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IN THE COURT OF APPEALS OF INDIANA

Justin Yeary,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

April 7, 2022

Court of Appeals Case No. 21A-CR-1080

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No. 29D01-1904-F4-2783

May, Judge.

[1] Justin Yeary appeals following his conviction of Level 1 felony dealing in a controlled substance resulting in death.[1] Yeary raises multiple issues on appeal, but we confine our analysis to three, which we restate as:

> 1. Whether Indiana Code section 35-42-1-1.5, Indiana's drug-induced homicide ("DIH") statute, violates the United States Constitution and/or the Indiana Constitution by eliminating the State's burden of proving proximate causation, limiting the accused's right to present a defense, and failing to give fair notice of the behavior it prohibits;
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> 2. Whether the trial court erred in refusing to give Yeary's proposed jury instructions on causation; and
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> 3. Whether the text messages the victim sent in the days prior to his death were relevant to Yeary's defense.

We reverse and remand.

Facts and Procedural History[2]

[2] In early 2019, Tyler Humphrey was twenty-three years old and attended Indiana University Purdue University-Indianapolis. He had been diagnosed

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[1] Ind. Code § 35-42-1-1.5.

[2] We heard oral argument in this case on February 9, 2022, at the University of Southern Indiana in Evansville. We commend counsel for their advocacy and thank the University of Southern Indiana's faculty, staff, and students for their warm reception and hospitality.

with social anxiety and depression, and doctors prescribed Xanax and Lexapro to help Tyler cope with these issues. Tyler and Bryan Kavensky met through a mutual friend in 2017. They met in-person once or twice, but they mostly communicated with each other by text message.

[3] On Friday, February 8, 2019, Tyler texted Kavensky that he was "fiending"[3] (Tr. Vol. III at 114), and Kavensky informed Tyler he could buy heroin from Yeary. Tyler and Kavensky agreed Tyler would purchase two grams of heroin from Yeary. Tyler would use a portion of the heroin and give the remainder to Kavensky. Tyler and Yeary did not know each other, so Kavensky gave Yeary's phone number to Tyler. Tyler texted Yeary, and Yeary confirmed he would sell Tyler two grams of heroin for $200. Tyler then agreed to travel to Yeary's house in Noblesville and buy the heroin. Tyler returned to his house at about 5:30 p.m. A little after 6:30 p.m., Tyler texted Yeary: "Sniffed half a point and I have no words[.] Except for holy shit I am high on drugs[.]" (Tr. Vol. V at 111.) Yeary responded, "Like it I take it?" (*Id.*)

[4] Tyler; his sister, Emily; and his mother, Geralyn, spent the evening watching television and eating cookies in the living room. Geralyn testified Tyler was "fine" and acted "normal" throughout the evening. (Tr. Vol. II at 116.) Around 10:00 p.m., Tyler went upstairs to his bedroom. He responded to Yeary's text message: "Yessir. I wrote snorting H off cause the last time did

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[3] Kavensky described "fiending" as a state occurring "when you are addicted to something and you have gone without it and you are experiencing withdrawal symptoms." (Tr. Vol. III at 114.)

damn near notging. Id have spent like $30 to get where I'm at right now for $5-6[.]" (Tr. Vol. V at 111) (errors in original). Tyler also exchanged text messages with Geralyn about a stray cat she saw roaming outside the Humphrey's house.

[5] Geralyn and Emily went to bed around 11:00 p.m. Michael, Tyler's father, was returning from a business trip to Georgia, and he did not arrive at the house until around 11:30 p.m. As Michael prepared for bed, he heard Tyler snoring, so he decided to check on Tyler before retiring for the night. Michael observed Tyler sleeping, and he turned off Tyler's light and closed the door.

[6] Geralyn woke up at approximately 7:30 a.m. the next day. One of the family dogs routinely slept in Tyler's bedroom, and Tyler opened his bedroom door to let the animal out around this time. Michael woke up a little while later, and he went outside to work on converting the family's pool house into an in-law suite. Emily left the house that morning and went to work at her part-time job. Geralyn was a realtor, and as she got dressed to prepare for a showing shortly before 11:00 a.m., she heard Tyler snoring very loudly. Geralyn left for the showing, and she returned home between 2:00 p.m. and 2:30 p.m. Geralyn noticed Tyler's door was still closed when she returned home. Around 3:30 p.m., Geralyn opened Tyler's door. She saw Tyler slumped over, and he did not appear to be breathing. Geralyn ran outside and yelled for Michael to come into the house. Michael began to perform CPR while Geralyn called 911.

[7] Sergeant Joseph Dennemann of the Zionsville Police Department responded to the call and arrived on the scene. Tyler did not have a pulse when Sergeant Dennemann arrived. He began to assist with CPR and administered Naloxone in Tyler's nose. However, these efforts were unsuccessful, and Tyler died at the scene. Annie Green, a crime scene investigator with the Whitestown Police Department, also responded to the 911 call. She photographed Tyler's body and the scene. Investigator Green collected Tyler's phone, laptop, and empty prescription bottles. Among the items Investigator Green collected was a "Monday through Friday prescription pill case" with Xanax pills inside it. (Tr. Vol. II at 183.) Police also found a Xanax prescription bottle in Tyler's car. The bottle was empty even though the prescription had been filled only a few days prior. Tyler's parents gave the authorities permission to access Tyler's phone. Investigator Green found text messages on Tyler's phone regarding a heroin sale between him and Yeary, but law enforcement did not find any heroin at the scene. In the days following Tyler's death, his parents found additional Xanax pills hidden in the laundry room.

[8] Dr. Thomas Sozio, a forensic pathologist, performed an autopsy on Tyler's body on February 11, 2019. Dr. Sozio collected Tyler's blood and other bodily fluids during the autopsy and submitted the samples to a forensic toxicology lab. The toxicology report indicated Tyler had therapeutic levels of Xanax and an antidepressant in his system at the time of his death. The report also indicated Tyler had an elevated level of fentanyl in his system. Dr. Sozio testified the level of fentanyl found in Tyler's blood was within a range known

to be fatal. The report did not indicate Tyler had any heroin in his system. Dr. Sozio concluded Tyler's cause of death was "acute fentanyl, citalopram, and alprazolam intoxication . . . The combination of all three of those drugs together caused an intoxicated state resulting in respiratory depression and cardiac arrest or his heart stopping." (Tr. Vol. III at 62.) Pursuant to guidelines from the National Association of Medical Examiners, Dr. Sozio reported all three drugs as contributing to Tyler's death even though fentanyl was the only one of the three drugs found at an elevated, non-therapeutic level.

