MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jamal M. McFadden,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 31, 2023

Court of Appeals Case No. 23A-CR-254

Appeal from the Monroe Circuit Court

The Honorable Valeri Haughton, Judge

Trial Court Cause No. 53C02-2010-MR-1010

Memorandum Decision by Judge Riley
Judges Bradford and Weissmann concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Jamal M. McFadden (McFadden), appeals his convictions and sentence for murder, a felony, Ind. Code § 35-42-1-1(2); and robbery resulting in serious bodily injury, a Level 2 felony, I.C. § 35-42-1-5(a)(1).

[2] We affirm in part, reverse in part, and remand with instruction.

ISSUES

[3] McFadden presents this court with three issues, two of which we find dispositive and which we restate as follows:

(1) Whether the State presented sufficient evidence beyond a reasonable doubt to sustain his conviction for murder; and
(2) Whether McFadden's convictions and sentence for murder and robbery resulting in serious bodily injury violated the prohibition against double jeopardy.

FACTS AND PROCEDURAL HISTORY

[4] On October 26, 2020, McFadden, McFadden's cousin, Keeshawn Bess (Bess), and Bess' friend, Malik Bennett (Bennett), drove from Indianapolis to Bloomington to purchase "some weed" from Damon Brown (Brown). (Transcript p. 166). That same day, Brown called his cousin, DJ Brown (DJ), and asked him if he could come over to DJ's trailer. He explained that he was going to sell marijuana to some guys and wanted to make the sale at DJ's

trailer. DJ agreed. Shortly after Brown arrived at DJ's trailer, McFadden drove up in his 2014 white Chevy Impala with Bess and Bennett. McFadden, Bess, and Bennett entered the trailer. McFadden approached DJ in the kitchen where McFadden tried to sell DJ some Xanax. Meanwhile, Bess walked to the back of the trailer, pretending to see DJ's dog but instead looking through the rooms.

[5] Brown's cousin, Evan Miller (Miller), and DJ's girlfriend, Lauren Sexton (Sexton), who were sitting on the bed in DJ's bedroom, noticed Bess standing in the doorway and checking out the room before walking off. After Brown retrieved a bag of marijuana, which was inside a Louis Vuitton bag located in DJ's bedroom, he returned to the kitchen where DJ, Bess, and Bennett were standing. Bess and Bennett took out their guns and ordered DJ and Brown to split up. Brown was held at gunpoint in the main room, while DJ remained in the kitchen. Bess instructed McFadden to go to the back room and "pick things up." (Tr. p. 50). McFadden went to DJ's room, where Miller and Sexton were still sitting, and told Miller to "run his pockets," while patting Miller's legs. (Tr. p. 62). Miller was "dumbfounded" and asked McFadden to repeat himself. (Tr. p. 72). Mc Fadden "laughed and said it again, 'run your pockets.'" (Tr. p. 72). Miller stood up from the bed and moved over to the dresser, where he grabbed his gun. When McFadden noticed Miller's gun, he ran out of DJ's room, yelling, "he got a gun, he got a gun." (Tr. p. 72). Brown, still in the living room, pleaded, "it [i]sn't worth it, you can just take it all," after which Brown was shot. (Tr. p. 37). McFadden, Bess, and Bennett ran out of the door and fled on foot. When officers arrived on the scene, Brown was laying on the

porch while a neighbor was performing CPR on him. Although Brown was still alive when the officers arrived, he passed away shortly thereafter. Upon a search of the area, officers located a Louis Vuitton bag containing drugs and THC cartridges behind DJ's trailer.

[6] On October 27, 2020, the Bloomington Police Department was contacted by the Indianapolis Police Department informing the Bloomington officers that McFadden had reported the white Chevy Impala as stolen. After McFadden arrived at the Bloomington police department to retrieve his car, he informed officers that his car had been stolen at a gas station in Indianapolis the previous night. However, a search warrant obtained for McFadden's cellphone placed him at DJ's trailer that previous night.

[7] On October 29, 2020, the State filed an Information, charging McFadden with murder, a felony, and robbery resulting in serious bodily harm, a level 2 felony. On October 17, 2022, the trial court conducted a bench trial, at the close of which the trial court found McFadden guilty and entered judgment of conviction on both charges. On January 20, 2023, the trial court sentenced McFadden to fifty-six years for murder and twenty years for robbery resulting in serious bodily injury, with those sentences to run concurrently.

