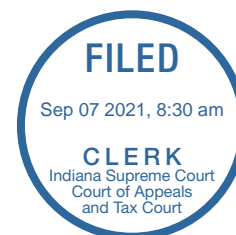


MEMORANDUM DECISION

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

Keymo E. Johnson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 7, 2021

Court of Appeals Case No.
21A-CR-45

Appeal from the Vanderburgh
Circuit Court

The Honorable David D. Kiely,
Judge

Trial Court Cause No.
82C01-1910-F1-7084

Altice, Judge.

Case Summary

- [1] Following a jury trial, Keymo E. Johnson was convicted of Level 2 felony attempted voluntary manslaughter, two counts of Level 3 felony aggravated battery, Level 4 felony unlawful possession of a firearm by a serious violent felon, Level 5 felony battery by means of a deadly weapon, and two counts of Class B misdemeanor criminal mischief, and he was adjudicated a habitual offender. Johnson appeals asserting that the trial court erred in admitting certain evidence such that all his convictions should be reversed and that the evidence was insufficient to convict him of possession of a firearm by a serious violent felon.
- [2] We affirm.

Facts & Procedural History

- [3] On the night of October 6, 2019, Johnson was at the American Legion Post (the Legion) for an event. Also present at the Legion were siblings Mikeal and Mika McBaine, who were Johnson's cousins. Sheree Fairrow was the cook that night, and Robert Wilson was working security. When Wilson arrived about 9:30 p.m., Johnson, who Wilson knew from the Legion,¹ was already there. During the course of the night, Wilson broke up several verbal and physical confrontations between Johnson and Mikeal inside the Legion.

¹ Johnson was a member at the Legion.

[4] Eventually, Wilson escorted Johnson to the door to leave, and Johnson complied without argument. Wilson intended for Mikeal to remain inside for a while to keep the two separated, but about twenty to thirty minutes later, Wilson noticed that Mikeal was gone. Wilson went out the back door to check Mikeal's whereabouts and discovered Johnson and Mikeal fighting again in the parking lot. By this time, it was between 2:00 and 3:00 a.m. Johnson had been wearing black pants and a white button-down shirt while in the Legion, but he was now wearing a red hoodie jacket and tank top. As Wilson and another security guard were attempting to separate Johnson and Mikeal, Johnson pulled a gun from his waistband and fired five shots, hitting Mikeal, Mika, Wilson, and Fairrow, as well as vehicles and the building. Johnson fled on foot.

[5] During this same time, Evansville Police Department (EPD) Officer Jeremy Matthews was parked in his police vehicle across the street from the Legion for safety as "fight runs and shootings" had become a problem in the area in the preceding weeks. *Transcript Vol. 2* at 139. Around 3:00 a.m., Officer Matthews heard four or five gunshots and immediately radioed a report of "shots fired." *Id.* at 140. He drove to the Legion and saw five or six people who appeared to be pointing him in the direction that the shooter had left on foot. Officer Matthews headed that direction but did not find the suspect, although he received additional information about the shooter's path, which Officer Matthews relayed to other officers coming on the scene. Mikeal, Mika, and Fairrow were taken to the hospital, while Wilson stayed at the scene and

received medical treatment for wounds, which were caused by a birdshot-type of ammunition.

[6] Meanwhile other responding officers formed a perimeter in the area and searched for the shooter. Officer Quinton Keil and his partner observed a man in a red hoodie, later determined to be Johnson, who matched the witnesses' description and was walking across the intersection of Governor and Cherry Streets, which was about a block from the Legion. Officers commanded Johnson to stop, and he gave them his name and identification. Officers conducted a pat down for safety and found no weapons. Johnson denied any involvement in the shooting.

[7] At some point during the stop with Johnson, the officers received information by radio that the suspect's name was Keymo Johnson. Wilson, after receiving medical treatment at the scene for his gunshot wounds, accompanied Officer Aaron Kennedy to the location where Johnson was being detained and identified him as the shooter.

