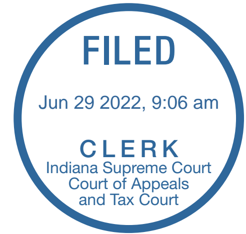

IN THE

Indiana Supreme Court

Supreme Court Case No. 22S-CR-59

Terrance Trabain Miller,

Appellant (Defendant below),

–v–

State of Indiana,

Appellee (Plaintiff below).

Argued: March 31, 2022 | Decided: June 29, 2022

Appeal from the Cass Circuit Court
No. 09C01-1906-F2-9
The Honorable Stephen R. Kitts, II, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 20A-CR-2315

Opinion by Justice Massa

Justices David, Slaughter, and Goff concur.
Chief Justice Rush concurs in part and dissents in part with separate opinion.

Massa, Justice.

Terrance Miller was pulled over by the police, who discovered drugs on his person and a firearm in his vehicle. A jury found him guilty of several offenses. Miller appealed, and an appellate panel reversed. It found a jury instruction indicated he had a previous conviction, which, even if invited by Miller, was fundamental error that required reversal. We now reject Miller's arguments and affirm his convictions.

Facts and Procedural History

In June 2019, police surveilled a residence in Logansport for drug activity. Officers then followed a vehicle, driven by Miller, that left the residence. Sergeant Aaron Campbell saw the vehicle turn without properly signaling and conveyed his observation over the radio. Detective Andrew Strong, who was part of the surveillance, heard him and got behind the vehicle. Detective Strong then noticed the vehicle's temporary license plate was difficult to read because of moisture between the plate and its plastic cover. He stopped the vehicle, which led to the discovery of methamphetamine and heroin in Miller's pocket and a handgun near the vehicle's front console.

The State charged Miller with six offenses, including unlawful possession of a firearm by a serious violent felon in violation of Indiana Code section 35-47-4-5(c). It also alleged he was a habitual offender under Indiana Code section 35-50-2-8. The parties agreed to partially bifurcate the unlawful possession charge, which meant that during the trial's first phase the jury would consider, along with the other charges, whether Miller possessed a firearm. If the jury found possession, it would determine whether Miller was a statutory serious violent felon during the second phase, when it would also consider the habitual offender enhancement. Miller's counsel characterized the partial bifurcation as a "strategic decision." Supp. Tr., p.6. The parties also agreed on Preliminary Instruction 18, which defined the crime as: "A person who knowingly or intentionally possesses a firearm **after having been convicted of and sentenced for an offense 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." Appellant's App. Vol. II, p.185 (emphasis added). The instruction listed three elements: "1. The Defendant 2. knowingly or intentionally 3. possessed a firearm." *Id.* Miller's counsel stated that the instruction "looks correct to me, what we have agreed on," and that "we are including the statute but not referring to the actual offence, which would be prejudicial." Supp. Tr., p.6.

T.M. was part of the first round of prospective jurors. During questioning of a subsequent round, T.M.—in response to a prospective juror's statements—indicated that he assumed there was a strong case against Miller. He later stated, after questioning by the court and parties, that he had not formed an opinion about the case's outcome. The court denied Miller's request to strike him for cause. At that point, Miller had not used all his peremptory challenges, but he did not try to use one against T.M. Trial began with T.M. on the jury, and the court gave Preliminary Instruction 18. Miller later unsuccessfully moved to suppress the methamphetamine and heroin by alleging the police did not have the necessary suspicion to stop him.

The jury found Miller guilty of possessing a firearm and of all other charges. The State then moved to dismiss the unlawful possession charge before the second phase, and Miller admitted to being a habitual offender. Miller appealed, arguing Preliminary Instruction 18 was fundamental error because it informed the jury about his prior felony conviction, the traffic stop violated the Fourth Amendment, and the trial court should have struck T.M. for cause.

The Court of Appeals reversed. It found Preliminary Instruction 18 was fundamental error because the instruction informed the jury that Miller had a prior conviction. *Miller v. State*, 177 N.E.3d 893, 899–900 (Ind. Ct. App. 2021), *vacated*. It held the invited-error doctrine did not preclude relief, *id.* at 896, without addressing Miller's other arguments, *id.* at 900.

The State petitioned for transfer, which we granted. *Miller v. State*, 182 N.E.3d 836 (Ind. 2022).

Standards of Review

Generally, we review jury instructions for an abuse of discretion. *Batchelor v. State*, 119 N.E.3d 550, 554 (Ind. 2019). Where, as here, a defendant fails to object to an instruction, he waives appellate review. *Pattison v. State*, 54 N.E.3d 361, 365 (Ind. 2016). But we may still review the instruction for fundamental error, a narrow exception to waiver. *Id.* An error is fundamental if it made 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." *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009). A defendant who challenges the admission of evidence based on the constitutionality of a search or seizure raises a question of law, which we review de novo. *Combs v. State*, 168 N.E.3d 985, 990 (Ind. 2021), *cert. denied*, 142 S. Ct. 1125 (2022). We review a trial court's denial of a challenge to a juror for an abuse of discretion. *Woolston v. State*, 453 N.E.2d 965, 967 (Ind. 1983).

