MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Casey Farrington
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Jamar Gaddis,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 10, 2023

Court of Appeals Case No. 23A-CR-796

Appeal from the Marion Superior Court

The Honorable Mark Stoner, Judge

The Honorable Andrew Borland, Magistrate

Trial Court Cause No. 49D32-2212-F5-34658

Memorandum Decision by Judge Bradford
Judges Vaidik and Brown concur.

Bradford, Judge.

Case Summary

[1] In December of 2022, Jamar Gaddis and A.P. were living together and in a romantic relationship. On December 28, 2022, Gaddis returned home intoxicated and strangled A.P. to unconsciousness when she refused his sexual advances. When A.P. regained consciousness and threatened to call the police, Gaddis strangled her again, causing her to have difficulty breathing. When police arrived, Gaddis resisted their attempts to remove him and had to be carried out on a tarpaulin.

[2] The State charged Gaddis with Level 5 and Level 6 felony domestic battery, Level 6 felony strangulation, and Class A misdemeanor resisting law enforcement, and the trial court found him guilty as charged. At sentencing, the trial court merged Gaddis's Level 6 felony domestic battery conviction into his Level 5 felony domestic battery conviction, imposed an aggregate sentence of four years of incarceration with two years suspended and one of those suspended to probation. The trial court also ordered that Gaddis pay various costs and fees. Gaddis contends that the trial court erred in merging his Level 6 felony domestic battery conviction instead of vacating it, the trial court's order that he pay various fees requires clarification, and his convictions for Level 5 felony domestic battery and Level 6 felony strangulation violate prohibitions against double jeopardy. Because the State concedes Gaddis's first two arguments and we reject his third, we affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[3] Gaddis and A.P. began living together around 2008. At some point, they started "[c]asually dating" each other, which involved "casually having sex and stuff like that" and eventually "became […] a couple[.]" Tr. Vol. II pp. 24–25. On December 28, 2022, A.P. was home sleeping when Gaddis came home intoxicated. A.P. could smell alcohol on Gaddis, and he was belligerent and saying derogatory things about her. When Gaddis attempted to remove A.P.'s underwear, she told him to stop and attempted to resist. Gaddis began choking A.P. and continued until she had lost consciousness. After A.P. regained consciousness and told Gaddis that she was going to the police, he choked her a second time, causing her difficulty in breathing. A.P. managed to fight Gaddis off and call the police.

[4] After police arrested Gaddis, they attempted to remove him from the house, but Gaddis stood still and "just went dead-body weight and laid [sic] down on the ground." Tr. Vol. II p. 41. Officers picked up Gaddis, and every couple of steps, Gaddis "just stopped walking and went completely dead-body weight[.]" Tr. Vol. II p. 41. The police contacted the fire department, who arrived with a tarpaulin. The police and firefighters carried Gaddis outside on the tarpaulin.

[5] The State charged Gaddis with Level 5 felony domestic battery, Level 6 felony strangulation, Level 6 felony domestic battery, and Class A misdemeanor resisting law enforcement. The charging informations for Level 5 felony domestic battery and Level 6 felony strangulation, respectively, read as follows:

COUNT I

> On or about December 28, 2022, JAMAR GADDIS did knowingly or intentionally touch [A.P.], a family or household member, in a rude, insolent or angry manner, resulting in serious bodily injury, that is: loss of consciousness.
> COUNT II
> On or about December 28, 2022, JAMAR GADDIS in a rude, insolent or angry manner, did knowingly apply pressure to the throat or neck of [A.P.] in a manner that impeded normal breathing or blood circulation of [A.P.]

Appellant's App. Vol. II p. 24.

[6] The trial court found Gaddis guilty as charged and entered judgment of conviction on all counts. At sentencing, the trial court merged Gaddis's convictions for Level 5 and Level 6 felony domestic battery "for sentencing purposes." Tr. Vol. II p. 66. The trial court sentenced Gaddis to an aggregate four years of incarceration, with two years suspended and one year suspended to probation. The trial court found that there was a "fifty[-]dollar mandatory domestic violence fee" and that Gaddis was "indigent as to other fines, fees, and costs[.]" Tr. Vol. II p. 77. The trial court ordered Gaddis to pay a "minimum probation fee and a sliding scale community corrections fee." Tr. Vol. II p. 77. In its written sentencing order, the trial court imposed a $100.00 adult-probation administrative fee, a $373.45 adult-probation monthly and initial user fee, a $50.00 domestic-violence-prevention fee, and an $11.55 probation user fee.

