MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Austin Green,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 26, 2024

Court of Appeals Case No.
23A-CR-748

Appeal from the Marion Superior Court

The Honorable Mark D. Stoner, Judge

Trial Court Cause No.
49D32-2011-MR-34559

Memorandum Decision by Judge Pyle
Judges Tavitas and Foley concur.

Pyle, Judge.

Statement of the Case

[1] Austin Green ("Green") appeals his convictions, following a jury trial, of murder[1] and attempted murder.[2] He argues that: (1) the trial court abused its discretion when it admitted certain evidence; and (2) there is insufficient evidence to support his attempted murder conviction. Concluding that: (1) the trial court did not abuse its discretion when it admitted certain evidence; and (2) there is sufficient evidence to support Green's attempted murder conviction, we affirm the trial court's judgment.

[2] We affirm.

Issues

1. Whether the trial court abused its discretion when it admitted certain evidence.
2. Whether there is sufficient evidence to support Green's attempted murder conviction.

Facts

[3] The facts most favorable to the verdict reveal that in 2018, Green, Christian Allen ("Allen"), Sincere Dupree ("Dupree"), D'Londre Calmes ("Calmes"), and Aarieonna Lafayette ("Lafayette") attended Pike High School in

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[1] IND. CODE § 35-42-1-1.

[2] I.C. § 35-42-1-1 and I.C. § 35-41-5-1.

Indianapolis. Green and Allen, who were cousins, were friends with Dupree. Calmes and Lafayette, who were involved in a romantic relationship, knew Green, Allen, and Dupree but were not friends with them. Calmes and Lafayette became the parents of a son in August 2018.

[4] In 2019, Calmes moved to Fort Wayne. In the summer of 2019, Calmes and Allen began arguing on social media because Allen did not like the social media name that Calmes was using. Specifically, Allen did not like that Calmes was using a social media name that included the word "paid."[3] (Tr. Vol. 2 at 201). Lafayette eventually blocked Allen from Calmes' social media account.

[5] In March 2020, twenty-year-old Calmes was still living and working in Fort Wayne. On March 21, 2020, Calmes drove his 2011 Ford Fusion ("Calmes' car"), which had tinted windows, to Indianapolis to spend time with Lafayette and their son. The following day, March 22, 2020, Lafayette went to her mother's house while Calmes picked up his two cousins.

[6] Early in the afternoon on March 22, 2020, nineteen-year-old Green used his cell phone to take a live photograph[4] of himself pointing at the camera what appeared to be the muzzles of two handguns. Green then edited the

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[3] The use of the word "paid" implied that Calmes was not a gang member. (Tr. Vol. 2 at 201).

[4] A live photograph is a photograph that records what happens immediately before and after the photograph is taken. It is captured as a "very short video." (Tr. Vol. 4 at 111).

photograph to blur out his face and sent the photograph to friends in a group message.

[7] At approximately 2:00 that afternoon, Calmes and his two cousins went to a gas station on the corner of 56th Street and Georgetown Road ("the gas station"). Green, who was also at the gas station, texted a friend, "[CALMES]." (Ex. Vol. 2 at 68). The friend responded, "Where[?]" (Ex. Vol. 2 at 68). Green answered, "G station . . . he was talking to me. . . . He said you tryna shoot. . . . I said wassup then gon skate off . . . He scary he took off[.]" (Ex. Vol. 2 at 68-70).

[8] Later that afternoon, Green met Allen and Dupree in a parking lot across the street from the gas station. The three men got into Dupree's car ("Dupree's car"), which had tinted windows. Dupree was in the driver's seat, Green was in the front passenger seat, and Allen was in the back seat. Green had two firearms, a 9mm handgun and a .40 caliber Smith and Wesson ("the Smith and Wesson"). Allen had a 9 mm Glock handgun, and Dupree had a Glock handgun in a gun box in the backseat of his car. Green texted his girlfriend, "I'm wit Dupree don't call back[.]" (Ex. Vol. 2 at 73).

