

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Anthony J. Lopez,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 11, 2023

Court of Appeals Case No.
22A-CR-2912

Appeal from the Allen Superior
Court

The Honorable Frances C. Gull,
Judge

Trial Court Cause No.
02D05-2204-MR-6

Memorandum Decision by Judge Bailey
Judges Tavitas and Kenworthy concur.

Bailey, Judge.

Case Summary

- [1] Anthony J. Lopez appeals his convictions for Murder, a felony,¹ and Carrying a Handgun Without a License, as a Level 5 felony.² We affirm the conviction for Murder and reverse the conviction for Carrying a Handgun Without a License.

Issues

- [2] Lopez presents two issues for review:
- I. Whether the trial court erred in admitting into evidence a handgun retrieved from Lopez's backpack; and
 - II. Whether the trial court abused its discretion by denying Lopez's motion for severance of the charges, although the seized handgun was not used to commit the charged murder.

Facts and Procedural History

- [3] During the afternoon of April 14, 2022, two Fort Wayne youths walked into a park and discovered the body of William Kintzel. Police officers and medical personnel were summoned, and Kintzel was pronounced dead. First responders discovered that Kintzel had around his neck two key fobs for a rented silver Dodge Durango. An autopsy revealed that he had died as a result

¹ Ind. Code § 35-42-1-1.

² I.C. § 35-47-2-1 (2017).

of multiple gunshot wounds. The forensic pathologist formed the opinion that Kintzel had been killed four days before the discovery of his body.

[4] Fort Wayne Police detectives commenced an investigation, which included interviewing nearby residents and business proprietors. One neighbor recalled hearing gunshots a few days earlier, something he had initially dismissed as fireworks. He was able to describe a vehicle in the vicinity when the shots rang out, the vehicle's driver, and a man he had seen run toward the vehicle and enter it. Security camera footage obtained from another neighbor corroborated that sequence of events and indicated that the occurrence had been on April 10. During the investigation, it was also learned that a 9-1-1 call had been placed at around 7:00 p.m. on April 10 to report shots fired in the vicinity.

[5] Security footage from a nearby Dollar General showed a silver Dodge Durango pull into the parking lot just after 7:00 p.m. on April 10. Two men entered the store and purchased bleach and cleaning wipes. They returned to the Dodge Durango and appeared to be cleaning the interior. The vehicle would not restart, so the men abandoned it. Surveillance video from another nearby business showed one of those men looking around and then discarding a plastic bag in the dumpster behind the business. He also removed some clothing and threw the items into the dumpster.

[6] Fort Wayne Police Officer Robert Geiger became aware that investigators were trying to identify the persons depicted in security footage. Upon review of that footage, Officer Geiger recognized Lopez. He went to Lopez's Facebook page

and saw that some posted photographs showed Lopez wearing some items, such as jewelry, like those worn by the person who ran from the crime scene. Lopez's companion was identified as Michael Barker.

[7] On April 16, 2022, Lopez contacted his uncle, Carl Lopez, and requested a ride. Carl picked up Lopez and helped him pawn some jewelry. The two then drove to a fast-food restaurant where they were detained by Fort Wayne police officers. Lopez was arrested and removed from the scene.³ One of the officers asked Carl if he would consent to a search of his truck for weapons. Carl responded that he only had a knife. He denied having any knowledge of whether Lopez had brought with him a bag, backpack, or luggage. However, Carl consented to a search of his truck. During the search, one of the officers unzipped a backpack and retrieved a handgun. Lopez later acknowledged that the gun was his. A firearms examiner determined that the handgun was unrelated to Kintzel's murder.

[8] On April 21, 2022, the State charged Lopez with Murder and Carrying a Handgun Without a License. The State also alleged that a sentencing enhancement for the use of a firearm in commission of the murder should be imposed upon Lopez, pursuant to Indiana Code Section 35-50-2-11.

[9] On September 15 and September 22, Lopez filed a motion for severance and a motion to suppress, respectively. The parties appeared for a hearing on

³ Lopez does not challenge the warrantless arrest.

September 29, at which Lopez argued that the search of his backpack was unreasonable and that the admission into evidence of the handgun would unduly prejudice him if the counts against him were not severed. At the conclusion of the hearing, the trial court denied the motion for severance and took the motion to suppress under advisement.

[10] The parties appeared for a jury trial on October 4, 2022. Immediately prior to the commencement of trial, the trial court denied Lopez's motion to suppress. In bifurcated proceedings, the jury returned verdicts finding Lopez guilty of Murder and Carrying a Handgun Without a License and then determined that he had a prior felony elevating the handgun offense and that he had used a handgun in the commission of the murder. Lopez was sentenced to sixty-five years imprisonment for Murder. He was given a consecutive sentence of six years for Carrying a Handgun Without a License. Finally, his sentence was enhanced by twenty years pursuant to Indiana Code Section 35-50-2-11. Lopez now appeals.