[8] Detectives at the scene of the shooting found five waddings associated with shotgun shells on the ground and noticed pellet damage to victims, vehicles, and the building. Sergeant Daniel Deeg went back later, in daylight, with several officers to look for the firearm that was used. They searched, among other places, sewer grates in the area, with the assistance of the water department. The officers located and retrieved a firearm from the bottom of a storm drain at the southwest corner of Governor and Cherry Streets. It was a

Taurus Judge revolver, which shoots both bullets and shotgun shells. Later testing revealed Johnson's DNA on the grip and trigger.

[9] On October 9, 2019, the State charged Defendant with three counts of attempted murder as Level 1 felonies (Counts I-III), Level 4 felony unlawful possession of a firearm by a serious violent felon (Count IV), two counts of Level 5 felony battery by means of a deadly weapon (Counts V-VI), Class A misdemeanor resisting law enforcement (Count VII), and four counts of criminal mischief as Class B misdemeanors (Counts VII-XI). The State also alleged that Johnson was a habitual offender and added the firearm-sentencing enhancement to Counts I-III. The matter proceeded to a jury trial in November 2020.

[10] At trial, Detective John Pieszchalski testified that, based on the size and type of pellet damage at the scene and to victims, he believed that the weapon used was either a small-caliber shotgun or a Taurus Judge revolver because the Taurus Judge is capable of shooting "multiple different munitions," including a "shotgun style shell[,] and there are "not a lot" of handguns that shoot shotgun shells, so "you don't have many choices." *Transcript Vol. 2* at 89, 92-93. Detective Pieszchalski explained that, when a Taurus Judge is fired, the pellets wrapped in wadding are expelled but the empty shell casings are not ejected.

[11] During Detective Pieszchalski's testimony, the State offered various exhibits regarding the Taurus Judge, which were admitted without any objection.

Those included: a picture of the manhole where the Taurus Judge revolver was found, a picture of the revolver, a picture of it with the cylinder open that showed “all five rounds inside had been fired[,]” and the Taurus Judge handgun itself. *Id.* at 89. When the State moved to admit these exhibits, Johnson stated, “No objection.” *Id.* at 73, 90. Detective Pieszchalski testified, “[W]ith finding the five waddings [at the scene] and then finding the firearm right in that area, . . . and finding five spent cartridges of shotgun style in [the revolver], that led me to believe that this was possibly our firearm used.” *Id.* at 97.

[12] Mika testified that, toward the end of the night, she went outside to the parking lot where she and others, including Mikeal, were “just hanging out.” *Id.* at 159. She said that Johnson walked up and began arguing with Mikeal. At one point, Johnson shoved Mika, at which point Mikeal and Johnson started fighting. She said that Johnson suddenly “started shooting us.” *Id.* at 154. Mika was hit in the head and shoulder and said that she still had “over a hundred buckshot[.]” in her body that were never removed. *Id.* at 154. She described watching Johnson as he “just kept shooting.” *Id.* at 155. She testified that she watched Johnson shoot her brother. Mika testified that, as a result of the shooting, she lost her sight in one eye, and her brother, Mikeal, resides in a nursing home, cannot walk, and has a feeding tube.

[13] Fairrow testified that she was putting away her cooking supplies in her car and talking with Mikeal, when Johnson appeared, and he and Mikeal argued and physically fought about a family matter. Fairrow recalled that she heard a

“boom” and realized she had been hit by gunfire. *Id.* at 175. She fell to the ground and then heard more “boom, boom, boom” sounds. *Id.* at 176. She recalled turning and seeing “the fire from the gun and the red jacket.” *Id.* at 178, 181.

[14] The 911 call placed by someone at the scene was played for the jury without objection. The caller had witnessed the shooting and identified the shooter as “Keymo Johnson” and said he was wearing a red hoodie. *Id.* at 193. Wilson testified that he watched security camera footage, could see shots being fired, and Johnson was the person who fired the shots.

