ATTORNEY FOR APPELLANT

Lori S. James
Law Office of Lori S. James, P.C.
Rensselaer, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Caroline G. Templeton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Ashley N. Garth,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 31, 2022

Court of Appeals Case No. 21A-CR-1415

Appeal from the Newton Superior Court

The Honorable Daniel J. Molter, Judge

Trial Court Cause No. 56D01-1912-MR-1281

Crone, Judge.

Case Summary

[1] Ashley N. Garth appeals her convictions for murder and conspiracy to commit murder. She asserts that the trial court committed reversible error by making certain evidentiary rulings and by denying her motion for mistrial. She also asserts that her convictions are unsupported by sufficient evidence and violate

Indiana's prohibition against double jeopardy. We conclude that the trial court did not abuse its discretion in its evidentiary and mistrial rulings and that her convictions are supported by sufficient evidence and do not violate double jeopardy. Therefore, we affirm.

Facts and Procedural History[1]

[2] In March 2019, Garth was in an intimate relationship with Garett Kirts. Kirts had also been in an "intimate relationship with [Nicole Bowen] for a few months." Tr. Vol. 3 at 24. Over the course of two months, Garth, Kirts, and Kirts's friend Jason Palladino had "a couple" of conversations about "getting rid" of Bowen. *Id*. at 30, 44. On March 29, 2019, Kirts, Bowen, and Talitha Beckley were at Palladino's house. *Id*. at 26. Palladino told Kirts that they had "to make a decision" that Bowen "has to go" and that "it's got to be done." *Id*. At that point, Kirts drove Bowen and Beckley in Bowen's car to a trailer in Kentland where Garth was. *Id*. at 26, 197.

[3] Once at the trailer, Bowen and Kirts sat on the couch and used methamphetamine. *Id*. at 27. Garth came out of a bedroom and "exchanged words" with Bowen, which escalated "into a fist fight." *Id*. Kirts stood up and "wrapped [Bowen] into a chokehold from behind until [she] collapsed." *Id*. Kirts yelled at Garth to hand him an extension cord, which she did. *Id*. Kirts tied the cord around Bowen's neck and handed it back to Garth. "[Garth]

[1] Garth's citations to the transcript are to the wrong pages, which hindered our review.

pulled on it so tight that the extension cord broke." *Id*. Garth helped Kirts lift up the couch, and Kirts tied the extension cord under it. *Id*. Kirts also then tied a scarf around Bowen's neck. *Id*. Kirts got a roll of tape and trash bags and taped Bowen up in a trash bag. *Id*. at 28. Kirts took the body to Bowen's car, drove the car to pick up a friend, and continued to drive around with his friend looking for a spot to dispose of Bowen's body. They saw an empty semitrailer and placed the body inside. *Id*. They then returned to the trailer and got high with Garth. *Id*.

[4] On March 30, 2019, the owner of the property on which the semitrailer was located visited his property. He saw a body inside the semitrailer and called 911. Police discovered Bowen's body wrapped in a blanket and secured with different types of tape. When the police removed the blanket the following day, they found a plastic bag over Bowen's head, her wrists taped together behind her back, and a scarf tied around her neck. Under the scarf, an electrical cord was tied around her neck. After the electrical cord was removed, ligature marks on Bowen's neck were visible. An autopsy indicated that the cause of death was neck compression and ligature strangulation. DNA testing indicated strong support for the proposition that Garth was a contributor to the DNA profile found on a cardboard tube discovered with Bowen's body, very strong support for the proposition that Garth was a contributor to the DNA on Bowen's fingernail scrapings, and limited support for the proposition that Garth was a contributor to the DNA profile found on the scarf tied around Bowen's neck.

Id. at 107-09. DNA testing was also performed on the electrical cord but was inconclusive. *Id*. at 106.

[5] In December 2019, the State charged Garth with murder, level 1 felony conspiracy to commit murder, and level 5 felony assisting a criminal. The State later amended the charging information to add level 5 felony involuntary manslaughter. A jury trial was held from May 17 to 21, 2021. Kirts testified for the State. During cross-examination, Garth sought to admit a letter Kirts wrote to her, which the trial court denied. As part of the State's case-in-chief, the State offered State's Exhibit 44, a videotaped police interview with Garth. The trial court admitted the exhibit over Garth's objection. After publication of Exhibit 44, the jury informed the trial court that they had difficulty hearing it. The trial court replayed Exhibit 44 over Garth's objection.

