



Appellant-defendant Terrance Anderson appeals his convictions for two counts of Attempted Murder,<sup>1</sup> a class A felony,<sup>2</sup> arguing that the evidence is insufficient to support those convictions. He also contends that the trial court erroneously imposed consecutive, enhanced sentences. Finding no error, we affirm the judgment of the trial court.

### FACTS

On June 10, 2005, Anderson, Franklin Davis, Antonio Jackson, and Jazanda Williams were being driven by Davis in Davis's gray Saturn in Indianapolis. Anderson instructed Davis to drive to Gray Street. The vehicle eventually arrived at the intersection of North and Gray Streets, and Anderson ordered Davis to stop the vehicle in the middle of the intersection. A rumor had spread in the neighborhood that a fight was about to take place at the intersection, so many residents—including fourteen-year-old James Legg and twelve-year-old Mack Taylor—were gathered there in anticipation.

Also in the middle of the intersection were Amos Davis and Tyric Rudolph, who were playing “curb ball[.]” Appellee's Br. p. 3. Anderson leaped out of the vehicle and faced Rudolph, warning Rudolph that this neighborhood was Anderson's territory. Anderson then pulled out a gun and shot Rudolph at close range, hitting Rudolph twice. Anderson also shot at others in the area—eyewitnesses reported hearing between three and seven shots fired. Anderson pointed his gun at Nora Davis, Amos's mother, but the gun jammed and did not fire. Nine spent cartridges of the same make and caliber as

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<sup>1</sup> Ind. Code § 35-41-5-1, § 35-42-1-1.

<sup>2</sup> Anderson was also convicted of murder and class A misdemeanor carrying a handgun without a license, but he does not challenge those convictions on appeal.

Anderson's weapon were found at the scene. Nine bullets was the maximum capacity of Anderson's gun.

Rudolph suffered two bullet wounds, one of which was fatal. As Legg and Taylor fled the scene, both were struck by bullets. Legg suffered bullet wounds to both biceps. He wore bandages for three months, suffered diminished use of his hands, and experienced pain that he still felt at the time of Anderson's trial. Taylor was shot in the leg. The bullet entered near his ankle and traveled the length of his calf, lodging in his knee, where it will likely remain for the rest of his life. After three surgeries, Taylor recovered the use of his leg.

Police officers arrived at the scene and eventually discovered Davis's Saturn, which the men had driven to another location. The officers discovered a gun by the vehicle's right front tire and a single live round on the sidewalk. The gun was later proved to be the one used to fire the casings found at the crime scene and the bullet recovered from Rudolph's body.

On June 15, 2005, the State charged Anderson with murder, two counts of class A felony attempted murder, two counts of class B felony aggravated battery, and class A misdemeanor carrying a handgun without a license. After a three-day trial, the jury found Anderson guilty as charged on October 25, 2006.

On November 3, 2006, the trial court held a sentencing hearing. It vacated Anderson's convictions for the two counts of aggravated battery, finding that those charges merged into the two counts of attempted murder. It sentenced Anderson to sixty years for murder, to forty years each on the two counts of class B felony attempted

murder, and to one year for carrying a handgun without a license. The trial court ordered the sentences for murder and attempted murder to be served consecutively and the sentence for carrying a handgun to be served concurrently with those terms, for a total aggregate sentence of 140 years imprisonment.<sup>3</sup> Anderson now appeals.

## DISCUSSION AND DECISION

### I. Sufficiency of the Evidence

Anderson first argues that the State failed to present sufficient evidence to support his convictions for attempted murder. When reviewing claims of insufficient evidence, we consider only the probative evidence and reasonable inferences supporting the judgment, without weighing evidence or assessing witness credibility, and determine therefrom whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Miller v. State, 770 N.E.2d 763, 774 (Ind. 2002).

To convict Anderson of class A felony attempted murder, the State was required to prove beyond a reasonable doubt that Anderson, while acting with the specific intent to kill another person, engaged in conduct constituting a substantial step toward the killing. I.C. § 35-41-5-1, § 35-42-1-1; Blanche v. State, 690 N.E.2d 709, 712 (Ind. 1998).