[9] On April 12, 2019, the State charged Yeary with Level 4 felony dealing in a narcotic drug.[4] The State then amended the information on May 9, 2019, to include a charge of Level 1 felony dealing in a controlled substance resulting in death, colloquially known as drug-induced homicide ("DIH"). Yeary filed a motion to dismiss the DIH count arguing the statute was unconstitutional under both the United States Constitution and the Indiana Constitution. On September 4, 2020, the trial court issued an order denying Yeary's motion to dismiss. The trial court certified the order denying Yeary's motion to dismiss for interlocutory appeal, but we refused to accept jurisdiction.

[10] At the final pretrial conference on February 18, 2021, the State objected to two of Yeary's proposed preliminary instructions. Yeary's proposed preliminary instruction six concerned the definitions of "cause-in-fact" and "proximate

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[4] Ind. Code § 35-48-4-1.

cause." (App. Vol. IV at 16.) Yeary's proposed preliminary instruction seven related to the definition of "intervening or overriding cause." (*Id*. at 17.) The State argued the instructions ignored "the context of subsection (d) of the Dealing Resulting in Death statute." (Tr. Vol. II at 54.) The trial court took the State's objections under advisement.

[11] The trial court held a four-day jury trial from March 8, 2021, through March 11, 2021. Yeary renewed both his motion to dismiss and his request for proposed preliminary jury instructions on causation at the beginning of trial, and the trial court denied both motions. The State questioned Investigator Green about the text messages between Tyler and Yeary that she recovered from Tyler's phone. During Yeary's cross-examination of Investigator Green, Yeary asked: "Did you find text messages about buying Xanax off the street?" (*Id.* at 205.) The State objected, arguing the text messages were inadmissible hearsay. The trial court sustained the objection. Yeary then made an offer of proof outside the presence of the jury. In his offer of proof, Yeary introduced text messages Investigator Green recovered from Tyler's phone after his death. These text messages included conversations with Kavensky, "Dusty New," and "Wes 2"[5] about buying and splitting drugs. (*Id*. at 211.) Yeary argued the text messages were relevant to his defense that the police did not adequately investigate the source of the fentanyl and prematurely zeroed in on him as the

[5] The record does not reflect the legal names for the contacts labeled "Dusty New" and "Wes 2" in Tyler's phone.

source of the fentanyl. The State reasserted its hearsay objection, and the trial court did not change its initial ruling on the State's objection.

[12] The State later called Kavensky to testify. Prior to Yeary's cross-examination of Kavensky, Yeary asked the court for permission to enter into evidence texts Yeary and Kavensky exchanged on February 8, 2019, for the purpose of impeachment. The State raised several objections to the text messages: "The text messages between Bryan Kavensky and Tyler, it's not just hearsay. Depending on the text there are a number of objections the State could make given any particular test on hearsay, on relevance, particularly 401, 403, and 404." (Tr. Vol. III at 96.) Later in its argument to the trial court, the State asserted:

> Most of these texts are not relevant. Again, State asserts that the relevance of this witness is that he connected Tyler with Justin Yeary and he can help establish the amount that Tyler was going to buy, which we have to prove the amount he buyed [sic], not the amount that he intended to use, what he did use.

(*Id*. at 106.) The trial court ruled copies of the text messages could be used to refresh Kavensky's recollection, but the text messages themselves could not be introduced into evidence.

[13] Prior to closing arguments, Yeary again asked the trial court to give his proposed instructions on causation, and the trial court denied the request. The trial court did include in its final instructions an elements instruction that included "results in death" as an element of the crime, an instruction stating the

State was required to prove each element beyond a reasonable doubt, and an instruction defining "cause of death." (App. Vol. IV at 175-76, 188.) The jury returned guilty verdicts on both counts, and the trial court entered judgment of conviction as to the DIH count. The trial court held a sentencing hearing on May 6, 2021, and sentenced Yeary to a term of thirty-five years. The trial court ordered the sentence be served with twenty-five years executed in the Indiana Department of Correction ("DOC"), three years served in community corrections, and the remaining seven years suspended with four of those years served on probation.

Discussion and Decision

I. Constitutionality of Indiana's DIH statute

A. Fourteenth Amendment to the United States Constitution and Causation

[14] Yeary argues the DIH statute is unconstitutional because it infringes upon his Fourteenth Amendment right to due process of law before being deprived of life, liberty, or property. To determine the constitutionality of a statute, "we must examine 'the language of the text in the context of the history surrounding its drafting and ratification' as well as 'the purpose and structure of our constitution.'" *Horner v. Curry*, 125 N.E.3d 584, 598 (Ind. 2019) (quoting *City of Hammond v. Herman & Kittle Props., Inc.*, 119 N.E.3d 70, 79 (Ind. 2019)). We do not concern ourselves with the "desirability or wisdom of the laws passed by the Legislature." *Paul Stieler Enters., Inc. v. City of Evansville*, 2 N.E.3d 1269, 1277 (Ind. 2014) (internal citation omitted). Our objective is solely "to determine

whether the exercise of legislative discretion violates express provisions of the Indiana and Federal constitutions." *Id.* We review challenges to the constitutionality of a statute de novo. *Coleman v. State*, 149 N.E.3d 313, 318 (Ind. Ct. App. 2020), *trans. denied*. We begin with the presumption that the statute is constitutional, and the party challenging the statute's constitutionality bears a heavy burden. *Id.* at 318-19. If a statute may be interpreted two ways, one constitutional and the other unconstitutional, we will interpret the statute in the way that renders it constitutional. *Id.* at 319.