Discussion and Decision

Admission of Evidence

[11] Lopez frames his appellate issue as whether the trial court erred when it denied his pretrial motion to suppress the handgun found in his backpack. However, Lopez did not seek interlocutory review of that decision and thus his issue is more properly framed as whether the trial court abused its discretion by admitting the evidence at trial. *See Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind.

2014) (recognizing that direct review of the denial of a motion to suppress is only proper when the defendant files an interlocutory appeal)

[12] In ruling on admissibility following the denial of a motion to suppress, the trial court considers the foundational evidence presented at trial. *Id.* It also considers the evidence from the suppression hearing that is favorable to the defendant, but “only to the extent it is uncontradicted at trial.” *Id.* We review a trial court’s ruling for an abuse of discretion and reverse only if a ruling is clearly against the logic and effect of the facts and circumstances and the error affects a party’s substantial rights. *Id.* However, the ultimate determination of the constitutionality of a search or seizure is a question of law that a reviewing court will consider de novo. *Id.*

[13] Lopez contends that the search of his backpack violated the Fourth Amendment prohibition against unreasonable searches and seizures.⁴ He concedes that Carl gave valid consent to search the vehicle but argues that Carl could not give valid consent to search Lopez’s personal property.

[14] “A valid consent to a search may be given by either the person whose property is to be searched or by a third party who has common authority over or a sufficient relationship to the premises to be searched.” *Norris v. State*, 732 N.E.2d 186, 188 (Ind. Ct. App. 2000) (citing *Illinois v. Rodriguez*, 497 U.S. 177,

⁴ The Fourth Amendment to the United States Constitution preserves the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST. amend. IV.

179 (1990)). A backpack “is generally not an object for which two or more persons share common use and authority.” *Id.* at 191. The determination of whether a valid consent to a search has been given is to be judged against an objective standard; that is, would the facts available to the officer at the moment of the search “warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.” *Id.* at 188 (citing *Rodriguez*, 497 U.S. at 188).

[15] In *Norris*, the vehicle driver had consented to a search of his vehicle during a traffic stop; his passenger had no knowledge of the consent. *See id.* at 190. Officers located the passenger’s backpack, opened it, and found a handgun, without determining the ownership of the backpack. *Id.* On appeal of *Norris*’s conviction for possession of a firearm, a panel of this Court found *State v. Friedel*, 714 N.E.2d 1231 (Ind. Ct. App. 1999) to be analogous.

[16] In *Friedel*, an Indiana State Police trooper stopped the vehicle in which Susan Friedel was a passenger. The male driver consented to a search of the vehicle, and the passengers were ordered to exit it. *See id.* at 1234-35. A Steuben County Sheriff’s Department deputy discovered a purse in the back seat of the vehicle next to where Friedel had been sitting, opened it, and found marijuana and amphetamines. Friedel was charged with possession of these substances. The trial court granted her motion to suppress the drugs, and the State appealed. *Id.* at 1235.

[17] The issue was “not whether the purse was within the scope of the search,” but rather whether the driver “had actual or apparent authority to consent to the search.” *Id.* at 1239. In reviewing the record, the Court found it “unclear as to whether [the defendant] heard [the driver] give the officers consent to search his vehicle” and saw “no indication in the record that [the defendant] abandoned her purse by leaving it in the van after she and her child were ordered out of the vehicle by the officers.” *Id.* at 1241. The *Friedel* Court found it “quite clear” that the driver did not have actual authority to consent to the search, and rejected the State’s contention that it was reasonable for the officers to believe that the driver had apparent authority for the search of the purse. *Id.* at 1240.

[18] Finally, the Court discussed consent by implication and abandonment:

Consent may not reasonably be implied from a passenger’s silence or failure to object where the officer did not expressly or impliedly ask the passenger for consent to search. Additionally, although the State suggests otherwise, there was no indication in the record that *Friedel* abandoned her purse by leaving it in the van after she and her child were ordered out of the vehicle by the officers. Moreover, to show abandonment, the State must show that *Friedel* relinquished her property with no intention of reclaiming it.

Id. at 1241 (citations omitted). Under those circumstances, the Court concluded that the driver did not have actual or apparent authority to consent to a search of the defendant’s purse and it was unreasonable for the officers to conclude that he did. *Id.* at 1243.

[19] The *Norris* Court also found support in *People v. James*, 645 N.E.2d 195 (Ill. 1994), observing:

In the *James* case, Delores James was a passenger in a vehicle that was stopped by police officers. The officers directed the driver and passengers to exit the vehicle. James left her purse on the front passenger seat. Although James was not aware of it, the driver of the car consented to a police search of the vehicle. During the search, the officers opened James' purse and found cocaine. James, who was charged with possession of a controlled substance, filed a motion to suppress the cocaine wherein she argued that the driver of the vehicle lacked the authority to consent to a search of her purse. The trial court granted the motion, and the Illinois Court of Appeals reversed. The Illinois Supreme Court allowed James' petition for leave to appeal.

