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IN THE COURT OF APPEALS OF INDIANA

Andrew Phillip McQuinn,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 19, 2022

Court of Appeals Case No. 21A-CR-1637

Appeal from the Johnson Superior Court

The Honorable Peter D. Nugent, Judge

Trial Court Cause No. 41D02-2002-F1-3

Weissmann, Judge.

[1] Andrew McQuinn fired a handgun in the parking lot of his apartment complex as a police officer arrived to investigate a report of domestic violence by McQuinn. The gunfire earned him an attempted murder charge. McQuinn was also charged with unlawful possession of a firearm by a serious violent felon (SVF), domestic battery, theft of a handgun, and carrying a handgun without a license.

[2] Amid disputed evidence as to McQuinn's intent in firing the gun, the trial court instructed the jury that the direction of the gunfire could be "substantial evidence" of McQuinn's intent to kill. Under the specific facts of this case, we find this instruction invaded the province of the jury to determine the weight of the evidence and undermined McQuinn's defense that he did not have the specific intent required for attempted murder. We also find that McQuinn did not personally waive his right to a jury trial before he purportedly pleaded guilty to unlawful possession of a firearm by a SVF. We do not find, however, that McQuinn's dual convictions for carrying a handgun without a license and unlawful possession of a firearm by a SVF constitute two punishments for the same criminal act.

[3] Accordingly, we reverse McQuinn's convictions for attempted murder and unlawful possession of a firearm by a SVF and remand for a new trial on those charges. We affirm his remaining convictions.

Facts

[4] After a day of heavy drinking, a highly intoxicated McQuinn smacked his girlfriend, Crystal Scotten, in the face, grabbed her by the throat, and threw her against a table inside their apartment. McQuinn also stole Scotten's handgun and, upon learning the police had been called, told Scotten he was going to have a "shootout with the cops." Tr. Vol. II, p. 148. McQuinn then left the apartment.

[5] When Bargersville Police Officer Klint Brown arrived at the apartment complex, he immediately observed McQuinn standing on the far side of the parking lot. Moments later, McQuinn fired six shots. Officer Brown heard the first few shots and saw muzzle flashes from the remainder. Fearing for his safety, he quickly reversed his vehicle away from the scene. Meanwhile, McQuinn put his hands up and laid down on the ground to be taken into custody.

[6] Police later found the gun and six shell casings in the general area where McQuinn had been standing but no fired bullets or bullet holes in Officer Brown's vehicle. Police also found no evidence of bullet strikes in the general area where Officer Brown's vehicle was located when McQuinn fired the gun.

[7] The State charged McQuinn as follows:

- Count I, attempted murder, a Level 1 felony;
- Count II, unlawful possession of a firearm by a SVF, a Level 4 felony;
- Count III, domestic battery, a Level 6 felony;

- Count IV, theft of a firearm, a Level 6 felony; and
- Count V, carrying a handgun without a license, a Class A misdemeanor.

[8] At trial, Officer Brown testified that, based on the muzzle flashes he observed during the shooting, McQuinn appeared to have fired the gun "directly" at him. Tr. Vol. II, p. 187. Another witness similarly testified that the muzzle flashes "were pointing directly at the officer." *Id.* at 214. And two corrections officers who transported McQuinn to jail testified to statements McQuinn made shortly after his arrest. According to one officer, McQuinn loudly proclaimed, "[W]e shoot at police around here. Attempted murder, level one." Tr. Vol. III, p. 12. The other officer recalled McQuinn boasting, "[I] tried to kill a cop tonight, because that's what we do." *Id.* at 27.

[9] For his part, McQuinn testified that he did not shoot at Officer Brown or intend to kill him. Rather, he was "overwhelmed with life" and fired the gun in the air "to escape everything." *Id.* at 85. When confronted with his prior statements indicating an intent to kill, McQuinn explained, "I was being a jackass. Just talking." *Id.* at 86. Defense counsel likewise argued that McQuinn said "all kinds of crazy things" because he was drunk. *Id.* at 108.

