

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jacob E. McGee,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 29, 2022

Court of Appeals Case No.
21A-CR-1878

Appeal from the Grant Superior
Court

The Honorable Dana J.
Kenworthy, Judge

Trial Court Cause Nos.
27D02-1301-FB-9
27D02-1906-F1-5

Weissmann, Judge.

- [1] Jacob McGee confessed to shooting another man and to throwing the gun in a river. At his trial for Level 4 felony unlawful possession of a firearm by a serious violent felon, McGee argued that he lied during his confession, emphasizing that police never corroborated his story by searching the river for the gun. To everyone's surprise, however, a detective testified that the river was searched and no gun was found.
- [2] McGee was convicted and now appeals. He argues that his trial strategy was prejudiced by the State's failure to disclose evidence of the river search during discovery and that the State presented insufficient evidence that he possessed a firearm. Concluding that McGee waived the alleged discovery violation and finding sufficient evidence to support his conviction, we affirm.

Facts

- [3] On June 14, 2019, Kenneth Carter was non-fatally shot in the abdomen and leg while outside a Marion, Indiana apartment complex. Carter initially told police that McGee's roommate, Tamika Parker, was the shooter; however, he later identified the shooter as McGee. From the scene, police recovered seven .22 caliber shell casings, six of which were Remington brand. Police also executed a search warrant on McGee and Parker's home, where they found three .22 caliber, Remington brand bullets. Two were in the pocket of a pair of McGee's pants; the third was in a nearby drawer.
- [4] When interviewed by police, McGee initially denied shooting Carter or having access to a gun. But he eventually confessed to the shooting and to throwing the

gun in the Mississinewa river. The State charged McGee with four counts: Level 1 felony attempted murder; Level 3 felony aggravated battery; Level 4 felony unlawful possession of a firearm by a serious violent felon; and Level 6 felony criminal recklessness. Before trial, however, all but the possession of a firearm charge were dismissed at the State's request.

[5] During trial, defense counsel argued that McGee gave a false confession to police. In support of this argument, defense counsel emphasized that police made no effort to corroborate McGee's confession by searching for the gun he allegedly threw in the river. However, on the last day of trial, Detective Mark Stefanatos—the lead investigator on McGee's case—testified that a fire department dive team had, in fact, searched the river and did not find a gun. Detective Stefanatos also indicated that the fire department had a dive report documenting its search.

[6] Defense counsel did not object to Detective Stefanatos' testimony or request any remedial measures from the trial court. Tr. Vol. II, pp. 121-22. Instead, during closing argument, defense counsel informed the jury that the State had not disclosed evidence of the river search during discovery and that McGee had just learned about the search during trial. Defense counsel described the State's late disclosure as "disturbing" and "troubling," and he questioned whether the river search truly happened. *Id.* at 129-30.

[7] A jury found McGee guilty of Level 4 felony unlawful possession of a firearm by a serious violent felon, and the trial court sentenced him to twelve years'

imprisonment, with eight years executed and four years suspended to probation.

[8] After trial, McGee obtained a copy of the fire department's dive report, which stated, in pertinent part: "After completing several passes [of the river], it was determined that the river's current was just too strong to make for an effective search pattern. The dive team leader called off the search due to safety concerns in favor of waiting until the river current slows down a little." App. Vol. II, p. 179 (cleaned up).

[9] Based on the dive report, McGee filed a motion to correct error under Indiana Trial Rule 59. In his motion, McGee acknowledged that the prosecutor was also unaware of the river search prior to Detective Stefanatos' testimony. Still, McGee claimed the State's failure to provide the dive report during discovery "denied [him] a fair trial protected by both the United States Constitution and the Indiana Constitution." *Id.* at 176. The trial court denied McGee's motion without a hearing.

Discussion and Decision

I. Late Disclosed Evidence

[10] On appeal, McGee argues that the trial court erred in denying his motion to correct error because his trial strategy was prejudiced by the State's late disclosure of the river search and dive report. In support of this argument, McGee asserts:

This Court has stated, “[w]hile we do not contradict the line of Indiana cases which holds that a criminal defendant does not have an *absolute* right to discovery which is guaranteed by constitutional due process, we hold that the defendant does have a constitutional right to pretrial discovery. However, the defendant’s interest in discovery must be balanced against the state’s interest in nondisclosure.” *Sturgill v. State*, 497 N.E.2d 1070, 1072 (Ind. Ct. App. 1986) [(internal citations omitted)]. The State, in order to overcome the Defendant’s right to pretrial discovery must show it had a “paramount interest in non-disclosure.” *Id*[.] (quoting *Brandon v. State*, 374 N.E.2d 504, 509 (Ind. 1978)).

Appellant’s Br. pp. 7-8. McGee provides no further guidance as to the nature of his argument.¹ But presuming he alleges a discovery violation by the State, McGee waived the claim by failing to raise it with the trial court.

[11] “Where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated.” *Kindred v. State*, 524 N.E.2d 279, 286-87 (Ind. 1988). A party’s failure to object to and request relief from a discovery error therefore waives the issue for appellate review. *Etienne v. State*, 716 N.E.2d 457, 461 n.2 (Ind. 1999) (“The proper remedy for a violation of a trial court’s discovery order is a continuance, or in extreme circumstances, a mistrial.”).

¹ It is hard to see how McGee was harmed by testimony that no gun was found in the river when his defense partly relied on undermining his confession to throwing a gun into the river.

[12] Because McGee did not object when Detective Stefanatos testified about the river search and dive report at trial, any alleged discovery violation is waived. *See Troxel v. Troxel*, 737 N.E.2d 745, 752 (Ind. 2000) (“A party may not raise an issue for the first time in a motion to correct error or on appeal.”).

II. Sufficiency of the Evidence

[13] McGee also argues that the State presented insufficient evidence to support his conviction for Level 4 felony unlawful possession of a firearm by a serious violent felon. When reviewing the sufficiency of the evidence, we do not reweigh evidence or judge witness credibility. *Craig v. State*, 883 N.E.2d 218, 222 (Ind. Ct. App. 2008). We view all evidence and reasonable inferences drawn therefrom in a light most favorable to the conviction and will affirm if there is substantial evidence of probative value from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

[14] To convict McGee of Level 4 felony unlawful possession of a firearm by a serious violent felon, the State was required to prove that McGee is (1) a serious violent felon who (2) knowingly or intentionally (3) possessed a firearm. Ind. Code § 35-47-4-5(c). Before trial, McGee stipulated that he was a serious violent felon based on a 2013 conviction for Class B felony dealing in cocaine or narcotic drug. At trial, the State played a video recording of McGee’s police interview, during which McGee confessed to possessing a firearm, using the firearm to shoot Carter, and throwing the firearm in the river. The State also presented evidence that Carter identified McGee as the shooter as well as

physical evidence connecting McGee with the shooting. All of this evidence proves beyond a reasonable doubt that McGee knowingly or intentionally possessed a firearm.

[15] On appeal, McGee complains of inconsistencies in his statements to police and that Carter initially identified Parker as the shooter. But this is simply a request for us to reweigh the evidence. We will not. *See Craig*, 883 N.E.2d at 222-23.

[16] The judgment of the trial court is affirmed.

Najam, J., and Vaidik, J., concur.