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IN THE COURT OF APPEALS OF INDIANA

RONALD J. LAMPITOK,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 79A05-1011-CR-773
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0901-FB-24

November 2, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Ronald Lampitok was convicted of and ordered to serve consecutively twenty years for possession of a firearm by a serious violent felon ("SVF"), a Class B felony, which was enhanced by twenty years for being an habitual offender, and eight years for attempted battery while armed with a deadly weapon, a Class C felony, for an aggregate sentence of forty-eight years in the Indiana Department of Correction. Lampitok raises two issues for our review, which we expand and restate as three: 1) whether the trial court abused its discretion in admitting into evidence an exhibit containing information about Lampitok's prior conviction for carjacking; 2) whether the State's amendment to the charging information alleging Lampitok was an habitual offender was a change of substance, such that it should not have been allowed after the commencement of trial pursuant to Indiana Code section 35-34-1-5(b); and 3) whether Lampitok's convictions violate double jeopardy. Concluding the trial court erred in admitting the challenged evidence and by allowing the State to amend its charging information, but that both errors were harmless, and that Lampitok's conviction and sentence for both possession of a firearm by a SVF and carrying a handgun without a license violate double jeopardy, we affirm in part and reverse and remand in part with instructions.

Facts and Procedural History

In September 2009, Joseph Jackson was jogging when Lampitok drove by "very slow[ly]" on a moped and gave Jackson a "dirty look." Transcript at 37. Although the two had never met before, Lampitok stopped in the middle of the street, pulled out a firearm, and began shooting at Jackson. Jackson dove for cover behind a parked van, evading any wounds. Also behind the van were two men, one of whom sprinted for

cover after the initial shooting and one who remained behind the van with his hands in the air. Lampitok drove by the parked van, firing several shots before leaving. Lampitok was later apprehended outside of his home, where officers of the Lafayette Police Department found a nine-millimeter semi-automatic pistol and corresponding magazine in two different heating vents in Lampitok's house. Lampitok was identified by Jackson, along with two bystanders to the shooting.

Lampitok was charged with the following: possession of a firearm by a SVF, a Class B felony; carrying a handgun without a license, a Class C felony; attempted battery while armed with a deadly weapon, a Class C felony; criminal recklessness while armed with a deadly weapon, a Class D felony; and being an habitual offender. At trial, the State asked Lampitok if he had been convicted of robbery. He stated that "[t]he Appellate Court through [sic] it out." Id. at 336-37. The State moved to admit certified court records to show that Lampitok's appeal had been unsuccessful. Lampitok objected, and the trial court admitted the exhibits over Lampitok's objection.

Lampitok was convicted of all charges and sentenced to twenty years for possession of a firearm by a SVF, which was enhanced by twenty years for being an habitual offender; eight years for carrying a handgun without a license; eight years for criminal recklessness while armed with a deadly weapon; and three years for attempted battery while armed with a deadly weapon. The trial court ordered the enhanced sentence for possession of a firearm by a SVF and the sentence for attempted battery while armed with a deadly weapon to be executed and served consecutively, for an aggregate of forty-eight years executed in the Indiana Department of Correction. Lampitok now appeals.

Discussion and Decision

I. Evidence of Lampitok's Carjacking Conviction

The admission of evidence is within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed absent a showing of manifest abuse of discretion by the trial court resulting in the denial of a fair trial. Johnson v. State, 831 N.E.2d 163, 168-69 (Ind. Ct. App. 2005), trans. denied. A decision is an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances before the court. Id. at 169. In reviewing the decision, we consider the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. Id.

While Lampitok testified during his jury trial, on cross-examination the State endeavored to impeach Lampitok's credibility by offering evidence of his 2002 conviction for robbery, an infamous crime that is expressly admissible pursuant to Indiana Rule of Evidence 609(b) for the purpose of attacking the credibility of a witness.

> Q . . . You were convicted of robbery . . . correct?
> A The Appellate Court through [sic] it out.
> Q You have been convicted of robbery is that correct?
> A Yes.
> * * *
> Q Mr. Lampitok [sic] you had [sic] stated that you had been thrown out [sic] was there an appeal filed in that case?
> A Yes sir.
> Q Was that overturned?
> A Yes sir.
> Q Nothing further.

Tr. at 336-37. Lampitok appealed his robbery conviction, but on appeal his conviction was affirmed. See Lampitok v. State, 817 N.E.2d 630, 644 (Ind. Ct. App. 2004), trans. denied. Because this fact was unclear from Lampitok's testimony, the State sought to introduce Exhibits 43 and 44. Lampitok objected to the admission of the exhibits

because in addition to information about his robbery conviction, they contain information about other convictions, including carjacking, which is not an admissible infamous crime under Rule 609(b). The State suggested that it would redact the inadmissible information from the exhibits, and the trial court overruled Lampitok's objection. Although the State redacted some of the inadmissible information, several references to Lampitok's carjacking conviction remained in the admitted Exhibits.

