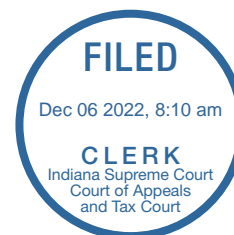


MEMORANDUM DECISION

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

Treonte D. Cross,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 6, 2022

Court of Appeals Case No.
22A-CR-73

Appeal from the LaPorte Circuit
Court

The Honorable Thomas J.
Alevizos, Judge

Trial Court Cause No.
46C01-2008-F4-964

Altice, Judge.

Case Summary

- [1] Treonte Demonte Cross appeals his conviction for the unlawful possession of a firearm by a serious violent felon (SVF), a Level 4 felony. Cross contends that the conviction must be set aside because the trial court committed fundamental error by “administering . . . the trial in a single phase” rather than conducting a “two-phase bifurcated proceeding” where the first phase addresses the substantive charge, and the second phase involves the prior felony. *Appellant’s Brief* at 12. Cross also maintains that he was denied the right to a fair trial and that fundamental error occurred when the trial court permitted the jury to hear evidence regarding his prior conviction that was the basis for the SVF charge, along with evidence that the firearm he possessed had been reported stolen.
- [2] We affirm.

Facts and Procedural History

- [3] On July 31, 2020, Deputy Wade Wallace of the La Porte County Sheriff’s Department observed a silver Pontiac automobile with an expired license plate “weaving through the pack of cars” on U.S. Highway 20. *Appellant’s Appendix Vol. II* at 24. Deputy Wallace initiated a traffic stop and approached the vehicle. Upon asking the driver and the passenger for identification, he detected the odor of marijuana emanating from the vehicle. Cross was

identified as the driver, and Deputy Wallace learned that the vehicle was registered to the passenger, Shaniqua Birdsong.

[4] Deputy Wallace ordered Cross and Birdsong from the vehicle and directed them to stand next to his patrol car while he searched their car. Just before the search commenced, Cross removed an Indiana firearm permit from his pants pocket and handed it to Deputy Wallace. The permit was registered to Kayla Morris, Cross's ex-girlfriend. Cross told Deputy Wallace that he used the vehicle earlier that day to help Morris move some of her belongings to a new residence and that she had left the permit and a firearm in the vehicle. Cross then volunteered that the gun was in the trunk. When Deputy Wallace opened the trunk, he found a loaded nine-millimeter semiautomatic handgun next to a shoebox. A subsequent trace of the firearm indicated that Morris—the registered owner of the gun—had reported it stolen. Deputy Wallace also recovered a substance from the vehicle's center console that was later identified as marijuana.

[5] Cross was arrested, and on August 3, 2020, the State charged him with possession of a firearm by a SVF in Count I, a Level 4 felony, theft, a Level 6 felony (Count II), and possession of marijuana, a Class A misdemeanor (Count III). The information in Count I alleged that Cross had been previously convicted of Aggravated Robbery, a Level 2 felony, in Cook County, Illinois, on October 29, 2014.

[6] During a pretrial conference, the State amended the charging information in Count I to omit the phrase “serious violent felon.” *Transcript Vol. II* at 3. The parties agreed that Count I, the SVF charge, should be tried first, and that the remaining counts should be tried later if the State did not dismiss those charges. When Cross’s jury trial on the SVF charge commenced on November 8, 2021, the trial court gave the following instructions:

[The] information, omitting the formal parts, reads as follows:
That on or about the 31st day of July, 2020, in the County of LaPorte, State of Indiana, Treonte D. Cross did knowingly or intentionally possess a firearm, to-wit: A 9mm Taurus G20 handgun, after having been convicted of and sentenced for an offense enumerated under Indiana Code 35-47-4-5, to-wit: Aggravated Robbery, a Level 2 Felony, in Cook County, Illinois in Cause 2014CR133240.

The crime of possession of a firearm in violation of 35-47-4-5 is defined by law as follows:

A person who knowingly or intentionally possesses a firearm after having been convicted of and sentenced for an offense enumerated under Indiana Code 35-47-4-5 commits possession of a firearm in violation of said statute. That is a Level 4 Felony.