[10] The jury found McQuinn guilty on Counts I, III, IV, and V, after which McQuinn pleaded guilty to Count II. The trial court entered convictions on all five counts and sentenced McQuinn to a total of 30 years in the Indiana Department of Correction.

Discussion and Decision

I. Attempted Murder

[11] McQuinn appeals his conviction for attempted murder, arguing that the trial court erred in instructing the jury on that charge. The crime of attempted murder occurs when a person, acting with the specific intent to kill, engages in conduct that constitutes a substantial step toward killing another person. Ind. Code §§ 35-42-1-1(1), -41-5-1(a). McQuinn challenges one of the jury instructions on specific intent, which stated, in pertinent part:

> Discharging a weapon in the direction of a victim can be substantial evidence from which the jury could infer intent to kill.

Tr. Vol. III, p. 105; App. Vol. II, p. 95.

[12] "We generally review a trial court's jury instruction for an abuse of discretion." *Batchelor v. State*, 119 N.E.3d 550, 554 (Ind. 2019). "The trial court abuses its discretion 'when the instruction is erroneous and the instructions taken as a whole misstate the law or otherwise mislead the jury.'" *Keller v. State*, 47 N.E.3d 1205, 1208 (Ind. 2016) (quoting *Isom v. State*, 31 N.E.3d 469, 484 (Ind. 2015)). However, "we will reverse a conviction only if the appellant demonstrates that the instruction error prejudices his substantial rights." *Treadway v. State*, 924 N.E.2d 621, 636 (Ind. 2010).

A. Erroneous Instruction

[13] McQuinn asserts several errors with the challenged instruction, including that it invaded the province of the jury by unduly emphasizing the direction in which he fired the gun. We find this issue dispositive.

[14] "[T]he Indiana Constitution protects the province of the jury in criminal trials . . . 'to determine the law and the facts.'" *Keller*, 47 N.E.3d at 1208 (quoting Ind. Const. art. I, § 19). "In performing this factfinding function, the jury must consider *all* the evidence presented at trial." *Ludy*, 784 N.E.2d at 461 (emphasis in original). The jury also has the exclusive duty "to determine the weight to be given each item placed in evidence." *Keller*, 47 N.E.3d at 1208 (cleaned up). "[A jury] instruction that invades this province by inappropriately emphasizing certain facts is erroneous and misleads the jury." *Id.*; *accord Ludy*, 784 N.E.2d at 461 ("Instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved.").

[15] For instance, in *Dill v. State*, 741 N.E.2d 1230 (Ind. 2001), our Supreme Court rejected the following instruction, finding it unduly emphasized the defendant's flight after an alleged burglary: "Flight and other actions calculated to hide a crime, though not proof of guilt, are evidence of consciousness of guilt and are circumstances which may be considered by you along with other evidence." *Id.* at 1232.

[16] In *Ludy v. State*, 784 N.E.2d 459 (Ind. 2003), the Court similarly found that the following instruction unfairly focused the jury's attention on the victim's

testimony: "A conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt." *Id.* at 460.

[17] And in *Ham v. State*, 826 N.E.2d 640 (Ind. 2005), the Court determined that the following instruction unnecessarily emphasized an OWI defendant's refusal to take a chemical breath test: "Defendant's refusal to submit to a chemical test may be considered as evidence of intoxication." *Id.* at 641.

[18] Like the instructions in *Dill*, *Ludy*, and *Ham*, McQuinn's challenged instruction unnecessarily emphasized a particular evidentiary fact—the direction in which he fired the gun. Moreover, the instruction amplified the potential weight of this fact by stating it could be "substantial evidence" of McQuinn's intent to kill. *See Substantial*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/substantial (last visited September 18, 2022) (defining "substantial" as "important," "essential," "considerable in quantity," and "significantly great"); *Substantial*, *The Am. Heritage Dictionary*, https://www.ahdictionary.com/word/search.html?q=substantial (last visited Sept. 18. 2022) (defining "substantial" as "[c]onsiderable in importance, value, degree, amount, or extent").

