MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Denise L. Turner
DTurner Legal LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Jodi Kathryn Stein
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Darryl Britt Evans,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 28, 2022

Court of Appeals Case No. 21A-CR-1355

Appeal from the Tippecanoe Superior Court

The Honorable Thomas H. Busch, Senior Judge

Trial Court Cause No. 79D02-1905-F4-27

Molter, Judge.

[1] While conducting a welfare check at the residence Darryl Britt Evans shared with his girlfriend, police smelled an odor of raw and burnt marijuana coming

from the home and obtained a search warrant. The subsequent search uncovered large amounts of raw marijuana, THC cartridges, cash, several firearms, plastic baggies, and a digital scale.

[2] After a bifurcated jury trial, Evans was convicted of Level 4 felony unlawful possession of a firearm by a serious violent felon ("SVF"), Level 6 felony possession of marijuana, Level 6 felony maintaining a common nuisance, and two counts of Level 6 felony neglect of a dependent. The jury also concluded Evans is a habitual offender. The trial court sentenced him to an aggregate sentence of fifteen years with eight years executed, three years in community corrections, and four years suspended to probation.

[3] On appeal, Evans argues that the State failed to present sufficient evidence to support his conviction for Level 6 felony maintaining a common nuisance, that the trial court erred when it failed to trifurcate his trial, and that the trial court abused its discretion when it ordered him to serve a portion of his sentences consecutively. Finding no error, we affirm.

Facts and Procedural History

[4] On the evening of February 8, 2019, Lafayette police officers were called to Evans's residence, which he shared with his girlfriend, Peyton Cruea, to conduct a welfare check and locate Evans's son. As one of the officers approached the front door of the residence from the sidewalk, he detected a heavy odor of raw and burnt marijuana coming from the residence. After Cruea answered the door and stepped outside to speak with the officers,

shutting the door behind her, both officers detected an even stronger odor of raw and burnt marijuana emanating from the residence. Cruea told the officers that Evans and his son were not there, and she called Evans and asked him to return. Evans declined to return but allowed an officer to speak with his son on the phone.

[5] After the officers confirmed the safety and whereabouts of Evans's son, they began investigating the marijuana odor and detained Cruea while they secured a search warrant. While waiting for the search warrant, the officers did a protective sweep of the house and discovered Cruea's two young children inside. Evans arrived back at his home as the search warrant was being sought, and the search warrant was eventually served at 9:17 p.m.

[6] While conducting the search, the officers discovered: an aggregate 1,739 grams of raw marijuana throughout the residence, which had a low-end street value of about $12,400; dozens of THC vape cartridges (which were 91.74% marijuana) with a street value of about $3,100 in a large safe; several firearms located on top of and in the same safe, including a Taurus 9 mm, a Glock 27, a Glock 45, a pump-action shotgun, a rifle with a drum magazine, an AK-47, and an AR-15; plastic baggies; a digital scale; a vacuum sealer; and $70,000 in cash throughout the house. One of the packages of marijuana, which was found in the master bedroom dresser next to plastic baggies and a digital scale, weighed roughly 121 grams. A second large quantity of marijuana was found in a backpack in the back bedroom, and two other large bundles of marijuana, weighing 439.24 grams, were found on the floor next to a dresser. Both the

Glock 27 and the Taurus 9 mm found on the top of the safe were functioning firearms.

[7] At the scene, Evans admitted to one of the officers that he owned the safe in which cash, the THC cartridges, and the firearms were located, and he provided the safe combination to the officers. However, Evans denied owning the raw marijuana. When he was detained by the police, Evans had $5,765 in cash on his person. He told the officers that Cruea did not smoke marijuana because she was pregnant, that he smoked the THC cartridges, and that he had smoked marijuana a few hours before in the garage.

