## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Travis Walker Phelps,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff*

February 9, 2021

Court of Appeals Case No.
20A-CR-831

Appeal from the
Vanderburgh Superior Court

The Honorable
Robert J. Pigman, Judge

Trial Court Cause No.
82D03-1903-MR-1814

**Vaidik, Judge.**

# Case Summary

[1] Travis Walker Phelps appeals his convictions for murder and attempted murder, arguing the trial court erroneously instructed the jury as to the lesser-included offenses of voluntary manslaughter and attempted voluntary manslaughter, erroneously admitted evidence of a statement he made after the offenses, and his guilty plea during the firearm-enhancement proceedings was not made knowingly, intelligently, and voluntarily. We reverse as to the enhancement and remand for further proceedings but affirm in all other respects.

# Facts and Procedural History

[2] Austin Smith and Kelsey Cavendar were in a relationship "on and off" for "six or seven years" and had two children together. Tr. Vol. II p. 78. In early 2017, the couple broke up but remained friends. That summer, Cavendar moved into Phelps's house in Evansville, and he considered her his "girlfriend." Tr. Vol. III p. 5. On the morning of August 31, Smith called Cavendar and asked her to "hang out." Tr. Vol. II p. 68. Phelps was in the room and heard at least part of the conversation. He was "agitated" and told Cavendar not to bring Smith to the house. Tr. Vol. III p. 27.

[3] When Smith arrived at Phelps's house to pick up Cavendar, she left through the back door and got in the passenger seat of Smith's car. Once in the car, she saw Phelps on the front porch of the house holding a gun. Phelps fired multiple

shots at Smith's car. Smith attempted to drive off but crashed into a tree a few blocks from the house. He told Cavendar to call 911 because "he was shot." Tr. Vol. II p. 74. Neighbors who witnessed the shooting also called 911 and attempted to administer first aid to Smith. Smith was transported to the hospital, where he received emergency surgery for a gunshot wound to the abdomen. Despite treatment, Smith never regained consciousness after the shooting. He was released to hospice care and died ten months later. The State charged Phelps with one count of murder for Smith and one count of attempted murder for Cavendar. The State also sought a sentencing enhancement for use of a firearm in the commission of the offenses.

[4] A jury trial was held in February 2020. Christy Harris Mitchell, Phelps's neighbor, testified she was on her front porch with her husband, granddaughter, and Joseph Phelps, Phelps's father, when she heard gunfire and saw Phelps pointing a gun at Smith's car. She then testified as to a confrontation she had with Phelps while she was at the police station giving her witness statement. She stated she saw Phelps in the hallway at the police station and told him her "granddaughter was on the porch in the direction he was shooting." *Id.* at 98. She stated Phelps replied, "B*tch, I don't give a f*ck." *Id.* The State then introduced a surveillance video of this interaction. *See* Ex. 15, 0:13-0:16. The defense objected, arguing the recording had no probative value and was unfairly prejudicial. Defense counsel stated Mitchell testified as to Phelps's statement "before I had a chance to object" and asked the court to strike that testimony and admonish the jury to disregard it. Tr. Vol. II p. 100. The court overruled

the objections and admitted the recording, stating it felt the statement "has probative value." *Id*.

[5] At trial, the theory of defense was Phelps did not have intent to harm when he shot at Smith's car and he acted in self-defense. He stated there was "animosity" between he and Smith. Tr. Vol. III p. 6. He testified on the day of the shooting Cavendar put her phone on speaker while talking to Smith, and Smith had a "very aggressive" tone and stated "he was going to pull up and he was going to harm [Phelps]." *Id.* at 8, 9. Phelps also stated Cavendar told him Smith had a gun. He then testified that after Cavendar left the house, he went on his porch to smoke and noticed Smith's car was still there. He stated he saw the car slam on its brakes and saw Smith motion "to go grab something." *Id.* at 17. Fearing Smith was grabbing a gun, Phelps fired shots at the car. Phelps stated he was not aiming for Smith or Cavendar but was merely "trying to scare them off." *Id.* at 18.

