

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT

Marielena Duerring
South Bend, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Myriam Serrano
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Larhonda Renee Marshall,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 22, 2022

Court of Appeals Case No.
21A-CR-1725

Appeal from the St. Joseph
Superior Court

The Honorable Stephanie E.
Steele, Judge

Trial Court Cause No.
71D01-2010-F3-56

Altice, Judge.

Case Summary

- [1] Following a jury trial, Larhonda R. Marshall was convicted of Level 3 felony aggravated battery and Level 5 felony battery causing serious bodily injury, and the trial court sentenced her on both convictions. Marshall claims that there was insufficient evidence to convict her. Finding sufficient evidence exists, we affirm Marshall's conviction for aggravated battery. However, we *sua sponte* reverse Marshall's conviction for battery resulting in serious bodily injury on double jeopardy grounds.
- [2] We affirm in part, reverse in part, and remand.

Facts & Procedural History

- [3] The night of September 7 and into the morning hours of September 8, 2020, Jae'dn Evins was with Lesean Green at the residence where Green lived. Evins, age twenty, and Green, who was about ten years older, were romantically involved. Around 10:00 p.m., Green told Evins that he was not feeling well and that he was going next door, to his grandmother's house, to get some medicine. Green left and, when he did not return in ten or fifteen minutes, Evins "got worried" and looked out the window. *Transcript* at 113. She did not see Green, but she did see a car parked in front of the house. Evins walked out onto the front porch and saw Marshall pacing in the yard. Marshall and Green previously had been in a relationship for eight years, and they were the parents of one child. Marshall was displeased with Evins's presence at Green's home, and Marshall entered the house, went to Green's bedroom, and

threw around bed coverings and other items before leaving the house. Green was not home during this time and was not answering Evins's phone calls to him.

[4] Marshall returned, went into the kitchen, and got a steak knife. At some point, Green came home, and according to Evins, Marshall chased Green out of the house while wielding the knife. Evins and Green then stood outside, while Marshall yelled to them from the front porch. Marshall asked Green, "So, you in love with her?" Green nodded affirmatively. *Id.* at 130. "In the blink of an eye," Marshall, with a bottle of Hennessy in one hand and a kitchen knife in the other, lunged off the porch and attacked Evins, hitting Evins in the head with the bottle, which shattered. *Id.* at 132. The two scuffled and fought, rolling on a hill. Marshall bit Evins in the arm, leaving a mark. Evins was "dizzy" and realized her face "was leaking" with blood. *Id.* at 132-33. As a result of the hit to the head with the glass bottle, Evins suffered significant injuries to her left eye, including a detached retina and a deflated eye.

[5] Responding officers with the South Bend Police Department located Marshall inside the house and escorted her to a police car. Marshall was "calm and compliant" and voluntarily spoke with Officer Samuel Chaput about what had occurred. *Transcript* at 39. She described that she did not know exactly how the fight started but stated, "I finished it." *State's Exhibit 2* (police body camera video). When Officer Chaput asked her to explain what she meant by that statement, Marshall said, "I hit her upside the head with the bottle that I had in my hand." *Id.*

- [6] At the request of police, Marshall came to police headquarters on September 28 for an interview. Marshall told Officer Joshua Brooks that she came to the home that night to talk to Green, and they argued outside. Marshall admitted that she went into the house and grabbed a knife from the kitchen, intending to intimidate Green. Marshall also admitted that she left the house with a bottle of Hennessy in one hand and the knife in the other and that she hit Evins in the head with the bottle, although she told Officer Brooks that Evins struck her first.
- [7] On October 13, 2020, the State charged Marshall with: Count I, Level 3 felony aggravated battery by knowingly or intentionally inflicting injury on Evins that caused serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ; Count II, Level 5 felony battery by knowingly or intentionally touching Evins in a rude, insolent or angry matter “resulting in serious bodily injury, a traumatic eye injury”; and Count III, Level 5 felony intimidation by communicating a threat to Green by drawing or using a deadly weapon with the intent that Green be placed in fear that the threat will be carried out. *Appellant’s Appendix* at 5. A jury trial was held in June 2021. Several officers and Evins testified to the above series of events; Green did not testify. The jury found Marshall guilty on Counts I and II and not guilty on Count III.
- [8] Prior to the sentencing hearing, the State submitted a sentencing memorandum, asking the trial court to impose not less than twelve years of incarceration. The memorandum described the fight, noting that Marshall hit Evins in the head

and face with the bottle and that Evins suffered significant injuries to her left eye. The memorandum outlined that “Count I, Aggravated Battery, requires a risk of death or serious permanent disfigurement or protracted loss or impairment of the function of the bodily member or organ” and the “loss of function of Evins’s left eye [] was greater than what was necessary to satisfy the elements of the charges.” *Appellant’s Appendix* at 126. There was no separate discussion of Count II.

