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IN THE
COURT OF APPEALS OF INDIANA

Trevor Kentrell Bowie,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 6, 2023

Court of Appeals Case No.
22A-CR-1149

Appeal from the Tippecanoe
Superior Court

The Honorable Randy J. Williams,
Judge

Trial Court Cause No.
79D01-2005-F1-9

Opinion by Judge Riley

Chief Judge Altice and Judge Pyle concur

STATEMENT OF THE CASE

[1] Appellant-Defendant, Trevor Bowie (Bowie), appeals his convictions for attempted murder, a Level 1 felony, Ind. Code §§ 35-42-1-1(1), 35-41-5-1(a); unlawful possession of a firearm by a serious violent felon, a Level 4 felony, I.C. § 35-47-4-5(c); resisting law enforcement, a Level 6 felony, I.C. § 35-44.1-3-1(a)(3); theft of a firearm, a Level 6 felony, I.C. § 35-43-4-2(a); possession of marijuana, a Class A misdemeanor, I.C. § 35-48-4-11(a)(1); disobeying a declaration of a disaster emergency, a Class B misdemeanor, I.C. § 10-14-3-12; and the jury's verdicts that he is an habitual offender, I.C. § 35-50-2-8, and that he was eligible for a firearm enhancement, I.C. § 35-50-2-11(e).

ISSUES

[2] Bowie presents this court with two issues, which we restate as:

(1) Whether Bowie knowingly, intelligently, and voluntarily waived his right to counsel and proceeded pro se; and

(2) Whether the State's attempted murder charge was fatally defective because it alleged multiple separate offenses.

FACTS AND PROCEDURAL HISTORY

[3] In April 2020, Joniaya Ladd (Ladd) lived in the 800 block of North 7th Street in Lafayette, Indiana. Ladd and Bowie were dating, but on April 20, 2020, and into the early morning hours of April 21, 2020, they had been fighting. Around 12:45 a.m. on April 21, 2020, Ladd called 911 to report that Bowie would not leave her home as she had requested. The responding officer observed a man,

later identified as Bowie, lurking in the shadows of a nearby house. As the officer approached to investigate, Bowie ran away. The officer took a statement from Ladd, who reported that Bowie had stolen her firearm, and then broadcast a description of Bowie.

[4] Around 1:20 a.m., Officer Israel Salazar (Officer Salazar) spotted Bowie and pursued him on foot. Bowie did not obey Officer Salazar's commands to stop and subsequently ran right in front of Officer Khouri Elias' (Officer Elias) patrol car close to the intersection of 7th and Cincinnati Streets. Officer Elias activated his patrol car's lights and sirens and pursued Bowie as he ran west down a grassy embankment toward the Health Department's parking lot, where Bowie fell. Ladd's handgun, which Bowie had in his possession, also fell on the ground. Officer Elias parked in the Health Department parking lot and took a position behind the open driver's side door of his patrol car. Officer Salazar arrived and positioned himself behind Officer Elias' patrol car. Bowie picked up the handgun and pointed it at the officers. Officer Elias ordered Bowie at least four times to drop his weapon. Bowie changed his position but again pointed the firearm at the officers. At that point, Officer Elias fired at Bowie, who fell to the ground. When Bowie picked up the handgun again and pointed it in the officers' direction, both officers fired on Bowie a second time. Bowie was struck in the arms, thigh, and foot by a total of six bullets but still did not immediately drop his weapon. After Bowie was finally disarmed, he was transported for treatment of his gunshot wounds.

[5] On April 27, 2020, the State filed an Information, charging Bowie with Level 4 felony unlawful possession of a firearm by a serious violent felon; Class A misdemeanor carrying a handgun without a license; two Counts of Level 6 felony pointing a firearm; Level 6 felony resisting law enforcement; Level 6 felony theft of a firearm; Level 5 felony felon carrying a handgun; Class A and Class B misdemeanor possession of marijuana; and Class B misdemeanor disobeying a declaration of a disaster emergency. The State also alleged that Bowie was an habitual offender. The State subsequently filed amended Informations, adding charges of Level 1 felony attempted murder, Level 3 felony aggravated battery, and an allegation that Bowie was eligible for a firearm enhancement. As to the attempted murder charge, the State alleged as follows:

