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IN THE INDIANA COURT OF APPEALS
APPELLATE CASE NO. 21A-CR-01315

CHRISTOPHER HARRIS, Appellant,	)	Marion County Superior Court Criminal Division 27
vs.	)	Case No.49D27-1908-F3-032941
STATE OF INDIANA, Appellee.	)	The Honorable Barbara Crawford, Senior Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Sources

STATEMENT OF THE ISSUES

I. Did the trial court violate Mr. Harris's rights under Article 1, Sections 19 and 13, as well as the Fourteenth Amendment, when it refused to allow him to testify during the habitual offender proceeding?

II. Did the State offer insufficient evidence to prove Mr. Harris guilty beyond a reasonable doubt of robbery and battery?

STATEMENT OF THE CASE

On August 20, 2019, the State charged Christopher Harris with robbery, a Level 3 felony; battery, a Level 5 felony; criminal recklessness, a Level 6 felony; and unlawful possession of a firearm as a serious violent felon, a Level 4 felony. App. 28-29.[1] On September 17, 2019, the State filed an additional information alleging that Harris had accumulated two prior offenses and was a habitual offender. App. 72.

On August 14, 2020, the parties filed a waiver of trial by jury, which was accepted by the trial court. App. 156-61; Tr. 72. As part of that waiver, the State dismissed the possession by a serious violent felon count. App. 160.

After a bench trial, the trial court found Harris guilty of robbery and battery but not guilty of criminal recklessness. Tr. Vol. 3, p. 6. It also found him guilty of unlawful possession of a firearm before both the State and defense counsel reminded the court that the count had been dismissed. *Id.*

Near the conclusion of the bench trial, the trial court discovered it had not held an initial hearing on the habitual offender information and then

held one. Tr. Vol 2, p. 249-50 & Vol. 3, p. 2-4. The deputy prosecutor expressed concern about whether the earlier jury waiver applied to the habitual offender and asked that court to "give Mr. Harris the option again of a jury trial or a bench trial with regard to the habitual." Tr. Vol. 3, p. 5. Harris chose a jury trial. *Id.* at 7.

On September 3, 2020, a jury trial was held on the habitual offender allegation, after which the jury found that Harris was a habitual offender. Tr. Vol 3, p. 126; App. 202-03. On June 17, 2021, the trial court sentenced him to twenty-seven years (twelve for robbery consecutive to fifteen for the habitual) to run concurrently with three years for battery. Tr. Vol. 3, p. 157; App. 21-22.[2]

A notice of appeal was timely filed on June 29, 2021. App. 2-6. The clerk filed her notice of completion of the transcript on September 9. After two extensions of time were granted, this Court ordered on November 5 that the Appellant's Brief be filed no later than November 29.

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[1] Citations to "App." are to Volume II of the Appellant's Appendix.

[2] The abstract of judgment shows a "guilty" disposition for "Count V," the habitual allegation. App. 21. It shows a fifteen-year sentence for Count V "consecutive" to "Count 1 and 2." *Id.*

"It is well settled that an habitual offender finding does not constitute a separate crime nor does it result in a separate sentence, rather it results in a sentence enhancement imposed upon the conviction of a subsequent felony." *Guffey v. State*, 42 N.E.3d 152, 158 (Ind. Ct. App. 2015) (cleaned up). When a trial court erroneously enters a separate sentence on the habitual offender determination, remand is required "to the trial court with instructions to correct the sentencing order, abstract of judgment, and chronological case summary to reflect that the . . . habitual offender enhancement serves as an enhancement of" the robbery sentence in count one. *Id.*

STATEMENT OF THE FACTS

In August of 2019, Alex Roberts was working in maintenance at an apartment complex in Indianapolis. Tr. Vol. 2, p. 101. He was acquainted with Autumn Summers, a three-year resident of the apartment complex. *Id.* at 222-23. Roberts described the relationship as a "flirting" relationship, *id.* at 102, 125, but Summers stated the two had sexual relations over a one-year period. *Id.* at 233-34. More recently, Summers had been "hanging out" with Christopher Harris, a relationship with a "romantic component" to it. *Id.* at 224.

