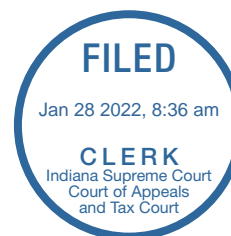


MEMORANDUM DECISION

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

Anthony E. Spencer,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 28, 2022

Court of Appeals Case No.
21A-CR-1568

Appeal from the Shelby Circuit
Court

The Honorable Trent E. Meltzer,
Judge

Trial Court Cause No.
73C01-1909-F4-19

Mathias, Judge.

- [1] Anthony E. Spencer was convicted in the Shelby County Circuit Court of Level 4 felony unlawful possession of a firearm by a serious violent felon. He now

appeals his conviction, arguing that the trial court committed fundamental error when it failed to bifurcate his trial. Because the trial court was not required to order bifurcation *sua sponte*, we affirm.

Facts and Procedural History

- [2] On the evening of September 3, 2019, Anthony Spencer exited a Speedway gas station convenience store and encountered Christopher Stewart in the parking lot. Tr. Vol. II, pp. 117–18, 149–151. Several others were also present. Spencer and Stewart generally did not get along, and the two began to argue. At some point during the argument, Spencer, who lived within eyesight of the gas station, entered his vehicle, drove toward his residence, and then returned to the Speedway parking lot. Stewart approached Spencer’s vehicle and the argument continued. A nearby bystander shouted, “gun.” *Id.* at 124, 139, 152. Spencer then left the gas station, and a Speedway employee called 911.
- [3] Law enforcement officers arrived at the gas station shortly thereafter and spoke with bystanders who identified Spencer as the man with whom Stewart had been arguing. After the officers learned that Spencer may have possessed a gun, they located him at the home of his fiancée, Samantha Macklin, where he lived. Macklin agreed to let the officers search her home. *Id.* at 200–201; Ex. Vol. at 12. When asked if there were firearms inside the home, she responded, “Hell no.” *Id.* at 202. However, officers discovered a .40 caliber Glock 22 hand gun in Macklin’s bedroom. At that point, Spencer realized the officers were going to

apprehend him, so he fled. He did not get far before officers caught him and arrested him.

[4] Because he had previously been convicted of attempted robbery, the State charged Spencer with Level 4 felony unlawful possession of a firearm by a serious violent felon.¹ Appellant's App. p. 62. At trial, the court removed all references to Spencer's status as a "serious violent felon" from both the preliminary and final jury instructions and phrased Spencer's prior felony as one "enumerated under IC 35-47-4-5." *Id.* at 82–98, 100–21; Tr. Vol. II, pp. 98–101. Spencer did not object to the instructions. During its opening statement, the State told the jury that "Spencer has been convicted of attempted robbery," and that "[t]hat's what disqualifies him from being able to possess a gun." Tr. Vol. II, p. 106.

[5] The State presented the testimony of Officer Marshall Hoskins, who confirmed that Spencer had previously been convicted of a felony. Spencer's counsel cross-examined Officer Hoskins and asked whether the purpose of the officer's testimony was "to confirm that [Spencer] is a convicted felon." Tr. Vol. III, p. 4. Officer Hoskins replied, "Yes, sir." *Id.* The State also offered into evidence a copy of Spencer's plea agreement from the prior conviction, as well as the charging information and sentencing order. *Id.* at 3; Ex. Vol. at 30–36. Spencer did not object to this evidence. During its closing argument, the State again

¹ Other charges were dismissed prior to trial. The SVF count was the sole charge that proceeded to trial.

referred to Spencer's prior felony as "an offense enumerated in . . . [Indiana Code 35-47-4-5](#)," Tr. Vol. III, p. 37, and also as the "requisite prior conviction," *id.* at 42.

- [6] The jury found Spencer guilty of "Possession of a Firearm in Violation of I.C. 35-47-4-5, a Level 4 Felony." Appellant's App p. 123. Spencer now appeals his conviction.

Discussion and Decision

- [7] Spencer argues that evidence of his prior conviction "likely swayed" the jury to rely on forbidden inferences in determining that he possessed a firearm as charged here. Appellant's Br. at 21. He claims that, to circumvent the prejudice arising from the jury's exposure to that evidence, the trial court was required to bifurcate his trial. Generally, we review the denial of a motion to bifurcate for an abuse of discretion. [Russell v. State](#), 997 N.E.2d 351, 354 (Ind. 2013).

However, as Spencer acknowledges, he did not ask the trial court to bifurcate his trial, and he did not object when the State introduced evidence of his prior conviction. He has therefore waived this argument on appeal. [Hunter v. State](#), 72 N.E.3d 928, 932 (Ind. Ct. App. 2017) ("Any grounds for objections not raised at trial are not available on appeal[.]").

- [8] To avoid the consequences of his waiver, Spencer insists that the trial court's failure to order bifurcation *sua sponte* constitutes fundamental error. The fundamental error doctrine provides an "extremely narrow" exception to the waiver rule. [Hitch v. State](#), 51 N.E.3d 216, 219 (Ind. 2016); [Ryan v. State](#), 9

N.E.3d 663, 668 (Ind. 2014). A party claiming fundamental error faces the heavy burden of showing either that the purported error was so prejudicial to his rights as to make a fair trial “impossible,” *Ryan*, 9 N.E.3d at 668, or that the purported error constitutes a “clearly blatant” violation of basic due process principles, *Blaize v. State*, 51 N.E.3d 97, 102 (Ind. 2016).

