MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Melvin Ray Bell, III,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 5, 2022

Court of Appeals Case No. 21A-CR-2618

Appeal from the Vigo Superior Court

The Honorable Sarah K. Mullican, Judge

Trial Court Cause No. 84D03-2011-F4-3734

Friedlander, Senior Judge.

[1] Melvin Bell appeals his convictions for criminal recklessness and unlawful possession of a firearm by a serious violent felon as well as his adjudication as

an habitual offender, contending that the jury was incorrectly instructed. In the alternative, Bell asserts that remand is necessary to correct errors in both the sentencing order and the abstract of judgment. Finding any instructional error to be harmless but determining that correction of the sentencing documents is necessary, we affirm and remand.

[2] Sydney Hines told her sister, Haven Morgan, that individuals in a blue Jeep had stolen her bag and used her debit card at a gas station. Morgan, Anthony Cheesman (Morgan's fiancé), and Cheesman's brother drove to the gas station to get the Jeep's license plate number so they could provide it to the police. They located the Jeep at the station and began following it.

[3] There were four individuals in the Jeep, who were later identified as Kaylie Vangilder, Kevin Joyner, Bell, and Bell's son. Vangilder drove the Jeep to the parking lot of one of the local high schools. Morgan exited her vehicle and approached the driver's window of the Jeep to request the return of her sister's bag. Cheesman also exited the car to follow Joyner, who had exited the Jeep and was running toward a nearby fence. Cheesman walked toward Joyner and tried "to flag him down and tell him hey, we just want our stuff back. We don't want no confrontation or anything." Tr. Vol. II, p. 116. Joyner jumped down from the fence, pulled a gun from his waistband, pointed it at Cheesman's head, and asked, "[D]o you want to die, bitch?" *Id.* at 117. Cheesman put his hands in the air and retreated to his vehicle, but Joyner chased after him and punched him in the face through the open car window.

[4] Cheesman could hear someone shouting, "shoot him, shoot him, shoot him." *Id.* at 118. He started to drive away but then realized Morgan was not yet back in the car. As someone from the Jeep continued to shout, "shoot them," Cheesman watched Joyner, who was still armed, run across the parking lot toward the Jeep where Morgan stood. *Id.* at 119. To protect Morgan, Cheesman circled his car around and struck Joyner, who rolled across the hood of the car and fell to the pavement. Bell retrieved Joyner's gun from where it had landed on the pavement and fired it at Cheesman's car. Cheesman instructed his brother to get down as Morgan ran toward the car. Before Morgan made it to the car, a bullet entered a back window and went through the headrest where Cheesman's brother had just been sitting. Morgan was able to get in the car, and they left the parking lot and called the police.

[5] Based upon this incident, the State charged Bell with criminal recklessness as a Level 5 felony; carrying a handgun without a license as a Level 5 felony; obstruction of justice as a Level 6 felony; carrying a handgun without a license as a Class A misdemeanor; unlawful possession of a firearm by a serious violent felon as a Level 4 felony; and being an habitual offender. A jury found Bell guilty of criminal recklessness and carrying a handgun without a license as both a felony and a misdemeanor. Out of the presence of the jury, Bell entered a guilty plea to unlawful possession of a firearm and admitted that he is an habitual offender. On the State's motion at sentencing, the court vacated the judgment of conviction as to both counts of carrying a handgun without a

license. The court then sentenced Bell to an aggregate executed sentence of sixteen years. Bell now appeals.

[6] Bell presents two issues for our review, which we restate as:

1. Whether the trial court erred in instructing the jury on self-defense; and
2. Whether the sentencing documents need correction.

1. Jury Instruction

[7] Bell contends the trial court erred in instructing the jury on self-defense, and as a result, his convictions should be reversed.[1] Instructing the jury lies solely within the discretion of the trial court, and we will reverse only upon an abuse of that discretion. *Elliott v. State*, 786 N.E.2d 799 (Ind. Ct. App. 2003). Where a defendant challenges an instruction as an incorrect statement of the law, we apply a de novo standard of review. *Townsend v. State*, 45 N.E.3d 821 (Ind. Ct. App. 2015), *trans. denied* (2016). To obtain a reversal, a defendant must demonstrate that the instructional error prejudiced his substantial rights. *Id.* Instructional error will result in reversal if the reviewing court cannot say with complete confidence that a reasonable jury would have rendered a guilty verdict

[1] We note that Bell failed to include the jury instruction in his brief as required by Appellate Rule 46(A)(8)(e). That rule mandates: "When error is predicated on the giving or refusing of any instruction, the instruction shall be set out verbatim in the argument section of the brief with the verbatim objections, if any, made thereto." Failure to comply with this mandate results in waiver of the issue on appeal. *Davis v. State*, 892 N.E.2d 156 (Ind. Ct. App. 2008). Nevertheless, Bell included the instruction in his appendix, and we will address the issue.

had the instruction not been given. *Id.* Instructional error is harmless, therefore, where the jury could not properly have found otherwise. *Id.*

[8] A claim of self-defense can serve as a legal justification for an otherwise criminal act. *Burnside v. State*, 858 N.E.2d 232 (Ind. Ct. App. 2006). Our self-defense statute provides that a person is not justified in using force if the person is committing a crime. Ind. Code § 35-41-3-2(g)(1) (2019). Our Supreme Court has specifically clarified that a person is not justified in using force if he is committing a crime that has an "immediate causal connection" to the confrontation. *Mayes v. State*, 744 N.E.2d 390, 394 (Ind. 2001).