[6] During Garth's case-in-chief, she sought to call Beckley as a witness. Beckley had been subpoenaed, but she was not present. Garth read Beckley's deposition into the record. In rebuttal, the State sought to admit State's Exhibit 56, a videotaped police interview with Beckley. The trial court admitted Exhibit 56 over Garth's objection. After the exhibit was played for the jury, the prosecutor informed the trial court that Beckley had arrived while Exhibit 56 was being played. Garth moved to strike Beckley's deposition and Exhibit 56. The trial court denied the motion to strike but permitted Garth to call Beckley as a live witness. After Beckley testified, Garth moved for mistrial, which the trial court denied.

[7] The jury found Garth guilty of murder, conspiracy to commit murder, and assisting a criminal, and not guilty of involuntary manslaughter. The trial court sentenced Garth to concurrent terms of forty-eight years for her murder conviction, thirty years for her conspiracy conviction, and three years for her assisting a criminal conviction. This appeal ensued. Additional facts will be provided below.

Discussion and Decision

Section 1 – The trial court did not abuse its discretion in ruling on the admissibility of certain evidence.

[8] "Our standard of review for the admissibility of evidence is well established." *Whiteside v. State*, 853 N.E.2d 1021, 1025 (Ind. Ct. App. 2006).

> The admission or exclusion of evidence lies within the sound discretion of the trial court and is afforded great deference on appeal. We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. Errors in the admission or exclusion of evidence are considered harmless unless they affect the substantial rights of a party. To determine whether an error in the admission of evidence affected a party's substantial rights, we assess the probable impact of the evidence on the jury.

Id. (citations omitted).

Section 1.1 – The trial court did not abuse its discretion by excluding Kirts's letter to Garth.

[9] During Garth's cross-examination of Kirts, she sought to admit a letter that he wrote to her while they were incarcerated following their arrests. Tr. Vol. 3 at 36. The State objected, arguing that the letter was extrinsic evidence not admissible to impeach Kirts. *Id*. at 37. Garth asserted that the letter was admissible as a present sense impression under Indiana Evidence Rule 803(3), as a recorded recollection under Evidence Rule 803(5), or for impeachment of an adverse party under Evidence Rule 609. *Id*. During her offer to prove, Garth also asserted that the letter was admissible as a prior inconsistent statement regarding motive because it contradicted Kirts's earlier testimony as to motive. *Id*. at 39. The State continued to object to the admissibility of the letter. The trial court excluded the letter but permitted Garth to question Kirts about statements in the letter regarding motive. *Id*. at 40. Garth asked Kirts whether he had written a statement in the letter expressing that he killed Bowen to protect Garth and because his relationship with Bowen made Garth jealous. *Id*. at 41. Kirts admitted that he wrote that statement. *Id*. Garth also asked Kirts if he killed Bowen, but he testified repeatedly that both he and Garth killed Bowen. *Id*.

[10] On appeal, Garth contends that the trial court abused its discretion by excluding Kirts's letter because it was admissible under an exception to the hearsay rule. Hearsay is a statement not made by the declarant while testifying at trial that is offered to provide the truth of the matter asserted. Ind. Evidence

Rule 801(c). Hearsay is not admissible unless rules of evidence or other law provides otherwise. Ind. Evidence Rule 802.

[11] Specifically, Garth asserts that the letter was admissible as a recorded recollection pursuant to Evidence Rule 803(5). That rule allows admission of a record that "is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately[,] was made or adopted by the witness when the matter was fresh in the witness's memory[,] and accurately reflects the witness's knowledge." Garth maintains that Kirts did not recall the letter well enough to testify fully and accurately about it because, although he testified that it was a letter he wrote, he also testified that he could not recall the letter.