[9] Spencer has not established fundamental error here. A jury found him guilty of the single charge he was tried on: possession of a firearm by a serious violent felon (“SVF”). We have consistently held that bifurcation is not required when a defendant is tried on a sole charge of possession of a firearm by a SVF.² *Bowens v. State*, 24 N.E.3d 426, 428 (Ind. Ct. App. 2014); *Dugan v. State*, 860 N.E.2d 1288, 1293 (Ind. Ct. App. 2007); *Spearman v. State*, 744 N.E.2d 545, 550 (Ind. Ct. App. 2001). Nonetheless, Spencer insists that the trial court was obligated to bifurcate his trial to ensure that evidence establishing his legal status as a SVF would not be presented to the jury during its determination of whether he possessed a firearm.

[10] Spencer’s concern that the evidence of his prior conviction may have had some prejudicial effect is not wholly unwarranted; such evidence is generally inadmissible because it has no tendency to establish guilt. *Dugan*, 860 N.E.2d,

² While bifurcation may not be required in all instances, trial courts retain discretion to bifurcate trials involving SVF charges where appropriate. *See, e.g., DePriest v. State*, 113 N.E.3d 286 (Ind. Ct. App. 2018) (upholding bifurcation where trial was held on a sole SVF charge); *Williams v. State*, 834 NE2d 225 (Ind. Ct. App. 2005) (“[W]e believe that the bifurcation procedure serves the ends of justice in such trials and urge our state’s trial judges to use this procedure in SVF cases.”); *see also, e.g., Russell*, 997 N.E.2d at 351 (Ind. 2013) (upholding bifurcation where the State lodged an SVF charge and a robbery charge).

1291; *see also* Ind. Evidence Rule 404(b). However, while prejudice may arise from the introduction of prior conviction evidence under Indiana Code section 35-47-4-5, the focus cannot be placed solely on its prejudicial effect. *Dugan*, 860 N.E.2d at 1292; *Spearman*, 744 N.E.2d at 549. Rather, the focus should be on whether the prejudice arising from such evidence outweighs its probative value. *Id.*

[11] Here the probative value of the limited evidence establishing Spencer’s prior conviction substantially outweighs its prejudicial effect because that evidence was necessary to prove that Spencer possessed a firearm in violation of Indiana Code section 35-47-4-5. That statute prohibits “a person who has been convicted of committing a serious violent felony” from possessing a firearm. Ind. Code § 35-47-4-5 (2020). “A serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon.” *Id.*; *see also Jackson v. State*, 908 N.E.2d 1140, 1142 n.1 (Ind. 2009). The legal status of one who has been convicted of a serious violent felony “is an essential element” of that offense. *Dugan*, 860 N.E.2d at 1292 (quoting *Spearman*, 744 N.E.2d at 548). Indeed, “the act—the possession—is illegal only if performed by one occupying that status.” *Id.*; *see also Russell*, 997 N.E.2d at 354 (recognizing that “unlawful possession of a firearm is not a crime under the Indiana Code”). Thus, although evidence of a defendant’s prior conviction is generally disallowed, the rationale for disallowing it breaks down where proof of a requisite prior conviction is necessary to a jury’s determination

of whether the defendant possessed a firearm in violation of [section 35-47-4-5](#).
[Dugan](#), 860 N.E.2d at 1291.

[12] Moreover, courts presiding over single-charge SVF trials can take measures to mitigate the prejudicial effect of prior-conviction evidence. For example, courts can exclude evidence regarding the underlying facts of the prior felony, [Spearman](#), 744 N.E.2d at 550; reference the prior felony as one “enumerated under IC 35-47-4-5,” *id.* at 550 n.1; rephrase jury instructions to avoid specific references to SVF status, [Bowens](#), 24 N.E.3d at 428; accept a defendant’s stipulation that he is a SVF, *id.*; or employ some combination of these or other appropriate measures. *See also*, [McAnalley v. State](#), 134 N.E.3d 488, 513 (Ind. Ct. App. 2019) (Bradford, C.J., concurring).

[13] We observe here that the trial court took several measures to avoid prejudice. Namely, references to the crime charged were rephrased from “unlawful possession of a firearm by a serious violent felon,” to “possession of a firearm in violation of I.C. 35-47-4-5.” The trial court also crafted the preliminary and final jury instructions without specific references to Spencer’s status as a serious violent felon. On top of that, the parties referenced Spencer’s prior conviction no more than a few times during trial. Physical evidence establishing his conviction was limited to the charging information, his plea agreement, and the court’s sentencing order. And, again, evidence of Spencer’s prior conviction was necessary to prove an essential element of the offense charged against him.

[14] We have held since *Spearman* that bifurcation is not required when a defendant is tried on a sole SVF charge. [744 N.E.2d at 550](#). Likewise, bifurcation was not required here. We credit the trial court's efforts to follow Indiana law and to avoid prejudice, and, for all of these reasons, we conclude that the court's decision to forego *sua sponte* bifurcation did not constitute fundamental error.

Conclusion

[15] We therefore affirm Spencer's conviction for unlawful possession of a firearm by a serious violent felon.

[16] Affirmed.

Bailey, J. and Altice, J., concur.