

## 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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Lavon Edward Beverly,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

February 16, 2022

Court of Appeals Case No.  
21A-CR-1463

Appeal from the Marion Superior  
Court

The Honorable Cynthia L. Oetjen,  
Judge

The Honorable Anne M.  
Flannelly, Magistrate

Trial Court Cause No.  
49D30-1911-F4-43946

**Brown, Judge.**

[1] Lavon Edward Beverly appeals his conviction for unlawful possession of a firearm by a serious violent felon as a level 4 felony. We affirm.

### *Facts and Procedural History*

[2] On November 14, 2019, parole agents for the Indiana Department of Correction (the “DOC”) located Beverly, who had a previous conviction for robbery, in a vehicle in a store parking lot in Marion County and discovered a firearm in the vehicle. The State charged Beverly with unlawful possession of a firearm by a serious violent felon as a level 4 felony. The State filed a motion in limine indicating that it was seeking to introduce evidence of the employment of John Hosler and Devyn Dice as parole agents for the DOC, evidence that Officer Hosler conducted a search of the vehicle pursuant to his parole authority, and evidence of Beverly’s status as a parolee on November 14, 2019. The motion also indicated the State would not present evidence of the crime for which Beverly was on parole and argued the introduction of Beverly’s parolee status was necessary for the jurors to understand the actions taken by the parole agents in encountering Beverly and the subsequent search of the vehicle.

[3] On June 16, 2021, the court held a jury trial. On the day of trial and before jury selection, the court heard arguments on the motion in limine. Beverly’s counsel objected to the evidence the State sought to introduce and argued, “if we say that they’re parole agents, that he’s on parole, that they’re doing, you know, a search under their authority, all of those lead to the fact that he has a prior bad act. And it’s prejudicial.” Transcript Volume II at 75. The prosecutor stated “I tried to think of a way through stipulation or do anything to avoid it,” “it just

didn't make sense anymore, because then we can't let the agents talk about what they do for a living," "[i]t's vital that they're able to talk about that, their training, experience, their duties, goes to their credibility, and explains the case for the jury," and "if we can't talk about what they do, it's going to prejudice the State's case." *Id.* at 76. The court stated it would allow Officers Hosler and Dice to testify they were parole agents and as to their responsibilities, it would not allow evidence regarding Beverly's prior convictions or whether he went to prison, and it would caution the jury that, although they heard Beverly had a parole status, they were not to use that in considering whether or not he was in possession of a firearm.

[4] Officer Hosler testified that he had been employed as a parole agent with the DOC for ten years, in November 2019 he was part of a special task force, and on November 14, 2019 he was looking for a parolee by the name of Lavon Beverly, and Officer Hosler identified Beverly in court. The court stated:

[A]t this time I'm telling the jury, you have just heard testimony that [Beverly] had a parole status. Such evidence is admitted for a limited purpose, mainly to explain the presence of parole agents at the scene. It may not be used to establish [Beverly] possessed a firearm in this case, nor may it be used to establish that [Beverly] has a propensity to possess a firearm.

*Id.* at 162-163. Officer Hosler testified that he, together with two other agents, located Beverly and found him in the front passenger seat of an SUV in an AutoZone parking lot in Marion County. He testified the agents had Beverly exit the vehicle, placed him in handcuffs, patted him down, and searched the

vehicle, that the search was conducted pursuant to his parole authority, and that, when he opened the passenger front door, he immediately found a firearm in the center console. He indicated that, as soon as the parole agents saw the firearm, they stopped and called the Indianapolis Metropolitan Police Department (“IMPD”). He testified the gun “was sitting on, like, a rag in the center console.” *Id.* at 164. The State introduced photographs depicting the vehicle and firearm. When asked “it’s really sitting on top of a rag, on top of the center console,” Officer Hosler answered affirmatively. *Id.* at 166. In reference to one of the photographs, he stated “that’s what I saw once I opened the door and leaned into the vehicle to start the search, immediately saw a firearm and stopped.” *Id.*

[5] Officer Dice testified that in November 2019 he was a parole agent, Beverly was one of his assigned parolees, he was attempting to locate Beverly on November 14, 2019, and he identified Beverly in court. The court stated:

I’ll remind the jury that you just heard testimony [that Beverly] had a parole status. Such evidence is admitted for a limited purpose, namely to explain the presence of a parole agent at the scene. It may not be used to establish [that Beverly] possessed a firearm in this case, nor may it be used to establish that [Beverly] has a propensity to possess a firearm.

