Filing # 172323236 E-Filed 05/03/2023 10:12:44 AM

IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER ALLEN PRYOR,	:	
	:	
Petitioner,		
	:	Case No. SC23-593
vs.		
	:	
STATE OF FLORIDA,		
	:	
Respondent.		
_____:		

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE ISSUES

The primary issue in this case concerns the direct and express conflict between the opinion in the present case and the three other district court opinions noted below. That conflict concerns the meaning of the test for fundamental error adopted in *F.B. v. State*, 852 So. 2d 229 (Fla. 2002) for use with unpreserved evidence-sufficiency issues in direct criminal appeals. The secondary issue here is whether this Court should reconsider that fundamental error test because it is logically flawed, unfair and inefficient.

STATEMENT OF THE CASE AND FACTS

The district court affirmed Petitioner's conviction for possession a firearm by a violent career criminal even though the State failed to "prove that he possessed the requisite prior convictions to qualify as a VCC [because] his juvenile escape conviction is not a qualifying offense under section 775.084(1)(d)1." *Pryor v. State*, 2023 WL 2777195, at *4-6 (Fla. 2d DCA Apr. 5, 2023), copy in Appendix. Noting that the issue was not preserved, the court said:

> [W]e review for fundamental error, [which] means that the appellant must show that *the evidence was insufficient to prove that he committed any crime at all.* [Citing *F.B.*].
>
> … Mr. Pryor fails to demonstrate that he committed no crime [because the evidence proved he committed the necessary-lesser-included offense of felon in possession of a firearm].

Id. at *5–6 (emphasis added) .

SUMMARY OF THE ARGUMENT

The opinion in the present case directly and expressly conflicts with the opinions in *T.E.B. v. State*, 338 So. 3d 290 (Fla. 4th DCA 2022), *Castillo v. State*, 217 So. 3d 1110 (Fla. 3d DCA 2017) and *Hamilton v. State*, 71 So. 3d 247 (Fla. 4th DCA 2011) on the issue of the proper test for fundamental error for evidence-sufficiency issues in direct criminal appeals. In the present case, the evidence proved a necessary-lesser of the offense of conviction but was insufficient to prove the "enhancing element" needed to prove that greater offense. Interpreting *F.B.,* the district court concluded fundamental error did not occur because the evidence did prove that "a crime was committed" (*F.B.,* 852 So. 2d at 229), *i.e.,* the necessary lesser of felon-in-possession.

As discussed further below, the three conflict cases all reach the opposite conclusion on legally identical facts. In all three cases, the evidence also proved a necessary lesser of the offense of conviction but was insufficient to prove the enhancing element needed to prove the greater offense. And in all three cases, the courts

concluded this constituted fundamental error. Thus, there is a direct and express conflict in the district courts regarding how *F.B.* should be read and applied.

As also discussed below, there are other unresolved issues regarding the meaning of *F.B*, including whether its test for fundamental error applies if the evidence is sufficient to prove a wholly unrelated (*i.e.,* not a necessary-lesser) offense or even an uncharged offense. With all due respect, Petitioner believes these issues are arising because *F.B.* was wrongly decided, as it is logically flawed, unfair and inefficient.

The argument on this latter point is a condensed version of the one laid out in Richard Sanders, *Doin' Time for an Unproven Crime: The Problem of Unpreserved Evidence Sufficiency Issues in Criminal Appeals*, 27 St. Thomas Law R. 94 (2015) and Richard Sanders, *The Problem of Unpreserved Evidence Sufficiency Issues in Direct Criminal Appeals*, 31 The Florida Defender 20 (Spring 2019). In sum, that argument is as follows:

> 1) As an abstract matter, the only reason to require evidence-sufficiency issues to be raised during criminal

trials is to give the State a chance to cure any deficiencies in its proof before the case is submitted to the jury; but

2) in Florida, Rule 3.380(c) allows evidence-sufficiency issues to be initially raised post-verdict, when it is too late for the State to cure any evidence deficiencies (*State v. Stevens*, 694 So. 2d 731 (Fla. 1997)); so therefore

3) there is no valid reason for Florida courts to require such issues to be preserved; and further

4) defense counsel's failure to move for an acquittal under Rule 3.380(c) will *always* amount to ineffective assistance.[1]

This Court has not adopted this reasoning. Rather, in *F.B.*, the Court has adopted a limited test for fundamental error whose precise meaning is as yet unclear. Regardless of how that issue is eventually resolved, the *F.B.* test is logically flawed, unfair and inefficient.