[9] Also, later that day, Calmes, who was still with his cousins, picked up Lafayette. Lafayette sat in the front passenger seat, and Calmes' cousins sat in the back seat. At approximately 6:30 p.m., Calmes went back to the gas station to purchase cigars. Calmes parked in a parking spot in front of the gas station's convenience store and went into the convenience store while Lafayette and his

cousins waited in the car. While Calmes was in the convenience store, Dupree pulled up in the parking spot next to the driver's side of Calmes' car. Specifically, the front passenger door of Dupree's car was next to the driver's door of Calmes' car. Fifteen seconds later, Dupree backed his car up to a gas pump behind Calmes' car. At some point, one of Calmes' cousins opened the back door of Calmes' car but did not exit the car.

[10] At 6:38 p.m., Calmes returned to his car, pulled out of the parking lot, and drove away from the gas station. Green told Dupree to follow Calmes' car, and Dupree followed Calmes out of the gas station. Calmes drove to his uncle's house in a nearby housing addition and dropped off his cousins. Calmes then pulled away from the curb and stopped at the stop sign at the intersection of Crickwood Court and Crickwood Place ("the Crickwood intersection"). While Calmes was at the stop sign, Green, Allen, and Dupree drove past the front of Calmes' car, and Green and Allen began shooting at Calmes and Lafayette. When Calmes turned left at the stop sign, Dupree made a U-turn and pursued Calmes and Lafayette through the housing addition. Calmes told Lafayette to climb into the back seat of his car and lie on the floor.

[11] As Calmes left his uncle's housing addition, he turned east onto 71st Street, south onto Michigan Road and west onto 62nd street. Dupree continued to follow Calmes and Lafayette, and when 62nd Street turned into Lafayette Road, Green and Allen fired additional gunshots at Calmes and Lafayette. During the pursuit, Lafayette heard gunshots hitting Calmes' car, and she peeked over the

rear passenger seat to look at Dupree's car. Also, during the pursuit, Lafayette called her mother and 911.

[12] When Calmes and Lafayette were near the I-65 exit ramp on Lafayette Road, Calmes' car broke down. As Calmes and Lafayette attempted to flag down passing cars, Dupree drove past them, and Green and Allen fired additional gunshots at Calmes and Lafayette. Dupree then made a U-turn and drove back towards Calmes' car. Calmes told Lafayette to run, and they took off in different directions. Before Dupree's car had even come to a stop, Green opened the door, jumped out of the car, and pursued a limping Calmes, who had been shot in the leg, into a nearby field. When Green reached Calmes, Green shot Calmes three times in the head. Green then ran back to Dupree's car, and Dupree sped away from the scene.

[13] Shortly thereafter, law enforcement officers arrived at the scene. Lafayette, who had not been shot, told an officer what had happened and took him to the Crickwood intersection where Green and Allen had fired the initial shots at Calmes and Lafayette. The officer found eleven shell casings and two fired bullets at the Crickwood intersection.

[14] Crime scene technicians found three 9mm shell casings next to Calmes' body in the field. The 9mm shell casings had all been fired from the same gun. In addition, technicians who processed the interior of Calmes' car discovered three fired bullets, two fired bullet jackets, and metal fragments. The exterior of

Calmes' car was riddled with twenty-two possible bullet holes all over the car, and both the front passenger window and rear windshield had been shattered.

[15] Calmes' autopsy revealed that Calmes had been shot five times. Specifically, Calmes had been shot in his left arm and in his right thigh. The gunshot to his right thigh had shattered his femur. In addition, Calmes had three gunshot wounds to his head. One bullet had lodged in the back of his skull, one bullet had lodged in his mouth, and one bullet had gone through his brain stem. Calmes' cause of death was multiple gunshot wounds.

[16] On March 27, 2020, law enforcement officers found Dupree and his car and took Dupree in for questioning. During the police interview, Dupree told an officer that when he had been at the gas station with Green and Allen on the evening of March 22, 2020, Green had told him to drive and to follow Calmes' car. Dupree further told the officer that he had not known why Green had wanted him to follow Calmes' car but that he had followed Green's instructions. Dupree acknowledged that he had been driving his car when Allen and Green had shot at Calmes and Lafayette.[5]

[17] The following day, Green sent his father a text message wherein he stated that he "need[ed] to be out the state real soon . . . Like far[.]" (Ex. Vol. 2 at 100).