[15] The Fourteenth Amendment's due process clause "prohibits the State from relying upon an evidentiary presumption that has the effect of relieving it of its burden to prove every essential element of a crime beyond a reasonable doubt." *Pattison v. State*, 54 N.E.3d 361, 365 (Ind. 2016). Our criminal justice system recognizes causation as an essential element to imposing liability in most circumstances. *See Burrage v. U.S.*, 571 U.S. 204, 214, 134 S. Ct. 881, 889 (2014) (referring to "but-for" causation as a "traditional background principle" of criminal law); *Paroline v. U.S.*, 572 U.S. 434, 446, 134 S. Ct. 1710, 1720 (2014) (describing proximate cause as a "standard aspect of causation in criminal law and the law of torts"). Causation refers to the general principle that when an offense is predicated upon a certain result, the State must prove the defendant's action brought about the result. *Cannon v. State*, 142 N.E.3d 1039, 1043 (Ind. Ct. App. 2020). Causation requires the criminal act to be "both 1) the actual cause (sometimes called the 'cause-in-fact'); and 2) the legal cause (sometimes called the 'proximate cause') of the result." *Bowman v. State*,

564 N.E.2d 309, 313 (Ind. Ct. App. 1990), *summarily aff'd in relevant part*, 577 N.E.2d 569 (Ind. 1991).

[16] "Cause-in-fact requires that 'but for' the antecedent conduct, the result would not have occurred." *Id.* If more than one cause precipitated the result, the antecedent conduct must be a "substantial factor" in bringing about the result. *Id.* Proximate cause centers on the concept of foreseeability, whereby a defendant is only responsible for the foreseeable results of his actions. *Id.* This requires "a value judgment as to the extent of the physical consequences of an action for which the actor should be held responsible." *Id.* "In Indiana, a result is deemed foreseeable if it is a 'natural and probable consequence' of the act of the defendant." *Id.* However, an unforeseen action by the victim, a third party, or a non-human actor may interfere with and break the chain of causation stemming from the defendant's original action. *Id.* In such a circumstance, the defendant is not responsible for the result. *Id.*

[17] Indiana's DIH statute provides, in relevant part:

> (a) A person who knowingly or intentionally manufactures or delivers a controlled substance or controlled substance analog, in violation of:
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> * * * * *
>
> (4) IC 35-48-4-2 (dealing in a schedule I, II, or III controlled substance);

> that, when the controlled substance is used, injected, inhaled, absorbed, or ingested, results in the death of a human being who used the controlled substance, commits dealing in a controlled substance resulting in death, a Level 1 felony.
>
> * * * * *
>
> (d) It is not a defense to an offense described in this section that the human being died:
>
> > (1) after voluntarily using, injecting, inhaling, absorbing, or ingesting a controlled substance or controlled substance analog; or
> >
> > (2) as a result of using the controlled substance or controlled substance analog in combination with alcohol or another controlled substance or with any other compound, mixture, diluent, or substance.

Ind. Code § 35-42-1-1.5. We interpret "results in death" to mean the defendant's conduct caused the death. *See Spaulding v. State*, 815 N.E.2d 1039, 1041-42 (Ind. Ct. App. 2004) (holding sufficient evidence supported defendant's conviction of operating a motor vehicle with a suspended license resulting in death when the defendant's driving "was the substantial, and only, cause of [the victim's] death"). Thus, the plain language of subsection (a) of the DIH statute requires the State to prove a causal connection between the controlled substance delivered by the defendant and the victim's death. In fact, Yeary acknowledges subsection (a), when read in isolation, requires the State "to prove that, but for use of the controlled substance the victim would not have died, and the victim's

death was reasonably foreseeable given the defendant's conduct." (Appellant's Br. at 29.)

[18] However, Yeary argues subsection (d) of the DIH statute so waters down this element of the DIH offense as to effectively relieve the State of the burden of proving a causal connection. He contends:

> The first excluded defense precludes the defendant from being able to argue that the victim's death was not reasonably foreseeable or that the victim's conduct was an intervening cause that broke the chain of causation. The second excluded defense prohibits the defendant from being able to argue that any substance other than the one manufactured or delivered by the defendant was the cause of, or even a substantial factor in bringing about, the victim's death.

(*Id*. at 29-30.) Thus, according to Yeary's argument, to obtain a conviction, "the State need only show the victim used a drug that at some point the defendant had manufactured or delivered, and the victim died later." (Appellant's Br. at 24.) The State, in contrast, asserts it was required to "prove that the controlled substance sold by the defendant was a cause-in-fact and proximate cause of the victim's death." (Appellee's Br. at 22.) The State contends subsection (d) of the DIH statute holds the defendant responsible for the foreseeable consequences of drug dealing but does not remove the State's obligation to prove causation.

[19] Yeary reads the defense exclusions in the DIH statute too broadly. The plain language of subsection (d)(1) only precludes a defendant from raising as a

complete defense that the person who died made the voluntary choice to use, inject, inhale, absorb, or ingest the drug manufactured or delivered by the defendant. *See, e.g.*, *Willis v. State,* 888 N.E.2ds 177, 182-84 (defenses of parental privilege and self-defense are "complete defense[s]" eliminating culpability for an otherwise criminal act); *Heyward v. State*, 470 N.E.2d 63, 64 (Ind. 1984) (involuntary intoxication may be complete defense to crime); *Melton v. Ousley*, 925 N.E.2d 430, (Ind. Ct. App. 2010) (truth is a complete defense in civil actions for defamation and, therefore, bars recovery).

[20] As applied here, the defense exclusion in subsection (d)(1) merely prevented Yeary from seeking acquittal solely because Tyler voluntarily chose to ingest the drug that Yeary sold him. In other words, Yeary could not argue that Tyler's ingestion of that drug was an intervening cause that broke the chain of causation and required Yeary's acquittal of drug-induced homicide. Tyler's consumption of the drug he purchased from Yeary was reasonably foreseeable and thus could not be an intervening cause. *See generally Bowman*, 564 N.E.2d at 313 (result is reasonably foreseeable if it is a natural and probable consequence of the defendant's act). Contrary to Yeary's claim, the defense limitation in subsection (d)(1) does not alter the State's burden of proof imposed by the Fourteenth Amendment. The State remained obligated to prove Tyler's death resulted from the drugs Yeary distributed and that the death was reasonably foreseeable.