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[1] An analysis of the possible reasons for requiring the preservation of evidence-sufficiency issues, and why those reasons do not apply in Florida (given Rule 3.380(c)), is found in Sanders, *Doin' Time,* 27 St. Thomas L.R. at 119-25.

Although *F.B.* was a juvenile case and Rule 3.380(c) would not apply, the juvenile rules contain a similar provision. Fla.R.Juv.P. 8.130. Further, none of the post-*F.B.* cases that apply the *F.B.* rule, many of which involve adult convictions, suggest that the logic or applicability of *F.B.* is contingent on which rules apply.

ARGUMENT

THE OPINION IN THE PRESENT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH THE OPINIONS IN *T.E.B. v. State*, 338 So. 3d 290 (Fla. 4th DCA 2022), *Castillo v. State*, 217 So. 3d 1110 (Fla. 3d DCA 2017) AND *Hamilton v. State*, 71 So. 3d 247 (Fla. 4th DCA 2011) ON THE ISSUE OF THE PROPER TEST FOR FUNDAMENTAL ERROR FOR EVIDENCE-SUFFICIENCY ISSUES IN DIRECT CRIMINAL APPEALS.

The standard of review here is *de novo*. *Williams v. State*, 957 So. 2d 595, 598 (Fla. 2007).

In *F.B.*, this Court held fundamental error occurs with evidence-sufficiency issues only "when the evidence is insufficient to show that a crime was committed at all." 852 So. 2d at 230. In *Monroe v. State*, 191 So. 3d 395, 401 (Fla. 2016), the Court reaffirmed the *F.B.* rule, which it said applied when "there is insufficient evidence that a defendant committed *any* crime." However, although the Court concluded no fundamental error occurred in *Monroe,* the Court granted relief because it found trial counsel's failure to preserve the valid sufficiency issue constituted clear ineffective assistance. *Id.* at 404. But in *Steiger v. State*, 328 So. 3d 926, 932 (Fla. 2021), the Court receded from *Monroe* on this

latter point and held unpreserved ineffectiveness claims cannot be raised on direct appeal.

In the present case the district court read *F.B.* as meaning no fundamental error occurred because the evidence proved a necessary-lesser offense even though the evidence was insufficient to prove the enhancing element needed to prove the greater offense of conviction. The three conflict cases reached the opposite result on legally identical facts.

In *T.E.B.*, the defendant was convicted on two counts of felony battery but both counts were improperly enhanced to felonies on the basis of an alleged prior conviction that could not be used for that enhancement. Citing *F.B.,* the court reduced the convictions to ones for simple battery because "it was fundamental error to convict of a greater crime where there was no proof of underlying elements." 338 So. 3d at 295.

Similarly, in *Castillo,* the court held fundamental error occurred when section 775.087(1) was used to reclassify a second-degree murder conviction from a first-degree felony to a life felony because

the evidence didn't prove Castillo "personal[ly] possess[ed]" the firearm while committing the crime (a required predicate for reclassification). 217 So. 3d at 1115. And in *Hamilton*, the court reduced a conviction for armed robbery to one for simple robbery, finding fundamental error occurred because the State didn't prove the defendant used a weapon during the robbery. 71 So. 3d at 248.

Thus, in all three conflict cases, the evidence proved a necessary-lesser offense but failed to prove the enhancing element needed to elevate the level of that offense to the offense of conviction. All three cases expressly and directly conflict with the present case.

Respectfully, Petitioner believes this problem is caused by the fact that *F.B.* was wrongly decided, for the reasons stated above. Again, the only abstract reason to require evidence-sufficiency issues to be preserved in criminal cases is the cure-the-deficiency logic but, because Rule 3.380(c) allows such issues to be initially raised post-verdict, there is no reason to require such issues to be preserved in Florida.

