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IN THE
COURT OF APPEALS OF INDIANA

Terrance Trabain Miller,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 1, 2021

Court of Appeals Case No.
20A-CR-2315

Appeal from the Cass Circuit Court

The Honorable Stephen R. Kitts II,
Judge

Trial Court Cause No.
09C01-1906-F2-9

Friedlander, Senior Judge.

Statement of the Case

[1] After a jury trial, Terrance Trabain Miller was convicted of one count of Level 2 felony dealing in methamphetamine,¹ one count of Level 2 felony dealing in heroin, a narcotic drug,² and one count of Class A misdemeanor resisting law enforcement.³ The State moved to dismiss one count of unlawful possession of a firearm by a serious violent felon (SVF) after the jury's verdict, and the court granted the motion. After pleading guilty to an habitual offender enhancement, Miller received an aggregate sentence of forty-nine years executed in the DOC. Finding that fundamental error occurred during trial, we reverse and remand.

Issue

[2] Miller now appeals, raising several issues, but the following is dispositive: Absent an objection, which results in waiver of the issue, did fundamental error occur when the trial court gave a preliminary jury instruction on Miller's SVF charge to which Miller's counsel agreed?

Facts and Procedural History

[3] The following is a summary of the facts pertinent to our disposition of this appeal. On the morning of June 5, 2019, members of the Cass County Drug

¹ Ind. Code §§ 35-48-4-1.1(a)(2) & (e)(1) (2017).

² Ind. Code §§ 35-48-4-1(a)(2) & (e)(2) (2017).

³ Ind. Code § 35-44.1-3-1(a)(1) (2016).

Task Force (CCDTF), who had received a tip about possible drug activity, began surveillance of a black SUV and a duplex where Miller was known to frequent. The CCDTF watched Miller's movements, both on foot and in the black SUV. After observing at least one traffic violation, the CCDTF initiated a traffic stop of the black SUV which Miller was driving. An officer smelled the odor of raw and burnt marijuana emanating from the vehicle when Miller rolled down the window. Miller initially refused to comply with officers' requests for him to exit the vehicle, but he eventually did so and, after some effort, was handcuffed. Miller reached for his right front pocket several times after being handcuffed even though officers had told him to stop. A pat down search led to the discovery of baggies of heroin and methamphetamine, and nearly \$1,000 of U.S. currency. A search of the car led police to find a handgun in a blue fanny pack near the console of the driver's side of the vehicle and more cash and a cell phone on the driver's seat.

[4] The State charged Miller with one count each of dealing in methamphetamine, dealing in a narcotic drug, possession of methamphetamine, possession of a narcotic drug, unlawful possession of a firearm by an SVF, and resisting law enforcement. The State also alleged Miller was an habitual offender.

[5] Prior to voir dire at Miller's jury trial, the State and Miller discussed the preliminary instructions relating to the SVF charge and agreed on the instructions provided to the jury. Counsel for Miller told the court that, "for the record, uh, strategic decision, that rather than have possession of a firearm bifurcated and tried separate, we've agreed, uh, with the State to separate just

the uh, element of the enhancement, the previous [offense] as part of the jury instruction.” Tr. Vol. 2 at 28. That instruction, Preliminary Instruction No. 18,⁴ read as follows,

Count 5: Possession of a Firearm in Violation of I.C. 35-47-4-5.
I.C. 35-47-4-5.

The crime of possession of a firearm in violation of I.C. 35-47-4-5 is defined by law as follows:

A person who knowingly or intentionally possesses a firearm after *having been convicted of and sentenced for an offense* enumerated under I.C. 35-47-4-5 commits possession of a firearm in violation of I.C. 35-47-4-5, a Level 4 felony.

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. possessed a firearm

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of a firearm in violation of I.C. 35-47-4-5, Level 4 felony, as charged in Count 5.

Appellant’s App. Vol. II, p. 185 (emphasis added).

[6] At the conclusion of the first phase of Miller’s jury trial, the jury found Miller guilty of dealing in methamphetamine, dealing in a narcotic drug, possession of methamphetamine, possession of a narcotic drug, possession of a firearm by an

⁴ The parties indicate that the instruction given was based on Indiana Pattern Jury Instruction (Criminal) 7.2740.

