MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jonah Samuel Henderson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 19, 2023

Court of Appeals Case No. 22A-CR-2298

Appeal from the Johnson Circuit Court

The Honorable Andrew S. Roesener, Judge

Trial Court Cause No. 41C01-1910-F1-19

Memorandum Decision by Judge Kenworthy
Judges Crone and Felix concur.

Kenworthy, Judge.

Case Summary

[1] Jonah S. Henderson appeals his convictions for Level 1 felony attempted murder[1] and Level 5 felony criminal recklessness,[2] raising for our review eight issues which we combine, restate, and reorder as:

> 1. Did the trial court err in admitting into evidence Henderson's statements to police?
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> 2. Did the State present sufficient evidence Henderson committed attempted murder and criminal recklessness?
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> 3. Do Henderson's convictions violate the prohibition against double jeopardy?
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> 4. Was Henderson denied his right to be present when the trial court entered its written judgment of conviction?
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> 5. Does fundamental error exist because Henderson did not waive the conflict of interest between the trial judge and his defense counsel's firm?
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> 6. Did the trial court abuse its discretion when sentencing Henderson?
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> 7. Does Henderson's sentence warrant revision under Appellate Rule 7(B)?

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[1] Ind. Code §§ 35-42-1-1(1) (2018) & 35-41-5-1(a) (2014).

[2] I.C. § 35-42-2-2(b)(2)(A) (2019).

[2] We affirm.

Facts and Procedural History

[3] On October 8, 2019, Henderson had just turned eighteen years old. He and his friend Noah Adamson made plans to smoke marijuana together. Henderson went to buy rolling papers at a Speedway gas station. There, Henderson noticed another customer, Robert Bonecutter, whom Henderson thought he recognized because Bonecutter had "stolen something from him or robbed him when he was . . . roughly 12 years old[.]" *Tr. Vol. 2* at 181. Meanwhile, Bonecutter noted Henderson's "nasty" demeanor. *Id.* at 137. While driving out of the lot, Bonecutter saw Henderson and Adamson exit the gas station and walk toward a gold Toyota Corolla with a temporary "doughnut" tire. *Id.* at 139. Henderson and Adamson followed Bonecutter's truck out of the parking lot.

[4] After exiting the gas station, Bonecutter drove a couple of blocks to Katelin Coy's—Bonecutter's fiancée—house to pick up his son. When Bonecutter arrived, he exited his truck and began to walk toward the front door. While doing so, Bonecutter noticed the same gold Toyota from the gas station across the street in the parking lot of the Greenwood Lawn and Garden store. Bonecutter reached the door to the residence where his son and Coy stood waiting. At this point, both Bonecutter and Coy had a "clear view" of Henderson standing in the store's parking lot pointing a gun at them and positioned in an "[a]ttack stance." *Id.* at 142, 166.

[5] Henderson fired about five rapid shots toward Bonecutter. One bullet pierced the side of the house, leaving a hole two feet and seven inches from the door frame and six feet and one inch from the base of the porch. *Id.* at 215. Another bullet penetrated a cardboard box situated amongst other personal property on the front porch. And a third bullet left holes in a trash can located between Coy's residence and the parking lot Henderson fired from. After hearing the shots, Coy pulled Bonecutter into the residence and Bonecutter called the police.

[6] That evening, police arrested Henderson. At the Johnson County Sheriff's Office, Detectives Travis Wampler and Joseph Schmidt conducted a recorded interview of Henderson. Prior to questioning, Detective Wampler read Henderson his *Miranda* rights[3] and Henderson signed a written waiver. Henderson admitted to shooting at Bonecutter. He explained, "I did the shit, there's nothing I can say" and "I shot at that motherfucker" from "the little lawnmower place." *Media Vol. page 5* at 18:01:58–18:02:01, 18:14:35–38, 18:14:59–18:15:02.[4] Although Henderson did not know Bonecutter's name, he recalled Bonecutter had "robbed [him] when [he] was like 12" having "sold [Henderson] some oregano in a bag and ran off with like $140." *Id.* at 18:11:35–41. Henderson denied trying to kill Bonecutter, stating he "was just

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] Citations to the recording of Henderson's interrogation are to the timestamp shown in the video.

trying to prove a point" and was "intoxicated" at the time of the shooting, having snorted a Percocet beforehand. *Id.* at 18:19:44–46, 18:18:27:13–15.

[7] After about fifteen minutes of questioning, Major Damien Katt interrupted the interview. Major Katt told Henderson Attorney Daniel Vandivier had been retained for him and relayed Attorney Vandivier had called and said he did not want Henderson to keep talking. Major Katt also informed Henderson he could continue talking if he wished. Henderson responded, "I already admitted to everything," "I want to keep talking," and "we already talked." *Id.* at 18:17:23–24, 18:21:40–41, 18:21:57–59. Based on Attorney Vandivier's call and Major Katt's discussion with a prosecutor, Detective Wampler once again advised Henderson of his *Miranda* rights. And just as before, Henderson signed a written waiver. At no point did Henderson request counsel and neither Attorney Vandivier nor a representative from his office came to the Johnson County Sheriff's Office that evening.

[8] After questioning, the police took Henderson to the location he claimed to have disposed of the gun used during the shooting. The search was unsuccessful. Once back in the interview room, Henderson consented to the police searching his phone, provided his phone's passcode, received a *Pirtle* warning,[5] and signed a written waiver prior to the phone search.

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[5] *Pirtle v. State*, 323 N.E.2d 634 (Ind. 1975).