Anderson argues that although the State proved that Anderson intended to shoot Rudolph, it did not establish that he intended to shoot Legg and Taylor. Intent to commit murder may be inferred from the intentional use of a deadly weapon in a manner likely to cause death. Taylor v. State, 681 N.E.2d 1105, 1111 (Ind. 1997). In other words, if the

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<sup>3</sup> The trial court also ordered the sentence herein to be served consecutively to a sixty-year sentence imposed following a conviction in a separate matter.

State establishes that a defendant uses a deadly weapon in a manner likely to cause death, that is sufficient evidence to support a conclusion that the defendant intended to kill. Bartlett v. State, 711 N.E.2d 497, 500 (Ind. 1999). Indeed, our Supreme Court has held that evidence that a defendant fired a shotgun into a crowd of people is sufficient to support a conviction for attempted murder. Echols v. State, 722 N.E.2d 805, 807-08 (Ind. 2000).

Here, the State presented evidence that after Anderson shot Rudolph, he fired his weapon into the surrounding crowd.<sup>4</sup> Tr. p. 121. Nine spent cartridges from Anderson's weapon were found at the scene, indicating that he had emptied the gun. Id. at 240, 439, 456-62. A jury could have reasonably inferred from this conduct that Anderson intended to commit murder when he fired into the crowd, hitting Taylor and Legg in the process.

Anderson argues that the evidence established that he “only specifically intended to fire at Tyric Rudolph.” Appellant's Br. p. 14. Even if that were the case, the doctrine of transferred intent provides that “a defendant's intent to kill one person is transferred when, by mistake or inadvertence, the defendant kills a third person; the defendant may be found guilty of the murder of the person who was killed, even though the defendant intended to kill another.” Blanche, 690 N.E.2d at 712. This doctrine also applies to the intent needed to commit attempted murder. Straub v. State, 567 N.E.2d 87, 90-91 (Ind.

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<sup>4</sup> Anderson also attempted to shoot Nora Davis, though apparently his gun jammed and did not fire. Anderson argues that the fact that the State chose to charge him for the attempted murders of Taylor and Legg but not for the incident involving Nora Davis lends support for his argument that the State prosecuted him for those acts merely because the injuries were more severe even though it did not have evidence of his intent to commit those crimes. This exercise of prosecutorial discretion, however, in no way illuminates the sufficiency of the evidence supporting Anderson's convictions for attempted murder.

1991). The State established that Anderson intended to kill Rudolph and, according to Anderson's argument, he shot Taylor and Legg by mistake as he attempted to shoot Rudolph. According to the doctrine of transferred intent, this evidence is sufficient to establish the requisite mens rea. Thus, under either scenario, the State has provided sufficient evidence to support Anderson's convictions for the attempted murders of Taylor and Legg.<sup>5</sup>

## II. Sentences

Anderson argues that the trial court erroneously imposed consecutive, enhanced sentences. Specifically, he contends that the amended sentencing scheme only empowers a trial court to impose a consecutive sentence if it imposes the advisory sentence for that crime. Indiana Code section 35-50-2-1.3(c) provides, in relevant part, as follows:

In imposing consecutive sentences in accordance with I.C. 35-50-1-2 . . . a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

Anderson argues that this statute authorizes the trial court to impose only advisory, consecutive sentences.

This argument highlights a split of authority on our court. In analyzing the amended sentencing statutes, different panels of this court have reached different conclusions regarding the interaction between Indiana Code sections 35-50-1-2(c) and -

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<sup>5</sup> Although the doctrine of transferred intent was not the basis of the State's case at trial, we may affirm the trial court if it can be done on any legal ground apparent in the record. Ratliff v. State, 770 N.E.2d 807, 809 (Ind. 2002).

1.3(c). In White v. State, we found that trial courts are authorized to impose enhanced, consecutive sentences:

Indiana Code § 35-50-2-1.3 instructs: “In imposing consecutive sentences in accordance with IC 35-50-1-2[,] a court is required to use the appropriate advisory sentence in imposing a consecutive sentence[.]” We conclude that when the General Assembly wrote “appropriate advisory sentence,” it was referring to the total penalty for “an episode of criminal conduct,” which, except for crimes of violence, is not to exceed “the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.” See Ind. Code § 35-50-1-2(c). In other words, the advisory sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person has been convicted is the “appropriate advisory sentence” for an episode of non-violent criminal conduct. Indiana Code § 35-50-1-2 in no other way limits the ability of a trial court to impose consecutive sentences. In turn, Indiana Code § 35-50-2-1.3, which references Indiana Code § 35-50-1-2, imposes no additional restrictions on the ability of trial courts to impose consecutive sentences.