Discussion and Decision

We reject Miller's challenges to Preliminary Instruction 18, the lawfulness of the stop, and the trial court's refusal to strike T.M. for cause.

I. Miller invited any error that arose from Preliminary Instruction 18, which precludes relief on direct appeal.

The invited-error doctrine generally precludes a party from obtaining appellate relief for his own errors, even if those errors were fundamental. *Brewington v. State*, 7 N.E.3d 946, 974–75 (Ind. 2014). A party invites an error if it was "part of a deliberate, 'well-informed' trial strategy." *Batchelor*, 119 N.E.3d at 558 (quoting *Brewington*, 7 N.E.3d at 954). This means there must be "evidence of counsel's strategic maneuvering at trial" to establish invited error. *Id.* at 557. "[M]ere 'neglect'" or the failure to object, "standing alone, is simply not enough." *Id.* at 557–58. And

"when there is **no evidence** of counsel's strategic maneuvering, we are reluctant to find invited error." *Id.* at 558 (emphasis added).

Assuming Preliminary Instruction 18 was fundamental error, Miller invited it. The instruction was part of his counsel's explicit "strategic decision" to partially bifurcate the unlawful possession charge, Supp. Tr., p.6, which was certainly permissible, *see Russell v. State*, 997 N.E.2d 351, 353–55 (Ind. 2013) (upholding partial bifurcation). Miller's counsel not only affirmed the instruction "looks correct," he also stated that "we are including the statute but not referring to the actual offence, which would be prejudicial." Supp. Tr., p.6. He was very much aware of the potential for prejudice if the jury knew Miller's criminal history. Indeed, he had even filed a motion in limine—which was discussed and granted right after the instruction was discussed and approved—to exclude references during the trial's first phase to Miller's previous convictions and incarcerations and the pending habitual offender enhancement. Yet he still requested the instruction as part of his strategy. He "did far more than simply fail to object." *Durden v. State*, 99 N.E.3d 645, 656 (Ind. 2018).

If he wishes, Miller can challenge his counsel's strategy through a post-conviction relief petition alleging ineffective assistance of counsel. *See Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001) (noting defendants who do not argue ineffective assistance of counsel on direct appeal may do so in a post-conviction proceeding); *Brewington*, 7 N.E.3d at 977–78 (acknowledging the importance of pursuing claims of ineffective assistance of counsel through post-conviction proceedings because of the ability to develop a record on counsel's strategy). However, the record before us contains **direct evidence** of counsel's strategic maneuvering and establishes Miller invited any error from Preliminary Instruction 18. *See Durden*, 99 N.E.3d at 656. He is not entitled to relief on direct appeal.

II. Detective Strong lawfully stopped Miller.

The Fourth Amendment to the United States Constitution, incorporated against the states through the Fourteenth Amendment, forbids unreasonable searches and seizures. A traffic stop is a seizure under the Fourth Amendment and requires at least reasonable suspicion. *Heien v.*

North Carolina, 574 U.S. 54, 60 (2014). This means an officer must have a "particularized and objective basis" to suspect the driver violated the law. *See United States v. Cortez*, 449 U.S. 411, 417–18 (1981). "An officer's decision to stop a vehicle is valid so long as his on-the-spot evaluation reasonably suggests that lawbreaking occurred." *Meredith v. State*, 906 N.E.2d 867, 870 (Ind. 2009). And an objectively reasonable mistake of law or fact does not make a stop unlawful. *Heien*, 574 U.S. at 66.

There were two infractions that caused Detective Strong to stop Miller: turning without properly signaling, Ind. Code § 9-21-8-25 (2019), and not maintaining a license plate "free from foreign materials and in a condition to be clearly legible," I.C. § 9-18.1-4-4(b)(2). Because Detective Strong could have stopped Miller only for the first infraction, we do not analyze the second.

Under the collective-knowledge doctrine, an officer's personal knowledge of facts that establish the necessary suspicion may be imputed to another officer. *See Baker v. State*, 485 N.E.2d 122, 124 (Ind. 1985) (addressing reasonable suspicion); *Benton v. State*, 273 Ind. 34, 38, 401 N.E.2d 697, 699 (1980) (addressing probable cause). This means an officer without personal knowledge can initiate a stop if he acts upon information from an officer with personal knowledge. *United States v. Hensley*, 469 U.S. 221, 232–33 (1985).