[12] Garth's focus on Kirts's memory of the letter is misplaced. Garth's expressed intent in seeking to admit the letter was to contradict Kirts's previous testimony regarding his motive for killing Bowen. Thus, it is not the letter itself, but the subject matter of the letter that is the relevant focus for purposes of Evidence Rule 803(5). Garth does not direct us to any testimony that Kirts did not recall his motive. In fact, Kirts testified in detail about the murder, and therefore his letter is not admissible as a recorded recollection. *See Marcum v. State*, 772 N.E.2d 998, 1002 (Ind. Ct. App. 2002) (explaining that victim's previous written statement to police was not admissible under Evidence Rule 803(5) because it was not offered to refresh her memory of the crime but was used to contradict her testimony).

[13] In addition, Evidence Rule 803(5) requires that the recorded recollection be "made or adopted by the witness when the matter was fresh in the witness's memory." Although the record does not reveal the specific date the letter was written, it was clearly written after both Kirts and Garth had been arrested and incarcerated. Thus, the letter was written weeks or months after Bowen's murder. Accordingly, we conclude that the trial court did not abuse its discretion in excluding Kirts's letter.[2]

Section 1.2 – The trial court did not abuse its discretion by replaying State's Exhibit 44.

[14] At trial, Garth objected to the admission of Exhibit 44 on the basis that it contained extraneous information that had nothing to do with the investigation of Bowen's murder. Tr. Vol. 2 at 205. The trial court admitted Exhibit 44 over Garth's objection and permitted its publication. Prior to its publication, the trial

---

[2] Garth also contends that the letter was admissible pursuant to Evidence Rule 803(3), which permits the admission of "[a] statement of the declarant's then-existing state of mind." On this point, Garth's sole argument is that "defense counsel clearly outline[d] that the letter contained statements of the declarant's then existing state of mind as to the plan and memory." Appellant's Br. at 11. Garth fails to develop this argument, and her failure to present a cogent argument results in waiver. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring that contentions in appellant's brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal); *Diaz v. State*, 158 N.E.3d 363, 369 n.1 (Ind. Ct. App. 2020) (concluding that defendant waived claim that his convictions violated double jeopardy under "very same act" rule by failing to develop an argument).

Garth also argues that the letter was admissible as evidence of motive pursuant to Evidence Rule 616. Evidence Rule 616 permits the use of evidence that a witness has a bias, prejudice, or interest for or against any party to attack the credibility of the witness. However, Garth did not present this argument to the trial court. Although Garth asserts that defense counsel notified the trial court that the letter concerned Kirts's motive, that was in the context of her argument that the letter was admissible as a prior inconsistent statement. Accordingly, we conclude that Garth has waived this argument because she did not raise it at trial. *See Shorter v. State*, 144 N.E.3d 829, 841 (Ind. Ct. App. 2020) ("[A]s a general rule, a party may not present an argument or issue on appeal unless the party raised that argument or issue before the trial court.") (quoting *Marshall v. State*, 621 N.E.2d 308, 314 (Ind. 1993)), *trans. denied*.

court instructed the jury, "I think the volume is right. By chance, if it's not, speak up. … If you're not hearing clearly what's being said, raise your hand." *Id*. at 208-09. Exhibit 44 was then played for the jury.

[15] In her police interview, Garth told police that on March 29, 2019, Kirts left her alone in the trailer for most of the day and returned around 11:00 p.m. with Bowen. *Id*. at 212-13. She explained that she wanted to fight Bowen because she knew that Bowen and Kirts had an intimate relationship. *Id*. at 209-10, 213. According to Garth, when she and Bowen began to fight, Kirts separated them and put Bowen in "a head lock" and would not let her go. *Id*. at 217. Garth explained that Kirts "wrapped [Bowen] up in tape and plastic and took her somewhere" and did not return until morning. *Id*. at 219, 226.

[16] After Exhibit 44 was played, the jurors informed the bailiff that they had difficulty hearing the exhibit. *Id.* at 249. The trial court told the jurors that it was going to replay the video, but very clearly instructed them that the court "was not emphasizing the value of the evidence one way or another, just that we have to get everybody to hear." *Id*. at 249-50. Garth objected to republishing Exhibit 44, alleging that it was unnecessary and that it unfairly emphasized the evidence. Tr. Vol. 3 at 50-51. Garth also asked the Court to repeat its previous instruction about replaying the video. *Id*. at 51. The court then instructed the jury, "The only reason this is happening is because of the audio and the important thing is you weigh all the evidence and examine it as you see fit. I'm not saying this is more important." *Id*. The trial court overruled Garth's objection and permitted the State to republish Exhibit 44. *Id*.