[19] We further observe that the challenged instruction is derived from case law addressing an appellate issue—sufficiency of the evidence—not the facts to be determined by a jury at trial. *See Leon v. State*, 525 N.E.2d 331, 332 (Ind. 1988) (finding sufficient evidence of attempted murder because "[d]ischarging a

weapon in the direction of a victim is substantial evidence from which the jury could infer intent to kill"); *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008) (finding insufficient evidence of attempted murder but recognizing that "firing a gun in the direction of an individual is substantial evidence from which a jury may infer intent to kill").

[20] Our Supreme Court has long recognized that "[a]ppellate review of the sufficiency of the evidence . . . will 'rarely, if ever,' be an appropriate basis for a jury instruction[] because the determination is fundamentally different." *Keller*, 47 N.E.3d at 1208 (quoting *Garfield v. State*, 74 Ind. 60, 64 (1881)). "A trial court jury is not reviewing whether a conviction is supported[; it] is determining in the first instance whether the State proved beyond a reasonable doubt that a defendant committed a charged crime." *Id.* (quoting *Ludy*, 784 N.E.2d at 461).

[21] The challenged instruction exemplifies the pitfall noted by the Supreme Court. In the sufficiency context, "substantial evidence" is generally defined as "[e]vidence that a reasonable mind could accept as *adequate* to support a conclusion." *Substantial Evidence*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). But a jury is composed of laypersons. We therefore consider the plain and ordinary meaning of the word "substantial" in the context of a jury instruction. *Supra* ¶ 18.

[22] In this case, the jury was instructed that "[d]ischarging a weapon in the direction of a victim can be substantial evidence from which the jury could infer intent to kill." Tr. Vol. III, p. 105; App. Vol. II, p. 95. This instruction unduly

emphasized the direction in which McQuinn fired the gun and encouraged the jury to give it considerable weight—all at the expense of conflicting evidence. Because the instruction invaded the province of the jury, it was improper.

B. Prejudice to Substantial Rights

[23] Our finding that that the challenged instruction was erroneous does not end our inquiry. We also must determine whether giving the instruction prejudiced McQuinn's substantial rights. *See Treadway*, 924 N.E.2d at 636. "Errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise." *Dill*, 741 N.E.2d at 1233. However, "[a]n instruction error will result in reversal when the reviewing court cannot say with complete confidence that a reasonable jury would have rendered a guilty verdict had the instruction not been given." *Id.* (internal quotation omitted).

[24] Here, the State presented sufficient evidence of McQuinn's intent to kill by showing that he fired a gun in Officer Brown's direction and made incriminating statements to the corrections officers who transported him to jail (*e.g.*, "[I] tried to kill a cop tonight, because that's what we do."). McQuinn, however, countered this evidence by showing that police found no bullet holes in or around Officer Brown's vehicle and by specifically testifying that he was not trying to kill the officer. McQuinn further explained that his incriminating statements to the corrections officers were mere bluster.

[25] Though the State's evidence may seem more compelling, this is not a sufficiency review. A properly instructed jury could have found that McQuinn did not intend to kill Officer Brown based on the evidence McQuinn presented at trial.[1] More importantly, the jury could have found reasonable doubt on the issue. But the challenged instruction emphasized the direction in which McQuinn fired the gun as "substantial" (*i.e.*, "significantly great") evidence of his intent to kill. *See* supra ¶ 18. In doing so, the instruction prompted the jury to find that McQuinn intended to kill Officer Brown even if it believed McQuinn's testimony that he did not.

[26] Because we are not completely confident the jury would have found McQuinn guilty had it been properly instructed, we must conclude that the challenged instruction prejudiced McQuinn's substantial rights. We therefore reverse his conviction for attempted murder and remand for a new trial on that charge.

II. Unlawful Possession of a Firearm by a SVF

[27] McQuinn appeals his conviction for unlawful possession of a firearm by a SVF, arguing that the trial court erred in accepting his guilty plea on that charge because he never waived his right to jury trial. We agree.

