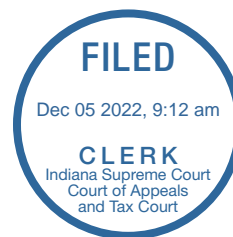


MEMORANDUM DECISION

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

Edward D. Jackson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

December 5, 2022

Court of Appeals Case No.
22A-CR-568

Appeal from the
Marion Superior Court

The Honorable
Cynthia Oetjen, Judge

Trial Court Cause No.
49D30-2006-F2-19689

Vaidik, Judge.

Case Summary

- [1] Edward D. Jackson appeals his convictions for several drug offenses and the finding that he is a habitual offender. He argues the trial court committed fundamental error in a preliminary instruction to the jury. We disagree and affirm.

Facts and Procedural History

- [2] The State charged Jackson and his brother with two counts each of Level 2 felony dealing in a narcotic drug and one count each of Level 2 felony dealing in methamphetamine, Level 4 felony dealing in cocaine, and Level 4 felony unlawful possession of a firearm by a serious violent felon. The State also alleged that Jackson is a habitual offender.
- [3] The brothers were tried together in a single jury trial. Before opening statements, the court gave the jurors preliminary instructions both in writing and orally. The instruction at issue in this appeal—Preliminary Instruction 5—identified the charges against each brother. Appellant’s App. Vol. II p. 147. As part of the instruction, the jury was given a copy of the charging information that had been filed against each defendant. *Id.* at 148-51. The signature block of each information included the name of the elected prosecutor and the electronic signature of the deputy prosecutor trying the case. In addition, each information included the following introductory language before stating the factual allegations underlying the charges: “On this date, the undersigned Deputy

Prosecuting Attorney of the Nineteenth Judicial Circuit, being duly sworn on his/her oath (or having affirmed), says that in Marion County, Indiana . . .” *Id.* at 148, 150. Jackson did not object to Preliminary Instruction 5 or ask for any changes. (It does not appear that his brother challenged the instruction either.) When the court read the instruction to the jury, it omitted “the formal parts,” including the part about the deputy prosecutor “being duly sworn on his/her oath (or having affirmed).” Supp. Tr. pp. 3-4.

[4] On the dealing charges, the jury found Jackson guilty but his brother not guilty. The jury did not reach a verdict on the firearm charge as to either brother. After Jackson admitted to being a habitual offender, the trial court sentenced him to a total of thirty-five years in prison.

[5] Jackson now appeals.

Discussion and Decision

[6] Jackson contends the trial court erred by including an unredacted copy of his charging information as part of Preliminary Instruction 5 because the information states that the deputy prosecutor made the allegations “being duly sworn on his/her oath (or having affirmed).” We normally review a trial court’s jury instructions for abuse of discretion, but because Jackson did not object to Preliminary Instruction 5 in the trial court, he has waived the issue and must show fundamental error. *See Pattison v. State*, 54 N.E.3d 361, 365 (Ind. 2016). Fundamental error is an error so blatant and substantial that the trial court

should take action even without a request or objection from a party. *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014), *reh'g denied*.

- [7] Jackson argues that giving the instruction with the affirmation language included was fundamental error because it signaled to the jury that the deputy prosecutor had already concluded he was guilty, the elected prosecutor endorsed that conclusion, and the trial court accepted the conclusion. He asserts the affirmation language “encouraged the jury to determine [his] guilt based on a circumstance not adduced as proof at trial,” in violation of his right to due process under the Fourteenth Amendment to the U.S. Constitution, and “invaded the province of the jury” in violation of Article 1, Section 19 of the Indiana Constitution, which provides that “the jury shall have the right to determine the law and the facts” in criminal cases. Appellant’s Br. pp. 21-26.
- [8] We rejected a similar fundamental-error claim in *Lynn v. State*, 60 N.E.3d 1135 (Ind. Ct. App. 2016), *trans. denied*. There, the trial court’s Preliminary Instruction 4 included the following affirmation language from the original charging information: “The undersigned affiant does hereby swear or affirm under the penalties of perjury that . . .” *Id.* at 1138. We “strongly advise[d]” redaction of such language, noting it “has no place in jury instructions[.]” *Id.* at 1139. However, we held that the giving of the instruction did not amount to fundamental error:

In addition to Preliminary Instruction 4, the jury was specifically instructed that “[t]he charges which have been filed are the formal methods of bringing the Defendant to Trial. The filing of

charges ... is not to be considered by you as any evidence of guilt.” The jurors were instructed that a person charged with a crime is presumed to be innocent and that the State bore the burden to prove each element of the crime charged beyond a reasonable doubt. The jurors were also told to consider the instructions as a whole and that they were the exclusive judges of the evidence and facts as they found them. Accordingly, we conclude that Preliminary Instruction Number 4 did not invade the province of the jury and that the affirmation language did not so affect the entire charge that the jury was misled.

Id. (citations omitted).

[9] As in *Lynn*, other instructions in this case lead us to conclude that the giving of Preliminary Instruction 5 was not fundamental error. Preliminary Instruction 1 said the jury “should not form or express any conclusion or judgment about the outcome of the case until the court submits the case to you for your deliberations.” Appellant’s App. Vol. II p. 142. Preliminary Instruction 3 and Final Instruction 15 said, “Under the Constitution of Indiana, the jury has the right to determine both the law and the facts.” *Id.* at 145, 175. Preliminary Instruction 4 and Final Instructions 16 and 22 addressed the presumption of innocence and the State’s obligation to overcome it with proof beyond a reasonable doubt. *Id.* at 146, 176, 182. Preliminary Instruction 6 and Final Instruction 23 stated, “The charges that have been filed are the formal method of bringing the defendants to trial. The filing of a charge or the defendant’s arrest is not to be considered by you as any evidence of guilt.” *Id.* at 165, 183. Preliminary Instruction 7 and Final Instruction 25 said the State’s burden to prove the charges beyond a reasonable doubt is “a strict and heavy burden.” *Id.*

at 166, 185. Preliminary Instruction 8 and Final Instruction 24 told the jurors they were “the exclusive judges of the evidence[.]” *Id.* at 167, 184. Final Instruction 14 stated, “You are to consider all of the instructions, both preliminary and final, together. Do not single out any certain sentence or any individual point or instruction and ignore the others.” *Id.* at 174. And perhaps most importantly, Final Instruction 27 provided, “Statements made by the attorneys are not evidence.” *Id.* at 187.

[10] Jackson argues that this case is distinguishable from *Lynn* because the affiant in *Lynn* was “unknown” (i.e., was not named in the instruction), whereas the instruction here identified the affiant as the deputy prosecutor trying the case. Jackson notes that the jurors “saw and heard [the deputy prosecutor] in person as she tried the case for the State” and were allowed to see that the deputy prosecutor “swore or affirmed” the truth of the charges and that this affirmation “was further endorsed by [the elected prosecutor].” Appellant’s Br. pp. 15-16. We are not convinced this distinction matters. Other instructions that were given in this case—detailed above—made it abundantly clear that the charging information and any other statements by the deputy prosecutor were not evidence and that the jury was the ultimate decisionmaker notwithstanding anything the deputy prosecutor said.

[11] Two other facts bolster our conclusion. First, when the court read Preliminary Instruction 5 to the jury, it omitted the affirmation language, explaining it was just a “formal” part of the charging information. Second, the jury found Jackson’s brother not guilty of the dealing charges even though his charging

information also included the affirmation language. This is a solid indication that the affirmation language did not impact the jury’s deliberations.

[12] The giving of Preliminary Instruction 5 did not constitute fundamental error.¹

[13] Affirmed.

Riley, J., and Bailey, J., concur.

¹ Jackson notes that there is a pattern instruction that can be used to inform the jury of the charges against the defendant—Indiana Pattern Criminal Jury Instruction 1.0700—and that it was amended in response to *Lynn* to specifically provide for redaction of affirmation language. “In this case, the State of Indiana has charged the Defendant with [Count 1: *(insert Count 1)*, Count 2: *(insert Count 2)*, etc.] The charge(s) read(s) as follows: _____ [*insert the Charge (with oath or affirmation language redacted)*].” (Emphasis added). For the reasons stated above, the failure to follow this pattern instruction did not amount to fundamental error.