MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jamarcus A. Tucker,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 15, 2022

Court of Appeals Case No. 21A-CR-2231

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D06-2012-F3-97

Brown, Judge.

[1] Jamarcus A. Tucker appeals his convictions for carrying a handgun without a license as a level 5 felony and criminal recklessness as a level 6 felony. We affirm.

Facts and Procedural History

[2] On December 12, 2020, Gabriel Carswell rented Room 319 at the Coliseum Inn, and his cousin Tucker, his second cousin Michael Stephens, and Stephens's girlfriend Destiny were staying with him. Carswell owned a gun that he had with him that day. Nori Shepherd was with a friend in Room 321, which was next to Room 319, when she heard what sounded like a fight and then two shots. A bullet came into her room and "flew like an inch past [Shepherd's] face." Transcript Volume II at 231.

[3] Fort Wayne Police Officer Tyler Karns was patrolling the Coliseum Inn when Carswell ran out of a hotel room and told him he had been shot by "Jamarcus." *Id.* at 150. Officer Karns called for emergency medical services and other officers and gave the name and description of the suspected shooter. Shepherd approached Officer Karns from Room 321, indicated she had recovered a projectile that came from Room 319 through the common wall into her room, and gave the projectile to Officer Karns.

[4] Fort Wayne Police Officer Daniel Nerzig responded to the scene, observed Tucker who matched the suspect's description walking just east of the Inn, and directed any incoming officer to intercept him. Officers apprehended him and

asked him if he had a weapon. Tucker said he had a weapon, and officers retrieved it from his front jacket pocket.

[5] On December 17, 2020, the State charged Tucker with: Count I, robbery as a level 3 felony; Count II, battery as a level 5 felony; Count III, carrying a handgun without a license as a level 5 felony; and Count IV, criminal recklessness as a level 6 felony.[1]

[6] On July 7, 2021, the State filed a motion in limine asserting that it believed Tucker's counsel may mention or inform the jury of burdens of proof that exist in civil cases. It objected to defense counsel doing so because the information was not relevant in a criminal trial, confused the issues, and created a danger of misleading the jury.

[7] In July 2021, the court held a jury trial. Before *voir dire*, Tucker's counsel discussed the State's motion in limine. The court stated:

> I'll show [the State's motion] granted in part. [Defense counsel] can talk about civil burden cause well I do. I just don't want you to talk about the second floor of clear and convincing to take your kids away is my only issue because I don't think that's relevant and I think that could confuse the jury with the clear and convincing to take your kids away argument on the CHINS, or the second floor is what I call it. But if you want to talk about

[1] Count IV alleged that Tucker, "did while armed with a deadly weapon, recklessly, knowingly, or intentionally perform an act, which act created a substantial risk of bodily injury to another person, to wit: Nori Shepherd . . . ." Appellant's Appendix Volume II at 25.

> the civil burden or probable cause, I don't have a problem with that because that's –

Id. at 7. Tucker's counsel responded: "Understood." *Id.*

[8] During the first of two sessions of *voir dire*,[2] Tucker's counsel spoke with a prospective juror and stated:

> And some of you may have served on civil jurors, [sic] that's gonna be referenced here. In a civil jury, the proof that's required is a different standard. It's not beyond a reasonable doubt over in civil juries, it's preponderance of the evidence, meaning more likely than not. The old scales of justice. One side is slightly better than the other side, they win. That's not what we're doing here today, do you understand the difference?

Id. at 56. The prospective juror answered affirmatively. Tucker's counsel also stated: "One is saying fifty-one percent (51%) beats forty-nine percent (49%). That's not what we're doing. We're doing beyond a reasonable doubt, okay. That's a higher burden of proof. You're okay with that?" *Id.* The prospective juror answered affirmatively. When asked why we should do that in criminal cases, the prospective juror answered that criminal cases involve a "more serious nature." *Id.* at 57.

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[2] At the beginning of the first session, the court stated that the coronavirus "changed the way we do jury selection" and "[w]e used to bring a hundred (100) people in, fill the box out there, and people would all sit up here. We can't have you sit up here because the seats are too close." Transcript Volume II at 9. After the jury was selected, the court stated: "As you know you were selected in two (2) different rounds yesterday, so this is the first time I've had you all together . . . ." *Id.* at 137.

[9] Tucker's counsel stated:

> Yeap, [sic] they have to put up more evidence to cross that goal line. And it is definitely more serious, it is definitely more serious. That's clearly a value judgment made by our law makers and our judges for hundreds of years now, hundreds of years now, that these are more serious. Criminal cases are more serious and therefore we use this higher burden of proof. We make it harder for the State on purpose. So I need to know from the people here whether you're willing to take your place in that long[]line of history and hold the State to its burden even if you like the State and you don't like the defendant.