[17] On appeal, Garth contends that Exhibit 44 should not have been replayed because the jury was told that they should notify the court if they could not hear the video. She then states, "Defense had previously objected to the playing of the video and the Court still determined that the video should be replayed. Therefore, Garth was unfairly prejudiced when the trial court replayed the video after encountering technical difficulties." Appellant's Br. at 14.

[18] We observe that a trial court has a duty to "'manage and control' the proceedings which are conducted before it" and enjoys a "wide latitude of discretion" to carry out its duties. *Williams v. State*, 669 N.E.2d 1372, 1378 (Ind. 1996). Here, the trial court took appropriate steps when it was informed that the jurors could not hear the video properly. Before replaying the video, the trial court clearly instructed the jurors, not once, but twice, that it was replaying the video because they needed to be able to hear it and that the court was not emphasizing the evidence. We find no abuse of discretion.

Section 1.3 – Garth waived her argument that the trial court committed reversible error by admitting Exhibit 56.

[19] In Garth's case-in-chief, she sought to call Beckley as a witness. Tr. Vol. 3 at 116. Defense counsel informed the trial court that Beckley had been subpoenaed to testify but was still not present. *Id*. Defense counsel suggested that she read Beckley's deposition into the record. *Id*. at 117. The State indicated that it had no objection to the trial court finding Beckley unavailable. *Id*. Garth's counsel then read Beckley's deposition into the record.

[20] In her deposition, Beckley stated that on March 29, 2019, she went to the trailer with Kirts and Bowen. *Id*. at 122. She said she went straight to the bathroom, and when she came out, she saw Bowen slap Garth and Garth push Bowen. *Id*. at 122. Beckley explained that she went into a bedroom, closed the door, and fell asleep. *Id*. at 123. When she woke up the next day, she, Kirts, and Garth left the trailer together, and she did not see anyone else in the trailer. *Id*. at 124.

[21] On rebuttal, the State sought to admit Exhibit 56, Beckley's videotaped police interview. *Id*. at 140. Garth objected that it was inadmissible hearsay. *Id*. at 141. The State argued that because Beckley had been found unavailable, Exhibit 56 was admissible under Evidence Rule 804(b)(3) as a statement against interest. *Id*. The trial court admitted the exhibit over Garth's objection and permitted it to be published. *Id*. at 142.

[22] In her police interview, Beckley said that she, Kirts, and Bowen went to the trailer. *Id*. at 156. When they arrived, Beckley initially went to the bathroom and then went into a bedroom where Garth was. *Id*. at 157. Beckley stated that Garth was "riled up" because Kirts was not talking to her. *Id*. Garth left the bedroom, and Beckley heard slapping and thought it was Garth and Kirts. *Id*. at 158. Garth came back into the bedroom followed by Kirts, who yelled and screamed at Garth and "reached out and smacked [Garth]." *Id*. Kirts and Garth went back out to the living room, and Beckley heard more yelling. *Id*.

[23] Beckley stated that Garth returned to the bedroom. Beckley then heard stomping, heard Kirts saying "snitch[,]" and then "heard a pop." *Id*. at 159.

Beckley said that she left the bedroom and walked to the back door because she wanted to leave. When she was walking to the back door, "[Kirts] was tying a rope to the underneath – he – he had – he had Ashley pick up the chair on the end of the couch leg of the chair." *Id*. at 179. Kirts approached Beckley and told her to "sit down and smoke a bowl." *Id*. at 160. Beckley saw Bowen "on the living room floor. [Kirts] had a rope around her neck and it was tied to underneath of the couch." *Id*. at 161. Beckley returned to the bedroom and used methamphetamine. *Id*. at 160. Beckley said that she heard Kirts ask for tape and that he taped Bowen up and put her in the car. *Id*. at 161, 164. Beckley fell asleep and woke up the next morning. *Id*. at 166. She left the trailer with Kirts and Garth. *Id*. at 173. Beckley stated that she did not believe that Garth had any involvement in the murder. *Id*. at 177-78. Beckley thought that Garth helped with the trash bag and brought tape to Kirts but explained that she did not actually see Garth assist Kirts in doing anything and did not see Garth hand the trash bags or tape to Kirts. *Id*. at 178, 180-81.

