

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Khalil Payne,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 13, 2022

Court of Appeals Case No.
21A-CR-2813

Appeal from the Tippecanoe
Superior Court

The Honorable Thomas Busch,
Senior Judge

Trial Court Cause No.
79D02-2009-F4-56

Robb, Judge.

Case Summary and Issue

- [1] Following a jury trial, Khalil Payne was convicted of unlawful possession of a firearm by a serious violent felon, a Level 4 felony, and found to be an habitual offender. Payne appeals his conviction, raising one issue for our review which we restate as whether the trial court abused its discretion when it provided the jury with a supplemental instruction on possession during deliberations. Concluding the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

- [2] On September 1, 2020, Taylor Gallien called 9-1-1 and reported that Payne was at her house and threatening to hurt her. When police arrived, Gallien told police that Payne was in her home with a firearm. However, when Payne exited the home, he did not have a firearm on his person. Gallien then brought police a backpack and removed a Taurus Spectrum 380 handgun. Gallien had placed the gun in the backpack, but she testified that the backpack belonged to Payne. The handgun was subsequently tested for DNA and Payne's DNA was found on the grips, trigger, slide, and magazine. Gallien testified that prior to providing the handgun to the police, she had seen Payne take the gun out of his pocket, remove the clip, and place the gun in a pair of shoes that he had already taken off. She also testified that the gun was not hers, she never gave Payne permission to have a gun in her home, and she had never seen the gun before Payne brought it to her house.

- [3] The State charged Payne with Count I, carrying a handgun without a license, a Class A misdemeanor; Count II, unlawful possession of a firearm by a serious violent felon, a Level 4 felony; and Count III, carrying a handgun without a license, a Level 5 felony. The State also alleged that Payne was an habitual offender.
- [4] A bifurcated jury trial was conducted in November 2021. At the conclusion of the initial phase, the jury found Payne not guilty of carrying a handgun without a license as a Class A misdemeanor. As a result, the charge of carrying a handgun without a license as a Level 5 felony was dismissed. Notwithstanding the outcome of the initial phase, Payne admitted to being a serious violent felon and an habitual offender prior to the start of the second phase. In the second phase, the jury was asked to determine only whether Payne possessed a firearm. During closing arguments, the State provided the jury with definitions of actual and constructive possession. However, during final instructions, although the trial court instructed the jury that it needed to determine whether the State proved beyond a reasonable doubt that Payne “possessed a firearm[,]” the trial court did not instruct the jury as to the definition of possession. Transcript, Volume 2 at 166.
- [5] During deliberations, the jury submitted the following question to the trial court, “Is ‘possession’ the same as ownership? If not, please clarify the definition of ‘possession.’” Appellant’s Appendix, Volume II at 61. In response, the trial court determined that it was an omission “to leave [an instruction on possession] out” and decided to instruct the jury on both actual

and constructive possession. Tr., Vol. 2 at 169. Payne objected to the instruction because he believed the pattern instruction the trial court intended to provide required additional language regarding the definition of actual and constructive possession. *See id.* at 169-70. The trial court overruled Payne's objection.

[6] The trial court then instructed the jury as follows:

Okay, phase two supplemental final instructions. The word possess means to own or to exert control over. The word possession can take on several different but related meanings. There are two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control of a thing at a given time is then in actual possession of it. A person who although not in actual possession knowingly has both the power and the intention at a given time to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it. Possession may be sole or joint. [If] [o]ne person alone has actual or construct[ive possession] of a thing, then possession is sole. If two or more person[s] share actual or constructive possession of a thing, then possession is joint. Possession may be actual or constructive and either alone or jointly with others. 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 172-73; *see also* Appellant's App., Vol. II at 62-64. The trial court also indicated that copies of the supplemental instruction would be provided to the jury by the bailiff.

[7] The jury found Payne guilty of possession of a firearm. Given Payne’s earlier admissions, the trial court entered judgment of conviction for unlawful possession of a firearm by a serious violent felon, sentenced Payne to serve six years for this conviction, and enhanced his sentence by an additional six years for the habitual offender finding. Two years of his sentence were suspended to probation. Payne now appeals.

Discussion and Decision

[8] We typically review the trial court’s manner of instructing the jury for an abuse of discretion. *Ramirez v. State*, 174 N.E.3d 181, 195 (Ind. 2021). It is well-settled that jury instructions are to be considered as a whole and not in isolation. *McDowell v. State*, 102 N.E.3d 924, 936 (Ind. Ct. App. 2018), *trans. denied*. Therefore, to constitute an abuse of discretion, the instructions taken as a whole must misstate the law or otherwise mislead the jury. *Id.* at 936-37. Failure to object to a jury instruction on a specific ground at trial results in waiver of that same objection on appeal. *Ramirez*, 174 N.E.3d at 198.