Here, Sergeant Campbell, an experienced officer who spent several years as "a road trooper," Tr. Vol. II, p.68, saw Miller turn without properly signaling, which provided him with at least reasonable suspicion for a stop. He then radioed the infraction to other officers, including Detective Strong, who heard him and subsequently stopped Miller. Sergeant Campbell's reasonable suspicion was imputed to Detective Strong. The trial court properly admitted the drugs.

III. Miller did not comply with the exhaustion rule, which precludes review of the trial court's refusal to strike T.M. for cause.

Under the exhaustion rule, a party can only appeal a trial court's denial of a for-cause challenge if he used a peremptory challenge against the juror or had already exhausted his challenges. *Whiting v. State*, 969 N.E.2d 24, 29–30 (Ind. 2012). If he does not comply with the rule, he has waived the issue. *Id.* An objection standing alone is insufficient, because, unlike with other issues, a party can "cure the alleged error at the outset" through a peremptory challenge. *Id.* at 31. And, like the trial court, a party is better positioned than us to evaluate a juror's suitability, so his decision not to use a peremptory challenge strongly indicates he "did not consider the juror sufficiently biased to warrant removal." *Id.*

Here, Miller had ten peremptory challenges. I.C. § 35-37-1-3(b); Ind. Jury Rule 18(a)(2). He never attempted to use one against T.M., even though he had not exhausted them when the court denied his for-cause challenge. He now asserts that he did not have any **available** peremptory challenges, because T.M. was in the first round of prospective jurors, and he did not request that the court strike T.M. until after questioning had moved past that round. In other words, he had "passed over" T.M., so his only recourse was a for-cause challenge.

Even if the court would have deemed Miller's peremptory challenge late and denied it, Miller still had to try. The use of peremptory challenges is subject to the trial court's "reasonable regulation." *Nagy v. State*, 505 N.E.2d 434, 437 (Ind. 1987). Certainly, the court can refuse a belated peremptory challenge, and such refusal might be upheld on appeal. *See, e.g.*, *id*. However, an **anticipated** refusal does not excuse compliance with the exhaustion rule. A party must still try to use a peremptory challenge even if he believes it will be unsuccessful. Again, part of the rationale for the rule is that a party must do everything possible to cure the alleged error. And the court may very well determine a belated peremptory challenge is reasonable and allow it. *See Dora v. State*, 783 N.E.2d 322, 325–26 (Ind. Ct. App. 2003) (finding no abuse of discretion when trial court

allowed belated peremptory challenge), *trans. denied*; *cf. Nagy*, 505 N.E.2d at 437 (affirming denial of belated peremptory challenges because the defendant already had an opportunity to use his challenges and, "[m]ore importantly," the court "was not in a position to grant further examination and challenges of prospective jurors" because the jury had been sworn in).

Miller had not exhausted his peremptory challenges when the court refused to strike T.M. for cause. Because he did not try to use a peremptory challenge against T.M., he has waived this issue.

Conclusion

We reject Miller's arguments and affirm the trial court.

David, Slaughter, and Goff, JJ., concur.
Rush, C.J., concurs in part and dissents in part with separate opinion.

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Rush, C.J., concurring in part and dissenting in part.

Miller argues that Preliminary Instruction 18 resulted in fundamental error because it "unnecessarily poison[ed] the jury with the knowledge that [he] had a prior unrelated felony conviction." The majority holds that, even if fundamental error occurred, "Miller invited it." *Ante*, at 5. On this record, I respectfully disagree and, for reasons provided below, would review Miller's claim for fundamental error. I fully concur with the majority's decision in all other respects.

Relying on precedent, the majority correctly observes that a party "invites an error if it was part of a deliberate, well-informed trial strategy" as shown through "evidence of counsel's strategic maneuvering at trial." *Id.* at 4 (citations omitted). Though true, notably omitted is what it means to find that counsel's trial strategy was "well-informed": the decision must derive from a **reasonable** basis. *Brewington v. State*, 7 N.E.3d 946, 974, 976–77 (Ind. 2014); *see also Durden v. State*, 99 N.E.3d 645, 656 (Ind. 2018). A review of this record demonstrates that counsel's decision agreeing to the preliminary instruction did not derive from a reasonable basis and, thus, was not part of a "well-informed trial strategy."

Recall that counsel made what he characterized as a "strategic decision" to partially bifurcate Miller's charge for unlawful possession of a firearm as a serious violent felon. This decision meant that—during the first phase of trial—the jury would consider whether Miller possessed a firearm. If proven, the jury would then determine—during the second phase of trial—whether Miller had a prior conviction that qualified him as a serious violent felon, making the possession unlawful.

