

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brandon Kaiser,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

October 26, 2023

Court of Appeals Case No.
22A-CR-2705

Appeal from the Marion Superior
Court

The Honorable Shatrese M.
Flowers, Judge

Trial Court Cause No.
49D28-1906-F3-25479

Memorandum Decision by Judge Weissmann
Judges Riley and Bradford concur.

Weissmann, Judge.

- [1] Brandon Kaiser shot two unarmed men during an early morning fracas in downtown Indianapolis. At his jury trial on charges of aggravated battery, battery, and a firearms violation, Kaiser claimed he shot in self-defense. The jury rejected Kaiser's defense and found him guilty of most of the charges.
- [2] Kaiser appeals, claiming that he proved he acted in self-defense. He also asserts that evidence of his 3½-hour standoff with police at his home impermissibly prejudiced the jury. Finding no error in those issues, we affirm but remand for correction of the trial court's sentencing statements.

Facts

- [3] Kaiser and his nephew, Alfredo Vasquez (Nephew), were drinking alcohol at a downtown Indianapolis bar when they decided to drive to a nearby White Castle restaurant around 2:30 a.m. As they entered the restaurant parking lot in a car driven by Nephew, the pair noticed Sabrina Bell, Andrew Adams, and Bradley Jacobs apparently dancing on the sidewalk. Bell, Adams, and Jacobs—all trial court judges in southern Indiana—were waiting on a colleague, who was ordering food inside the restaurant. The trio had been drinking alcohol in various downtown bars previously that evening.
- [4] Kaiser whistled at the group while Nephew parked the car. As Kaiser and Nephew walked to the restaurant door, they exchanged words and gestures with Bell, Adams, and Jacobs, as recorded by two security cameras in the parking lot. Adams and Nephew then charged at each other and began fighting.

Kaiser joined in and kicked Adams. Jacobs eventually subdued Kaiser by alternatively sitting or lying on top of him. Nephew tried to displace Jacobs by punching, pushing, and hitting him. Meanwhile, Adams and Bell tried to keep Nephew away from Jacobs and Kaiser. Nephew kept throwing punches at Adams, who fought back.

[5] Jacobs told Kaiser that the fight was over. But Nephew then managed to remove Jacobs from Kaiser and pin him over a concrete trash container. Once free but while still on the ground, Kaiser drew his gun and shot Jacobs. As Kaiser began to stand up, Kaiser turned and shot Adams, who was standing several feet behind him. Once Kaiser stood up, he shot Jacobs again as Nephew continued to attack Jacobs. While an already injured and incapacitated Jacobs was writhing in pain on the ground, Kaiser stood over Jacobs, shot him in the abdomen, and kicked him in the head.

[6] As Kaiser and Jacobs headed toward their car, a White Castle employee heard Kaiser say something like, "I told you not to mess with me." Tr. Vol. II, p. 234. With Jacobs and Adams seriously injured and bleeding in different parts of the parking lot, Kaiser leisurely walked back to retrieve some money from the ground. Then Kaiser and Nephew drove away as 911 calls were made.

[7] Police soon arrived and found three fired cartridge cases and a bullet at the scene. Police recovered a fourth cartridge case and bullet in Jacobs's clothing at the hospital where he was taken. All were fired from the same gun.

- [8] Adams suffered a gunshot wound to his stomach that severed his intestine. He underwent two surgeries during his 16 days in the hospital. Jacobs suffered two gunshot wounds and also underwent two surgeries during his 15-day hospital stay. He needed transfusions of more than half of his normal blood volume to stabilize. The bullets broke his ribs, injured both his liver and an artery, and punctured a lung. Jacobs also suffered a broken nasal bone and some facial injuries.
- [9] A few days later police identified Kaiser as the shooter by comparing the restaurant's security video to that of the bar where Kaiser had been drinking earlier in the evening. A detective who obtained a warrant to search Kaiser's home proceeded there with SWAT officers. Kaiser was arrested after a 3½-hour standoff.
- [10] A grand jury indicted Kaiser on fourteen counts: four counts of Level 3 felony aggravated battery; two counts each of Level 5 felony battery, Level 6 felony battery, Class A misdemeanor battery, and Class B misdemeanor battery; Class A misdemeanor carrying a handgun without a license; and Class B misdemeanor disorderly conduct. Before Kaiser's three-day jury trial, the State dismissed the five counts charging misdemeanor battery and disorderly conduct. The jury returned verdicts of guilty as to all the remaining counts except for the Level 6 felony battery, for which it acquitted Kaiser.
- [11] The trial court ultimately convicted Kaiser on all counts on which the jury found Kaiser guilty. But it "merged" two of the convictions for Level 3 felony

aggravated battery with two other aggravated battery convictions that were based on the same acts. The court sentenced Kaiser to 11 years imprisonment, with 3 years suspended to probation. Kaiser appeals.

