DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CHRISTOPHER ALLEN PRYOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D22-563

April 5, 2023

Appeal from the Circuit Court for Pinellas County; Philip J. Federico, Judge.

Howard L. Dimmig, II, Public Defender, and Siobhan Helene Shea, Special Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Cerese Crawford Taylor, Assistant Attorney General, Tampa, for Appellee.

LaROSE, Judge.

At the conclusion of a bifurcated trial, the jury found Christopher Allen Pryor guilty of possessing a firearm by a violent career criminal (VCC). *See* § 790.235, Fla. Stat. (2019). We have jurisdiction.[1] *See* Fla. R. App. P. 9.030(b)(1)(A). We affirm.

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[1] Mr. Pryor was also convicted of battery and improper exhibition of a firearm, lesser included misdemeanor offenses, and received time served dispositions. We affirm these convictions without further comment.

Background

In December 2019, Mr. Pryor was dating the victim, A.H. He lived in her house. The relationship soured quickly on the day he forgot to bring home a rat to feed to A.H.'s pet snake. A heated squabble ensued.

The dispute escalated beyond shouting. Mr. Pryor hurled hot soup on A.H.'s face. He left the house for a short time. When he returned, he saw A.H. moving his belongings out of the house. He was incensed. Brandishing a gun, Mr. Pryor confronted A.H. in the driveway. He put the gun under her chin and pulled the trigger. She heard a click. The gun misfired. Seeing a chance to escape, A.H. ran to safety. Mr. Pryor fired several shots into the air.

A.H.'s neighbors heard multiple gunshots. Police officers recovered three spent shell casings. During a search for the gun, the officers discovered a .380 semiautomatic pistol and a box of ammunition stowed in a grill in the backyard. A neighbor recalled seeing Mr. Pryor walking from the direction where the gun and ammunition were found. A ballistics expert opined that the shell casings were discharged from that gun.

Prior to trial, Mr. Pryor filed a motion to sever the possession of a firearm by a VCC count from the remaining charges.[2] He claimed that "[s]everance . . . [wa]s necessary to achieve a fair determination of [his] guilt or innocence of each offense." The trial court denied severance but bifurcated the proceedings. The trial court reasoned that severing the charge would deprive the jury of hearing the event's full context:

> [T]he firearm's found in the—in the grill. The implication is he ran in the house and then put it in the grill in the back,

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[2] The State also charged Mr. Pryor with burglary with a battery arising from Mr. Pryor's striking a motorist who had stopped to render aid to A.H., aggravated assault related to A.H., and simple assault stemming from Mr. Pryor's threatening behavior toward a neighbor.

> right? So why would he hide the firearm in the grill? Because he knows the cops are coming on a domestic because the whole blocks [sic] calling. I don't know how you separate that out as part of the circumstances related to the firearm. You can't—you can't just totally—hey, she—she says he fired some shots and there's a gun found in the grill, that's all you need to know about that situation. I mean, that's not a fair presentation of what the evidence is in that scenario.

The trial court divided the trial into two phases. The first phase required the jury to find whether Mr. Pryor possessed a firearm. At the conclusion of this phase, the jury found that Mr. Pryor had possessed a firearm.

After a brief recess, the jury reconvened for the second phase of the trial. The trial court advised the jury that "the [S]tate is going to present evidence that [Mr. Pryor i]s a [VCC]." The State introduced a Department of Corrections "Crime and Time Report" detailing Mr. Pryor's most recent release date from prison as well as multiple prior convictions. Specifically, the State introduced Mr. Pryor's 2012 Hernando County conviction for aggravated battery with great bodily harm, a 2005 Hernando County burglary conviction, and, as relevant here, a 1995 Pinellas County conviction for escape from a secure juvenile detention facility. Mr. Pryor raised no objection to the State's use of the 1995 conviction as a qualifying offense. Finding that Mr. Pryor qualified as a VCC, the jury found him guilty on the possession of a firearm by a VCC charge. The trial court imposed the statutorily mandated life sentence. *See* §§ 790.235(1); 775.084(4)(d)1, Fla. Stat. (2019).

