MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Christopher L. Akinyemi,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 26, 2023

Court of Appeals Case No. 23A-CR-564

Appeal from the Marion Superior Court

The Honorable James B. Osborn, Judge

Trial Court Cause No. 49D21-2112-F3-36389

Memorandum Decision by Judge Bailey
Judges May and Felix concur.

Bailey, Judge.

Case Summary

[1] Christopher Akinyemi appeals his conviction for robbery, as a Level 3 felony,[1] and his adjudication as a habitual offender.[2] We affirm.

Issues

[2] Akinyemi raises three issues for our review:

1. Whether the State presented sufficient evidence to support his robbery conviction.

2. Whether the court committed fundamental error when it allowed the State to file the habitual offender charge two days before his jury trial.

3. Whether the court erroneously concluded that it lacked authority to determine that he is not a habitual offender even when the State proved that he had the requisite prior felonies.

Facts and Procedural History

[3] On November 21, 2021, Karl Melvin stopped at a gas station and parked at one of the pumps. Akinyemi walked in front of Melvin's car and "flagged [him]

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[1] Ind. Code § 35-42-5-1(a) (2022).

[2] I.C. § 35-50-2-8.

down." Tr. Vol. 2 at 158. As Melvin exited his car, Akinyemi asked if Melvin could "help [him] out." *Id*. Melvin responded: "I can't help you." *Id*. at 159. Melvin then walked behind his car toward the pump to begin fueling his car, and Akinyemi followed him. Akinyemi appeared "off-putting" and "[v]ery aggressive." *Id*. at 160. Akinyemi then asked Melvin for money again, and Melvin replied: "hey buddy, I'm sorry I can't help you." *Id*. Akinyemi responded: "I'm not you f**king buddy" and started "getting closer" to Melvin. *Id*. Akinyemi then pulled a brick out of his pocket, and he held it "to his side and kind of cocked back." *Id*. at 170. Melvin started to back away, and Akinyemi kept "demanding" money. *Id*. at 164. Melvin "feared for [his] life" and his "general safety," so he gave Akinyemi twenty dollars in order to "deescalate the situation." *Id*. at 165. Once Akinyemi received the money, he walked away and disposed of the brick.

[4] Melvin then called the police and reported that a "tall black male" wearing an orange hat had "threatened" him with a brick. *Id*. at 147. Officers with the Speedway Police Department responded and detained Akinyemi, who matched the description Melvin had provided. Officers recovered a twenty-dollar bill from Akinyemi's front pocket.

[5] The State charged Akinyemi with robbery, as a Level 3 felony. The court ultimately scheduled a bifurcated jury trial for October 27, 2022. On October 25, the State filed an information alleging that Akinyemi was a habitual offender. Prior to the start of the trial on October 27, the parties discussed the habitual offender enhancement. The court asked Akinyemi if he had had a

chance to speak with his attorney about the enhancement, and Akinyemi responded: "Yeah." Tr. Vol. 2 at 62. He further stated that his attorney "spoke to [him] about it" and that he "kn[e]w about it." *Id.* The court then noted that the enhancement had not been filed at least thirty days before trial but that Akinyemi's attorney was aware of the possibility that it would be filed. Akinyemi confirmed that his attorney had "informed [him] a few weeks ago." *Id*. at 63. The court determined that that notice was "good enough[.]" *Id*.

[6] During the ensuing first phase of jury trial, the State presented the testimony of the responding officers and Melvin. In particular, Melvin testified about the incident, and he stated that he would not have given Akinyemi the money "if he wasn't holding a brick in his hand." *Id*. at 165. In his defense, Akinyemi testified that, when he asked Melvin for money, Melvin responded in a "derogatory" way with a "racial undertone[.]" *Id*. at 179. Akinyemi also testified that Melvin's body language "intimidated" and "threatened" him, which caused him to remove the brick from his pocket. *Id*. at 181. He then testified that Melvin offered him the twenty dollars, which he accepted, and then walked away and disposed of the brick.