Discussion and Decision

[12] Kaiser challenges his convictions on three bases. First, he argues that the trial court committed fundamental error when it admitted evidence of a lengthy standoff when police tried to search his home and arrest him. Second, Kaiser contends the State failed to rebut his self-defense claim. Finally, Kaiser asserts that the trial court erred in merging, but not vacating, two of the aggravated battery counts. We find any evidentiary error was harmless and conclude that the evidence was sufficient to support the convictions that Kaiser challenges. We agree with Kaiser that the court should have vacated, rather than just merged, two of the aggravated battery counts. Therefore, we affirm but remand for correction of the trial court's sentencing statements.

I. Evidence of Arrest

[13] Kaiser challenges the trial court's admission of testimony by Indianapolis Metropolitan Police Department Detective Ronald Clayton about the standoff at Kaiser's home before Kaiser's arrest. The trial court has broad discretion to admit evidence and will be reversed on appeal only when it abuses that discretion. *Phillips v. State*, 174 N.E.3d 635, 641 (Ind. Ct. App. 2021). An abuse of discretion occurs when the court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.*

- [14] Detective Clayton testified that a few days after the shooting, he accompanied a SWAT tactical team to Kaiser’s home, for which they had a search warrant. Detective Clayton testified that Kaiser would not comply with police commands by speaker and telephone to leave the home and was arrested only after six rounds of tear gas were deployed into his home.
- [15] The trial court denied Kaiser’s pretrial motion in limine seeking to exclude Detective Clayton’s testimony about the standoff, and Kaiser did not object to the testimony at trial. Acknowledging that he waived his claim by failing to object, Kaiser relies on the fundamental error doctrine to challenge the admission of Detective Clayton’s testimony. This narrow exception to waiver applies when the error renders a fair trial impossible or “was a ‘clearly blatant violation[] of basic and elementary principles of due process’ that presented ‘an undeniable and substantial potential for harm.’” *Miller v. State*, 188 N.E.3d 871, 874 (Ind. 2022) (quoting *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009)).
- [16] Kaiser argues that Detective Clayton’s testimony that “Kaiser remained in his home for several hours until tear gas was administered” was inadmissible under Indiana Evidence Rule 404(b). That rule provides:

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in a Criminal Case*. 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. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

Evid. R. 404(b).

[17] Kaiser claims the challenged testimony was offered by the State to prove his poor character and discredit his claim of self-defense. According to Kaiser, the jury could infer from the evidence of the standoff that he “was a person who disregards authority” and “has a propensity to act like the rules do not apply to him.” Appellant’s Brief, pp. 17-18. But Kaiser claims he delayed surrendering not as an act of rebellion but because he feared that police would retaliate for his shooting of two judges.

[18] We need not determine the admissibility of the standoff evidence because even if we assumed error, it was harmless and not fundamental. The jury had before it clear video of the entire confrontation at the White Castle parking lot. The video showed that Kaiser voluntarily entered the fracas and that he shot Jacobs at close range and kicked him in the head after incapacitating both Jacobs and Adams through earlier shots. Under these circumstances—explored more fully in the next section of this opinion—the probable effect of the standoff evidence on the jury was minimal and did not prejudice Kaiser’s substantial rights,

including his right to a fair trial. *See Hayko v. State*, 211 N.E.3d 483, 488 (Ind. 2023) (noting that non-constitutional error in the admission of evidence is harmless when its probable impact in light of all the evidence is so sufficiently minor that it does not impact the substantial rights of the parties); *see also Bennett v. State*, 5 N.E.3d 498, 511 (Ind. Ct. App. 2016) (finding any erroneous admission of evidence prohibited by Rule 404(b) “was at most harmless” where the record contained substantial independent evidence of defendant’s guilt).