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[5] In October 2022, Dupree pled guilty to two counts of attempted murder, and the State dismissed charges for murder and Level 5 felony battery by means of a deadly weapon. Pursuant to the terms of a plea agreement, Dupree agreed to the following terms: (1) the sentences for the two counts would be open and determined by the trial court; (2) the sentences for the two counts would run concurrently with each other; and (3) Dupree would cooperate in Green's prosecution, including providing truthful testimony at Green's trial.

On April 1, 2020, Green sent a text message to his aunt who lived in Alabama and asked her if he and his pregnant girlfriend could stay with her because he "just need[ed] to get out the state for a min[.]" (Ex. Vol. 2 at 94).

[18] The day after Green had sent the text to his aunt, law enforcement officers located Green at an Indianapolis residence. During a search of the residence, law enforcement officers found the Smith and Wesson. Subsequent forensic testing revealed that the Smith and Wesson had fired five of the eleven shell casings and the two fired bullets found at the Crickwood intersection. Forensic testing also revealed that six of the eleven shell casings found at the Crickwood intersection had been fired from a 9mm handgun. Forensic testing further revealed that the three 9mm shell casings found next to Calmes' body in the field had been fired from a second 9mm handgun. Officers also found 9mm ammunition in Green's car.

[19] In addition, during the search of the residence, officers found Green's cell phone with the photographs that he had taken of himself the day of the murder. Specifically, those photographs showed Green pointing at the camera what appeared to be the muzzles of two handguns.

[20] In November 2020, the State charged Green with: (1) murder for knowingly or intentionally killing Calmes; (2) Level 1 felony attempted murder for attempting to intentionally kill Calmes; (3) Level 1 felony attempted murder for attempting to intentionally kill Lafayette; and (4) Level 5 felony attempted battery for the

attempted battery of Lafayette with a deadly weapon. Law enforcement officers arrested Green in South Carolina in January 2021.

[21] Before trial, Green filed a motion in limine asking the trial court to enter an order precluding the State "from either directly or indirectly conveying . . . to the jury" the photographs of "Green holding two guns in violation of Rules 403 and 404." (App. Vol. 2 at 145). Following a hearing, the trial court denied Green's motion and stated that it would determine at trial the admissibility of the photographs.

[22] At Green's three-day trial in January and February 2023, the jury heard the evidence as set forth above. In addition, the jury saw a video of Dupree at the gas station pulling up in the parking spot next to the driver's side of Calmes' car and then pulling back to the gas pump located behind Calmes' car. The jury further saw a Ring doorbell video that had recorded Calmes dropping his cousins off at their house, pulling away from the curb, and stopping and sitting at a stop sign as Dupree drove in front of Calmes' car and Green and Allen fired shots at Calmes and Lafayette. The video also showed Calmes turning left at the stop sign, and Dupree's car passing in front of the stop sign again in pursuit of Calmes' car. The jury also saw several photographs of Calmes' car that were taken when the vehicle had been processed. Specifically, the photographs showed the condition of the car following the shooting, including the twenty-two possible bullet holes all over the car, the shattered front passenger window, and the shattered rear windshield. In addition, the jury saw a photograph of the Smith and Wesson.

[23] Also, during the trial, the State asked the trial court to admit into evidence the two photographs that Green took of himself pointing at the camera what appeared to be the muzzles of two handguns. When Green objected to the admission of the photographs, the trial court held a sidebar conference.

[24] During the sidebar conference, the State specifically explained to the trial court that State's Exhibit 283 was "a selfie that show[ed] [Green's] full face that is a live photo on an iPhone. So it is captured as a very short video." (Vol. 4 at 111). According to the State, the "live selfie" was taken at 1:13 p.m. on March 22, 2020, the day of the shootings. (Tr. Vol. 4 at 112). The State further explained that Green "then blur[red] his face, which is shown in [State's Exhibit] 285, and sen[t] that photo to the group message shown in State's [Exhibit] 287." (Tr. Vol. 4 at 112).

