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

REPLY BRIEF OF APPELLANT

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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. As an initial matter, the claim is not waived. The trial court was aware of the constitutional protection at issue, having instructed the jury on it and because defense counsel mentioned it during his short opening statement. The State does not suggest the purpose of the requirement of an objection was frustrated, and our supreme court prefers to address claims on their merits.

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. The State's reliance on decades-old precedent is irreconcilable with more recent precedent that includes broad language allowing admission of evidence about "the facts regarding the predicate convictions." Moreover, the proffered evidence was relevant to the jury determining whether Mr. Harris was a habitual offender, and thus refusing to allow Harris to testify also violated Article 1, Section 13, which promises criminal defendants the right to be heard, and 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 armed 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. The State's evidence at trial included holes and inconsistencies, and the State offered no corroborating DNA or fingerprint evidence.

ARGUMENT

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

Mr. Harris has not waived appellate review of his constitutional claim, and his 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. The constitutional claims are properly before this Court.

The State's waiver argument should be rejected; constitutional claim "may be raised at any stage of the proceeding including raising the issue *sua sponte* by this Court." *Morse v. State*, 593 N.E.2d 194, 197 (Ind. 1992).

Moreover, Harris made an offer of proof and an adequate objection. After stipulating to the underlying offenses for the habitual offender, defense counsel called Mr. Harris to testify. When the State objected, 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.

Defense counsel's rationale for offering this testimony was sufficiently clear. During his brief opening statement, defense counsel told the jury,

"[y]ou get to judge the law and the facts," Tr. Vol. 3, p. 99, which echoes the language of Article 1, Section 19. Moreover, the trial court gave jury instructions that accurately stated that the jury had the right to decide both the facts and the law—and because of this, "even where you find the fact of the prerequisite felony convictions is uncontroverted, you have the unquestioned right to find that the defendant is not a habitual offender." App. 176, 197. In other contexts, appellate courts have long stated they "presume the trial judge is aware of and knows the law, and considers only evidence properly before the judge in reaching a decision." *Dumas v. State*, 803 N.E.2d 1113, 1121 (Ind. 2004). The State does not suggest that uttering the words "Article 1, Section 19" would have changed the trial court's mind but instead offers a string-cite of waiver cases. Br. of Appellee at 11-12. None of these are controlling because in none of these cases did the trial court instruct the jury on the very basis of the objection.

The rationale for requiring a timely objection at trial is "to promote a fair trial by preventing a party from sitting idly by and appearing to assent to an offer of evidence or ruling by the court only to cry foul when the outcome goes against him." *Hale v. State*, 54 N.E.3d 355, 358–59 (Ind. 2016) (quoting *Robey v. State,* 7 N.E.3d 371, 379 (Ind. Ct. App.), *trans. denied,* 11 N.E.3d 923 (Ind. 2014)). That purpose was satisfied by the objection in this case. Moreover, "whenever possible, [Indiana appellate courts] prefer to

resolve cases on the merits instead of on procedural grounds like waiver." *Id.* at 360 (quoting *Pierce v. State,* 29 N.E.3d 1258, 1267 (Ind. 2015)).

B. Article 1, Section 19

The State's reliance on *Taylor v. State*, 511 N.E.2d 1036, 1040 (Ind. 1987), and even older cases, is grounded in a since-overruled view of Article 1, Section 19. Br. of Appellee at 13-14. A decade after *Taylor*, our supreme court made clear 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). 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. *Taylor*, in contrast, takes the view that the prior convictions are all that matters because "Article 1, Section 19 of the Indiana Constitution does not require that [any other] evidence go to the jury." 511 N.E.2d at 1040.

Taylor is also irreconcilable with *Hollowell v. State*, 753 N.E.2d 612, 617 (Ind. 2001), where our supreme court upheld the trial court's admission of a CCS, despite a stipulation of prior convictions, 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." The State's exceedingly narrow view of *Hollowell*—that the CCS was relevant because it

"proves or disproves the defendant's prior felony convictions," Br. of Appellee at 15—is at odds with the broad language allowing admission of evidence in a habitual proceeding about "the facts regarding the predicate convictions." *Hollowell*, 753 N.E.2d at 617.