> On or about April 27, 2020, in Tippecanoe County, State of Indiana, Trevor Kentrell Bowie, while acting with the intent to kill Officer K. Elias and/or Officer Salazar, did engage in conduct which constituted a substantial step towards the killing of Officer K. Elias and/or Officer Salazar, to wit: knowingly or intentionally picked up handgun, stood up, turned towards Officer K. Elias and/or Officer Salazar and pointed the handgun at Officer K. Elias and/or Officer Salazar; Trevor Kentrell Bowie subsequently disregarded commands to drop said handgun and instead laid down into a supine shooting position and pointed the gun at Officer K. Elias and/or Officer Salazar; after Officer K. Elias and/or Officer Salazar fired at Trevor Kentrell Bowie, Trevor Kentrell Bowie did drop the handgun, but again picked up the handgun from the ground and pointed it at Officer K. Elias and/or Officer Salazar.

(Appellant's App. Vol. II, p. 76). Bowie was appointed a public defender (Defense Counsel) to represent him.

[6] From May 2020 to September 2020, Defense Counsel filed and pursued motions for a change of venue, for appointment of a special prosecutor, and objecting to the Information amendments. On September 10, 2020, Bowie filed a pro se motion seeking to have Defense Counsel replaced with another public defender. For a variety of reasons, including the COVID-19 pandemic, Bowie's trial date was continued multiple times. On June 1, 2021, the parties were present in open court, and Bowie made an oral motion to replace Defense Counsel with a different public defender. On June 2, 2021, the trial court held a hearing on Bowie's motion to relieve Defense Counsel during which Bowie was informed that the public defender's office would not assign him new counsel. In a July 15, 2021, filing, Defense Counsel provided notice that Bowie had expressed the desire to represent himself. On July 16, 2021, the trial court held a hearing on Bowie's intention to proceed pro se. After the trial court engaged in an extended colloquy with Bowie and after Defense Counsel questioned Bowie on the record about his decision to proceed pro se, Bowie affirmed that he still wished to represent himself. The trial court granted Bowie's request to proceed pro se and appointed Defense Counsel as stand-by counsel.

[7] On July 16, 2021, Bowie filed several motions, including a motion to suppress and a request for a mental health evaluation. At a July 22, 2021, hearing, Bowie clarified that he intended to raise an insanity defense at trial and that he sought the mental health evaluation in pursuit of that defense. At the

conclusion of the hearing, the trial court ordered that Bowie be granted access to the jailhouse law library and to the State's discovery. During an August 3, 2021, hearing on Bowie's motion to suppress, the trial court expressed its concern that Bowie wished to proceed pro se while simultaneously filing a motion for an insanity evaluation. The trial court ordered a competency evaluation for Bowie to assist in rendering a decision about whether Bowie had the ability to represent himself. The trial court appointed Dr. Lori Rogers (Dr. Rogers) and Dr. Kevin Hurley (Dr. Hurley) to evaluate Bowie, and the proceedings were stayed until the evaluations were completed.

[8] On October 25, 2021, Dr. Rogers filed her report that Bowie was competent to stand trial. Dr. Rogers had interviewed Bowie for three hours before compiling her report, during which she observed that Bowie's thought process was organized and linear, he denied currently experiencing auditory hallucinations, he was awake, alert, and had an intact memory, and that his speech was good. Bowie self-reported being previously diagnosed with post-traumatic stress disorder and bipolar disorder. According to Bowie, he had been prescribed four medications but had stopped taking them in August 2020 due to financial concerns. In Dr. Roger's opinion, Bowie had the ability to appraise the legal defenses available to him, plan a legal strategy, appraise the roles of the participants in courtroom proceedings, understand court procedures, understand the charges against him, and challenge prosecution witnesses realistically, with little-to-no unmanageable behavior. Dr. Rogers

recommended that Bowie take at least one of his medications to prevent reoccurrence of a mood episode or psychosis.