[21] Yeary also misconstrues subsection (d)(2). The plain language of that provision merely bars a defendant from raising as a complete defense that the person's

death resulted from the person's combined use of the distributed drug and alcohol or another controlled substance. The legislative intent is clear: to ensure that a defendant does not escape liability merely because the person who died used other drugs or drank alcohol while ingesting the drug provided by the defendant.

[22] As with subsection (d)(1), subsection (d)(2) does not alter the State's constitutional burden of proving causation. The State still must prove that the death resulted from the drug distributed by the defendant. Where multiple drugs are in the defendant's system, such proof may consist of evidence that the drug distributed by the defendant was enough, by itself, to cause the death. It also may consist of evidence that the distributed drug, while not enough to cause the death by itself, foreseeably combined with other substances to cause the death.

[23] Subsection (d)(2) also does not bar the defendant from raising as a defense that the death was not caused by the drug provided by the defendant. For instance, subsection (d)(2) would not impede the defendant from arguing that the death resulted solely from the other substances and did not result from the "combination" of the distributed drug and the other substances. Similarly, the defendant could argue that the person's ingestion of other substances was not foreseeable and, thus, the defendant is not culpable. The only defense precluded by subsection (d)(2) is that acquittal is appropriate solely because the person used other drugs or alcohol "in combination" with the distributed drug caused the person's death.

[24] Indiana's DIH statute does not violate the due process clause of the Fourteenth Amendment, as Yeary has alleged, because it does not relieve the State of the burden of proving causation. *See Pattison*, 54 N.E.3d at 369 (holding rebuttable presumption regarding defendant's blood-alcohol concentration at time of traffic stop based on results of breath test performed ninety minutes later did not impermissibly shift the burden of proof onto the defendant in violation of the Fourteenth Amendment's due process clause).

B. Right to Present a Defense

[25] Alternatively, Yeary asserts subsection (d) of the DIH statute unconstitutionally infringes upon his right to present a defense, as guaranteed by various provisions of both the United States Constitution[6] and the Indiana Constitution.[7] It is generally the prerogative of the legislature to define criminal offenses and fix penalties. *Powell v. State*, 151 N.E.3d 256, 263 (Ind. 2020). Consequently, the legislature also has the power to restrict what defenses a defendant may assert to avoid criminal liability. *See*, *e.g.*, Ind. Code § 35-41-2-5 (voluntary intoxication is not a defense); Ind. Code § 35-41-3-8 (duress not a

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[6] "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984)) (internal citations omitted).

[7] *See* Ind. Const. art. 1, § 19 ("In all criminal cases whatever, the jury shall have the right to determine the law and the facts."); Ind. Const. art. 1, § 12 ("Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."); and Ind. Const. art. 1, § 13 ("In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel[.]").

defense to offenses against a person); and Ind. Code § 35-41-2-4 (principal's acquittal or non-prosecution is not a defense to charge of aiding and abetting). States are also generally free to adopt rules governing the admissibility of relevant evidence in criminal proceedings. *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S. Ct. 2013, 2017 (1996). Yet, "to say that the right to introduce relevant evidence is not absolute is not to say that the Due Process Clause places no limits upon restriction of that right." *Id.* at 42-43. A state may not impose a restriction that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 2322 (1977) (internal quotation marks omitted). Yeary argues the excluded defenses language of the DIH statute restricts such a fundamental principle of justice in that it limits what evidence a defendant can put forward to challenge causation.

[26] We reject Yeary's premise because, as we noted in the prior section, subsection (d) of the DIH statute does not prevent a defendant from contesting causation. Subsection (d)(1) specifies that it is not a defense for the defendant to assert the victim voluntarily chose to use the controlled substance. In that respect, this statute is consistent with other states' DIH statutes. *See*, *e.g.*, Kan. Stat. Ann. § 21-5430 ("It shall not be a defense that the user contributed to the user's own great bodily harm or death by using the controlled substance or consenting to the administration of the controlled substance by another."); N.J. Stat. Ann. § 2C:35-9 ("It shall not be a defense to a prosecution under this section that the decedent contributed to his own death by his purposeful, knowing, reckless or

negligent injection, inhalation or ingestion of the substance, or by his consenting to the administration of the substance by another."); 720 ILCS 5/9-3.3 (Individual commits drug induced homicide if the individual delivers a controlled substance "and any person's death is caused by the injection, inhalation, absorption, or ingestion of any amount of that controlled substance."). Subsection (d)(1) does not prohibit the defendant from ever arguing the user's voluntary actions broke the chain of causation. Instead, it effectively prohibits the defendant from only arguing that one particular voluntary decision by a user – to ingest the substance – breaks the chain of causation. Subsection (d)(2) of the DIH statute prohibits a defendant from asserting as a defense that the user died "as a result of using the controlled substance or controlled substance analog in combination with alcohol or another controlled substance or with any other compound, mixture, diluent, or substance." Ind. Code § 35-42-1-1.5. Yeary argues this subsection "prevents the defendant from presenting evidence that some other drug, and not the drug in question, caused the victim's death." (Appellant's Br. at 25.) But that is not the case. Subsection (d)(2) does not bar a defendant from arguing that another drug alone caused the death—not "the combination" of the distributed drug and the other controlled substance(s) or alcohol. For instance, where the State presents evidence that a person's death was caused by the combination of heroin distributed by a defendant and cocaine obtained by other means, subsection (d)(2) would not bar the defendant from presenting rebuttal evidence that the cocaine alone caused the person's death. It would only

prevent the defendant from arguing that the presence of the cocaine absolves him of culpability.

