial was violated, the trial court committed fundamental error by failing to instruct the jury on the underlying felony of theft, and the evidence is insufficient to sustain his burglary conviction. We affirm.

On September 7, 2009, Gerald, Corey Stout, Gregory Kirk, and two other friends were in Elkhart County driving around in Stout's car. Later that night, Gerald, Stout, and Kirk dropped off the two friends at their house on Tulip Tree Lane and headed to Kirk's mother's house a couple of streets away on Wild Cherry Lane, where Kirk and Stout were living at the time. When Gerald said he had no place to stay, Stout left his keys in the car and told Gerald he could sleep in it. *See* Tr. p. 157 ("I let him sleep in it, and the keys were there so, like, he could go and -- he could go somewhere and park and sleep, you know."). Stout then went into the house to go to bed. Kirk drank with Gerald in Stout's car for about a half hour and then went into the house to go to bed. It was around midnight when Kirk left Gerald outside in Stout's car.

Around 5:30 a.m. on September 8, 2009, thirteen-year-old Mackenzie Cartwright was sleeping in her house less than a quarter of a mile away on Tulip Tree Lane when she woke to the sound of her dogs barking. Someone was banging on the front door. Mackenzie looked out her front bedroom window and saw a man standing in the driveway. He was wearing a black hooded sweatshirt with the hood up and baggy blue jeans. Mackenzie suddenly realized that the man was trying to break in. Both her parents had already left for work. Scared and frantic, Mackenzie called her dad, Chris

Cartwright. After Mackenzie got off the phone, she heard “a loud bang like something being broken.” *Id.* at 88-89. She opened her window, climbed out with her phone, hid in the gap between her fence and her neighbor’s fence, and called 911.

Chris arrived at the house about five minutes after Mackenzie’s call, and the police arrived a few minutes later. No one was found inside the house. The deadbolt on the front door was still in the locked position but the door jamb had been broken, consistent with forced entry. A television, DVD player, laptop computer, and Wii gaming system were missing from the house.

Rob Froelich lived on Wild Cherry Lane. That morning, Froelich was running late for his 5:30 a.m. shift. He was going to his vehicle in the driveway when he heard the sound of a vehicle being driven in reverse. When the sound “kept going and going and going like somebody was backing up,” Froelich walked around the corner to see what was going on. *Id.* at 176. He saw a car backing up around the corner and down the street into the front yard of a house. He had seen that particular car at that house before. Froelich saw only one person in the car.

Froelich got in his vehicle and left for work but was stopped by the police on Tulip Tree Lane. When the police said they needed to search his vehicle, he told them that he just saw a car backing up from the general area and that it seemed odd. Officer Adam Dernay of the Elkhart County Sheriff’s Department followed Froelich back to his house, and Froelich pointed out the car. An Elkhart city police officer was already there when Officer Dernay arrived. Officer Dernay saw the car on the edge of the road in the grass with fresh tire tracks in the grass indicating that the car had pulled in recently. There was

one male in the driver's seat and no one else in the car. As Officer Dernay approached, he saw several items inside, including a television and a DVD player. The driver was asked to step out of the car, identified as James Gerald, arrested, and placed in the back of the Elkhart city police officer's vehicle. Gerald's behavior was "belligerent and unpleasant." *Id.* at 74.

Officer Jeremy Shotts of the Elkhart County Sheriff's Department arrived at Kirk's mother's house after Gerald had already been taken into custody. As Officer Shotts spoke with Gerald, he noticed that he was wearing a black hooded sweatshirt and baggy jeans. Gerald appeared intoxicated and was "[b]elligerent and uncooperative." *Id.* at 137.

Officers Shotts and Dernay went to the house and spoke with Kirk's mother. Kirk's mother said that the car belonged to her son's friend, Corey Stout. When she knocked on the door of Kirk and Stout's room, they both came out and spoke with the officers. Kirk and Stout both appeared to Officer Shotts like they had been sleeping. Stout told the officers that he owned the car and gave them permission to search it. When Officer Shotts asked about the television, DVD player, computer, and gaming system found in the car, Stout responded that those items should not be in his car. Kirk said that when he got out of the car at sometime between midnight and 12:45 a.m., those items were not in the car. Officer Shotts took the items from the car and returned them to the Cartwrights.