Analysis

I. Denial of Severance Motion

Mr. Pryor contends that the trial court erred in denying his severance motion. He asserts that the trial court's decision did not cut the mustard, constitutionally speaking. *See* Fla. R. Crim. P.

3.152(a)(2)(A) ("In case 2 or more charges of related offenses are joined in a single indictment or information, the court . . . shall grant a severance of charges on motion of the state or of a defendant . . . before trial on a showing that the severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense . . . ."); *State v. Vazquez*, 419 So. 2d 1088, 1090 (Fla. 1982) ("A severance should be granted liberally when prejudice is likely to flow from refusing the severance."). Reviewing Mr. Pryor's argument for an abuse of discretion by the trial court, we cannot agree. *See Knott v. State*, 198 So. 3d 768, 770 (Fla. 2d DCA 2016); *Campfield v. State*, 189 So. 2d 642, 642 (Fla. 2d DCA 1966) ("An application for severance is addressed to the trial court's sound discretion and the order thereon will not be reversed except for palpable abuse of judicial discretion.").

Those charges requiring proof of Mr. Pryor's criminal record had to be considered separately from other charges.[3] *See Tucker v. State*, 884 So. 2d 168, 172 (Fla. 2d DCA 2004) ("Although a trial court has discretion to grant or deny a motion for severance, that discretion has been sharply curtailed when it concerns a request to sever a charge of felon in possession of a firearm. . . . Because the trial court abused its

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[3] However, that is not the case when possession of a firearm by a convicted felon is the sole charge before the jury. *See Tucker v. State*, 884 So. 2d 168, 172 n.5 (Fla. 2d DCA 2004). *Compare Vazquez*, 419 So. 2d at 1091 (holding that proof of a prior conviction, although unfairly prejudicial to other counts, was relevant, admissible, and not unfairly prejudicial for a charge of felon in possession of firearm and, thus, affirming that charge), *with Syder v. State*, 921 So. 2d 871, 872-73 (Fla. 4th DCA 2006) (approving the trial court's denial of Mr. Syder's motion to bifurcate two counts of possession of a firearm by a convicted felon because "[i]n the case of the charge of possession of a firearm by a convicted felon, possession of a firearm by itself is not a criminal offense," instead Mr. Syder's "status of convicted felon is a necessary element of the offense charged").

discretion by denying Mr. Tucker's request to sever the felon in possession of a firearm charge from the charges for carrying a concealed firearm and aggravated assault with a firearm, we reverse Mr. Tucker's convictions on the latter two charges."); *cf. State v. Harbaugh*, 754 So. 2d 691, 693 (Fla. 2000) ("[A]bsent the bifurcated process, the jury is directly confronted with evidence of defendant's prior criminal activity and the presumption of innocence is destroyed and . . . '[i]f the presumption of evidence is destroyed by proof of an unrelated offense, it is more easily destroyed by proof of a similar related offense.' " (second alteration in original) (quoting *State v. Rodriguez*, 575 So. 2d 1262, 1265 (Fla. 1991))); *Fox v. State*, 543 So. 2d 340, 342 (Fla. 1st DCA 1989) ("Certainly the lower court should have granted the initial motion to sever. Having failed to do so, it caused defense counsel to reveal to the prospective jurors that appellant had a criminal past. Considering the extremely prejudicial nature of such information, the fact that the error occurred prior to the commencement of trial, and that appellant's right to a fair trial could have been preserved by selection of a new jury, we conclude that the lower court erred in denying appellant's motion for mistrial.").[4]

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[4] In fact, even the "VCC" term, itself, has been deemed sufficiently prejudicial such that it could not be utilized in the jury's presence in a trial for possession of a firearm by a VCC. *See State v. Emmund*, 698 So. 2d 1318, 1320 (Fla. 3d DCA 1997) (approving trial court's order prohibiting State from using "violent career criminal" statutory terminology in trial for possession of a firearm by a VCC because of the "potential for jury confusion and unfair prejudice, as well as the risk that the defendant's prior record will become a feature of the case. . . . The focus of the case should remain on the facts that are actually in dispute: whether the defendant possessed the firearm on the date charged."). The trial court's decision to bifurcate prevented the undue prejudice envisioned in *Emmund*.