[27] Yeary also asserts whether the DIH statute will apply to a particular drug transaction is unforeseeable "because application of the statute is based on too many variables, nearly all of which arise from unpredictable future actions taken by the victim." (*Id.*) The State on the other hand contends it is reasonably foreseeable a user will use illegally purchased drugs in combination with other controlled substances or alcohol, and therefore, a defendant should not be allowed to escape criminal liability when the user ingests the drugs the defendant sold him in combination with other substances. However, as we explained above, the State's burden to prove the controlled substance sold by the defendant caused the victim's death remains intact under the DIH statute. As the State observed at oral argument, it is a defense to the DIH statute that something other than the drug the defendant sold the user resulted in the user's death or that the defendant did not sell a large enough quantity of drugs to the user to cause the user's death. In both instances, the essence of the defense is that the combination of the substances did not cause the death. Thus, subsection (d)(2), which only bars a defendant from claiming non-culpability because the death resulted from a combination of the distributed drug and other specified substances, would not apply. *See Sanchez v. State*, 749 N.E.2d 509, 521 (Ind. 2001) (holding statute prohibiting defendants from arguing voluntary intoxication prevented them from forming requisite mens rea was constitutional).

C. Vagueness

[28] The last of Yeary's constitutional arguments is that the DIH statute violates the Fourteenth Amendment because it is unconstitutionally vague.[8] "A fundamental aspect of our nation's jurisprudence is that criminal statutes must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden so that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Lock v. State*, 971 N.E.2d 71, 74 (Ind. 2012) (internal quotation marks omitted). Along these same lines, a criminal statute is not required to be free of all ambiguity. *Whatley v. State*, 928 N.E.2d 202, 206 (Ind. 2010). Rather, we will consider a statute to be unconstitutionally vague if: (1) the statute fails to provide sufficient notice to an ordinary person of what conduct is proscribed; or (2) the statute authorizes or encourages arbitrary or discriminatory enforcement. *Coleman*, 149 N.E.3d at 319. We will hold a statute unconstitutionally vague "only if it is vague as applied to the precise circumstances of the present case. Additionally, a defendant is not at liberty to devise hypothetical situations which might demonstrate vagueness." *Id.* (internal quotation marks and citation omitted).

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[8] Yeary also purports to raise a vagueness challenge pursuant to Article I, section 12 of the Indiana Constitution. The Indiana Supreme Court has never determined whether Article I, Section 12 of the Indiana Constitution provides greater protection against vague statutes than the United States Constitution. *Tiplick v. State*, 43 N.E.3d 1259, 1262 n 2 (Ind. 2015) (reserving for another day the question of whether the Indiana Constitution requires a different analysis of vagueness claims). Panels of this Court have determined a vagueness analysis is identical under the federal and state constitutions. *See Pava v. State*, 142 N.E.3d 1071, 1075 n.2 (Ind. Ct. App. 2020) (noting that line of authority), *trans. denied*. Applying that precedent here, we need not separately analyze Yeary's vagueness argument under the Indiana Constitution.

[29] Yeary contends a reasonable person has no way of knowing whether his conduct will fall under the DIH statute because the statute does not have an explicit temporal limitation and liability under the statute depends in part on the unpredictable future actions of another person. For instance, whether someone dies after using a controlled substance "is based on variables such as the user's health, any medical issues he may have, the amount of drug the user decides to take at any one time, other drugs the user may have ingested before, during, or after the drug in question, etc." (Appellant's Br. at 39.) Yeary further argues the DIH statute promotes arbitrary enforcement as evidenced by the fact that the State initially chose to charge him with Level 4 felony dealing in a narcotic drug only to later amend the charging information to include Level 1 felony dealing in a narcotic drug resulting in death. However, while users may have varied reactions after taking controlled substances, the DIH statute's parameters are clear and easy to understand. A person of ordinary intelligence reading the DIH statute would understand that it prohibits the knowing or intentional manufacture or delivery of a specified controlled substance that when ingested, kills the user. Ind. Code § 35-42-1-1.5.

[30] Several of our sister states have analyzed their DIH statutes and concluded they were not unconstitutionally vague. *See Faircloth v. Sterns*, 853 N.E.2d 878, 883 (Ill. Ct. App. 2006) (finding DIH statute was not constitutionally vague when it provided in relevant part: "A person commits drug-induced homicide . . . by unlawfully delivering a controlled substance to another, and any person's death is caused by the injection, inhalation, absorption, or ingestion of any amount of

that controlled substance."); *Commonwealth v. Proctor*, 156 A.3d 261, 268-69 (Pa. Super. Ct. 2017) (finding no unconstitutional vagueness where DIH statute provided in relevant part: "A person commits a felony of the first degree if the person intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance . . . and another person dies as a result of using the substance."); *State v. Christman*, 249 P.3d 680, 689 (Wash. Ct. App. 2011) (rejecting constitutional vagueness claim where DIH statute provided in relevant part: "A person who unlawfully delivers a controlled substance . . . which controlled substance is subsequently used by the person to whom it was delivered, resulting in the death of the user, is guilty of controlled substances homicide . . . a class B felony . . . .")

[31] Moreover, it is foreseeable that someone who receives a large amount of fentanyl or another opioid will die from an overdose. Regrettably, deaths from opioid overdoses are all too common. In 2019, nearly 50,000 people in the United States died from opioid-involved overdoses. Nat. Insts. of Health--Nat. Inst. on Drug Abuse, Opioid Overdose Crisis [Perma | Opioid Overdose Crisis | National Institute on Drug Abuse (NIDA)]. In 2021, over 1,000 Hoosiers died as the result of an opioid overdose. Ind. Dept. of Health, Ind. Drug Overdose Dashboard [Perma | Health: Overdose Prevention:] We agree with the State's sentiment that: "With drug overdose deaths a daily occurrence in Indiana, drug dealers can reasonably foresee that the drugs they deliver may result in a death, and that is only more so with respect to dealers of opioids, the

type of drug responsible for the majority of overdose deaths." (Appellee's Br. at 33.)

