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IN THE
COURT OF APPEALS OF INDIANA

JAMES L. TEAGUE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-1009-CR-1113
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0803-FB-64

May 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-defendant James L. Teague ("Teague") appeals his conviction for Unlawful Possession of Firearm by a Serious Violent Felon.[1] We affirm.

Issues

Teague raises two issues for our review, which we restate as the following three issues:

I. Whether Indiana Code Section 35-47-4-5 is unconstitutional as applied to his case;

II. Whether references at trial to his status as a "serious violent felon" or to his prior convictions constitute fundamental error; and

II. Whether testimony and argument concerning Teague's possession of a muzzleloader was fundamental error.

Facts and Procedural History

On November 30, 2007, Teague went to the Alexandria Police Department to report a burglary to his business. Officer Michael Montgomery ("Officer Montgomery") and Officer Kyle Williams ("Officer Williams") took the report. Teague told the officers that he was deer hunting the day before and then visited his business afterwards, where he discovered evidence of a burglary. The officers decided to investigate, and followed Teague to the location. The officers rode together and followed Teague, who drove alone.

While en route, the officers started a conversation about Teague's deer hunting and whether he had a prior conviction that precludes his possession of a firearm. Upon arrival,

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[1] Ind. Code § 35-47-4-5.

Officer Montgomery pulled in behind Teague. Officer Williams got out of the vehicle, walked by Teague's car, noticed a shotgun inside, and then went into Teague's business to investigate the burglary.

Officer Montgomery stayed in his vehicle until Teague and Officer Williams went inside. He then exited and walked by Teague's car, where he observed a shotgun in the passenger side, muzzle down, along with one red shotgun shell lying in the front seat. Upon observing the gun, Officer Montgomery called his dispatch to confirm whether Teague had a prior felony conviction that would preclude his possession of a firearm. The dispatcher was unable to confirm his conviction while the officers were at Teague's business, but they were later able to make the confirmation back at the police station. The officers then returned to Teague's business, again observed the shotgun, and told Teague that they needed to speak with him at the police station.

Teague was eventually arrested and charged with Unlawful Possession of a Firearm by a Serious Violent Felon.[2] He filed a motion to dismiss on October 26, 2009, which the trial court denied on April 13, 2010. Before trial, Teague stipulated that he was previously convicted of an offense classified as a serious violent felony and the State amended the charging information accordingly.[3] A jury trial was held on August 12, 2010 and at the conclusion Teague was convicted as charged. On August 23, 2010, the trial court sentenced

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[2] Teague pleaded guilty to voluntary manslaughter on June 5, 1979, and was convicted of "second degree" burglary on November 6, 1970.

[3] Rather than specifically listing Teague's voluntary manslaughter and burglary convictions, the amended charging information instead stated that Teague "did knowingly possess a firearm after having been convicted of a felony enumerated under Indiana Code 35-47-4-5." App. 13.

Teague to eight years on home detention. He now appeals.

Discussion and Decision

Teague argues that he was stripped of the presumption of innocence and denied a fundamentally fair trial for three reasons. He first maintains that the statute he violated, Indiana Code Section 35-47-4-5, is unconstitutional because it does not require bifurcated trial proceedings. He next argues that references made during the trial to his status as a serious violent felon or to his prior convictions are fundamental error. Teague's final argument is that his trial was improperly "infused" with discussion and argument regarding his possession of a muzzleloader in addition to possession of a shotgun. Appellant's Br. p. 1. As we explain below, we do not agree with Teague that any of his claimed errors warrant reversal of his conviction.

Bifurcated Proceedings and the Constitutionality of Indiana Code Section 35-47-4-5

As a person accused of a criminal offense, Teague had a constitutional due process right to a fair trial. See U.S. Const. Amends. V, XIV; Ind. Const. Art. 1, §§ 12, 13. Due process constitutionally protected Teague with the presumption of innocence until he was found guilty. See Bayes v. State, 779 N.E.2d 77, 81 (Ind. Ct. App. 2002) (citing Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)), trans. denied. Teague maintains that Indiana Code 35-47-4-5 denied him this right, and is therefore unconstitutional because it does not mandate bifurcated trial proceedings (one phase to determine whether he possessed a firearm, and then another phase to determine whether he was a serious violent felon). Without bifurcated proceedings, Teague argues, the jury was aware of his status as a

convicted felon throughout the trial, therefore denying him the presumption of innocence and due process of law.

