ATTORNEY FOR APPELLANT

Sean C. Mullins
Appellate Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Tiffany A. McCoy
Deputy Attorney General
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

Shenell Dasha Moore,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff*

January 20, 2022

Court of Appeals Case No. 21A-CR-1083

Appeal from the Lake Superior Court

The Honorable Natalie Bokota, Judge

Trial Court Cause No. 45G02-1808-F5-165

**Vaidik, Judge.**

## Case Summary

[1] Shenell Dasha Moore was convicted of two counts of Level 6 felony criminal recklessness for firing two gunshots in quick succession in the presence of three other people. She argues that the convictions constitute double jeopardy under

the new test established by our Supreme Court in *Powell v. State*, 151 N.E.3d 256 (Ind. 2020). We agree. The criminal-recklessness statute does not clearly indicate a "unit of prosecution" that would allow for multiple convictions in this case, and the actions in question were so compressed in terms of time, place, singleness of purpose, and continuity of action that only a single conviction can be imposed.

# Facts and Procedural History

[2] In August 2018, Shenell was renting a house in Hammond. Her mother, Barbara Moore, was living with her but was not on the lease. On the afternoon of August 30, Shenell and Barbara were joined at the house by Barbara's sister, Deborah Moore, and Deborah's daughter, Kiauna Moore. Deborah began braiding Barbara's hair, but an argument arose, and Shenell told everyone to leave. Deborah and Barbara said they would not leave until Deborah was done braiding Barbara's hair, so Shenell called 911. An officer responded, and the parties eventually agreed that Barbara, Deborah, and Kiauna would leave when the hair braiding was done.

[3] After the officer left, the arguing resumed, and Shenell again told the others to leave. When they refused, Shenell went out to her car, retrieved a handgun, and returned inside. Barbara grabbed Shenell's arms, but Shenell broke free. She pointed the gun at Barbara and Deborah and then, with all four women "at close range" and "in arms reach," Tr. pp. 72, 114, she fired a shot into the floor and a second shot into an adjacent room. Barbara, Deborah, and Kiauna then

left the house, and Deborah called 911. Officers responded and arrested Shenell.

[4] The State charged Shenell with three counts of Level 5 felony intimidation with a deadly weapon, three counts of Level 6 felony criminal recklessness with a deadly weapon, and three counts of Level 6 felony pointing a firearm. (For each of the three offenses, one count named Barbara as the victim, one count named Deborah, and one count named Kiauna.) The State also charged Shenell with Class A misdemeanor domestic battery for pushing Barbara. The four charges relating to Barbara were later dismissed because the State could not secure her presence for trial.

[5] A bench trial was held on the six remaining counts in April 2021. Deborah and Kiauna testified Shenell was drunk and argumentative before the shooting, and they denied they were violent or threatening toward her. Shenell, on the other hand, testified she was not drunk and was acting in self-defense when she retrieved and fired the gun. Specifically, she testified she called 911 because Barbara and Deborah had threatened to "whoop [her] 'A'." *Id.* at 146. She said she was handicapped and in "constant pain" because of a car accident in 2010 and that she feared getting assaulted. *Id.* at 147-49. She testified that after the officer left the house Deborah said, "We still gonna whoop your 'A' when I finish braiding your mama's hair." *Id.* at 151. She said she was scared and explained why she left the house and retrieved the gun:

> So I left. I went out to my car. I sat there about 20, 30 minutes trying to think what else can I do to get them to leave. So just got

> my gun out the trunk and went inside with it. I said, maybe they see a gun they leave. You know I don't want to get jumped on. I'm terrified right now, and I was hurting.

*Id.* at 152. Shenell testified that when she re-entered the house and Barbara tried to take the gun from her, she fired it so the other women would leave and not beat her up as they had threatened.

[6] The trial court found Shenell guilty of both counts of criminal recklessness and the count of pointing a firearm at Deborah but not guilty on the other three counts. In sentencing Shenell, the court found as a mitigating circumstance that she "acted under strong provocation in that the victims had threatened [her] with bodily harm." Appellant's App. Vol. II p. 79. However, it also concluded her response was not reasonable and that "you can't pull out a gun and threaten people." Tr. p. 182. The court entered convictions on all three guilty findings and sentenced Shenell to one year in jail for each conviction, all suspended to probation.