[9] The State charged Henderson with Level 1 felony attempted murder and Level 5 felony criminal recklessness. Henderson sought to have the statements he made to police on October 8, 2019, suppressed. Henderson claimed his statements were involuntary because they were obtained due to coercion, misrepresentations, and promises of leniency. *See Appellant's App. Vol. 2* at 103–04. Following a suppression hearing, the trial court denied Henderson's motion.

[10] Shortly thereafter, Henderson's counsel moved to withdraw because Henderson had hired other counsel. Attorney Carrie Miles appeared on behalf of Henderson and listed Attorneys Andrew Baldwin, Michael Auger, and Hans Rundkvist as co-counsel. During a hearing Henderson attended via "audio/video connection" soon after Attorney Miles appeared, the trial court informed the parties he was related to Attorney Baldwin by marriage; thus, there would be a conflict of interest if Attorney Baldwin was involved in the case. *Tr. Vol. 2* at 84. More specifically, the trial court explained:

> I'm required, [Henderson], to let you know, um, that I'm related to Andy Baldwin by, uh, marriage and what that means for purposes of this court is that in any case where Mr. Baldwin is providing representation that I can't hear the case. There are obviously other attorneys within that office, um, who provide representation and as long as I disclose the relationship that I have with Mr. Baldwin on the record and the parties agree for me to hear the case, I can continue to do so. I don't know whether that conversation has even been had or not or whether Andy is gonna be the one that's principally doing this. If he is, I don't think I can.

Id. Attorney Miles then assured the court she and Attorney Auger "would be primaries" on Henderson's case and noted she already spoke with Henderson's family regarding the conflict and would discuss it further with Henderson. *Id.* Attorney Miles continued to represent Henderson throughout his trial and sentencing.

[11] Henderson waived his right to a jury trial and the trial court found Henderson guilty of both counts. At sentencing, the trial court determined Henderson's extensive juvenile history, his violation of bond, and his poor conduct in jail were aggravating factors. As a mitigating factor, the court noted Henderson's young age. Concluding the aggravators outweighed the mitigator, the trial court sentenced Henderson to consecutive terms of thirty-two years for attempted murder and four years for criminal recklessness, with a total of four years suspended to probation. Henderson now appeals. Additional facts are provided when necessary.

1. The Trial Court Did Not Err in Admitting into Evidence Henderson's Statements to Police

[12] Henderson argues the trial court erred in admitting a videotape of the police interrogation during which Henderson acknowledged his guilt. More specifically, Henderson claims it was error to admit his statements made during the interrogation because: (1) law enforcement officers violated his right to counsel under the Federal and Indiana Constitutions; and (2) his confession was not voluntarily given and therefore was inadmissible because it was made in violation of the Fifth, Sixth, and Fourteenth Amendments to the United

States Constitution and Article 1, Sections 12, 13, and 14 of the Indiana Constitution.

A. Henderson's Right to Counsel was Not Violated

[13] Henderson argues his right to counsel under both the Federal and Indiana Constitutions was violated. Trial courts have discretion regarding the admission of evidence, and although "we assess claims relating to admitting or excluding evidence for abuse of discretion, to the extent those claims implicate constitutional issues, we review them de novo." *Ramirez v. State*, 174 N.E.3d 181, 189 (Ind. 2021).

Sixth Amendment

[14] According to Henderson, his Sixth Amendment right to counsel was violated when police continued to question him after Attorney Vandivier called and informed the police he had been retained by Henderson's family and requested the officers halt the interview.[6] In relevant part, the Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

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[6] Henderson also argues his Sixth Amendment right to counsel was violated because Attorney Vandivier "had also represented Henderson in his other cases" and the police "knew or should have known of [Henderson's] previous legal history, including his legal counsel." *Appellant's Br.* at 23. The Sixth Amendment right to counsel, however, is "offense specific" and "cannot be invoked once for all future prosecutions[.]" *Texas v. Cobb*, 532 U.S. 162, 167 (2001) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)). Thus, Henderson's statements were admissible notwithstanding attachment of his Sixth Amendment right to counsel in his other prior or pending cases.

Crucial here, a defendant's Sixth Amendment right "does not attach until a prosecution is commenced, that is, 'at or after the initiation of adversary judicial proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *McNeil*, 501 U.S. at 175 (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)); *see also Jewell v. State*, 957 N.E.2d 625, 629 (Ind. 2011) (explaining the protections of the Sixth Amendment do not attach until formal commencement of adversarial proceedings).

[15] Here, Detectives Wampler and Schmidt questioned Henderson during the evening of October 8, 2019. Two days later the State filed its charging information and probable cause affidavit. Because the State had not initiated adversary judicial proceedings against Henderson at the time of his interrogation, his right to counsel under the Sixth Amendment had not yet attached, and admitting his statements made during the interrogation into evidence did not violate his Sixth Amendment right to counsel.

Article 1, Section 13

[16] Additionally, Henderson argues his right to counsel under Article 1, Section 13 of Indiana's Constitution was violated. The pertinent portion of Section 13 reads: "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel." Ind. Const. art. 1, § 13. Our Supreme Court has concluded "section 13 affords Indiana's citizens greater protection than its federal counterpart" and "[d]epending on the circumstances, the section 13

right to counsel, unlike the Sixth Amendment, attaches prior to the filing of formal charges against the accused." *Malinski v. State*, 794 N.E.2d 1071, 1078–79 (Ind. 2003). To enjoy the protections of this right, however, a suspect must make a "clear and unequivocal" request for counsel to be present during a custodial interrogation. *Taylor v. State*, 689 N.E.2d 699, 704 (Ind. 1997). Indiana's Constitution "does not require a lawyer to be present during custodial interrogation irrespective of the suspect's wishes." *Id.*

[17] In this case, Henderson never made a request for counsel. In fact, Detective Wampler informed Henderson of his right to counsel twice. Each time, Henderson indicated he understood his rights, signed the written waiver forms, and expressed his desire to keep talking. Because Henderson failed to make an unequivocal request for counsel, the interrogation did not violate his right to counsel under Section 13.