[9] On October 29, 2021, Bowie filed a motion for an insanity evaluation to determine whether, at the time of the offenses, he suffered from a mental defect that prevented him from appreciating the wrongfulness of his actions. On November 1, 2021, Dr. Hurley filed his report concluding that Bowie was competent to stand trial. This opinion was based on the doctor's observations during a two-hour online interview that Bowie was oriented, had normal speech, and expressed himself well; Bowie's thought process was organized, coherent, and logical; Bowie's cognitive functioning was intact in terms of his memory and focus; and Bowie demonstrated average intellectual functioning. The doctor also observed that there was a lack of evidence that Bowie was then experiencing hallucinations, delusions, psychosis, mania "or any other severe mental illness[.]" (Appellant's App. Vol. III, p. 114). Dr. Hurley concluded that Bowie did not require any involuntary treatment and was competent to refuse treatment.

[10] On November 12, 2021, Bowie submitted a forty-five-page letter to the trial court detailing his childhood trauma, mental health issues, his version of the events of the offenses, and his desire to obtain mental health treatment. On November 15, 2021, the trial court ordered Drs. Rogers and Hurley to perform an insanity evaluation for Bowie. On December 30, 2021, Dr. Hurley submitted his report in which he found that Bowie had been legally sane at the time of the offenses. Dr. Hurley found insufficient evidence of bipolar disorder,

schizophrenia, or any other mental illness apart from major depressive disorder. Dr. Rogers interviewed Bowie on February 25, 2022, and filed her report on March 3, 2022, indicating that, although Bowie presented with symptoms of PTSD and bipolar disorder and was at-risk for suicide, he was legally sane at the time of the offenses. Bowie reported that he was not taking any of his prescribed mental health medications, but he also reported that he was spending approximately five hours each day in the law library preparing for his trial.

[11] On March 28, 2022, the trial court convened Bowie's four-day jury trial at which Bowie represented himself. When Bowie cross-examined Officer Elias about whether he had ever been involved in an officer shooting before drew an objection from the State, the trial court called a recess and allowed Bowie to consult with stand-by defense counsel. After the recess, the trial court asked Bowie if he still wished to proceed pro se, and Bowie expressed his continued desire to do so. At trial, Bowie made evidentiary objections, cross-examined each State witness, and testified on his own behalf regarding his version of the events and his insanity defense. The trial court called Drs. Rogers and Hurley to testify, and Bowie examined both doctors at length about the bases for their conclusions that he was sane at the time of the offenses.

[12] At the close of the evidence, Bowie moved to dismiss the attempted murder charge, arguing that the State should have separated the charge into two separate counts, one as to each officer, and that the charge as written provided "the prosecution three ways to give the jury to convict me." (Tr. Vol. IV, p. 73). The State countered that the Information served its purpose of putting

Bowie on notice of the charge. The State offered to further address Bowie's concerns by creating separate verdict forms for each of the victims, an offer that Bowie rejected. The trial court noted that Bowie's motion to dismiss was most likely untimely but took the matter under advisement, stating that "[w]e may address it at a later time." (Tr. Vol. IV, p. 73). The parties did not further address the matter on the record.

[13] The jury found Bowie guilty as charged. After the jury rendered its verdicts on the underlying offenses, the State presented evidence that Bowie is a serious violent felon, that he is an habitual offender, and that he was eligible for the firearm enhancement. The jury entered guilty verdicts consistent with that evidence.

[14] On May 5, 2022, the trial court held Bowie's sentencing hearing. The trial court vacated all of Bowie's convictions apart from those for unlawful possession of a firearm by a serious violent felon, resisting law enforcement, theft of a firearm, Class A misdemeanor possession of marijuana, disobeying a declaration of disaster emergency, and attempted murder. The trial court imposed a forty-three-year sentence for the underlying offenses. The trial court enhanced Bowie's sentence for attempted murder by fourteen years for being an habitual offender and using a firearm during the offense, for an aggregate sentence of fifty-seven years.

[15] Bowie now appeals. Additional facts will be presented as necessary.