[7] Shenell now appeals.

# Discussion and Decision

## I. Sufficiency of Evidence

[8] Shenell first contends the State failed to present sufficient evidence to disprove her claim of self-defense. If a claim of self-defense is raised and finds support in the evidence, the State has the burden of negating the claim beyond a

reasonable doubt. *Wilson v. State*, 770 N.E.2d 799, 800-01 (Ind. 2002). "The State may meet this burden by rebutting the defense directly, by affirmatively showing the defendant did not act in self-defense, or by simply relying upon the sufficiency of its evidence in chief." *Miller v. State*, 720 N.E.2d 696, 700 (Ind. 1999). When a defendant challenges the sufficiency of the State's evidence in this regard, we will not reweigh the evidence or judge the credibility of witnesses. *Wilson*, 770 N.E.2d at 801. We will reverse "only if no reasonable person could say that self-defense was negated by the State beyond a reasonable doubt." *Id.* In other words, a trier of fact's decision on a claim of self-defense is generally entitled to considerable deference on appeal. *Taylor v. State*, 710 N.E.2d 921, 924 (Ind. 1999).

[9] A claim of self-defense requires that the defendant "(1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm." *Wilson*, 770 N.E.2d at 800. Shenell argues all three of these elements were satisfied here. The State asserts, among other things, that Shenell "participated willingly in the violence." Appellee's Br. p. 9. We agree with the State.

[10] When Shenell left the house, she did so freely, and none of the other women followed her. She then sat in her car "about 20, 30 minutes," all the while knowing the other women had agreed to leave after Deborah finished braiding Barbara's hair. But instead of waiting for that to occur, Shenell chose to escalate the situation—which to that point had not involved any weapons or actual violence—by retrieving her gun and re-entering the house to confront the others

with it. When she did that, the other women reacted reasonably by trying to keep her from using the gun. Shenell pulled away and then made the choice to fire two shots. This evidence that Shenell willingly participated in the violence was sufficient to defeat her claim of self-defense.

## II. Double Jeopardy

[11] Shenell also argues her two criminal-recklessness convictions constitute double jeopardy under the new test established by our Supreme Court in *Powell v. State*, 151 N.E.3d 256 (Ind. 2020).[1] It does not appear she raised this claim in the trial court, but the State does not argue waiver, and we have held that such claims can be raised for the first time on appeal or even by this Court sua sponte because double jeopardy implicates fundamental rights. *See Howell v. State*, 97 N.E.3d 253, 263 (Ind. Ct. App. 2018), *trans. denied*; *Montgomery v. State*, 21 N.E.3d 846, 864 n.5 (Ind. Ct. App. 2014), *trans. denied*.

[12] *Powell* provides the double-jeopardy test when a defendant is convicted multiple times under a single statute based on a single criminal act or transaction. 151 N.E.3d at 263. The inquiry involves two steps. *Id.* at 264. The first step is determining whether the statute at issue clearly indicates a "unit of prosecution." *Id.* "[A] unit of prosecution is 'the minimum amount of activity a defendant must undertake, what he must do, to commit each new and

[1] *Powell* was decided two years after the events in this case, but both parties treat it as providing the applicable double-jeopardy test.

independent violation of a criminal statute[.]'" *Barrozo v. State*, 156 N.E.3d 718, 725 (Ind. Ct. App. 2020) (quoting *United States v. Rentz*, 777 F.3d 1105, 1109 (10th Cir. 2015) (en banc)). If the statute clearly indicates a unit of prosecution, the court follows the legislature's guidance and the analysis is complete. *Powell*, 151 N.E.3d at 264. If it does not—that is, if the statute is ambiguous—the court proceeds to the second step. *Id.* "Under this second step, a court must determine whether the facts—as presented in the charging instrument and as adduced at trial—indicate a single offense or whether they indicate distinguishable offenses." *Id.*

[13] In discussing the unit-of-prosecution step, the *Powell* Court first noted, "In determining whether a single criminal statute permits multiple punishments for multiple victims, Indiana courts (as with other jurisdictions) often distinguish conduct-based statutes from result-based statutes." *Id.* at 265. The Court described conduct-based statutes as follows:

> A conduct-based statute, under our criminal code, consists of an offense defined by certain actions or behavior (e.g., operating a vehicle) and the presence of an attendant circumstance (e.g., intoxication). Under these statutes, the crime is complete once the offender engages in the prohibited conduct, regardless of whether that conduct produces a specific result (e.g., multiple victims). The focus—or "gravamen"—of the statutory offense is the defendant's actions, not the consequences of those actions. To be sure, a specific result or consequence (e.g., death or serious bodily injury) may enhance the penalty imposed. But multiple consequences do not establish multiple crimes, since the crime may still be committed without the consequence. Indeed, under a conduct-based statute, a single discrete incident can be the basis

> for only one conviction, no matter how many individuals are harmed.