Mr. Pryor's case is akin to *Jackson v. State*, 881 So. 2d 711 (Fla. 3d DCA 2004). There, the State charged Mr. Jackson with armed robbery, possession of a firearm by a convicted felon, and giving a false name after arrest. *Id.* at 715. Mr. Jackson moved to sever the armed robbery count. *Id.* The trial court denied severance but bifurcated Mr. Jackson's trial; the jury would first try the armed robbery count and if he was convicted, the same jury would reconvene to decide the remaining two counts. *Id.* The Third District observed that "the same goal was achieved here by bifurcation" and concluded that "bifurcation was within the court's discretion and follows established procedure for a trial of this type." *Id.* After all, during the trial of the armed robbery charge, the jury did not learn that Mr. Jackson had a prior felony record. *Id.* at 716. The jury's interrogatory verdict only found the defendant guilty of robbery with a firearm. *Id.* The Third District reasoned that bifurcation prevented the jury from hearing irrelevant and unduly damaging evidence of the defendant's prior convictions while considering whether he possessed a firearm. *Id.*

Similarly, in *Walters v. State*, 933 So. 2d 1229 (Fla. 3d DCA 2006), the Third District explained the State's ability to rely on factual findings by the same jury in the first phase of a bifurcated trial to establish the charge of possession of a firearm by a convicted felon in the second phase:

> The appropriate procedure in a bifurcated trial is to have the jury reconvene in the second phase for the trial of the charge of possession of a firearm by a convicted felon. In the second phase, the jury would be instructed that the fact that the defendant possessed a firearm had already been established by the verdict in the first phase. The State must then introduce evidence that the defendant is a convicted felon.

Id. at 1231.

For Mr. Pryor, because the jury did not learn of his prior convictions during the first phase of trial, "the same goal [sought by severance] was achieved here by bifurcation." *Jackson*, 881 So. 2d at 715. As in *Jackson*, bifurcation accorded Mr. Pryor due process. Indeed, the State satisfied its burden of proof in phase one—possession of a firearm—without using evidence of Mr. Pryor's status as a VCC. In our view, the trial court crafted a sound solution.

II. Bifurcated Trial & Fundamental Error

Mr. Pryor contends that "[i]t was fundamental error to adjudicate [him] guilty of possession of a firearm by a [VCC] where the jury never reached a verdict, was never instructed on, and never found all the elements of possession of a firearm by a [VCC]." He contends that "[t]he trial court added the verdicts from separate trials together to adjudicate [him] guilty of possession of a firearm by a [VCC]." We disagree.

A bifurcated proceeding is conducted in "stages" or "phases." Yet, it remains a single proceeding. *See Harbaugh*, 754 So. 2d at 694 ("Examining the *Rodriguez* bifurcated trial process in felony DUI prosecutions . . . we hold that in this bifurcated process the jury, not the judge, must determine the verdict from the evidence presented in the second phase. . . . It follows then that felony DUI trials must be conducted before the jury in two stages because the concern remains about tainting the consideration of the current misdemeanor DUI with evidence concerning the past DUI."); *Gonzalez v. State*, 306 So. 3d 1124, 1134 (Fla. 3d DCA 2020); *Emory v. State*, 46 So. 3d 89, 91 (Fla. 4th DCA 2010); *Walters*, 933 So. 2d at 1231 (holding that where the trial court bifurcates a possession of a firearm by a convicted felon charge from charges of attempted murder and aggravated battery, the jury must "reconvene in the second phase for the trial of the charge of possession of a firearm by a convicted felon").