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 predicate convictions" or any basis to "consider mercy in its deliberations." *Hollowell*, 753 N.E.2d at 617-18.[1]

C. 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,

[1] Any statutory changes do not affect this constitutional claim. *See* Br. of Appellee at 15 (citing Ind. Code § 35-50-2-8(h)). As an initial matter, it is not at all clear what the statutory prohibition on parties "conduct[ing] any additional interrogation or questioning of the jury" means. No questions were posed of the jury. Interrogation means "a formal and systematic questioning," and again no questioning "of" the jury occurred. https://www.merriam-webster.com/dictionary/interrogation The statutory language does not limit, much less prohibit, presenting evidence to the jury about whether it should find a person to be a habitual offender. Moreover, because Article 1, Section 19 provides a right for jurors to determine the law, the Indiana General Assembly cannot infringe upon or alter that right by statute. *See generally Strong v. Daniel*, 5 Ind. 348, 350 (1854) ("[I]f a legislative act conflicts with the constitution, it is a nullity, and inoperative for any purpose.").

"In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . . ."

The State makes no attempt to distinguish Harris's cited authority, which emphasized the "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 State's suggestion that the evidence was irrelevant fails for the same reasons addressed in Part B because Section 19 renders evidence related to the underlying convictions relevant.

D. 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. Contrary to the State's claim of irrelevance, "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. Therefore, 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 v. State*, 118 N.E.3d 778, 786 (Ind. Ct. App. 2019), *trans. denied.*

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

As previously argued, the State relied heavily on the testimony of Alex Roberts, the alleged victim 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.

Mr. Harris has additional concerns about holes in the State's case. Specifically, the State relies on the testimony of Officer Holloway for the proposition that "[t]here was a handgun in between the middle console and the passenger seat of the vehicle" in which he was a passenger later in the day. Br. of Appellee at 7 (citing Tr. Vol. 2, p. 169). On cross-examination, however, the officer agreed with his earlier deposition testimony that the handgun "wasn't really apparent until you know we actually really went through the car." Tr. Vol. 2, p. 175. The evidence regarding the handgun was further undercut when the driver of the vehicle never testified, and the State dismissed the Level 4 felony firearm charge before the bench trial. App. 160, 165; Tr. Vol. 2, p. 71-72.

The State also relies on a jail call recording between Mr. Harris and Autumn Summers. According to the State, "Summers asked Harris what he did, and Harris told her to ask Roberts (Tr. Vol. II 229)." Br. of Appellee at 8. Summers testified Mr. Harris told her to call her "little boyfriend or however he was referring to Alex." Tr. Vol. 2, p. 229. Mr. Harris wants to be sure this

Court knows that Summers testified she merely "believed" Mr. Harris used the term boyfriend, which does not mean she knew for sure. *Id.* at 227 ("It's been a very long time, but I believe that was the term.").

Finally, as previously argued, the State's evidence fell short in other ways such as the State offering no DNA or fingerprint evidence from the firearm later found in the vehicle or on the fired shell casings found at the scene of the crime. *Id.* at 145, 163-64, 200, 205, 211.

For all these reasons and those previously argued, Mr. Harris requests his convictions be reversed based on insufficient evidence.

CONCLUSION

Christopher Harris respectfully requests this Court vacate his convictions for armed 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.[2]

Respectfully submitted,

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[2] In addition, remand is required to correct the abstract of judgment for the reasons stated in footnote two of the Appellant's Brief and conceded by the State. Br. of Appellee 20 n.1.

CERTIFICATE OF SERVICE

I certify that the foregoing Reply Brief of Appellant was served by electronic filing through the IEFS upon Deputy Attorney General George Sherman on March 1, 2022.

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