849 N.E.2d 735, 743 (Ind. Ct. App. 2006), trans. denied.

In Robertson v. State, a separate panel rejected the White analysis and, instead, held that “the advisory sentencing statute, IC 35-50-2-1.3, is clear and unambiguous and imposes a separate and distinct limitation on a trial court’s ability to deviate from the advisory sentence for any sentence running consecutively.” 860 N.E.2d 621, 625 (Ind. Ct. App. 2007), trans. granted.<sup>6</sup> The Robertson court expressed concern about the result in White:

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<sup>6</sup> We acknowledge that the Robertson opinion has been vacated pursuant to our Supreme Court’s grant of transfer. We refer to the vacated opinion merely to illuminate our discussion of the split of authority on this issue.

Our concern with the analysis in White is that (1) it renders the language in IC 35-50-2-1.3 surplusage since the consecutive sentencing statute, IC 35-50-1-2, clearly limits the total of the consecutive sentences for non-violent offenses to the advisory sentence for the next highest class of felony; and (2) nothing in the advisory sentencing statute, IC 35-50-2-1.3, limits its application to non-violent offenses. Although the White decision argues that the legislature could not have intended the results the statute is capable of generating, the argument is moot “[w]hen the language of the statute is clear and unambiguous.” 849 N.E.2d at 742-43.

Id. at 624-25 (citation omitted). Ultimately, the Robertson court remanded the case to the trial court with instructions that it reduce the enhanced, consecutive sentence to the advisory sentence.

Recently, another panel of our court denounced the Robertson analysis and, instead, applied the White analysis. Barber v. State, 863 N.E.2d 1199, (Ind. Ct. App. 2007). Specifically, the Barber court found that the amended sentencing statutes do not limit a trial court’s authority to impose enhanced, consecutive sentences:

Indiana Code § 35-50-2-1.3 serves another very important purpose. In the wake of Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005), our legislature transformed Indiana’s sentencing scheme from a presumptive scheme to an advisory scheme. Under the former presumptive scheme, a trial court was required to impose the “presumptive” sentence for a felony conviction unless the court found aggravating circumstances to enhance the sentence or mitigating circumstances to reduce the sentence. Under the new advisory scheme, trial courts are generally not required to use an advisory sentence. See I.C. § 35-50-2-1.3 (“Except as provided in subsection (c), a court is not required to use an advisory sentence.”). Because an advisory sentence is in most cases exactly that—advisory—the legislature included subsection (c) of Indiana Code § 35-50-2-1.3 to remind Indiana’s trial courts of those statutory provisions that do require the “use” of an advisory sentence[, in relevant part,] in imposing consecutive sentences in accordance with Indiana Code § 35-50-1-2 . . . . We acknowledge that nothing in Indiana Code § 35-50-2-1.3(c) limits its application to any specific subsections of Indiana

Code §§ 35-50-1-2, 35- 50-2-8, and 35-50-2-14, but each of those statutes only includes one subsection that refers to advisory sentences.

Id. at 1211 (emphases in original).

We are persuaded that the better analysis is that set forth in White and Barber. When we read Indiana Code section 35-50-2-1.3 in conjunction with section 35-50-1-2, it is apparent that the reference to the “appropriate advisory sentence” was meant to apply to situations involving the single episode of criminal conduct limitation on consecutive sentencing. This statute was not intended to place any other limits on a court’s ability to impose consecutive sentences. Contrary to the conclusion of the Robertson court, we do not believe that this interpretation renders the statutory language to be surplusage; rather, it provides clarification regarding what advisory sentence is to be used when the single episode of criminal conduct limitation is applicable. We also note that a troubling consequence of the Robertson analysis would be that trial courts would be prohibited from imposing enhanced, consecutive sentences on the worst offenders. That cannot have been the intent of our legislature. Consequently, we find that the trial court herein had the authority to impose enhanced, consecutive sentences, and did not err by doing so.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.