[32] Even though the State did not initially charge Yeary with Level 1 felony dealing in a narcotic drug resulting in death, it is common for the State to amend the charges against a defendant in the course of litigation, and the State's decision to do so in this case is not evidence of the arbitrary nature of the DIH statute. *See Kibbey v. State*, 733 N.E.2d 991, 996 (Ind. Ct. App. 2000) (recognizing the "well-established proposition" that when a defendant's conduct violates two or more criminal statutes, the prosecutor retains general discretion to decide which charges to bring). Therefore, we hold Indiana's DIH statute is not unconstitutionally vague. *See Price v. State*, 911 N.E.2d 716, 720 (Ind. Ct. App. 2009) (holding statute prohibiting cruelty to animals was not unconstitutionally vague because a person of ordinary intelligence would understand that repeatedly striking a small dog in the face and stomach with a belt violates the statute even though it exempted owners engaged in reasonable physical discipline from liability), *trans. denied*.

II. Trial Court's Denial of Yeary's Tendered Jury Instructions

A. Yeary's Proposed Jury Instructions

[33] Yeary argues the trial court erred in refusing his proposed jury instructions six and seven. Yeary's proposed preliminary instruction six stated:

> The concept of causation in criminal law is like that found in tort law. The criminal act must be both 1) the actual cause

> (sometimes called the "cause-in-fact"); and 2) the legal cause (sometimes called the "proximate cause").
>
> If there is more than one cause of the result, the Accused's action is the cause-in-fact if it is a "substantial factor" in bringing about the result.
>
> Legal or proximate cause is a distinct concept, speaking not to the physical relationship between the Accused's conduct and the result, but embodying a value judgment as to the extent of the physical consequences of an action for which a person should be responsible. Thus, proximate cause questions are often couched in terms of "foreseeability."
>
> The Accused is not criminally responsible for consequences that are unforeseeable. In Indiana, a result is seen as foreseeable if it is a "natural and probable consequence" of one's act.

(App. Vol. IV at 16.) Yeary's proposed preliminary instruction seven read:

> When an action of the victim . . . affects the chain of causation, foreseeability is again a factor. Such an occurrence is called [an] "intervening cause," and it becomes the overriding cause—breaking the chain of causation if it was not foreseeable.
>
> If an intervening or overriding cause helped bring about the result, the Accused is not criminally liable; it would be unfair to hold him responsible for the result.

(*Id*. at 17) (ellipses in original).

[34] Our standard of review regarding a claim of instructional error is well-settled:

> The purpose of jury instructions is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. In reviewing a trial court's decision to give a tendered jury instruction, we consider (1) whether the instruction correctly states the law, (2) is supported by the evidence in the record, and (3) is not covered in substance by other instructions. The trial court has discretion in instructing the jury, and we will reverse only when the instructions amount to an abuse of discretion. To constitute an abuse of discretion, the instructions given must be erroneous, and the instructions taken as a whole must misstate the law or otherwise mislead the jury. We will consider jury instructions as a whole and in reference to each other, not in isolation.

Murray v. State, 798 N.E.2d 895, 899-900 (Ind. Ct. App. 2003) (internal citations omitted). "A criminal defendant is entitled to have a jury instruction on 'any theory or defense which has some foundation in the evidence.'" *Hernandez v. State*, 45 N.E.3d 373, 376 (Ind. 2015) (quoting *Toops v. State*, 643 N.E.2d 387, 389 (Ind. Ct. App. 1994)).

[35] The State concedes both of Yeary's proposed instructions correctly stated the law. The text of the proposed instructions closely tracks our discussion of causation in *Bowman*, 564 N.E.2d at 313. Evidence in the record also supported giving the proposed instructions because Yeary challenged whether it was the drugs he sold Tyler that caused Tyler's death.[9] In his closing argument, Yeary

[9] The State attempts to draw a distinction between a challenge to whether Yeary was the source of the drugs that killed Tyler and a challenge to whether fentanyl was the cause of Tyler's death. However, given that the

referenced the Xanax bars found in Tyler's bedroom. He noted "fentanyl is showing up in counterfeit pills, in pills purchased off the street" and he argued the police prematurely narrowed in on him as the prime suspect. (Tr. Vol. IV at 12.)

[36] However, with respect to the third prong of our analysis, the State argues the proposed instructions were properly refused because other instructions given to the jury adequately covered the causation requirement. The State notes the trial court instructed the jury, in both the preliminary instructions and the final instructions, as to the elements the State was required to prove and the standard of proof the State had to meet:

> Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:
>
> 1. The Defendant, Justin Ryan Yeary
>
> 2. knowingly or intentionally
>
> 3. delivered
>
> 4. a controlled substance in violation of IC 35-48-4-1, said statute establishing that the crime of dealing in a narcotic drug, which is to knowingly or intentionally deliver a narcotic drug, to-wit:

State's theory of the case is that Yeary sold Tyler fentanyl and Tyler died as a result of consuming the fentanyl, we do not see any meaningful distinction, and thus conclude evidence supported giving Yeary's proposed instructions. *See Wilson v. State*, 842 N.E.2d 443, 448 (Ind. Ct. App. 2006) (holding evidence in the record supported giving tendered jury instruction), *reh'g denied*, *trans. denied*.

> fentanyl, which the court instructs you is classified by statute as a controlled substance in schedule II,
>
> 5. and that, when the controlled substance was used . . . inhaled, absorbed, or injected, resulted in the death of a human being who used the controlled substance.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of dealing in a controlled substance resulting in death, a Level 1 felony, charged in Count 1.

(App. Vol. IV at 64-65 & 175-76.) The trial court also instructed the jury during final instructions: "'Cause of death' is that event which initiates a chain of events, however short or protracted, that results in the death of an individual." (*Id*. at 188.) The State asserts that "[b]ecause ordinary persons understand what it means to say that one thing 'results in' another thing—and, specifically, understand that it means causation—there was no need for the trial court to give any further definition explaining the causation requirement." (Appellee's Br. at 40.)

[37] However, Yeary argues these instructions were insufficient because "[t]he instructions as a whole left the jury with the impression that 'but-for' and proximate causation were not required; or even if one or both were required, they were satisfied simply by the State showing that Tyler died after ingesting the drug." (Appellant's Br. at 45.) He also contends the "cause of death" instruction erroneously suggested "that any event that begins the chain of events leading to death is sufficient to prove the victim's death resulted from the

initiating act." (*Id.*) This instruction did not require the victim's death to be a reasonably foreseeable consequence of the defendant's action. In contrast, Yeary asserts his "proposed instructions explained that where there is more than one cause of the result (i.e., the death), the result was actually caused by the defendant's actions only where the defendant's actions were a substantial factor in bringing about the result." (Appellant's Reply Br. at 8.)