DISCUSSION AND DECISION

I. *Waiver of Right to Counsel*

A. *Standard of Review*

[16] Bowie contends that he did not validly waive his constitutionally guaranteed right to counsel. We review a trial court's finding that a defendant waived his right to counsel under a de novo standard of review. *McBride v. State*, 992 N.E.2d 912, 917 (Ind. Ct. App. 2013), *trans. denied*. However, our supreme court has acknowledged that the trial court is in the best position to determine whether a defendant has fully waived his right to counsel. *Poynter v. State*, 749 N.E.2d 1122, 1128 (Ind. 2001). As a result, we will review the record and will most likely uphold the trial court's ruling on the defendant's request to proceed pro se if the trial court judge made the proper inquiries, conveyed the proper information, and reached a reasoned conclusion about the defendant's waiver of counsel. *Id*.

B. Knowing, Intelligent, and Voluntary Waiver

[17] The Sixth Amendment of the United States Constitution guarantees the fundamental right to counsel in a criminal trial, and it also provides and protects the implicit right to self-representation. *Wright v. State*, 168 N.E.3d 244, 252, 256 (Ind. 2021) (citing *Faretta v. California*, 422 U.S. 806, 817, 818, 831-32, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Despite its fundamental nature, the right to self-representation is "'not absolute[,]'" and once a defendant has invoked his right to proceed pro se, strict procedural requirements are triggered in order to ensure "compliance with basic constitutional guarantees of fairness"

and to ensure that the defendant "'knows what he is doing and his choice is made with eyes wide open.'" *Id*. at 258 (quoting *Indiana v. Edwards*, 554 U.S. 164, 171, 128 S.Ct. 2379, 2384, 171 L.Ed.2d 345 (2008), and *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2525).

[18] To protect these interests, a defendant must be warned of the dangers and disadvantages of self-representation, and a defendant's waiver of the right to counsel must be "'knowing, voluntary, and intelligent.'" *Id*. (quoting *Iowa v. Tovar*, 541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004)). When determining whether a defendant has validly waived his right to counsel, we may consider the following four factors:

> (1) the extent of the court's inquiry into the defendant's decision, (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, (3) the background and experience of the defendant, and (4) the context of the defendant's decision to proceed pro se.

Poynter, 749 N.E.2d at 1127-28. There are no specific mandatory requirements for the trial court's inquiry. *Jones v. State*, 783 N.E.2d 1132, 1138 (Ind. 2003). Rather, we will generally find a defendant's waiver constitutionally adequate where the trial court acquainted the defendant with the advantages of being represented by an attorney and the disadvantages of proceeding pro se. *Id*. For example, in *Jones*, our supreme court found a valid waiver of the right to counsel where the trial court judge reminded Jones that, in contrast to his attorneys, he was not trained in the law, he was warned that he would be held

to the same standard as an attorney, and he was informed that, if convicted, no claim of ineffectiveness of counsel would be available to him. *Id*. at 1139. The trial court also attempted to discourage Jones' decision to represent himself by telling him, "I advise you [Jones] I don't think it's a good idea . . . If I was charged with this, I wouldn't want to represent myself." *Id*. Jones' appointed attorneys also discussed the matter with him and informed the trial court that they thought Jones understood what his decision entailed. *Id*. In spite of these warnings and advisements, Jones affirmed several times that he wished to proceed pro se. *Id*.

[19] We find the circumstances of this case to be analogous to *Jones*. Here, during its colloquy with Bowie, the trial court made Bowie aware that his attorney possessed skills, such as negotiating plea agreements, that Bowie did not have, that Bowie would be held to the same standards as an attorney, and that, as a pro se litigant, he would receive "no leeway" in the trial court's rulings. (Tr. Vol. II, p. 54). The trial court attempted to dissuade Bowie by informing him that facing such severe criminal charges by himself was "generally unwise" and that if "an attorney were to get into trouble, an attorney would usually retain another attorney to represent him or her in a proceeding, you understand this?" (Tr. Vol. II, pp. 53-54). Additional questioning by the trial court established that Bowie understood the nature of the charges and possible penalties he faced; there were possible defenses and mitigating circumstances related to the alleged offenses; Bowie might conduct his defense in a manner that harmed him; Bowie had a high school education, some college, and was fluent in English; Bowie

