MEMORANDUM DECISION

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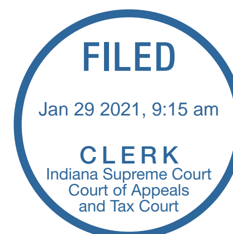

ATTORNEY FOR APPELLANT

Joel M. Schumm
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Caroline G. Templeton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Bruce Jackson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 29, 2021

Court of Appeals Case No. 20A-CR-764

Appeal from the Marion Superior Court

The Honorable Barbara Crawford, Judge

Trial Court Cause No. 49G01-1905-F4-017959

May, Judge.

[1] Bruce Jackson appeals following his convictions of Level 4 felony unlawful possession of a firearm by a serious violent felon ("SVF")[1] and Level 5 felony battery by means of a deadly weapon.[2] Jackson raises three issues, which we consolidate and restate as two:

> I. Whether the trial court committed reversible error in ordering Jackson shackled during trial; and
>
> II. Whether Jackson's conviction and sentence for unlawful possession of a firearm by a SVF violate either Article I, section 16 or Article I, section 18 of the Indiana Constitution.

The State raises a third issue on cross-appeal:

> III. Whether Jackson waived the arguments he presents on appeal because he did not raise them before the trial court.

We affirm.

Facts and Procedural History

[2] Jackson and his girlfriend, L.A., lived together in a house on North Emerson Avenue in Indianapolis. On May 5, 2019, two of Jackson's friends, Stacy Hurt and Donna Ezell, visited the house. Hurt brought a bottle of liquor with him.

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[1] Ind. Code § 35-47-4-5(c) (2018).

[2] Ind. Code § 35-42-2-1(g)(2) (2018).

At some point, Hurt poured a drink for L.A., and Jackson made a comment that there was "something going on" between L.A. and Hurt. (Tr. Vol. II at 241.) L.A. became upset and threw a coffee cup at Jackson's head.

[3] The coffee cup missed, but Jackson pulled out a handgun and shot L.A. The bullet traveled through L.A.'s buttocks and lodged itself into the wall. Hurt fled the house and flagged down Indianapolis Metropolitan Police Department ("IMPD") Officer Taylor Jones at a nearby gas station. Hurt told Officer Jones about the shooting at Jackson's house, and Officer Jones, along with another officer, traveled to the house to investigate. They performed a security sweep of the house, and Officer Jones found L.A. in a bedroom. She initially denied that she had been shot, but Officer Jones noticed a hole and a blood spot near the seat of L.A.'s pants. L.A. was also crying and had trouble sitting. Emergency medical personnel responded to the scene and transported L.A. to Methodist Hospital by ambulance.

[4] The State charged Jackson with Level 4 felony unlawful possession of a firearm by an SVF; Level 5 felony battery by means of a deadly weapon; and Level 5 felony domestic battery by means of a deadly weapon.[3] While the trial court initially appointed a public defender to represent Jackson, Jackson asserted his right to represent himself, and the court appointed Jackson's public defender as standby counsel. The trial court held a jury trial beginning on December 2,

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[3] Ind. Code § 35-42-2-1.3(c) (2016).

2019. Prior to voir dire, the court ordered Jackson remain shackled, and the following discussion occurred:

> THE COURT: Secondly, you will remain in shackles. You may not leave the defense table. You may stand if you choose to, but you must stay at the seat at that table. So we'll take these next few minute[s], 20 minutes or so, to give you a chance to go through those [jury] questionnaires.
>
> MR. JACKSON: All right. I've got – yeah. Yeah, I'm going through that and you saying other word [sic], I've got to stay seated. So if I was going to cross-examine my witness, I'd cross-examine. I mean, I'm just saying in –
>
> THE COURT: You may cross-examine from there.
>
> MR. JACKSON: All right. I'm just asking because like I said in the past, I was totally (indiscernible), I'm just asking now.
>
> THE COURT: Yeah.
>
> MR. JACKSON: I know we cited our case law down in Sullivan County and they had their legs out, they came out with the sheet and everything. And the judge got in trouble for that because they said that I was exposed to the jury. They put a seat [sic] around there, and the seat [sic] fell down and they exposed the leg shackles.
>
> And one other thing, when I got up to cross-examine the witness and everything, they seen the leg shackles. And there's a case – I can't think of the name of that case just right off the bat, where [in] that case the person had a situation like that, and the case got overturned because they exposed themselves to the jury with leg shackles on.

