



## STATEMENT OF THE CASE

Matthew A. Flores appeals his conviction, after a trial by jury, of unlawful possession of a firearm by a serious violent felon, a class B felony, and his sentence thereon.

We affirm.

### ISSUES

1. Whether the trial court committed reversible error in its instructions to the jury.
2. Whether sufficient evidence supports the conviction.
3. Whether the sentence imposed is inappropriate.

### FACTS

On the evening of November 7, 2009, Flores, Chandra Tennant,<sup>1</sup> Cleveland Tennant, Latoya Wright, and Danielle Loraine went to Stine's Tavern. When Cleveland became involved in a confrontation, Chandra and Elyshia Burdett went from Stine's to Chandra's home, where she retrieved a shotgun. Chandra placed the shotgun on the backseat of her pick-up truck.

Subsequently, the group left Stine's and went to Legends Sports Bar. After several hours, the group left Legends and got into Chandra's truck. Chandra drove through the parking lot, stopped, and Flores got out.

In the meantime, Robert Wallace was exiting from Legends with his girlfriend and her daughter. As Wallace walked toward his car, Flores yelled at him, "[W]hat'd you

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<sup>1</sup> Chandra and Flores had three children together.

say, fat boy?” (Tr. 78). Wallace responded that he had said nothing, and continued walking. Flores “got in his face” and said, “What’d you say, you want to go?” *Id.* Wallace again responded that he had not said anything, and he saw that Flores held a shotgun “at his side.” *Id.*

Inside Legends, security guard Tyrone Fluker was informed that a man was in the parking lot pointing a gun. Fluker emerged from Legends and saw Flores “pointing his shotgun” at Wallace. *Id.* at 100. Fluker also saw Flores “rack a round,” meaning “he loaded it,” and “heard him say come on or something like that.” *Id.* at 102. Fluker then saw “everybody just hit the ground, including Mr. Wallace,” and heard Flores’ companions “telling him come on, the police coming.” *Id.* at 104, 106. The group “fled the scene.” *Id.* at 106.

The police were called, and a dispatch was broadcast about “an armed party” having fled Legends, with a description of the pick-up truck and possible license plate number. *Id.* at 112. Officer Douglas Weaver saw the truck shortly thereafter and, with assisting officers, effected a stop. Chandra exited from the driver’s seat; Flores from the passenger seat; and Cleveland, Latoya, and Danielle from the back seat. On the floor behind the passenger seat was a shotgun, loaded with a 12-gauge round. The shotgun barrel measured 16 1/8 inches long; the overall length of the shotgun was 28 inches. At the scene where the truck was stopped, Wallace, Fluker, Chandra, and Cleveland identified Flores as the man who had held the shotgun outside Legends earlier.

On November 18, 2009, the State charged Flores with unlawful possession of a firearm by a serious violent felon, as a class B felony, and dealing in a sawed-off shotgun, as a class D felony.

On June 2, 2010, the trial court held a jury trial, at which the above evidence was heard. The jury found Flores guilty on both counts,<sup>2</sup> and the trial court entered judgment of conviction.

At sentencing, on June 28, 2010, the trial court vacated the conviction on the second count on double jeopardy grounds. It found as “aggravating circumstances” Flores’ “juvenile and adult criminal record from 1999 to 2009,” reciting the extensive listing of juvenile adjudications and adult convictions, and his numerous probation violations and parole revocations – including the fact that Flores had been released from parole “just eight days prior to committing this offense.” (Sent. Tr. 14-15, 17). It found “no mitigating circumstances.” *Id.* at 18. The trial court sentenced Flores to a twenty-year term.

## DECISION

### 1. Jury Instruction

The trial court has discretion in instructing the jury, and we will reverse only when the instructions amount to an abuse of discretion. *Whitney v. State*, 750 N.E.2d 342, 344 (Ind. 2001). A defendant is entitled to have the jury instructed correctly on the law. *Hill v. State*, 615 N.E.2d 97, 99 (Ind. 1993).