*Id.* at 173. Officer Dice testified that Beverly was located in the front passenger seat of a vehicle at an AutoZone, the vehicle’s windows and doors were shut, the agents approached the vehicle, he placed his hand on the door handle and instructed Beverly to exit the vehicle, and Beverly opened the door and exited

the vehicle. He testified that an admitted photograph was an accurate representation of how the gun appeared.

- [6] The jury found that Beverly knowingly or intentionally possessed a firearm, Beverly admitted he had a prior conviction for robbery, and the court entered judgment of conviction for unlawful possession of a firearm by a serious violent felon as a level 4 felony.

### *Discussion*

- [7] Generally, we review the trial court's ruling on the admission of evidence for an abuse of discretion. *Noojin v. State*, 730 N.E.2d 672, 676 (Ind. 2000). Failure to object to the admission of evidence at trial normally results in waiver and precludes appellate review unless its admission constitutes fundamental error. *Cutter v. State*, 725 N.E.2d 401, 406 (Ind. 2000), *reh'g denied*. To rise to the level of fundamental error, an error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. *Maul v. State*, 731 N.E.2d 438, 440 (Ind. 2000). 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). Further, errors in the admission of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. *McClain v. State*, 675 N.E.2d 329, 331 (Ind. 1996); Ind. Trial Rule 61. In determining whether an error affected the defendant's substantial rights, we assess the probable impact of the evidence upon the jury. *McClain*, 675 N.E.2d at 331.

[8] Beverly asserts the elements of the crime for which he was charged could be proven without referring to his parole status, the probative value of the evidence is unclear, and the risk of unfair prejudice to him was immense. He argues “the average juror most certainly understands that someone on parole has done something bad previously” and “certainly know[s] they’ve been previously convicted of a crime.” Appellant’s Brief at 10. He argues the jury “inferred that he had committed and been convicted of a previous crime,” “they knew that parole was actively looking for” him, and “[t]here is an unacceptable risk to [him] that the jury will infer, or conclude, or perhaps guess that this is a bad guy whose done bad things with guns previously, and now his parole agents are hunting him down.” *Id.* He also argues the error cannot be harmless, this was a constructive possession case, and “it is entirely reasonable that the jury’s decision was impacted by the introduction of the impermissible knowledge that he was a bad guy who had done bad things before.” *Id.* at 12. The State maintains that Beverly waived his argument by not objecting at trial or alleging fundamental error on appeal. It argues the admission of Beverly’s parole status was not unfairly prejudicial, the court limited the jury’s use of the parole agents’ testimony, and the evidence of Beverly’s guilt was overwhelming.

[9] Defense counsel did not object during the testimony of Officer Hosler or Officer Dice to their testimony that they were parole agents, Beverly was a parolee, they were looking for him, and the search of the vehicle was conducted pursuant to their authority as parole agents. Accordingly, Beverly has waived

his argument. We further note Beverly does not allege fundamental error on appeal.

[10] Waiver notwithstanding, we conclude that reversal is not warranted. While Beverly does not cite Ind. Evidence 404,<sup>1</sup> he cites Ind. Evidence Rule 403<sup>2</sup> and claims the jury likely found him guilty of the charged offense because “he was a bad guy who had done bad things before.” Appellant’s Brief at 12. 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 Rule 403. *Boone v. State*, 728 N.E.2d 135, 137-138 (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.*

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<sup>1</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>2</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.

*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 is necessary for the jury to understand the relationships between the victim, various witnesses, and the defendant may be admissible. *See Wilson v. State*, 765 N.E.2d 1265, 1270-1271 (Ind. 2002).

[11] The record reveals the challenged evidence was not introduced to show Beverly's propensity to engage in crime or that his behavior was in conformity with a character trait. The parole agents' testimony explained the reasons that they approached the vehicle in which Beverly was seated and instructed him to exit the vehicle, placed him in handcuffs, and began a search of the vehicle. We cannot say the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The court did not permit the parole agents to testify regarding the reason Beverly was on parole or the reason they were looking for him. Further, the court specifically instructed the jury, during the testimony of Officer Hosler and again during the testimony of Officer Dice, that Beverly's parole status was admitted for the limited purpose of explaining the presence of the parole agents at the scene and that the evidence may not be used to establish Beverly possessed a firearm or "to establish that [he] has a propensity to possess a firearm." Transcript Volume II at 163, 173. We presume the jury followed the court's admonishment. *See Francis v. State*, 758 N.E.2d 528, 532 (Ind. 2001). We cannot say that the admission of the testimony regarding Beverly's parolee status requires reversal.



[12] For the foregoing reasons, we affirm Beverly's conviction.

[13] Affirmed.

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