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[1] Notably, the intent to kill is not the only intent that can be inferred from discharging a weapon in the direction of a victim. *See Straub v. State*, 567 N.E.2d 87, 92 (Ind. 1991) ("Intent to commit battery may be inferred from the deliberate use of a deadly weapon in a manner calculated to strike another person."); *see generally Richeson v. State*, 704 N.E.2d 1008, 1010 (Ind. 1998) (discussing the problem of "intent ambiguity" in attempted murder cases).

[28] "The Indiana Constitution guarantees the right to jury trial, which may be waived by one, and only one, person—the defendant." *Horton v. State*, 51 N.E.3d 1154, 1155 (Ind. 2016); *see* Ind. Const. art. 1, § 13. "Unless the defendant personally communicates to the judge a desire to waive that right, he must receive a jury trial." *Horton*, 51 N.E.3d at 1155. Whether a jury trial waiver was constitutional is a question of law we review de novo. *Id.*

[29] Here, the trial court bifurcated the proceedings on the charge of unlawful possession of a firearm by a SVF. During the second phase, the following exchange occurred between the trial court and McQuinn:

> THE COURT: Ladies and gentlemen, typically in a situation as this, your job would be over, however, because the State has alleged in count two that Mr. McQuinn has a prior, which would elevate count 2 to a Level 4 felony, we may need to proceed on that, let me check, are you ready to proceed on that [defense counsel]?
>
> [DEFENSE COUNSEL]: Yes[,] Your Honor.
>
> THE COURT: Okay, how do you want to proceed on that, sir?
>
> [DEFENSE COUNSEL]: At this time, Mr. McQuinn would like to plead guilty to the Level 4 felony.
>
> THE COURT: Okay, Mr. McQuinn?
>
> MR. MCQUINN: Yes.
>
> THE COURT: You've previously been sworn, sir, is that correct, sir?
>
> MR. MCQUINN: Yes sir.

> THE COURT: And you've heard your attorney that you understand today you are here on count two, you've been convicted of the underlying unlawful possession of firearm, is that correct?
>
> MR. MCQUINN: Yes sir.
>
> THE COURT: And to elevate that to a Level 4, the State has alleged that you have a prior conviction for battery resulting in bodily injury to a pregnant woman, Level 5 felony, on February 18, 2015, in Marion County, Indiana, is that correct, sir?
>
> MR. MCQUINN: Yes sir.
>
> THE COURT: And that would have been under cause 49G05-1411-F5-051814. And that's correct, is that right?
>
> MR. MCQUINN: Yes sir.
>
> ***
>
> THE COURT: We will find that he has admitted and accepted that and pled guilty to that, the level, count two will become a Level 4 felony. . . .

Tr. Vol. III, pp. 129-31.

[30] Nowhere in this colloquy did McQuinn personally communicate a desire to waive his right to jury trial. The State contends McQuinn's personal waiver was not necessary because he had just experienced a jury trial, "understood" his rights, and affirmatively indicated that he wished to plead guilty. Appellee's Br. p. 27. The law, however, requires more. *See Horton*, 51 N.E.3d at 1158-59 (declining to make exception to personal waiver requirement in second phase of bifurcated trial based on defendant's experience with jury trial in first phase);

Saylor v. State, 55 N.E.3d 354, 365-67 (Ind. Ct. App. 2016) (holding defendant did not personally waive right to jury trial by pleading guilty in second phase of bifurcated trial after defense counsel advised court that defendant was aware of right to jury trial).

[31] We reverse McQuinn's conviction for Level 4 felony unlawful possession of a firearm by a SVF and remand for a new trial on that charge.

III. Carrying a Handgun Without a License

[32] McQuinn appeals his conviction for carrying a handgun without a license, arguing that his dual convictions for that charge and for unlawful possession of a firearm by a SVF constitute double jeopardy. Because this issue may recur on remand, we opt to address it here.