[25] Green argued that the photographs violated Evidence Rule 404(b) because they showed Green committing the prior bad act of holding handguns. Green further argued that the photographs were not relevant because the handguns could have been toy guns.

[26] The State responded that the admission of the photographs did not involve a 404(b) issue because Green's possession of the handguns was not a bad act. The State specifically argued that "the act of having guns themselves is not illegal[,]" and the State had not charged Green with any gun-related offenses. (Tr. Vol. 4 at 128). The State further argued that even if the trial court found that the photographs depicted a bad act, "one of the exceptions to 404[b] is that

the Defendant has the opportunity to commit the crime, and having two handguns five hours before certainly gives [Green] the opportunity to then use those guns to kill Mr. Calmes on March 22nd of 2020." (Tr. Vol. 4 at 128). In addition, the State pointed out that if Green wanted to argue to the jury that those were not real handguns, "that [was within] [his] purview." (Tr. Vol. 4 at 128). Green responded that the State was unconstitutionally shifting the burden to him to prove that the handguns in the photograph were not operational handguns.

[27] After hearing the parties' arguments, the trial court admitted the photographs into evidence. The live photograph was admitted as State's Exhibit 283 ("Exhibit 283") and the photograph with Green's face blurred out that Green had sent to friends in an instant message was admitted as State's Exhibit 285 ("Exhibit 285") (collectively "the Exhibits"). In addition, the trial court read the jury the following limiting instruction:

> Sometimes, ladies and gentlemen, evidence can be admitted . . . for a general purpose, and it's up to you to decide the value you give to it. Sometimes evidence can be . . . admitted for a limited purpose. . . . The Court anticipates that . . . what you're going to be seeing is a photograph. The photograph purports to be pictures of what may or may not be considered to be weapons. The Court . . . will be giving you an instruction as to what a deadly weapon is . . . and it would be up to you to determine whether or not what you're seeing is . . . a deadly weapon or not. So that's a factual determination that you have the ability to make. . . . [T]here will be pictures of [Green] having possession of items of which will be photographed a short time before this incident occurred. You may consider this evidence solely for the

> purpose of whether or not [Green] had access to weapons or not, keeping in mind it's up to you to decide: one, did he have access; two, whether it's a weapon or not. Okay? But here's what you may not consider it for. . . . You may not draw the inference that if he had it then, he must have had those two items at the time of the incident, because there is no evidence on that.

(Tr. Vol. 4 at 134-35).

[28] During closing argument, Green's counsel told the jury that "if you're going to have the specific intent to commit murder on . . . Lafayette, you have to know she's in the car." (Tr. Vol. 4 at 190). According to Green's counsel, there was no evidence that Green had known that Lafayette had been in Calmes' car at the time of the shootings. This argument appears to be based on the fact that both Dupree's car and Calmes' car had tinted windows.

[29] Following closing arguments, the trial court further instructed the jury as follows:

> Instruction Number 6
>
> The term "deadly weapon" is defined by law as meaning a loaded or unloaded firearm.
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> * * * * *
>
> Instruction [Number] 8
>
> Sometimes evidence is admitted for a limited purpose.
>
> You have heard testimony from witnesses involved in the recovery of pictures of what may be the display of . . . guns several hours before the alleged incident. You may consider the testimony of such witnesses as it relates to the incident on Lafayette Road for the limited purpose of determining whether

> the Defendant had access to deadly weapons on the case before you.
>
> You may not consider such testimony for any other purpose. Specifically, you may not consider the evidence as proof of the defendant's character. You may not draw any inference that, because the defendant acted a certain way on one occasion, he must have acted the same way on a different occasion because of that character trait.

(App. Vol. 2 at 195, 197).

[30] After deliberating, the jury convicted Green of all charges. The trial court merged the two counts relating to Calmes. The trial court also merged the two counts relating to Lafayette and entered judgment of conviction for murder (Calmes) and attempted murder (Lafayette). Thereafter, the trial court sentenced Green to fifty-five (55) years for the murder conviction and thirty (30) years for the attempted murder conviction. The trial court further ordered the sentences to run consecutively to each other for a total aggregate sentence of eighty-five (85) years to be served in the Department of Correction.