[24] After publication of Exhibit 56 was complete, the prosecutor informed the trial court that they needed to address a matter outside the presence of the jury. *Id*. at 191. The prosecutor then disclosed that Beckley had arrived while Exhibit 56 was being played. *Id*. The prosecutor brought Beckley into the courtroom, and she told the trial court that she had arrived about an hour earlier. *Id*. at 192. Garth moved to strike both Exhibit 56 and Beckley's deposition under the best evidence rule because Beckley was now present. *Id*. at 193. The State argued that Beckley had arrived while the video was playing, and it would have been

error to not show the entire exhibit that had previously been admitted. *Id*. The trial court denied Garth's motion to strike but permitted Garth to call Beckley as a live witness. *Id*. at 193-94.

[25] Beckley testified that she, Kirts, and Bowen drove to the trailer. *Id*. at 197. When they arrived, Beckley went into the bathroom, and when she came out, Garth and Bowen were already fighting and slapping each other. *Id*. Beckley testified that she did not see anything else happen between Garth and Bowen. *Id*. Beckley stated that she went into a bedroom. *Id*. At one point, Garth came into the bedroom with a red face, and she was mad and said that Kirts had hit her. *Id*. at 197- 98. Kirts came into the bedroom and denied hitting Garth. *Id*. at 198. Garth and Kirts left the bedroom, and Beckley fell asleep. *Id*. When Beckley woke up, it was daylight, and she left the trailer with Kirts and Garth in Bowen's car. *Id*. at 199. Beckley testified that she did not see anything else happening in the trailer, did not recall witnessing Garth do anything else, and did not recall seeing Kirts do anything else. *Id*. at 198. Beckley also testified that she did not remember the police interview because she was high on methamphetamine. *Id*. at 199-200. The State cross-examined Beckley, and the jurors were permitted to ask questions. The trial court adjourned for the day.

[26] The following morning, defense counsel moved for mistrial, arguing that she had learned that Beckley was outside the courtroom for an hour and a half while Exhibit 56 was being played, and, had Beckley been brought in when she arrived, all the evidence admitted after her arrival would not have been admissible. *Id*. at 213-14. The prosecutor confirmed that about halfway through

Exhibit 56, he learned that Beckley had arrived. *Id*. at 214. The trial court denied Garth's motion for mistrial, explaining that it did not find ill intent on anyone's part and that the remedial measures it took to allow Beckley's live testimony was the best it could do under the circumstances. *Id*. at 215.

[27] Garth asserts that the trial court committed reversible error by admitting Exhibit 56 and denying her motion to strike it. Specifically, she contends that Exhibit 56 is not admissible as a statement against interest under Evidence Rule 804(b)(3). When a witness is unavailable, Evidence Rule 804(b)(3) permits admission of "[a] statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, ... [it] expose[d] the declarant to civil or criminal liability." However, a statement offered against the accused in a criminal case is inadmissible if it implicates both the declarant and the accused. Ind. Evidence Rule 804(b)(3).

[28] There is no dispute that Beckley was unavailable when Exhibit 56 was admitted. As for whether Beckley made statements that exposed her to civil or criminal liability, we note that prior to the interview, Beckley had been charged with assisting a criminal in connection with Bowen's murder. In the interview, Beckley admitted that she was present in the trailer, saw Bowen lying on the floor with a rope tied around her neck, and heard Kirts drag the body to the car, but did not call police. In addition, Beckley repeatedly stated that she used methamphetamine. These statements are facially incriminating. *See Hendricks v. State*, 162 N.E.3d 1123, 1132 (Ind. Ct. App. 2021) ("A statement against interest must be incriminating on its face to be admissible under this

exception."), *trans. denied*. Thus, admissibility of Exhibit 56 under Evidence Rule 804(b)(3) turns on whether Beckley made statements that implicated Garth in civil or criminal liability. However, Garth did not address this issue in either her objection to Exhibit 56 or in her motion to strike, which results in waiver of appellate review. *See Shorter v. State*, 144 N.E.3d 829, 841 (Ind. Ct. App. 2020) ("[A]s a general rule, a party may not present an argument or issue on appeal unless the party raised that argument or issue before the trial court.") (quoting *Marshall v. State*, 621 N.E.2d 308, 314 (Ind. 1993)), *trans. denied*.

