MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Austin Augustine Mendez,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 24, 2023

Court of Appeals Case No. 23A-CR-121

Appeal from the Lake Superior Court

The Honorable Samuel L. Cappas, Judge

Trial Court Cause No. 45G04-1807-MR-12

Memorandum Decision by Judge Weissmann
Judges Riley and Bradford concur.

Weissmann, Judge.

[1] Austin Mendez attacked and repeatedly stabbed the mother of his children, L.L., after she refused to have sex with him. At the time, L.L. was nearly 30 weeks pregnant with their second child, I.L. Although L.L. survived, I.L. died following his premature birth a week later. The State charged Mendez for the murder of I.L. and attempted murder of L.L., and a jury found Mendez guilty of both offenses. Mendez now appeals his murder conviction, arguing that the trial court abused its discretion in instructing the jury. Finding no reversible error, we affirm Mendez's convictions but remand to the trial court to vacate his lesser-included offenses.

Facts

[2] L.L. and Mendez met in 2011 and had a daughter together. Over the next few years, Mendez ceased contact with his daughter and, at least once, battered L.L. severely enough to fracture her arm. But, for the sake of their daughter, Mendez and L.L. reconciled. L.L. became pregnant with Mendez's son sometime near the end of 2016.

[3] By August 2017, despite being nearly 30 weeks along and visibly showing, L.L. had not yet disclosed to Mendez that she was pregnant with their son. One day, Mendez contacted L.L. and asked to meet her, saying he wanted to "do some things for his daughter." Tr. Vol. III, pp. 101. L.L. agreed and met with Mendez at a gas station. The two smoked marijuana together and walked into a nearby alley where Mendez told L.L. he wanted to have sex with her. When

L.L. refused, Mendez pushed her inside an abandoned building and attacked her.

[4] Mendez stabbed L.L. multiple times in the stomach, chest, and thigh with a knife. L.L. managed to get away from Mendez and eventually collapsed outside the building. A passerby found L.L. lying on the ground and called 911. While en route to the hospital, L.L. went into cardiac arrest for six minutes before paramedics reestablished her pulse. It took L.L. two days to regain consciousness.

[5] L.L. delivered her son, I.L., a couple of days later. He was born with "irreversible brain damage" that his physician believed stemmed from a lack of oxygen while L.L. was in cardiac arrest. Tr. Vol. IV, p. 76. Although I.L. was at first placed on a ventilator, it became apparent that he had no chance of recovery. I.L. was taken off life support and died within an hour. An autopsy noted no abnormalities besides brain damage consistent with a lack of oxygen.

[6] The State charged Mendez with two counts of murder for I.L.'s death: one alleging Mendez caused I.L.'s death and the other alleging Mendez caused the death of a viable fetus. The State also charged Mendez with attempted murder, a Level 1 felony, and aggravated battery, a Level 3 felony, for his attack against L.L.

[7] At Mendez's jury trial, the State proposed a jury instruction ("life support instruction") specifying that the removal of life support does not constitute an intervening cause to murder. Mendez objected on the grounds that the life

support instruction was duplicative and infringed on the jury's ability to determine the law and facts. The trial court overruled the objection and gave the instruction.

[8] Mendez was found guilty on all counts. The trial court convicted Mendez on all four counts but merged the two counts of murder together and the aggravated battery with the attempted murder conviction.[1] It sentenced Mendez to consecutive terms of imprisonment of 60 years for murder and 35 years for attempted murder.

Discussion and Decision

[9] Mendez argues that the trial court abused its discretion in giving the life support instruction because it was based on language from an appellate opinion involving sufficiency of the evidence review.[2] He also alleges that the instruction invaded the role of the jury to decide the law and facts.

[10] Trial courts have broad discretion in instructing the jury. *McCowan v. State*, 27 N.E.3d 760, 763 (Ind. 2019). "When a trial court's instruction to the jury is challenged as erroneous, we consider 'whether the instruction (1) correctly

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[1] The record is admittedly opaque as to exactly what happened with Mendez's convictions. The State contends that the trial court convicted Mendez for one count of murder and attempted murder and "merged" the other counts without entering convictions. Appellee's Br., p. 4. The transcript from Mendez's trial and the sentencing order both seemingly support this interpretation. Tr. Vol. V, p. 100;.App. Vol. III, p. 166. But the actual abstract of judgment describes the merged counts as "Convictions." App. Vol. III, p. 168. We take the abstract of judgment at its word and find that the trial court entered convictions on all four counts and, after the fact, merged the lesser-included offenses into the greater.

[2] Although the State would have us waive Mendez's argument on this point for failure to raise this argument before the trial court, we decline to do so.

states the law, (2) is supported by the evidence in the record, and (3) is covered in substance by other instructions.'" *LaPorte Cmty. Sch. Corp. v. Rosales*, 963 N.E.2d 520, 523 (Ind. 2012) (quoting *Wal-Mart Stores, Inc. v. Wright*, 774 N.E.2d 891, 893 (Ind. 2002)). "We reverse the trial court only if the instruction resulted in prejudice to the defendant's 'substantial rights.'" *Batchelor v. State*, 119N.E.3d 550, 554 (Ind. 2019) (quoting *Hernandez v. State*, 45 N.E.3d 373, 376 (Ind. 2015)); *see* Ind. Appellate Rule 66(A).