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<sup>2</sup> The trial was bifurcated, such that the jury initially found Flores guilty of possession of an illegal firearm and dealing in a sawed-off shotgun. It then heard evidence of Flores’ prior conviction, one enumerated by statute as enhancing the possession of an illegal firearm to a class B felony; and it found him guilty of the class B felony offense.

Flores argues that the trial court erred in instructing the jury by “modifying the statutory definition of ‘sawed-off shotgun.’” Flores’ Br. at 4. He reminds us that pursuant to the statute,

“Sawed-off shotgun” means:

- (1) a shotgun having one (1) or more barrels less than eighteen (18) inches in length; and
- (2) any weapon made from a shotgun (whether by alteration, modification, or otherwise) if the weapon as modified has an overall length of less than twenty-six inches.

Ind. Code § 35-47-1-10.

We note that Flores’ brief does not set out the instruction he argues to have been erroneous, *see* Ind. Appellate Rule 46(A)(8)(e); nor does he specifically direct us thereto in his Appendix. Nevertheless, we find that final instruction No. 3 reads as follows:

The crime of Dealing in a Sawed-off Shotgun is defined by law as follows:

A person who manufactures, causes to be manufactured, imports into Indiana, keeps for sale, offers or exposes for sale, or give, lends, or possesses any sawed-off shotgun, commits Dealing in a Sawed-Off Shotgun.

To convict the Defendant of Count II, the State must have proved each of the following beyond a reasonable doubt:

The Defendant, Matthew A. Flores,

1. possessed,
2. a shotgun with one or more barrels less than 18 inches in length OR a weapon made from a shotgun (whether by alteration, modification, or otherwise) which as modified had an overall length of less than 26 inches.

(App. 20). Also, final instruction No. 6, states:

The term “sawed-off shotgun” means:

1. a shotgun having one or more barrels less than 18 inches in length; OR

2. any weapon made from a shotgun (whether by alteration, modification, or otherwise) if the weapon has an overall length of less than 26 inches.

(App. 23).

Flores objected to the trial court that because the statute said “and” but the trial court’s instruction said “or,” the trial court’s instruction was “not a correct statement of the law.” (Tr. 180). The trial court overruled Flores’ objection, “to comport with the *Hall* case” and what it “believe[d] to be the statutory intent of the legislature.” (Tr. 184).<sup>3</sup>

*Hall v. State*, 791 N.E.2d 257 (Ind. Ct. App. 2003), relied on the holding of *Brook v. State*, 448 N.E.2d 1249, 1251 (Ind. Ct. App. 1983), as to the definition of a sawed-off shotgun. *Brook* quoted the then-existing statutory definition as follows:

“Sawed-off shotgun” means a shotgun having one (1) or more barrels less than eighteen (18) inches in length and any weapon made from a shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than twenty-six (26) inches.

448 N.E.2d at 1250. *Brook* argued that his shotgun was “was not ‘sawed-off’ because it did not have a barrel length of less than eighteen inches and an overall length of less than twenty-six inches as required by statute.” *Id.* Judge Shields’ opinion held that this

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<sup>3</sup> We note that Flores’ objection and the ensuing colloquy took place at the conclusion of the evidence presentation in the first of the bifurcated proceedings. Earlier, however, in the trial court’s initial statement to all potential jurors it read the State’s charges against Flores and stated that to convict him of dealing in a sawed-off shotgun, the State was required to prove that Flores possessed “a shotgun with one or more barrels less than eighteen (18) inches in length or a weapon made from a shotgun, whether by alteration, modification, or otherwise, which was modified as [sic] an overall length of less than twenty six (26) inches.” (Tr. 13) (emphasis added). In addition, after the jury was selected, the trial court distributed “a copy of the Court’s preliminary instructions” and proceeded “to read the preliminary instructions” to the jury. *Id.* at 69. Again, it instructed that to convict Flores of dealing in a sawed-off shotgun, the State “must prove” that Flores “possessed . . . a shotgun with one or more barrels less than eighteen (18) inches in length, or a weapon made from a shotgun whether by alteration, modification, or otherwise, which as modified had an overall length of less than twenty six (26) inches.” *Id.* at 71 (emphasis added).