Appellant’s Appendix Vol. II at 41-42. Cross’s counsel did not object to these instructions, and the trial court further instructed the jury as to the presumption of innocence, and the requirement that the State must prove Cross’s guilt beyond a reasonable doubt.

- [7] During the State’s opening argument, the deputy prosecutor remarked to the jury that certified records of Cross’s prior conviction for aggravated robbery in 2014 would be offered into evidence. At trial, a police officer testified that a criminal history report showed that Cross had a prior felony conviction for aggravated robbery in 2014, and a State’s Exhibit that was published to the jury provided some of the circumstances surrounding the robbery.
- [8] At some point during the trial, the State presented evidence that Morris had reported the firearm as stolen. Cross objected to the reference to the gun as “stolen,” which the trial court overruled. *Transcript Vol. II* at 225-26. Also, Anthony McClintock—an investigator with the prosecutor’s office—testified that he had listened to recordings of inmate calls from the La Porte County Jail that originated from the pin number that had been assigned to Cross. Cross objected to McClintock’s testimony for lack of foundation, which the trial court overruled. McClintock testified that he believed the calls were between Cross and Morris and that Cross had questioned Morris about reporting the gun as stolen. Cross also described where the gun was found and explained that it was loaded.
- [9] Cross testified that Deputy Wallace’s testimony about the circumstances surrounding the traffic stop and seizure of the handgun was false. More particularly, Cross testified—contrary to Deputy Wallace’s claim—that he did not know who owned the gun or that the gun was in the vehicle. Cross also admitted on cross examination without objection that he was “a violent

convicted felon” and that he “had an Illinois conviction.” *Transcript Vol. III* at 143.

[10] At the conclusion of the evidence, the parties made their closing arguments. The State’s argument focused on the evidence demonstrating that Cross knowingly possessed the handgun. The only time that Cross’s prior conviction was discussed was when the State addressed whether the evidence was sufficient to prove that Cross had a prior qualifying conviction to support the charge. More particularly, the deputy prosecutor commented that “we brought in the fingerprint person because we had no knowledge whether or not the defendant was going to testify or not. So we brought her in to say his arrest and the prior conviction are one in the same person. That was the point of that. *The defendant, however, admitted it on the stand, yes, that Illinois conviction, that was me.*” *Id.* at 167-68 (emphasis added).

[11] Without objection from Cross, the trial court instructed the jury about the elements of the charged offense as follows:

The crime of possession of a firearm in violation of I.C. 35-47-4-5 is defined by law as follows:

A person who knowingly or intentionally possesses a firearm after having been convicted of and sentenced for an offense in any other jurisdiction if the elements of the other jurisdiction’s crime for which the conviction was entered are substantially similar to the elements of an Indiana offense enumerated under I.C. 35-47-4-5 commits possession of a firearm in violation of I.C. 35-47-4-5, a Level 4 felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. possessed a firearm
4. after the Defendant had been convicted of the Cook County, Illinois crime of aggravated robbery, which the Court instructs you is substantially similar to an Indiana crime enumerated under I.C. 35-47-4-5.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of a firearm in violation of I.C. 35-47-4-5, a Level 4 felony, as charged in Count 1.

Transcript Vol. III at 92-96.

[12] The jury found Cross guilty as charged. Thereafter, the trial court granted the State's motion to dismiss the theft and possession of marijuana charges. On December 10, 2021, Cross was sentenced to six years of incarceration in the Indiana Department of Correction with two years suspended.

[13] Cross now appeals.

Discussion and Decision

I. Bifurcated Proceedings

[14] Cross claims that he was unfairly prejudiced and denied his right to a fair trial because the substantive charge (possession of a handgun) was tried along with the prior felony conviction that served as the basis for the SVF charge (the prior Illinois aggravated robbery conviction). Cross claims that his right to due process was violated because a “two-phase bifurcated proceeding” was required in this instance. *Appellant’s Brief* at 10.

[15] We initially observe that Cross concedes that he did not present this issue to the trial court. An argument or issue not presented to the trial court is generally waived for appellate review. *See Lambert v. State*, 448 N.E.2d 288, 291 (Ind. 1983). In an effort to avoid waiver, Cross seeks appellate review on the grounds that he was deprived of the right to a fair trial because of the unfair prejudice that allegedly occurred. In other words, Cross claims that the trial court’s failure to bifurcate the proceedings was fundamental error.

