MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Thomas G. Snider,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 15, 2023

Court of Appeals Case No. 23A-CR-867

Appeal from the Fulton Superior Court

The Honorable Gregory L. Heller, Judge

Trial Court Cause Nos. 25D01-1811-F4-828 and 25D01-2209-F4-581

Memorandum Decision by Judge Mathias
Judges Riley and Crone concur.

Mathias, Judge.

[1] In this consolidated appeal, Thomas G. Snider challenges his convictions for two Level 4 felony counts of unlawful possession of a firearm by a serious violent felon as well as the ensuing revocation of his probation. Snider raises three issues for our review, which we restate as follows:

> 1. Whether Snider invited any error when the trial court did not sua sponte bifurcate his trial on the Level 4 felony charges.
>
> 2. Whether Snider's two convictions violate Indiana's prohibition against double jeopardy.
>
> 3. Whether the State presented sufficient evidence to support the revocation of Snider's probation.

[2] We affirm Snider's convictions and the revocation of his probation.

Facts and Procedural History

[3] In 1991, Snider was convicted of robbery in Kentucky. Thereafter, he moved into an apartment in Rochester, Indiana. Snider's apartment was inside of a house that had been partitioned into apartments. Snider rented the entire house and sublet the additional apartments.

[4] In June 2022, Snider pleaded guilty to Level 4 felony unlawful possession of a firearm by a serious violent felon in cause number 25D01-1811-F4-828 ("Cause No. F4-828"). As a result of his guilty plea, the court sentenced Snider to ten years, which the court suspended to probation. The conditions of Snider's probation prohibited him from committing additional criminal offenses.

[5] Desiree Griffith was a friend of Snider's, and, in August, her daughter was subletting one of the apartments in the house Snider rented. On August 21, Desiree took several photographs of herself and Snider posing with a 9mm-caliber handgun and an AR-15 rifle. On August 24, Snider and Desiree got into an argument over her daughter's rent, and Snider threatened "to cause harm to [her] daughter and her [daughter's] boyfriend." Tr. in Cause No. 25D01-2209-F4-581, Vol. 3, p. 118.

[6] The next day, Desiree reported Snider's threat to police and showed officers the photographs of Snider with the firearms. Officers then obtained a search warrant for Snider's apartment. In executing that warrant, officers discovered and seized the 9mm-caliber handgun and corresponding ammunition from Snider's bedroom. Officers also seized ammunition consistent with an AR-15, but they did not locate the rifle itself. A few hours after officers left the apartment, however, Snider's daughter located the AR-15 behind a lazy susan in Snider's kitchen. Officers then took custody of the AR-15.

[7] The State charged Snider with two counts of Level 4 felony unlawful possession of a firearm by a serious violent felon in cause number 25D01-2209-F4-581 ("Cause No. F4-581"). At the final pretrial hearing before his jury trial, the court asked Snider's counsel if he wanted to bifurcate the question of Snider's alleged possession of the firearms and the question of Snider's status as a serious violent felon, and Snider's counsel responded, "No." Tr. in Cause No. F4-581, Vol. 2, p. 23. The State then explained to the court that "we agreed not to. And I think it's confusing [to bifurcate] because everybody's going to walk

around on eggshells making sure they don't mention that he's a serious[] violent felon even though it's part of the charging information." *Id.* The State added that it did not want to "make a big deal" of Snider's status to the jury, noting that, "we get it in, and then we move on." *Id.* at 24. And the State further acknowledged its desire to avoid having Snider's criminal history "become prejudicial unfairly." *Id.* The court then again followed up with Snider's counsel, and he responded, "we're on the same page." *Id.*

[8] Thereafter, the court held Snider's jury trial, after which the jury found him guilty as charged. The court entered its judgment of conviction on both counts and sentenced Snider accordingly.

[9] Meanwhile, in Cause No. F4-828, the State filed a notice of probation violation in light of Snider's new criminal acts as charged in Cause No. F4-581. At an ensuing fact-finding hearing, the State introduced Snider's judgment of conviction in Cause No. F4-581 in lieu of other evidence that might have independently supported the State's allegation that Snider had committed those additional offenses. The trial court agreed with the State that Snider had violated the conditions of his probation, revoked his probation, and ordered him to serve the balance of his previously suspended sentence in the Department of Correction.

