

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ashlee Marie Mercer,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 14, 2022

Court of Appeals Case No.
21A-CR-2681

Appeal from the Vanderburgh
Circuit Court

The Honorable David D. Kiely,
Judge

The Honorable Kelli E. Fink,
Magistrate

Trial Court Cause No.
82C01-2012-F6-6718

Altice, Judge.

Case Summary

[1] Ashlee Marie Mercer appeals her conviction for domestic battery, a Level 6 felony as alleged in Count 1 of the charging information, following the trial court’s merger of that Count with the jury’s finding of guilt of attempted domestic battery alleged in Count 2. Mercer argues that even though the trial court merged the offenses and entered a judgment of conviction only as to Count 1, fundamental error occurred because the State failed to name the victim in Count 2 of the charging information. Mercer further claims that the trial court’s failure to *sua sponte* instruct the jury on self-defense amounted to fundamental error.

[2] We affirm.

Facts and Procedural History

[3] In December 2020, Mercer was living in Vanderburgh County with her Mother, Cindy Snyder. On Christmas eve, Mercer’s brother, Evan, and his wife, Mallory, (collectively, the Couple) drove to Snyder’s residence for a visit before traveling to Alabama for the holiday season. Mercer’s fourteen-year-old son was also at the residence when the Couple arrived.

[4] During the visit, Mercer had a verbal argument with Evan. At some point, Mercer “charged” the Couple and yelled obscenities at them. *Transcript Vol. II* at 27, 33, 47-48. Mercer also swung her arms at Mallory and threw objects at her. In an attempt to stop the altercation, Evan pushed Mercer into the bathroom.

- [5] As the Couple started to leave the residence, Mercer continued the argument, swung her arms at Mallory, spit in her face, and threw a box at her. Mercer then struck Evan in the face, resulting in a gash to his forehead.
- [6] Once outside the residence, Mallory called 911 and reported the incident. Vanderburgh County Sheriff's Deputy Nicholas Helfert arrived at the house within minutes. Deputy Helfert first spoke with the Couple about the episode, and they both stated that Mercer started the physical altercation. Deputy Helfert also observed and photographed Evan's forehead injury. Mercer reported to Deputy Helfert that the Couple had attacked her. But she admitted spitting in Mallory's face. Deputy Helfert then arrested Mercer for domestic battery and transported her to the county jail.
- [7] On December 29, 2020, the State charged Mercer with Level 6 felony domestic battery under Count 1 and with Level 6 attempted domestic battery in Count 2. The charging informations alleged in relevant part that:

Count 1

Ashlee Marie Mercer did knowingly or intentionally touch Evan Snyder, a family or household member in a rude, insolent, or angry manner by striking said victim and Ashlee Marie Mercer committed said offense in the presence of a child less than 16 years of age, knowing that the child was present and might be able to see or hear the offense, contrary to the form of the statutes in such cases made and provided by I.C. 35-42-2-1.3(a)(1) and I.C. 35-42-2-1.3(b)(2) and against the peace and dignity of the State of Indiana.

Count 2

Ashlee Marie Mercer did attempt to commit the crime of Domestic Battery, by knowingly taking a substantial step toward the commission of said crime of Domestic Battery, contrary to the form of the statutes in such cases made and provided by I.C. 35-42-2-1.3(a)(a) and I.C. 35-42-5-1 and against the peace and dignity of the State of Indiana.

Appellant's Appendix Vol. II at 24.

[8] Following a jury trial on October 11, 2021, Mercer was found guilty of both offenses. At the November 2, 2021 sentencing hearing, the trial court merged the offenses because:

Count 2 is an attempted domestic battery and there was never a victim listed in Count 2 and so we cannot determine whether or not that was an attempted [sic] the jury made a conviction of attempted domestic battery on Evan Snyder or Mallory Snyder, we can't tell, and for that reason normally an attempt would be a lesser included of the domestic battery so *I am going to find that Count 2 merges into Count 1. I will be only entering conviction on Count 1.*

Transcript Vol. II at 110 (emphasis added). The trial court sentenced Mercer on Count 1 to one year, suspended to probation.

[9] Mercer now appeals.

Discussion and Decision

I. Charging Information

[10] Mercer claims that her conviction on Count 1 must be reversed because the charging information did not name a victim in Count 2. Mercer maintains that the faulty charging information “set off a string of errors,” including testimony about “the uncharged battery,” and the State’s argument “for convictions on batteries to two individuals.” *Appellant’s Brief* at 9-10. Although Mercer did not challenge the propriety of the charging information at the trial court level, she claims that fundamental error occurred and she was, therefore, denied the right to a fair trial.

[11] A charging instrument must sufficiently apprise the defendant of the nature of the charges against her so that the defendant may anticipate the proof and prepare a defense in advance of trial. *Kindred v. State*, 524 N.E.2d 279, 284 (Ind. 1988). A defendant’s failure to challenge an allegedly defective charging information at the trial court level in a timely fashion, however, results in waiver unless fundamental error has occurred. *See Hayden v. State*, 19 N.E.3d 831, 840 (Ind. Ct. App. 2014), *trans. denied*.