[8] The State charged Evans with: Count I, Level 4 felony unlawful possession of a firearm by a SVF; Count II, Level 6 felony dealing in marijuana; Count III, Class B misdemeanor possession of marijuana; Count IV, Level 6 felony maintaining a common nuisance; Count V, Level 6 felony counterfeiting; Count VI, Level 6 felony neglect of a dependent; Count VII, Level 6 felony neglect of a dependent; Count VIII, Level 6 felony possession of marijuana; and a habitual offender allegation. A bifurcated jury trial was held, and during Phase I, Evans was tried on Counts II through VII. In Phase I of his trial, Evans admitted to his prior Class D felony criminal confinement conviction, which was the underlying felony supporting the SVF charge. Although Evans denied knowledge of any marijuana, guns, or THC cartridges in the house in his testimony at trial, his statements to police that he owned the safe in which cash, firearms, and THC cartridges were discovered were admitted into evidence.

[9] At the conclusion of Phase I, the jury found Evans guilty of Count III, Class B misdemeanor possession of marijuana; Count IV, Level 6 felony maintaining a common nuisance; and Counts VI and VII, two counts of Level 6 felony neglect of a dependent. The jury was unable to reach a verdict on Count II, Level 6 felony dealing in marijuana, and found Evans not guilty on Count V, Level 6 felony counterfeiting. In Phase II, the jury was asked to decide Count I, Level 4 felony unlawful possession of a firearm by a SVF; Count VIII, the felony possession of marijuana enhancement; and whether he was a habitual offender. Evans stipulated to the prior qualifying conviction for the unlawful possession of a firearm by a SVF charge and the felony possession enhancement, as well as all of his prior felony convictions supporting the habitual offender allegation. The evidence introduced in Phase I was incorporated into Phase II for the jury's consideration. The jury found Evans guilty on Count I, Level 4 felony unlawful possession of a firearm by a SVF and Count VIII, Level 6 felony possession of marijuana, and it determined that Evans was a habitual offender.

[10] At sentencing, the trial court found four aggravating factors: Evans's criminal history; Evans had been convicted of a misdemeanor after the commission of the instant offenses; Evans had seven petitions to revoke probation filed with three petitions pending at the time of sentencing; and Evans was on probation at the time of the offenses. As mitigating factors, the trial court found Evans's family support; his good work history and employability; his good behavior while on bond; and that long term imprisonment may be a hardship to his dependents. Finding that the aggravators outweighed the mitigators, the trial

court sentenced Evans as follows: Count I, Level 4 felony unlawful possession of a firearm by a SVF—six years, enhanced by six years for the habitual offender determination, for a total of twelve years; Count IV, Level 6 felony maintaining a common nuisance—one year suspended to probation; Counts VI and VII, Level 6 felony neglect of a dependent—one year each to run concurrently and suspended to probation; Count VIII, Level 6 felony possession of marijuana—one year suspended to probation.

[11] The trial court merged Count III, Class B misdemeanor possession of marijuana into Evans's conviction for Level 6 felony possession of marijuana. The trial court ordered the sentences for Count IV, Count VI, and Count VIII to run consecutive to Count I and the sentence for Count VII to run concurrently to Count VI for a total sentence of fifteen years. The aggregate fifteen-year sentence was ordered to be served with eight years executed, three years in community corrections, and four years suspended to probation. Evans now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

[12] Evans challenges the sufficiency of the evidence presented to support his conviction for Level 6 felony maintaining a common nuisance. When there is a challenge to the sufficiency of the evidence, "[w]e neither reweigh evidence nor judge witness credibility." *Gibson v. State*, 51 N.E.3d 204, 210 (Ind. 2016), *cert. denied*, 137 S. Ct. 1082 (2017). Instead, "we consider only that evidence most

favorable to the judgment together with all reasonable inferences drawn therefrom." *Id.* (quotations omitted). "We will affirm the judgment if it is supported by substantial evidence of probative value even if there is some conflict in that evidence." *Id.* (quotations omitted). Further, "[w]e will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Love v. State*, 73 N.E.3d 693, 696 (Ind. 2017).

[13] To convict Evans of maintaining a common nuisance as a Level 6 felony, the State was required to prove that he knowingly or intentionally maintained a building, structure, vehicle, or other place that is used for one or more of the following purposes: to unlawfully use, manufacture, keep, offer for sale, sell, deliver, or finance the delivery of a controlled substance or an item of drug paraphernalia. Ind. Code § 35-45-1-5(c). Our court has previously stated that a location is a common nuisance only if it is one where "continuous or recurrent prohibited activity takes place." *Leatherman v. State*, 101 N.E.3d 879, 884 (Ind. Ct. App. 2018).