[6] After both sides presented their cases, the court asked both parties about jury instructions, which included the charged crimes of murder and attempted murder as well as the lesser-included offenses of voluntary manslaughter, attempted voluntary manslaughter, criminal recklessness, and reckless homicide. The defense indicated it had read the instructions and had "[n]o objections." *Id.* at 41. The trial then proceeded to closing arguments, where the defense emphasized its theory of self-defense, stating Phelps "was actually retreating" while firing the gun, "didn't aim at anybody," and "had no intent to kill anyone . . . [h]is only intention was to protect himself[.]" *Id.* at 64.

[7] The jury found Phelps guilty of murder and attempted murder. After the verdicts were read, the State indicated it wanted to proceed on the firearm enhancement. The following exchange then occurred:

> THE COURT: Does he want a hearing on the firearm enhancement?
>
> [DEFENSE COUNSEL]: Do you want to explain that to him? I was just discussing that with him but I can say it and you can correct me if I'm wrong.
>
> THE COURT: Go ahead.
>
> [DEFENSE COUNSEL]: Travis you knew that there was a gun enhancement that if you were convicted of the murder count, that there could be an enhancement because of the use of a gun.
>
> THE DEFENDANT: Uh-hum (affirmative).
>
> [DEFENSE COUNSEL]: You could — obviously there's testimony, you already testified that you used a gun. It wouldn't take anything to prove that.
>
> THE DEFENDANT: Uh—uh (negative).
>
> [DEFENSE COUNSEL]: You could — you have a right to have a hearing on that subject or you could stipulate that you, in fact, had the gun.
>
> THE [DEFENDANT]: Yeah (affirmative), I had it.

*Id.* at 76-77. The court, apparently taking this as a guilty plea, then set the matter for sentencing.

[8] The following month, the trial court sentenced Phelps to sixty years for the murder conviction, increased by ten years for the firearm enhancement, and thirty-five years for the attempted-murder conviction, to be served consecutively, for a total sentence of 105 years.

[9] Phelps now appeals.

# Discussion and Decision

## I. Jury Instructions

[10] Phelps first contends the trial court erred in instructing the jury on voluntary manslaughter and attempted voluntary manslaughter. Because he did not object to the instructions, Phelps raises this issue as fundamental error. The doctrine of fundamental error is an extremely narrow exception to the waiver rule that requires the defendant to show the alleged error was so prejudicial to his rights as to make a fair trial impossible. *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014), *reh'g denied*.

[11] Instructing a jury is left to the sound discretion of the trial court, and we review its decision for an abuse of discretion. *Winkleman v. State*, 22 N.E.3d 844, 849 (Ind. Ct. App. 2014), *trans. denied*. "To constitute an abuse of discretion, the instruction given must be erroneous, and the instructions viewed as a whole must misstate the law or otherwise mislead the jury." *Id.* When considering

whether an incorrect jury instruction amounts to fundamental error, "we look not to the erroneous instruction in isolation, but in the context of all relevant information given to the jury, including closing argument and other instructions." *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002), *reh'g denied*.

[12] Phelps challenges Instruction 9, which provides in part:

> If you find that the State has failed to prove any one of the essential elements of the charged crimes of Murder and Attempted Murder, **you should then decide** whether the State has proved beyond a reasonable doubt all elements of the included crimes of Voluntary Manslaughter, Reckless Homicide, and Criminal Recklessness which have been defined for you.

Appellant's App. Vol. II p. 182 (emphasis added). Phelps argues this instruction "foreclosed the possibility" he could have been convicted of voluntary manslaughter or attempted voluntary manslaughter because it instructed the jury to consider those offenses only if it found the State did not prove murder or attempted murder, when in actuality the jury should consider voluntary manslaughter and attempted voluntary manslaughter after finding the State proved murder or attempted murder, because sudden heat is a mitigator that reduces murder to voluntary manslaughter. Appellant's Reply Br. p. 4.