We have held that where a final instruction was read to the jury as a preliminary instruction without objection from the defendant, the defendant has waived his right to appeal the final instruction. *VanWanzele v. State*, 910 N.E.2d 240, 246-47 (Ind. Ct. App. 2009) (citing *Hollowell v. State*, 707 N.E.2d 1014, 1022-23 (Ind. Ct. App. 1999)).

“reading of the statute is erroneous.” Noting that “statutory language is deemed to have been used intentionally, and that “the conjunction ‘and’” was “immediately followed by the phrase ‘any weapon made from a shotgun . . . ,’” *Brook* held that the “plain language” of the statute did not set forth “a single definition of sawed-off shotgun which contains two requirements.” *Id.* It found the “rationale for the legislative ban of sawed off shotguns” to center on “their concealability and therefore likely use for criminal purposes rather than sport of hunting.” *Id.* A shotgun with an eighteen-inch or less barrel length would have “decreased range and therefore minimal utility” for hunting, with its “chief value” being as a weapon. *Id.* A shotgun modified to an overall length of less than twenty-six inches was considered “undesir[.]able by the legislature” based on its concealability. *Id.* Accordingly, “Brook’s shotgun, with its barrel length of less than eighteen inches, c[a]me[.] within one of the statutory definitions of sawed-off shotgun,” and the “overall length of his shotgun [was] irrelevant.” *Id.* at 1251 (emphasis added).

Judicial interpretation of a statute, accompanied by substantial legislative inaction for a considerable time, may be understood to signify the legislature’s acquiescence and agreement with the judicial interpretation. *Beer v. State*, 885 N.E.2d 33, 42 (Ind. Ct. App. 2008) (citing *Fraley v. Minger*, 829 N.E.2d 476, 492 (Ind. 2005)). *Brook* was issued in 1983. After twenty years, with the statute still using the word “and” in the definition of a “sawed-off shotgun,” we reiterated in *Hall* that “[a] shotgun meeting either of these definitions is considered a sawed-off shotgun.” 791 N.E.2d at 259 (citing *Brook v. State*, 448 N.E.2d at 1251).

We conclude that the trial court's instruction on the definition of a sawed-off shotgun was a correct statement of the law. Accordingly, we find no abuse of discretion here.

## 2. Sufficiency of the Evidence

When we review the sufficiency of the evidence to support the conviction, we consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the jury's role to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* Appellate courts affirm the conviction unless no reasonable fact-finder could find the crime proven beyond a reasonable doubt. *Id.*

Flores' sufficiency argument rests on the success of his previous contention – that the trial court should have given “the ‘and’ instruction.” Flores' Br. at 8. We have found, however, that the trial court did not err in its instruction on the definition of a sawed-off shotgun. Further, the trial court vacated the conviction requiring the State to prove that the shotgun possessed by Flores met that definition. Moreover, as the trial court noted at sentencing, evidence of Flores' possession of the weapon was “similar or the same” on both counts. (Sent. Tr. 14). To sustain a conviction for the offense of unlawful possession of a firearm by a serious violent felon, a class B felony, however, the State had to prove beyond a reasonable doubt that Flores knowingly or intentionally possessed a firearm and did so while being a serious violent felon pursuant to Indiana Code section 35-47-4-5.

Fluker testified that Flores pointed the shotgun at Wallace outside Legends; and both Wallace and Chandra testified that Flores was holding the shotgun during the confrontation with Wallace. After the truck in which Flores and his companions fled Legends was stopped, Cleveland advised an officer that “there’s a gun” in the truck, and that Flores “cranked one off . . . he had it, but he didn’t shoot anybody or shoot it”; while Danielle advised another officer that Flores “was the . . . man who held the gun.” *Id.* at 168, 132. The shotgun was recovered from the floor behind the seat occupied by Flores. The State also presented evidence that Flores had previously been convicted of robbery, a qualifying offense for serious violent felon status. *See* I.C. 35-47-4-5. This evidence is sufficient for a reasonable jury to find Flores guilty beyond a reasonable doubt of possession of a firearm as a serious violent felon, a class B felony.