Thus, the *F.B.* rule is logically flawed at the outset. Further, the

precise meaning and scope of the rule is unclear. As an initial matter, although the present case (like *F.B.*) involves a greater-offense/necessary-lesser-offense situation, the *F.B.* test could be read as meaning that, if the defendant is convicted of two entirely unrelated offenses and the evidence is sufficient to prove one but not the other, there is no fundamental error as to the unproven crime because the evidence proved the unrelated crime (*e.g.,* a cocaine-possession conviction is affirmed, even though the evidence failed to prove the possession element, because a battery was proven). Note here that *Monroe,* in which the Court applied *F.B.* to conclude no fundamental error occurred, did *not* involve a greater/necessary-lesser situation; the two offenses there were mutually exclusive.[2] *See also Bybee v. State*, 295 So. 3d 1229, 1232 (Fla. 2d DCA 2020)

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[2] Monroe was convicted of capital sexual battery. The disputed issue was Monroe's age at the time of the offense. This created, not a lesser-included relationship between the two relevant offenses, but an either/or relationship. If Monroe was under 18, that would *dis*prove the crime of capital sexual battery under §794.011(2)(a); and if he was over 18, that would *dis*prove the alternative offense, a violation of §794.011(2)(b), which applies only if he was under 18. Thus, the §794.011(2)(b) offense is not a lesser-included of capital sexual battery.

(refusing to address as fundamental error a meritorious unpreserved sufficiency issue regarding Crime A because the defendant was also convicted of the unrelated Crime B).

Also unresolved is how the *F.B.* test applies if the evidence proves an uncharged crime. Recall that in *Monroe*, this Court restated the *F.B.* rule for fundamental error as "there is insufficient *evidence* that a defendant committed *any* crime." 191 So. 3d at 401 (first emphasis added). The emphasis on "evidence" indicates the *F.B.* test does not require proof that the defendant was convicted of, or even charged with, this proven "any crime"; all that is required is that there is *evidence* of "any crime" in the record. *See H.R. v. State*, 298 So. 3d 1217 (Fla. 3d DCA 2020) (refusing to address a meritorious unpreserved sufficiency issue regarding Crime A because the evidence proved the uncharged Crime B).[3]

But if the *F.B.* test is meant to promote the cure-the-deficiency interest, how is that interest served by reading that test to include

[3] Other potential, and as yet unresolved, problems with the *F.B.-Monroe* a/any-crime-was-committed test are discussed in Sanders, *Doin' Time,* 27 St. Thomas L.R. at 113-19.

unrelated and uncharged crimes? The fact that the defendant committed an unrelated or uncharged other crime is irrelevant to the issue of whether the State could have cured the evidence-deficiency in the challenged crime of conviction.

And even if we limit the *F.B.* test to great/necessary-lesser cases, the test is still logically flawed, unfair and inefficient.

The *F.B.* Court did not discuss the perceived relationship between the fundamental error test it adopted and the cure-the-deficiency logic invoked to support it. Why is the State given a chance to cure-the-deficiency if a/any-crime was proven but not if no crime was proven? Why would we assume that, if given the chance, the State couldn't have cured-the-deficiency if no crime was proven?[4]

Nor did *F.B.* consider whether preservation is required–-and the

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[4] Suppose the defendant is convicted of a crime that requires proof that the victim was a minor; and no crime would occur if the victim wasn't a minor; but the State didn't prove the victim's age. How do we know whether, if the issue had been raised, the State could have cured this defect (which might require nothing more than asking the victim her birthday, a question the prosecutor simply forgot to ask)?

a/any-crime test applies–-even if it is clear in the record that the State could *not* have cured-the-deficiency if the issue had been raised; what purpose does a preservation requirement serve in that situation?[5]

In sum, the *F.B.* test is logically flawed and not necessarily related to promoting the cure-the-deficiency interest that justifies it.

The *F.B.* test is also unfair to defendants, for the reasons discussed in Sanders, *Doin' Time,* 27 St. Thomas L.R. at 123-25. The primary unfairness is that, in refusing to address an unpreserved sufficiency issue, a court is casting on defendants (who may have serious mental or education deficiencies, or may not even speak English) the burden of preparing pro se motions that

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[5] *See Burrell v. State*, 601 So. 2d 628, 629 (Fla. 2d DCA 1992) (concluding fundamental error occurred when it was undisputed in the record that defendant could not have committed the crime of conviction but he did commit a necessary-lesser).