had been represented by counsel in previous criminal matters; and that Bowie had observed jury selection, opening statements, direct and cross-examination, and closing statements and was familiar enough with these procedures and the rules of evidence to represent himself. After the trial court finished its inquiry, Defense Counsel then questioned Bowie on the record about matters pertaining to his choice to proceed pro se, including his understanding that lesser-included offenses could exist to the charges; Defense Counsel had significant criminal law experience that Bowie might not have; the State would be represented by experienced attorneys who might possess skills Bowie did not; standby counsel was limited in its scope; and that Bowie's best chance at success at trial was with an attorney. Despite the totality of these warnings and advisements, Bowie affirmed multiple times in open court that he was capable of representing himself and wished to proceed pro se, that he was making the choice of his own free will, and that he was making the decision knowingly, intelligently, and voluntarily after having been fully advised of his rights under the state and federal Constitutions. Given these circumstances, we conclude that Bowie validly waived his right to counsel. *See Jones*, 783 N.E.2d at 1138; *see also Taylor v. State*, 944 N.E.2d 84, 90-91 (Ind. Ct. App. 2011) (holding that the trial court's inquiry and advisements sufficient where they included informing Taylor it was "ill advised" to face his serious charges without counsel, warning Taylor of the substantial sentence that he faced, inquiring into Taylor's non-extensive education, confirming Taylor's multiple contacts with the criminal justice system, and advising Taylor that the judge himself would not proceed pro se if faced with serious criminal charges).

[20] Despite this evidence of his valid waiver of counsel, Bowie contends that the trial court did not adequately inquire into his decision to proceed pro se because, in light of his repeated pre-waiver hearing requests for a different public defender and his comment at the waiver hearing that "the [c]ourts won't appoint me a new public defender so I feel like I'm forced to represent myself[,]" it was evident that he did not truly wish to proceed pro se. (Tr. Vol. II, p. 62). However, Bowie had been made aware prior to the waiver hearing that the public defender's office would not assign him a new public defender, and, after being so informed, he expressed his desire to proceed pro se. As the State correctly points out, an indigent criminal defendant is not entitled to the public defender of his choice. *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 151, 126 S.Ct. 2557, 2565, 165 L.Ed.2d 409 (2006). Bowie did not equivocate in his desire to proceed pro se; rather, he stressed that he felt compelled to represent himself and not rely on a public defender. Therefore, Bowie has not shown that the trial court's inquiry was inadequate. As we will address more fully below, Bowie also contends that his mental health status militated against a valid waiver in light of the second and third *Poynter* factors.

[21] As to the fourth *Poynter* factor, the context of the decision to proceed pro se, Bowie maintains that there was inadequate evidence that he "was exercising a tactical strategy in requesting self-representation." (Appellant's Br. p. 20). This factor examines whether the defendant's choice of self-representation "appears tactical or strategic in nature or seems manipulative and intending delay, inferring knowledge of the system and understanding of the risks and

complexities of trial from more deliberative conduct." *Poynter*, 749 N.E.2d 1128 n.6. Here, Bowie and Defense Counsel apparently did not agree on Bowie's insanity defense: Defense Counsel did not file a notice of insanity defense before or after the first omnibus date, June 4, 2020, and, in his June 1, 2021, Motion to Relieve Counsel, Bowie complained that Defense Counsel would not order a mental health evaluation. On the same day that Bowie waived his right to counsel, he filed a motion for a mental health evaluation to pursue his insanity defense. Therefore, one of Bowie's chief motivations for proceeding pro se was to pursue his chosen defense, which is a tactical choice supporting an inference of knowledge of the legal system. *Id*.

C. *Mental Health*

[22] Bowie contends that his mental health status was evidence of his lack of understanding of the dangers of self-representation and of the inadequacy of his background and experience under the second and third *Poynter* factors. Bowie argues that his mental health weighed against his valid waiver and should have alerted the trial court that he was incapable of conducting his own defense. The United States Supreme Court has held that "[s]tates may also insist on representation by counsel for persons who, though competent to stand trial, "'suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.'" *Wright*, 168 N.E.3d at 259 (quoting *Edwards*, 554 U.S. at 178, 128 S.Ct. at 2379). The Indiana Supreme Court has observed that deciding whether a defendant is too mentally ill to conduct his own defense is "'a fact-sensitive evaluation of the defendant's capabilities that

the trial court is best-situated to make.'" *Sturdivant v. State*, 61 N.E.3d 1219, 1224 (Ind. Ct. App. 2016) (quoting *Edwards v. State*, 902 N.E.2d 821, 824 (Ind. 2009)), *trans. denied*. We will affirm the trial court's decision unless it is clearly erroneous, meaning that it is unsupported by the facts and circumstances and reasonable inferences, and, as a result, defendants making such a claim face "an uphill battle." *Id*.