[9] The court held a sentencing hearing on July 21, 2021. Initially, the trial court confirmed Marshall’s understanding that the jury found her guilty of Counts I and II and “[w]e’re here now for your sentencing for both Count I and Count II.” *Transcript* at 226. After receiving evidence and testimony, the court addressed Marshall and said, “I am going to sentence you on both counts that the Jury found you guilty of and they will be served consecutively.” *Id.* at 240. On Count I, the court imposed a sentence of eight years, with three executed in the Indiana Department of Correct (the DOC) and five suspended, the first three of those five to be served through St. Joseph Community Corrections (SJCC). On Count II, the court imposed a three-year sentence, with two executed at the DOC and the remaining one year suspended to probation.

[10] The court and counsel for both parties thereafter engaged in some discussion to clarify the sentence. Ultimately, the court and counsel agreed that the two convictions were based on “the same event” and, therefore, the court “can sentence on both” but “they have to merge.” *Id.* at 242.

[11] That same day, the court issued a written sentencing order, consistent with the above, imposing, on Count I, a sentence of eight years with three executed at the DOC and five suspended, of which three would be served through SJCC, and, on Count II, a sentence of three years with two executed at the DOC and one suspended to probation. The order also stated, “The sentences for the two Counts merge.” *Appellant’s Appendix* at 134. Marshall now appeals, challenging the sufficiency of the evidence for her two convictions.

Discussion & Decision

I. Sufficiency

[12] Marshall contends that the State failed to present sufficient evidence to convict her of either aggravated battery or battery resulting in serious bodily injury and asks us to vacate the two convictions and instead enter judgment of conviction on a lesser-included Class A misdemeanor battery. In reviewing challenges to the sufficiency of the evidence, this court does not reweigh evidence or judge witness credibility. *Mann v. State*, 895 N.E.2d 119, 121 (Ind. Ct. App. 2008). We consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom. *Woodcock v. State*, 163 N.E.3d 863, 876 (Ind. Ct. App. 2021), *trans. denied*. We will affirm the conviction if the probative evidence and reasonable inferences could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Mann*, 895 N.E.2d at 121.

[13] To convict Marshall of aggravated battery as a Level 3 felony, the State had to prove beyond a reasonable doubt that she knowingly or intentionally inflicted injury on Evins and that the injury caused a protracted loss or impairment of the function of a bodily member or organ. *See* Ind. Code § 35-42-2-1.5. To convict Marshall of the Level 5 felony battery, the State was required to prove beyond a reasonable doubt that she knowingly or intentionally touched Evins in a rude, insolent, or angry matter and that the offense resulted in serious bodily injury¹ to Evins – specifically, as charged, “a traumatic eye injury.” I.C. § 35-42-2-1(c)(1), (g)(1); *Appellant’s Appendix* at 5.

[14] Marshall’s sufficiency argument asserts that the State “was required to prove . . . that [she] ‘knowingly or intentionally’ assaulted and or battered the victim with the design to cause her serious bodily injury” but that the evidence was insufficient “to establish that [she] intended to cause or inflict serious bodily injury[.]” *Appellant’s Brief* at 6, 8. That is, she argues, “there was insufficient evidence to show that Marshall knowingly or intentionally desired that Evins be seriously injured.” *Id.* at 9. We have previously rejected that argument.

[15] In *Lowden v. State*, 51 N.E.3d 1220, 1223 (Ind. Ct. App. 2016), *trans. denied*, we held that the mens rea, or level of culpability, applies to the conduct prohibited by the statute, not to the result of that conduct. *See also* I.C. § 35-41-2-2(d)

¹ Serious bodily injury is defined as “bodily injury that creates a substantial risk of death or that causes (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; [or] (4) permanent or protracted loss or impairment of the function of a bodily member or organ.” Ind. Code § 35-31.5-2-292.

(stating that “if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct”). “The prohibited conduct in the aggravated battery statute is to inflict injury on another.” *Lowden*, 51 N.E.3d at 1221. Likewise, the prohibited conduct in the battery statute is to touch someone in a rude, insolent, or angry manner. See *Maldonado-Morales v. State*, 985 N.E.2d 25, 28 (Ind. Ct. App. 2013) (holding that the mens rea applied only to “touched a person in a rude, insolent, or angry manner”). Although the State had to prove the necessary injury – i.e., “protracted loss or impairment of the function of a bodily member or organ” or “serious bodily injury” – as that is an element of each offense, the severity of the injury is not the prohibited conduct to which the mens rea applies. Accordingly, contrary to Marshall’s claim, the State was not required to prove that Marshall knew she would cause serious injury.