Discussion and Decision

I. Issues Conceded by the State

[7] The State concedes that Gaddis's conviction for Level 6 felony domestic battery should have been vacated instead of merged. "A trial court's act of merging, without also vacating the conviction, is not sufficient to cure a double jeopardy violation." *West v. State*, 22 N.E.3d 872, 875 (Ind. Ct. App. 2014), *trans. denied*. We agree with the State that the proper remedy is to remand with instructions to vacate Gaddis's conviction for Level 6 felony domestic battery.

[8] The State also concedes that remand is appropriate to clarify the fees ordered by the trial court. We review a trial court's sentencing order for an abuse of discretion, *McElroy v. State*, 865 N.E.2d 584, 588 (Ind. 2007), including a trial court's decision to impose fees and costs. *Coleman v. State*, 61 N.E.3d 390, 392 (Ind. Ct. App. 2016). If we determine that there is an irregularity in a trial court's sentencing decision, we can remand to the trial court for clarification or a new sentencing determination, affirm the sentence if the error is harmless, or adjust the sentence directly. *McElfresh v. State*, 51 N.E.3d 103, 112 (Ind. 2016). "The approach employed by Indiana appellate courts in reviewing sentences in non-capital cases is to examine both the written and oral sentencing statements to discern the findings of the trial court." *McElroy*, 865 N.E.2d at 589.

[9] First, remand is appropriate for an indigency hearing. Indiana Code section 33-37-2-3(a) allows a trial court to impose certain fees on convicted defendants if "the person is not indigent." The trial court must either hold a hearing to determine whether the defendant is indigent when the fees are imposed or hold an indigency hearing at a later date if the fees are not due immediately. Ind.

Code § 33-37-2-3(a), -3(b). Here, the trial court ordered fees, due immediately, without holding a hearing on Gaddis's ability to pay them. The trial court found that Gaddis had to pay certain fees but also said that he was indigent as to others. We agree with the State that remand is appropriate for a hearing to determine which fees, if any, Gaddis is able to pay, pursuant to Indiana Code section 33-37-2-3(a).

[10] Second, the State acknowledges that, although the trial court said it was imposing a minimum probation fee, it imposed a higher fee. A trial court may impose an initial probation user's fee of between $25.00 and $100.00. Ind. Code § 35-38-2-1(d)(1). A trial court may impose a monthly probation user's fee of between $15.00 and $30.00. Ind. Code § 35-38-2-1(d)(1). At the sentencing hearing, the trial court sentenced Gaddis to one year of probation and to pay minimum probation fees, so the minimum probation user's fee would have been $205.00. The trial court's written sentencing order, however, directed Gaddis to pay $373.45 for probation user's fees. We agree with the State that remand is appropriate for the trial court to clarify the amount of the user's fee if, after a hearing, it finds that Gaddis is not indigent.

[11] Finally, the State concedes that remand is appropriate for the trial court to clarify Gaddis's fees for community corrections. At the sentencing hearing, the trial court said that it was imposing community-corrections fees pursuant to a sliding scale, but its written order did not include any additional detail about that fee. Fees for home detention administered by community corrections must be "set by the court[.]" Ind. Code § 35-38-2.5-6(7). The record only shows that

the trial court applied a sliding scale but included nothing about what the actual amount is. Remand is appropriate for the trial court to clarify Gaddis's community-corrections fee. *See Amick v. State*, 126 N.E.3d 909, 911–12 (Ind. Ct. App. 2019) (remanding to the trial court to clarify its intent regarding fee).[1]

II. Double Jeopardy

[12] Gaddis contends that his convictions for Level 5 felony domestic battery and Level 6 felony strangulation violate Indiana prohibitions against double jeopardy. We review *de novo* whether two offenses violate double-jeopardy protections. *Wadle v. State*, 151 N.E.3d 227, 237 (Ind. 2020). Although Indiana's Double Jeopardy Clause does not help Gaddis because he was not successively prosecuted, Gaddis may still have substantive protection from multiple punishments in a single proceeding from statutory, common law, and other constitutional protections. *Id.* at 246–47. A three-step test applies to determine whether multiple punishments for a single act or transaction violate a defendant's right to be free from double jeopardy. *Id.* at 246-49.