On September 10, 2009, the State filed an information charging Gerald with Class B felony burglary and being a habitual offender. The chronological case summary entry

for November 23, 2009, states, “Cause set for further proceedings 12/7/09 at 8:30 am. All time chargeable to the Defendant.” Appellant’s App. pp. 9-10. On December 7, 2009, the trial date was set for April 13, 2010. On January 8, 2010, the trial court granted the State’s motion to transfer the case from Elkhart Superior Court 2 to Elkhart Circuit Court. In Elkhart Circuit Court, the trial date was set for May 3, 2010. On May 3, the court reset the trial date for May 24 due to congestion of the court calendar and unavailability of the courtroom. On May 24, the court reset the trial date for August 9 due to congestion of the court calendar and unavailability of the courtroom. On August 9, the court reset the trial date for September 27 because of the unavailability of Gerald’s primary counsel due to a scheduled vacation and substitute counsel due to physical illness. On September 27, the court reset the trial date for December 6 due to congestion of the court calendar and unavailability of the courtroom. Gerald’s trial began on December 6. At no time did Gerald move for discharge on speedy trial grounds.

At trial, the court physically gave the jury a set of final instructions and also read those instructions to the jury. Those instructions included the State’s charge that

one JAMES E. GERALD did break and enter the dwelling of another person, to-wit: Chris Cartwright, with intent to commit a felony therein, to-wit: theft, that is to knowingly exert unauthorized control over the property of another person with the intent to deprive that person of the value or use of said property.

Id. at 59; *see also* Tr. p. 212. The instructions also included the definition of burglary and what the State was required to prove:

The crime of burglary is defined by law as follows:

A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a Class C

Felony. However, the offense is a Class B Felony if the building or structure is a dwelling.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally;
3. broke and entered
4. the building or structure of Chris Cartwright
5. with the intent to commit a felony, to-wit: theft, by knowingly exerting unauthorized control over the property of a person intending to deprive the person of any part of the use or value of the property; and
6. the building or structure was a dwelling.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Burglary, a Class B Felony.

Appellant's App. p. 60; *see also* Tr. pp. 212-13. The court instructed the jury without objection from Gerald.

The jury found Gerald guilty of Class B felony burglary. Gerald admitted to being a habitual offender. The court sentenced him to an aggregate term of thirty-six years with one year suspended. Gerald now appeals.

Gerald raises three issues:

- I. Whether his right to a speedy trial was violated.
- II. Whether the trial court committed fundamental error by failing to instruct the jury on the underlying felony of theft.
- III. Whether the evidence is insufficient to sustain his burglary conviction.

I. SPEEDY TRIAL

Gerald contends that his right to a speedy trial was violated. Specifically, he argues that his speedy trial rights were violated as provided by Indiana Criminal Rules

4(A) and 4(C) and *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

The Sixth Amendment to the United States Constitution and Article 1, Section 12 of the Indiana Constitution guarantee the right to a speedy trial. *Clark v. State*, 659 N.E.2d 548, 551 (Ind. 1995); *Wilkins v. State*, 901 N.E.2d 535, 537 (Ind. Ct. App. 2009), *trans. denied*. The provisions of Indiana Criminal Rule 4 implement these protections. *Clark*, 659 N.E.2d at 551; *Wilkins*, 901 N.E.2d at 537.

We first address Gerald's claim that his speedy trial rights were violated under Rule 4(A). Rule 4(A) provides:

No defendant shall be detained in jail on a charge, without a trial, for a period in aggregate embracing more than six (6) months from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge (whichever is later); except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar Any defendant so detained shall be released on his own recognizance at the conclusion of the six-month period aforesaid and may be held to answer a criminal charge against him within the limitations provided for in subsection (C) of this rule.