- [16] Here, the State presented undisputed evidence that Marshall, who was angry about Evins being with Green at his residence, lunged off the front porch and deliberately hit Evins in the head with the bottle that Marshall was holding in her hand. A jury could reasonably conclude from these facts that Marshall knowingly or intentionally inflicted injury on Evins and that she touched Evins in a rude, insolent, and angry manner. There is no quarrel with the fact that Evins suffered serious and permanent injury to her eye; as of trial, she had undergone two surgeries, may need more, cannot fully see out of her eye, may lose her vision in that eye entirely, and has permanent scarring. The State thus

presented sufficient evidence to convict Marshall of Level 3 felony aggravated battery and of Level 5 felony battery resulting in serious bodily injury.

II. Double Jeopardy

[17] We *sua sponte* address a second issue: Do Marshall’s separate convictions for Level 3 felony aggravated battery and Level 5 felony battery resulting in serious bodily injury violate double jeopardy? The Indiana Constitution provides, “No person shall be put in jeopardy twice for the same offense.” Ind. Const. art. 1, § 14. “Because questions of double jeopardy implicate fundamental rights, we routinely correct double jeopardy violations even when not first invited by the parties.” *Phillips v. State*, 174 N.E.3d 635, 644 (Ind. Ct. App. 2021); *see also Morales v. State*, 165 N.E.3d 1002, 1009 (Ind. Ct. App. 2021) (*sua sponte* reversing one of two arson convictions on double jeopardy grounds), *trans. denied*. Whether convictions violate double jeopardy is a pure question of law, which we review de novo. *Morales*, 165 N.E.3d at 1007.

[18] For her act of hitting Evins in the head with the bottle, Marshall was charged and convicted of aggravated battery and battery causing serious bodily injury. Because Marshall’s “single act or transaction implicates multiple criminal statutes,” we apply the analytical framework outlined by our Supreme Court in *Wadle v. State*, 151 N.E.3d 227, 235 (Ind. 2020). *Wadle* directs that, if neither

statute permits multiple punishments, as is the case here,² we next determine whether, under Indiana’s included-offense statute, Ind. Code § 35-31.5-2-168,³ either offense is included in the other. *Wadle*, 151 N.E.3d at 248.

If neither offense is included in the other (either inherently or as charged), there is no violation of double jeopardy. But if one offense is included in the other (either inherently or as charged), then the court must examine the facts underlying those offenses, as presented in the charging information and as adduced at trial. If, based on these facts, 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,” then the prosecutor may charge the offenses as alternative sanctions only. But if the defendant’s actions prove otherwise, a court may convict on each charged offense.

Id. at 253.

[19] This court has consistently recognized that battery resulting in serious bodily injury is an inherently lesser included offense of aggravated battery. *See Massey*

² As discussed *supra*, Level 3 felony aggravated battery under I.C. § 35-42-2-1.5 requires that a person knowingly or intentionally inflicted injury on another and that the injury caused a protracted loss or impairment of the function of a bodily member or organ. Level 5 felony battery under I.C. § 35-42-2-1 requires that a person knowingly or intentionally touched another in a rude, insolent, or angry matter and that the offense resulted in serious bodily injury. Neither statute authorizes multiple punishment for the same criminal act.

³ I.C. § 35-31.5-2-168 defines “included offense” as an offense that:

- (1) 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) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
- (3) 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.

v. State, 803 N.E.2d 1133, 1138 (Ind. Ct. App. 2004) (applying a prior, but identically worded, version of the included-offense statute); *Simmons v. State*, 793 N.E.2d 321, 325 (Ind. Ct. App. 2003). Indeed, battery resulting in serious bodily injury differs from aggravated battery only in the respect that a less serious harm to the same person is required to establish the offense. *Cornelious v. State*, 988 N.E.2d 280, 283 (Ind. Ct. App. 2013) (“The element that distinguishes aggravated battery from battery is the nature of the injury caused by the touching.”), *trans. denied*. As the State used the same evidence at trial to establish both offenses, the dual convictions constitute double jeopardy. See *Phillips*, 174 N.E.3d at 647 (“[A] prosecutor cannot secure two convictions for the same act using the exact same evidence.”).

[20] At the sentencing hearing, the trial court and both parties recognized that Marshall was being sentenced twice for “the same event” and agreed that the solution was to merge the sentences. *Transcript* at 242. However, a double jeopardy violation “cannot be remedied by the ‘practical effect’ of concurrent sentences or by merger after conviction has been entered.” *Hines v. State*, 30 N.E.3d 1216, 1221 (Ind. 2015) (additional quotations and citations omitted). Rather, one of Marshall’s convictions must be vacated. *Morales*, 165 N.E.3d at 1010. “As the State satisfied its burden for both felonies, the lesser should fall.” *Jones v. State*, 159 N.E.3d 55, 65 (Ind. Ct. App. 2020), *trans. denied*.

[21] Accordingly, we affirm Marshall’s conviction for Level 3 felony aggravated battery (Count I), reverse her conviction for Level 5 felony battery resulting in

serious bodily injury (Count II), and remand with instructions to vacate the conviction and sentence on Count II.

[22] Judgment affirmed in part, reversed in part, and remanded.

Bailey, J. and Mathias, J., concur.