[15] Nicole Hoffman, a forensic scientist with the Indiana State Police conducted forensic testing on the Taurus Judge handgun that police recovered. When the State offered Hoffman’s certificate of analysis, Johnson had “no objection” and it was admitted. *Id.* at 199. Harrison explained that there was DNA from four people on one swab and 70% of the profile was from Johnson. She testified that it was 290 quadrillion times “more likely to occur if it had originated from [] Johnson and three unknown individuals than if it originated from four unknown unrelated individuals.” *Id.* at 201.

[16] During trial, the court granted the State’s request to dismiss Counts VIII and XI (two criminal mischief counts). The jury found Johnson guilty of Count I, the lesser-included offense of Level 2 felony attempted voluntary manslaughter; Count II and III, the lesser-included offense of Level 3 felony aggravated battery creating substantial risk of death; and Counts IV-VI and IX-X as

charged. The jury found him not guilty of Count VII (resisting law enforcement). Johnson pled guilty to the firearms sentencing enhancement and admitted to being a habitual offender and a serious violent felon. The court granted Johnson's motion to correct error and vacated Count VI.

[17] Following a December 7, 2020, sentencing hearing, the trial court sentenced Johnson to an aggregate sentence of forty-three years to be served at the Indiana Department of Correction. Johnson now appeals.

Discussion & Decision

I. Admission of Evidence

[18] Johnson claims that the trial court abused its discretion when it admitted "all testimony and evidence related to the Taurus Judge handgun because the State never linked this handgun to the charged offenses." *Appellant's Brief* at 11. Johnson's argument is that "the handgun was only conditionally relevant until the State provided a link between the charged offense and the handgun" and, here, none of the victims described the gun and the State did not offer ballistic evidence that "definitively linked the handgun to the scene." *Id.* at 11, 15. Accordingly, he argues, the handgun and all evidence about it was not relevant and should not have been admitted.

[19] Johnson did not object when various witnesses testified about the Taurus Judge and he affirmatively stated that he had "no objection" when exhibits were offered into evidence. *Transcript Vol. 2* at 73, 90. To avoid waiver, he now asserts that the error in admitting the evidence was fundamental and asks us to

reverse his convictions and remand for a new trial. With regard to fundamental error, our Supreme Court has clarified:

[T]he fundamental error exception is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process. This exception is available only in egregious circumstances.

Halliburton v. State, 1 N.E.3d 670, 678 (Ind. 2013) (cleaned up).

[20] The *Halliburton* Court held that the fundamental error doctrine is inapplicable in situations where the defendant affirmatively stated “no objection,” explaining: “[U]pon an express declaration of ‘no objection’ a trial judge has no duty to determine which exhibits a party decides, for whatever strategic reasons, to allow into evidence[,]” as “[o]nly the interested party himself can really know whether the introduction or exclusion of a particular piece of evidence is in his own best interests.” *Id.* at 679 (some quotations omitted); *see also Taylor v. State*, 86 N.E.3d 157, 161 (Ind. 2017) (“[W]e will not review claims, even for fundamental error, when appellants expressly declare at trial that they have no objection.”). While Johnson argues that the *Halliburton* decision is “flawed” and encourages us to invite the Supreme Court to reconsider it, we decline to do so. *Reply Brief* at 10.

[21] Furthermore, even if the fundamental error doctrine was not inapplicable, Johnson has not established that fundamental error occurred. He claims that “the identity of the shooter was the central issue at trial[,]” and the State relied on the evidence regarding the Taurus Judge “to convince the jury that [Johnson] was the shooter.” *Appellant’s Brief* at 16, 18. We flatly reject this claim as there was never any dispute that Johnson was the shooter. Wilson, Fairrow, and Mika each told police at the scene and testified at trial that Johnson was the person who shot them. Wilson rode with a detective to where Johnson was being detained and identified Johnson to police as the shooter. Detective Kennedy testified that “[n]umerous people” at the scene provided Johnson’s name as the shooter. *Transcript Vol. 2* at 186. Indeed, Johnson’s counsel in closing argument effectively conceded that identity was not at issue, stating – in opposition to the State’s claim that Johnson acted with a specific intent to kill – “There is nothing in the record that would indicate that Mr. Johnson did any more than pull that gun out and fire it.” *Id.* at 249.