[16] The doctrine of fundamental error permits an appellate court to correct the most egregious and blatant trial errors that otherwise would have been procedurally barred. *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014). A claim of fundamental error is an extremely narrow exception to the rule barring review of claims made for the first time on appeal. *Jewell v. State*, 887 N.E.2d 939, 942 (Ind. 2008). Moreover, a fundamental error claim is extremely difficult to bear out. It is not enough to claim that an error is prejudicial or that it implicates a constitutional right. *Salahuddin v. State*, 492 N.E.2d 292, 296 (Ind. 1986). To be sure, fundamental error requires a showing of a clear, blatant violation of basic and elementary principles of due process which, if left uncorrected, would deny

fundamental due process. *Cain v. State*, 955 N.E.2d 714, 721 (Ind. 2011). Such review is highly restricted and does “not . . . provide a second bite at the apple” for the defense. *Ryan*, 9 N.E.3d at 668. Consequently, Cross must prove that the alleged error was so severe that any competent trial judge would have immediately intervened to prevent it, regardless of whether a request or objection was made. See *Brewington v. State*, 7 N.E.3d 946, 974 (Ind. 2014).

[17] This court has considered the issue of bifurcating SVF trials on several occasions. For instance, in *Spearman v. State*, 744 N.E.2d 545, 548 (Ind. Ct. App. 2001), *trans. denied*, the defendant was arrested on a gun charge and, because he had a prior felony conviction (criminal confinement), the sole charge that the State brought against him was unlawful possession of a firearm by a SVF pursuant to I.C. § 35-47-4-5. *Id.* Spearman moved for bifurcated proceedings “so the jury would not be told of his [prior felony] conviction before it determined whether he was in possession of a firearm.” *Id.* The trial court denied the motion. *Id.* Spearman stipulated to the prior felony conviction at trial, and the jury convicted him of the charged offense. *Id.*

[18] On appeal, Spearman claimed that permitting his prior conviction to be introduced during trial violated his due process rights under the Fourteenth Amendment to the United States Constitution. A panel of this court rejected Spearman’s argument, noting that “the rationale for inadmissibility of prior convictions breaks down when the evidence of the prior conviction not only has the ‘tendency’ to establish guilt or innocence but also is essential to such determination.” *Id.* at 547. Additionally, “the legal status of one who has been

convicted of a serious violent felony and who knowingly or intentionally possesses a firearm *is an essential element of the crime*, and the act—the possession—is illegal only if performed by one occupying that status.” *Id.* at 548 (emphasis added). The *Spearman* Court also observed that

[T]his is a very different situation from one in which the act itself is illegal without regard to the status of the offender, from one where the level of the illegal act is elevated based upon the offender’s status, and from one where the punishment for the illegal act is enhanced based upon the offender’s status. In each of these instances, it is possible to bifurcate the trial because the jury can reasonably perform its function of determining whether the defendant committed an illegal act without hearing evidence of the defendant’s legal status or prior crimes. *Here, such bifurcation is not possible because the jury cannot determine if [Spearman] committed an illegal act without hearing such evidence.*

Id. (emphasis added). Thus, it was determined that bifurcation is “not practical, or even possible” where a defendant—such as Spearman—is charged *only* as an SVF who knowingly or intentionally possessed a firearm. *Id.*

Finally, the *Spearman* court recognized that while prejudice may arise due to the admission of the prior conviction, “the focus cannot be placed solely on the question of the prejudicial effect of such evidence.” *Id.* at 549. Rather, the focus “should be on whether the prejudice arising from evidence of prior crimes outweighs the probative value of such evidence.” *Id.* And any prejudicial effect can be mitigated “by excluding evidence regarding the underlying facts of the prior felony and limiting prosecutorial references thereto.” *Id.* at 550. *See also Dugan v. State*, 860 N.E.2d 1288, 1291 (Ind. Ct. App. 2007) (holding that the

parties' stipulation that the defendant was a SVF, and the State's use of the language that defines the crime with which the defendant was charged did not require bifurcation and was not a violation of the defendant's due process rights), *trans. denied*; see also *Person v. State*, 764 N.E.2d 743. 749-50 (Ind. Ct. App. 2002) (same), *trans. denied*.¹