Suppose, in *Monroe,* it was clear in the record that Monroe was under 18 when the sexual battery occurred, which means that the capital crime of conviction was *dis*proven at trial and the either/or under-17 offense *was* proven. This would mean fundamental error did not occur because a-crime was proven, even though it is clear that the State could *never* have cured-the-deficiency. This is analogous to the situation in *Burrell.*

raise an issue that the three law-school-trained trial professionals (judge, prosecutor, defense counsel) all missed. We can note here, not only defense counsels' obligation to provide effective assistance, but also prosecutors' ethical duty to "do justice" (as opposed to "just winning") and the fact that trial judges can always grant judgments of acquittal *sua sponte* under Rule 3.380(a).[6]

And even if the defendant can afford to hire a lawyer for this--

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[6] To the extent that the preservation rule is designed to give trial courts the chance to initially rule on issues, there is less need to strictly enforce that rule with regard to decisions that trial courts must, or may, make regardless of whether anyone asks. This includes sufficiency issues, which courts *may* address *sua sponte* under Rule 3.380(a) ("If, at the close of the evidence[,] the court is of the opinion that the evidence is insufficient[,] it may ... enter a judgment of acquittal.").

Thus, an unpreserved sufficiency issue could be raised without invoking either fundamental error or ineffectiveness by framing it as "the trial court abused its discretion by failing to *sua sponte* grant an acquittal under Rule 3.380(a)." As one federal court said after defining plain error, "[i]n the context of sufficiency of the evidence, the [plain] error is the failure of the [trial] court 'of its own motion' to order a judgment of acquittal when the evidence is insufficient." *United States v. Meadows*, 91 F.3d 851, 855 (7th Cir. 1996).

As to how other courts handle the problem of unpreserved sufficiency issues, see Sanders, *Doin' Time,* 27 St. Thomas L.R. at 127-30.

and where's the fairness in making her pay for that--, there will generally be a delay, perhaps of many months, before a Rule 3.850 motion works its way through the system to the inevitable result.

And while all this is happening, the defendant may be in prison or under supervision for a period of time much longer than the maximum sentence for the crime the State actually proved. For instance, in *F.B.,* the defendant was convicted of grand theft, a third-degree felony, but the State only proved a petit theft, a misdemeanor with a maximum sentence of one year. In such cases, it is possible that a five-year prison sentence could be imposed; and after the inevitable 12 month or so appellate time frame, the appellate court concludes the State didn't prove the value element; but that court refuses to grant relief despite the fact that the defendant has already served more than the maximum one-year sentence that should have been imposed; and the defendant will have to remain incarcerated or under supervision while seeking relief through Rule 3.850.

Seems neither fair, efficient, nor logical.

CONCLUSION

This Court should take jurisdiction to resolve the inter-district conflict and to reconsider *F.B.*

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on May 3rd, 2023.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Bookman Old 14-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,
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APPENDIX

Pryor v. State, 2D22-563, 2023 WL 2777195 (Fla. 2d DCA Apr. 5, 2023)

District Court of Appeal of Florida, Second District.

Christopher Allen PRYOR, Appellant,
v.
STATE of Florida, Appellee.
No. 2D22-563
April 5, 2023

Appeal from the Circuit Court for Pinellas County; Philip J. Federico, Judge.

LaROSE, Judge.

*1 At the conclusion of a bifurcated trial, the jury found Christopher Allen Pryor guilty of possessing a firearm by a violent career criminal (VCC). *See* § 790.235, Fla. Stat. (2019). We have jurisdiction.[1] *See* Fla. R. App. P. 9.030(b)(1)(A). We affirm.

Background

In December 2019, Mr. Pryor was dating the victim, A.H. He lived in her house. The relationship soured quickly on the day he forgot to bring home a rat to feed to A.H.'s pet snake. A heated

squabble ensued.

The dispute escalated beyond shouting. Mr. Pryor hurled hot soup on A.H.'s face. He left the house for a short time. When he returned, he saw A.H. moving his belongings out of the house. He was incensed. Brandishing a gun, Mr. Pryor confronted A.H. in the driveway. He put the gun under her chin and pulled the trigger. She heard a click. The gun misfired. Seeing a chance to escape, A.H. ran to safety. Mr. Pryor fired several shots into the air. A.H.'s neighbors heard multiple gunshots. Police officers recovered three spent shell casings. During a search for the gun, the officers discovered a .380 semiautomatic pistol and a box of ammunition stowed in a grill in the backyard. A neighbor recalled seeing Mr. Pryor walking from the direction where the gun and ammunition were found. A ballistics expert opined that the shell casings were discharged from that gun.