[13] Phelps points to cases where we have found instructions like Instruction 9 wrong in the past. *See McDowell v. State*, 102 N.E.3d 924, 935 (Ind. Ct. App. 2018), *trans. denied*; *Roberson v. State*, 982 N.E.2d 452, 460 (Ind. Ct. App. 2013). Those instructions were erroneous because they informed the jury to consider voluntary manslaughter only after finding the State failed to prove murder, and

the murder definitions did not require that the State disprove sudden heat. *See Roberson*, 982 N.E.2d at 460. This is incorrect because it precludes the jury from considering voluntary manslaughter if the jury first finds the State proved murder. Unlike other lesser-included offenses—in which "a defendant charged with a crime and with a lesser-included offense of that crime who is convicted of the first crime would also by definition have to have committed the lesser-included offense"—voluntary manslaughter contains a mitigating factor of sudden heat that the State must prove in addition to the elements of murder. *Watts v. State*, 885 N.E.2d 1228, 1232 (Ind. 2008). For the jury to convict of voluntary manslaughter or attempted voluntary manslaughter, it first must conclude the State proved the elements of murder or attempted murder, then consider whether the State negated the existence of sudden heat. *McDowell*, 102 N.E.3d at 935. Therefore, the instructions in *Roberson* and *McDowell* were erroneous for informing "the jury that it could only consider convicting [the defendants] of voluntary manslaughter instead of murder if it first found him not guilty of murder, given that the jury instruction for murder did not inform the jury that the State had to disprove the existence of sudden heat." *See Roberson*, 982 N.E.2d at 460.

[14] But Instruction 9, when read with the murder and attempted-murder instructions, does not make this error. Both the instructions for murder and attempted murder include the State's burden of negating the existence of sudden heat. Instruction 4 provides in part:

> Before you may convict the Defendant on Count 1 the State must have proved each of the following beyond a reasonable doubt: 1. The Defendant 2. Knowingly or intentionally 3. Killed 4. Austin Smith **5. And the Defendant was not acting under sudden heat.** If the State failed to prove each of the elements 1 through 4 beyond a reasonable doubt, you must find the Defendant not guilty of Murder as charged in Count 1. **If the State did prove each of the elements 1 through 4 beyond a reasonable doubt, but the State failed to prove beyond a reasonable doubt element 5 you may find the Defendant guilty of Voluntary Manslaughter, a Level 2 Felony, a lesser included offense of Count 1.**

Appellant's App. Vol. II p. 175 (emphases added). Similarly, Instruction 5—the attempted-murder instruction—provides in part:

> Before you may convict the Defendant of Attempted Murder, the State must have proved each of the following elements beyond a reasonable doubt: 1. The Defendant 2. Acting with the specific intent to kill Kelsey Cavendar 3. Did knowingly or intentionally fire a handgun in the direction of Kelsey Cavendar 4. Which was conduct constituted [sic] a substantial step toward the commission of the intended crime of killing Kelsey Cavendar. **5. And the Defendant was not acting under sudden heat.** If the State failed to prove each of these elements 1 through 4 beyond a reasonable doubt you should find the defendant not guilty of the crime of Attempted Murder, as charged in Count 2. **If the State did prove each of the elements 1 through 4 beyond a reasonable doubt but the State failed to prove beyond a reasonable doubt element 5, you may find the Defendant guilty of Attempted Voluntary Manslaughter,** a Level 2 Felony an included offense of the offense in Count 2.

*Id*. at 177-78 (emphases added). Here, unlike in *McDowell* and *Roberson*, the murder and attempted-murder instructions included as an "element" that the State needed to negate the existence of sudden heat.[1] Again, the issue in those cases was the instructions told the jury it could stop after finding the elements of murder, which prevented consideration of sudden heat. Here, because lack of sudden heat was included as an element of murder, if the jury found the State proved murder, then it would have necessarily already considered sudden heat. So Instruction 9 did not preclude the jury from considering voluntary manslaughter.