Lampitok contends Exhibit 44 was inadmissible character evidence under Indiana Rule of Evidence 404(b).[1] The standard for assessing the admissibility of 404(b) evidence is: 1) the court must 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) the court must balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403. Udarbe v. State, 749 N.E.2d 562, 564 (Ind. Ct. App. 2001). We need not address the fact that Rule 609(b) might render Exhibit 44 inadmissible because the evidence regarding Lampitok's carjacking conviction was imperfectly redacted. Exhibit 44 fails to even have the desired probative value of confirming that Lampitok's robbery conviction was affirmed on appeal because Exhibit 44 only contains records from trial court proceedings – the result of which Lampitok conceded – and does not contain any information about his appeal. While his robbery conviction may be relevant to his credibility under Rule 609(b), the prejudicial effect of Exhibit 44 far outweighs its probative value, especially considering the exhibit contains information about a conviction that is inadmissible under the Indiana Rules of

[1] Lampitok does not challenge, and we do not address, the admissibility of Exhibit 43.

Evidence. Thus, we conclude the trial court abused its discretion in admitting Exhibit 44 because it was clearly against the logic and effect of the circumstances before it.

The State argues that even if the trial court abused its discretion in admitting Exhibit 44, such error is harmless. The improper admission of evidence is harmless error when the reviewing court is satisfied that the conviction is supported by substantial independent evidence of guilt so that there is no substantial likelihood that the challenged evidence contributed to the conviction. Meadows v. State, 785 N.E.2d 1112, 1122 (Ind. Ct. App. 2003), trans. denied. To determine that the error did not contribute to the verdict, we determine whether the error was unimportant in relation to everything else the jury considered on the issue in question. Id. The State presented significant evidence against Lampitok. Multiple witnesses identified him as the driver of a moped who stopped and shot at Jackson. Police officers found a magazine for a nine-millimeter semi-automatic pistol, the corresponding pistol, and a moped at Lampitok's home shortly after the shooting. The shell casings found at the scene of the shooting matched the firearm found at Lampitok's home. We are satisfied that the conviction is supported by substantial independent evidence of Lampitok's guilt and there is no substantial likelihood that Exhibit 44 contributed to his convictions.

II. The State's Amendment of Lampitok's Habitual Offender Count

In determining Lampitok was a SVF for his possession of a firearm by a SVF offense, the State relied upon his prior convictions for carjacking and robbery. After the trial court found he was a SVF based on these offenses, the State moved to amend its habitual offender charge by removing his prior convictions for carjacking and robbery from the list of convictions the State asserted made Lampitok an habitual offender.

Lampitok contends allowing this amendment was reversible error by the trial court pursuant to Indiana Code section 35-34-1-5(b), which provides that an "indictment or information may be amended in matters of substance . . . at any time . . . (2) before the commencement of trial; . . . ." This court recently addressed this statute in Gibbs v. State, 952 N.E.2d 214 (Ind. Ct. App. 2011). In Gibbs, the issue was whether the amendment to an information was a matter of substance, and thus only allowed before commencement of trial, or a matter of form, which is allowed at any time unless it prejudices the substantial rights of the defendant.[2] Id. at 221. We concluded that where the amendment eliminated a defense the defendant could have used at trial, the amendment was a matter of substance. Id.

As in Gibbs, the State's amendment to the information charging Lampitok as an habitual offender was an amendment of substance because it took away a defense he could have used at trial. Our supreme court recently stated, "a defendant convicted of unlawful possession of a firearm by a [SVF] may not have his or her sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the defendant was a [SVF]." Mills v. State, 868 N.E.2d 446, 452 (Ind. 2007). Thus, Lampitok could have asserted as a defense the fact that his convictions for carjacking and robbery were used for both the SVF and habitual offender determinations.

Although the trial court should not have permitted the amendment, the error is harmless. In addition to including Lampitok's convictions for carjacking and robbery as predicate offenses, the information pertaining to his habitual offender charge also included two prior felonies in Illinois, criminal damage to government supported property

[2] See Ind. Code § 35-34-1-5(c).

and threatening a public official, and three in California, residential burglary and two convictions of assault with a deadly weapon. Proof of these prior convictions is sufficient to conclude Lampitok is an habitual offender even without the convictions of carjacking and robbery.[3] Further, the prior convictions in Illinois and California were originally included in the information, not added after the State amended the information.

