

IN THE
INDIANA SUPREME COURT

No. 21A-CR-1315

CHRISTOPHER HARRIS,
Appellant-Defendant,

v.

STATE OF INDIANA,
Appellee-Plaintiff.

Appeal from the
Marion Superior Court,

No. 49D27-1908-F3-032941,

The Honorable
Angela Dow Davis, Judge,
The Honorable
Barbara Crawford, Senior Judge.

RESPONSE IN OPPOSITION TO PETITION TO TRANSFER

GEORGE P. SHERMAN
Supervising Deputy Attorney General
Attorney No. 0023745-53

OFFICE OF ATTORNEY GENERAL
Indiana Government Center South
302 West Washington Street
Indianapolis, Indiana 46204-2770
Telephone (317) 233-1877
George.Sherman@atg.in.gov

Counsel for Appellee

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STATE’S RESPONSE IN OPPOSITION TO PETITION TO TRANSFER

In a unanimous opinion, the Court of Appeals correctly found that Harris had waived his evidentiary challenge based on Article 1, Section 19 of the Indiana Constitution by failing to raise it in the trial court. *Harris v. State*, No. 21A-CR-1315, slip op. at 8 (Ind. Ct. App. April 21, 2022). The Court of Appeals also properly found that waiver notwithstanding, Harris’s claim failed on the merits. Both this Court and the General Assembly have made clear that the only relevant evidence in a habitual offender proceeding is evidence that proves or disproves the defendant’s prior felony convictions. Because Harris’s proffered evidence was not relevant, and there is no constitutional right to admit irrelevant evidence, the trial court did not err in ruling the evidence was inadmissible. Therefore, transfer should be denied.

ARGUMENT

The Court of Appeals correctly found that Harris’s constitutional claim was waived and also properly concluded that he had not established that the trial court erred in ruling on his evidentiary claim regardless.

As an initial matter, the Court of Appeals properly found that Harris’s claim based on Article 1, Section 19 of the Indiana Constitution was waived. *Harris*, slip op. at 8. During the habitual offender phase of the proceedings, Harris stated to the court that “there are things that we think the jury should hear” (Tr. Vol. III 108). However, when discussing the matter with the trial court, Harris failed to cite any evidentiary rule or constitutional provision in support of his claim (Tr. Vol. III 108-12). “In order to preserve a claim of trial court error in the admission or exclusion of evidence, it is necessary at trial to state the objection together with the specific

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ground or grounds therefor at the time the evidence is first offered.” *Mullins v. State*, 646 N.E.2d 40, 44 (Ind. 1995). Because Harris did not raise any constitutional arguments in the trial court nor inform the trial court of the basis for his position, he has waived these claims on appeal (Tr. Vol. III 108). *McCallister v. State*, 91 N.E.3d 554, 563 (Ind. 2018) (defendant waived constitutional argument by failing to raise it at trial); *Gill v. State*, 730 N.E.2d 709, 711 (Ind. 2000) (a defendant may not raise an argument on appeal that was not made in the trial court); *Grace v. State*, 731 N.E.2d 442, 444 (Ind. 2000) (“Grounds for objection must be specific and any grounds not raised in the trial court are not available on appeal”).

Waiver aside, the Court of Appeals properly found that Harris failed to establish any error in the trial court’s ruling. *Harris*, slip op. at 8-13. During his testimony for the habitual offender phase, Harris acknowledged that he was convicted of robbery in 2002 and unlawful possession of a firearm by a serious violent felon in 2013 (Tr. Vol. III 106). He also acknowledged his conviction for robbery in 2019, and during his subsequent offer to prove, Harris indicated that he wished to testify that around 30 days before his most recent armed robbery conviction, he was diagnosed with PTSD (Tr. Vol. III 106, 110). Harris stated that the medication his therapist prescribed “was too strong” for him and that he “never had a chance to get [his] medicine adjusted because [he] got in trouble, which is this situation here” (Tr. Vol. III 110). The trial court ruled the evidence was not relevant stating,

First of all, during the trial, you had the opportunity to present that evidence to that Court. Secondly, those are issues that

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are more relevant to sentencing, rather than what the jury has to decide today. I don't believe they're relevant and so I'm not going to allow that information.

(Tr. Vol. III 112).