Indiana Code Section 35-47-4-5 states, in relevant part:

> (a) As used in this section, "serious violent felon" means a person who has been convicted of:
>
> (1) committing a serious violent felony in:
> (A) Indiana;
> . . .
>
> (b) As used in this section, "serious violent felony" means:
> . . .
>
> (2) voluntary manslaughter (IC 35-42-1-3)
> . . .
>
> (15) burglary as a Class A felony or Class B felony (IC 35-43-2-1)
> . . .
>
> (c) A serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon, a Class B felony.

Every statute is "clothed with the presumption of constitutionality until that presumption is clearly overcome by a contrary showing." Jensen v. State, 905 N.E.2d 384, 390 (Ind. 2009). The party challenging the statute's constitutionality bears the burden of proof, and all doubts are resolved against that party. Id. "If two reasonable interpretations of a statute are available, one of which is constitutional and the other not, we will choose that path which permits upholding the statute because we will not presume that the legislature violated the constitution unless the unambiguous language of the statute requires that conclusion." Id. at 390-91 (quoting State Bd. of Tax Comm'rs v. Town of St. John, 702

N.E.2d 1034, 1037 (Ind. 1998)).

We first note that Teague did not raise his constitutional challenge for the trial court in his motion to dismiss, nor did he even request a bifurcated trial. "A challenge to the constitutionality of a criminal statute must be raised by a motion to dismiss prior to trial." Wiggins v. State, 727 N.E.2d 1, 5 (Ind. Ct. App. 2000), trans. denied. Failure to timely raise the issue by a motion to dismiss waives the alleged error. Id. A defendant must raise all constitutional grounds in a timely motion to dismiss, and "[t]hose that are not raised in such a motion are waived, regardless of whether the statute's constitutionality was challenged on other grounds." Id. (refusing to address an appellant's argument that a statute was unconstitutionally vague when he challenged it only on ex post facto grounds in his motion to dismiss).

In his motion to dismiss, Teague argued that Section 35-47-4-5 violates the Ex Post Facto clause of the United States Constitution and the Indiana Constitution, and that charging him with a violation of Section 35-47-4-5 also violated procedural due process because the State did not affirmatively and personally warn him that he could no longer possess a firearm after 1999. He does not renew these rejected challenges on appeal, and instead argues that Section 35-47-4-5 denies him the presumption of innocence. Having failed to raise this issue for the trial court's consideration, he has waived it for our review.

Waiver notwithstanding,[4] because Teague also argues error concerning the closely-related issue of unfair prejudice stemming from references to his status as a serious violent felon or to his prior convictions, we take this opportunity to note that a unified (rather than bifurcated) trial for the sole charge of Possession of a Firearm by a Serious Violent Felon does not deny a defendant procedural due process. In Spearman v. State, this court wrote:

> It is not practical, or even possible to bifurcate the proceedings in this case. . . . The only charge Spearman faced was as a serious violent felon who knowingly or intentionally possesses a firearm. The court could not hold a guilt phase as to the possession of a firearm before holding a guilt phase regarding the existence of a prior conviction that constitutes a serious violent felony because, without more, one is not "guilty" of possession of a firearm. The court could not tell the jury that the defendant is charged with possessing a firearm because that in and of itself is insufficient to constitute a crime. In the absence of the serious violent felony conviction there is no *unlawful* possession component.

744 N.E.2d 545, 549 (Ind. Ct. App. 2001) (emphasis in original), trans. denied.

We have since reaffirmed the rule that bifurcated trials are not necessary, Person v. State, 764 N.E.2d 743, 749-50 (Ind. Ct. App. 2002), trans. denied; Dugan v. State, 860 N.E.2d 1288, 1293 (Ind. Ct. App. 2007), trans. denied, and our supreme court has cited Spearman's rule approvingly. Hines v. State, 801 N.E.2d 634, 635 (Ind. 2004); see also Imel v. State, 830 N.E.2d 913, 918 (Ind. Ct. App. 2005) ("[O]ur supreme court agreed with the court's rationale advanced in Spearman where we said that 'bifurcation was impractical, if not impossible, because the defendant was tried solely for the offense of Unlawful Possession of a Firearm by a Serious Violent Felon") (quoting id.), trans. denied. Although we have

[4] In so doing, we caution that our decision to address the issue is not an invitation to neglect filing a motion to dismiss and then argue for the first time on appeal that a statute is unconstitutional. See Price v. State, 911 N.E.2d 716, 719 n.2 (Ind. Ct. App. 2009), trans. denied.

permitted trial courts to hold bifurcated proceedings in these types of cases, "current precedent does not require trial courts to bifurcate SVF trials." Williams v. State, 834 N.E.2d 225, 228 (Ind. Ct. App. 2005). Teague was not denied procedural due process by a unified, rather than bifurcated, trial.