Id.

[10] During the second session of *voir dire*, Tucker's counsel again raised the burden of proof in civil trials. Specifically, he stated:

> So, sometimes we talk about civil juries, how do you know which box to check in – in a civil jury, how do you know who wins in a civil jury. The standard of proof there, I think we talked a little bit about this, is, uh, preponderance of the evidence, more likely than not. I think one has you feeling like I'm fifty-one percent (51%) in their camp and I'm forty-nine percent (49%) in the other camp, fifty-one percent (51%) wins, okay. That's preponderance of the evidence. In criminal cases we use the higher burden, the highest burden in American law, it's beyond a reasonable doubt. Does that seem fair to hold them to a higher burden in a criminal case?

Id. at 128-129. A prospective juror answered affirmatively.

[11] The State presented testimony of multiple witnesses including Carswell, Shepherd, and Officers Karns and Nerzig. Carswell testified that he placed the

gun in the top drawer of a dresser in his room, went to the bathroom, and returned to find Tucker standing with his hands in his pockets. He testified that he opened the drawer, found the gun missing, and told Tucker to return his gun. He also testified that Tucker shot twice through his pocket, a bullet struck him in the stomach, a bullet grazed his pelvis, and Tucker ran out of the room with his gun.

[12] After the State rested, Tucker testified Carswell placed the gun in his waistband and it was not in a dresser drawer. He stated that Carswell grabbed his arm, tried to take control of him, and was angry about something. He testified that Carswell reached for his firearm and that he reached for it as well. He indicated that he shoved Carswell, was able to grab hold of the gun, and placed it in his own pocket. He testified that Carswell lunged for him and reached for the pocket, the firearm went off, and he started to run. He also indicated that he did not intentionally shoot Carswell.

[13] After the State rested and then again after the defense rested, the court and the parties discussed jury instructions and did not discuss any instruction involving the burden of proof in the civil context. The court instructed the jury on the concept of proof beyond a reasonable doubt and stated "[s]ome of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true" and, "[i]n criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt." Appellant's Appendix Volume II at 78, 108. The jury found Tucker not guilty of Counts I and II and guilty of Count III, carrying a

handgun without a license, and Count IV, criminal recklessness. Tucker then stipulated that he had convictions in 2019 for resisting law enforcement and possession of cocaine as level 6 felonies. The court entered convictions for Count III, carrying a handgun without a license as a level 5 felony, and Count IV, criminal recklessness as a level 6 felony. The court sentenced him to consecutive terms of four years for Count III and one year for Count IV.

Discussion

[14] Tucker argues that he was not allowed a full opportunity to inquire during *voir dire* or to argue during closing argument "regarding the civil standard of proof clear and convincing evidence as it compares to beyond a reasonable doubt." Appellant's Brief at 10. He cites *Winegeart v. State*, in which the Indiana Supreme Court stated:

> We believe that jurors will benefit from an instruction that refers to civil juries on which they may previously have served and the different standards of proof used in civil proceedings. Not only should this be helpful to jurors who actually have such experience, but it will also help dispel inapplicable concepts that jurors may have obtained from national television or popular novels.

665 N.E.2d 893, 902 n.2 (Ind. 1996). He also argues that the trial court did not include an instruction "comparing beyond a reasonable doubt to reasonable suspicion, probable cause, clear and convincing evidence, or any other standard of proof used in civil proceedings." Appellant's Brief at 11. He contends that

"[a]n inquiry by [him] was critical to ensuring a lesser standard was not being used behind the closed door of the deliberation room." *Id.* at 12.

[15] The State argues that Tucker has waived his challenge to the grant of its motion in limine because he failed to make an offer of proof. It asserts he failed to raise a claim of fundamental error and the trial court did not commit error or fundamental error in granting the motion in limine.