[9] At trial, Payne objected to the trial court’s supplemental jury instruction because he believed the pattern instruction the trial court intended to provide required more information regarding the definition of actual and constructive possession. *See* Tr. Vol. 2 at 169-70. On appeal, Payne now argues that the trial court “committed reversible error by failing to re-read the entire set of final instructions contemporaneously with the giving of the additional instruction when asked a question by the jury.” Appellant’s Brief at 13. Payne has

changed the basis of his objection entirely. Accordingly, Payne’s argument is waived.

[10] Waiver notwithstanding, Payne is unable to show that the manner in which the trial court provided supplemental instruction to the jury amounts to an abuse of discretion. According to Indiana Code section 34-36-1-6, “If, after the jury retires for deliberation . . . the jury desires to be informed as to any point of law arising in the case[,] the jury may request the officer to conduct them into court, where the information required shall be given[.]” The record shows the trial court’s final instructions with respect to Count II informed the jury that the State was required to prove beyond a reasonable doubt that Payne “possessed a firearm.” Tr., Vol. 2 at 166. However, no subsequent instruction defined possession and during deliberations, the jury asked, “Is ‘possession’ the same as ownership? If not, please clarify the definition of ‘possession.’” Appellant’s App., Vol. II at 61. In response, the trial court provided a definition of possession *and* instructed the jury “to consider all of the instructions, both preliminary and final together [and] [d]o not single out any certain sentence or any individual point or instruction and ignore the others.” Tr., Vol. 2 at 172-73.

[11] Although the proper procedure for responding to an instructional problem during jury deliberations is for the trial court to call the jury back into open court and reread all instructions given to it prior to deliberations, without emphasizing any one of them and without further comment, *Campbell v. State*, 19 N.E.3d 271, 275 (Ind. 2014), we do not agree with Payne’s argument that

the trial court's failure to reread "the entire set of final instructions contemporaneously" with the supplemental instruction amounts to reversible error. Appellant's Br. at 13. Our supreme court has generally recognized that trial courts are given "greater leeway to facilitate and assist jurors in the deliberative process, in order to avoid mistrials." *Campbell*, 19 N.E.3d at 275. (internal quotations omitted). Here, in response to a gap in the instructions, the trial court instructed the jury on the definition of possession. It did not provide any further comment on possession or ownership and although it did not reread the entirety of its final instructions, the trial court did direct the jury to consider the supplemental instruction "together" with the preliminary and final instructions. Tr., Vol. 2 at 172-73. Accordingly, we cannot say the trial court abused its discretion in providing the jury with the supplemental instruction.

[12] To the extent Payne argues that our opinion in *Graves v. State*, 714 N.E.2d 724 (Ind. Ct. App. 1999), requires we remand this case for a new trial, *Graves* is distinguishable from the present case. *Graves* was on trial for robbery. Evidence at trial demonstrated that although *Graves* left the victim's home without taking any of the victim's property, his accomplices took a bag of the victim's items. After deliberations began, the jury asked the trial court whether *Graves* had to "personally take the property to be guilty of robbery[.]" *Id.* at 725. The State suggested that the trial court only read the jury an instruction on accomplice liability. *Graves* objected and argued that if the trial court were to give an instruction on accomplice liability, the trial court should also reread the entire set of final instructions including the additional instruction. Over

Graves' objection, the trial court provided only an instruction on accomplice liability and Graves was convicted of robbery. On appeal, we reversed Graves' conviction, reasoning that by not rereading the entire set of final instructions, the trial court "not only placed special significance on the particular issue of Graves' culpability with regard to the charge of robbery, but also the lone, additional instruction suggests a resolution to the jury's predicament evidenced by their note." *Id.* at 727. Accordingly, the "potential for prejudice [was] great." *Id.* at 726. The same cannot be said for Payne.

[13] Here, the trial court instructed the jury on the definition of possession but unlike in *Graves*, limited any potential prejudice by also instructing the jury to consider its supplemental instruction in combination with the preliminary and final instructions already provided to it and to not single out any specific sentence or point of law while ignoring others. Without evidence to the contrary, we presume that jurors follow the instructions they are given. *Gibson v. State*, 43 N.E.3d 231, 241 n.5 (Ind. 2015), *cert. denied*, 137 S.Ct. 54 (2016). Therefore, the trial court's supplemental instruction did not amount to an abuse of discretion.

Conclusion

[14] The trial court did not abuse its discretion in providing the supplemental instruction to the jury after deliberations had begun. Accordingly, we affirm.

[15] Affirmed.

Bradford, C.J., and Weissmann, J., concur.