In its review of the case, the supreme court noted that consistent with *Rodriguez*, . . . decisions from other jurisdictions have generally held that a driver's consent to a search of his vehicle does not extend to an item remaining in the car that belongs to a passenger of the vehicle. *James*, 206 Ill. Dec. 190, 645 N.E.2d at 203. Applying this jurisprudence to the facts before it, the court concluded that the officer who searched the vehicle should have ascertained who owned the purse that he found in the vehicle before he opened it and searched its contents. *Id.*

Norris, 732 N.E.2d at 190 (citation omitted).

[20] Upon examining the foregoing authority and the circumstances of the search before it, the *Norris* Court concluded that the actions of the officer were not objectively reasonable and that his search of Norris' backpack was therefore unreasonable. *Id.* at 191.

[21] As observed in *Norris*, a backpack is not generally a shared item. 732 N.E.2d at 191. And here, Carl did not identify the backpack as his and there was no indication of his mutual use of the property. It was not objectively reasonable for the officer to believe that Carl had authority to consent to the seizure, unzipping, and search of the backpack. Accordingly, the trial court should not have admitted the handgun into evidence. The State did not present evidence independent of the seizure of the handgun – which was not the murder weapon – to support Lopez’s carrying offense. Thus, we reverse that conviction.

Severance

[22] Lopez contends that the trial court abused its discretion in denying his motion for severance. According to Lopez, “the only reason the State wanted to join Count II in the same case as Count I was to allow the jury to make the inference that if Mr. Lopez could possess a gun on April 16, 2022, he certainly could have possessed one on April 10, 2022 and thus used a weapon to kill Mr. Kintzel.” Appellant’s Brief at 19-20.

[23] Regarding severance of offenses, Indiana Code Section 35-34-1-11(a) provides:

Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant’s guilt or innocence of each offense considering:

- (1) the number of offenses charged;
- (2) the complexity of the evidence to be offered; and
- (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

[24] The degree of deference afforded a trial court's ruling on a motion for severance depends on the basis for joinder. *Pierce v. State*, 29 N.E.3d 1258, 1264 (Ind. 2015).

Where the offenses have been joined solely because they are of the same or similar character, a defendant is entitled to severance as a matter of right. Ind. Code § 35-34-1-11(a) (2008). The trial court thus has no discretion to deny such a motion, and we will review its decision de novo. *Jackson v. State*, 938 N.E.2d 29, 36 (Ind. Ct. App. 2010). But where the offenses have been joined because the defendant's underlying acts are connected together, we review the trial court's decision for an abuse of discretion.

Id. Lopez concedes that he was not entitled to severance as a matter of right. But he argues that the trial court abused its discretion in refusing to sever the offenses because they are wholly unrelated.

[25] With respect to the statutory factors: the number of offenses charged was only two; the evidence was not complex; and our review of the record leads us to conclude that the trier of fact was able to distinguish the evidence and apply the law intelligently as to each offense. However, the possession of a firearm without a license was not related to Kintzel's murder. The charged offenses have no commonality beyond Lopez's willingness to possess a gun.

[26] But here any error in the denial of severance would at most be harmless error. An error is harmless when it results in no prejudice to the “substantial rights” of a party. *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018); Ind. Trial Rule 61. *See also* Appellate Rule 66 (providing that no error in a ruling by the trial court “is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties”).

[27] Here, the State presented overwhelming evidence that Lopez murdered Kintzel. In the area where Kintzel’s body was found, a neighbor heard shots ring out and observed a man later identified as Lopez running to and entering a silver Dodge Durango. Key fobs to a rented silver Dodge Durango were found around Kintzel’s neck; the location of the key fobs would have prevented the vehicle from re-starting. Shortly after another neighbor’s camera captured Lopez running, a Dollar General security camera captured Lopez’s arrival in a silver Dodge Durango. After Lopez and his companion purchased cleaning supplies and cleaned the vehicle’s interior, it was abandoned because it would not start. Lopez abandoned some of his clothing in a dumpster after looking around his surroundings. Lopez’s telephone records placed him in the vicinity of Kintzel’s body and nearby businesses around the time of Kintzel’s murder.

[28] And while the State presented this evidence to support a murder conviction, the State also distinguished the charged offenses. Crucially, Officer Brian Martin and the State’s firearms examiner testified unequivocally that the recovered handgun was not the gun involved in Kintzel’s shooting. We can say with

confidence that the jury did not rely upon Lopez's later possession of a handgun to convict him of Kintzel's murder.

Conclusion

- [29] Because the handgun supporting the carrying conviction was obtained in violation of Lopez's Fourth Amendment rights and the State presented no independent evidence of this offense, we reverse that conviction. But Lopez did not show that the denial of his motion for severance prejudiced his substantial rights such that reversal of his conviction for Murder is warranted.
- [30] Affirmed in part; reversed in part; and remanded with instructions to vacate the conviction for Carrying a Handgun Without a License.

Tavitas, J., and Kenworthy, J., concur.