> THE COURT: Well, then if you're not satisfied with that then you will have an item for appeal, you'll have an issue for appeal.

(*Id*. at 55-56.) As the trial proceeded, Jackson did not further mention being shackled. The jury returned guilty verdicts on the counts of battery by means of a deadly weapon and domestic battery by means of a deadly weapon. The jury also found that Jackson possessed a gun.

[5] Jackson waived his right to have a jury determine whether he qualified as an SVF, and he elected instead for the court to make that determination. The State presented evidence that Jackson's right thumbprint matched the thumbprint on an arrest report from 1994. The State then submitted an abstract of judgment indicating Jackson had been convicted of two counts of Class B felony robbery[4] and one count of Class B felony criminal confinement.[5] The court found that Jackson qualified as an SVF. The court "merged" Jackson's domestic battery conviction with his battery by means of a deadly weapon conviction and sentenced Jackson to concurrent terms of nine years for unlawful possession of a firearm by an SVF and three years for battery by means of a deadly weapon.[6] (App. Vol. II at 19.)

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[4] Ind. Code § 35-42-5-1 (1984).

[5] Ind. Code § 35-42-3-3 (1989).

[6] It is a double jeopardy violation for a trial court to enter two judgments of conviction for the same criminal act. *Stickrod v. State*, 108 N.E.3d 385, 392 (Ind. Ct. App. 2018), *trans. denied*. "A trial court's act of merging, without also vacating the conviction, is not sufficient to cure a double jeopardy violation." *Id*. Thus, rather than denoting that Jackson's domestic battery conviction merged with his battery by means of a deadly

Discussion and Decision

I. Shackles During Trial

[6] Jackson argues he is entitled to a new trial because the court tried him in shackles without explaining its reason for doing so. As the United States Supreme Court has explained:

> [T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial.

Deck v. Missouri, 544 U.S. 622, 629, 125 S. Ct. 2007, 2012 (2005). We do not permit the routine use of restraints because they undermine the presumption of innocence, diminish the defendant's ability to confer with counsel, and upset the formal dignity of the courtroom. *Id*. at 630-31. Our Indiana Supreme Court has elaborated that "shackling may be imposed, but only if the trial court makes a particularized finding of need in the specific case." *Stephenson v. State*, 864 N.E.2d 1022, 1029 (Ind. 2007), *reh'g denied*, *cert. denied*, 552 U.S. 1314 (2008). "Jail garb and unnecessary shackling are both 'inherently prejudicial' and, if proper objection is made, require reversal unless the State establishes 'beyond a

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weapon conviction, the sentencing order should indicate a guilty finding for domestic battery without entry of a judgment of conviction.

reasonable doubt that the [shackling] error complained of did not contribute to the verdict.'" *Id*. (quoting *Deck*, 544 U.S. at 635, 125 S. Ct. at 2015).

[7] The State argues Jackson waived the issue. "A party's failure to object to, and thus preserve, an alleged trial error results in waiver of that claim on appeal." *Batchelor v. State*, 119 N.E.3d 550, 556 (Ind. 2019). The only time Jackson addressed the trial court regarding being tried in shackles was in the discussion prior to voir dire. Jackson voiced concern about the jury seeing his shackles and inquired about examining witnesses, but Jackson did not state that he objected to the shackles. The trial court allowed Jackson to examine witnesses and testify from counsel table, and Jackson did not complain during trial that the shackles hampered his ability to present a defense. There is also no indication that the jury was ever able to see Jackson's shackles. Therefore, Jackson waived any argument that the trial court erred by trying him in shackles because he did not make an objection. *See Dilts v. State*, 49 N.E.3d 617, 628 (Ind. Ct. App. 2015) (holding defendant waived issue on appeal by failing to make a contemporaneous objection before the trial court), *trans. denied*.