[18] Henderson also contends his Section 13 right to counsel was abridged because the interviewing detectives continued to question him even though he "had a continuous attorney-client relationship with [Attorney] Vandivier . . . because Vandivier represented Henderson" in other unconcluded matters. *Appellant's Br.* at 25. But our Supreme Court has indicated as a general rule, the state constitutional right to counsel is also "offense specific." *Jewell*, 957 N.E.2d at 635; *see also Hall v. State*, 870 N.E.2d 449, 461 (Ind. Ct. App. 2007) (recognizing the Section 13 right is more expansive than its federal counterpart but treating Indiana's right to counsel as "offense specific," just like the federal right), *trans. denied*.

[19] Notably, Henderson has not cited any authority supporting his contention the detectives violated his state constitutional right to counsel by interrogating him even though Attorney Vandivier previously represented Henderson in other matters.[7] Therefore, Henderson has waived further consideration of this claim. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring appellant's contentions be supported by cogent reasoning and citations to the authorities relied upon and evidence in the record); *see also Conley v. State*, 183 N.E.3d 276, 283 (Ind. 2022) (noting an appellate court's role is an impartial adjudicator, not an advocate; therefore, a court should not make up its own arguments when a party has not adequately presented them).

B. Henderson Gave His Statements Voluntarily

[20] Henderson next asserts the trial court erred by admitting into evidence his videotaped confession because it was involuntarily given.[8] We review a trial court's determination of voluntariness the same way as other sufficiency matters. *Wilkes v. State*, 917 N.E.2d 675, 680 (Ind. 2009), *cert. denied*. We will

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[7] Henderson cites *Malinski v. State*, 794 N.E.2d 1071 (Ind. 2003) to support his Section 13 claim. He fails, however, to support his claim with cogent reasoning; thereby waiving its review on appeal. Waiver notwithstanding, *Malinski* is distinguishable from the facts of Henderson's case. In *Malinski*, the Court held law enforcement officials have a duty to inform a custodial suspect immediately when an attorney hired by the suspect's family to represent him is present at the station seeking access to him. *Id.* at 1079. Henderson's situation was notably different. The attorney retained for Henderson called the Johnson County Sheriff's Office but was never present at the station seeking access to Henderson. And unlike in *Malinski*, law enforcement officials did inform Henderson that counsel had been retained for him. Therefore, the duty to inform recognized in *Malinski* was not violated here.

[8] While contending his right to counsel under the Sixth Amendment and Article 1, Section 13 was violated, Henderson repeatedly argues he gave his statements involuntarily. For clarity's sake, this opinion addresses the voluntariness of Henderson's statements in a single section.

not reweigh the evidence or judge witness credibility, and we affirm the trial court's finding if it is supported by sufficient evidence. *Id.*

[21] Indiana imposes a higher burden on the State to prove a confession was made voluntarily compared to the burden required under the Federal Constitution. *Compare id.* ("Indiana law imposes on the State the burden of proving beyond a reasonable doubt that a confession is voluntary."), *with Lego v. Twomey*, 404 U.S. 477, 489 (1972) ("[T]he prosecution must prove at least by a preponderance of the evidence that the confession was voluntary."). When determining whether a statement was given voluntarily, the trial court must consider the "totality of the circumstances," including "any element of police coercion; the length, location, and continuity of the interrogation; and the maturity, education, physical condition, and mental health of the defendant." *Wilkes*, 917 N.E.2d at 680; *see also Luckhart v. State*, 736 N.E.2d 227, 229 (Ind. 2000) (conveying the "totality of the circumstances" test focuses on the "entire interrogation, not on any single act by police or condition of the suspect."). To conclude a statement was voluntarily given, the court must find that "inducement, threats, violence, or other improper influences did not overcome the defendant's free will." *Wilkes*, 917 N.E.2d at 680.

[22] "[V]ague and indefinite statements by the police that it would be in a defendant's best interest if he cooperated do not render a subsequent confession inadmissible." *Clark v. State*, 808 N.E.2d 1183, 1191 (Ind. 2004). And "police deception does not automatically render a confession inadmissible. Rather, it is only one factor to consider in the totality of the circumstances." *Id.* Further, a

confession can still be given knowingly and voluntarily, notwithstanding the defendant's voluntary intoxication. *Luckhart*, 736 N.E.2d at 231. A defendant's confession is deemed incompetent only when he is so intoxicated he is not conscious of what he is doing or is in a manic state. *Id.* "Intoxication to a lesser degree only goes to the weight to be given to the confession, not its admissibility." *Id.*

[23] Sufficient evidence supports the trial court's determination Henderson gave his statements voluntarily. During the brief, ninety-minute interview, the interrogating detectives permitted Henderson to smoke, even providing him with cigarettes. The detectives offered Henderson food and beverage, which he declined. Additionally, Detective Wampler advised Henderson of his *Miranda* rights twice—at the outset of the interview and again around forty minutes later. Henderson signed a waiver form both times. *See Heavrin v. State*, 675 N.E.2d 1075, 1081 (Ind. 1996) (noting the signing of a waiver of rights form provides some indication the defendant's statement was made voluntarily). And after being advised counsel had been retained for him, Henderson explained, "I want to keep talking." *Media Vol. page 5* at 18:21:40–41. Detective Wampler later conveyed Henderson "spoke clearly, concisely" and did not appear to be under the influence of any drug. *Tr. Vol. 2* at 31. At no point did Henderson indicate he wanted to stop the interrogation, and he never asked for an attorney. Importantly, Detectives Wampler and Schmidt did not use violence or threats, make promises of leniency, or implement deceptive techniques to extract Henderson's confession. In sum, Henderson actively

participated in his interview and improper influences did not overcome his free will.

