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IN THE COURT OF APPEALS OF INDIANA

Christopher Harris,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

April 21, 2022

Court of Appeals Case No.
21A-CR-1315

Appeal from the
Marion Superior Court

The Honorable
Angela Dow Davis, Judge

The Honorable
Barbara Crawford, Senior Judge

Trial Court Cause No.
49D27-1908-F3-32941

Vaidik, Judge.

Case Summary

[1] Article 1, Section 19 of the Indiana Constitution provides, "In all criminal proceedings whatever, the jury shall have the right to determine the law and the facts." In *Seay v. State*, 698 N.E.2d 732 (Ind. 1998), our Supreme Court held that this provision applied in some habitual-offender proceedings because the legislature gave the jury in those cases the task of deciding whether the defendant was a habitual offender. Specifically, the Court explained that the jury's Article 1, Section 19 right to "determine the law" gives it the discretion to refuse to find the defendant to be a habitual offender even if the defendant has the requisite prior felony convictions. Three years later, in *Hollowell v. State*, 753 N.E.2d 612 (Ind. 2001), the Court held that evidence regarding the defendant's convictions, beyond the mere fact of conviction, is admissible because such evidence is relevant to the jury's decision whether to exercise its discretion under *Seay*.

[2] Here, the defendant in a habitual-offender proceeding wanted to testify about the circumstances surrounding his convictions in hopes of persuading the jury to reject the habitual charge, but the trial court wouldn't allow it. Citing *Seay* and *Hollowell*, the defendant argues this violated Article 1, Section 19. But after *Hollowell*, the legislature amended the habitual-offender statute to provide that the role of the jury in a habitual-offender proceeding is limited to determining whether the defendant has been convicted of the prior felonies. This amendment eliminated the broader role recognized in *Seay*, as well as the discretion inherent in that role. Because the jury's only role under the current

habitual-offender statute is to determine whether the defendant has the requisite prior convictions, the trial court did not err by barring the defendant's testimony about the circumstances surrounding his convictions.

Facts and Procedural History

[3] The evidence most favorable to the judgment is as follows. During the summer of 2019, Christopher Harris began seeing Autumn Summers. At some point he learned that Summers had previously been in a relationship with Alex Roberts, a maintenance worker at Summers's apartment complex. Harris brought up Roberts's name several times with Summers and was "dwelling" on the thought that she was still "hanging out" with him. Tr. Vol. II p. 225.

[4] In early August, Harris saw Roberts and asked if he was "messing around" with Summers. *Id.* at 105. Roberts said he wasn't. On August 17, Roberts was in his SUV at the apartment complex when a maroon Suburban "swerved" in front of him. *Id.* at 106-07. Harris exited the passenger side of the Suburban, approached Roberts, and pointed a handgun at him. Harris said, "[W]hy did you lie? I knew you was messing with her[.]" *Id.* at 108-09. Roberts denied being involved with Summers, but Harris fired a shot into Roberts's SUV then swung the gun at him. Roberts was bleeding from the head but was not shot. Harris told Roberts to call Summers. Roberts did but then dropped his phone before speaking with Summers. Harris told Roberts to give him "everything" he had, including the gold-chain necklace he was wearing. *Id.* at 113. Roberts gave Harris the chain

and a few dollars cash. Harris then fired several additional shots into the front of Roberts's SUV before re-entering the maroon Suburban, which drove off.

[5] Shortly after the robbery, Roberts was shown a photo array and identified Harris as the assailant. In addition, part of the incident had been recorded on Summers's voicemail. In the voicemail, gunshots are heard, along with Harris's voice saying, "Get out of the truck." *Id.* at 116-17. Also, Harris called Summers after the incident and said he had "f***** up," and when Summers asked what he had done, he told her to call her "little boyfriend[.]" *Id.* at 229.