[16] Generally, "[t]he granting of a motion in limine is a matter committed to the discretion of the trial court and an abuse of discretion must be demonstrated to justify reversal on appeal." *Ryan v. State*, 431 N.E.2d 115, 116 (Ind. 1982). "Rulings on motions in limine are not final decisions and, therefore, do not preserve errors for appeal." *Swaynie v. State*, 762 N.E.2d 112, 113 (Ind. 2002). "In order to preserve an error for appellate review, a party must do more than challenge the ruling on a motion in limine." *Azania v. State*, 730 N.E.2d 646, 651 (Ind. 2000) (citing *Miller v. State*, 716 N.E.2d 367, 370 (Ind. 1999)), *reh'g denied*. "Absent either a ruling admitting evidence accompanied by a timely objection or a ruling excluding evidence accompanied by a proper offer of proof, there is no basis for a claim of error." *Id. See also Boyd v. State*, 564 N.E.2d 519, 524 (Ind. 1991) ("The granting of a motion in limine is not a final ruling upon the admissibility of evidence. The purpose of a motion in limine is to prevent the proponent of potentially prejudicial matter from presenting such matter to the jury before the trial court has had a chance to rule upon its admissibility in the context of the trial itself. No issue is raised on appeal regarding an alleged violation of a motion in limine. Appellate review in this

instance would have to be based on the trial court's exclusion of evidence at trial.") (internal citations omitted).

[17] We note that the trial court granted the State's motion in limine in part and stated that Tucker's counsel could "talk about civil burden." Transcript Volume II at 7. It stated: "I just don't want you to talk about the second floor of clear and convincing to take your kids away is my only issue because I don't think that's relevant and I think that could confuse the jury with the clear and convincing to take your kids away argument on the CHINS, or the second floor is what I call it." *Id.* It also stated: "But if you want to talk about the civil burden or probable cause, I don't have a problem with that . . . ." *Id.*

[18] During *voir dire*, Tucker's counsel discussed the burden of proof in the civil context and indicated how it differed from the burden of proof in the criminal context. Tucker does not point to the record to show, and our review does not reveal that he subsequently raised the issue regarding the different burdens of proof or that he made any offer of proof. Under these circumstances, including that the trial court only partially granted the State's motion in limine, we conclude that Tucker waived his claim. *See West v. State*, 755 N.E.2d 173, 184 (Ind. 2001) (holding "[i]n order to preserve an issue for appellate review, a defendant must make an offer to prove, setting forth the grounds for admission of the evidence and the relevance of the testimony," finding the defendant's failure to make an offer to prove resulted in the trial court having no opportunity to reconsider its grant of the State's motion in limine, and concluding the defendant waived his claim); *Winn v. State*, 748 N.E.2d 352, 359

(Ind. 2001) (observing that the trial court granted the State's motion in limine and that the defendant did not direct the Court to any offer of proof or other action taken during trial to raise this question, and holding that "[t]he exclusion of the challenged evidence [was] therefore not an available issue on appeal").

[19] Waiver notwithstanding, we note that, in *Winegeart*, the Indiana Supreme Court referenced a proposal for a jury instruction from the Federal Judicial Center which provided:

> [T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you [should] find [him/her] guilty. If on the other hand, you think there is a real possibility that [he/she] is not guilty, you [should] give [him/her] the benefit of the doubt and find [him/her] not guilty.

Winegeart, 665 N.E.2d at 902 (quoting Federal Judicial Center, Pattern Criminal Jury Instructions 17-18 (1987) (instruction 21)). The Court held:

> A substantial improvement in effective communication may be achieved by utilization of the Federal Judicial Center's

> proposed instruction. We therefore authorize and recommend (but, acknowledging that two of the five members of this Court find the present Indiana Pattern Jury Instruction preferable, do not mandate) that Indiana trial courts henceforth instruct regarding reasonable doubt by giving the above-quoted Federal Judicial Center instruction,[3] preferably with no supplementation or embellishment. We also request that this instruction be added to the next revision of the Indiana Pattern Jury Instructions–Criminal.

Id.

[20] Here, the record reveals that the trial court gave the jury the following preliminary instruction:

> The State has the burden of proving the Defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence,

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[3] The Court included the footnote cited by Tucker on appeal, which provides: "We believe that jurors will benefit from an instruction that refers to civil juries on which they may previously have served and the different standards of proof used in civil proceedings. Not only should this be helpful to jurors who actually have such experience, but it will also help dispel inapplicable concepts that jurors may have obtained from national television or popular novels." *Winegeart*, 665 N.E.2d at 902 n.2.

> you are firmly convinced that the Defendant is guilty of the crime charged, you may find [him] guilty.
>
> If on the other hand, you think there is a real possibility that [he] is not guilty, you should give [him] the benefit of the doubt and find [him] not guilty.

Appellant's Appendix Volume II at 78-79. The court gave a similarly worded final instruction. *See id.* at 108. Reversal is not warranted.

[21] For the foregoing reasons, we affirm.

[22] Affirmed.

Mathias, J., and Molter, J., concur.