[31] Green now appeals.

Decision

[32] Green argues that: (1) the trial court abused its discretion when it admitted the Exhibits into evidence; and (2) there is insufficient evidence to support his conviction for attempting to murder Lafayette. We address each of his contentions in turn.

1. Admission of Evidence

[33] Green argues that the trial court abused its discretion when it admitted the Exhibits into evidence. We disagree.

[34] We review the trial court's ruling on the admission of evidence for an abuse of discretion. *Cherry v. State*, 57 N.E.3d 867, 875 (Ind. Ct. App. 2016), *trans. denied*. We reverse only where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id*.

[35] Green specifically argues that "[t]he trial court abused its discretion by admitting [the Exhibits] in violation of Evidence Rules 403 and 404(b)." (Green's Br. 21). We begin our analysis with Evidence Rule 404(b), which provides, in relevant part, as follows:

> (1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) *Permitted Uses*; *Notice in a Criminal Case*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

[36] "Evidence Rule 404(b) was designed to assure that the State, relying upon evidence of uncharged misconduct, does not punish a person for his character." *Rogers v. State*, 897 N.E.2d 955, 960 (Ind. Ct. App. 2008), *trans. denied*. "When a trial court assesses the admissibility of 404(b) evidence, it must (1) determine

that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403." *Nicholson v. State*, 963 N.E.2d 1096, 1100 (Ind. 2012) (cleaned up). "The effect of Rule 404(b) is that evidence is excluded only when it is introduced to prove the 'forbidden inference' of demonstrating the defendant's propensity to commit the charged crime." *Rogers*, 897 N.E.2d at 960.

[37] Green specifically argues that the Exhibits were "'evidence of a crime, wrong, or other act' that spoke to his character." (Green's Br. 26). The State responds that "[t]he possession of a firearm is legal and, without some indication that the defendant may not possess the firearm or that they are using it in an illegal manner, mere possession of a firearm is not a bad act under Rule 404(b)." (State's Br. 21). We agree with the State.

[38] Our Indiana Supreme Court considered a similar issue in *Williams v. State*, 690 N.E.2d 162 (Ind. 1997), wherein the defendant claimed that evidence regarding his prior possession of weapons and ammunition was admitted in violation of Rule 404(b). The supreme court stated, "[i]t is by no means clear that weapons possession, evidence of gun sales, and the like, are necessarily prior 'bad acts' for 404(b) purposes."[6] *Id*. at 174. *See also Pickens v. State*, 764 N.E.2d 295, 299 (Ind. Ct. App. 2002) (citing *Williams* and explaining that the possession of an

[6] The *Williams* court concluded, however, that this argument had been waived for failure to object at trial. *Id.* at 175.

assault rifle was not necessarily a "bad act" for the purposes of Rule 404(b)), *trans. denied*; *Fuentes v. State*, 10 N.E.3d 68, 73 (Ind. Ct. App. 2014) (explaining that "the possession of a firearm, generally speaking, is not a misdeed"), *trans. denied*. Here, where Green was not charged with the illegal possession of a firearm and there was no evidence presented to the jury that he was illegally possessing the firearms in the Exhibits, we conclude that Rule 404(b) simply does not apply.[7]

[39] Further, even assuming that Green's possession of two firearms was the sort of evidence to which Evidence Rule 404(b) applies, Green's argument that the trial court abused its discretion when it admitted the Exhibits still fails. "Evidence that the defendant had access to a weapon of the type used in the crime is relevant to a matter at issue other than the defendant's propensity to commit the charged act." *Rogers*, 897 N.E.2d at 960. In the *Rogers* case, Rogers was convicted of murder after he stabbed the victim in the neck with a steak knife. On appeal, Rogers argued that the trial court had abused its discretion when it had admitted evidence that he had previously been seen with a steak knife. However, we concluded that evidence that Rogers had, in the months before the stabbing, been seen with a similar steak knife went to Roger's access to a steak knife. *Id*. at 960. Therefore, evidence that Rogers had access to a steak

[7] We further note that to the extent that Green's possession of firearms might have implied misconduct, evidence that creates a mere inference of prior bad conduct does not fall within the purview of Rule 404(b). *See Dixson v. State*, 865 N.E.2d 704, 712 (Ind. Ct. App. 2007), *trans. denied*; *Allen v. State*, 743 N.E.2d 1222, 1232 (Ind. Ct. App. 2001), *trans. denied*.

knife was relevant to a matter other than "the forbidden inference." *Id*. at 960-61.