[6] That night, police stopped a maroon Suburban in a store parking lot and found Harris sitting in the passenger seat. Harris had Roberts's gold chain, and a handgun was found between the middle console and the passenger seat. A firearms examiner determined the gun fired the cartridges found at the scene of the robbery. After Harris was arrested, he called Summers from jail and said, "I ain't did damage to you, I did damage to your boyfriend." Ex. p. 101.

[7] The State charged Harris with Level 3 felony robbery while armed with a deadly weapon, Level 4 felony unlawful possession of a firearm by a serious violent felon, Level 5 felony battery with a deadly weapon, and Level 6 felony criminal recklessness while armed with a deadly weapon. A month later, the State added an allegation that Harris is a habitual offender based on prior felony convictions. Harris waived his right to a jury trial, and in exchange the State dismissed the firearm charge.

[8] After the bench trial, the trial court found Harris guilty on the robbery and battery charges but not guilty on the criminal-recklessness charge. The court discovered there had not been an initial hearing on the habitual-offender charge and held one. The State questioned whether the earlier jury waiver applied to the habitual-offender charge and asked the court to "give Mr. Harris the option again of a jury trial or a bench trial with regard to the habitual." Tr. Vol. III p. 5. Harris chose a jury trial.

[9] That jury proceeding was held a week later. The parties stipulated that Harris had two prior, unrelated felony convictions—robbery in 2002 and unlawful possession of a firearm by a serious violent felon in 2013. The State rested on that stipulation. Defense counsel then called Harris to the stand. When defense counsel asked Harris whether there was "anything going on in your life" at the time of the robbery in this case, *id.* at 106, the State objected on the ground that the answer would not be relevant. The trial court agreed, stating, "[W]e are here for one reason and that's [to] determine whether these two prior felony convictions make him a habitual offender." *Id.* at 107.

[10] The trial court allowed Harris to make an offer of proof outside the presence of the jury. Harris stated that he was diagnosed with PTSD about thirty days before the offenses in this case, his therapist prescribed medications that were too strong for him and made him "like a zombie," and since adjusting his medication while in jail everything has been fine. *Id.* at 110-11. Regarding the 2002 robbery conviction, Harris explained, "The part that I played in it, it wasn't a robbery. I was in the wrong place at the wrong time." *Id.* at 114. After

the offer of proof, the jury was brought back into the courtroom, and the defense rested. The court instructed the jurors that they were "the judges of the law and the facts" and were free to find Harris is not a habitual offender even if "the fact of the prerequisite prior felony convictions is uncontroverted[.]" Appellant's App. Vol. II p. 197. The jury declined to exercise that discretion and found Harris to be a habitual offender.

[11] The trial court sentenced Harris to twenty-seven years in the Department of Correction: twelve years for the robbery conviction, a concurrent term of three years for the battery conviction, and a fifteen-year habitual-offender enhancement to run "consecutive" to the other sentences. *See* Tr. Vol. III p. 157; Appellant's App. Vol. II pp. 21, 23.

[12] Harris now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

[13] Harris argues the evidence is insufficient to support his robbery and battery convictions. When reviewing sufficiency-of-the-evidence claims, we neither reweigh the evidence nor judge the credibility of witnesses. *Willis v. State*, 27 N.E.3d 1065, 1066 (Ind. 2015). We will only consider the evidence supporting the judgment and any reasonable inferences that can be drawn from the evidence. *Id.* A conviction will be affirmed if there is substantial evidence of probative value to support each element of the offense such that a reasonable

trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

[14] Harris does not dispute that Roberts was robbed and battered. He contends only that the State failed to prove he was the perpetrator. We disagree. The State presented evidence that: (1) Roberts knew who Harris was and identified him as the perpetrator; (2) Harris was "dwelling" on Roberts's relationship with Summers; (3) Harris called Summers after the incident, said he "f***** up," and told her to call her "little boyfriend"; (4) Harris was found in a maroon Suburban with the handgun that fired the cartridges found at the scene of the robbery; (5) Harris had Roberts's gold chain; and (6) Harris called Summers from jail and said he "did damage to your boyfriend." This evidence is more than sufficient to support the trial court's finding that Harris committed the robbery and battery.