[9] Most recently, in *Gammons v. State*, 148 N.E.3d 301 (Ind. 2020), the Court confirmed its holding in *Mayes*. There, facing charges of attempted murder and carrying a handgun without a license, Gammons asserted self-defense, and the trial court instructed the jury that "'a person may not use force if,' among other things, 'he is committing a crime that is directly and immediately related to the confrontation.'" *Id.* at 303 (quoting App. Vol. III, p. 110). On appeal, Gammons argued instructional error based on *Mayes*. The Court agreed, reiterated that self-defense is barred only when there is an immediate causal connection between the crime and the confrontation, and rejected the rephrasing of the defense using the "but for" language (i.e., but for the defendant committing a crime, the confrontation would not have occurred). The Court determined that, because Gammons maintained that he shot only until his aggressor retreated, it could not say with certainty that the jury would have convicted Gammons without hearing the erroneous instruction.

[10] Bell relies on *Gammons* in support of his argument. At Bell's trial, the court instructed the jury that self-defense/defense of another was at issue and that "a person may not use force if [ ] he is committing a crime that is directly and immediately connected to the confrontation. [I]n other words, for the Defendant to lose the right of self-defense, the jury must find that, but for the Defendant's commission of a separate crime, the confrontation resulting [in] injury to Kevin Joyner and/or Anthony Cheesman would not have occurred." Appellant's App. Vol. 2, p. 119. Bell asserts this language is erroneous and his convictions should be reversed.

[11] The facts of this case, however, differ from those in *Gammons*. Whereas Gammons maintained that he fired at his aggressor only until he retreated, the evidence here showed that Bell fired at a retreating victim and a retreating vehicle. Morgan testified that Bell was shooting as she was running back to the car and that, even after she was in the car, Bell fired one or two more shots. She was asked, "And, when you got in the vehicle, was the vehicle ever pointed in the direction of either of the individuals that were in the parking lot?" Tr. Vol. II, p. 84. Morgan responded, "No. We were going the opposite way, to get as far away as possible." *Id.* at 85. Cheesman also testified that Bell was shooting at the car as Morgan was running to it. Additionally, the parent of a high school volleyball player was in the parking lot at the time of this incident and testified at trial that Bell fired the gun at Cheesman's car "as the car was fleeing." *Id.* at 24. In response to the question, "Was the car moving north

when the shots were fired?" she responded, "Oh yeah. I was, it was speeding out of the parking lot. It was trying to leave." *Id.* at 28.

[12] While we agree the language of the instruction used at Bell's trial is an imprecise statement of the law and not favored, instructional error is harmless unless we can say with complete confidence that a reasonable jury would have rendered a guilty verdict had the instruction not been given. *See Townsend*, 45 N.E.3d 821. When danger of death or great bodily harm ceases, the right of self-defense/defense of others ceases with it. *Fuentes v. State*, 952 N.E.2d 275 (Ind. Ct. App. 2011), *trans. denied*. Accordingly, evidence of shooting following incapacitation or retreat of the purported aggressor has been found to undercut a claim of self-defense. *Id.* Given the testimony at Bell's trial that he was firing a gun at people who were fleeing, we conclude the jury could not have properly found that Bell acted in self-defense and therefore any instructional error that occurred here was harmless.

2. Sentencing Documents

[13] Bell asserts, and the State concedes, that there are inconsistencies between the trial court's oral sentencing statement and its written sentencing order and abstract of judgment.

[14] When oral and written sentencing statements conflict, we examine them together to determine the intent of the sentencing court. *Skipworth v. State*, 68 N.E.3d 589 (Ind. Ct. App. 2017). If the court's intent is unambiguous, we may remand the case for correction of clerical errors. *Id.*

[15] Our review of the trial court's oral sentencing statement reveals that the written sentencing order and the abstract of judgment both contain clerical errors. Accordingly, the sentencing order and abstract of judgment should be corrected to reflect the correct sentence of six years executed for the conviction of criminal recklessness served concurrently with twelve years, ten of which are executed, for the conviction of unlawful possession of a firearm by a serious violent felon, followed by an habitual offender enhancement of ten years, six of which are executed, for an aggregate sentence of twenty-two years with sixteen years executed.

[16] Based on the foregoing, we conclude that any instructional error was harmless and that the sentencing order and abstract of judgment contain clerical errors such that remand is necessary for correction of those documents.

[17] Affirmed and remanded.

Bradford, C.J., and Tavitas, J., concur.