Harris failed to establish any error by the trial court under Article 1, Section 19 of the Indiana Constitution, which states, "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." This Court previously considered a similar challenge in *Taylor v. State*, 511 N.E.2d 1036 (Ind. 1987). In that case, Taylor argued that based on Article 1, Section 19, the trial court should have permitted him "to testify about why he did not deserve to be considered a habitual criminal at that phase of trial." *Id.* at 1040. During his offer to prove, Taylor testified that "he never hurt anyone, never robbed, raped, or pulled a weapon on anyone. He said that while he stole things, he did not feel he was a habitual criminal." *Id.* This Court held, "Though the trial court may consider the testimony for sentencing, Article 1, Section 19 of the Indiana Constitution does not require that this evidence go to the jury." *Id.* Rather, "The only relevant evidence in a habitual offender proceeding is evidence that proves or disproves the defendant's prior felony convictions." *Id.*; see also *Thomas v. State*, 451 N.E.2d 651, 653-54 (Ind. 1983) (trial court did not err by precluding defendant from presenting to the jury evidence regarding "his positive character traits, opportunities for rehabilitation, and his work record" during habitual offender phase); *Williams v. State*, 431 N.E.2d 793, 795-96 (Ind. 1982) (the "only issue" "in an habitual criminal hearing" "is

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whether or not appellant has, in fact, been found guilty and sentenced as required under the statute of prior offenses.”).

In attempting to undermine *Taylor*, Harris points to *Seay v. State*, 698 N.E.2d 732 (Ind. 1998) and *Hollowell v. State*, 753 N.E.2d 612, 617 (Ind. 2001) (Appellant’s Br. 15-16). In *Seay*, this Court observed there had been some confusion concerning whether the jury’s role under the habitual offender statute was to determine whether a defendant had the requisite number of convictions or whether the jury was also to determine the defendant’s status as a habitual offender. *Seay*, 698 N.E.2d at 734-37. The Court determined, “if the legislature had intended an automatic determination of habitual offender status upon the finding of two unrelated felonies, there would be no need for a jury trial on the status determination.” *Id.* at 736. Thus, this Court found that “the Habitual Offender Statute at issue in *Seay* specifically assigned to the jury the duty to determine the status of a habitual offender.” *Smith v. State*, 825 N.E.2d 783, 786 (Ind. 2005).

Based on this understanding of the statute, the Court concluded that a jury had the ability to find a defendant “to be a habitual offender (or not to be a habitual offender) irrespective of the uncontroverted proof of prior felonies.” *Seay*, 698 N.E.2d at 737. In light of this conclusion, the Court held that under Article 1, Section 19, it was error for the trial court to instruct the jury during the habitual offender phase “that the jury was the judge of only the facts and not the law.” *Seay*, 698 N.E.2d at 733, 737 (stating “The jury was judge of both the law and facts as to that issue and it was error to instruct the jury otherwise”).

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In *Hollowell*, the Court reviewed a defendant's claim that the trial court erred in admitting a chronological case summary for one of the defendant's prior convictions. *Hollowell*, 753 N.E.2d at 616-17. The defendant claimed that "the case chronology was unnecessary because he stipulated to the prior convictions." *Id.* at 616. However, this Court found that the CCS was admissible 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." *Id.*

Contrary to Harris's argument, neither *Seay* nor *Hollowell* conflict with *Taylor* concerning the type of evidence that is admissible during the habitual offender phase of the proceedings (Appellant's Br. 15 n.3). In fact, the CCS at issue in *Hollowell* is the kind of information that would be relevant evidence under *Taylor* because it "proves or disproves the defendant's prior felony convictions." *Taylor*, 511 N.E.2d at 1040; *Hollowell*, 753 N.E.2d at 617 ("evidence of his prior convictions was still relevant even after Defendant's stipulation"). However, even if there were a conflict, the legislature later modified the habitual offender statute in a manner that aligns with *Taylor's* holding as will be discussed in more detail below.

Additionally, this Court later revisited its decision in *Seay* and disavowed the Court's reliance on Article 1, Section 19 for its holding in *Seay*. Specifically, the Court stated,

"We need not and should not have identified the Indiana Constitution as additional support for the holding and consider those comments to be obiter dicta. The authority given by the Legislature to determine both habitual offender status [under Indiana Code Section 35-50-2-8] and the law and the facts [under Indiana Code Section 35-27-2-2(5)]

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provides the basis for the holding in *Seay*, independent of the State Constitution.

Walden v. State, 895 N.E.2d 1182, 1185 (Ind. 2008).

However, in a subsequent opinion, without referencing *Walden*, the Court determined that a habitual offender jury instruction was erroneous under Article 1, Section 19. *Sample v. State*, 932 N.E.2d 1230, 1232-33 (Ind. 2010). In reaching this conclusion, the Court observed that it had previously held that the jury has the independent and separate authority to determine whether a defendant is a habitual offender, even if the State has proven beyond a reasonable doubt that the defendant has accumulated two prior unrelated felony convictions. *Id.* at 1232. Accordingly, the Court concluded that the trial court erred in instructing the jury that it “must” find Sample to be a habitual offender if it found that he had two prior unrelated felony convictions. *Id.*

The legislature subsequently amended the habitual offender statute by adding the following italicized language regarding the role of the jury in a habitual offender proceeding:

If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing under IC 35–38–1–3.