[24] Henderson directs our attention to other conflicting evidence—*e.g.*, his young age, lack of formal education, slight intoxication during the interview, and alleged deceptive statements made by police. But this is merely an invitation to reweigh evidence; a task we will not undertake. Accordingly, substantial evidence establishes, under the totality of the circumstances, Henderson voluntarily confessed to the police. Despite a more favorable standard to the defendant, we affirm the trial court's finding that the State proved the voluntariness of Henderson's statements beyond a reasonable doubt.[9]

2. Sufficient Evidence Supports Henderson's Convictions

[25] Next, Henderson contends the State failed to present sufficient evidence to sustain his convictions of attempted murder and criminal recklessness. A sufficiency-of-the-evidence claim warrants a "deferential standard of appellate review, in which we 'neither reweigh the evidence nor judge witness credibility[.]'" *Owen v. State*, 210 N.E.3d 256, 264 (Ind. 2023) (quoting *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). Rather, "we consider only probative evidence and reasonable inferences that support the judgment of the

[9] Having determined Henderson gave his statements voluntarily and admitting the statements did not violate Henderson's constitutional rights, his argument that his consent to search his phone should also be suppressed as "fruit of the poisonous tree" also fails. *Appellant's Br.* at 23 n.1.

trier of fact." *Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021). "We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* It is "not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)).

A. Sufficient Evidence Henderson Committed Attempted Murder

[26] Murder is generally defined by statute as knowingly or intentionally killing another human being. *See* I.C. § 35-42-1-1(a). And under Indiana's general attempt statute, "[a] person attempts to commit a crime when, acting with the culpability required for the commission of the crime, the person engages in conduct that constitutes a substantial step toward the commission of the crime." I.C. § 35-41-5-1(a). Attempted murder is subject to a special rule: "[a] conviction for attempted murder requires proof of a specific intent to kill." *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008); *see Rosales v. State*, 23 N.E.3d 8, 12 (Ind. 2015) (explaining attempted murder is "singled out . . . for special treatment" because of "the stringent penalties for attempted murder and the ambiguity often involved in its proof") (quoting *Hopkins v. State*, 759 N.E.2d 633, 637 (Ind. 2001)). Specific intent to kill may be inferred from the nature of the attack and the circumstances surrounding the crime or "from the use of a deadly weapon in a manner likely to cause death or great bodily harm." *Kiefer v. State*, 761 N.E.2d 802, 805 (Ind. 2002). Therefore, to convict Henderson of attempted murder, the State was required to prove beyond a reasonable doubt

Henderson, acting with the specific intent to kill, engaged in conduct that constituted a substantial step toward the commission of the crime of murder. On appeal, Henderson argues the State presented insufficient evidence he acted with the specific intent to kill when firing at Bonecutter.

[27] The evidence shows Henderson recognized Bonecutter as the man who "robbed" him six years prior. Henderson followed Bonecutter to Coy's house where he positioned himself in an "attack stance" and pointed his gun directly at Bonecutter. *Tr. Vol. 2* at 142. Henderson then fired about five shots toward Bonecutter. One bullet hit near the house's doorway—less than three feet from where Bonecutter and Coy were standing. Another bullet struck a box on the home's porch. And another bullet punctured a trash can in between Henderson and the house. This is sufficient evidence from which a reasonable trier of fact could infer Henderson acted with the specific intent to kill Bonecutter.

[28] At its core, Henderson's argument is a request to reweigh evidence and judge witness credibility. Our standard of review precludes us from doing so. Accordingly, sufficient evidence exists from which a reasonable finder-of-fact could find beyond a reasonable doubt Henderson committed attempted murder.

B. Sufficient Evidence Henderson Committed Criminal Recklessness

[29] In its charging information, the State alleged Henderson created a substantial risk of bodily harm to Coy by shooting a firearm into a house. *Appellant's App. Vol. 2* at 22. Henderson claims the State presented insufficient evidence to sustain his criminal recklessness conviction because "the State failed to show

that Henderson knew Coy was in or at the house or likely to be there." *Appellant's Br.* at 22. Under Indiana Code Section 35-42-2-2(a), a person who "recklessly, knowingly, or intentionally performs an act that creates a substantial risk of bodily injury to another person" commits criminal recklessness. An offense under this section is elevated to a Level 5 felony if it is "committed by shooting a firearm into an inhabited dwelling or other building or place where people are likely to gather." I.C. § 35-42-2-2(b)(2)(A). For criminal recklessness purposes, a house may be "inhabited" if someone is likely to be inside. *Tipton v. State*, 981 N.E.2d 103, 110 (Ind. Ct. App. 2012), *trans. denied*.

[30] At trial, Coy testified she was standing in the doorway at the time of the shooting and had a "clear view" of Henderson. *Tr. Vol. 2* at 166. From this position, Coy could identify what Henderson was wearing and recognized he was pointing something at her. Based on this evidence, a reasonable fact-finder could infer Henderson was able to see Coy prior to firing his gun. Furthermore, various personal items, like cardboard boxes, plants, and children's toys were scattered on the porch and adjacent lawn. Such items support an inference the house was inhabited. Again, Henderson essentially requests we reweigh the evidence; a task we will not do. Sufficient evidence exists to sustain Henderson's criminal recklessness conviction.