SVF, and resisting law enforcement. Next, the State orally moved to dismiss the SVF charge “because we [have not proved] the armed robbery that was alleged,” and the trial court granted the motion. Tr. Vol. III, p. 7. Miller then admitted his status as an habitual offender. The trial court sentenced Miller to an aggregate sentence of forty-nine years in the DOC.

Discussion and Decision

Fundamental or Invited Error?

[7] While acknowledging that no objection was made at trial, Miller first argues that fundamental error occurred when the court’s preliminary instruction on the SVF charge was given. More specifically, Miller argues that the instruction informed the jury of two things: (1) that Miller had a prior felony conviction (for robbery) that was not relevant to the other charges, and (2) that possession of the handgun was already established, as possession of the handgun was used to elevate two other charges against Miller, namely dealing and possession of a narcotic drug. In reply, the State argues that a fundamental error analysis is inappropriate because this issue should be decided under an invited error analysis. The State asserts that Miller’s counsel, who noted for the record that he was agreeing for strategic reasons not to bifurcate the trial on the SVF charge, also agreed to the language of Preliminary Instruction No. 18. The State contends that any error was invited. In rebuttal, Miller acknowledges that “invited error precludes relief from counsel’s strategic decisions gone awry.” Reply Br. p. 6 (quoting *Brewington v. State*, 7 N.E.3d 946, 975 (Ind. 2014)). Miller contends, however, that no such viable strategic decision existed.

- [8] The error of which Miller complains appears at first glance to be invited error. The “doctrine of invited error is grounded in estoppel, and forbids a party to take advantage of an error that [he] commits, invites, or which is the natural consequence of [his] own neglect or misconduct.” *Brewington*, 7 N.E.3d at 975 (internal quotations omitted). Miller’s counsel stated for the record that he agreed for strategic reasons not to bifurcate the SVF portion of the trial, and also agreed to the language of Preliminary Instruction No. 18.
- [9] It appears that Miller’s counsel invited the error and that the matter ends here. That said, we must decide whether invited error preempts fundamental error. We conclude that it does not.
- [10] Where fundamental error is not argued in terms of ineffective assistance of trial counsel, “fundamental error requires a showing of at least as much prejudice to the defendant as a claim of ineffective assistance of counsel.” *See id.* at 974. “To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007).
- [11] Here, Miller argues that there could be no viable strategic reason for his counsel to agree to the modified instruction in lieu of bifurcation of the SVF charge. Indeed, our Supreme Court has on many occasions wrestled with the issue of admissibility of prior convictions and their tendency “to prejudice or mislead or excite the minds and inflame the passions of the jury.” *See Lawrence v. State*, 286

N.E.2d 830, 832 (Ind. 1972). To that end, “evidence of prior crimes is generally inadmissible in a criminal case, because it has no tendency to establish the guilt or innocence of the accused.” *Id.* at 833; *see also* Ind. Evidence Rule 404. The Court has further observed, however, that prior-crimes evidence is admissible when relevant to some issue in the case, noting that “the undesirable tendency to prejudice remains, but the overriding interests of the State in arriving at the truth prevails.” *Lawrence*, 286 N.E.2d at 833. This comports with the language of Indiana Evidence Rule 404(b) and the rule’s permitted uses at trial of other crimes, wrongs, or acts.⁵

[12] In *Lawrence*, a case we find helpful in resolving the matter before us, our Supreme Court adopted the process of bifurcated proceedings in criminal cases where the defendant is charged with a crime and also alleged to be an habitual offender. *Id.* at 835. The Court stated,

We hereby adopt the procedure prescribed in the [*State v.*] *Ferrone* [, 96 Conn. 160, 113 A. 452 (1921)] case, because in so doing we appear to be carrying out the intent of the legislature to [impose] greater penalties upon recidivists who have failed to respond to prior convictions, without subjecting those only thus far accused of being members of such class to unnecessary prejudice, and by varying from the heretofore accepted procedure, we inflict but minimal inconvenience upon the courts.

⁵ 404(b)(2) Other Crimes, Wrongs, or Acts. Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Id. at 835-36. The Court reached this conclusion after noting that the defendant's prior crime was not relevant to the current charge he faced. *Id.* at 833. And so, with the *Lawrence* decision, the relevancy analysis began, in addition to the prejudice analysis that already existed.