[14] Evans argues the State's evidence was insufficient to prove that the home he shared with his girlfriend and her children was a "common nuisance" because there was no evidence presented of any criminal activity outside of the date charged in the charging information. He relies on *Leatherman* for this contention. In *Leatherman,* the defendant was convicted of maintaining a common nuisance for possessing methamphetamine while in his van. *Id.* at 882. We held that to prove that a nuisance was a common nuisance, "the State

must provide evidence that the vehicle was used on more than one occasion for the unlawful delivery of a controlled substance." *Id.* at 883 (citing *Zuniga v. State,* 815 N.E.2d 197, 200 (Ind. Ct. App. 2004)). Based on the evidence in that case, we found that the State failed to present sufficient evidence that the vehicle the defendant was driving had been used on multiple occasions for the delivery of a controlled substance. *Id.* at 884.

[15] We disagree that this case is analogous to *Leatherman*. Here, when the police searched Evans's home, they found large amounts of marijuana, THC cartridges, and cash, as well as plastic baggies, a digital scale, and a vacuum sealer. An aggregate 1,739 grams of raw marijuana was discovered throughout the residence, mainly in three large bundles with a street value of about $12,400, and dozens of THC vape cartridges with a street value of about $3,100, were found in the large safe. This substantial amount of drugs and cash was sufficient to allow a jury to reasonably infer that Evans had used his residence for the continuous or recurrent prohibited activity of keeping a controlled substance. *See Leatherman*, 101 N.E.3d at 884. Evans also admitted at the scene that he owned the dozens of THC cartridges, that he was the only one to smoke marijuana, that he smokes the THC cartridges, and that he had smoked marijuana just three hours earlier in the garage. From this evidence, the jury could reasonably infer that he unlawfully used marijuana on a recurring basis at the residence.

[16] The totality of the evidence presented at trial showed that Evans possessed marijuana on more than a single occasion because a single, solitary possession

or use would not require the high volume and packaging of the marijuana found here. Additionally, the discovery of the digital scale, baggies, and thousands of dollars in cash indicate this was not an instance of solitary use or possession. Thus, we conclude sufficient evidence supported Evans's conviction for maintaining a common nuisance.

II. Trifurcation of Trial

[17] Evans argues the trial court erred when it failed to trifurcate his trial. In other words, he contends the trial should have had three phases: Phase I for offenses that were not enhanced (marijuana possession, maintaining a common nuisance, and neglect of a dependent); Phase II for his SVF count; and Phase III for the habitual offender allegation. He argues that exposing the jury to prior felony convictions underlying the habitual offender count unfairly prejudiced the jury's consideration of the SVF and enhanced marijuana counts. We disagree.

[18] A trial court's decision whether to bifurcate or trifurcate a trial is subject to an abuse of discretion standard. *Russell v. State,* 997 N.E.2d 351, 354 (Ind. 2013). But as Evans acknowledges, he did not ask the trial court to trifurcate his trial, and he did not object to any of the evidence the State introduced in Phase 2 of his trial. He has therefore waived this argument on appeal. *Hunter v. State*, 72 N.E.3d 928, 932 (Ind. Ct. App. 2017) ("Any grounds for objections not raised at trial are not available on appeal[.]").

[19] To avoid waiver, Evans asserts that the trial court's failure to order bifurcation sua sponte constituted fundamental error. The fundamental error doctrine provides an "extremely narrow" exception to the waiver rule. *Hitch v. State*, 51 N.E.3d 216, 219 (Ind. 2016); *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014). A party claiming fundamental error faces the heavy burden of showing either that the purported error was so prejudicial to the defendant's rights as to make a fair trial "impossible," or that the purported error constitutes a "clearly blatant" violation of basic due process principles. *Blaize v. State*, 51 N.E.3d 97, 102 (Ind. 2016), *cert. denied*, 137 S. Ct. 85 (2016); *Ryan*, 9 N.E.3d at 668.