[8] McFadden now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

[9] McFadden contends that the State failed to present sufficient evidence beyond a reasonable doubt to support his conviction for murder. Our standard of review for claims challenging the sufficiency of the evidence is well-settled. "Sufficiency-of-the-evidence claims . . . warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility." *Dowell v. State*, 206 N.E.3d 1167, 1170 (Ind. Ct. App. 2023), *trans. denied*. Rather, we consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Id*. We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt. *Id*.

[10] The State charged McFadden with murder, a felony, pursuant to Indiana Code section 35-42-1-1(2), and elaborated in the charging Information that McFadden "did kill another human being, to wit: [Brown], while committing or attempting to commit robbery." (Appellant's App. Vol. II, p. 19). In its interpretation of this statute, our supreme court determined that the State need not prove intent to kill, only the intent to commit the underlying felony. *Exum v. State*, 812 N.E.2d 204, 207 (Ind. Ct. App. 2004). Our supreme court further held in *Palmer v. State*, 704 N.E.2d 124, 126 (Ind. 1999), that the statutory language "kills another human being while committing" does not restrict the felony murder provision only to instances in which the felon is the killer, but may also apply equally when, in committing any of the designated felonies, the felon contributes to the death of any person. *See also*, *Jenkins v. State*, 726 N.E.2d 268, 271 (Ind. 2000) (co-perpetrator was shot and killed by robbery

victim and the defendant was convicted of felony murder for that death). The *Palmer* court used this interpretation of the felony murder statute to uphold a conviction of Palmer for the murder of his co-perpetrator who had been shot by a law enforcement officer. Our supreme court explained:

> Our [c]ourt of [a]ppeals has correctly observed: [A] person who commits or attempts to commit one of the offenses designated in the felony-murder statute is criminally responsible for a homicide which results from the act of one who was not a participant in the original criminal activity. Where the accused reasonably should have . . . foreseen that the commission of or attempt to commit the contemplated felony would likely create a situation which would expose another to the danger of death at the hands of a nonparticipant in the felony, and where death in fact occurs as was foreseeable, the creation of such a dangerous situation is an intermediary, secondary, or medium in effecting or bringing about the death of the victim. There, the situation is a mediate contribution to the victim's killing.

Palmer, 704 N.E.2d at 126 (citing *Sheckles v. State*, 684 N.E.2d 201, 205 (Ind. Ct. App. 1997)).

[11] Challenging the State's burden of proof on the underlying felony, McFadden contends that he did not possess the *mens rea* to commit a robbery and his actions were not the mediate or the intermediate cause of Brown's death. Pursuant to Indiana Code section 35-42-5-1(a)(1), a person commits robbery when he knowingly or intentionally takes property from another person or from the possession of another person by using or threatening the use of force on any person.

[12] The facts favorable to the judgment reflect that after Brown revealed the location of the marijuana by pulling it out of the Louis Vuitton bag, he was met in the kitchen by Bess and Bennett who had taken out their guns and who continued to hold Brown and DJ at gunpoint. Once Bess and Bennett separated Brown and DJ, McFadden responded to Bess' instructions to go to the back room and "pick things up." (Tr. p. 50). A willing participant, McFadden went to DJ's room, where Miller and Sexton were still sitting, and told Miller to "run his pockets" twice while patting Miller's legs. (Tr. p. 72). Meanwhile, Bess and Bennett threatened force by holding Brown and DJ at gunpoint while McFadden could secure "things" without confrontation. (Tr. p 50). When Miller drew his own gun, the situation escalated with McFadden running out of the room and announcing to Bess and Bennett that Miller had a gun. Despite Brown's pleas, he was shot. Later, officers discovered the Louis Vuitton bag, containing drugs, outside the trailer.