The role of the jury is to determine whether the defendant has been convicted of the unrelated felonies. The state or defendant may not conduct any additional interrogation or questioning of the jury during the habitual offender part of the trial.

Ind. Code § 35-50-2-8(h). See P.L. 158-2013, § 661 (revising subsection (h) of the habitual offender statute).

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As the Court of Appeals correctly found, this provision clearly states the role of the jury in the habitual offender phase. *Harris*, slip op. at 12. In challenging the Court of Appeals' decision, Harris incorrectly claims that by amending the statute the legislature did not intend any changes but "merely codified existing practice." (Pet. at 8). However, if the legislature did not intend to make any change to existing practice, there would have been no need to add the new language in the first place. Further, if this provision were meant to merely codify the existing practice, the new language would have stated not only that the jury's role is to determine whether the defendant has been convicted of the unrelated felonies, but also to determine the defendant's status as a habitual offender. However, in defining the jury's role, the legislature conspicuously omitted any reference to determining the defendant's status regardless of his prior convictions.

When interpreting a statute, "we must consider not only what the statute says but what it does not say." *Curley v. Lake Cnty. Bd. of Elections & Registration*, 896 N.E.2d 24, 37 (Ind. Ct. App. 2008), *trans. denied*. In other words, "we are obliged to suppose that the General Assembly chose the language it did for a reason." *State v. Prater*, 922 N.E.2d 746, 750 (Ind. Ct. App. 2010), *trans. denied*. Here, when the legislature amended the habitual offender statute, it elected to provide for a singular role for the jury during the habitual offender sentencing phase, namely, to "determine whether the defendant has been convicted of the unrelated felonies." I.C. § 35-50-2-8(h).

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Thus, “[t]he only relevant evidence in a habitual offender proceeding is evidence that proves or disproves the defendant’s prior felony convictions.” *Taylor*, 511 N.E.2d at 1040 (unanimously rejecting defendant’s Article 1, Section 19 challenge to trial court’s evidentiary ruling during habitual offender phase). “If the substantive law renders the evidence irrelevant—which is what the [habitual offender] statute does to [Harris’s proffered evidence]—there is no right under” the Indiana Constitution to present it. *See Sanchez v. State*, 749 N.E.2d 509, 521 (Ind. 2001). Accordingly, the Court of Appeals properly found that the trial court did not abuse its discretion in declining to permit Harris to offer evidence that was not relevant to the jury’s decision. *Harris*, slip op. at 13.

Contrary to Harris’s claim, Article 1, Section 19 does not require that a jury must determine a defendant’s habitual offender “status” beyond concluding that a defendant has been convicted of the required felonies (Pet. at 11). Rather, it was because the Court in *Seay* concluded that it was the legislature’s intent that a jury determine a defendant’s habitual offender status irrespective of the proof of the felony convictions, that the Court held that Article 1, Section 19 applied. *Seay*, 698 N.E.2d at 733-35; *see also Smith*, 825 N.E.2d at 786 (stating it was because the Court in *Seay* found “that the Legislature intended for the jury to make a determination” of habitual offender status beyond the factual findings on the prior convictions, that the Court held that Article 1, Section 19 applied). The General Assembly has now made clear that it is not its intent for a jury to determine a defendant’s habitual offender status. Ind. Code § 35-50-2-8(h). Consequently, Article

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1, Section 19 does not apply to a habitual offender sentencing proceeding in the manner that the *Seay* Court found because a jury is no longer determining a defendant's habitual offender status.

Finally, with respect to Harris's request that the Court take transfer to offer guidance on jury instructions in light of the amendment to the habitual offender statute, the Indiana Judges Association Criminal Instructions Committee regularly addresses such matters. There is no reason to believe that after reviewing the changes to the habitual offender statute pointed out in the Court of Appeals opinion, the Criminal Instructions Committee will not be up to the task of producing pattern instructions that can later be reviewed by this Court. Accordingly, transfer should be denied.

CONCLUSION

The State respectfully requests that the Court deny transfer.

Respectfully submitted:

/s/ George P. Sherman
George P. Sherman
Supervising Deputy Attorney General
Atty. No. 0023745-53

Counsel for Appellee

WORD COUNT CERTIFICATE

I verify that this brief in response to transfer contains no more than 4,200 words according to the Microsoft Word program used to prepare this document.

/s/ George P. Sherman
George P. Sherman
Supervising Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on June 27, 2022, the foregoing document was electronically filed using the Indiana E-filing System (“IEFS”). I also certify that on June 27, 2022, the foregoing document was served upon the following person via IEFS:

Joel M. Schumm

/s/ George P. Sherman
George P. Sherman
Supervising Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
Indiana Government Center South, Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204-2770
Telephone (317) 233-1877