[23] In *Edwards*, the evidence that ultimately led the Indiana Supreme Court to uphold the trial court's insistence that Edwards be represented by counsel despite his requests to proceed pro se was summarized as follows:

> Edwards was evaluated by several mental health professionals from 1999 through 2004 and was diagnosed at various points in time with schizophrenia of an undifferentiated type, disorganized type schizophrenia, a delusional disorder, and a personality disorder. Edwards's psychiatric evaluations reveal that he experienced hallucinations and delusions, and that he manifested disorganized thought processes and impaired verbal communication. Several psychiatric reports concluded that Edwards was not competent to stand trial in the first instance, let alone represent himself.

Edwards, 902 N.E.2d at 827. In Bowie's case, the evidence, facts, and circumstances before the trial court were qualitatively different than those present in *Edwards*. Although Bowie reported being diagnosed with PTSD, bipolar disorder, and schizophrenia and suffering hallucinations and blackouts as a result, these diagnoses were self-reported and were not corroborated with medical records. At his waiver hearing in response to the trial court's inquiry

about his mental health, Bowie repeated these diagnoses but informed the trial court that he was taking medication that controlled his symptoms. Dr. Hurley noted in his competency report that neither he nor jailhouse staff observed anything corroborating Bowie's claims of psychosis and that there was a lack of evidence that Bowie was then experiencing hallucinations, delusions, psychosis, mania, "or any other severe mental illness." (Appellant's App. Vol. III, p. 114). Unlike the circumstances of *Edwards*, Drs. Rogers and Hurley found Bowie to be both competent to stand trial and legally sane at the time of the offenses, and their reports contained observations of Bowie's mental state and thought processes that were consistent with an ability to conduct one's own defense. We acknowledge that Dr. Rogers found that Bowie showed symptoms of PTSD, bipolar disorder, and suicide risk and that there was evidence that, at the time of trial, Bowie was not taking medications he had been previously prescribed. However, there was nothing before the trial court indicating that Bowie's mental health affected his ability to conduct his own defense to the extent that his right to represent himself should have been disallowed. Accordingly, we cannot say that the trial court's decision was unsupported in the record or that it was clearly erroneous. *See Sturdivant*, 61 N.E.3d at 1224.

[24] Bowie claims that his waiver was rendered invalid because he did not understand some legal concepts, he was incapable of introducing evidence, and he was unable to provide cogent argument on "virtually all the issues." (Appellant's Br. p. 25). However, our review of the proceedings revealed that, although at times Bowie had to be reminded of the trial court's evidentiary

rulings and to refrain from testifying when interfacing with witnesses, he demonstrated an adequate grasp of the legal issues, procedure, and the trial court's evidentiary rulings to argue a motion in limine and to conduct voir dire, opening and closing arguments, cross-examination, his case-in-chief, and the instruction conferences. Even so, this argument is not persuasive for the reason that we have recognized that "[a] court cannot deny a defendant the right of self-representation based on the defendant's lack of legal skills, experience, or knowledge." *Sturdivant*, 61 N.E.3d at 1225 n.1. Bowie's naked assertion that "as the case moved towards trial, it was obvious that Bowie suffered from serious mental illness and that he was incapable of representing himself" does not make it so. (Appellant's Br. p. 25). Accordingly, we affirm the trial court's decision to allow Bowie to conduct his own defense, as he requested.