3. Henderson's Convictions Do Not Violate Double Jeopardy

[31] Henderson claims his convictions for attempted murder and criminal recklessness violate the prohibition on double jeopardy.[10] Whether Henderson has been subjected to double jeopardy is a question of law, which we review *de novo*. *Wadle v. State*, 151 N.E.3d 227, 237 (Ind. 2020).

A. Wadle Eliminated Indiana's Common-Law Double Jeopardy Jurisprudence

[32] Henderson argues his convictions violate common-law double jeopardy and the continuous crime doctrine. In August 2020, our Supreme Court handed down *Wadle v. State*, announcing a new analytical framework for substantive double jeopardy analysis. The Court recognized that following the decision in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), our Supreme Court had "increasingly turned to the rules of statutory construction and common law" to resolve claims that did not fit neatly into *Richardson's* framework. *Wadle*, 151 N.E.3d at 243. To address what had become a "patchwork of conflicting precedent" and a "jurisprudence of 'double jeopardy double talk,'" the Court expressly overruled *Richardson's* constitutional tests. *Id.* at 244 (citations omitted). In doing so, however, the Court did not "directly state that it was overruling the body of common law jurisprudence that had developed to address various problems posed by *Richardson's* application." *Rice v. State*, 199 N.E.3d 815, 819–20 (Ind. Ct. App. 2022), *trans. denied*; *see also Wadle*, 151

[10] Although Henderson does not specify upon which prohibition on double jeopardy he relies, his arguments based solely on Indiana caselaw lead us to believe he challenges his convictions only under Article 1, Section 14 of Indiana's Constitution. Ind. Const. art. 1, § 14 ("No person shall be put in jeopardy twice for the same offense.").

N.E.3d at 235, 244. In fact, the *Wadle* court referenced "statutory, common law, and constitutional" sources as providing additional protection against successive prosecutions for the same offense. *Wadle*, 151 N.E.3d at 246.

[33] The first two published opinions of this Court applying *Wadle* analyzed claims using common-law double jeopardy principles. *See Rowland v. State*, 155 N.E.3d 637, 640–41 (Ind. Ct. App. 2020) (rejecting defendant's claim his convictions for marijuana possession and paraphernalia possession violated the common law "very same act test."); *see also Shepherd v. State*, 155 N.E.3d 1227, 1240–41 (Ind. Ct. App. 2020) (acknowledging the State's concession the defendant's convictions for Level 6 felony criminal recklessness and Class A misdemeanor reckless driving convictions violated the common law double jeopardy principle that both convictions were based on the same act), *trans. denied*. Indeed, the *Rowland* court observed "the *Wadle* Court appears to have left undisturbed the long adhered to series of rules of statutory construction and common law that are often described as double jeopardy but are not governed by the constitutional test set forth in *Richardson*." 155 N.E.3d at 640 (citation omitted); *see also Shepherd*, 155 N.E.3d at 1240 ("[I]t is our understanding that *Wadle* left Indiana's common law double jeopardy jurisprudence intact.").

[34] Since *Rowland* and *Shepherd*, however, this Court has consistently held Indiana's common law double jeopardy jurisprudence did not survive *Wadle*. *See, e.g., Hill v. State*, 157 N.E.3d 1225, 1229 (Ind. Ct. App. 2020) ("Reading *Wadle* in its entirety . . . it becomes clear that the Court's intent was to do away with all existing rules and tests for substantive double jeopardy . . . and start

from scratch with new tests."); *see also Rice*, 199 N.E.3d at 820 (surveying cases holding Indiana's common law double jeopardy jurisprudence ceased to exist following *Wadle*). Based on the caselaw of this Court after *Wadle*, we conclude our Supreme Court intended *Wadle* to supplant both *Richardson* and the common law double jeopardy jurisprudence that developed following *Richardson*. *See Rice*, 199 N.E.3d at 820. Therefore, we reject the portion of Henderson's argument rooted in common law double jeopardy principles and we will address only his claim based on the framework set forth in *Wadle*.

B. The Continuous Crime Doctrine is Now Part of the Wadle Analysis

[35] Henderson also claims his convictions violate double jeopardy based on the common-law rule of the continuous-crime doctrine. As previously explained, *Wadle* did away with both the constitutional and common-law protections recognized in *Richardson*. The continuous-crime doctrine, however, is "the only common-law rule that survived *Wadle*." *Hill*, 157 N.E.3d at 1229. Nevertheless, this doctrine now exists "only as part of the new tests, not as a separately enforceable double-jeopardy standard." *Id.* Therefore, like Henderson's other common-law double-jeopardy claim, we will not address his argument based on the continuous-crime doctrine. Instead, *Wadle's* framework guides our analysis.

C. Under Wadle, Henderson's Convictions Do Not Violate Double Jeopardy

[36] In part, Article 1, Section 14 of the Indiana Constitution declares "[n]o person shall be put in jeopardy twice for the same offense." We apply the *Wadle*

framework when a defendant's single act or transaction implicates multiple criminal statutes. *Wadle*, 151 N.E.3d at 235. The dispositive question is one of statutory intent and we first look to the statutory language itself. *Id.* at 247–48. If either of two or more statutes implicated by a conviction for a single act or transaction "clearly permits multiple punishment, either expressly or by unmistakable implication, [our] inquiry comes to an end and there is no violation of substantive double jeopardy." *Id.* at 248 (footnote omitted).