[22] There was plenty of evidence, aside from evidence concerning the Taurus Judge revolver, that Johnson fired a gun that he pulled from his waistband, leaving shotgun pellet injuries to victims and damage to property. He has not established how the admitted evidence made a fair trial impossible or constituted clearly blatant violations of basic principles of due process. Johnson has thus failed to show that the trial court committed any error, let alone fundamental error, when it admitted evidence concerning the Taurus Judge

handgun at trial. Accordingly, Johnson’s claim that all his convictions must be reversed fails.

II. Sufficiency of the Evidence

[23] Johnson next claims that the evidence was not sufficient to convict him of possession of a firearm by a serious violent felon. Our standard of review is well settled:

In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We consider only the evidence most favorable to the judgment and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. Circumstantial evidence alone is sufficient to support a conviction. . . . Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

McCoy v. State, 153 N.E.3d 363, 366 (Ind. Ct. App. 2020) (internal citations omitted).

[24] To convict Johnson, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally possessed a firearm after having been convicted of committing a serious violent felony. Ind. Code § 35-47-4-5(c). Johnson claims that the evidence was insufficient to prove that he possessed a firearm. Specifically, he maintains that “the State failed to link the Taurus Judge handgun recovered blocks from the scene of the crime” and that, although his DNA was on the handgun, the State “did not prove how the DNA

got there.” *Appellant’s Brief* at 23-24. He suggests that his DNA “could have gotten there because the DNA was transferred to the gun from [Johnson] to a third person to the handgun or it could have gotten on the weapon because [he] simply touched the gun without possessing it.” *Id.* at 24.

[25] It is well-settled that the State, however, need not rule out every possible hypothesis that “could have” explained why or how Johnson’s DNA was found on the handgun. *McCoy*, 153 N.E.3d 366-67 (evidence need not overcome every reasonable hypothesis of innocence). The State was only required to present evidence that would permit a reasonable inference that Johnson either actually or constructively possessed the firearm. *See Smith v. State*, 113 N.E.3d 1266, 1269-70 (Ind. Ct. App. 2018) (conviction for unlawful possession of a firearm may rest upon proof of either actual or constructive possession and evidence is sufficient if an inference may reasonably be drawn from it to support verdict), *trans. denied*.

[26] Actual possession is “the direct physical control of the gun,” whereas constructive possession occurs when the defendant “has (1) the capability to maintain dominion and control over the item, and (2) the intent to maintain dominion and control over it.” *Id.* at 1270. To establish possession, the State is not required to show that the defendant physically possessed the firearm on his person at the time of his apprehension. *Id.* (conviction for possessory offenses does not depend on accused being “caught red-handed” with the item).

[27] Here, in closing argument, Johnson’s counsel stated that Johnson “had the gun” but did not intend to shoot anyone and did nothing more “than pull that gun out and fire it.” *Transcript Vol. 2* at 249. Johnson thus conceded that he possessed a firearm. Regardless, the evidence presented was sufficient for the jury to infer that Johnson possessed a firearm, fired it, left the scene on foot, and discarded it in a drain about a block from the Legion, at the intersection where police saw Johnson minutes after the shooting. The Taurus Judge that police found had Johnson’s DNA on it, and it is one of a select few types of handguns that are capable of shooting shotgun-type shells, which expel wadding and birdshot pellets, evidence of which was found at the scene. Multiple witnesses, including Wilson and Mika, testified that Johnson was the shooter, from which the jury could reasonably infer that he held in his hand – that is, possessed – a firearm. The State presented ample evidence to convict Johnson of possession of a firearm by a serious violent felon.

[28] Judgment affirmed.

Bradford, C.J. and Robb, J., concur.