[15] In claiming otherwise, Harris notes: Roberts lied about the extent of his relationship with Summers; Roberts said his attacker was wearing a gray hoodie, but Harris was not wearing a gray hoodie when he was arrested hours later; Roberts said the attacker grabbed the gearshift of his SUV, but no fingerprints or DNA connected Harris to the gearshift; no DNA or fingerprints were offered into evidence from the firearm later found near Harris or on the fired shell casings found at the scene of the robbery; the driver of the Suburban did not testify or connect Harris in any way to the robbery; the firearms examiner testified his analysis had no "calculated error rate"; an apparent bullet hole in the Suburban was not explained at trial; the necklace Roberts said was

stolen "was not described as custom-made or with any distinctive markings[.]" Appellant's Br. pp. 18-20. Essentially, rather than arguing the State's evidence wasn't strong enough, Harris argues it could have been stronger. This is a textbook request for us to reweigh the evidence, which we cannot do. We therefore affirm Harris's robbery and battery convictions.

II. Habitual-Offender Proceeding

[16] Harris also argues the trial court's limitation of his testimony during the habitual-offender proceeding violated Article 1, Section 19 of the Indiana Constitution, which provides: "In all criminal proceedings whatever, the jury shall have the right to determine the law and the facts." Harris did not raise this constitutional claim in the trial court, thereby waiving it for appeal. *See McCallister v. State*, 91 N.E.3d 554, 563 (Ind. 2018); *Layman v. State*, 42 N.E.3d 972, 976 (Ind. 2015). Waiver notwithstanding, Harris's claim fails on the merits.

[17] Habitual-offender proceedings are governed by the habitual-offender statute, Indiana Code section 35-50-2-8. The statute has been amended many times over the years, but the basic concept has remained the same: a person convicted of a felony can have his sentence enhanced significantly if the State proves beyond a reasonable doubt that the person has a certain number of prior unrelated felony convictions. Unless the defendant admits his habitual-offender status, the status is determined in a separate proceeding after the defendant is convicted of the current offense. While the defendant has a constitutional right

to a jury trial on the current offense, he does not have a constitutional right to have a jury make the habitual-offender determination. *See Walden v. State*, 895 N.E.2d 1182, 1184 n.2 (Ind. 2008); *Smith v. State*, 825 N.E.2d 783, 786 (Ind. 2005); *O'Connor v. State*, 796 N.E.2d 1230, 1233 (Ind. Ct. App. 2003). However, as discussed below, the habitual-offender statute provides for a jury role in such proceedings. That is where Article 1, Section 19 comes into play.

[18] Despite its broad language, Article 1, Section 19 does not itself establish a right to a jury at any stage of a criminal case, including the habitual-offender phase. *See Smith*, 825 N.E.2d at 786. Rather, it means that when a jury is the decisionmaker on a particular issue, it is the judge of not only the facts but also the law.[1] Our Supreme Court addressed this provision in the habitual-offender context in *Seay v. State*, 698 N.E.2d 732 (Ind. 1998). The version of the habitual-offender statute at issue in *Seay* provided, in part:

> (c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing under IC 35-38-1-3.
>
> (d) A person is an habitual offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that

[1] Sixty-five years ago, our Supreme Court noted that "Indiana and Maryland are today the sole survivors of this archaic constitutional provision that a jury may determine the law in criminal cases." *Beavers v. State*, 141 N.E.2d 118, 121 (Ind. 1957).

> the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated felony convictions.