[8] Waiver notwithstanding, the evidence against Jackson was substantial. Jackson was one of four people present when the shooting occurred. Hurt testified that he saw Jackson shoot L.A., and Hurt identified Jackson in a police lineup. L.A. told law enforcement at the hospital that her boyfriend shot her and that her boyfriend was born in 1966. Detective Christopher Winter of the IMPD performed a record search and learned that Jackson was the only person born in

1966 living at the North Emerson house. Therefore, any error that resulted from the trial court's failure to make a particularized finding of need to shackle Jackson was harmless beyond a reasonable doubt.[7] *See Lakin v. Stine*, 431 F.3d 959, 966 (6th Cir. 2005) (holding shackling error was harmless because evidence against defendant was substantial), *cert. denied*, 547 U.S. 1118, 126 S. Ct. 1925 (2006).

II. Waiver of Constitutional Arguments

[9] Initially, we address the State's argument that Jackson waived any challenge to the constitutionality of the SVF statute because he did not file a motion to dismiss before the trial court. "Generally, a challenge to the constitutionality of a criminal statute must be raised by a motion to dismiss prior to trial, and the failure to do so waives the issue on appeal." *Rowe v. State*, 867 N.E.2d 262, 267 (Ind. Ct. App. 2007). The SVF statute states that a person convicted of one of twenty-nine enumerated offenses is a "serious violent felon," and a "serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon, a Level 4 felony." Ind. Code § 35-47-4-5 (2018).

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[7] Jackson contends that because he could not approach witnesses or the bench during sidebar conferences, the trial court conveyed to the jury that "Jackson, unlike everyone else in the courtroom, was a threat that should be feared." (Appellant's Reply Br. at 6.) However, we cannot determine how, if at all, Jackson was disadvantaged by having to remain at counsel table. Jackson was able to question witnesses regarding trial exhibits even if he was not allowed to approach the witnesses, and the sidebar conferences denoted in the record were brief and largely indiscernible. *See*, *e.g.*, *Wilhoite v. State*, 7 N.E.3d 350, 355 (Ind. Ct. App. 2014) (holding defendant failed to present a sufficient record to permit review of his claim that he was tried by a jury of his peers).

[10] The State charged Jackson with violating the SVF statute, and the charging information specified that Jackson's predicate offense was "Robbery as a Class B felony under Cause Number 49G03-9401-CF-007977 on or about September 30, 1994[.]" (App. Vol. II at 23.) On appeal, Jackson argues the SVF statute is unconstitutional under Article I, Section 16 or Article I, Section 18 of the Indiana Constitution. However, Jackson did not to file a motion to dismiss or advance these arguments before the trial court, and therefore, his constitutional claims are waived. *See Johnson v. State*, 879 N.E.2d 649, 654 (Ind. Ct. App. 2008) (holding defendant's constitutional claim waived because she did not file a motion to dismiss).

III. Indiana Constitutional Arguments

[11] Waiver notwithstanding, we address the merits of Jackson's constitutional claims. We presume statutes passed by the legislature are constitutional, and the party challenging the constitutionality of a statute bears the burden of proving the statute is unconstitutional. *Studler v. Ind. Bureau of Motor Vehicles*, 869 N.E.2d 1156, 1159 (Ind. Ct. App. 2008). We view "the outcome below without deference, and we resolve all doubts in favor of the legislature." *State v. Zerbe*, 50 N.E.3d 368, 369 (Ind. 2016). A party making an as-applied constitutional challenge need only show the statute is unconstitutional concerning the facts of the particular case. *Id*.

A. Article I, Section 16

[12] Article I, Section 16 of the Indiana Constitution states, "All penalties shall be proportioned to the nature of the offense." Jackson argues that a Level 4 felony conviction is disproportionate to the nature of his offense because the predicate offense on which his charge was based occurred twenty-five years earlier. In *Conner v. State*, our Indiana Supreme Court held that sentencing a defendant who distributed fake marijuana to a sentence twice the maximum term for selling real marijuana was out of proportion to the nature of his offense. 626 N.E.2d 803, 806 (Ind. 1993). The Court remanded the case for resentencing up to the maximum penalty available for distributing real marijuana. *Id*. Jackson maintains that his Level 4 felony conviction is out of proportion with the penalty for carrying a handgun without a license, which is generally a Class A misdemeanor and can be elevated to a Level 5 felony if the offender was convicted of a felony within the previous fifteen years or if another special condition applies. Ind. Code § 35-47-2-1(e). Jackson asserts that a "Class A misdemeanor is a more appropriate penalty as applied to defendants with decades-old predicate offenses." (Appellant's Br. at 15.)