[7] While the jury deliberated whether Akinyemi was guilty of the robbery charge, Akinyemi asked the court if he could present an argument during the habitual offender phase that, even if the jury finds that he had the requisite convictions, "they are not required to convict." *Id*. at 213. Following a brief discussion between the parties, the court concluded that "jury nullification arguments are not allowed" under Indiana law. *Id*. at 215. Akinyemi then asked for a jury

instruction that said: "if the State has met its burden, you may convict." *Id*. at 216. The court agreed to that instruction.

[8] The jury found Akinyemi guilty of robbery, and the court entered judgment of conviction accordingly. The court then proceeded to the second phase of the trial. The State then offered Akinyemi a plea agreement of six years, with placement to be determined by the trial court. Based on the court's indication that it had the option of placing Akinyemi in community corrections as opposed to in the Department of Correction, Akinyemi agreed to the State's offer. The court accepted the plea. However, at a subsequent hearing, the court informed Akinyemi that it had "misadvised" him regarding placement and that it was required to place Akinyemi in the Department of Correction. As a result, the court vacated Akinyemi's plea on the enhancement. *Id*. at 238.

[9] The court scheduled a jury trial on the habitual offender enhancement for February 23, 2023. Prior to its start, Akinyemi waived his right to a jury trial, and the court proceeded with a bench trial. In his opening statement, Akinyemi asked the court to reconsider "nullification." Tr. Vol. 3 at 35. The State then presented evidence that Akinyemi had previously been convicted of two prior, unrelated felonies. Then in his closing statement, Akinyemi again asked the court to "consider nullification." *Id*. at 44. He argued that his case was not "an appropriate use of the habitual offender enhancement" because he is not "the worst of the worst." *Id*. The court concluded that nullification is "inconsistent with what the law requires" and found Akinyemi to be a habitual offender. *Id*. at 45. Following a sentencing hearing, the court sentenced Akinyemi to three

years for the robbery conviction, enhanced by six years for the habitual offender adjudication, for an aggregate sentence of nine years. This appeal ensued.

Discussion and Decision

Issue One: Sufficiency of the Evidence

[10] Akinyemi first asserts that the State failed to present sufficient evidence to support his conviction for robbery. Our standard of review on a claim of insufficient evidence is well settled:

> For a sufficiency of the evidence claim, we look only at the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh the evidence. *Id*. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*.

Love v. State, 73 N.E.3d 693, 696 (Ind. 2017).

[11] To show that Akinyemi committed robbery, as a Level 3 felony, the State was required to prove that he knowingly or intentionally took property from Melvin while armed with a deadly weapon. *See* Ind. Code § 35-42-5-1(a). On appeal, Akinyemi does not dispute that he asked Melvin for money or that he removed a brick from his pocket. However, he contends that the State failed to present sufficient evidence to show that he "intended to rob Melvin or intended to take money from Melvin by threatening the use of force." Appellant's Br. at 18. In particular, Akinyemi asserts that, while he asked Akinyemi for money, he

"never demanded" it. *Id*. at 18-19. He also asserts that, while he removed a brick from his pocket, it "was not related to any request for money" but was because he "felt threatened by Melvin."[3] *Id*. at 19. And he maintains that, after he removed the brick," he "did not say anything else" to Melvin. *Id*. In other words, Akinyemi contends that the State failed to prove that he had acted with the requisite intent.

[12] Because intent is a mental function, absent a confession, "'it must be determined from a consideration of the conduct, and the natural consequences of the conduct.'" *Laughlin v. State*, 101 N.E.3d 827, 829 (Ind. Ct. App. 2018) (quoting *Duren v. State*, 720 N.E.2d 1198, 1202 (Ind. Ct. App. 1999), *trans. denied*). Accordingly, intent often must be proven by circumstantial evidence. *Id*. To that end, the trier of fact is entitled to infer intent from the surrounding circumstances. *White v. State*, 772 N.E.2d 408, 412 (Ind. 2002).