[29] Waiver notwithstanding, Garth's argument that the admission of Exhibit 56 constitutes reversible error is unconvincing. Beckley's comments that Garth got trash bags and tape for Kirts and that Kirts had Garth lift the end of the couch so that Kirts could tie a rope underneath it implicate Garth in criminal activity and thus render Exhibit 56 inadmissible under Evidence Rule 804(b)(3). Although the trial court abused its discretion by admitting Exhibit 56, the error is harmless for several reasons.

[30] First, we observe that Exhibit 56 was partially exculpatory. Beckley stated that Kirts yelled and screamed at Garth and that she saw Kirts strike Garth. Significantly, Beckley said that Garth was in the bedroom with her when Beckley heard "stomping" and then a "pop," supporting an inference that Garth was with her when Kirts killed Bowen. Tr. Vol. 3 at 159. Beckley stated that she did not believe that Garth had any involvement with Bowen's murder. At no point, did Beckley say that she saw Garth take any action that would

have contributed to Bowen's death. Beckley's statements clearly implicate Kirts, rather than Garth, as the person who murdered Bowen.

[31] In addition, the majority of Beckley's statements was cumulative of other properly admitted evidence. The admission of the cumulative evidence was harmless. *See Pelissier v. State*, 122 N.E.3d 983, 988 (Ind. Ct. App. 2019) (concluding that admission of declarant's videotaped statements was harmless because they were cumulative of other properly admitted evidence), *trans. denied*; *see also Tobar v. State*, 740 N.E.2d 106, 108 (Ind. 2000) ("Evidence that is merely cumulative is not grounds for reversal.").

[32] Finally, there is other substantial evidence of Garth's guilt. Kirts testified that he, Garth, and Palladino had "conversations" about "getting rid" of Bowen. Tr. Vol. 3 at 30. Kirts also testified that Garth and Bowen got into a fist fight, Garth got him the electrical cord and after he tied it around Bowen's neck, Garth pulled on it until it broke, and Garth helped him lift the couch to tie the cord under it. The forensic evidence indicated that Garth's DNA was present in Bowen's fingernail scrapings, on a cardboard tube that was found with Bowen, and on the scarf around Bowen's neck. Beckley testified that Garth was really mad and that she saw Garth and Bowen engaged in a slapping fight. In Garth's police interview, she admitted that she wanted to fight Bowen and that they got into a fight. In light of this evidence, we are convinced that the probable impact of Exhibit 56 on the jury was sufficiently minor so as not to affect Garth's substantial rights. *See Hendricks*, 162 N.E.3d at 1132 (concluding that erroneous admission of evidence under Evidence Rule 804(b)(3) was harmless). Thus, the

error in admitting the evidence was harmless and would not require reversal of Garth's convictions.[3]

Section 2 – The trial court did not abuse its discretion by denying Garth's motion for mistrial.

[33] Garth asserts that the prosecutor's failure to interrupt the publication of Exhibit 56 immediately upon Beckley's arrival constituted prosecutorial misconduct that warranted the granting of her motion for mistrial. "Because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury, the trial court's determination of whether to grant a mistrial is afforded great deference on appeal." *Booher v. State*, 773 N.E.2d 814, 820 (Ind. 2002). "A mistrial is an extreme remedy that is only justified when other remedial measures are insufficient to rectify a situation." *Woods v. State*, 98 N.E.3d 656, 670 (Ind. Ct. App. 2018), *trans. denied*. "To prevail on appeal from the denial of a motion for mistrial, the appellant must establish that the questioned conduct 'was so prejudicial and inflammatory that [she] was placed in a position of grave peril to which [she] should not have been subjected.'"