[37] When the statutory language is not clear, however, we turn to our included-offense statutes to determine statutory intent. *Id.* Indiana Code Section 35-38-1-6 prohibits a trial court from entering a judgment of conviction and sentence for both an offense and an "included offense." An included offense is an offense:

> (1) that "is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged,"
>
> (2) that "consists of an attempt to commit the offense charged or an offense otherwise included therein," or
>
> (3) that "differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission."

I.C. § 35-31.5-2-168. When neither offense is an included offense of the other (either inherently or as charged), there is no double jeopardy violation. *Wadle*, 151 N.E.3d at 248.

[38] But, if one offense is included in the other (either inherently or as charged), the court must "examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial" "to determine whether the offenses are the same." *Id.* at 248–49. When making this determination, the examining court must ask "whether the defendant's actions were 'so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.'" *Id.* at 249 (quoting *Walker v. State*, 932 N.E.2d 733, 735 (Ind. Ct. App. 2010)). If the facts show two separate and distinct crimes, there is no violation of substantive double jeopardy, "even if one offense is, by definition, 'included' in the other." *Id.* "But if the facts show only a single continuous crime, and one statutory offense is included in the other, then the prosecutor may charge these offenses only as alternative (rather than as cumulative) sanctions." *Id.*

[39] Applying this framework to Henderson's claim, we conclude he has not been subjected to double jeopardy. First, we note the statutes governing attempted murder and criminal recklessness do not permit multiple punishments, either expressly or by unmistakable implication. *See* I.C. § 35-42-1-1 (murder); I.C. § 35-41-5-1 (attempt); I.C. § 35-42-2-2 (criminal recklessness). Therefore, we move to analyzing whether criminal recklessness is a lesser included offense of

attempted murder, either inherently or as charged. *See Wadle*, 151 N.E.3d at 254; *see also* I.C. § 35-31.5-2-168.

[40] An offense is "inherently included" if it "may be established by proof of the same material elements or less than all the material elements defining the crime charged" or if "the only feature distinguishing the two offenses is that a lesser culpability is required to establish the commission of the lesser offense." *Wadle*, 151 N.E.3d at 251 n.30 (quotations omitted). And an offense is "factually included" in another 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." *Id.*

[41] Criminal recklessness is neither established by proof of the same or less than all the material elements required to establish attempted murder, nor does it differ from attempted murder only in that a less serious harm is required to establish its commission. Therefore, criminal recklessness is not an inherently included lesser offense of attempted murder. *See Ellis v. State*, 736 N.E.2d 731, 734 (Ind. 2000) ("We have consistently held that criminal recklessness is not an inherently included offense of attempted murder.").

[42] Whether criminal recklessness is a factually included offense of attempted murder may be discerned from the charging information. *Id.* Count 1 of Henderson's charging information alleged:

> on or about October 8, 2019 in Johnson County, State of Indiana, Jonah Samuel Henderson did attempt to commit the crime of Murder, which is to knowingly kill another human

> being, *namely: Robert George Bonecutter*, by knowingly or intentionally firing a gun at him, with the intent to kill, which conduct constituted a substantial step toward the commission of said crime of Murder.

Appellant's App. Vol. 2 at 21 (emphasis added). And Count 2 read:

> on or about October 8, 2019 in Johnson County, State of Indiana, Jonah Samuel Henderson did recklessly, knowingly, or intentionally perform an act that created a substantial risk of bodily injury to another person, to wit: *Katelin Coy*, by shooting a firearm into an inhabited dwelling or other building or place where people are likely to gather, to wit: a house.

Id. at 22 (emphasis added). Thus, Henderson's two crimes were alleged to have been committed on different victims and we cannot say his criminal recklessness offense was an included offense of attempted murder as charged. Under *Wadle*, there was no double jeopardy violation, and our inquiry ends here.[11]

[11] Even if we were to continue the *Wadle* analysis and further examine the specific facts of Henderson's case to determine whether his actions were so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction, we still would not find a double jeopardy violation. "If the facts show two separate and distinct crimes, there's no violation of substantive double jeopardy, even if one offense is, by definition, 'included' in the other." *Wadle*, 151 N.E.3d at 249. Although Henderson's actions were so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction, the attempted murder and criminal recklessness counts related to separate victims and thus were two distinct chargeable crimes. *See Woodcock v. State*, 163 N.E.3d 863, 876 (Ind. Ct. App. 2021) (holding that although the defendant's act of firing his gun once and striking two separate victims with a single bullet constituted a single transaction, the murder of one victim and the battery of another victim were two distinct chargeable crimes because there were two separate victims), *trans. denied*.

4. Henderson's Right to be Present When the Trial Court Entered Its Written Judgment of Conviction was not Violated

[43] Henderson claims he was "deprived of the opportunity to present argument, object, or make comment regarding the issue of double jeopardy," because he was not "present when the trial court found him guilty or entered its judgment of conviction(s)." *Appellant's Br.* at 46. In essence, Henderson argues he was denied his right to be present at trial because the trial court did not hold an additional hearing when it entered its written order finding him guilty as charged.

[44] Under the Federal Constitution, the accused has the right to be present at "any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). And due process provides a defendant the right to be present "whenever his presence has a relation, reasonably substantial, to the ful[l]ness of his opportunity to defend against the charge." *Majors v. State*, 773 N.E.2d 231, 234 (Ind. 2002) (quoting *United States v. Gagnon*, 470 U.S. 522, 526 (1985)). The right to be present guaranteed by Indiana's Constitution "only applies to situations where the jury's presence is required." *Stephenson v. State*, 742 N.E.2d 463, 491 (Ind. 2001), *cert. denied*.