II. *Charging Information*

[25] Bowie requests that we vacate his conviction for attempted murder because, by charging him with pointing a firearm at "Officer K. Elias and/or Officer Salazar" three times, the State impermissibly charged him with multiple separate offenses, such that he could not be assured of jury unanimity on the charge. (Appellant's App. Vol. II, p. 76). Indiana has "long required that a verdict of guilty in a criminal case must be unanimous." *Baker v. State*, 948 N.E.2d 1169, 1174-75 (Ind. 2011) (internal quote omitted). It is equally true that under well-established rules of criminal pleading, in Indiana "there can be no joinder of separate and distinct offenses in one and the same count" and that a "single count of a charging pleading may include but a single offense." *Vest v.*

State, 930 N.E.2d 1221, 1225 (Ind. Ct. App. 2010)*, trans. denied*. It is unacceptable for the State to allege two or more offenses in one count because it prevents the jury from rendering a verdict on each offense separately, and it may make it difficult to determine which offense formed the basis of the conviction. *Id*.

[26] In *Lainhart v. State*, 916 N.E.2d 924 (Ind. Ct. App. 2009), we faced a claim similar to that raised by Bowie. Lainhart was charged with Class A misdemeanor intimidation based on the State's allegation that he knowingly "communicate[d] a threat to another person, to wit: Ruth Schreier, Jamie Baker and/or Amy Robertson, with the intent that the other person be placed in fear of retaliation for a prior lawful act." *Id*. at 930. On appeal after his conviction, Lainhart argued that the trial court had committed fundamental error by permitting the State to charge and argue alternative victims in a single count, making it uncertain that the jury rendered a unanimous verdict. *Id.* at 940. We framed the issue as one of instructional error and held that "by arguing alternative victims–who were allegedly threatened at distinct periods of time on the night in question–the State actually charged [Lainhart] with several alternative crimes." *Id*. at 941-42. We did not find that fundamental error had occurred as a result of the flawed charging information and reversed on other grounds, but we concluded that "the trial court should have instructed [the] jurors that they had to reach a unanimous verdict as to which crime, if any, [Lainhart] committed." *Id*. at 942.

[27] After *Lainhart*, the *Baker* court concluded that although the charging information and evidence presented in that case posed a jury unanimity issue, Baker had waived his claim by not objecting to the trial court's instruction on unanimity or offering his own instruction. *Baker*, 948 N.E.2d at 1178. The *Baker* court then examined the matter for fundamental error, meaning error that represents "a blatant violation of basic principles rendering the trial unfair to the defendant and thereby depriving the defendant of fundamental due process." *Id*. at 1178. The court concluded that no fundamental error had occurred because the only issue in the case was the credibility of Baker's child molestation victims, Baker's only defense was to undermine the victims' credibility, and because the jury's resolution of that credibility dispute would have resulted in Baker's conviction on any of the various offenses presented to the jury. *Id*. at 1179.

[28] Here, the State charged Bowie with attempted murder, alleging alternative and aggregated victims of Bowie's multiple instances of pointing a firearm. We agree with Bowie that it is not possible to determine what permutation of victim and act the jury relied upon to convict him. Contrary to the State's assertions, we are not convinced that *Lainhart* is distinguishable on the basis that, here, the State alleged only a single criminal act. *See*, *e.g.*, *Powell v. State*, 151 N.E.3d 256, 269-70 (Ind. 2020) (examining the attempted murder statute and concluding that Powell's acts of shooting five times with the same intent at two victims sitting next to each other could support separate convictions). We conclude that, as in *Lainhart*, the State impermissibly charged Bowie with more than one

offense in the attempted murder count. However, we do not reverse the conviction because, although Bowie objected and raised his claim below, he did not offer his own jury unanimity instruction, and, therefore, he has waived his claim unless he could establish fundamental error. *Baker*, 948 N.E.2d at 1178. None occurred here, as the only real issue in this case was whether Bowie was sane at the time of the offense, which was an all-or-nothing theory that the jury could accept or reject. Its rejection of Bowie's insanity defense would have resulted in Bowie's conviction regardless of which acts and victim the jury chose to rely on. Therefore, we do not disturb the jury's attempted murder verdict.

CONCLUSION

[29] Based on the foregoing, we conclude that Bowie knowingly, intelligently, and voluntarily waived his right to counsel and that he has failed to establish that the defective attempted murder charge merits reversal.

[30] Affirmed.

[31] Altice, C. J. and Pyle, J. concur