[3] In support of her argument that admission of Exhibit 56 was not harmless error, Garth relies on *Payne v. State*, 854 N.E.2d 7 (Ind. Ct. App. 2006). However, *Payne* is clearly distinguishable. Although the *Payne* court determined that the admission of a co-conspirator's videotaped statement to police was not harmless error, the *Payne* court had already concluded that the erroneous admission of Payne's taped confession obtained in violation of her *Miranda* rights required reversal of her convictions. *Id.* at 17, 23. In addition, we note that unlike Garth, Payne objected at trial that the videotaped statement was inadmissible because it inculpated her. *Id.* at 22.

Mickens v. State, 742 N.E.2d 927, 929 (Ind. 2001) (quoting *Gregory v. State*, 540 N.E.2d 585, 589 (Ind. 1989)).

[34] When reviewing a claim of prosecutorial misconduct, "we first determine whether the prosecutor engaged in misconduct and then consider whether, under all of the circumstances, the prosecutor's misconduct placed the defendant in a position of grave peril to which [she] should not have been subjected." *Rodriguez v. State*, 795 N.E.2d 1054, 1058 (Ind. Ct. App. 2003), *trans. denied*. Whether a prosecutor committed misconduct is determined "by reference to case law and the Rules of Professional Conduct." *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). "The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct." *Id*.

[35] Garth asserts that the prosecutor violated his duty of candor. We observe that all attorneys are officers of the legal system and have a duty of candor toward tribunals. Ind. Professional Conduct Rule 3.3. Professional Conduct Rule 3.3 provides in relevant part that a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact previously made to the tribunal by the lawyer.

[36] There is no dispute that the parties agreed that Beckley was unavailable and proceeded accordingly. Garth read Beckley's deposition into evidence and rested her case-in-chief. The State then began its rebuttal. The trial court admitted Exhibit 56 over Garth's objection and permitted its publication. While

the Exhibit 56 was being played, the prosecutor was informed that Beckley had arrived. The prosecutor waited until publication of the exhibit was completed and then immediately informed the trial court of her arrival. The prosecutor explained that he believed it would be error to interrupt the publication of the exhibit. The trial court found no ill intent on behalf of the prosecutor. Under these circumstances, we conclude that the prosecutor did not violate his duty of candor to the tribunal by waiting until publication was complete before informing the court of Beckley's arrival. Furthermore, the remedial measures the trial court took under these unusual circumstances, by allowing Garth to present Beckley's live testimony over the State's objection, preserved Garth's right to a fair trial. Accordingly, the trial court did not abuse its discretion by denying Garth's motion for mistrial.

Section 3 – Garth's murder and conspiracy convictions are supported by sufficient evidence.

[37] In reviewing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of witnesses, and we consider only the evidence that supports the judgment and the reasonable inferences arising therefrom. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). It is "not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)). "We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt." *Bailey*, 907 N.E.2d at 1005.

[38] Garth's argument consists of three bald assertions: there was no evidence of an agreement to support her conspiracy conviction; any evidence that supports the convictions was admitted in violation of Indiana law; and but for the admission of improper evidence, there would have been no evidence to support the convictions. There is no development of these contentions and no citation to the record or case law. As such, Garth has failed to present a cogent argument, and therefore this issue is waived. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring that contentions in appellant's brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal); *Diaz v. State*, 158 N.E.3d 363, 369 n.1 (Ind. Ct. App. 2020) (concluding defendant waived claim that his convictions violated double jeopardy under "very same act" rule by failing to develop an argument).

[39] Waiver notwithstanding, Garth's argument is unavailing. To convict Garth of murder, the State was required to prove beyond a reasonable doubt that Garth knowingly or intentionally killed Bowen. Appellant's App. Vol. 2 at 16; Ind. Code § 35-42-1-1. To convict Garth of conspiracy to commit murder, the State was required to prove beyond a reasonable doubt that Garth, with intent to commit murder, agreed with another person to commit murder and performed an overt act in furtherance of the agreement, namely, helped Kirts strangle Bowen. Appellant's App. Vol. 2 at 17; Ind. Code § 35-41-5-2.