[10] This consolidated appeal ensued.

1. Snider invited any error with respect to the trial court not bifurcating his jury trial in Cause No. F4-581.

[11] We first address Snider's argument on appeal that the trial court committed fundamental error when it did not sua sponte bifurcate his jury trial in Cause No. F4-581. "An error is fundamental . . . if it made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process . . . ." *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018) (quotation marks omitted).

[12] However, our review under the fundamental-error doctrine may be precluded by an invited error. *Miller v. State*, 188 N.E.3d 871, 874-75 (Ind. 2022). Invited error "forbids a party from taking advantage of an error that she commits, invites, or which is the natural consequence of her own . . . misconduct." *Durden*, 99 N.E.3d at 651. As our Supreme Court has explained:

> throughout the [invited-error] doctrine's history, we have consistently required something more than mere "neglect" before applying the automatic rule of preclusion: evidence of counsel's strategic maneuvering at trial. Indeed, this Court has long held that the "policy behind" the doctrine is to prohibit a party, privy to an "erroneous action of the court," from alleging "prejudicial error" following an adverse decision.
>
> In reaffirming this precedent, we emphasize today that, to establish invited error, *there must be some evidence that the error resulted from the appellant's affirmative actions as part of a deliberate, "well-informed" trial strategy*. A "passive lack of objection," standing alone, is simply not enough. And when there is no evidence of counsel's strategic maneuvering, we are reluctant to

> find invited error based on the appellant's neglect or mere acquiescence to an error introduced by the court or opposing counsel.

Batchelor v. State, 119 N.E.3d 550, 557-58 (Ind. 2019) (emphasis added; citations omitted).

[13] Here, the record is clear that Snider affirmatively sought to proceed without bifurcation. The record further makes clear that Snider's decision was "part of a deliberate, 'well-informed' trial strategy." *Id.* The trial court expressly asked Snider if he wished to bifurcate his criminal trial, and he affirmatively informed the court that, "[n]o," he did not want to bifurcate the trial. Tr. in Cause No. F4-581, Vol. 2, p. 23. Immediately following that statement, the State explained to the court that the parties had "agreed not to" bifurcate as a matter of strategy, stating that it would be "confusing [to bifurcate] because everybody's going to walk around on eggshells making sure they don't mention that he's a serious[] violent felon even though it's part of the charging information." *Id.* The State further stated that, in not bifurcating the trial, the State would seek to avoid "mak[ing] a big deal" of Snider's status to the jury and to avoid having Snider's criminal history "become prejudicial unfairly." *Id.* at 24. And, when the court again followed up with Snider on this issue, he responded that he and the State were "on the same page." *Id.*

[14] Still, Snider asserts that the invited-error doctrine does not apply here because his counsel's apparent strategy in proceeding without bifurcation was not reasonable. But Indiana's case law does not require that invited error be

premised on reasonable strategies. Invited error simply requires evidence that the appellant took "affirmative actions" in the trial court "as part of a deliberate, 'well-informed' trial strategy." *Batchelor*, 119 N.E.3d at 557-58. And proceeding in a manner before the jury that avoids "confus[ion]" and "walk[ing] around on eggshells" is at least that much. Tr. in Cause No. F4-581, Vol. 2, pp. 23-24. Accordingly, we decline to review Snider's claim of fundamental error and hold that his argument on this issue is precluded by the doctrine of invited error.

2. Snider's two Level 4 felony convictions do not violate Indiana's prohibition against double jeopardy.

[15] Snider next contends that his two Level 4 felony convictions—one for each firearm located in his apartment—violate Indiana's prohibition against double jeopardy. We review such claims de novo. *Wadle v. State*, 151 N.E.3d 227, 237 (Ind. 2020). Our Supreme Court has explained that "[s]ubstantive double-jeopardy claims principally arise in one of two situations: (1) when a single criminal act or transaction violates multiple statutes with common elements, or (2) when a single criminal act or transaction violates a single statute and results in multiple injuries." *Powell v. State*, 151 N.E.3d 256, 263 (Ind. 2020). In either circumstance, the dispositive question is one of statutory intent. *Wadle*, 151 N.E.3d at 248. Snider's claim implicates the second scenario.