[15] Although Instruction 9's inclusion of voluntary manslaughter was not erroneous, it was redundant, as it instructed the jury to consider voluntary manslaughter after that offense had already been considered. But even so, the jury here had at least two proper instructions—Instructions 4 and 5—that explicitly explained the proper law for murder, attempted murder, voluntary manslaughter, and involuntary manslaughter. This is sufficient to cure any confusion. *See McDowell*, 102 N.E.3d at 937 (finding no error where instructions as a whole properly informed the jury of the law regarding voluntary manslaughter).

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[1] The existence of sudden heat is technically a mitigating factor, not an "element." The jury instruction for murder properly explains it is a mitigating factor but then understandably includes this requirement with the elements needed to prove murder for ease of explanation. Notably, this matches Indiana Criminal Pattern Jury Instruction 3.05, which addresses murder with the lesser-included offense of voluntary manslaughter.

[16] As such, the trial court did not abuse its discretion, let alone commit fundamental error, in including Instruction 9.

# II. Admission of Evidence

[17] Phelps next contends the trial court erred in admitting the recording of the confrontation between him and Mitchell shortly after the shooting, in which Mitchell stated Phelps could have shot her granddaughter and Phelps replied, "B*tch, I don't give a f*ck." Ex. 15, 0:13-0:16. Phelps argues the trial court abused its discretion in admitting the evidence because it was irrelevant, the danger of unfair prejudice substantially outweighed the probative value, and it constituted impermissible character evidence.

## A. Relevance

[18] Phelps first contends the statement "was not even relevant." Appellant's Br. p. 34. We disagree. The threshold for relevance is set rather low by Indiana Evidence Rule 401, which provides evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

[19] Here, the main issues at trial were whether Phelps had the necessary intent to commit murder or whether he acted in self-defense. Phelps testified he purposefully aimed away from Smith and Cavendar in the car to avoiding harming anyone, and defense counsel emphasized in his closing argument that Phelps did not have the intent necessary to convict him of murder. Phelps also testified he only shot because he was in fear of his life, and indeed self-defense

was the main defense theory at trial. Phelps's post-shooting statement he did not care if he shot bystanders tends to negate that he did not have intent to harm and that he was acting only out of fear for his own life. Thus, his statement has at least some tendency to make it more probable he had intent to harm or was not shooting purely out of fear for his own life. The statement is relevant.

## B. Danger of Unfair Prejudice

[20] Still, Indiana Evidence Rule 403 provides the trial court may exclude relevant evidence if its probative value is "substantially outweighed" by a danger of, among other things, unfair prejudice. The danger of unfair prejudice arises from the potential for a jury to substantially overestimate the value of the evidence, or its potential to arouse or inflame the passions or sympathies of the jury. *Wages v. State*, 863 N.E.2d 408, 412 (Ind. Ct. App. 2007), *reh'g denied*, *trans. denied*. Furthermore, the "balancing of the probative value against the danger of unfair prejudice must be determined with reference to the issue to be proved by the evidence." *Bryant v. State*, 984 N.E.2d 240, 249 (Ind. Ct. App. 2013), *trans. denied*. A trial court's decision regarding whether the admission of evidence violates Rule 403 is accorded a great deal of deference on appeal, and we review it only for an abuse of discretion. *Tompkins v. State*, 669 N.E.2d 394, 398 (Ind. 1996).

[21] Phelps contends the evidence should not have been admitted because it has "no probative value" and is "unfairly prejudicial" because it "was used to paint

Phelps as a dangerous, heartless thug who must have committed the shooting because he had this bad character." Appellant's Br. p. 15. We disagree. Regarding probative value the evidence tends to negate Phelps's defense theories. Thus, the evidence is probative. *See Bryant*, 984 N.E.2d at 249 (finding recording of jail call probative because it went to defendant's intent during fight with the victim).