Prior to trial, Mr. Pryor filed a motion to sever the possession of a firearm by a VCC count from the remaining charges.[2] He claimed that "[s]everance ... [wa]s necessary to achieve a fair

determination of [his] guilt or innocence of each offense." The trial court denied severance but bifurcated the proceedings. The trial court reasoned that severing the charge would deprive the jury of hearing the event's full context:

[T]he firearm's found in the—in the grill. The implication is he ran in the house and then put it in the grill in the back, right? So why would he hide the firearm in the grill? Because he knows the cops are coming on a domestic because the whole blocks [sic] calling. I don't know how you separate that out as part of the circumstances related to the firearm. You can't—you can't just totally—hey, she—she says he fired some shots and there's a gun found in the grill, that's all you need to know about that situation. I mean, that's not a fair presentation of what the evidence is in that scenario.

The trial court divided the trial into two phases. The first phase required the jury to find whether Mr. Pryor possessed a firearm. At the conclusion of this phase, the jury found that Mr. Pryor had possessed a firearm.

*2 After a brief recess, the jury reconvened for the second phase of the trial. The trial court advised the jury that "the [S]tate is going to present evidence that [Mr. Pryor i]s a [VCC]." The State introduced a Department of Corrections "Crime and Time Report" detailing Mr. Pryor's most recent release date from prison as well as multiple prior convictions. Specifically, the State introduced Mr. Pryor's 2012 Hernando County conviction for aggravated battery with great bodily harm, a 2005 Hernando County burglary conviction, and, as relevant here, a 1995 Pinellas County conviction for escape from a secure juvenile detention facility. Mr. Pryor raised no objection to the State's use of the 1995 conviction as a qualifying offense. Finding that Mr. Pryor qualified as a VCC, the jury found him guilty on the possession of a firearm by a VCC charge. The trial court imposed the statutorily mandated life sentence. *See* §§ 790.235(1); 775.084(4)(d)1, Fla. Stat. (2019).

Analysis

I. Denial of Severance Motion

Mr. Pryor contends that the trial court erred in denying his

severance motion. He asserts that the trial court's decision did not cut the mustard, constitutionally speaking. *See* Fla. R. Crim. P. 3.152(a)(2)(A) ("In case 2 or more charges of related offenses are joined in a single indictment or information, the court ... shall grant a severance of charges on motion of the state or of a defendant ... before trial on a showing that the severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense ...."); *State v. Vazquez*, 419 So. 2d 1088, 1090 (Fla. 1982) ("A severance should be granted liberally when prejudice is likely to flow from refusing the severance."). Reviewing Mr. Pryor's argument for an abuse of discretion by the trial court, we cannot agree. *See Knott v. State*, 198 So. 3d 768, 770 (Fla. 2d DCA 2016); *Campfield v. State*, 189 So. 2d 642, 642 (Fla. 2d DCA 1966) ("An application for severance is addressed to the trial court's sound discretion and the order thereon will not be reversed except for palpable abuse of judicial discretion.").

Those charges requiring proof of Mr. Pryor's criminal record had to be considered separately from other charges.[3] *See Tucker v.*

State, 884 So. 2d 168, 172 (Fla. 2d DCA 2004) ("Although a trial court has discretion to grant or deny a motion for severance, that discretion has been sharply curtailed when it concerns a request to sever a charge of felon in possession of a firearm.... Because the trial court abused its discretion by denying Mr. Tucker's request to sever the felon in possession of a firearm charge from the charges for carrying a concealed firearm and aggravated assault with a firearm, we reverse Mr. Tucker's convictions on the latter two charges."); *cf. State v. Harbaugh*, 754 So. 2d 691, 693 (Fla. 2000) ("[A]bsent the bifurcated process, the jury is directly confronted with evidence of defendant's prior criminal activity and the presumption of innocence is destroyed and ... '[i]f the presumption of evidence is destroyed by proof of an unrelated offense, it is more easily destroyed by proof of a similar related offense.' " (second alteration in original) (quoting *State v. Rodriguez*, 575 So. 2d 1262, 1265 (Fla. 1991))); *Fox v. State*, 543 So. 2d 340, 342 (Fla. 1st DCA 1989) ("Certainly the lower court should have granted the initial motion to sever. Having failed to do so, it caused defense counsel to

reveal to the prospective jurors that appellant had a criminal past. Considering the extremely prejudicial nature of such information, the fact that the error occurred prior to the commencement of trial, and that appellant's right to a fair trial could have been preserved by selection of a new jury, we conclude that the lower court erred in denying appellant's motion for mistrial.”).[4]

