

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Nicholas Owens,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

February 28, 2022

Court of Appeals Case No.  
21A-CR-1523

Appeal from the Wayne Superior  
Court

The Honorable Charles K. Todd,  
Jr., Judge

Trial Court Cause No.  
89D01-1912-F4-38

**Brown, Judge.**

[1] Nicholas Owens appeals his convictions for unlawful possession of a firearm by a serious violent felon as a level 4 felony, possession of a narcotic as a level 5 felony, and resisting law enforcement as a class A misdemeanor. We affirm.

### ***Facts and Procedural History***

[2] On December 13, 2019, Richmond Police Officer Sergio Santiago was dispatched to a residence regarding a disturbance between Owens and his girlfriend at the time, Erin. Officer Santiago also had a warrant to execute for Owens. Officer Santiago and other officers went to the front door of the residence, and Officer Tyler Smith went to the rear of the residence. Erin opened the front door, and Officer Santiago spoke with her. Officer Smith observed Owens exit the rear door of the upstairs apartment and “slowly creep down the steps” and “illuminated [Owens] with [his] flashlight and then he ran from [him] upstairs, reaching into his waistband.” Transcript Volume III at 16. Officer Smith, who was in police uniform, identified himself as a police officer and gave a verbal command for Owens to stop. Owens did not stop, “fled back inside the apartment,” and closed the door. *Id.* Officer Smith pursued Owens up the stairs and stated over the radio that Owens had exited the rear of the apartment and ran back inside the apartment from the rear landing. Officer Smith “gave commands and a few seconds later [Owens] came back out” and “laid down on his stomach.” *Id.* at 17. Meanwhile, upon receiving the information from Officer Smith over the radio, Officer Santiago entered the front of the apartment, “it was kind of quick, because [] at that point he was fleeing,” and Officer Santiago walked toward the rear of the apartment and saw

Owens “proned on the landing next to the rear apartment door.” Transcript Volume II at 218. Officer Santiago placed Owens in handcuffs and began to pat him down. Owens informed Officer Santiago “that he had dope in his right pocket of his sweat pants.” *Id.* at 219. Officer Santiago found a baggie containing a rocklike substance which was later determine to be fentanyl. Officer Smith looked around the area, saw a bucket with a mop in it located about six feet from Owens, and discovered a .22 caliber handgun in the bucket.

[3] Officer Santiago later interviewed Owens. Owens said that, when he became aware the Richmond Police were present, he went to the rear of the apartment, exited the door, started to move down the stairs, heard Officer Smith’s command to stop, and then “ran back inside to the apartment and he reached inside the right pocket of his sweat pants and reached - grabbed the firearm and threw it down immediately and then came back out and immediately surrendered.” *Id.* at 248. According to Officer Santiago, Owens stated that he threw the handgun because “he’s a felon so he did not want to get in trouble for possessing the gun.” *Id.* Owens also indicated he had purchased the gun for protection.

[4] On December 16, 2019, the State charged Owens with: Count I, unlawful possession of a firearm by a serious violent felon (“SVF”) as a level 4 felony; Count II, possession of a narcotic as a level 5 felony; and Count III, resisting law enforcement as a class A misdemeanor. The State also alleged Owens was an habitual offender.

[5] On April 27, 2021, the parties filed a joint stipulation which provided in part that Owens and the State agreed that Owens has a previous conviction for robbery as a class B felony under cause number 89C01-1001-FB-2 (“Cause No. 2”) and that the certified conviction would be entered into evidence. On April 29, 2021, the court held a status conference at which it addressed the joint stipulation. The court stated that, with respect to the charge of unlawful possession of a firearm by a SVF, the stipulations dealt with the “prior conviction and how to handle it,” “there are different thoughts on that” which included bifurcation, the parties agreed the jury would “at some point in . . . this first phase” be advised of the prior robbery conviction, and, rather than showing the jury the list of various offenses which qualify a person as a SVF, some of which were more egregious than Owens’s prior offense, the parties would stipulate that the offense qualified him under the statute. *Id.* at 69-70. Owens’s counsel indicated that the court’s explanation was a fair representation, and Owens indicated he understood.

[6] In May 2021, the court held a jury trial. The State moved to admit State’s Exhibit 15, which consisted of the judgment under Cause No. 2, and an exhibit containing a drug analysis report indicating the drug received for analysis was fentanyl, and defense counsel indicated that Owens did not have any objection

to the admission of the exhibits. The court instructed the jury as to the parties' joint stipulation.<sup>1</sup>

[7] Owens testified that he did not possess the firearm. He acknowledged that he had told Officer Santiago that the gun belonged to him. When asked “[w]hy did you do that,” he answered, “[b]ecause prior to him reading me my Miranda rights, he told me that he was going to go arrest Erin for it.” Transcript Volume III at 39. He testified “Erin was pregnant and I didn’t feel that she needed to be arrested” and “I was already under arrest for possession of narcotics and resisting.” *Id.* at 39-40.

[8] On cross-examination, Owens acknowledged that, when he heard a command to stop, he turned and ran back into the apartment and that he possessed fentanyl in his pocket at the time. He testified that he had moved into the apartment on the day of his arrest and that the gun had been left in the apartment when the prior tenant moved out. He testified that he knew the prior tenant and the prior tenant also left other personal belongings such as furniture and a bed. He indicated he never observed the gun in the bucket prior to the arrival of the police and had not used the mop. When asked “you told the

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<sup>1</sup> The court stated in part:

One of those matters the parties had stipulated to was that . . . Owens, had been previously convicted and sentenced on a robbery offense, a class B felony . . . . The State’s Exhibit 15 . . . is a copy of that, so the parties have stipulated that that is factual and the parties have also stipulated that that particular conviction qualifies as a . . . felony that fits what would be necessary for count one to be charged as it has, which is unlawful possession of a firearm as a level 4 felony.