On August 17, 2019, Roberts was in his green Tahoe when he encountered a maroon Suburban at the apartment complex. *Id.* at 106-07. Roberts testified that he saw a man get out of the passenger side of the Suburban; Roberts was "pretty much positive" the man was wearing a "gray hoodie." *Id.* at 107, 118, 128.

According to Roberts, the man put a gun in his face and asked why he "was lying" about whether Roberts had been "messing around" with Summers. *Id.* at 107. The man swung a semi-automatic firearm at Roberts' head and shot the firearm into Roberts' vehicle. *Id.* at 108, 110-11. Roberts was bleeding after the incident but was not shot. *Id.* at 119. The man grabbed the gearshift of Roberts' vehicle with "[h]is entire hand." *Id.* at 128.

The man told Roberts to give him "everything" he had and "that chain too." *Id.* at 113. Roberts gave the man eight to ten dollars and a "necklace

type chain." *Id.* at 113. Roberts described the chain as a "Cuban link," which he explained was "a bunch of links linked together to make a chain with a rectangular link at the end piece connecting them together." *Id.* at 120. Soon after the incident Roberts was presented an array of six photographs at the hospital, and he chose the photo of Christopher Harris as the person "involved in the incident." *Id.* at 119-20, 149-53.

Around 6:30 or 7:00 p.m. the same evening, police stopped a maroon Suburban at a Meijer store parking lot on the west side of Indianapolis. *Id.* at 167-68, 179-80. The vehicle belonged to Michael Arnett, who did not testify at trial. *Id.* at 182. After Harris exited the vehicle and an officer "really went through the car," a police officer saw a "handgun in between the middle console and the passenger seat" of the vehicle. *Id.* at 169, 174-75. A firearms examiner testified that the cartridges found at the scene of the robbery were fired by the same firearm found in the vehicle at Meijer. *Id.* at 216-17. A gold chain was also recovered from Harris. *Id.* at 121, 188.

Harris was charged with robbery, battery, and other offenses, as detailed in the Statement of Case. At trial, the State admitted Exhibit 5, an audio recording from Autumn Summers' voicemail. *Id.* at 115-16. The recording is mostly of Roberts, but according to Roberts the other voice that told him, "Get out of the truck" was Harris's. *Id.* at 117. The State also admitted a jail call in which Harris told Autumn Summers, "I didn't do damage to you. I did damage to your boyfriend." State's Ex. 85A, 7:53-58. The

prosecutor stated the call was "not an explicit point by point accounting" but from the context "we know exactly who he's talking about." Tr. Vol. 2, p. 242.

A few weeks after Harris was found guilty of robbery and battery at a bench trial, a jury trial was held on the allegation that he was a habitual offender. Defense counsel and the State entered a stipulation of two prior, unrelated felony convictions (one in 2002, another in 2013). Ex. Vol. 1, p. 108. After the State rested on the stipulation, Harris took the stand briefly to explain his prior offenses and then to discuss his mental health struggles and treatment at the time of the current offense.

When Harris was asked "around the time of your arrest for that robbery, was there anything going on in your life?," the State objected. Tr. Vol. 3, p. 106-07. The trial court declined to allow any such evidence, stating "We're not doing - we are here for one reason and that's determine [sic] whether these two prior felony convictions make him a habitual offender." *Id.* at 107.

The trial court excused the jury to allow the defense to make an offer of proof. *Id.* at 108. As part of the offer of proof, Harris noted he had been diagnosed with PTSD about thirty days before the 2019 offenses. His therapist prescribed medications that were "too strong" for him. *Id.* at 110. Since adjusting his medication while in jail, "everything else has been fine" for him. *Id.* at 111. Defense counsel sought to ask Harris if he had "plans to further rehabilitate himself." *Id.* at 112. The trial court prohibited Harris

from answering any of these questions to explain the offense or give the jury any information to weigh and consider in determining whether he was a habitual offender.