That is exactly what happened in Mr. Pryor's case. After finding in phase one that Mr. Pryor possessed a firearm, the jury was then tasked with determining whether he possessed the requisite criminal record to qualify for VCC sentencing. We see no error in this procedure, let alone one of fundamental import. *See Adams v. State*, 122 So. 3d 976, 979 (Fla. 2d DCA 2013) ("[E]rror is fundamental only if it 'goes to the very heart of the judicial process' and 'extinguishes a party's right to a fair trial,' such that it results in a miscarriage of justice." (quoting *Martinez v. State*, 933 So. 2d 1155, 1159 (Fla. 3d DCA 2006))).

III. Juvenile Escape & Possession of a Firearm by a VCC

Mr. Pryor claims that the State failed to prove that he possessed the requisite prior convictions to qualify as a VCC. Specifically, he contends that his juvenile escape conviction is not a qualifying offense under section 775.084(1)(d)1.

The State counters that Mr. Pryor ignores the applicable statutory language:

> (2) For purposes of this section, the previous felony convictions necessary to meet the violent career criminal criteria under [section] 775.084(1)(d) may be convictions for felonies committed as an adult **or adjudications of delinquency for felonies committed as a juvenile**. In order to be counted as a prior felony for purposes of this section, the felony must have resulted in a conviction sentenced separately, or an adjudication of delinquency entered separately, prior to the current offense, and sentenced or adjudicated separately from any other felony that is to be counted as a prior felony.

§ 790.235(2) (emphasis added). The State contends that it "properly relied on the escape from juvenile facility adjudication and detention to establish [Mr.] Pryor's VCC status." We are unpersuaded.

We are called upon to interpret the relevant statutory provisions. Accordingly, our review is de novo. *Braine v. State*, 255 So. 3d 470, 471

(Fla. 2d DCA 2018) ("Statutory interpretation raises an issue of law, and we review the trial court's ruling de novo." (quoting *Wegner v. State*, 928 So. 2d 436, 438 (Fla. 2d DCA 2006))). "The first place we look when construing a statute is to its plain language—if the meaning of the statute is clear and unambiguous, we look no further." *State v. Hackley*, 95 So. 3d 92, 93 (Fla. 2012). "We resort to other rules of statutory construction only where the statute is ambiguous in the sense that it could be reasonably understood to mean two different things." *Burgess v. State*, 198 So. 3d 1151, 1155 (Fla. 2d DCA 2016). We find no ambiguity in the relevant statute. Thus, we hew closely to the words as written, affording them their plain and ordinary meaning.

To qualify for VCC sentencing, a defendant must have previously been convicted as an adult three or more times of various enumerated felony offenses. § 775.084(1)(d). As relevant here, the list of enumerated convictions includes "[e]scape, as described in [section] 944.40."[5] § 775.084(1)(d)1.f. Seemingly, however, the State relied on Mr. Pryor's conviction for escape from a juvenile detention facility, pursuant to section 39.061, Florida Statutes (Supp. 1994), a third-degree felony.[6]

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[5] At the time Mr. Pryor committed the alleged qualifying offense, section 944.40, Florida Statutes (Supp. 1993), provided as follows: "Any prisoner confined in any prison, jail, road camp, or other penal institution, state, county, or municipal, working upon the public roads or being transported to or from a place of confinement who escapes . . . from such confinement shall be guilty of a felony of the second degree . . . . "

[6] Our record reflects that Mr. Pryor, born in 1979, was prosecuted as an adult for escape, under section 39.061. He committed the offense in 1994. At that time, Mr. Pryor was fourteen years old. He was sentenced to three years in prison. *Cf.* ch. 97-238, § 35, Laws of Fla. (creating section 985.227, entitled "Prosecution of juveniles as adults by the direct filing of an information in the criminal division of the circuit

Section 39.061 no longer exists. Beginning in 1997, the legislature renumbered and amended the statute several times, leading to its current iteration, found at section 985.721, Florida Statutes (2014) ("Escapes from secure detention or residential commitment facility"). *See* ch. 98-207, Laws of Fla.; ch. 2006-120, Laws of Fla. To be certain, however, escape, as proscribed by section 985.721, is not listed among the qualifying VCC offenses under section 775.084(1)(d)1.