[40] Here, as in *Rogers*, the Exhibits went to Green's opportunity or access to two firearms just hours before the shooting in which Green had used two firearms. Accordingly, the Exhibits were relevant to a matter other than the forbidden inference and did not violate Evidence Rule 404(b). *See also Dickens v. State*, 754 N.E.2d 1, 4 (Ind. 2001) (concluding that evidence that the defendant had been seen carrying a gun two days before the shooting went to opportunity and did not violate Rule 404(b)).

[41] Green further argues that the admission into evidence of the Exhibits violated Evidence Rule 403, which provides, in relevant part, that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger . . . of . . . unfair prejudice[.]" He specifically notes that the State did not establish that the handguns in the Exhibits were the handguns used in the offenses.

[42] In *Hubbell v. State*, 754 N.E.2d 884 (Ind. 2001), our Indiana Supreme Court acknowledged the "general proposition" that "the introduction of weapons not used in the commission of the crime and not otherwise relevant to the case may have a prejudicial effect." *Id*. at 890 (cleaned up). In *Hubbell*, the supreme court concluded that the admission into evidence of a handgun found in the defendant's home and bullets found in the defendant's van violated Rule 403 where there was no evidence that the handgun had been used to abduct or

murder the victim, who had been strangled.[8] *Id*. However, the facts in *Hubbell* are distinguishable from the facts in this case. Here, the evidence established that Calmes had been killed by a firearm.

[43] We further note that Evidence Rule 403 prohibits only the admission of "*unfairly* prejudicial" evidence. *Hall v. State*, 177 N.E.3d 1183, 1194 (Ind. 2021) (emphasis in the original). Although all relevant evidence is prejudicial in some sense, the question is not whether the evidence is prejudicial but whether the evidence is unfairly prejudicial. *Ward v. State*, 138 N.E.3d 268, 273 (Ind. Ct. App. 2019). "Unfair prejudice . . . looks to the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence to suggest decision on an improper basis." *Hall*, 177 N.E.3d at 1193 (cleaned up).

[44] In the *Hall* case, our Indiana Supreme Court concluded that where the State had introduced a deposition into evidence for a legitimate purpose and not to exploit or inflame the jury, Hall failed to demonstrate that any prejudice resulting from the deposition was unfair. *Id*. at 1194. Here, as in *Hall*, the State introduced the Exhibits into evidence for a legitimate purpose, and we find no indication that the State introduced the Exhibits to exploit or inflame the jury. Green has, therefore, failed to demonstrate that any prejudice resulting from the Exhibits was unfair. *See id*.

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[8] The supreme court ultimately concluded that the error in the admission of this evidence had been harmless. *Hubbell*, 754 N.E.2d at 890.

[45] We also note that before the Exhibits were admitted into evidence, the trial court instructed the jurors that they could consider the Exhibits for the *limited purpose* of whether Green had access to weapons. Further, during final instructions, the trial court reiterated that the jurors could consider the Exhibits for the *limited purpose* of whether Green had access to weapons. In light of our presumption that jurors faithfully follow the trial court's instructions, we presume that a clear and timely limiting instruction "cure[d] any error that might have occurred" unless the defendant proves otherwise. *See Cannon v. State*, 99 N.E.3d 274, 280 (Ind. Ct. App. 2018), *trans. denied*. Accordingly, the trial court did not abuse its discretion when it admitted the Exhibits into evidence.[9]

2. Sufficiency of the Evidence

[46] Green also argues that there is insufficient evidence to support his attempted murder conviction. Our standard of review for sufficiency of the evidence claims is well settled. We consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not reweigh the evidence or judge witness credibility. *Id.* We