After less than ten minutes of deliberations, the jury found that Harris was a habitual offender. Tr. Vol. 3, p. 125-26.

SUMMARY OF THE ARGUMENT

The trial court violated Mr. Harris's constitutional rights in refusing to allow him to testify in the habitual offender proceeding. Our supreme court has long held that a "jury has a choice and that it may determine that even though the defendant was convicted of two prior unrelated crimes, the defendant should not be given the status of a habitual offender." The trial court prohibited Harris from testifying before the jury to explain the offense or give the jury any information to weigh and consider in determining whether he was a habitual offender, which violates Article 1, Section 19 of the Indiana Constitution. Moreover, refusing to allow Harris to testify also violated Article 1, Section 13, which promises criminal defendants the right to be heard and has been liberally applied in contexts such as the alibi defense and allocution. Finally, barring Harris's testimony in the habitual proceeding violated his right to provide a complete defense in contravention of his federal Due Process rights.

In addition, the convictions must be vacated because the State offered insufficient evidence to support both the robbery and battery convictions.

Even the deputy prosecutor questioned the credibility of the State's only eyewitness to the offense, and some of the physical evidence was inconsistent with or unsupported by some of the State's evidence in the case. After the requisite "probing and sifting of the evidence to determine whether the residue of facts warrants a conviction," the State's evidence falls short of the necessary "substantial evidence of probative value to support the verdict."

STANDARD OF REVIEW

The first issue involves constitutional challenges to the trial court's refusal to allow Mr. Harris to testify in the habitual offender phase. "Constitutional claims raise questions of law, which [this Court] review[s] de novo." *Hendricks v. State*, 162 N.E.3d 1123, 1135 (Ind. Ct. App. 2021), *trans. denied* (citing *Tiplick v. State*, 43 N.E.3d 1259, 1262 (Ind. 2015)).

The second issue is sufficiency of evidence. Due process requires the State prove every element of a crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). When reviewing a challenge to the sufficiency of the evidence, an appellate court neither reweighs the evidence nor judges the credibility of the witnesses. *Sanders v. State*, 704 N.E.2d 119, 123 (Ind. 1999). Rather, it considers the evidence most favorable to the judgment and reasonable inferences drawn from that evidence and will affirm if the evidence and inferences provide "substantial evidence of probative value to support the verdict." *Id.* Although the sufficiency standard of review is deferential to factual determinations by the trial court,

the appellate court nevertheless has a "duty to examine the evidence closely," *Luginbuhl v. State*, 507 N.E.2d 620, 622 (Ind. Ct. App. 1987), which "may require a probing and sifting of the evidence to determine whether the residue of facts warrants a conviction." *Gaddis v. State*, 253 Ind. 72, 77, 251 N.E.2d 658, 660 (1969).

"Although a sufficiency of the evidence standard is deferential, it is not impossible to overcome, nor should it be." *Milam v. State*, 14 N.E.3d 879, 881 (Ind. Ct. App. 2014). "An impossible standard of review under which appellate courts merely 'rubber stamp' fact finder's determinations, no matter how unreasonable, would raise serious constitutional concerns because it would make the right to appeal illusory." *Id.*

ARGUMENT

I. The trial court violated Mr. Harris's constitutional rights in refusing to allow him to testify in the habitual offender proceeding.

A habitual offender determination, and the accompanying six to twenty years in prison, Ind. Code § 35-50-2-8(i)(1), requires more than documents showing two prior felonies. Trial courts cannot forbid a defendant from sharing with a jury facts relevant to the offenses at issue.

Here, defense counsel and the State entered a stipulation of two prior, unrelated felony convictions (one in 2002, another in 2013). Ex. Vol. 1, p. 108. The verdict form, however, properly required the jury not only to find these two offense but concluded with the following:

WE THE JURY FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT CHRISTOPHER HARRIS _____ A HABITUAL OFFENDER. IS / IS NOT

App. 202-03. After the State rested on the stipulation, Harris took the stand briefly to explain his prior offenses. Tr. Vol. 3, p. 106.