*3 Mr. Pryor's case is akin to *Jackson v. State*, 881 So. 2d 711 (Fla. 3d DCA 2004). There, the State charged Mr. Jackson with armed robbery, possession of a firearm by a convicted felon, and giving a false name after arrest. *Id.* at 715. Mr. Jackson moved to sever the armed robbery count. *Id.* The trial court denied severance but bifurcated Mr. Jackson's trial; the jury would first try the armed robbery count and if he was convicted, the same jury would reconvene to decide the remaining two counts. *Id.* The Third District observed that “the same goal was achieved here by bifurcation” and concluded that “bifurcation was within the court's discretion and follows established procedure for a trial of this type.” *Id.* After all, during the trial of the armed robbery charge, the jury

did not learn that Mr. Jackson had a prior felony record. *Id.* at 716. The jury's interrogatory verdict only found the defendant guilty of robbery with a firearm. *Id.* The Third District reasoned that bifurcation prevented the jury from hearing irrelevant and unduly damaging evidence of the defendant's prior convictions while considering whether he possessed a firearm. *Id.*

Similarly, in *Walters v. State*, 933 So. 2d 1229 (Fla. 3d DCA 2006), the Third District explained the State's ability to rely on factual findings by the same jury in the first phase of a bifurcated trial to establish the charge of possession of a firearm by a convicted felon in the second phase:

The appropriate procedure in a bifurcated trial is to have the jury reconvene in the second phase for the trial of the charge of possession of a firearm by a convicted felon. In the second phase, the jury would be instructed that the fact that the defendant possessed a firearm had already been established by the verdict in the first phase. The State must then introduce evidence that the defendant is a convicted felon.

Id. at 1231.

For Mr. Pryor, because the jury did not learn of his prior convictions during the first phase of trial, "the same goal [sought by severance] was achieved here by bifurcation." *Jackson*, 881 So. 2d at 715. As in *Jackson*, bifurcation accorded Mr. Pryor due process. Indeed, the State satisfied its burden of proof in phase one—possession of a firearm—without using evidence of Mr. Pryor's status as a VCC. In our view, the trial court crafted a sound solution.

II. Bifurcated Trial & Fundamental Error

Mr. Pryor contends that "[i]t was fundamental error to adjudicate [him] guilty of possession of a firearm by a [VCC] where the jury never reached a verdict, was never instructed on, and never found all the elements of possession of a firearm by a [VCC]." He contends that "[t]he trial court added the verdicts from separate trials together to adjudicate [him] guilty of possession of a firearm by a [VCC]." We disagree.

A bifurcated proceeding is conducted in "stages" or "phases."

Yet, it remains a single proceeding. *See Harbaugh*, 754 So. 2d at 694 ("Examining the *Rodriguez* bifurcated trial process in felony DUI prosecutions ... we hold that in this bifurcated process the jury, not the judge, must determine the verdict from the evidence presented in the second phase.... It follows then that felony DUI trials must be conducted before the jury in two stages because the concern remains about tainting the consideration of the current misdemeanor DUI with evidence concerning the past DUI."); *Gonzalez v. State*, 306 So. 3d 1124, 1134 (Fla. 3d DCA 2020); *Emory v. State*, 46 So. 3d 89, 91 (Fla. 4th DCA 2010); *Walters*, 933 So. 2d at 1231 (holding that where the trial court bifurcates a possession of a firearm by a convicted felon charge from charges of attempted murder and aggravated battery, the jury must "reconvene in the second phase for the trial of the charge of possession of a firearm by a convicted felon").

That is exactly what happened in Mr. Pryor's case. After finding in phase one that Mr. Pryor possessed a firearm, the jury was then tasked with determining whether he possessed the

requisite criminal record to qualify for VCC sentencing. We see no error in this procedure, let alone one of fundamental import. *See Adams v. State*, 122 So. 3d 976, 979 (Fla. 2d DCA 2013) ("[E]rror is fundamental only if it 'goes to the very heart of the judicial process' and 'extinguishes a party's right to a fair trial,' such that it results in a miscarriage of justice." (quoting *Martinez v. State*, 933 So. 2d 1155, 1159 (Fla. 3d DCA 2006))).

III. Juvenile Escape & Possession of a Firearm by a VCC

*4 Mr. Pryor claims that the State failed to prove that he possessed the requisite prior convictions to qualify as a VCC. Specifically, he contends that his juvenile escape conviction is not a qualifying offense under section 775.084(1)(d)1.