[45] Henderson's right to be present was not violated. We cannot say this stage of this proceeding was critical to the outcome of Henderson's case or that Henderson was denied his opportunity to defend against his charges. Likewise, if this were a jury trial, the jury's presence would not have been required during

the entering of the trial court's written judgment of conviction. Therefore, we do not believe the trial court erred by entering its written order without Henderson present.[12]

5. No Fundamental Error Based on the Trial Court's Conflict of Interest

[46] Next, Henderson argues fundamental error because he did not waive the conflict of interest between the trial judge and his defense counsel's firm. Fundamental error is an "extremely narrow exception to the waiver rule" and is designed to provide appellate courts with a means to correct the "most egregious and blatant trial errors that otherwise would have been procedurally barred." *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014). To prevail on a claim of fundamental error, the defendant bears the "heavy burden" of showing the alleged errors are "so prejudicial to the defendant's rights as to 'make a fair trial impossible.'" *Id.* (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)). Stated differently, fundamental error occurs when "the trial judge erred in not *sua sponte* raising the issue because alleged errors (a) 'constitute clearly blatant violations of basic and elementary principles of due process' and (b) 'present an

[12] Furthermore, it is unclear how Henderson's substantial rights were prejudiced by being absent when the trial court entered its written order. *See* Ind. Appellate Rule 66(A) (prohibiting reversal unless the error affects the substantial rights of the parties). And, Henderson had ample opportunity to "present argument, object, or make comment regarding the issue of double jeopardy" during his bench trial, at sentencing, or with a Motion to Correct Error pursuant to Trial Rule 59. *Appellant's Br.* at 46. But Henderson did not do so.

undeniable and substantial potential for harm.'" *Id.* (quoting *Benson*, 762 N.E.2d at 756).

[47] During a pre-trial hearing on November 1, 2021—which Henderson attended via audio/video connection—the trial judge disclosed the conflict of interest between him and Henderson's co-counsel, Andrew Baldwin. *Tr. Vol. 2* at 84. After disclosing the conflict, the court notified Henderson he would have to agree the trial judge could still hear the case. Defense counsel Miles assured the court she would further discuss the matter with Henderson. The record does not indicate further action was taken; instead recording the conflict as waived. *See Appellant's App. Vol. 2* at 140 ("The court notifies the parties of potential conflict of interest. The parties acknowledge the potential conflict of interest and waive the same."). Furthermore, Henderson waived his right to a jury trial after the trial judge had brought the conflict to Henderson's attention. *See id.* at 154. And during his sentencing hearing, Henderson reflected on his choice to stay in the same court: "Maybe I should have done a jury trial. Maybe we should have changed courtrooms like the judge offered when I first hired Carrie Miles, but should *these decisions* really affect the outcome of the rest of my life?" *Tr. Vol. 3* at 30 (emphasis added). Henderson waived the conflict of interest.

[48] Waiver notwithstanding, we fail to see how Henderson was prejudiced based on this alleged error.[13] Although Attorney Baldwin entered an appearance on Henderson's behalf, he did not participate in the bench trial or sentencing hearing. Henderson has not shown a clear and blatant violation of a basic principle of due process. Therefore, there was no fundamental error.

6. The Trial Court Did Not Abuse Its Discretion When Sentencing Henderson

[49] The trial court ordered Henderson to serve a thirty-two-year sentence for attempted murder and a four-year sentence for criminal recklessness. *See* I.C. § 35-50-2-4(b) (providing for a sentence of twenty to forty years for a Level 1 felony, with a thirty-year advisory sentence); *see also* I.C. § 35-50-2-6(b) (providing for a sentence of one to six years for a Level 5 felony, with a three-year advisory sentence). The trial court suspended a total of four years to probation. Henderson contends the trial court erred by considering allegations of misconduct while Henderson was incarcerated and by imposing consecutive sentences. We disagree.

A. It was not Error to Consider Uncharged Acts of Alleged Misconduct

[13] In part, Henderson bases his argument on a perceived violation of Rule 2.11 of the Indiana Code of Judicial Conduct. A judge's obligations under that Code, however, "do not create freestanding rights of enforcement in private parties." *Mathews v. State*, 64 N.E.3d 1250, 1255 (Ind. Ct. App. 2016), *trans. denied*. Rather, a judge's obligations are first enforced by the individual judge against himself and later by disciplinary actions of our Supreme Court if necessary. *Id.*

[50] Sentencing decisions lie within the sound discretion of the trial court and we review such decisions only for an abuse of discretion. *Owen*, 210 N.E.3d at 269. A trial court abuses its discretion when its decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.* (quoting *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007)). A court does not abuse its discretion if the record "supports its reasons for imposing a sentence and those reasons are proper as a matter of law." *Id.*

[51] According to Henderson, the trial court abused its discretion during sentencing by considering "uncharged acts of alleged misconduct." *Appellant's Br.* at 47. Indiana Code Section 35-38-1-7.1 provides circumstances a court may take into consideration when determining what sentence to impose for a crime. The circumstances included in the statute, however, are not meant to "limit the matters that the court may consider in determining the sentence." I.C. § 35-38-1-7.1(c); *see also Tunstill v. State*, 568 N.E.2d 539, 545 (Ind. 1991) (explaining a prior version of the statute also gave a sentencing court "the flexibility to consider any factor which reflects on the defendant's character, good or bad").

[52] "Allegations of prior criminal activity need not be reduced to conviction in order to be considered a proper aggravating factor." *Beason v. State*, 690 N.E.2d 277, 281 (Ind. 1998); *see also Chastain v. State*, 165 N.E.3d 589, 599 (Ind. Ct. App. 2021) (stating "allegations of prior criminal activity may be considered during sentencing even if the defendant has not been convicted of an offense related to the activity"), *trans. denied*. Pending charges and records of arrests do

not establish the historical fact the defendant committed the crime alleged, but they do reveal the defendant "has not been deterred even after having been subject to the police authority of the State." *Tunstill*, 568 N.E.2d at 545.