[13] However, we are not swayed by Jackson's likening of his offense to a Class A misdemeanor. It is an appropriate function of the legislature to assign penalties for criminal offenses. *Teer v. State*, 738 N.E.2d 283, 290 (Ind. Ct. App. 2000), *trans. denied*. We will not set aside a legislatively sanctioned penalty simply because we think it is too severe. *Id*. "Rather, a sentence may be unconstitutional by reason of its length, if it is so severe and entirely out of

proportion to the gravity of the offense committed as 'to shock public sentiment and violate the judgment of a reasonable people.'" *Id*. (quoting *Pritscher v. State*, 675 N.E.2d 727, 731 (Ind. Ct. App. 1996)).

[14] Jackson's offense was severe. He not only possessed a handgun after being convicted of a serious violent felony, but he used the gun to shoot his long-term girlfriend after a minor disagreement. As we have stated in reviewing a previous challenge to the SVF statute: "Our legislature has prohibited those who have committed serious violent felonies from possessing firearms, presumably, to make it harder for them to continue committing other violent crimes." *Id*. Given the facts of this case, such presumption seems wise. Consequently, we are not persuaded that a Level 4 felony is a disproportionate penalty for violating the SVF statute, even if the felon's predicate offense is decades old. *See Cole v. State*, 790 N.E.2d 1049, 1053 (Ind. Ct. App. 2003) (holding penalty for knowingly failing to deposit public funds was not disproportionate to the nature of the offense), *trans. denied*.

B. Article I, Section 18

[15] Jackson also contends that because the SVF statute does not impose a time limit regarding commission of the predicate offense, the statute violates Article I, Section 18 of the Indiana Constitution, which provides: "The penal code shall be founded on principles of reformation, and not vindictive justice." In *Teer*, the defendant challenged the SVF statute on the grounds that the statute was unconstitutional under Article I, Section 18 of the Indiana Constitution, and we held Section 18 was meant to govern the penal system as a whole and not

intended to be a vehicle for fact-specific challenges. 738 N.E.2d at 289. Jackson asks us to reconsider our holding in *Teer* and asserts that our interpretation was misplaced because "Indiana did not have categorical and timeless restrictions on gun possession, as in the SVF statute, at the time of Article I, Section 18's drafting and ratification," and the section "should offer some degree of protection grounded in 'principles of reformation.'" (Appellant's Br. at 17.)

[16] While we are not bound by horizontal stare decisis, *In re C.F.*, 911 N.E.2d 657, 658 (Ind. Ct. App. 2009), we are bound by Indiana Supreme Court authority. *See Dragon v. State*, 744 N.E.2d 103, 107 (Ind. Ct. App. 2002) ("Supreme court precedent is binding upon us until it is changed either by that court or by legislative enactment."), *trans. denied*. In *Henson v. State*, our Indiana Supreme Court explained, "our precedents have held that art. 1, § 18, applies only to the penal code as a whole, not to individual sentences." 707 N.E.2d 792, 796 (Ind. 1999). We thus follow this authority and hold that the SVF statute does not violate Article I, Section 18 of the Indiana Constitution.

Conclusion

[17] While the trial court should have entered a particularized finding of need before ordering Jackson tried in shackles, Jackson failed to object and thus waived the issue for appeal. Nonetheless, the evidence against Jackson was so substantial that any such error was harmless beyond a reasonable doubt. Jackson also waived his constitutional challenges to the SVF statute by not presenting them

before the trial court, but we nonetheless hold the SVF statute is not unconstitutional under either Article I, Section 16 or Article I, Section 18 of the Indiana Constitution. We therefore affirm the trial court.

[18] Affirmed.

Riley, J., and Altice, J., concur.