[13] Here, Akinyemi approached Melvin while at a gas station and asked for money, but Melvin said no. Melvin then walked around the back of his car, and Akinyemi followed him. Akinyemi's demeanor was "off-putting" and "[v]ery aggressive," and he again asked Melvin for money. Tr. Vol. 2 at 160. Melvin responded: "hey buddy, I'm sorry I can't help you," and Akinyemi replied: "I'm not your f**king buddy" while approaching Melvin. *Id*. At that point,

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[3] While Akinyemi uses the phrase "self-defense" in a few instances, he does not make a cogent argument that he had acted in self-defense. Indeed, he does not cite any case law related to self-defense, nor does he outline the elements of self-defense.

Akinyemi pulled a brick out of his pocket and held it to the side and "kind of cocked back." *Id*. at 170. Melvin started to back away, but Akinyemi kept "demanding" money. *Id*. at 164. Melvin "feared for his life," so he gave Akinyemi twenty dollars. And Melvin testified that he would not have given Akinyemi money if Akinyemi did not have the brick. A reasonable jury could infer from that evidence that Akinyemi had intended to take money from Melvin while armed with a deadly weapon.[4] Akinyemi's arguments on appeal are simply requests that we reweigh the evidence and credit his testimony over Melvin's, which we cannot do. We therefore affirm Akinyemi's conviction for robbery.

Issue Two: Fundamental Error

[14] Akinyemi next contends that the court erred when it allowed the State to file its habitual offender enhancement two days prior to his scheduled jury trial. The timeframe during which the State may amend a charging information to add a habitual offender count is governed by statute:

> An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8 must be made at least thirty (30) days before the commencement of trial. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial if the amendment does not prejudice the substantial rights of the defendant. . . .

[4] Akinyemi does not dispute that a brick is a deadly weapon.

I.C. § 35-34-1-5(e).

[15] Here, there is no dispute that the State did not file the habitual offender charge until two days before Akinyemi's jury trial. However, Akinyemi acknowledges that he did not object to the belated filing. Thus, he asserts that the court committed fundamental error. As our Supreme Court has explained:

> A claim that has been waived by a defendant's failure to raise a contemporaneous objection can be reviewed on appeal if the reviewing court determines that a fundamental error occurred. The 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.

Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010) (quotation marks and citations omitted). "To prove fundamental error," Akinyemi must show "that the trial court should have raised the issue sua sponte . . . ." *Taylor v. State*, 86 N.E.3d 157, 162 (Ind. 2017).

[16] Akinyemi contends that the State "provided no reason for the belated filing, and the court did not inquire." Appellant's Br. at 25. Akinyemi further asserts that the court "should have properly acted on its own by following the requirements of the statute" to determine whether there was good cause to support the late filing and whether the late filing prejudiced him. *Id*. at 26. And

he maintains that waiting until two days before trial to file the enhancement "is not sufficient notice that provides a defendant with an opportunity to adequately prepare a defense[.]" *Id*. In other words, Akinyemi contends that the court's failure to follow the statute constituted fundamental error.

[17] However, we cannot say that any error in the court's decision to allow the State's belated filing deprived Akinyemi of fundamental due process or constituted a blatant violation of his rights. Indeed, prior to the start of the first phase of his trial, the court engaged in a discussion with Akinyemi regarding the habitual offender filing. During that discussion, Akinyemi stated that he had "had a chance to talk to [his] attorney" about the enhancement. Tr. Vol. 2 at 61. Further, the State informed the court that it had spoken with Akinyemi's attorney "extensively" about the possibility of filing the charges "in the past." *Id*. at 62. And Akinyemi confirmed that his attorney had informed him "a few weeks" prior to trial that the State could file the enhancement. Tr. Vol. 2 at 61-62. Thus, while the State filed the enhancement only two days prior to trial, it is clear that Akinyemi and his attorney were aware of the possibility before then and could prepare Akinyemi's defense. In any event, the trial court did not hold the bench trial on the habitual offender enhancement until February 2023, several months after the State had filed the notice of the enhancement. We cannot say that the trial court committed fundamental error when it allowed the State to file the habitual offender enhancement two days prior to trial.

Issue Three: Habitual Offender Adjudication

[18] Finally, Akinyemi contends that the trial court erred when it concluded that it lacked the discretion to determine that he is not a habitual offender even though the State proved he had the requisite prior felonies. This issue presents a pure question of law. We review questions of law de novo. *See Clippinger v. State*, 54 N.E.3d 986, 988 (Ind. 2016).