[19] Cross, however, asserts that *Russell v. State*, 997 N.E.2d 351 (Ind. 2013), dictates that a standalone SVF trial compels bifurcation. We note, however, that the *Russell* court did not address a standalone SVF trial, as the defendant was also tried for murder. The trial court in *Russell* divided the SVF trial from the murder trial, but it permitted the jury to submit a special verdict finding the defendant "guilty" of the "non-existent offense" of "unlawfully" possessing a firearm. *Id.* at 354. In the first phase of the trial, the jury convicted Russell of both charges. In the second phase, the trial court instructed the jury to consider whether Russell was a SVF. The jury convicted Russell of the SVF charge and found that he was a habitual offender.

¹ As an aside, we note that in situations where a defendant is charged with a separate offense *and* unlawful possession of a firearm by a SVF, the result is different. For instance, in *Hines v. State*, 794 N.E.2d 469 (Ind. Ct. App. 2003), we observed that the defendant's status as a SVF was not an essential element of the separate offense of robbery. *Id.* at 472. Thus, unlike the circumstances in *Spearman* and *Dugan*, we determined that "it would have been feasible for the trial court to bifurcate the Robbery charge and the Unlawful Possession of a Firearm by a Serious Violent Felon charge." *Id.* We observed that in the absence of such bifurcation, the unfair prejudice resulting from the prior-conviction evidence "substantially outweigh[ed] its probative value with respect to the robbery charge." *Id.* at 474. Therefore, we concluded that the trial court abused its discretion in denying Hines's motion to bifurcate the robbery charge from the SVF charge. *Id.* at 473. We note, however, that there was no requirement that the SVF element should have been bifurcated from the gun possession element. Our Supreme Court granted transfer and adopted and incorporated by reference our decision in *Hines*. See *Hines v. State*, 801 N.E.2d 634 (Ind. 2004).

[20] Contrary to Cross’s claim, the Court in *Russell* only considered the defendant’s claim that he was unfairly prejudiced because the trial court’s special verdict procedure “undermined” a self-defense claim. *Id.* at 354-55. The defendant did not ask the Court to consider substantive due process as a basis for reversal, or to consider whether bifurcation was *required*. *See id.* at 355.

[21] We also reject Cross’s reliance on *Williams v. State*, 834 N.E.2d 225 (Ind. Ct. App. 2005). In *Williams*, a defendant charged only with SVF was tried by a jury after being told “there will be a trial on the issue of whether the Defendant knowingly or intentionally possessed the firearm as charged” and that, “[i]f you find beyond a reasonable doubt that the defendant knowingly or intentionally possessed the firearm as charged, there will be . . . a trial of the issue whether the Defendant committed a crime by possessing a firearm.” *Id.* at 228. *Williams* addressed the defendant’s claim that he was prejudiced by an instruction suggesting that a second phase of the trial could occur. *Id.*

[22] A panel of this Court held that the trial court’s bifurcation was acceptable because it “avoid[ed] any labeling of Williams as a ‘serious violent felon’ until after the jury had decided whether he had in fact possessed the [firearm].” *Id.* at 228. Contrary to Cross’s contention, the *Williams* court did not “urge” bifurcated trials of the possession and prior-conviction elements of a standalone SVF charge in every case. *See Appellant’s Brief* at 12. Rather, Williams “urged” that practice be followed if juries were going to be told that the General Assembly had designated defendants as “serious violent felons” during any time in the trial. *See Williams*, 834 N.E.2d at 228 (urging bifurcation as a way to

strike “the proper balance between advising the jury that [a defendant] had indeed been charged with a firearm-related crime and avoiding identifying [the defendant] as a ‘serious violent felon’ from the outset of trial”). Nonetheless, *Williams* acknowledged that “it is not grounds for reversal to refer to a defendant as a ‘serious violent felon’ before . . . guilt or innocence is decided.” *Id.*

[23] Here, the State’s amended information omitted allegations that Cross was a serious violent felon. Moreover, it was Cross who admitted during his testimony—with no objection—that he was a “violent convicted felon” with an “Illinois conviction.” *Transcript Vol. III* at 143.