[38] As we explained above, the DIH statute requires the State to prove the defendant's conduct is both the proximate cause and the actual cause of the victim's death. We expect the jury to "rely on its collective common sense and knowledge acquired through everyday experiences[,]" but the trial court has a duty to define for the jury words "of a technical or legal meaning normally not understood by jurors unversed in the law." *Clemons v. State*, 83 N.E.3d 104, 108 (Ind. Ct. App. 2017) (internal quotations omitted), *trans. denied*. "Proximate cause" is such a concept not readily understood by those unversed in the law, which is why it is defined in Indiana Criminal Pattern Jury Instruction 14.3260.[10] Similarly, "intervening cause" is defined in Indiana Model Civil

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[10] Criminal Pattern Jury Instruction No. 14.3260 states:

> A person's conduct is legally responsible for causing [an injury] [property damage] [a death] if:
>
> (1) the [injury] [property damage] [death] would not have occurred without the conduct, and
>
> (2) the [injury] [property damage] [death] was a natural, probable, and foreseeable result of the conduct.
>
> This is called a "proximate cause."
>
> [There can be more than one proximate cause for an injury.]

Jury Instruction 303[11] and could be modified for use in a criminal context. Simply saying that ingestion of a controlled substance "resulted in the death of a human being who used the controlled substance" does not convey the concept of proximate causation to a lay juror. (App. Vol. IV at 64-65 & 175-76.) Likewise, saying, "'Cause of death' is that event which initiates a chain of events, however short or protracted, that results in the death of an individual" does not convey to a lay person that some event may break the chain of causation. (*Id.* at 188.) A lay person could reasonably, but erroneously, interpret these instructions to mean the State was only required to prove the victim's death followed the drug sale because "result" and "follow" are synonyms. Merriam-Webster Thesaurus [Perma | 114 Synonyms & Antonyms of RESULT - Merriam-Webster]. Therefore, the trial court erred by not giving Yeary's proposed instructions. *See New v. State*, 135 N.E.3d 619, 624 (Ind. Ct. App. 2019) (holding trial court abused its discretion in refusing defendant's proposed jury instruction on negligence because the difference between negligence and recklessness was not adequately explained to the jury), *reh'g denied*.

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[11] Indiana Model Civil Jury Instruction 303 states:

> Sometimes an unrelated event breaks the connection between a defendant's negligent action and the injury a plaintiff claims to have suffered. If this event was not reasonably foreseeable, it is called an "intervening cause."
>
> When an intervening cause breaks the connection between a defendant's negligent act and a plaintiff's injury, a defendant's negligent act is no longer a "responsible cause" of that plaintiff's injury.

[39] Nonetheless, we will not reverse a conviction because of an instructional error if the error is harmless, meaning the "conviction is clearly sustained by the evidence and the instruction would not likely have affected the jury's verdict." *Dixson v. State*, 22 N.E.3d 836, 840 (Ind. Ct. App. 2014), *trans. denied*. Yeary does not contest selling drugs to Tyler, and text messages from Tyler to Yeary indicate Tyler was using Yeary's product during the evening of February 8, 2019. However, Tyler references only using a small amount of Yeary's product. (*See* Tr. Vol. V at 111 ("Sniffed half a point . . . Id have spent like $30 to get where I'm at right now for $5-6[.]") (errors in original).) Also, several hours elapsed between when these text messages were sent and when Tyler died. Tyler had more Xanax pills than he was prescribed in his possession at the time of his death and more pills were missing from the prescription bottle found in Tyler's car than one would expect given how recently the prescription had been filled. Due to the ambiguity regarding precisely what drugs and in what quantities Tyler took over the time period leading up to his death, the jury's verdict likely turned on its understanding of the legally required causal connection between the drugs Yeary sold Tyler and Tyler's death. Therefore, the trial court's instructional error cannot be called harmless, and we reverse Yeary's conviction of dealing in a controlled substance resulting in death. *See Lee v. State*, 964 N.E.2d 859, 865 (Ind. Ct. App. 2012) (holding failure to give jury instruction on the presumption of innocence was reversible error), *trans. denied*.

B. Double Jeopardy

[40] Because we reverse Yeary's conviction for procedural error, we must determine whether the State presented sufficient evidence to sustain Yeary's conviction, as that issue impacts whether the State may retry Yeary. *See Lainhart v. State*, 916 N.E.2d 924, 939 (Ind. Ct. App. 2009) (reviewing sufficiency to determine whether defendant may be retried following reversal). Both the United States Constitution and the Indiana Constitution provide protections against double jeopardy. The Fifth Amendment to the United States Constitution declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb[.]" Likewise, Article I, Section 14 of the Indiana Constitution states: "No person shall be put in jeopardy twice for the same offense." However, these constitutional provisions do not prohibit retrial when a defendant's conviction is reversed on grounds other than sufficiency of the evidence. *Calvert v. State*, 14 N.E.3d 818, 823 (Ind. Ct. App. 2014). In general, when assessing the sufficiency of the evidence, we look at the evidence and the inferences therefrom in the light most favorable to the verdict. *Rodriguez v. State*, 714 N.E.2d 667, 670 (Ind. Ct. App. 1999), *trans. denied*. We do not reweigh the evidence or evaluate the credibility of the witnesses. *Id.*

[41] The parties do not dispute Yeary sold Tyler a product purported to be heroin on February 8, 2019, and Tyler died the next day. The State's theory is that Yeary sold Tyler fentanyl rather than heroin, and it was Tyler's ingestion of this more potent substance that ultimately led to his death. To support this theory, the State put forth evidence of text messages between Tyler and Yeary in which

Tyler praises Yeary's product and comments that its effect is more powerful than Tyler expected. The State also pointed to Tyler's autopsy in which Dr. Sozio concluded Tyler died from a lethal mix of fentanyl and prescription drugs, and that while Tyler had a high level of fentanyl in his system, Tyler did not have any heroin in his system. This evidence could permit a reasonable trier of fact to determine the drugs Yeary sold to Tyler were the actual and proximate causes of Tyler's death, and the State may choose to retry Yeary.[12] *See Matthews v. State*, 718 N.E.2d 807, 810-11 (Ind. Ct. App. 1999) (holding retrial was permissible on rape charge after conviction was reversed because of an instructional error when the State presented sufficient evidence in the original trial to sustain the defendant's conviction).