References to Teague's Status as a Serious Violent Felon or to his Prior Convictions

Teague next argues that references to his status as a serious violent felon or to his prior convictions during trial deprived him of the presumption of innocence. Despite the rule that bifurcated proceedings are not necessary, we have nevertheless encouraged trial courts to limit references to a defendant's status as a serious violent felon. See, e.g., Spearman, 744 N.E.2d at 549 (stating that a trial court "can mitigate the prejudicial effect of evidence of a prior conviction by excluding evidence regarding the underlying facts of the prior felony and limiting prosecutorial references thereto"). When, as here, the defendant stipulates to his status as a serious violent felon, "removal of the need to prove that status should shift the principal focus to the need to avoid prejudice to the defendant." Dugan, 860 N.E.2d at 1292-93.

Teague acknowledges in his brief that he did not object at trial to any of the references he now alleges are error. Generally, the failure to object at trial results in a waiver of the issue on appeal. Bayes v. State, 779 N.E.2d 77, 81 (Ind. Ct. App. 2002), trans. denied. "A contemporaneous objection affords the trial court the opportunity to make a final ruling on the matter in the context in which the evidence is introduced." Id.

Teague nevertheless seeks to escape waiver by arguing that the references constitute

fundamental error. The fundamental error exception to the waiver rule regarding contemporaneous objections is an extremely narrow one. Id. The doctrine is "available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible." Jewell v. State, 887 N.E.2d 939, 942 (Ind. 2008).

At trial, the words "serious violent felon" were uttered only a handful of times. They were first spoken in the preliminary instructions (approved by Teague) when the judge read the title of the charged offense[5] and the title of Section 35-47-4-5 (the statute defining the charged offense). Tr. 17-18. The judge also used the words "serious violent felon" when he explained that "[u]nlawful possession of a firearm by a serious violent felon does not require proof that the defendant knew he was a serious violent felon." Tr. 21. These instructions were reiterated at the close of trial. Although the trial court did mention Teague's name immediately after it read the title of the offense, we do not think that these comments were unduly prejudicial to Teague. The comments were not meant to imply that Teague has a propensity for crime; rather they were an accurate statement of the charge against him and Indiana law. See Imel, 830 N.E.2d at 918 (holding that it was not unduly prejudicial to read a defendant's name in the context of the charge for Unlawful Possession of a Firearm by a Serious Violent Felon), trans. denied. Indeed, the judge instructed the jury both at the beginning and the end of trial that it should not use the fact that charges were brought to be

[5] The judge correctly read the text of the amended charging information.

evidence of guilt. Tr. 18, 113.

The State was also careful to limit its references to Teague as a serious violent felon and did so only twice. The first instance was in the rebuttal phase of the prosecutor's closing argument, when he stated that "Unlawful possession of a firearm by a serious violent felon does not require proof that the defendant knew he was a serious violent felon." Tr. 109. The prosecutor also mentioned in closing that "The State of Indiana, the citizens of Indiana are now entitled to him being guilty of being a serious violent felon in possession of a firearm." Tr. 112. These two statements were made in the context of explaining the law and reciting the charges against Teague. The prosecutor did not attempt to use Teague's prior conviction to suggest a propensity for crime, and the jury was instructed both at the beginning and conclusion of the trial that statements of attorneys are not evidence. The State did specifically mention Teague's prior burglary conviction, but it was used to impeach Teague's credibility for truth and veracity, which he put in issue by taking the stand.[6] See Garner v. State, 274 Ind. 675, 676-77, 413 N.E.2d 584, 585 (1980).

There was only one questionable reference in testimony to Teague's status as a serious violent felon. It happened when Officer Montgomery testified to Teague's reaction upon

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[6] We hasten to note, however, that Teague was convicted of burglary in 1970. Indiana Rule of Evidence 609 states that convictions more than ten years old from the day of sentence or the day of release from confinement are not admissible for purposes of attacking the credibility of witnesses unless the court determines in the interests of justice that the probative value substantially outweighs the prejudicial effect. Moreover, if a party intends to use such evidence, it must provide the adverse party with sufficient advance written notice. Ind. R. Evid. 609. We have no indication that such notice was provided, but Teague did not object to its introduction at trial and does not challenge its admission on appeal as a violation of Rule 609. We may not become an advocate for Teague, and conclude any argument he has on this basis to be waived. See Thacker v. Wentzel, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003).

police questioning, and stated "[Teague] thought he was allowed to have a shotgun just not a handgun [as] a violent felon." Tr. 45. Teague did not object to this statement, and we do not think that this one reference so prejudiced Teague as to make his trial fundamentally unfair.