Under the terms of Rule 4(A), the remedy for its violation is the defendant's release from jail on his own recognizance, after which he is still liable to be tried within the time limits of Rule 4(C). Any Rule 4(A) challenge after conviction is moot. *See Bowens v. State*, 481 N.E.2d 1289, 1290 (Ind. 1985) ("If Defendant lost any rights, as he now complains, it was the right to be released on bond because of his incarceration for a period of six months. Defendant still remained subject to prosecution, however, and since he was tried and convicted within the statutory one year period, the issue is now moot and beyond

appellate review.”); *Fink v. State*, 469 N.E.2d 466, 468 (Ind. Ct. App. 1984) (“[The defendant’s] sole remedy under C.R. 4(A), moreover, is release on recognizance pending trial and not discharge following conviction.”), *clarified on reh’g*, 471 N.E.2d 1161 (1984). Because Gerald has already been convicted, his Rule 4(A) claim is moot.

Gerald next claims that his speedy trial rights were violated under Rule 4(C), which provides:

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar Any defendant so held shall, on motion, be discharged.

Rule 4(C) provides that a defendant may not be held to answer a criminal charge for greater than one year unless the delay is caused by the defendant, emergency, or court congestion. *Pelley v. State*, 901 N.E.2d 494, 497 (Ind. 2009). The State’s duty to try the defendant within one year is an affirmative duty, and the defendant is under no obligation to remind the State of its duty. *Marshall v. State*, 759 N.E.2d 665, 668 (Ind. Ct. App. 2001). However, when a trial date is set beyond the one-year limit provided under Rule 4(C), the defendant must file a timely objection to the trial date or waive his right to a speedy trial. *Id.* If a defendant seeks or acquiesces in any delay which results in a later trial date, the time limitations of the rule are also extended by the length of those delays. *Id.*

After Gerald's arrest, the State charged him with burglary and being a habitual offender. The charges were filed on September 10, 2009. On November 23, the cause was set for further proceedings on December 7, with "[a]ll time chargeable to the Defendant." Appellant's App. pp. 9-10. At this point, the time chargeable to Gerald is fourteen days. The case was transferred to Elkhart Circuit Court, and the trial date was set for May 3, 2010. From May 3 until Gerald's ultimate trial date of December 6, the trial court reset the trial date three times due to court congestion and one time due to the unavailability of Gerald's counsel. Because the resettings between May 3 and December 6 were due to court congestion or delay on the part of Gerald, that time period, roughly seven months, does not count toward the aggregate one-year period of Rule 4(C). Therefore, although Gerald was tried around fifteen months after he was charged, seven months and fourteen days do not count toward the aggregate one-year period of Rule 4(C). His Rule 4(C) claim necessarily fails.

Nonetheless, Gerald argues that the trial court should have provided "specific reasons for the court congestion finding." Appellant's Br. p. 8. Challenges to court congestion findings have been addressed by our Supreme Court in *Clark v. State*, 659 N.E.2d 548 (Ind. 1995). In that case, the defendant requested a speedy trial pursuant to Indiana Criminal Rule 4(B), which requires a detained defendant who moves for an early trial to be discharged if not brought to trial within seventy days. *Id.* at 550. The court set the trial date for seventy days later. *Id.* On the day of trial, however, the court reset the trial date due to court congestion. *Id.* After the resetting and before trial, the defendant filed a motion for discharge under Rule 4(B). *Id.* At a hearing on the motion, the

defendant presented testimony from the bailiff that no jury trial was held and no jurors were summoned to appear on the original trial date. *Id.* The State emphasized that jury trials in sixteen other criminal cases were scheduled for the same date but did not establish whether any of them were entitled to priority. *Id.* at 552. The trial court denied the motion for discharge. *Id.* at 550.