[9] As previously noted, during the sidebar conference when the parties were discussing the Exhibits, the State argued that it was within Green's purview to argue that the items depicted in the Exhibits were not real handguns. Green argues that the "State's argument improperly shifted the burden to Green to put on proof that the pictures did not contain operational handguns." (Green's Br. 23-24). However, Green has waived appellate review of this one-sentence assertion that is not supported by citation to relevant authority or portions of the record. *See Wingate v. State*, 900 N.E.2d 468, 475 (Ind. Ct. App. 2009) (explaining that a party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record).

will affirm the conviction unless no reasonable fact finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* The evidence is sufficient if an inference may be reasonably drawn from it to support the verdict. *Id.* at 147.

[47] In order to convict Green of attempted murder, the State had to prove beyond a reasonable doubt that Green, acting with the specific intent to kill Lafayette, engaged in conduct that constituted a substantial step toward the commission of murder. *See* I.C. § 35-42-1-1 and I.C. § 35-41-5-1; *Rosales v. State*, 23 N.E.3d 8, 12 (Ind. 2015).

[48] Green specifically argues that the "evidence was insufficient to prove Green had the specific intent to kill . . . Lafayette because there was no evidence Green had any knowledge that she was in [Calmes' car] with [Calmes]." (Green's Br. 11). Green appears to base his argument on the fact that both Calmes' car and Dupree's car had tinted windows.

[49] In support of his argument, Green directs us to *Henley v. State*, 881 N.E.2d 639 (Ind. 2008). In the *Henley* case, Henley was convicted of the attempted murder of Officer David Molinet ("Officer Molinet"). The evidence most favorable to the verdict revealed that after an officer had stopped the car that Henley was driving, Henley fled from the scene. While being pursued by Officer Molinet and a police dog, Henley hid inside a van. The back left-hand door of the van was closed, but the right-hand door was off its hinges. The dog, which was on a fifteen-foot leash that Officer Molinet was holding, jumped into the back of the

van. Henley fired four shots in rapid succession and killed the dog. Hearing the gunfire, Officer Molinet, who was standing outside the van, took cover and began shouting at Henley to put down his weapon, raise his hands, and exit the van. Henley, who fired no additional shots, did not comply with Officer Molinet's orders and was eventually pulled out of the van by additional officers who arrived at the scene.

[50] A jury convicted Henley of attempting to murder Officer Molinet. On direct appeal, this Court: (1) concluded that four of Henley's ten issues had been waived for lack of cogent argument and failure to cite relevant legal authority; (2) addressed Henley's remaining claims; and (3) affirmed the trial court's judgment. *Henley v. State*, 82A01-9904-CR-141 (Ind. Ct. App. Apr. 11, 2000) (mem.).

[51] Henley filed a petition for post-conviction relief, wherein he argued, among other things, that appellate counsel had been ineffective because he had failed to present a cogent argument to challenge the sufficiency of the evidence supporting the attempted murder conviction. The post-conviction court denied Henley's petition, and this Court reversed the post-conviction court on another ineffective assistance of counsel issue. *Henley v. State*, 855 N.E.2d 1018, 1028 (Ind. Ct. App. 2006), *trans. denied*. Therefore, we did not address Henley's remaining claims, including the attempted murder sufficiency argument. We remanded the case to the trial court for a new trial. *Id*. at 1029.

[52] On transfer, our Indiana Supreme Court concluded that Henley had failed to show that appellate counsel had rendered ineffective assistance of counsel on the issue that this Court had decided. *Henley v. State*, 881 N.E.2d 639, 649 (Ind. 2008). The supreme court, therefore, addressed Henley's remaining issues, including his argument that appellate counsel had been ineffective for failing to present a cogent argument to challenge the sufficiency of the evidence supporting the attempted murder conviction.