The State counters that Mr. Pryor ignores the applicable statutory language:

(2) For purposes of this section, the previous felony convictions necessary to meet the violent career criminal criteria under [section] 775.084(1)(d) may be convictions for felonies committed as an adult **or adjudications of delinquency for**

felonies committed as a juvenile. In order to be counted as a prior felony for purposes of this section, the felony must have resulted in a conviction sentenced separately, or an adjudication of delinquency entered separately, prior to the current offense, and sentenced or adjudicated separately from any other felony that is to be counted as a prior felony.

§ 790.235(2) (emphasis added). The State contends that it "properly relied on the escape from juvenile facility adjudication and detention to establish [Mr.] Pryor's VCC status." We are unpersuaded.

We are called upon to interpret the relevant statutory provisions. Accordingly, our review is de novo. *Braine v. State*, 255 So. 3d 470, 471 (Fla. 2d DCA 2018) ("Statutory interpretation raises an issue of law, and we review the trial court's ruling de novo." (quoting *Wegner v. State*, 928 So. 2d 436, 438 (Fla. 2d DCA 2006))). "The first place we look when construing a statute is to its plain language—if the meaning of the statute is clear and unambiguous, we look no further." *State v. Hackley*, 95 So. 3d 92,

93 (Fla. 2012). "We resort to other rules of statutory construction only where the statute is ambiguous in the sense that it could be reasonably understood to mean two different things." *Burgess v. State*, 198 So. 3d 1151, 1155 (Fla. 2d DCA 2016). We find no ambiguity in the relevant statute. Thus, we hew closely to the words as written, affording them their plain and ordinary meaning. To qualify for VCC sentencing, a defendant must have previously been convicted as an adult three or more times of various enumerated felony offenses. § 775.084(1)(d). As relevant here, the list of enumerated convictions includes "[e]scape, as described in [section] 944.40."[5] § 775.084(1)(d)1.f. Seemingly, however, the State relied on Mr. Pryor's conviction for escape from a juvenile detention facility, pursuant to section 39.061, Florida Statutes (Supp. 1994), a third-degree felony.[6]

*5 Section 39.061 no longer exists. Beginning in 1997, the legislature renumbered and amended the statute several times, leading to its current iteration, found at section 985.721, Florida Statutes (2014) ("Escapes from secure detention or residential

commitment facility"). *See* ch. 98-207, Laws of Fla.; ch. 2006-120, Laws of Fla. To be certain, however, escape, as proscribed by section 985.721, is not listed among the qualifying VCC offenses under section 775.084(1)(d)1.

As a result, we conclude that the State reaches too far. As the State would have it, any "adjudication[ ] of delinquency for felonies committed as a juvenile" would be a predicate conviction for VCC sentencing. § 790.235(2). We read section 790.235(2) differently. The State's parsing of the statute impermissibly excises the antecedent, qualifying portion of the sentence. *See Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Schs., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009) ("Basic to our examination of statutes, and an important aspect of our analysis here, is the 'elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.' " (quoting *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606 (Fla. 2006))). Namely, "**[f]or purposes of**

[section 790.235], the previous felony convictions necessary to meet the [VCC] criteria under [section] 775.084(1)(d)" may also include "adjudications of delinquency for felonies committed as a juvenile." § 790.235(2) (emphasis added). Thus, not just any adjudication for a felony committed as a juvenile will do. Instead, section 790.235(2) simply broadens the adult convictions already enumerated under 775.084(1)(d)1 as necessary for VCC qualification to also include juvenile adjudications for those same enumerated offenses. *See Jackson v. State*, 729 So. 2d 947, 950 (Fla. 1st DCA 1998) (stating that "[t]he goal of [section 790.235] was … to protect the public by prohibiting the possession of firearms by persons previously convicted of, ***or adjudicated delinquent for, the commission of certain enumerated felonies***" (emphasis added)). Although juvenile adjudications are not permissible prior convictions for purposes of qualifying as a VCC under section 775.084(1)(d) 1, section 790.235(2) allows for juvenile felony adjudications of the offenses listed in section to 775.084(1)(d) to suffice. And, once again, we observe, section 775.084(1)(d) does not

include escape from a secure detention or residential commitment facility, section 985.721, among the qualifying offenses. The offenses proscribed by sections 985.721 and 944.40 are not interchangeable. *See Lacey v. State*, 114 So. 3d 452, 453-54 (Fla. 4th DCA 2013).