[13] When a single criminal act or transaction violates multiple statutes with common elements, courts "first look to the statutory language" for each charge. *Id.* at 248. If the language of either statute "clearly permits" multiple

[1] We do not address Gaddis's argument that cases allowing trial courts to impose fees against indigent defendants were wrongly decided. (Appellant's Br. 20-23). Because further proceedings are necessary to determine whether Gaddis is indigent, this argument is not ripe for appellate review. *See Owens v. State*, 947 N.E.2d 482, 485 (Ind. Ct. App. 2011) (finding propriety of the order directing the defendant to pay public-defender fees was not ripe for appellate review because, in that case, the trial court was not yet required to hold an indigency hearing), *trans. denied*.

punishments, there is no double-jeopardy violation. *Id.* In this case, neither statute clearly permits multiple punishments, either expressly or by unmistakable implication, so the next step of the analysis applies.

[14] The next step is to determine whether one of the offenses is inherently or factually included in the other. *Id.* at 249. An offense is an inherently lesser-included offense if it "is established by the same material elements or less than all the material elements" required to establish the offense charged; the offense "consists of an attempt to commit the offense charged"; or the offense differs from the offense charged in that there is a less serious risk of harm, or a lesser culpability required to establish its commission. Ind. Code § 35-31.5-2-168.

[15] Gaddis was convicted of Level 5 felony domestic battery resulting in serious bodily injury and Level 6 felony strangulation. The elements of domestic battery resulting in serious bodily injury are: (1) a person; (2) who knowingly or intentionally; (3) touches; (4) a family or household member; (5) in a rude, insolent, or angry manner; (6) and the offense results in serious bodily injury; (7) to a family or household member. Ind. Code § 35-42-2-1.3(a)(1), -1.3(c)(1). The elements of strangulation are: (1) a person; (2) who, in a rude, angry, or insolent manner; (3) knowingly or intentionally; (4) applies pressure to the throat or neck; (5) of another person; (6) in a manner that impedes the normal breathing or circulation; (7) of the other person. Ind. Code § 35-42-2-9(c)(1).

[16] Domestic battery resulting in serious bodily injury and strangulation are not inherently included in one another. Neither offense constitutes an attempt to commit the other, they do not differ from each other only in a degree of harm or culpability required, and each offense requires proof of something the other

does not. At the very least, domestic battery resulting in serious bodily injury can only be committed against a family or household member, while strangulation is limited to conduct directed at the throat or neck such that normal breathing or circulation is impaired. Because each statute requires at least one material element that the other does not, neither of the offenses are inherently included in the other. Ind. Code § 35-31.5-2-168(1), -168(3); *see also Wadle*, 151 N.E.3d at 251 n.30.

[17] The offenses are also not factually included offenses because the charging information alleges different means of committing each offense. An offense is "'factually included' when 'the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense.'" *Wadle*, 151 N.E.3d at 251 n.30 (quoting *Young v. State*, 30 N.E.3d 719, 724 (Ind. 2015)). When answering a question of factual inclusion, only the facts alleged in the charging information about the means by which the offense was committed are taken into account. *See id*. (analyzing facts adduced at trial only after determining whether an offense was inherently or factually included and explaining that factual inclusion relates only to the means by which an offense is alleged to have been committed in the charging information). *Wadle* does not permit courts to look at the evidence presented at trial to determine whether one offense is factually included in another. *See Mills v. State*, 211 N.E.3d 22, 34 (Ind. Ct. App. 2023) (citing *Wadle*, 151 N.E.3d at 248); *see also Wadle*, 151 N.E.3d at 251 n.30. In the charging information in this case, the State did not allege that Gaddis committed domestic battery by strangulation. Accordingly, the two offenses are not factually included, so our

inquiry ends here with our conclusion that there is no double-jeopardy violation in this case.

[18] We affirm in part, reverse in part, and remand for further proceedings consistent with this memorandum decision.

Vaidik, J., and Brown, J., concur.