Ind. Code § 35-50-2-8 (1985). The Court read this language to mean that the jury was tasked with making not just the underlying determination of whether the defendant had the prior convictions but also the ultimate determination of habitual-offender status. *Seay*, 698 N.E.2d at 733-34. Having read the statute that way, the Court held that the jury's Article 1, Section 19 right to "determine the law" gave the jury the discretion to refuse to find the defendant to be a habitual offender even if the defendant had the requisite prior felony convictions. *Id.* at 734. The Court explained, "If the legislature had intended an automatic determination of habitual offender status upon the finding of two unrelated felonies, there would be no need for a jury trial on the status determination." *Id.* at 736.[2]

[19] Three years later, the Supreme Court addressed this discretion in *Hollowell v. State*, 753 N.E.2d 612 (Ind. 2001). There, the defendant argued the trial court erred during the habitual-offender phase by allowing the State to present evidence regarding the defendant's prior crimes beyond the mere fact of conviction. The Supreme Court disagreed. Citing *Seay*, the Court held that "the

[2] The State notes that in *Walden v. State* our Supreme Court characterized as "dicta" its statement in *Seay* that Article 1, Section 19 applies during the habitual-offender phase. 895 N.E.2d 1182, 1185 (Ind. 2008). Two years later, however, the Court issued an opinion in which it discussed *Seay* and Article 1, Section 19 together and referenced a jury's "Article I, Section 19 authority" during the habitual phase, without any mention of *Walden*. *Sample v. State*, 932 N.E.2d 1230, 1233 (Ind. 2010).

facts regarding the predicate convictions are relevant to the jury's decision whether or not to find a defendant to be a habitual offender." *Id.* at 617.

[20] Harris, in arguing the trial court violated Article 1, Section 19 by barring his testimony about the circumstances surrounding his convictions, relies on *Seay* and *Hollowell*. He contends he should have been allowed to present evidence about his crimes that might have persuaded the jury to exercise its discretion under *Seay*, just as the State in *Hollowell* was allowed to present evidence about Hollowell's crimes that might have persuaded the jury **not** to exercise that discretion. At first glance, this argument seems compelling. What's good for the goose is good for the gander.

[21] But as *Seay* makes clear, Article 1, Section 19 applies during habitual-offender proceedings only to the extent the legislature has provided for a jury role, and after *Hollowell*, the legislature amended the habitual-offender statute to explicitly limit the jury's role. At the time of *Seay* and *Hollowell*, the statute included the provision quoted above: "If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing under IC 35-38-1-3." I.C. § 35-50-2-8(c) (1998); I.C. § 35-50-2-8(c) (1985). The current version of this provision, found in subsection (h), includes two additional sentences:

> If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court or the judgment was entered on a guilty plea, the court

> alone shall conduct the sentencing hearing under IC 35-38-1-3.[3] **The role of the jury is to determine whether the defendant has been convicted of the unrelated felonies. The state or defendant may not conduct any additional interrogation or questioning of the jury during the habitual offender part of the trial.**

I.C. § 35-50-2-8(h) (emphasis added).[4]

[22] Harris addresses the second added sentence, arguing "it is not at all clear what the statutory prohibition on parties 'conduct[ing] any additional interrogation or questioning of the jury' means." Appellant's Reply Br. p. 8 n.1. But he doesn't address the first added sentence: "The role of the jury is to determine whether the defendant has been convicted of the unrelated felonies." That sentence is absolutely clear. A jury in a habitual-offender proceeding only decides whether the defendant has the requisite prior felonies. If the jury finds the defendant does, then habitual-offender status is automatic under the statute. The jury is no longer "entitled to make a determination of habitual offender status as a matter of law independent of its factual determinations regarding prior unrelated felonies[.]" *Seay*, 698 N.E.2d at 734. And because the jury no longer has that discretion, evidence about a defendant's convictions beyond the

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[3] As discussed above, Harris did not have a jury trial on his current offenses, but the State asked the trial court to give him the option of having a jury determine his habitual-offender status because of concerns that his jury waiver did not cover the habitual-offender charge. Tr. Vol. III p. 5.