[13] The *Lawrence* Court also considered its prior decision in *Metzger v. State*, 13 N.E.2d 519 (1938) and dicta in *Johnson v. State*, 245 N.E.2d 659 (1969). In *Metzger*, the Court, while recognizing the prejudicial impact of prior-crimes evidence where habitual offender allegations are also made, found that not bifurcating the charges was proper as long as the jury used the prior crime evidence for the sole purpose of its adjudication of the defendant as an habitual offender, and did not use it to determine the defendant's guilt of the principal charge. *Metzger*, 13 N.E.2d at 521. And, although the issue was not properly preserved for review in *Johnson*, the Court echoed its prior concerns saying,

This should not be construed to mean that this court necessarily approves the procedures presently used under the habitual criminal statutes. Had the issue been properly presented, *this court might well have questioned the fairness of a procedure which allows the jury to learn of a defendant's past convictions while deciding his guilt or innocence on the principal charge.* * * * However, this question was never properly presented to the trial court and, therefore, cannot be considered by this court on this appeal.

Johnson, 245 N.E.2d at 662 (emphasis added).

[14] In a more recent opinion, the Court considered whether a trifurcation of proceedings should occur when a principal charge was sought to be elevated by prior convictions and an habitual offender allegation was filed. *See Shelton v.*

State, 602 N.E.2d 1017 (Ind. 1992). In *Shelton*, the appellant argued that the trial court should have divided the proceedings into three phases: (1) the guilt/innocence determination on Shelton’s attempted murder, auto theft, and handgun possession charges; (2) the determination of whether the auto theft and handgun possession convictions should be elevated to higher class felonies; and (3) the determination of whether Shelton was a habitual offender. *Id.* at 1019. The Court in *Shelton* held that the trial court did not err in holding bifurcated, rather than trifurcated, proceedings. *Id.* at 1020. In reaching its determination, the Court observed that the use of prior convictions for elevation of the principal charges and evidence of prior convictions for purposes of the habitual offender adjudication did not “offend any interest of the defendant in a fair trial,” because the jury, in the second phase of the trial, is not asked to find the defendant guilty of another charge, “but merely to find facts which would enhance defendant’s sentence.” *Id.* (internal quotations omitted). Those non-primary charges—that is, the charges that supported the elevation of the principal charges and the habitual offender determination—were properly bifurcated from the primary charges. No separate, third phase was required.

[15] Our Supreme Court, in *Shelton*, also cited this Court’s extension of those principles in our opinion in *Smith v. State*, 451 N.E.2d 57 (Ind. Ct. App. 1983), where we held that “the *Lawrence* bifurcation requirement applied when the State sought elevation of intoxicated driver charges convictions.” *Shelton*, 602 N.E.2d at 1020 (citing *Smith*, 451 N.E.2d at 62).

[16] This brings us to the question before us, specifically, the instance of SVF charges tried along with the principal charges in a case. This Court has considered bifurcation of SVF charges, in a variety of factual settings. In *Spearman v. State*, 744 N.E.2d 545, 548 (Ind. Ct. App. 2001), *trans. denied*, we held that bifurcation was impractical, and the trial court did not abuse its discretion, in denying the motion to bifurcate where the defendant faced only the charge alleging he was an SVF. Next, in *Hines v. State*, 794 N.E.2d 469, 473 (Ind. Ct. App. 2003), *trans. denied*, we held that the trial court abused its discretion and reversal was required where the court denied a request that the principal charge of robbery be bifurcated from the unlawful possession of a firearm by an SVF charge. In *Hines*, there was only minimal evidence that the defendant may have flashed a gun during the commission of the robbery, and the defendant had offered to stipulate to his SVF status if the jury convicted him of the robbery charge. The *Hines* Court explicitly reversed because the prior crime evidence was not probative of the primary charge, but also implicitly because it was not relevant.

[17] A petitioner in *Pace v. State*, 981 N.E.2d 1253, 1261 (Ind. Ct. App. 2013) claimed ineffective assistance of trial counsel for failing to request a bifurcation of his proceedings at trial. We held that trial counsel should have requested bifurcation of the SVF charge from the drug charges the petitioner also faced. The jurors heard, in a case based on constructive possession of both the drugs and the gun, that he had prior convictions and arrests for drug offenses. Judge Barnes, in his concurring opinion on direct appeal, said,

I note here my concern with the ability of a person, much less a juror asked to determine the guilt of a suspected drug dealer, to divorce him or herself from the fact that this defendant, presumably clothed with a presumption of innocence, previously has been convicted of being just what he is now alleged to be—a drug dealer.

