

## MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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Julio Serrano,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

March 21, 2023

Court of Appeals Case No.  
22A-CR-2177

Appeal from the Hendricks  
Superior Court

The Honorable Stephenie LeMay-  
Luken, Judge

Trial Court Cause No.  
32D05-1702-F3-14

**Memorandum Decision by Judge Bailey**  
Judges Brown and Weissmann concur.

**Bailey, Judge.**

## Case Summary

- [1] Julio Serrano appeals following his conviction for unlawful possession of a firearm by a serious violent felon, as a Level 4 felony,<sup>1</sup> and his adjudication as a habitual offender.<sup>2</sup> Serrano presents one issue for our review, namely, whether the State presented sufficient evidence to support his adjudication as a habitual offender. The State concedes that it failed to present sufficient evidence to support the enhancement. We agree and, thus, reverse Serrano’s adjudication as a habitual offender and remand for resentencing.

## Facts and Procedural History

- [2] At approximately 9:30 p.m. on February 20, 2017, Officer Dirk Fentz with the Brownsburg Police Department was on patrol when he received a report of a “person armed” in a nearby neighborhood. Tr. Vol. 2 at 185. Officer Fentz responded to the dispatch and, while he was on his way, the report changed to “an armed robbery in progress.” *Id.* Officer Fentz then learned that the suspect fled the scene in a white Cadillac Escalade. As officer Fentz approached the neighborhood, he saw a white Escalade stopped at a stop light. Officer Fentz parked his car “nose to nose” with the Escalade in order to prevent the suspect vehicle from leaving. Tr. Vol. 3 at 33.

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<sup>1</sup> Ind. Code § 35-47-4-5(c) (2017).

<sup>2</sup> I.C. § 35-50-2-8(b).

- [3] Other officers arrived to assist Officer Fentz, and the officers were able to observe a female driver and at least one person in the back seat. Officers approached the car, and Officer Chad Brandon observed the occupants making “furtive movements[.]” Tr. Vol. 2 at 250. Officers ordered the occupants to exit the vehicle, but they did not comply initially. Ultimately, officers heard the car doors unlock, and Officer Jonathon Flowers pulled Serrano out of the rear passenger seat of the vehicle.
- [4] Serrano took off running “as soon as his feet hit the ground[.]” Tr. Vol. 3 at 37. Officers began to chase Serrano on foot. During the chase, Officer Fentz saw Serrano “reach behind his back into his waistband and pull a firearm out.” Tr. Vol. 2 at 199. Officer Fentz then saw Serrano “turn to his right to shoot toward” Officer Fentz. *Id.* At that point, Officer Fentz shot Serrano. Serrano “dropped right there,” and he dropped the firearm. *Id.* at 200. Officers were able to secure the firearm, and they called for medics to treat Serrano.
- [5] The State charged Serrano with unlawful possession of a firearm by a serious violent felon, as a Level 4 felony, and alleged that he is a habitual offender.<sup>3</sup> The court then held a bifurcated jury trial. At the conclusion of the first phase, the jury found Serrano guilty of the Level 4 felony. The court then proceeded to the second phase. In support of its allegation that Serrano was a habitual

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<sup>3</sup> The State also initially charged Serrano with attempted robbery, as a Level 3 felony; carrying a handgun without a license, as a Level 5 felony; and criminal recklessness, as a Level 6 felony. But on the State’s motion, the court dismissed those charges prior to trial.

offender, the State presented evidence that Serrano had been convicted of two prior offenses in Illinois. In particular, the State admitted as evidence documents that demonstrated that Serrano had been convicted of manufacturing or delivering between one and fifteen grams of cocaine, as a Class 1 felony, in 2007, and that Serrano had been convicted of aggravated battery, as a Class 2 felony, in 2011. *See* Ex. Vol. 5 at 44, 60.

- [6] At the conclusion of the second phase, the jury found that Serrano was a habitual offender. The court entered judgment of conviction accordingly and sentenced Serrano to ten years for the Level 4 felony conviction, enhanced by ten years for the habitual offender adjudication, for an aggregate sentence of twenty years in the Indiana Department of Correction. This appeal ensued.

## Discussion and Decision

- [7] Serrano contends, and the State agrees, that the State failed to present sufficient evidence to support his adjudication as a habitual offender. Upon a challenge to the sufficiency of the evidence for a habitual offender determination, this Court neither reweighs the evidence nor judges the credibility of the witnesses; rather we examine only the evidence most favorable to the judgment, together with all of the reasonable and logical inferences to be drawn therefrom. *See Woods v. State*, 939 N.E.2d 676, 677 (Ind. Ct. App. 2010), *trans. denied*. The habitual offender determination will be sustained on appeal so long as there is substantial evidence of probative value supporting the judgment. *Id.*

[8] To demonstrate that Serrano is a habitual offender, the State was required to prove that he had been convicted of two prior unrelated felonies and that one of those felonies was not a Level 6 or Class D felony. Ind. Code § 35-50-2-8(b) (2017). Here, the only evidence the State presented showed that Serrano had been convicted of two prior unrelated felonies in Illinois. Indeed, the State presented evidence that Serrano had been convicted of manufacturing or delivering between one and fifteen grams of cocaine, as a Class 1 felony, in 2007, and that Serrano had been convicted of aggravated battery, as a Class 2 felony, in 2011. *See* Ex. Vol. 5 at 44, 60.

[9] However, at the time Serrano committed the offense in 2017,<sup>4</sup> the Indiana General Assembly defined a Level 6 felony conviction as “a conviction, in any other jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year.” I.C. § 35-50-2-1(a)(2). And our Supreme Court interpreted that statute to mean that “all non-Indiana felonies count as Level 6 felonies for habitual-offender enhancements.” *Calvin v. State*, 87 N.E.3d 474, 477 (Ind. 2017). As a result, Serrano’s two Illinois felonies count as Level 6 felonies under the habitual offender statute. But Indiana Code Section 35-50-2-8(b) does not allow a habitual offender enhancement based only on two Level 6 felonies. We therefore hold that the

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<sup>4</sup> While the statute has since been amended, there is no dispute that the “sentencing statute in effect at the time a crime is committed governs the sentence for that crime.” *Harris v. State*, 897 N.E.2d 927, 928-29 (Ind. 2008).

State presented insufficient evidence to support Serrano's adjudication as a habitual offender.

## Conclusion

[10] The State failed to present sufficient evidence to support Serrano's adjudication as a habitual offender. We therefore reverse Serrano's adjudication and remand for resentencing on the Level 4 felony conviction.

[11] Reversed and remanded with instructions.

Brown, J., and Weissmann, J., concur.