Transcript Volume III at 32.

officer you fled back into the apartment . . . because you didn't want to get caught with a handgun due to a prior conviction, correct," Owens said "[c]orrect." *Id.* at 53. When asked "[a]nd there's a second reason why you would have fled back into that apartment and that is that you were on parole at the time, correct," Owens replied affirmatively, and when asked "you knew that you were not allowed to have a handgun as a condition of your parole," he again responded affirmatively. *Id.* The jury found Owens guilty on Counts I, II, and III. Owens pled guilty to being an habitual offender.

### *Discussion*

[9] Owens asserts the trial court committed fundamental error when it did not *sua sponte* bifurcate the proceeding on Count I from the other charges and by permitting reference throughout the trial to his robbery conviction. The State maintains that Owens invited any error by stipulating to the prior conviction, he has not established fundamental error as the prior conviction was relevant to prove motive in connection with the resisting law enforcement charge, and that, given Owens's admission regarding his felon status and that he possessed drugs, the prior conviction was not unduly prejudicial to the possession charge.

[10] The record reveals that Owens entered into a joint stipulation pursuant to which he agreed that he had a previous conviction for robbery as a class B felony under Cause No. 2 and that evidence of the conviction would be admitted at trial. At trial, the trial court instructed the jury as to the joint stipulation. The court asked whether it "shared an accurate representation of what the parties have stipulated to," and Owens's defense counsel responded

affirmatively. Transcript Volume III at 33. Accordingly, Owens has invited any error. *See Brewington v. State*, 7 N.E.3d 946, 975 (Ind. 2014) (“[T]he 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”) (internal quotations and brackets omitted), *cert. denied*, 574 U.S. 1077 (2015).

[11] Further, the standard for fundamental error is whether the error was so prejudicial to the rights of the defendant that a fair trial was impossible. *Boatright v. State*, 759 N.E.2d 1038, 1042 (Ind. 2001). While Owens does not cite Ind. Evidence Rule 404,<sup>2</sup> he claims that “the jury was informed that Owens was a criminal, convicted of robbery” and thus it was impossible for him to receive a fair trial. Appellant’s Brief at 16. The standard for assessing the admissibility of Rule 404(b) evidence is: (1) the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant’s propensity to commit the charged act; and (2) the court must balance the probative value of the evidence against its prejudicial effect pursuant to Ind. Evidence Rule 403.<sup>3</sup> *Boone v. State*, 728 N.E.2d 135, 137-138

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<sup>2</sup> Ind. Evidence Rule 404 provides in part that 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. Rule 404(b)(2) provides “[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”

<sup>3</sup> Ind. Evidence Rule 403 provides: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.”

(Ind. 2000), *reh'g denied*. The purpose of the rule is to prevent the jury from making the “forbidden inference” that a defendant is guilty of the charged offense on the basis of other misconduct. *Hicks v. State*, 690 N.E.2d 215, 218-219 (Ind. 1997). The trial court has wide latitude in weighing the probative value of the evidence against the possible prejudice of its admission. *Crain v. State*, 736 N.E.2d 1223, 1235 (Ind. 2000). If evidence has some purpose besides behavior in conformity with a character trait and the balancing test is favorable, the trial court can elect to admit the evidence. *Boone*, 728 N.E.2d at 138. For instance, evidence which shows the defendant’s motive or plan may be admissible. *See* Ind. Evidence Rule 404(b)(2).

[12] The record reveals the evidence that Owens had a prior robbery conviction and was on parole was not introduced to show his propensity to engage in crime or that his behavior was in conformity with a character trait. The evidence explained his motive for resisting law enforcement and the reason that Owens exited the apartment through the back door in an attempt to evade the police, did not comply with Officer Smith’s commands to stop, and reentered the apartment. Evidence of his prior conviction and parole terms could also have established a motive for Owens to refrain from carrying a firearm. *See* Transcript Volume III at 39, 53 (Owens testified he knew he was prohibited from having a gun as a condition of his parole and due to his prior conviction and that at no point did he possess a firearm). We cannot say the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.



[13] In light of its relevancy to show motive and Owens's admission to possessing the drugs, it was unlikely the jury gave undue weight to the prior robbery conviction in finding him guilty. Under these circumstances, we cannot say the admission of the challenged evidence or the fact the trial court did not *sua sponte* bifurcate the proceedings requires reversal. *See Talley v. State*, 51 N.E.3d 300, 302-305 (Ind. Ct. App. 2016) (finding, where the defendant was charged with unlawful possession of a firearm by a SVF and resisting law enforcement, that his prior robbery conviction was relevant to prove motive in connection with the resisting law enforcement charges; observing defense counsel did not request a bifurcated trial because the prior conviction could be admitted as evidence of motive and, conversely, could have also established a motive to refrain from carrying a firearm; finding the defendant admitted to an officer to being a felon; and holding, based on the admission, that it was unlikely the jury would give undue weight to the prior robbery conviction), *trans. denied*.<sup>4</sup>

[14] For the foregoing reasons, we affirm Owens's convictions.

[15] Affirmed.

May, J., and Pyle, J., concur.

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<sup>4</sup> To the extent Owens cites *Hines v. State*, 801 N.E.2d 634 (Ind. 2004), and *Pace v. State*, 981 N.E.2d 1253 (Ind. Ct. App. 2013), we find those cases to be distinguishable in that the defendants in those cases were charged with robbery or dealing in amphetamine and the prior convictions were not relevant to those charges. *See Talley*, 51 N.E.3d at 305-306 (noting *Hines* and *Pace* were distinguishable and finding, in contrast to those cases, the defendant's prior robbery conviction was relevant to show his motive to commit resisting law enforcement).