II. Sufficiency of Evidence

- [19] Kaiser next contends his aggravated battery convictions should be reversed because the State failed to rebut his claim of self-defense beyond a reasonable doubt. We conclude the evidence was sufficient to allow the jury’s rejection of Kaiser’s self-defense claim.
- [20] “A valid claim of self-defense is legal justification for an otherwise criminal act.” *Gammons v. State*, 148 N.E.3d 301, 304 (Ind. 2011). A person is justified in using deadly force, and does not have a duty to retreat, if the person reasonably believes that force is necessary to prevent serious bodily injury to himself or a third person or the commission of a forcible felony. Ind. Code § 35-41-3-2(c).
- [21] A defendant claiming self-defense must prove that he: (1) was in a place where he had a right to be; (2) acted without fault in that he did not provoke, instigate, or participate willingly in the violence; and (3) reasonably feared or perceived death or great bodily harm. *Larkin v. State*, 173 N.E.3d 662, 670 (Ind. 2021). “The State must then negate at least one element beyond a reasonable doubt ‘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.” *Id.* (quoting *Lilly v. State*, 506 N.E.2d 23, 24 (Ind. 1987)). Whether a defendant acted in self-defense generally is a question of fact for the jury. *Turner v. State*, 183 N.E.3d 346, 357 (Ind. Ct. App. 2022).

[22] When assessing a claim that the defendant proved he acted in self-defense, we neither assess witness credibility nor weigh the evidence. *Stewart v. State*, 167 N.E.3d 367, 376 (Ind. Ct. App. 2021). We reverse only if no reasonable person could say that the State negated the defendant’s self-defense claim beyond a reasonable doubt. *Id.*

[23] The State rebutted Kaiser’s claim of self-defense by proving he was a mutual combatant and then an aggressor. An initial aggressor or mutual combatant cannot claim self-defense unless he ”withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action.” Ind. Code § 35-41-3-2(g).

[24] Kaiser never communicated an intent to withdraw from the altercation with Adams and Jacobs, and he withdrew only after he shot the men. At the beginning of the encounter, Kaiser raced toward Adams alongside Nephew and immediately threw punches at both Adams and Jacobs. Kaiser continued to engage in the brawl both before and after he was subdued on the ground by Jacobs. Even after both Adams and Jacobs were seriously wounded and unable

to defend themselves, Kaiser continued the confrontation by shooting Jacobs and kicking him in the head as Jacobs lay writhing in pain on the ground from his first gunshot wound. And Kaiser’s own comments—“I told you not to mess with me” or something equivalent—showed Kaiser acted vindictively and not in self-defense. Tr. Vol. II, p. 234. Thus, Kaiser was not entitled to claim self-defense. *Richardson v. State*, 79 N.E.3d 958, 964 (Ind. Ct. App. 2017) (“A mutual combatant, whether or not the initial aggressor, must declare an armistice before he may claim self-defense.”).

[25] The evidence also would have justified the jury’s rejection of Kaiser’s self-defense claim based on his use of excessive force. The force that an individual may use to protect himself “must be proportionate to the urgency of the situation.” *Turner*, 183 N.E.3d at 358. Use of greater force than is reasonably necessary under the circumstances extinguishes the right of self-defense. *Id.*

[26] Kaiser was not constrained by anyone when he fired the shots. Although he claimed to have been protecting Nephew, Kaiser fired his first shot when Nephew had the better of Jacobs, whom Nephew had pinned against a concrete trash container. Kaiser shot Adams when Adams was standing nearby.

[27] But most indicative of excessive force is Kaiser’s final shot. Both Adams and Jacobs were incapacitated on the ground when Kaiser stood over Jacobs, shot him at close range in the abdomen, and then kicked him in the head. Based on this evidence, the jury would have been justified in finding any right of self-defense extinguished. *See Birdsong v. State*, 685 N.E.2d 42, 46 (Ind. 1997)

(affirming jury’s rejection of self-defense claim when defendant shot two victims several times, including after they were incapacitated); *Hill v. State*, 532 N.E.2d 1153 (Ind. 1989) (finding self-defense not proven when defendant shot victim a second time after victim fell to his hands and knees). Kaiser’s arguments to the contrary are merely an invitation to reweigh the evidence.

III. Merger

[28] Kaiser and the State agree that the trial court erred in “merging,” but not vacating, two of his aggravated battery convictions—counts II and IV. After Kaiser’s trial, the trial court entered judgment of conviction on both those counts. But at sentencing, the court determined those two convictions violated the prohibition against double jeopardy because they were based on the same conduct as other counts of aggravated battery for which Kaiser also was convicted.

[29] Merging the convictions alone did not remedy the double jeopardy violation. *Gregory v. State*, 885 N.E.2d 697, 703 (Ind. Ct. App. 2008) (ruling that merger of two convictions based on double jeopardy concerns was insufficient because one offense must be vacated to cure any double jeopardy violation). Remand to correct this error is necessary. *See id.*

[30] We affirm the trial court’s judgment and remand with instructions to vacate Kaiser’s convictions for counts II and IV, aggravated battery.

Riley, J., and Bradford, J., concur.