[19] Akinyemi contends that, under Indiana law, the jury has the right to determine at a habitual offender proceeding whether "the defendant has the conviction[s] alleged" and whether "those convictions make the defendant a habitual offender as a matter of law." Appellant's Br. at 21. Akinyemi is correct. Our Supreme Court recently held that, "in the habitual offender phase, the jury may determine both whether the defendant has the convictions alleged and whether those convictions make the defendant a habitual offender as a matter of law." *Harris v. State*, 211 N.E.3d 929, 937 (Ind. 2023).[5] While this case does not involve a jury trial, it goes without saying that the trial judge assumes the role of fact-finder during a bench trial. Thus, we hold that, as in a jury trial, the trial judge in a bench trial has the responsibility to decide both whether a defendant has the requisite prior convictions and whether those convictions make the defendant a habitual offender as a matter of law.

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[5] We note that the trial court did not have the benefit of the *Harris* decision at the time it held the bench trial on Akinyemi's habitual offender charge. *Harris* was decided on June 29, 2023, more than four months after Akinyemi's bench trial.

[20] Here, Akinyemi contends that the court erroneously believed that it must adjudicate him a habitual offender if he had the requisite prior felonies and that the court would not have entered an adverse judgment against him if it believed it had the discretion to refrain from doing so. To support his assertion, Akinyemi relies on the court's statements that "jury nullification arguments are not allowed," that the court said that "with much disappointment because . . . it should be" and that nullification is "inconsistent with what the law requires." Tr. Vol. 2 at 215; Tr. Vol. 3 at 45. The portion of the transcript Akinyemi relies on clearly indicates that the court believes nullification arguments should be allowed. But even if the court incorrectly believed that it lacked the power to refrain from entering an adverse judgment, Akinyemi has not demonstrated that the court would have declined to adjudicate him a habitual offender.

[21] Indeed, at no point did the court say that it would nullify *his* status as a habitual offender if it had the authority to do so. Rather, we agree with the State that the court's statement that nullification is "inconsistent with what the law requires" should be interpreted as the court's statement that nullification *in this case* was not justified. We find support for that interpretation in the court's sentencing statement, during which it identified Akinyemi's criminal history as including three prior felonies, two of which "are specifically violent." Tr. Vol 3 at 75. The court also noted that Akinyemi has "had probation revocations where he's been given the opportunity to address things in a less . . . restrictive fashion and has not been successful at doing that." *Id*. Stated differently, it seems clear that the court relied on Akinyemi's criminal history—including two

prior violent felonies and failed attempts at alternate placement—and concluded that, based on those facts, nullification of the habitual offender enhancement was not appropriate. And the court came to that conclusion despite Akinyemi's arguments that he was "not the worst of the worst" and that "this is not an appropriate use of the habitual offender enhancement." *Id*. at 44.

[22] Further, we acknowledge that the court made comments during the sentencing hearing that "our system isn't built to handle" Akinyemi's mental health issues, that incarceration will not "necessarily meet[] the goals of reform," and that "locking [Akinyemi] up" would "probably compound the issues" that he has instead of solving them. *Id*. at 78. But those statements are merely a commentary on the court's belief that the State has not adequately funded mental health treatment for our incarcerated individuals. Nothing about those comments demonstrates that the court would not have adjudicated him a habitual offender if it believed it had the authority to refrain from doing so. Akinyemi has not demonstrated that the court would have nullified his adjudication. We therefore affirm his adjudication as a habitual offender.

Conclusion

[23] The State presented sufficient evidence to demonstrate that Akinyemi committed robbery, as a Level 3 felony. In addition, the court did not commit fundamental error when it allowed the State to file a habitual offender charge two days prior to trial. Finally, while we hold that the trial judge in a bench trial has the responsibility of determining both whether a defendant has the

prior requisite felonies and whether those felonies make him a habitual offender, Akinyemi has not demonstrated that, even if the court knew it could nullify his habitual offender adjudication, it would have. We therefore affirm Akinyemi's conviction and habitual offender adjudication.

[24] Affirmed.

May, J., and Felix, J., concur.