[20] Evans has not met the heavy burden of proving that the failure to trifurcate his trial was fundamental error. Phase I of the trial included Evans's admission to the police at the scene that he possessed the multiple firearms discovered in his home; physical evidence that Evans possessed multiple firearms that were located both on top of and in a safe; and Evans's admission on cross-examination that he had a prior conviction for Class D felony criminal confinement, which was the underlying felony for his unlawful possession of a firearm by a SVF charge. He does not challenge the admission of any of this evidence for Phase I. He also stipulated to the criminal confinement underlying the SVF conviction and the prior marijuana possession conviction for the felony enhancement.

[21] Because Evans stipulated to these convictions, the only question left for the jury with respect to the SVF charge was whether Evans actually possessed the firearm. He previously admitted to that possession, and the evidence of his

possession in Phase I was overwhelming. We therefore cannot say that his due process rights were blatantly violated or that it was impossible for the jury to consider fairly the SVF and marijuana counts.

[22] Evans also claims prejudice in the way the jury's verdict form indicated its determination that he was habitual offender. On the verdict form for the habitual offender enhancement, the jury specifically found that Evans had three prior felony convictions.

VERDICT

We the jury, find the defendant, Darryl Britt Evans, has the following prior convictions:

(YES) NO On or about March 10, 2016, Darryl Britt Evans was convicted in the Superior Court No. 2, Tippecanoe County, State of Indiana, under cause number 79D02-1506-F5-36, of the offense of Operating a Motor Vehicle While Privileges are Forfeited for Life (a Level 5 Felony), committed in Tippecanoe County, State of Indiana, on or about January 15, 2015, for which offense the said Darryl Britt Evans was sentenced on or about March 10, 2016.

(YES) NO On or about June 24, 2010, Darryl Britt Evans was convicted in the Circuit Court, Marion County, State of Indiana, under cause number 49F09-0911-FD-92861, of the offense of Operating a Motor Vehicle While Suspended as a Habitual Traffic Violator (a Class D Felony), committed in Marion County, State of Indiana, on or about November 4, 2009, for which offense the said Darryl Britt Evans was sentenced on or about June 24, 2010.

(YES) NO On or about May 20, 2009, Darryl Britt Evans was convicted in the Superior Court No. 6, Tippecanoe County, State Of Indiana, under cause number 79D06-0803-FD-70, of the offense of Operating a Motor Vehicle While Suspended as a Habitual Traffic Violator (a Class D Felony), committed in Tippecanoe County, State of Indiana, on or about March 11, 2008, for which offense the said Darryl Britt Evans was sentenced on or about May 20, 2009.

Appellant's App. Vol. II at 127. But where the jury indicated whether it found that Evans had been convicted of a felony in Phase I or Phase II of the trial, and of what level of felony, the numbers 5 and 6 of the verdict form were circled, and the "yes" or "no" choice was not circled.

We the jury, find the defendant, Darryl Britt Evans:

YES NO committed and was convicted of a Level 4, (5) or (6) felony **(Circle all that apply)** charged in Phase I or Phase II of this case.

NOTE: Please circle appropriate yes or no choices above.

We, the jury, find that the defendant, Darryl Britt Evans,

_X_ is an habitual offender.

_____ is not an habitual offender.

Id. at 128.

[23] Although Evans asserts it was "unclear as to whether the jury found he had 'committed and was convicted of a Level 4, 5, or 6 felony charged in Phase I or Phase II of this case,'" Appellant's Br. at 19 (quoting Appellant's App. Vol II at 128), the "Yes" and "No" were superfluous given that the jury also circled the felonies for which they concluded Evans was charged and convicted (especially in light of the more specific instruction to circle the felonies). While it is true Evans was not charged with a Level 5 felony in either Phase I or II of the trial,

he was charged with, and found guilty of several Level 6 felonies. Under Indiana Code section 35-50-2-8(d), the State had to prove that Evans, having been convicted of a felony in these proceedings: (1) had been convicted of three prior unrelated felonies; (2) was alleged to have committed a prior unrelated Level 5 or 6 felony or Class C or D felony; and (3) not more than ten years had elapsed between the time Evans committed the current offense and when he was released from imprisonment, probation, or parole for at least one of the three prior unrelated felonies. The jury's answers on the verdict form confirm they concluded the State met its burden as to each of these requirements, so we cannot say the verdict form was so prejudicial as to make a fair trial impossible, and Evans has therefore not shown fundamental error.