[53] During sentencing, the trial court considered Henderson's misconduct while incarcerated—sexual harassment of jail staff, destruction of property, and insubordination. This evidence is reflective of Henderson's character and is indicative of the risk he will commit other crimes in the future. *See id.* (stating arrests and pending charges are relevant and may be considered by a sentencing court as reflective of the defendant's character and indicative of the risk he will commit future crimes). Therefore, the trial court did not err by considering it when determining Henderson's sentence.[14]

B. The Trial Court Did Not Abuse Its Discretion by Imposing Consecutive Sentences

[54] Henderson argues the trial court abused its discretion by imposing consecutive sentences for his offenses.[15] As previously noted, we review sentencing decisions only for an abuse of discretion. *Owen*, 210 N.E.3d at 269.

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[14] Even if this was error, it was at most harmless error because the other aggravators considered by the trial court were supported by the record and sufficient for the slightly-above-advisory sentence given to Henderson. *See Gober v. State*, 163 N.E.3d 347, 356 (Ind. Ct. App. 2021) (explaining a "single aggravating factor is sufficient to impose consecutive sentences."), *trans. denied*.

[15] Although it is not entirely clear, Henderson also appears to argue his consecutive sentences violate the statutory limit for crimes part of a single "episode of criminal conduct." I.C. § 35-50-1-2(d). This argument is misplaced. Under Indiana Code Section 35-50-1-2(d)(6), the total of the consecutive terms of imprisonment to which a defendant is sentenced cannot exceed forty-two years when the most serious crime for which the defendant is sentenced is a Level 1 felony. Henderson's consecutive sentences total thirty-six years. Thus, Henderson's sentences do not run afoul of the statutory prohibition. But the term limits under

[55] Subject to a few limitations, the decision to impose consecutive sentences lies within the trial court's discretion. *Gober*, 163 N.E.3d at 356. A trial court must state its reasons for imposing consecutive sentences, and a "single aggravating circumstance may be sufficient to support the imposition of consecutive sentences." *Id.* To repeat, the trial court properly identified three aggravating factors: Henderson's several juvenile arrests for possession of marijuana, resisting law enforcement, theft, and operating a vehicle while intoxicated; Henderson's violation of bond; and Henderson's misconduct while incarcerated. Because a single aggravating factor is sufficient to impose consecutive sentences, the trial court was within its discretion to order Henderson's sentences be served consecutively.

7. Henderson's Sentences Do Not Warrant 7(B) Revision

[56] Henderson asks us to review and revise his sentences. Under Indiana Appellate Rule 7(B), we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We show the trial court "considerable deference" when reviewing a sentence under Appellate Rule 7(B). *Oberhansley v. State*, 208 N.E.3d 1261, 1267 (Ind. 2023) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008)).

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subsection (d) do not apply to "crimes of violence." *See* I.C. § 35-50-1-2(c). And attempted murder is a "crime of violence." *See* I.C. § 35-50-1-2(a)(2). Thus, Henderson's sentences are not subject to the subsection (d) limits and his argument fails two-fold.

"Whether we find a sentence inappropriate 'turns on myriad factors that come to light in a given case' and ultimately 'boils down to our collective sense of what is appropriate.'" *State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020) (quoting *Taylor v. State*, 86 N.E.3d 157, 165 (Ind. 2017)). When conducting our review under Appellate Rule 7(B), we are not limited to the trial court's findings of aggravators and mitigators, and our principal role is to "leaven outliers rather than achieving a perceived correct sentence." *Id.* (quoting *Gibson v. State*, 51 N.E.3d 204, 215 (Ind. 2016)).

[57] We conclude Henderson's aggregate sentence of thirty-six years is not inappropriate given the nature of the offense and Henderson's character. The nature of Henderson's offense weighs against sentence revision. The record shows Henderson shot at Bonecutter based on a perceived slight from six years prior. Henderson followed Bonecutter to Coy's house and fired about five shots at Bonecutter, hitting near Bonecutter, Coy, and their young son. Given the senselessness of Henderson's crime and the significant potential harm, the nature of the offense weighs against revision.

[58] Henderson's character also tends to weigh against 7(B) revision. Henderson turned eighteen years old about two weeks prior to his offense. Henderson had not yet graduated high school and suffered from significant drug addiction and mental health challenges. Although these considerations would tend to reflect favorably on Henderson under the character of the offender analysis, the trial court determined the aggravating factors outweighed this mitigating factor. Amongst these aggravating factors were Henderson's extensive juvenile history,

his arrest just two months after being placed on bond in this case, and his numerous acts of misconduct while incarcerated. Not to mention, Henderson has shown little remorse for shooting at Bonecutter. During sentencing, Henderson conveyed "[t]hroughout this whole thing the only people that have really got hurt are myself and my family," and later referred to shooting at Bonecutter as "some petty ass shit." *Tr. Vol. 3* at 30; *Media Vol. page* 7. Given this, we see nothing about Henderson's character that would warrant 7(B) revision. Accordingly, Henderson's slightly-above-advisory sentence is not an outlier appropriate for 7(B) revision.

Conclusion

[59] In sum, the State presented sufficient evidence to sustain both of Henderson's convictions and Henderson was not subjected to double jeopardy. We discern no reversible error as to Henderson's other issues and do not believe Henderson's sentence warrants revision. Accordingly, we affirm.

[60] Affirmed.

Crone, J., and Felix, J., concur.