### 3. Inappropriate Sentence

The Indiana Constitution authorizes independent appellate review and revision of a sentence, authority implemented through Appellate Rule 7(B). *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g on other grounds*, 875 N.E.2d 218 (Ind. 2007). The Rule provides that a court “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” *Id.* (quoting Ind. Appellate Rule 7(B)). “The burden is on the defendant to persuade” the appellate court that his or her sentence is inappropriate. *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Flores “argues that he does not deserve the maximum sentence of 20 years,” asserting that “[t]he maximum sentence should be reserved for the worst offenders.” Flores’ Br. at 9. We are not persuaded.

At sentencing, the trial court stated as follows:

Court does find aggravating circumstances with your juvenile and adult criminal record from 1999 to 2009. As a juvenile, you were adjudicated delinquent for robbery, what would have been a class C Felony had it been committed by an adult. You were placed with your aunt, ordered into joint counseling with your aunt and your mother, team parenting counseling, adolescent thinking errors program. That disposition was modified five months later and you were placed at Crossroads in October of 1999. In October of 1999 apparently what led to that placement was two convictions – two adjudications for resisting law enforcement, one . . . would have been a Class D Felony had it been committed by an adult, one which would have been a Class A Misdemeanor had it been committed by an adult. In March of 2000 that disposition was modified and you were committed to the Indiana Department of Correction. In October of 2001, you were adjudicated delinquent for what would have been burglary, a Class C Felony, had it been committed by an adult and committed to the Department of Correction. As an adult beginning in June of 2002, you were convicted of public intoxication and minor consuming alcohol, given a suspended jail sentence, unsupervised probation with treatment then at Brown and Associates. In August of 2002 those sentences were suspended – those suspended sentences were modified and you were placed in jail. In October of 2002 another minor consuming alcohol, jail time, fine and costs. In February of 2003 another minor consuming alcohol, jail time, a fine and costs. In May of 2003, another minor consuming alcohol, jail, fine and costs. In June of 2003, another minor possession of alcohol, given a suspended jail sentence this time, ordered back into Brown and Associates for counseling. In August of 2003, you were convicted of robbery as a Class B Felony and Possession of Cocaine or Narcotic Drug, a Class C Felony, given a 10 year Department of Correction sentence, four years suspended, two years to probation. You were released to the community transition program in May of 2005, your parole was revoked in August of 2005 and you were returned to the Department of Correction. They released you to probation a month later. That suspended sentence was then revoked two months later and you were placed back in the Department of Correction. They released you to community transition program in January of 2007. You were on parole then in May of 2007 and the Re-Entry

Program. Your parole was revoked and you were returned to the Department of Correction in July of 2007, released to parole then again in September of 2008. Finally discharged from parole in October of 2009 and commits this offense November 7<sup>th</sup>, 2009. November of 2009 and the conviction for public intoxication, given a suspended jail sentence, ordered into criminal division services. You've been in Boys' School, the Department of Correction twice, you've had seven misdemeanors and two prior felony convictions, one of which was for Robbery. You've had misdemeanor sentences modified and revoked. You've had a felony suspended sentence revoked. You were released from parole as I noted just eight days prior to committing this offense. I don't know what else it is that the system is expected to do for you Mr. Flores. You're 26 years old. You've been through everything. And you continue. You do what you want to do on your terms and to hell with what society expects you to do. Unfortunately at this young age of 26, Mr. Flores, there's nothing else to do. There are no mitigating circumstances.

(Sent. Tr. 14-18).

As reflected by the trial court's extensive recitation, for more than ten years Flores has flouted the law and refused to conform his conduct to that expected by society. Such paints an exceedingly negative portrait of his character.

As to the nature of his offense, having a conviction that rendered him a serious violent felon, Flores confronted Wallace and pointed a loaded firearm at him.

Based on the character of the offender and the nature of Flores' offense, we do not find the twenty-year sentence imposed to be inappropriate.

Affirmed.

NAJAM, J., and BAILEY, J., concur.