*Id.* at 265-66 (cleaned up). The Court said the following regarding result-based statutes:

> A result-based statute, on the other hand, consists of an offense defined by the defendant's actions and the results or consequences of those actions. In crimes such as murder, manslaughter, battery and reckless homicide, the gravamen of the offense is causing the death or injury of another person, i.e., the result is part of the definition of the crime. In other words, the resulting death, injury or offensive touching is an element of the crime. And that crime is complete so long as the required actus reus and mental state are present. Under these statutes, then, where several deaths or injuries occur in the course of a single incident, the prohibited offense has been perpetrated several times over. The separate victims represent different offenses because conduct has been directed at each particular victim.

*Id.* at 266 (cleaned up). "In short, crimes defined by conduct (rather than by consequence) permit only a single conviction (with multiple consequences resulting in enhanced penalties, not multiple crimes). But crimes defined by consequence (rather than by conduct) permit multiple convictions when multiple consequences flow from a single criminal act." *Id.*

[14] *Powell* concerned the crime of attempted murder, which involves both the murder statute and the attempt statute. Read together, those statutes provide that a person commits attempted murder "when he or she, acting with the requisite culpability, "engages in conduct that constitutes a substantial step

toward" the "intentional killing of another human being." *Id.* at 265 (quoting Ind. Code §§ 35-41-5-1(a) (attempt) and 35-42-1-1(1) (murder)). The Court explained that these statutes include both conduct-based language—"engages in conduct that constitutes a substantial step toward" murder"—and result-based language—the direct object "another human being." *Id.* at 266, 267. Because "[t]hese alternative readings of our attempted-murder statute reveal equally legitimate ways of thinking about the statute's unit of prosecution," the Court found the statutes to be ambiguous and moved on to the second step of the test. *Id.* at 268.

[15] The criminal-recklessness statute is equally ambiguous in this regard. The statute provides, in relevant part, "A person who recklessly, knowingly, or intentionally performs an act that creates a substantial risk of bodily injury to another person commits criminal recklessness." I.C. § 35-42-2-2(a). The statute includes both conduct-based language—"recklessly, knowingly, or intentionally performs an act"—and result-based language—"that creates a substantial risk of bodily injury to another person." Because the statute is ambiguous as to the unit of prosecution, we must proceed to the second step of the *Powell* test.

[16] Again, that second step requires us to "determine whether the facts—as presented in the charging instrument and as adduced at trial—indicate a single offense or whether they indicate distinguishable offenses." *Powell*, 151 N.E.3d at 264.

> To answer this question, we ask whether the defendant's actions are so compressed in terms of time, place, singleness of purpose,

> and continuity of action as to constitute a single transaction. If the defendant's criminal acts are sufficiently distinct, then multiple convictions may stand; but if those acts are continuous and indistinguishable, a court may impose only a single conviction. Any doubt counsels against turning a single transaction into multiple offenses.

*Id.* at 264-65 (cleaned up).

[17] Under that standard, Shenell's actions do not support multiple criminal-recklessness convictions. The evidence in the record indicates the two gunshots were fired in the same general direction and without a meaningful break in time. There is no evidence that one shot was meant for one victim and the second shot was meant for another, or evidence that any victim was placed at greater risk by one shot or the other. The record demonstrates Shenell fired the two shots in quick succession with the unified purpose of scaring the other women out of her house. In short, the two shots were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." Therefore, under *Powell*, the two criminal-recklessness convictions constitute double jeopardy, and one of them must be reversed. We remand this matter to the trial court with instructions to vacate one of the convictions and re-sentence Shenell accordingly.

[18] Affirmed in part and reversed and remanded in part.

Najam, J., and Weissmann, J., concur.