[12] The fundamental error doctrine is extremely narrow and applies “only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible.” *Jewell v. State*, 887 N.E.2d 939, 942 (Ind. 2008). In extraordinary circumstances, the fundamental error doctrine allows appellate consideration of a claim of trial error even though there has been a failure to properly preserve the issue at trial. *See Hardley v. State*, 905 N.E.2d 399, 402 (Ind. 2009).

[13] Here, the probable cause affidavit alleged that Mercer had attacked both Evan and Mallory, and evidence of the entire altercation was relevant and would have been admitted at trial regardless of whether Mallory or Evan had been named as the attempted battery victim. Mercer's defense was that both Evan and Mallory had attacked her and that she was acting in self-defense during the altercation. Mercer's defense remained the same regardless of who she was alleged to have battered. Thus, we do not see how Mercer was prejudiced with respect to Count 1 by the absence of a named victim in Count 2.

[14] Moreover, any error in the omission of the named victim in Count 2 was harmless. A trial court's error is harmless and does not require reversal unless it affects the substantial rights of a party and denies them a fair trial. *Pelissier v. State*, 122 N.E.3d 983, 988 (Ind. Ct. App. 2019), *trans. denied*. The jury clearly determined that the evidence established that Mercer committed the battery offense against Evan as alleged in Count 1, and the trial court treated the attempted domestic battery offense as a lesser included offense of that battery because there was no clear indication that the jury believed that Mercer had attempted to commit battery against Mallory. If Evan was the intended victim in Count 2, then the trial court correctly merged that offense with Count 1. *See, e.g., Williams v. State*, 690 N.E.2d 162, 171 (Ind. 1997) (holding that the trial court should have merged the defendant's conviction for attempting to commit murder and conspiracy to commit murder with regard to the same victim).

[15] For all these reasons, Mercer does not prevail on her claim that the State's failure to name a victim in Count 2 of the charging information deprived her of the right to a fair trial.

II. Self-Defense Instruction

[16] Mercer next claims that her conviction must be reversed because the trial court did not give an instruction on self-defense. Mercer asserts that because her counsel argued at trial that Mercer acted in self-defense, the trial court's failure to give a self-defense instruction *sua sponte* amounted to fundamental error that deprived her of the right to a fair trial.

[17] Trial courts generally enjoy considerable discretion when instructing the jury. *King v. State*, 799 N.E.2d 42, 50 (Ind. Ct. App. 2003), *trans. denied*. We review the trial court's decision only for an abuse of discretion. *Powell v. State*, 769 N.E.2d 1128, 1132 (Ind. 2002). Mercer concedes that she did not tender a jury instruction on self-defense. Thus, because the trial court cannot now be faulted for declining to give an instruction that it was never asked to give, Mercer has waived the claim on appeal. *Giden v. State*, 150 N.E.3d 654, 661 (Ind. Ct. App. 2020) (citing *Baker v. State*, 948 N.E.2d 1169, 1178 (Ind. 2011)), *trans. denied*.

[18] In an effort to avoid waiver, however, Mercer contends that the trial court's failure to *sua sponte* instruct the jury on her claim of self-defense constituted fundamental error. Our self-defense statute provides that a "person is justified in using reasonable force against any other person to protect the person . . . from what the person reasonably believes to be the imminent use of *unlawful force*." Ind. Code §

35-41-3-2(c) (emphasis added). For a trial court to abuse its discretion in refusing to give a jury instruction, there must be evidence in the record to support giving it. *See Griffin v. State*, 644 N.E.2d 561, 562 (Ind. 1994).

[19] In this case, Mercer did not testify at trial, and there is no evidence in the record establishing that Mercer feared that either Mallory or Evan would use—or were imminently about to use—unlawful force against her. At trial, Mercer called one witness, Snyder, whose testimony does not support an inference that Mallory or Evan were using unlawful force against Mercer. Rather, the record shows that Mercer charged Mallory and Evan during the shouting match. It was Mercer who initiated the physical altercation by swinging her arms at the Couple, throwing objects at Mallory and spitting on her, and striking Evan in the forehead.

[20] Mercer has failed to show that she feared the use of unlawful force against her from the Couple. And because it was Mercer who provoked the situation that caused any potential fear of bodily harm, her self-defense claim was to no avail. *See Henson v. State*, 786 N.E.2d 274, 278-79 (Ind. 2003). In short, Mercer’s self-defense argument was negated from the onset of the altercation. Even had Mercer offered a self-defense instruction, the trial court would have been correct in refusing it. *See, e.g., Henson*, 786 N.E.2d at 279 (holding that a self-defense instruction is properly refused when the evidence does not support the giving of such an instruction). For all these reasons, Mercer’s claim that the trial court’s decision not to *sua sponte* instruct the jury on self-defense amounted to fundamental error fails.

[21] Judgment affirmed.

Vaidik, J., and Crone, J., concur.