[22] Regarding unfair prejudice, Phelps argues the evidence paints him as "callous" toward the safety of others. Appellant's Br. p. 33. But the jury could easily have concluded that from the overwhelming evidence Phelps shot not only at Smith and Cavendar (whom Phelps claimed was his "girlfriend"), but also toward Mitchell's front porch that contained innocent bystanders, including a seven-year-old girl and Phelps's own father.

[23] The trial court did not abuse its discretion in determining the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

## C. Character Evidence

[24] Besides asserting the evidence is irrelevant and unfairly prejudicial, Phelps argues the recording was impermissible character evidence under Indiana Evidence Rule 404(a).[2] Although Phelps objected to this evidence, he did so

[2] In his reply brief, Phelps also contends the admission of the evidence violated Indiana Evidence Rule 404(b). Appellant's Reply Br. p. 10. However, he has failed to develop that argument beyond that bare assertion and therefore it is waived. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring that contentions in appellant's brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal).

only on the grounds of relevancy and Rule 403, not Rule 404. Therefore, he has waived appellate review of this claim. *Halliburton v. State*, 1 N.E.3d 670, 683 (Ind. 2013). We again review only for fundamental error. *Abd v. State*, 121 N.E.3d 624, 630 (Ind. Ct. App. 2019), *trans. denied*.

[25] Rule 404(a)(1) provides, "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Phelps argues his statement constituted impermissible character evidence under Rule 404(a) because it painted him "as a callous, dangerous thug." Appellant's Br. p. 33. However, the State correctly notes this statement "cannot be characterized as the kind of character evidence prohibited under Rule 404(a)." Appellee's Br. p. 42. "Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness." *Malinski v. State*, 794 N.E.2d 1071, 1082 (Ind. 2003) (quotation omitted). Here, the evidence was of a single statement Phelps made to a neighbor. This is not a "generalized description" of his character, nor does it describe his disposition. As such, it is not character evidence under Rule 404(a).

[26] In any event, "because the general exclusionary rule of Evidence Rule 404(a) applies only when character evidence is used for the purpose of proving action in conformity with his character, it is apparent that when character evidence is utilized for some other purpose, such as to show defendant's state of mind, the rule is inapplicable." *Brand v. State*, 766 N.E.2d 772, 779 (Ind. Ct. App. 2002), *trans. denied*. And here, Phelps's state of mind was a central issue. His entire

defense theory was centered on his intent—that he did not intend to harm anyone and acted only out of self-defense. This statement negates his argument that his state of mind at the time of the shooting was fear for his life and not intent to harm. Therefore, even if this were character evidence under Rule 404(a), it was admissible.

[27] The trial court did not err in admitting the evidence, and certainly not to the level of fundamental error.

## III. Enhancement

[28] Finally, Phelps argues his firearm enhancement should be vacated, either because his stipulation did not amount to a guilty plea or, if it did, because he did not knowingly, intelligently, or voluntarily waive his rights. When a defendant pleads guilty to an enhancement, he must personally waive his right to a jury trial on the enhancement. *Young v. State*, 143 N.E.3d 965, 971 (Ind. Ct. App. 2020), *trans. denied*. Here, the State concedes there was an invalid waiver of rights, and we agree. Even assuming Phelps's stipulation amounted to a guilty plea, it is undisputed the trial court failed to advise Phelps of his rights and therefore Phelps did not knowingly, intelligently, and voluntarily waive his right to a jury trial on the enhancement. Accordingly, we vacate the

adjudication on the firearm enhancement and remand for a new proceeding on that enhancement.[3]

[29] Affirmed in part, reversed in part, and remanded.

Brown, J., and Pyle, J., concur.

[3] Phelps also argues his sentence is inappropriate and should be reduced pursuant to Indiana Appellate Rule 7(B). Appellant's Br. p. 40. However, because we are vacating the enhancement and remanding for new proceedings on the enhancement, we do not know what his aggregate sentence will ultimately be. Thus, we decline to address the sentence issue at this time.