[24] In light of our discussion above, we conclude that bifurcation was not “practical or even possible” in this instance because the sole charge against Cross was the unlawful possession of a firearm by a SVF. *See Spearman*, 744 N.E.2d at 548; *see also, Dugan*, 860 N.E.2d at 1291. Thus, Cross’s fundamental error claim that he was denied his right to a fair trial when the trial court did not bifurcate the proceedings, fails.

II. Admission of Evidence

[25] In a related issue, Cross claims that even though his counsel did not object to the admission of certain evidence regarding the prior conviction that was the basis for the SVF charge and to the reports that the firearm had been stolen, the trial court committed fundamental error in admitting that evidence because of the “unnecessary prejudice” that inured to him. *Appellant’s Brief* at 9, 10. Put

another way, Cross asserts that fundamental error occurred because the trial court did not limit witness testimony and edit various exhibits that were admitted.

[26] First, we note that when a defendant does not object to the admission of evidence, the trial court is not required to sua sponte pose an objection. *Halliburton v. State*, 1 N.E.3d 670, 679 (Ind. 2013). Thus, Cross’s claim that the trial court erred in admitting documentation that related to the prior conviction without objection, fails. *See id.* at 679. Even so, Cross contends that disclosing the prior conviction to the jury was prejudicial and constituted fundamental error because the jurors’ passions were inflamed. We note, however, that there was no suggestion at trial that the circumstances surrounding the prior conviction made it more likely that Cross possessed the handgun in his car. Even more compelling, “all relevant evidence is ‘inherently prejudicial’ in a criminal prosecution, so the inquiry [pursuant to Evidence Rule 403]² boils down to a balance of the probative value [of the proffered evidence] against the likely unfair prejudicial impact [of the evidence].” *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002).

² Evid. R. 403 provides that “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.”

[27] When evidence is highly and directly probative of guilt, it is only “prejudicial” to the extent it establishes the elements of the offense and should not be excluded. *Williams v. State*, 782 N.E.2d 1039, 1047 (Ind. Ct. App. 2003), *trans. denied*. Here, evidence of Cross’s prior offense and conviction was extremely relevant and probative as to whether he committed the charged crime. Without that evidence, Cross would be entitled to acquittal. *See* I.C. §§ 35-47-4-5(a); Ind. Code § 1-1-2-4(b). Therefore, the admission of the references to Cross’s prior conviction was not error. *Brewington*, 7 N.E.3d at 974.

[28] As for Cross’s allegation that the jury was improperly permitted to hear evidence that Morris had reported that her handgun had been stolen, he overlooks the fact that he claimed specific knowledge of how the gun came to be in his car when he was stopped by the police. More specifically, Cross told Deputy Wallace that there was nothing illegal in the vehicle. But when Cross realized that the vehicle was going to be searched for drugs, he produced Morris’s firearms permit, gave it to Deputy Wallace, and explained that Morris had probably left the gun in the trunk. And it was subsequently learned that Morris had reported the gun stolen several days earlier.

[29] As the trial court recognized, that evidence contradicted Cross’s initial statement that he made to Deputy Wallace regarding his knowledge about the gun and its presence in the vehicle. Hence, it was relevant to prove that Cross tried to mislead police about the ownership and possession of the firearm, thus indicating his consciousness of guilt. *See, e.g., Grimes v. State*, 450 N.E.2d 512, 521 (Ind. 1983) (evidence as to the defendant’s attempts to conceal or suppress

implicating evidence is relevant to reveal consciousness of guilt). As a result, there was no error—much less fundamental error—in the admission of this evidence.

Conclusion

[30] In light of our discussion above, we conclude that the trial court did not commit fundamental error in permitting Cross to be tried in a single-phase proceeding on the SVF charge. Due process does not require a bifurcation of the proceedings when the SVF offense is—as here—the sole charge for the jury to consider. We also conclude that there was no error when the jury was presented with evidence of Cross’s prior conviction and evidence that the handgun seized from the vehicle had been reported stolen.

[31] Judgment affirmed.

Brown, J. and Tavitas, J., concur.