[16] As our Court has explained:

> *Powell* provides the double-jeopardy test when a defendant is convicted multiple times under a single statute based on a single

> criminal act or transaction. 151 N.E.3d at 263. The inquiry involves two steps. *Id.* at 264. The first step is determining whether the statute at issue clearly indicates a "unit of prosecution." *Id.* "[A] unit of prosecution is 'the minimum amount of activity a defendant must undertake, what he must do, to commit each new and independent violation of a criminal statute[.]'" *Barrozo v. State*, 156 N.E.3d 718, 725 (Ind. Ct. App. 2020) (quoting *United States v. Rentz*, 777 F.3d 1105, 1109 (10th Cir. 2015) (en banc)). *If the statute clearly indicates a unit of prosecution, the court follows the legislature's guidance and the analysis is complete*. *Powell*, 151 N.E.3d at 264. If it does not—that is, if the statute is ambiguous—the court proceeds to the second step. *Id.* "Under this second step, a court must determine whether the facts—as presented in the charging instrument and as adduced at trial—indicate a single offense or whether they indicate distinguishable offenses." *Id.*

Moore v. State, 181 N.E.3d 442, 446-47 (Ind. Ct. App. 2022) (emphasis added; alterations original to *Moore*).

[17] Indiana Code section 35-47-4-5(c) (2022) provides as follows: "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." (Emphasis added.) Our Court has repeatedly concluded that that language clearly indicates our legislature's intent that the statute's unit of prosecution is "a firearm," not "firearms." *Walton v. State*, 81 N.E.3d 679, 682 (Ind. Ct. App. 2017); *Daugherty v. State*, 52 N.E.3d 885, 892 (Ind. Ct. App. 2016), *trans. denied*; *Taylor v. State*, 929 N.E.2d 912, 921-22 (Ind. Ct. App. 2010), *trans. denied*. And, despite substantial changes to our criminal code since our 2010 opinion in *Taylor*, our legislature has not amended Indiana Code section 35-47-4-5(c) to abrogate our

analysis and to reflect a different intent. *See, e.g.*, *Myers v. Crouse-Hinds Div. of Cooper Industries, Inc.*, 53 N.E.3d 1160, 1163 (Ind. 2016) ("the doctrines of *stare decisis* and legislative acquiescence are especially compelling in matters of statutory interpretation").

[18] Still, Snider asks that we disregard the weight of our Court's precedent and instead follow the dissenting opinion in *Walton*, which would have held that the possession of multiple firearms at the same time by a serious violent felon is a single offense under the statute. 81 N.E.3d at 684-89 (Bailey, J., dissenting). But we agree with the majority analysis in *Walton* as well as the unanimous panels in *Daugherty* and *Taylor* that the statutory language speaks for itself. Thus, we decline Snider's request to adopt the dissenting opinion in *Walton*, and we conclude that the plain language of Indiana Code section 35-47-4-5(c) ends Snider's double-jeopardy argument under *Powell*.

3. The State presented sufficient evidence to support the revocation of Snider's probation.

[19] Last, Snider asserts that the State failed to present sufficient evidence to support the revocation of his probation. At the fact-finding hearing on its petition to revoke Snider's probation, the State submitted certified records of his judgment of conviction on the two Level 4 felonies in Cause No. F4-581. The State presented no other evidence that Snider had committed additional, new offenses.

[20] Snider's entire argument on this issue is premised on our agreement with him that his convictions in Cause No. F4-581 must be vacated. As explained above, however, we have rejected Snider's arguments on appeal in Cause No. F4-581; accordingly, we likewise reject his derivative argument that the State failed to present sufficient evidence to support the revocation of his probation. We therefore affirm the trial court's revocation of Snider's probation.

Conclusion

[21] For all of the above-stated reasons, we affirm Snider's two convictions for Level 4 felony unlawful possession of a firearm by a serious violent felon as well as the trial court's revocation of his probation.

[22] Affirmed.

Riley, J., and Crone, J., concur.