III. Trial Court's Exclusion of Text Message Evidence

[42] Despite our reversal of Yeary's conviction due to instructional error, we address Yeary's argument regarding the relevance of the text messages Tyler sent and received in the days preceding his death because of the likelihood the issue will present itself on retrial. *See Irvine v. Irvine*, 685 N.E.2d 67, 71 (Ind. Ct. App. 1997) (addressing whether trial court could award post-judgment interest because the issue was likely to appear on remand). During its case-in-chief, the State introduced Exhibit 39, a text conversation from February 8, 2019,

[12] As we reverse Yeary's conviction and remand the matter for further proceedings, we do not address Yeary's argument that his sentence is inappropriate in light of the nature of his offense and his character. *See Horseman v. Keller*, 841 N.E.2d 164, 167 n.1 (Ind. 2006) (declining to address issue on cross-appeal when case is resolved on other grounds).

between Tyler and Yeary. However, the trial court did not allow Yeary to introduce Defense Exhibits G and H. Exhibit G included a text conversation between Tyler and "Wes 2" centered on buying, selling, and trading drugs. Tyler texted "Wes 2" on February 8, 2019, indicating he misplaced some Xanax bars and discussed arranging for "Wes 2" to sell drugs to a new customer. Exhibit H included various text message conversations between Tyler and others in the days leading up to Tyler's death. These text conversations included Tyler lamenting to Kavensky and others the misplaced Xanax bars, and a conversation from February 8, 2019, in which Tyler texted Kavensky he was "[f]iendin[.]" (Tr. Vol. VI at 58.) Tyler also texted Kavensky: "I do still have that Tesla[13] for you." (*Id.* at 59.)

[43] Indiana Rule of Evidence 401 states: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Evidence of a victim's drug use is generally irrelevant, and even when relevant, the evidence is still subject to the prohibition of Indiana Rule of Evidence 403 against unfairly prejudicial evidence. *Pannell v. State*, 686 N.E.2d 824, 826 (Ind. 1997). A victim's drug use is relevant if it affected the victim's ability to observe, remember, or recount the subject matter of the victim's testimony. *Strunk v. State*, 44 N.E.3d 1, 4 (Ind. Ct. App. 2015), *trans. denied*. Likewise, a victim's drug use is admissible if it makes a fact of consequence more or less

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[13] The record is silent about what Tyler is referring to when he uses the term "Tesla".

probable. *Cf.* *Forgey v. State*, 886 N.E.2d 16, 22 (Ind. Ct. App. 2008) (holding evidence of victim's past drug use and former employment as a burlesque dancer was not relevant because it did not make any fact of consequence more or less probable).

[44] Yeary contends the text messages "not only supported [Yeary's] defense that police immediately assumed [Yeary] was the source of the fentanyl and failed to investigate other possible sources, but the evidence also supported [Yeary's] claim that they were the source of the fentanyl and not the substance Tyler purchased from [Yeary]." (Appellant's Br. at 48.) The State argues the texts are not relevant because "the texts do not actually show that Tyler bought or used any other drugs on February 8th." (Appellee's Br. at 46.) However, as Yeary notes in his reply brief:

> The State fails to consider the fact that Tyler could have used drugs on February 8th that he already had in his possession. . . The additional text message evidence, if presented to the jury, would have revealed that Tyler had multiple, overlapping conversations going that day, primarily about the use, purchase, and sale of various illicit drugs. The pressed Xanax bars and "Tesla" pill were not obtained from a pharmacy, as those text messages revealed, and were in Tyler's possession that day. This evidence would have provided the jury with a more complete picture of Tyler's actions that day and with at least two other possible sources of the fentanyl.

(Appellant's Reply Br. at 10-11.) As we explained above, the DIH statute requires the State to prove the controlled substance manufactured or delivered by the defendant was both the actual and the proximate cause of the victim's

death. The text messages point to potential alternate sources of the fentanyl Tyler ingested, and therefore, they affect the probability of whether the drugs Yeary sold Tyler proximately caused Tyler's death. Consequently, at least portions of Defense Exhibits G and H are relevant to the issue of causation.[14] *See Reliable Dev. Corp. v. Berrier*, 851 N.E.2d 983, 989 (Ind. Ct. App. 2006) (holding trial court committed reversible error by excluding testimony regarding plaintiff's prior back injuries because testimony was relevant to issue of causation of plaintiff's current condition), *reh'g denied*, *trans. denied*.

Conclusion

[45] The DIH statute requires the State to prove the drugs sold by the defendant were both the proximate cause and the actual cause of the victim's death and does not improperly inhibit a defendant's ability to contest such proof. We therefore reject Yeary's constitutional challenges. Nonetheless, we agree with Yeary that the text messages Tyler sent in the days immediately preceding his death are relevant to the question of whether the drugs Yeary sold Tyler caused Tyler's death. We also agree with Yeary that the trial court's jury instructions did not properly convey to the jury the necessity of finding Yeary's drugs were the actual cause and proximate cause of Tyler's death, which resulted in

[14] Admission of the exhibits at retrial is still contingent upon a proper foundation being laid, and we do not comment on whether such a proper foundation was laid before the trial court here because we reverse Yeary's conviction on other grounds. *See State v. Glaze*, 146 N.E.3d 1086, 1091 n.2 (Ind. Ct. App. 2020) (declining to address one of appellee's contentions when not necessary to resolve appeal), *trans. denied*.

reversible error. The State may retry Yeary if it so chooses because the State presented sufficient evidence for a reasonable jury to find Yeary guilty. We reverse and remand for further proceedings consistent with this opinion.

[46] Reversed and remanded.

Brown, J., and Weissmann, J., concur.