As a result, we conclude that the State reaches too far. As the State would have it, any "adjudication[] of delinquency for felonies committed as a juvenile" would be a predicate conviction for VCC sentencing. § 790.235(2). We read section 790.235(2) differently. The State's parsing of the statute impermissibly excises the antecedent, qualifying portion of the sentence. *See Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Schs., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009) ("Basic to our examination of statutes, and an important aspect of our analysis here, is the 'elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.' " (quoting *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606 (Fla. 2006))). Namely, "**[f]or purposes of [section 790.235], the previous felony convictions necessary to meet the [VCC] criteria under [section] 775.084(1)(d)**" may also include "adjudications of delinquency for felonies committed as a juvenile." § 790.235(2) (emphasis added). Thus, not just any adjudication for a felony committed as a juvenile will do. Instead, section 790.235(2) simply broadens the adult convictions already enumerated

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court; discretionary criteria; mandatory criteria," effective October 1, 1997).

under 775.084(1)(d)1 as necessary for VCC qualification to also include juvenile adjudications for those same enumerated offenses. *See Jackson v. State*, 729 So. 2d 947, 950 (Fla. 1st DCA 1998) (stating that "[t]he goal of [section 790.235] was . . . to protect the public by prohibiting the possession of firearms by persons previously convicted of, ***or adjudicated delinquent for, the commission of certain enumerated felonies***" (emphasis added)). Although juvenile adjudications are not permissible prior convictions for purposes of qualifying as a VCC under section 775.084(1)(d)1, section 790.235(2) allows for juvenile felony adjudications of the offenses listed in section to 775.084(1)(d) to suffice. And, once again, we observe, section 775.084(1)(d) does not include escape from a secure detention or residential commitment facility, section 985.721, among the qualifying offenses. The offenses proscribed by sections 985.721 and 944.40 are not interchangeable. *See Lacey v. State*, 114 So. 3d 452, 453-54 (Fla. 4th DCA 2013).

The State's misplaced reliance on his 1995 escape conviction does not end the story. At trial, Mr. Pryor failed to challenge the State's use of that conviction to prove that he qualified as a VCC. Consequently, Mr. Pryor's sufficiency of the evidence challenge was not preserved for review. *See Bybee v. State*, 295 So. 3d 1229, 1232 (Fla. 2d DCA 2020) ("[A] motion or objection must be specific to preserve a claim of insufficiency of the evidence for appellate review." (alteration in original) (quoting *F.B. v. State*, 852 So. 2d 226, 230 n.2 (Fla. 2003))). Thus, we review for fundamental error. *Id.* And in the context of fundamental error, that means that the appellant must show that the evidence was insufficient to prove that he committed any crime at all. *See Spencer v. State*, 216 So. 3d 11, 14 (Fla. 1st DCA 2015) (" 'The state's failure to prove all elements of a charged offense does not constitute "fundamental error" which may be raised for the first time on appeal.' Instead, in order to prove

fundamental error, the evidence must be 'insufficient to show that a crime was committed at all.' " (first quoting *Sanders v. State*, 765 So. 2d 778 (Fla. 1st DCA 2000); and then quoting *F.B.*, 852 So. 2d at 230)).

On this record, Mr. Pryor fails to demonstrate that he committed no crime. *See* § 790.23(1)(a), Fla. Stat. (2019) ("It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm[or], ammunition . . . if that person has been . . . [c]onvicted of a felony in the courts of this state . . . .").

Conclusion

We affirm Mr. Pryor's judgment and sentences without prejudice to his challenging the possession of a firearm by a VCC conviction on collateral review. *See* Fla. R. Crim. P. 3.850.

Affirmed.

KELLY and LABRIT, JJ., Concur.

Opinion subject to revision prior to official publication.