In light of counsel's partial-bifurcation decision, he agreed to Preliminary Instruction 18: "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." Counsel confirmed the instruction "looks correct to me," noting that while it included the serious-violent-felon statute, it did not specifically mention what offense Miller had been convicted of and sentenced for, which counsel maintained would have been "prejudicial."

But the instruction explicitly informed the jury that Miller had a prior qualifying conviction. Now, at first glance, it may appear that counsel invited this error. As the majority observes, he "did far more than simply fail to object" and seemed "very much aware" of the prejudicial impact of exposing the jury to Miller's criminal history. *Ante*, at 5 (citations omitted). But, as noted above, for the invited-error doctrine to apply, we must also conclude that counsel's assent to the preliminary instruction derived from a reasonable basis.

Neither party can discern any reasonable basis for counsel to agree to Preliminary Instruction 18. The record shows that his strategy in bifurcating the charge was to separate—that is, entirely sever—the possession element from the prior-conviction element. But the instruction informed the jury that Miller had a prior conviction. So, although counsel may have wanted the instruction as part of the strategic partial-bifurcation, *see ante*, at 5, providing it to the jury conflicts with that "strategic" decision.

Moreover, if a defendant is charged with multiple offenses and one requires proof of a prior conviction, a bifurcated proceeding may be necessary to preserve the defendant's presumption of innocence. *See Lawrence v. State*, 259 Ind. 306, 286 N.E.2d 830, 832–33 (1972). And when, as here, complete bifurcation is not utilized, the defendant's prior conviction can be introduced only if (1) the defendant is charged solely with unlawful possession of a firearm by a serious violent felon or (2) the conviction is admissible for a proper evidentiary purpose. *See Hines v. State*, 794 N.E.2d 469, 471–73 (Ind. Ct. App. 2003), *adopted and incorporated by reference in* 801 N.E.2d 634 (Ind. 2004); Ind. Evidence Rules 404(b)(2), 403, 609. *Compare Pickett v. State*, 83 N.E.3d 717, 719–20 (Ind. Ct. App. 2017) (finding reversible error where the defendant's prior conviction was introduced without bearing any relevance to the charged offenses), *with Talley v. State*, 51 N.E.3d 300, 303–05 (Ind. Ct. App. 2016) (finding no reversible error where defendant's prior conviction was relevant to prove the motive of a principal offense), *trans. denied*. Here, Miller was charged with five other offenses, and it is undisputed that his prior conviction was not admissible for any proper evidentiary purpose. Simply put, this

record is devoid of a reasonable, strategic purpose for revealing Miller's prior conviction to the jury.

Further demonstrating a lack of a reasonable strategy is the fact that, as Miller prudently observes, the preliminary instruction was "useless." The State also charged Miller with dealing in a narcotic drug which was elevated to a Level 3 felony based in part on him committing the crime while in possession of a firearm. *See* Ind. Code §§ 35-48-4-1(d)(2), -1-16.5. So, to secure a conviction, the State had to prove that Miller possessed a firearm. The jury, therefore, was already going to decide the gun-possession issue as part of the dealing charge. And thus, Preliminary Instruction 18 did nothing more than inform the jury that it needed to make the same determination twice.

We have previously recognized that in cases where "either the source of the error or counsel's motives at trial are less than clear," it is imperative that we "resolve any doubts **against** a finding of invited error." *Batchelor v. State*, 119 N.E.3d 550, 558 (Ind. 2019). Indeed, such a finding "typically forecloses appellate review altogether," even if the error allegedly "made a fair trial impossible." *Id.* at 556, 559. Given the gravity of this consequence, we must exercise caution when reviewing for invited error. And if any doubt arises upon review—as it does here—we should proceed with a fundamental-error analysis.

Yet, despite our collective speculation as to a reasonable basis, the majority observes that Miller can still "challenge his counsel's strategy through a post-conviction relief petition alleging ineffective assistance of counsel." *Ante*, at 5. To succeed on this claim, the defendant must prove that (1) counsel rendered deficient performance and (2) the deficient performance resulted in prejudice. *See, e.g.*, *Bobadilla v. State*, 117 N.E.3d 1272, 1280 (Ind. 2019). Though I agree that Miller is free to pursue an ineffective-assistance-of-counsel claim, I cannot ignore an emerging tension: if counsel's error was invited, this means it was well-informed and likely not deficient. Thus, a finding of invited error may preclude even post-conviction relief. *See Hardy v. State*, 786 N.E.2d 783, 787 (Ind. Ct. App. 2003), *trans. denied*.

Our invited-error doctrine serves an important purpose. But we must be careful not to let it transform into a "rigid and undeviating judicially declared practice," serving only to defeat—not promote—the ends of justice. *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). Here, with a record lacking any indicia of a reasonable basis for counsel's assent to Preliminary Instruction 18, we should carefully review Miller's claim for fundamental error.