But when asked "around the time of your arrest for that robbery, was there anything going on in your life?," the State objected. Tr. Vol. 3, p. 106-07. The trial court refused to allow any such evidence, stating "We're not doing - we are here for one reason and that's determine [sic] whether these two prior felony convictions make him a habitual offender." Tr. Vol. 3, p. 107.

The trial court excused the jury to allow the defense to make an offer of proof. *Id.* at 108. As part of the offer of proof, Harris noted he had been diagnosed with PTSD about thirty days before the 2019 offenses. His therapist prescribed medications that were "too strong" for him. *Id.* at 110. Since adjusting his medication while in jail, "everything else has been fine" for him. *Id.* at 111. Defense counsel also sought to ask Harris if he had "plans to further rehabilitate himself." *Id.* at 112. But the trial court prohibited Harris from answering any of these questions to explain the offense or give the jury any information to weigh and consider in determining whether he was a habitual offender.

As argued below, the trial court's exclusion of Mr. Harris's testimony regarding his offenses in the habitual offender phase violated Article 1,

Sections 19 and 13 of the Indiana Constitution as well as the federal Due Process Clause.

A. Article 1, Section 19

Unlike most state constitutions, Indiana's constitution provides, "In all criminal cases whatever, the jury shall have the right to determine **the law** and the facts." Ind. Const. Art. 1, § 19 (emphasis added). Section 19 is not a hollow or meaningless provision. *See generally* Honorable Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 Val. U. L. Rev. 449 (1999).

Our supreme court made clear more than two decades ago that juries may find a defendant to be "a habitual offender (or not to be a habitual offender) irrespective of the uncontroverted proof of prior felonies." *Seay v. State*, 698 N.E.2d 732, 737 (Ind. 1998) (discussing jury instructions). That unanimous opinion adopted Justice Dickson's view from recent dissenting opinions where he had written "that the jury has a choice and that it may determine that even though the defendant was convicted of two prior unrelated crimes, the defendant should not be given the status of a habitual offender." *Id.* at 736.

A few years after *Seay*, the State admitted evidence in a habitual offender proceeding beyond a stipulation of prior offenses; our supreme court upheld the trial court because "the facts regarding the predicate convictions are relevant to the jury's decision whether or not to find a defendant to be a

habitual offender." *Hollowell v. State*, 753 N.E.2d 612, 617 (Ind. 2001). The opinion reaffirmed that a jury "has discretion to determine whether a defendant is a habitual offender 'irrespective of the uncontroverted proof of prior felonies.'" *Id.* (quoting *Seay*, 698 N.E.2d at 737).[3]

Justice Rucker, joined by Justice Dickson, dissented from the outcome in *Hollowell* but shared the majority's view that jurors can consider more than the barebones existence of a prior conviction. They wrote that the "right of an Indiana jury in a criminal case not to be bound to convict even in the face of proof beyond a reasonable doubt allows the jury to consider mercy in its deliberations." *Id.* at 618. But the dissent would have reversed the habitual adjudication because "[a]ny consideration of mercy in this case was very likely eliminated by the erroneous and prejudicial information contained in the case chronology." *Id.*

Here, the trial court's prohibition on Harris's testimony during the habitual offender phase was grounded in a legally incorrect view that a habitual proceeding was simply about "whether these two prior felony convictions make [Harris] a habitual offender" and thus violated Section 19. Tr. Vol. 3, p. 107. Reversal and a new proceeding are warranted because the jury was given no opportunity to learn about "the facts regarding the

[3] Decades ago, the Indiana Supreme Court upheld the exclusion of a defendant's testimony that he "never hurt anyone, never robbed, raped, or pulled a weapon on anyone," explaining that "[t]he only relevant evidence in a habitual offender proceeding is evidence that proves or disproves the defendant's prior felony convictions." *Taylor v. State*, 511 N.E.2d 1036, 1040

predicate convictions" or any basis to "consider mercy in its deliberations." *Id.* at 617-18.[4]

B. Article 1, Section 13

Prohibiting a defendant from testifying in a habitual offender proceeding also violates Article 1, Section 13, which provides in relevant part, "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . . ."