[13] Accordingly, the evidence and reasonable inferences establish that McFadden and his co-perpetrators engaged in dangerously violent and threatening conduct and their conduct created a situation that exposed persons present to the danger of death at the hands of a non-participant, who did resist or respond to the conduct. McFadden's actions, evincing his intent to commit the robbery, were an instigation for Miller to draw his gun and constituted the immediate result of bringing about Brown's death. *See, e.g., Jenkins*, 726 N.E.2d at 271 (Ind. 2000) (concluding that "the defendant and his co-perpetrator engaged in dangerously violent and threatening conduct and that their conduct created a situation that

exposed persons present to the danger of death at the hands of a non-participant who might resist or respond to the conduct... and that the defendant's role in creating this dangerous situation, which included the use of at least two guns during the episode, was an intermediary, secondary, or medium in effecting or bringing about the death."); *Forney v. State*, 742 N.E.2d 934, 936 (Ind. 2001) (Our supreme court affirmed the defendant's felony murder conviction based on accomplice liability where, in the perpetration of a robbery, the defendant instructed his co-perpetrator to "get the money by saying, 'get the scrill get the scrill.'" Upon which, the co-perpetrator pulled out a gun, pointed it at the stomach of the intended robbery victim and said, "Shut up, empty your pockets." A struggle over the gun ensued. The co-perpetrator fired the weapon, striking another co-perpetrator in the chest who died as a result.) We find that the State presented sufficient evidence beyond a reasonable doubt to support McFadden's felony murder conviction while attempting to commit a robbery.

II. *Double Jeopardy*

[14] Next, McFadden contends—and the State concedes—that his convictions for felony murder and robbery resulting in serious bodily injury violated the prohibition against double jeopardy. Whether convictions violate Indiana's prohibition against double jeopardy is a question of law reviewed *de novo*. *Wadle v. State*, 115 N.E.3d 227, 256 (Ind. 2020).

[15] In *Wadle*, our supreme court established the new double jeopardy framework to be applied when, as here, "a single criminal act or transaction violates multiple statutes with common elements." *Id.* at 247. (*Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020), on the other hand, established the framework to be applied "when a single criminal act or transaction violates a single statute and results in multiple injuries."). The supreme court summarized the *Wadle* test as follows:

> [W]hen multiple convictions for a single act or transaction implicate two or more statutes, we first look to the statutes themselves. If either statute clearly permits multiple punishment, whether expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy. But if the statutory language is not clear, then a court must apply our included-offense statutes to determine whether the charged offenses are the same. *See* [I.C.] § 35-31.5-2-168. 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 instrument 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.

[16] Applying the test here, we first observe that neither the murder statute nor the robbery statute clearly permits multiple convictions, either expressly or by unmistakable implication. *See* I.C. §§ 35-42-1-1(2); 35-42-1-5(a)(1). With no

statutory language clearly permitting multiple convictions, we move to analyzing whether robbery resulting in serious bodily harm is a lesser included offense of murder, either inherently or as charged.

[17] An offense is "inherently included" in another 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). 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*.

[18] Indiana Code section 35-38-1-6 provides: "Whenever: (1) a defendant is charged with an offense and an included offense in separate counts; and (2) the defendant is found guilty of both counts; judgment and sentence may not be entered against the defendant for the included offense." Indiana Code section 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.

[19] Here, a double jeopardy violation occurred. The elements necessary to establish McFadden's conviction for robbery resulting in bodily injury were necessary to establish the underlying robbery felony charged in the felony murder count. *See Glenn v. State*, 884 N.E.2d 347, 357 (Ind. Ct. App. 2008) (Double jeopardy was violated when a defendant was convicted and sentenced for both felony murder and the underlying robbery because the conviction for felony murder could not be established without proof of the robbery). When faced with dual convictions that offend double jeopardy principles, we remedy the violation by vacating the offense that carries the lesser criminal penalty. *See Shepherd v. State*, 157 N.E.3d 1209, 1223 (Ind. Ct. App. 2020). Accordingly, we vacate McFadden's conviction for robbery resulting in serious bodily injury.[1]

CONCLUSION

[20] Based on the foregoing, we conclude that the State presented sufficient evidence to support McFadden's murder conviction. However, because McFadden's robbery conviction and sentence violated the principle of double jeopardy, we vacate the robbery conviction and remand to the trial court to issue a corrected sentencing order.

[21] Affirmed in part, reversed in part, and remanded with instruction.

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[1] In his appellate brief, McFadden also argues that "[i]f the felony murder conviction is vacated here, however, and the robbery conviction is affirmed, an issue remains with McFadden's robbery sentence" and contends that the imposed sentence for the robbery conviction is inappropriate in light of the nature of the offense and his character. (Appellee's Br. p. 19). However, because we vacated McFadden's robbery conviction, we will not address this argument.

[22] Bradford, J. and Weissmann, J. concur