III. Double Jeopardy

Lampitok contends his convictions for both attempted battery while armed with a deadly weapon and criminal recklessness while armed with a deadly weapon, and for both possession of a firearm by a SVF and carrying a handgun without a license, violate double jeopardy principles.

A. Attempted Battery and Criminal Recklessness

Indiana Code section 35-42-2-1 governs the offense of battery. Generally, battery is a Class B misdemeanor pursuant to Indiana Code section 35-42-2-1(a), but Lampitok's crime was enhanced pursuant to section 35-42-2-1(a)(3), which provides that battery is a Class C felony if it is committed by means of a deadly weapon. Likewise, criminal recklessness is generally a Class B misdemeanor, but pursuant to Indiana Code section 35-42-2-2(c)(2)(A), it is enhanced to a Class D felony if it is committed while armed with a deadly weapon. Lampitok does not argue that his convictions for attempted battery and criminal recklessness violate double jeopardy, but rather, he argues enhancements to both convictions based on the "same behavior" of carrying a deadly weapon violates double jeopardy. Brief of Appellant at 10.

[3] See Ind. Code § 35-50-2-8.

Our supreme court addressed a similar argument in Miller v. State, 790 N.E.2d 437 (Ind. 2003). There, the defendant argued on appeal that enhancements to his convictions because of "the presence of a singular knife" violated Indiana's double jeopardy clause, Article 1, section 14 of the Indiana Constitution. Id. at 438. The court concluded that multiple enhancements for the very same behavior or harm violate double jeopardy, but that "repeated use of a weapon to commit multiple separate crimes is not 'the very same behavior' precluding its use to separately enhance the resulting convictions. Rather, the use of a 'single deadly weapon during the commission of separate offenses may enhance the level of each offense.'" Id. at 439 (quoting Gates v. State, 759 N.E.2d 631, 633 n.2 (Ind. 2001)). Here, Lampitok's attempted battery and criminal recklessness were not the very same behavior. Although his shots were directed at Jackson, at least two other people were in the vicinity who could have been harmed, and Lampitok fired multiple shots. Enhancements to both convictions for carrying and using a deadly weapon does not violate double jeopardy.

B. Possession of a Firearm by a SVF and Carrying a Handgun Without a License

To show that two challenged offenses constitute the same offense under the actual evidence test of the Indiana Double Jeopardy Clause, the defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. Lundberg v. State, 728 N.E.2d 852, 854 (Ind. 2000). Lampitok contends it is certain that the trier of fact relied upon the same evidence to convict him of possession of a firearm by a SVF and carrying a handgun without a license, pointing out that the State conceded at trial that these two offenses should merge.

Rather than truly merging the two offenses, however, the trial court convicted and sentenced Lampitok for both.

> The Court having considered the written pre-sentence report and argument of counsel now accepts the recommendation of the probation a [sic] department and sentences the defendant to the Indiana Department of Corrections for a period of eighty [sic] (8) years [for carrying a handgun without a license], a Class C felony, twenty (20) years [for possession of a firearm by a SVF], a Class B felony, eight (8) years [for attempted battery while armed with a deadly weapon], a Class C felony, three (3) years [for criminal recklessness while armed with a deadly weapon], a Class D felony. The Court orders that [the sentences for carrying a handgun without a license and criminal recklessness while armed with a deadly weapon] shall run concurrently with [the sentence for possession of a firearm by a SVF] and [the sentence for possession of a firearm by a SVF] shall run consecutively with [the sentence for attempted battery while armed with a deadly weapon] for a total sentence of twenty-eight (28) years.

Appendix of Appellant at 21.

As our supreme court stated in Green v. State, 856 N.E.2d 703, 704 (Ind. 2006), this is insufficient. It is not a violation of double jeopardy for a defendant to be found guilty of two crimes for the same offense, but a trial court may not convict and sentence a defendant twice for the same offense. Id. Merged offenses are unproblematic as long as the defendant is not convicted or sentenced for both. Id. Thus, we reverse Lampitok's carrying a handgun without a license conviction and remand to the trial court with instructions to vacate the conviction and corresponding sentence.

Conclusion

We conclude that Exhibit 44 should not have been admitted and the trial court should not have allowed the State to amend its charging information for Lampitok's habitual offender charge, but that both errors were harmless. We also conclude Lampitok's conviction and sentence for both possession of a firearm by a SVF and

carrying a handgun without a license violate double jeopardy, and we reverse and remand with instructions to vacate the conviction and sentence for carrying a handgun without a license.

Affirmed in part, reversed and remanded in part with instructions.

BARNES, J., and BRADFORD, J., concur.