III. Consecutive Sentences

[24] Evans contends the trial court abused its discretion when it ordered his sentences to be served consecutively. Sentencing decisions, including the decision whether to impose consecutive sentences, lie within the sound discretion of the trial court. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008); *Gross v. State*, 22 N.E.3d 863, 869 (Ind. Ct. App. 2014) (citing *Gilliam v. State*, 901 N.E.2d 72, 74 (Ind. Ct. App. 2009)), *trans. denied*. A single aggravating circumstance may be sufficient to support imposing consecutive sentences, but a trial court must state its reasons for imposing consecutive sentences (or other enhanced terms). *Id.*

[25] Here, the trial court found several aggravating factors, including Evans's criminal history; his misdemeanor conviction after the instant offense; the multiple probation revocation petitions, including three pending petitions at the time of sentencing; and the fact that Evans was on probation at the time of the offenses. Evans does not challenge the validity of any of the aggravators, and a single aggravating circumstance may be sufficient to support imposing consecutive sentences. *Gross*, 22 N.E.3d at 869. Because the trial court found at least one unchallenged aggravating factor, the imposition of consecutive sentences was not an abuse of discretion.

[26] Although his consecutive sentences were sufficiently supported by aggravating factors, Evans relies on *Kocielko v. State,* 943 N.E.2d 1282 (Ind. Ct. App. 2011), *trans. denied*, to argue it was an abuse of discretion to order consecutive sentences because his crimes constituted a single incident.[1] In that case, our court affirmed the imposition of concurrent sentences for two counts of sexual misconduct with a minor, explaining that the sentencing decision "fairly reflects the episodic nature of the crimes." *Id.* at 1283. We relied on *Bowling v. State*,

[1] Evans argues that the trial court abused its discretion in ordering consecutive sentences because his crimes constituted a single incident and should have been ordered to run concurrently. However, under Indiana Code section 35-50-1-2, which governs consecutive and concurrent sentencing, his sentence was not erroneous. Under subsection (c) of that statute, a trial court's discretion to order consecutive sentences is limited when the crimes involved are not crimes of violence. Ind. Code § 35-50-1-2(c). In those circumstances, the total of the consecutive terms of imprisonment to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the period described in subsection (d). *Id.* Where, as in this case, the most serious crime for which the defendant is sentenced is a Level 4 felony, the total of the consecutive terms of imprisonment may not exceed fifteen years. Ind. Code § 35-50-1-2(d)(3). The sentence here totaled fifteen years, and therefore, did not exceed the maximum allowed under statute.

560 N.E.2d 658 (Ind. 1990), which held that "the imposition of two sentences for the same injurious consequences sustained by the same victim during a single confrontation" violated both the federal and state double-jeopardy prohibitions. *Id*. at 660.

[27] Critical here, *Bowling*'s double jeopardy analysis has been superseded by subsequent cases, including *Wadle v. State*, 151 N.E.3d 227, 235 (Ind. 2020), and our court has explained that *Kocielko* was a double jeopardy case, not a consecutive sentencing case. *Vermillion v. State*, 978 N.E.2d 459, 466 (Ind. Ct. App. 2012) ("*Kocielko* is not easily applied here. Consecutive sentencing was never at issue. Double jeopardy was."). "A trial court may impose consecutive sentences for separate and distinct crimes that arise out of a single confrontation involving the same victim" subject to "double-jeopardy protections, other sentencing mandates, and our abuse-of-discretion review." *Id.* Evans does not make a double jeopardy claim, and he does not point to any other limitation on the trial court's discretion in imposing consecutive sentences. We thus conclude the trial court did not abuse its discretion in ordering Evans's sentences to be served consecutively.

[28] Affirmed.

Riley, J., and Robb, J., concur.