[4] This amendment took effect in 2014, but we have found no Indiana appellate decision addressing it.

fact of conviction is no longer relevant. In short, the statutory amendment superseded the holdings in *Seay* and *Hollowell*.

[23] Harris contends the change to the statute does not affect his claim under Article 1, Section 19 "because Article 1, Section 19 provides a right for jurors to determine the law" and "the Indiana General Assembly cannot infringe upon or alter that right by statute." Appellant's Reply Br. p. 8 n.1. But again, Article 1, Section 19 applies during habitual-offender proceedings only because the legislature has provided for a jury role in those proceedings. *See Seay*, 698 N.E.2d at 734, 736. And because the legislature could **eliminate** the jury's role entirely without violating Article 1, Section 19, it can **limit** the jury's role without violating Article 1, Section 19. It has done so in the current version of the habitual-offender statute, providing that the only decision the jury makes is whether the defendant has the requisite prior convictions.

[24] For these reasons, Harris's testimony about the circumstances surrounding his convictions would not have been relevant to the jury's decision, and he did not have a right to give it under Article 1, Section 19 or the habitual-offender statute. Therefore, the trial court did not err by barring the testimony.[5]

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[5] Harris also briefly argues the trial court's limitation of his testimony during the habitual-offender proceeding violated Article 1, Section 13 of the Indiana Constitution ("In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . . .") and "his right to present a defense as protected in the United States Constitution." Appellant's Br. pp. 16-18. For two reasons, we find these claims waived and will not address them. First, Harris did not raise them in the trial court. *See McCallister*, 91 N.E.3d at 563; *Layman*, 42 N.E.3d at 976. Second, his arguments are entirely conclusory. The cases he cites did not involve habitual-offender proceedings, and he fails to specifically explain why the rights he invokes include the right

[25] As a final note, while the trial court's evidentiary decision was consistent with the current version of the habitual-offender statute, its jury instruction and verdict form were not. The court instructed the jury it was free to find Harris is not a habitual offender even if "the fact of the prerequisite prior felony convictions is uncontroverted." *See* Appellant's App. Vol. II p. 197. And it gave the jury a verdict form that asked not only whether Harris has the requisite prior convictions but also whether he is a habitual offender. *Id.* at 202-03. Harris, of course, is not complaining about the instruction or the verdict form, as they could have only benefitted him. But under the current statute, the ultimate decision of whether the defendant is a habitual offender is no longer the jury's to make, so that instruction and verdict form are inaccurate and should not be used. Trial courts should give instructions and verdict forms that recognize the jury's limited role as provided in the current statute: determining whether the defendant has the requisite prior convictions. Article 1, Section 19 still applies to such proceedings, to the extent a jury is involved, but the jury's role and inquiry are much narrower than they were under *Seay*, and the instructions and verdict forms should reflect that.

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to testify about the circumstances surrounding one's convictions during the habitual-offender phase. *See* Ind. Appellate Rule 46(a)(8)(a) (requiring that each contention in the argument section of an appellant's brief be supported by cogent reasoning and citations to relevant authorities). We will not develop these arguments for him.

III. Habitual-Offender Enhancement

[26] The parties agree that the trial court erred by ordering the fifteen-year habitual-offender enhancement to run "consecutive" to Harris's other sentences. The habitual-offender statute provides, "Habitual offender is a status that results in an enhanced sentence. It is not a separate crime and does not result in a consecutive sentence. The court shall attach the habitual offender enhancement to the felony conviction with the highest sentence imposed and specify which felony count is being enhanced." I.C. § 35-50-2-8(j). Therefore, we remand this matter to the trial court with instructions to correct the sentencing documents to show that the habitual-offender enhancement is attached to the twelve-year sentence for the robbery conviction, for a total of sentence of twenty-seven years on that count.

[27] Affirmed and remanded.

Najam, J., and Weissmann, J., concur.