[40] In her reply brief, Garth concedes that Kirts's testimony was evidence of her involvement with Bowen's murder. Reply Br. at 9. An accomplice's testimony is by itself sufficient to sustain a conviction. *Herron v. State*, 808 N.E.2d 172, 176

(Ind. Ct. App. 2004), *trans. denied*. "The fact that the accomplice may not be completely trustworthy goes to the weight and credibility of his testimony, something that is completely within the province of the jury and cannot be reviewed on appeal." *Id*. Further, as we stated in Section 1.3 above, there was evidence in addition to Kirts's testimony of Garth's involvement with Bowen's murder. We conclude that the evidence was sufficient to establish that Garth knowingly or intentionally killed Bowen and that Garth and Kirts agreed to kill Bowen and committed an overt act in furtherance of their agreement. *See* Ind. Code §§ 35-42-1-1, 35-41-5-2.

Section 4 – Garth's convictions do not violate double jeopardy.

[41] Garth contends that her convictions violate Indiana's prohibition against double jeopardy. We review this claim de novo. *Wadle v. State*, 151 N.E.3d 227, 237 (Ind. 2020). Our supreme court has explained that "[s]ubstantive double-jeopardy claims principally arise in one of two situations: (1) when a single criminal act or transaction violates multiple statutes with common elements, or (2) when a single criminal act or transaction violates a single statute and results in multiple injuries." *Powell v. State*, 151 N.E.3d 256, 263 (Ind. 2020). In either circumstance, the dispositive question is one of statutory intent. *Wadle*, 151 N.E.3d at 248. Garth's claim implicates the first situation.

[42] *Wadle* set forth a multi-step analysis to evaluate substantive double jeopardy claims that arise when, as here, a single criminal act implicates multiple statutes with common elements. *Id*. at 235. The first step is to determine whether the

statutes, either explicitly or by unmistakable implication, allow for multiple punishments. *Id*. at 248. If the statutes allow for multiple punishments, there is no double jeopardy violation, and our inquiry ends. *Id*. If the statutes are unclear, we apply our included-offense statutes. *Id*. (citing Ind. Code § 35-31.5-2-168). If either offense is included in the other, either inherently or as charged, we then consider whether the defendant's actions are "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Id*. at 249. If the facts show only a single crime, judgment may not be entered on the included offense. *Id*. at 256.

[43] Here, Garth was charged with murder and conspiracy to commit murder. Appellant's App. Vol. 2 at 16-17. Thus, our first task is to determine whether these statutes either explicitly or by unmistakable implication allow for multiple punishments. "A person who knowingly or intentionally kills another human being" commits murder. Ind. Code § 35-42-1-1. "A person conspires to commit a felony when, with intent to commit the felony, the person agrees with another person to commit the felony." Ind. Code § 35-41-5-2(a). To obtain a conviction for conspiracy, the State "must allege and prove that either the person or the person with whom he or she agreed performed an overt act in furtherance of the agreement." Ind. Code § 35-41-5-2(b).

[44] The State asserts that the "conspiracy statute permits by 'unmistakable implication' multiple punishments: one for agreeing to commit the crime and another for actually committing the crime. Although the conspiracy offense is defined by reference to the offense itself, it contemplates a separate punishment

for planning to commit the offense and actually committing the offense." Appellee's Br. at 23. We agree. In addition to the statutes themselves, we find support for the proposition that the legislature intended multiple punishments in Indiana Code Section 35-41-5-3, the statute immediately following the attempt and conspiracy statutes. Section 35-41-5-3 explicitly prohibits convictions for both a conspiracy and an attempt with respect to the same underlying crime. It also prohibits convictions for both a crime and an attempt to commit the same crime. *Id*. Notably, however, it does not prohibit convictions for both a crime and a conspiracy to commit the same crime. If the legislature wanted to prohibit convictions for both a crime and a conspiracy to commit that same crime, it surely would have included such language in Section 35-41-5-3. *See N.D.F. v. State*, 775 N.E.2d 1085, 1088 (Ind. 2002) ("[I]t is just as important to recognize what the statute does not say as it is to recognize what it does say."). We conclude that the murder and conspiracy statutes allow for multiple punishments, and consequently Garth's convictions do not violate double jeopardy. Based on the foregoing, we affirm Garth's convictions.

[45] Affirmed.

Bradford, C.J., and Tavitas, J., concur.