On review, our Supreme Court noted the standard review:

Upon appellate review, a trial court's finding of congestion will be presumed valid and need not be contemporaneously explained or documented by the trial court. However, a defendant may challenge that finding, by filing a Motion for Discharge and demonstrating that, at the time the trial court made its decision to postpone trial, the finding of congestion was factually or legally inaccurate. Such proof would be prima facie adequate for discharge, absent further trial court findings explaining the congestion and justifying the continuance. In the appellate review of such a case, the trial court's explanations will be accorded reasonable deference, and a defendant must establish his entitlement to relief by showing that the trial court was clearly erroneous.

Id. at 552. Because neither the State nor the trial court established or asserted that any trial was in fact conducted or otherwise explained or supported the finding of congestion, our Supreme Court concluded that the trial court's declaration of congestion was clearly erroneous and that the motion for discharge should have been granted. *Id.*

Here, had Gerald filed a motion for discharge and demonstrated that the trial court's finding of congestion was inaccurate, the trial court would have had to explain the congestion justifying the continuance. Because he did not do so, we presume that the trial court's finding of congestion was valid. To the extent Gerald is requesting a change in the law so as to require a trial court to document specific reasons with a finding of

congestion, *see* Appellant's Br. p. 8, we decline his invitation in light of the procedure set forth in *Clark*.

Gerald also argues that *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), supports his speedy trial claim. In *Barker*, the United States Supreme Court determined that a Sixth Amendment speedy trial claim involves balancing a number of factors, including: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) the prejudice to the defendant. 407 U.S. at 530. None of these factors are either a necessary or sufficient condition to finding a speedy trial violation. *Id.* at 533. They are instead related factors to be considered together with other relevant circumstances. *Id.* "In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Id.* Indiana has employed the *Barker* balancing test to evaluate speedy trial claims under our state constitution. *See, e.g., Sweeney v. State*, 704 N.E.2d 86, 102 (Ind. 1998); *Fisher v. State*, 933 N.E.2d 526, 530 (Ind. Ct. App. 2010).

Post-accusation delay exceeding one year triggers the *Barker* inquiry. *Danks v. State*, 733 N.E.2d 474, 481 (Ind. Ct. App. 2000) (citing *Doggett v. United States*, 505 U.S. 647, 652 n.1, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)), *trans. denied*. Gerald was charged with burglary and being a habitual offender in September 2009 and tried in December 2010. This fifteen-month delay is sufficient to trigger the *Barker* inquiry. However, the reasons for seven and a half months of the delay include a postponement that the trial court charged to Gerald, the unavailability of Gerald's counsel for trial, and court congestion. These reasons do not weigh heavily against the State. Moreover,

Gerald failed to assert his speedy trial rights. *See Barker*, 407 U.S. at 532 (“We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.”).

Finally, the *Barker* Court determined that prejudice should be assessed in light of three interests that the speedy trial right was designed to protect: “(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.” *Id.* at 532. “Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” *Id.* As to prejudice, Gerald states generally that he was oppressively incarcerated before trial and that his incarceration exceeded the appropriate time frames. These general assertions are insufficient to establish prejudice, particularly as Gerald makes no claim that the delay impaired his defense. *See State v. Montgomery*, 901 N.E.2d 515, 522 (Ind. Ct. App. 2009) (defendant failed to show prejudice where he asserted only that he experienced great anxiety and concern over whether he would have to return to prison but failed to claim any impairment of his defense), *adhered to on reh’g*, 907 N.E.2d 1057 (2009). The balancing of the *Barker* factors weighs against Gerald’s speedy trial claim.

We conclude that Gerald’s speedy trial rights were not violated.

II. JURY INSTRUCTIONS

Gerald also contends that the trial court committed fundamental error by failing to instruct the jury on the underlying felony of theft. A defendant in a criminal case is entitled to have the jury instructed on all the elements of the charged offense. *Taylor v.*

State, 922 N.E.2d 710, 716 (Ind. Ct. App. 2010), *trans. denied*. A defendant who fails to object to the court’s final instructions and fails to tender his own instruction that would correct an alleged error waives that claim of error on appeal. *Williams v. State*, 771 N.E.2d 70, 72 (Ind. 2002); *Mitchem v. State*, 685 N.E.2d 671, 674 (Ind. 1997). Because Gerald neither objected to the final instructions nor tendered his own instruction on the elements of theft, he has waived the issue for our review. He nonetheless argues that the alleged omission of the theft instruction constitutes fundamental error. The fundamental error doctrine 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. *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002).