[53] In addressing this issue, the supreme court noted that there was no evidence presented to the jury that Henley had been aware of Officer Molinet's presence when he had fired his gun. *Id*. at 652. Further, Officer Molinet testified that he had not known that Henley had been in the van and that he had not given any commands to the dog. *Id*. In addition, the supreme court noted that there had been no testimony that the shots that Henley had fired had "'whizzed'" past Officer Molinet. *Id*. Rather, according to the supreme court, the most relevant evidence concerning Henley's intent to kill Officer Molinet had been the officer's testimony that he had heard the gunshots and had seen three muzzle flashes. *Id*. However, Officer Molinet had also testified that he had not seen Henley because it had been "'pitch black.'" *Id*. Based on this evidence, our Indiana Supreme Court concluded that had appellate counsel presented cogent argument with citation to relevant authority challenging the sufficiency of the evidence to support the attempted murder conviction, the conviction would have been reversed. *Id*. at 653. Accordingly, the supreme court: (1) concluded that appellate counsel had rendered ineffective assistance of counsel in

presenting this claim; (2) reversed the post-conviction court on this issue; and (3) remanded the case with instructions to vacate Henley's attempted murder conviction and the sentence imposed thereon. *Id*.

[54] Here, however, the facts are distinguishable from those in *Henley*. Specifically, our review of the evidence in this case reveals ample evidence from which the jury could have determined, despite the tinted windows in both Calmes' and Green's cars, that Green was aware of Lafayette's presence in Calmes' car when Green repeatedly fired his gun. Specifically, while Calmes was in the convenience store, Dupree pulled up in the parking spot next to the driver's side of Calmes' car. At that time, the front passenger door of Dupree's car was next to the driver's door of Calmes' car, and Lafayette was sitting in the front passenger seat of Calmes' car. Fifteen seconds later, Dupree backed his car up to a gas pump behind Calmes' car. At some point, one of Calmes' cousins opened the back door to Calmes' car but did not exit the car.

[55] We further note that while Calmes was at the stop sign at the Crickwood intersection, Green, Allen, and Dupree drove past the front of Calmes' car, and Green and Allen began shooting at Calmes' car. When Calmes turned left at the stop sign, Dupree made a U-turn and pursued Calmes and Lafayette through the housing addition. Although Calmes told Lafayette to climb into the back seat of his car and lie on the floor, when Lafayette heard gunshots hitting Calmes' car, she peeked over the rear passenger seat to look at Dupree's car. In addition, during closing arguments, Green's counsel argued there was no evidence that Green had known that Lafayette had been in Calmes' car at

the time of the shootings. The jury clearly rejected this argument when it convicted Green of attempting to murder Lafayette. Green now asks us to reweigh the evidence, which we will not do. *See Drane*, 867 N.E.2d at 146.

[56] Green further appears to argue that even if he had known that Lafayette was in Calmes' car, "[i]t is not reasonable to infer from the haphazard location of the bullet holes on [Calmes' car] that Green had the specific intent to shoot at [Lafayette]." (Green's Br. 18). However, intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or great bodily injury. *Perez v. State*, 872 N.E.2d 208, 213 (Ind. Ct. App. 2007), *trans. denied*. Further, "[d]ischarging a weapon in the direction of a victim is substantial evidence from which the jury could infer intent to kill." *Id*. at 213-14 (cleaned up).

[57] Here, the jury saw photographs of the condition of Calmes' car following the shooting, including the twenty-two possible bullet holes all over the car, the shattered front passenger window, and the shattered rear windshield. Green firing multiple gunshots at the car in which Lafayette was a passenger is substantial evidence that Green intended to kill Lafayette. There is sufficient evidence to support Green's conviction of Level 1 felony attempted murder. *See Powell v. State*, 151 N.E.3d 256, 270 (Ind. 2020) (finding sufficient evidence to support Powell's two attempted murder convictions where "Powell sprayed the

side of the Cadillac, firing multiple shots at close range, fully aware of the vehicle's occupants.").[10]

[58] Affirmed.

Tavitas, J., and Foley, J., concur.

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[10] Because we have found sufficient evidence to support Green's attempted murder conviction, we need not address his alternative argument that "[t]here was also insufficient evidence to prove Green committed attempted murder under an accomplice liability theory[.]" (Green's Br. 11).