Our supreme court has explained "[t]his language places a unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges." *Campbell v. State*, 622 N.E.2d 495, 498 (Ind. 1993) (discussing the alibi defense), *abrogated on other grounds by Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). The same principle has been cited in cases involving the right to allocution, not simply at sentencing hearings after a trial but also after a defendant pleads guilty or after the revocation of probation. *Biddinger v. State*, 868 N.E.2d 407, 412 (Ind. 2007) (citing *Vicory v. State,* 802 N.E.2d 426 (Ind. 2004)).

Prohibiting Harris from telling the jury what was happening in his life at the time of the 2019 offense or otherwise provide reasons why jurors

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(Ind. 1987). Although never explicitly overruled, *Taylor* cannot be reconciled with the more recent opinions in *Seay* and *Hollowell*.

[4] This appeal does not challenge the ability of trial courts to limit a collateral attack on a prior conviction. *See* Tr. Vol. 3, p. 114; I.C. 35-50-2-8(k) ("A prior unrelated felony conviction may not be collaterally attacked during a

should not find him to be a habitual offender warrants reversal because it "cut[s] at the heart of the jury determination of these crucial matters . . . ." *Campbell*, 622 N.E.2d at 499.

C. Federal Due Process

The exclusion of Mr. Harris's testimony during the habitual proceeding also violated his right to present a defense as protected in the United States Constitution. Although trial courts have "wide latitude to direct the order of proof," they cannot prevent the defense's "full and fair participation in the adversary factfinding process." *Book v. State*, 880 N.E.2d 1240, 1248, 1250 (Ind. Ct. App. 2008).

"Whether it is rooted directly in the Due Process Clause of the Fourteenth Amendment or the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Saintignon v. State*, 118 N.E.3d 778, 786 (Ind. Ct. App. 2019), *trans. denied* (citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). At issue here is the "right to testify on one's own behalf in a criminal proceeding," which has been described by the Supreme Court as "a right implicit in the Constitution." *Correll v. State*, 639 N.E.2d 677, 680 (Ind. Ct. App. 1994) (citing *United States v. Dunnigan*, 507 U.S. 87, 96 (1993)).

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habitual offender proceeding unless the conviction is constitutionally invalid."); *Dexter v. State*, 959 N.E.2d 235, 238 (Ind. 2012).

Because "the facts regarding the predicate convictions are relevant to the jury's decision whether or not to find a defendant to be a habitual offender," *Hollowell*, 753 N.E.2d at 617, the trial court's prohibition on Mr. Harris's testimony denied him any opportunity, much less a "meaningful opportunity to present a complete defense." *Saintignon*, 124 N.E.2d at 786.

II. The State offered insufficient to support the convictions for robbery and battery.

A conviction for robbery as a Level 3 felony requires proof beyond a reasonable doubt that Mr. Harris took property from Alex Roberts by force while he was armed with a deadly weapon. Ind. Code § 35-42-5-1(a)(1). A conviction for battery as a Level 5 felony requires proof beyond a reasonable doubt of a knowing or intentional touching of Alex Roberts while Harris had a deadly weapon. Ind. Code § 35-42-2-1(c)(1) & 35-42-2-1(g)(2); App. 28-29. The State failed to meet its burden for either count.

At trial, the State relied heavily on the testimony of Alex Roberts, the alleged victim of both offenses and only eyewitness. After defense counsel called Roberts a liar during closing argument, the State largely agreed but argued the lies Roberts told on the stand about his infidelity and sexual relationship with Autumn Summers were "rational to an extent." Tr. Vol. 2, p. 245-46. Roberts had admitted only "flirting" with Summers and repeatedly denied having sexual relations with her. *Id.* at 124-25. But Summers testified she had sex with Roberts over the course of a year before she later became involved with Harris. *Id.* at 233-34.