Pace v. State, No. 20A03-0504-CR-158, slip op. *8, (Ind. Ct. App. Aug. 2005).

[18] The decision in *Pace* cited this Court’s decision in *Gray v. State*, 841 N.E.2d 1210, 1214-20 (Ind. Ct. App. 2006). In *Gray*, we reversed the denial of post-conviction relief and the defendant’s convictions for unlawful possession of a firearm by an SVF, murder, attempted murder, and robbery after finding that appellate counsel was ineffective for failing to raise the issue challenging the denial of the defendant’s motion to bifurcate his SVF charge from other charges. *Id.*

[19] In *Talley v. State*, 51 N.E.2d 300, 304-05 (Ind. Ct. App. 2016), *trans. denied*, we held that the petitioner did not receive ineffective assistance of counsel when his counsel failed to move to bifurcate his SVF charge based on a prior armed robbery conviction from his two charges of resisting law enforcement. The trial court would not have been obligated to grant the motion because the prior conviction showed the petitioner’s motive for resisting arrest and the petitioner shouted for the officers to let him go because he was a convicted felon. We found no error and declined to reverse the conviction.

[20] Further, in *Pickett v. State*, 83 N.E.3d 717 (Ind. Ct. App. 2017), we reversed a defendant’s convictions of obstruction of justice, abuse of a corpse, two counts

of false informing, one count of failure to report a dead body, one SVF count and murder. We concluded that the trial court abused its discretion by denying the defendant's motion to bifurcate the SVF charge from the remaining charges. We observed that the jury instruction avoided the use of the words serious violent felon, instead naming the qualifying felony and citing the statute. We concluded that the modifications to the instruction "did nothing to ameliorate the prejudicial irrelevance in this case." 83 N.E.3d at 720. The defendant's prior conviction was for escape.

[21] This line of cases shows the slippery slope which has developed over the years under the SVF charge relevancy analysis. We can think of no reason why a jury should be made aware of the fact of a defendant's prior conviction to support an SVF charge during the phase where the other primary charges are being tried. Evidence Rule 404(b) provides the mechanism for the introduction of that evidence in allowable situations. Prior convictions may also be used to impeach the defendant if he chooses to testify. *See* Evidence Rule 609 (impeachment by evidence of a criminal conviction).

[22] We believe that a bright line must be drawn here. Instruction No. 18 should not have been agreed to let alone used. The prejudicial nature of the prior-crimes evidence in the primary charge phase of the trial erodes if not eviscerates the defendant's right to the presumption of innocence. This is so no matter the level of sophistication of the juror tasked with divorcing himself from applying that knowledge to the primary charge. We believe that bifurcation of SVF charges serves the purpose of protecting a defendant's right to the presumption

of innocence and ensures a fair trial. Miller did not receive a fair trial because of this fundamental error.

[23] Here, Miller’s counsel should have moved for bifurcation of the SVF charge rather than agree to an instruction referring to the prior conviction. Although the State dismissed the SVF charge after the jury had rendered its verdicts, reasoning that “we [have not proved] the armed robbery that was alleged,” Tr. Vol. III, p. 7, this does little to balance the rights that were deprived for the duration of the trial on the primary charges. The jury was made aware at the outset when receiving preliminary instructions that Miller had a prior conviction. The damage was already done.

[24] We cannot say that Miller’s convictions were not tainted by the “forbidden inference that he had a criminal propensity and therefore engaged in the charged conduct.” *See Thompson v. State*, 690 N.E.2d 224 (Ind. 1997). “We have previously explained that the reason the forbidden inference is forbidden is not because the inference is unreasonable, but because it *is* reasonable and thus susceptible to misuse.” *Cannon v. State*, 99 N.E.3d 274, 290 (Ind. Ct. App. 2018) (Robb, J., dissenting) (citing *Craun v. State*, 762 N.E.2d 230, 240 (Ind. Ct. App. 2002) (Kirsch, J., dissenting), *trans. denied*). Because there is a risk that such misuse occurred, we must reverse Miller’s convictions, finding that fundamental error occurred.

[25] We do not reach the other issues presented because of our decision on this dispositive issue.

Conclusion

[26] For the reasons set forth above, we reverse.

[27] Judgment reversed and remanded.

Najam, J., and Pyle, J., concur.