The State's misplaced reliance on his 1995 escape conviction does not end the story. At trial, Mr. Pryor failed to challenge the State's use of that conviction to prove that he qualified as a VCC. Consequently, Mr. Pryor's sufficiency of the evidence challenge was not preserved for review. *See Bybee v. State*, 295 So. 3d 1229, 1232 (Fla. 2d DCA 2020) ("[A] motion or objection must be specific to preserve a claim of insufficiency of the evidence for appellate review." (alteration in original) (quoting *F.B. v. State*, 852 So. 2d 226, 230 n.2 (Fla. 2003))). Thus, we review for fundamental error. *Id*. And in the context of fundamental error, that means that the appellant must show that the evidence was insufficient to prove that he committed any crime at all. *See Spencer v. State*, 216 So. 3d 11, 14 (Fla. 1st DCA 2015) (" 'The state's failure to prove all

elements of a charged offense does not constitute "fundamental error" which may be raised for the first time on appeal.' Instead, in order to prove fundamental error, the evidence must be **'insufficient to show that a crime was committed at all.'** " (first quoting *Sanders v. State*, 765 So. 2d 778 (Fla. 1st DCA 2000); and then quoting *F.B.*, 852 So. 2d at 230)).

*6 On this record, Mr. Pryor fails to demonstrate that he committed no crime. *See* § 790.23(1)(a), Fla. Stat. (2019) ("It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm[or], ammunition ... if that person has been ... [c]onvicted of a felony in the courts of this state ....").

Conclusion

We affirm Mr. Pryor's judgment and sentences without prejudice to his challenging the possession of a firearm by a VCC conviction on collateral review. *See* Fla. R. Crim. P. 3.850.

Affirmed.

KELLY and LABRIT, JJ., Concur.

Footnotes

1. Mr. Pryor was also convicted of battery and improper exhibition of a firearm, lesser included misdemeanor offenses, and received time served dispositions. We affirm these convictions without further comment.

2. The State also charged Mr. Pryor with burglary with a battery arising from Mr. Pryor's striking a motorist who had stopped to render aid to A.H., aggravated assault related to A.H., and simple assault stemming from Mr. Pryor's threatening behavior toward a neighbor.

3. However, that is not the case when possession of a firearm by a convicted felon is the sole charge before the jury. *See Tucker v. State*, 884 So. 2d 168, 172 n.5 (Fla. 2d DCA 2004). *Compare Vazquez*, 419 So. 2d at 1091 (holding that proof of a prior conviction, although unfairly prejudicial to other counts, was relevant, admissible, and not unfairly prejudicial for a charge of felon in possession of firearm and, thus, affirming that charge), *with Syder v. State*, 921 So. 2d 871, 872-73 (Fla. 4th DCA 2006)

(approving the trial court's denial of Mr. Syder's motion to bifurcate two counts of possession of a firearm by a convicted felon because "[i]n the case of the charge of possession of a firearm by a convicted felon, possession of a firearm by itself is not a criminal offense," instead Mr. Syder's "status of convicted felon is a necessary element of the offense charged").

4. In fact, even the "VCC" term, itself, has been deemed sufficiently prejudicial such that it could not be utilized in the jury's presence in a trial for possession of a firearm by a VCC. *See State v. Emmund*, 698 So. 2d 1318, 1320 (Fla. 3d DCA 1997) (approving trial court's order prohibiting State from using "violent career criminal" statutory terminology in trial for possession of a firearm by a VCC because of the "potential for jury confusion and unfair prejudice, as well as the risk that the defendant's prior record will become a feature of the case.... The focus of the case should remain on the facts that are actually in dispute: whether the defendant possessed the firearm on the date charged."). The trial court's decision to bifurcate prevented the undue prejudice

envisioned in *Emmund*.

5. At the time Mr. Pryor committed the alleged qualifying offense, section 944.40, Florida Statutes (Supp. 1993), provided as follows: "Any prisoner confined in any prison, jail, road camp, or other penal institution, state, county, or municipal, working upon the public roads or being transported to or from a place of confinement who escapes ... from such confinement shall be guilty of a felony of the second degree .... "

6. Our record reflects that Mr. Pryor, born in 1979, was prosecuted as an adult for escape, under section 39.061. He committed the offense in 1994. At that time, Mr. Pryor was fourteen years old. He was sentenced to three years in prison. *Cf.* ch. 97-238, § 35, Laws of Fla. (creating section 985.227, entitled "Prosecution of juveniles as adults by the direct filing of an information in the criminal division of the circuit court; discretionary criteria; mandatory criteria," effective October 1, 1997).