According to Roberts, a man he later identified as Harris got out of the passenger side of a maroon Suburban. Tr. Vol. 2, p. 107, 118. According to Roberts, the man put a gun in his face and asked why he "was lying" about whether Roberts had been "messing around" with Summers. *Id.* at 107. The man fired a semi-automatic firearm into Roberts' vehicle. *Id.* at 108.

The man told Roberts to give him "everything" he had and "that chain too." *Id.* at 113. Roberts gave the man eight to ten dollars and a "necklace type chain." *Id.* at 113. Roberts described the chain as a "Cuban link," which he explained was "a bunch of links linked together to make a chain with a rectangular link at the end piece connecting them together." *Id.* at 120. Roberts was bleeding after the incident but was not shot. *Id.* at 119. Soon after the incident Roberts was presented an array of six photographs at the hospital, and he chose the photo of Harris as the person "involved in the incident." *Id.* at 119-20, 149-53.

Roberts' testimony was inconsistent with or unsupported by some of the State's evidence in the case. Roberts was "pretty much positive" that the man who robbed him was wearing a "gray hoodie," but Harris was not wearing a gray hoodie when he was arrested hours later. *Id.* at 128. Roberts said the man who robbed him grabbed the gearshift of his vehicle with "[h]is entire hand, *id.* at 128, but no fingerprints or DNA connected Mr. Harris to the gearshift. *Id.* at 193.

An audio recording from Autumn Summers' voicemail was mostly of Roberts' voice and only he identified one comment as being made by Harris. Moreover, a recorded jail call between Harris and Summers included the comment, "I didn't do damage to you. I did damage to your boyfriend." State's Ex. 85A, 7:53-58. The prosecutor stated the call was "not an explicit point by point accounting" but from the context "we know exactly who he's talking about." Tr. Vol. 2, p. 242.

The State's evidence fell short in other ways. No DNA or fingerprints were offered into evidence from the firearm later found near Harris or on the fired shell casings found at the scene of the robbery. *Id.* at 145, 163-64, 200, 205, 211. The driver of the Suburban did not testify or connect Harris in any way to the robbery. A firearms examiner testified that the cartridges found at the scene of the robbery were fired by the same firearm later found near Harris, but his analysis had no "calculated error rate." *Id.* at 216-17. An apparent bullet hole in the Suburban was not explained at trial. *Id.* at 174. Although Roberts reported a gold chain was taken from him (similar to one later found with Harris), the necklace was simply described as a "Cuban link" and was not described as custom-made or with any distinctive markings but simply "a bunch of links linked together to make a chain with a rectangular link at the end piece connecting them together." *Id.* at 120, 121, 188-89.

In sum, after "probing and sifting of the evidence to determine whether the residue of facts warrants a conviction." *Gaddis v. State*, 253 Ind. 72, 77,

251 N.E.2d 658, 660 (1969), the State's evidence falls short of the "substantial evidence of probative value to support the verdict." *Sanders v. State*, 704 N.E.2d 119, 123 (Ind. 1999). For these reasons, Mr. Harris respectfully requests his convictions for robbery and battery be vacated. *See generally Webb v. State*, 147 N.E.3d 378, 386–87 (Ind. Ct. App. 2020) (reversing Level 2 and 3 convictions for attempted robbery based in part on "discrepancies in the evidence about Webb's car and hair, the lack of physical evidence connecting Webb to the offenses"), *trans. denied*.

CONCLUSION

Christopher Harris respectfully requests this Court vacate his convictions for robbery and battery based on insufficient evidence; alternatively, he requests the habitual offender enhancement be reversed because the trial court violated his constitutional rights in refusing to allow him to testify about the facts of the predicate offenses in that proceeding.[5]

Respectfully submitted,

/s/ Joel M. Schumm
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Appellate Public Defender

[5] In addition, remand is required to correct the abstract of judgment for the reasons stated in footnote two.

CERTIFICATE OF SERVICE

I certify that the foregoing Brief of Appellant was served by electronic filing through the IEFS upon Attorney General Theodore Rokita on November 29, 2021.

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