Otherwise, the State was careful to word its references to Teague's prior convictions. For example, the prosecutor argued in his opening statement that Teague possessed a firearm "while being convicted of a crime that precludes you from owning a firearm." Tr. 25. He also used that phraseology when questioning witnesses, or instead referred to it as "that type of conviction." Tr. 36, 52. This approach comports with our suggestion in Spearman, 744 N.E.2d at 550, n. 8 ("[f]or example, trial courts may determine to reference the predicate felony as one 'enumerated under IC 35-47-4-5' rather than as a 'serious violent felony.'"). Moreover, to the extent that Teague disagrees with this approach and maintains that there should have been no references to his prior convictions, we also disagree. As we wrote in Spearman:

> We understand that prejudice may arise when a jury is informed of a prior conviction under I.C. 35-47-4-5, but the focus cannot be placed solely on the question of the prejudicial effect of such evidence. Indeed, much of the evidence adduced at a criminal trial will be prejudicial to a defendant. Rather, the focus should be on whether the prejudice arising from evidence of prior crimes outweighs the probative value of such evidence.

744 N.E.2d 545, 549.

Teague has not demonstrated, consistent with our fundamental error analysis, that these references were so prejudicial as to make a fair trial impossible. Jewell, 887 N.E.2d at 942.

References and Argument Concerning the Muzzleloader

Teague next argues that the trial court denied him a fundamentally fair trial when it allowed testimony and argument concerning his ownership of a muzzleloader gun because it was improper character evidence of uncharged misconduct. We disagree.[7]

In order to convict Teague as charged, the State had to prove that Teague knowingly or intentionally possessed a firearm after having been convicted of an offense listed in 35-47-4-5. A "firearm" means any weapon that is capable of expelling or designed to expel or that may readily be converted to expel a projectile by means of explosion. I.C. § 35-47-1-5. To support this charge, the State introduced testimony from two police officers that Teague had a shotgun in the passenger side of his car on at least two separate occasions. Evidence concerning the muzzleloader which came to light at trial was used by the State to demonstrate an alternate theory of culpability. See Taylor v. State, 840 N.E.2d 324, 334 (Ind. 2006) (holding "that while jury unanimity is required as to the defendant's guilt, it is not required as to the theory of the defendant's culpability"). This was proper because Teague was charged with possession of a firearm, not a specific gun, and according to Teague's own testimony, a muzzleloader is a firearm. Tr. 89. The evidence was not, as Teague contends, character evidence of uncharged conduct. Its admission was not error.

However, Teague argues and we do acknowledge that the State failed to establish

[7] We note at the outset that Teague failed to object at trial to any references or argument concerning the muzzleloader gun. As such, he has waived any claim to error. Bayes, 779 N.E.2d at 81. Again seeking to avoid waiver, Teague maintains that his complained of errors are fundamental. See Jewell, 887 N.E.2d at 942.

venue for the muzzleloader possession. His waiver of this issue notwithstanding,[8] we note that "The Indiana Constitution states, 'In all criminal prosecutions, the accused shall have the right to a public trial. . . in the county in which the offense shall have been committed.'" Stroup v. State, 810 N.E.2d 355, 359 (Ind. Ct. App. 2004) (quoting Ind. Const. Art. 1, § 13(a)); see also, I.C. § 35-32-2-1(a). Venue is not an element of the offense but the State is required to prove it by a preponderance of the evidence. Id.

Teague testified that his muzzleloader was locked up at his house in Huntington County, and the State did not rebut this evidence. Thus, there was insufficient evidence of venue for the muzzleloader possession. However, this error was ultimately harmless because the State did establish venue[9] and marshal sufficient evidence to support the shotgun offense.

Conclusion

Teague's due process rights were not violated when he was tried in a unified rather than bifurcated trial, and references to his status as a serious violent felon or to his prior convictions did not unduly prejudice him. Moreover, Teague's trial was not improperly tainted by character evidence of uncharged conduct because Teague's possession of a muzzleloader was an alternate theory of culpability. That the State failed to establish venue was ultimately harmless as it did so for the shotgun possession.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.

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[8] "Many times this Court has held that a defendant waives error relating to venue when he fails to make an objection at the appropriate time in the trial court." Floyd v. State, 503 N.E.2d 390, 394 (Ind. 1987).

[9] Teague testified that his shop is in Madison County, Indiana.