[33] In *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), our Supreme Court established a multi-step analysis to evaluate substantive double jeopardy claims that arise when a single criminal act implicates multiple statutes. *Id.* at 235. First, we look to the statutes. *Id.* at 248. If they explicitly allow for multiple punishments, no double jeopardy occurs, and our inquiry ends. *Id.* If the statutes are unclear, we apply Indiana's included-offense statutes. *Id.* (citing Ind. Code § 35-31.5-2-168). If neither offense is included in the other, either inherently or as charged, there is no double jeopardy. *Id.* But if one is an included offense, we proceed to the second step and ask whether the defendant's actions are "so compressed in terms of time, place, singleness of purpose, and continuity of action as to

constitute a single transaction." *Id.* at 249. If the facts show only a single crime, judgment may not be entered on the included offense. *Id.* at 256.

[34] At the time of McQuinn's offense, Indiana's carrying a handgun without a license statute (carrying statute) was codified at Indiana Code § 35-47-2-1.[2] The statute generally made it a Class A misdemeanor to "carry a handgun in any vehicle or on or about the person's body without being licensed . . . to carry a handgun." Ind. Code § 35-47-2-1(a), (e) (2020). However, it provided an exception when "the person carries the handgun . . . on property that is owned, leased, rented, or otherwise legally controlled by the person." *Id.* § 35-47-2-1(b). Thus, the location where the defendant carries a handgun was an essential element of the offense. *See Webster v. State*, 64 N.E.3d 919, 922 (Ind. Ct. App. 2016) (recognizing location as essential element of offense based on 2003 carrying statute's "dwelling, property, or place of business" exception); *see also Robertson v. State*, 765 N.E.2d 138, 140 (Ind. 2002) (holding "dwelling" exception in 1999 carrying statute did not apply to common areas serving defendant's apartment).

[35] Indiana's unlawful possession of a firearm by a SVA is codified at Indiana Code § 35-47-4-5 (possession statute). This statute provides: "A serious violent felon who knowingly or intentionally possesses a firearm commits unlawful

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[2] The carrying statute was amended and partially recodified after McQuinn's offense. *See* Ind. Code §§ 35-47-2-1, -1.5 (effective July 1, 2022). Our legislature also regularly amended the statute prior to his offense, but those changes are not material to our analysis. *Compare* Ind. Code § 35-47-2-1 (2020), *with* Ind. Code § 35-47-2-1 (2003), *and* Ind. Code § 35-47-2-1 (1999).

possession of a firearm by a serious violent felon, a Level 4 felony." Ind. Code § 35-47-4-5(c). "As used in this section, 'serious violent felon' means a person who has been convicted of committing a serious violent felony," including Level 5 battery. Ind. Code § 35-47-4-5(a), (b)(4)(B).

[36] Neither the 2020 carrying statute nor the possession statute clearly permits multiple punishments. We therefore turn to our included-offense statute. Indiana Code § 35-31.5-2-168 defines "included offense" as an offense that:

> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;
>
> (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
>
> (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

[37] Our included-offense statute is not implicated here because carrying a handgun without a license is not established by proof of unlawful possession of a firearm by a SVF and vice versa. *See* Ind. Code § 35-31.5-2-168(1). Unlike the 2020 carrying statute, the possession statute does not require proof that a defendant possessed a handgun in a particular location. *Compare* Ind. Code § 35-47-4-5(c), *with* Ind. Code § 35-47-2-1(a), (b) (2020). And unlike the possession statute, the 2020 carrying statute does not require proof that a defendant is a SVA. *Id.* Neither of McQuinn's convictions were for an attempt crime, and the carrying

and possession statutes differ in respects other than degree of harm or culpability. *See* Ind. Code § 35-31.5-2-168(2), (3).

[38] Because neither of McQuinn's offenses—unlawful possession of a firearm by a SVF and carrying a handgun without a license—is included in the other, the prohibition against double jeopardy did not bar McQuinn's conviction for both. We therefore affirm his conviction for carrying a handgun without a license.

IV. Conclusion

[39] In summary, we reverse McQuinn's convictions for attempted murder and unlawful possession of firearm by a SVF, and we remand this case to the trial court for a new trial on those charges. We affirm McQuinn's remaining convictions.

[40] Reversed in part, affirmed in part, and remanded.

Robb, J., and Pyle, J., concur.