The trial court gave the jury a set of final instructions and also read those instructions aloud. Those instructions included the State’s charge that

one JAMES E. GERALD did break and enter the dwelling of another person, to-wit: Chris Cartwright, with intent to commit a felony therein, to-wit: theft, that is to knowingly exert unauthorized control over the property of another person with the intent to deprive that person of the value or use of said property.

Appellant’s App. p. 59; *see also* Tr. p. 212. The instructions also informed the jury of the elements the State was required to prove for burglary, including that it be committed with the intent to commit the felony of “theft, by knowingly exerting unauthorized control over the property of a person intending to deprive the person of any part of the use or value of the property.” Appellant’s App. p. 60; *see also* Tr. p. 213. These instructions

sufficiently apprised the jury of the elements of theft. We find no error, much less fundamental error.

III. SUFFICIENCY OF THE EVIDENCE

Gerald finally contends that the evidence is insufficient to sustain his burglary conviction. Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this Court does not reweigh the evidence or judge the credibility of the witnesses. *Bond v. State*, 925 N.E.2d 773, 781 (Ind. Ct. App. 2010), *trans. denied*. We consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and affirm if the evidence and those inferences constitute substantial evidence of probative value to support the verdict. *Id.* A conviction may be based upon circumstantial evidence alone. *Id.* Reversal is appropriate only when reasonable people would not be able to form inferences as to each material element of the offense. *Id.*

To convict Gerald of Class B felony burglary as charged here, the State had to prove that he broke and entered Chris Cartwright's dwelling with the intent to commit theft in it. *See* Ind. Code § 35-43-2-1(1)(B)(i); Appellant's App. p. 16. Gerald argues that: (1) his mere possession of the stolen property is insufficient to prove burglary and (2) his mere presence in the vehicle with the stolen property combined with his opportunity to commit the crime is insufficient to prove burglary.

The evidence most favorable to the verdict, however, shows more than his possession of the stolen property and his presence in the vehicle with the stolen property with an opportunity to commit the crime. Stout gave Gerald permission to stay in his car

overnight and left the keys so that Gerald could go park somewhere and sleep. That night, when Kirk left Gerald in the car on Wild Cherry Lane, Gerald was the only person in the car and there were no stolen items in the car. The Cartwrights lived less than a quarter of a mile away on Tulip Tree Lane. When Mackenzie Cartwright woke the next morning around 5:30 a.m. to the sound of her dogs and banging on the front door, she looked out the window and saw only one person. That person was dressed in a black hooded sweatshirt and baggy blue jeans. Mackenzie heard “a loud bang like something being broken” before she escaped out a window. Tr. pp. 88-89. When Mackenzie’s father Chris and the police arrived, they discovered that the front door had been forced open and that a television, DVD player, laptop computer, and Wii gaming system had been stolen. Wild Cherry Lane resident Rob Froelich was running late for his 5:30 a.m. shift when he saw a car with only one occupant backing up around the corner and down the street into the front yard of a nearby house. When officers stopped Froelich’s vehicle on Tulip Tree Lane, Froelich directed the police to the suspicious car. The car was in front of Kirk’s mother’s house. Fresh tire tracks indicated that the car had recently pulled in. Gerald, who was wearing a black hooded sweatshirt and baggy jeans, was the only person in the car. The Cartwrights’ television, DVD player, computer, and gaming system were found in the car. When the police spoke with Stout and Kirk, they appeared to have just woken up.

To the extent Gerald questions the facts proving his identity and the feasibility of one person stealing the items from the house before Chris arrived, these are merely

requests to reweigh the evidence, which we will not do. We conclude that the evidence is sufficient to support Gerald's conviction for burglary.

For the reasons stated above, we affirm the trial court.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.