[11] The life support instruction comprised two paragraphs:

> It is the rule of homicide law that a defendant is responsible for the death of the decedent if the injuries inflicted contribute either mediately or immediately to the death. In order for an intervening cause to break the chain of criminal responsibility, it must be so extraordinary that it would be unfair to hold the defendant responsible for the actual result.
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> Where life support is removed because the victim suffered irreversible cessation of [circulatory and respiratory functions; or] irreversible cessation of all functions of their entire brain, the removal of life support is not an intervening cause that relieves the killer from the inexorable consequences of his or her actions.

App. Vol. III, p. 122 (brackets in original). Both parties agree that the second paragraph in this instruction—with the exception of the bracketed language—tracked language in an opinion by our Supreme Court, *Ewing v. State*, 719 N.E.2d 1221, 1225 (Ind. 1999). The bracketed language, which was added by the State, echoes language of Indiana's Uniform Death Act, Ind. Code § 1-1-4-3(a).

[12] Crafting jury instructions from verbatim language in an appellate decision is discouraged. *Batchelor v. State,* 119 N.E.3d 550, 563 (Ind. 2019). This is particularly so when the challenged instruction stems from a case involving appellate review of the sufficiency of the evidence. *Id.* In such a situation, the challenged instruction "will 'rarely, if ever' be an appropriate basis for a jury instruction" because appellate review of the sufficiency of the evidence "is fundamentally different." *Keller v. State*, 47 N.E.3d 1205, 1208 (Ind. 2016) (quoting *Garfield v. State*, 74 Ind. 60, 64 (1881)).

[13] Assuming arguendo that this instruction should not have been given, we turn to whether Mendez suffered any violation of his substantial rights because of it. He did not.

[14] To convict Mendez of murder, the State needed to prove that he "knowingly or intentionally kill[ed] another human being." Ind. Code § 35-42-1-1(1). Because the victim, I.L., did not die for around two weeks following Mendez's attack, and was on life support until his death, the State proposed jury instructions on proximate and intervening causes. These instructions informed the jury that:

> A person's conduct is legally responsible for causing a death if:
> (1) the death would not have occurred without the conduct, and
> (2) the death was a natural, probable, and foreseeable result of the conduct. This is called a "proximate cause."
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> ***
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> An intervening cause is an independent force that breaks the causal connection between the actions of the defendant and the injury.

App. Vol. III, pp. 120-21. Mendez does not allege that these instructions contained any error.

[15] Nonetheless, Mendez contends that the life support instruction improperly emphasized to the jury how to apply the proximate and intervening cause instructions to the facts before it. He likens this situation to *Keller v. State*, in which our Supreme Court reversed two convictions for burglary after the trial court erroneously gave a jury instruction that defined burglary based on the factual context of an Indiana Court of Appeals opinion. 47 N.E.3d at 1207-10. There, the instruction was "misleading," consequently "invad[ing] the province of the jury" and thus erroneous and prejudicial. *Id.* at 1209; *see also McQuinn v. State*, 197 N.E.3d 348, 351-53 (Ind. Ct. App. 2022) (collecting cases).

[16] Standing alone, the life support instruction might violate the jury's role under the Indiana Constitution to determine the law and facts. Ind. Const. art. 1, § 19. Yet jury instructions are read and reviewed not in isolation, but "as a whole." *Isom v. State*, 31 N.E.3d 469, 485 (Ind. 2015). And here the jury was instructed of its "right to determine both the law and the facts." App. Vol. III, p. 107. The jury also knew "to consider all the instructions together" and to "not single out any certain sentence or any individual point or instruction and ignore the others." *Id.* at 108.

[17] Furthermore, the State presented uncontroverted evidence showing that Mendez murdered I.L. There were no allegations that someone else committed the attack on L.L., and it is undisputed that L.L. was visibly pregnant with I.L.

when Mendez stabbed her multiple times—including in the stomach. Additionally, the expert testimony from I.L.'s attending physicians sufficiently established that Mendez's actions proximately caused I.L. irreversible brain damage that ultimately led to his death. This evidence was "sufficient enough to overcome the presumption of prejudice that applies to our analysis of jury instructions for harmless error." *Batchelor*, 119 N.E.3d at 562.

[18] All in all, we find this case tantamount to our Supreme Court's decision in *Batchelor v. State*. There, the challenged instruction "fell short" of reversible error because "the jury charge, as a whole, cured the instructional defect, and because the evidence clearly sustained the defendant's conviction." *Batchelor*, 119 N.E.3d at 553. Thus, the Court found no reversible error. *Id.*; *cf. McQuinn*, 197 N.E.3d at 353 (finding erroneous jury instruction "prejudiced [defendant's] substantial rights" where appellate court was "not completely confident the jury would have found [defendant] guilty if it had been properly instructed . . . .").

[19] Finding no reversible error, we affirm Mendez's convictions.

II. Merger

[20] Lastly, we sua sponte address the trial court's merger of Mendez's murder convictions and his convictions for attempted murder and aggravated battery. The abstract of judgment lists "Conviction Merged" as the disposition for the second of Mendez's murder charges and the aggravated battery charge. App. Vol. III, p. 168. But simply merging the offenses was not enough to resolve the obvious double jeopardy concerns. *See, e.g., Owens v. State*, 206 N.E.3d 1187,

1190-91 (Ind. Ct. App. 2023), *trans. denied*, 211 N.E.3d 1013 (Ind. 2023); *Spry v. State*, 720 N.E.2d 1167, 1170 (Ind. Ct. App. 1999) ("Merging, without also vacating [lesser included] convictions, is not sufficient."). Although some evidence exists that the trial court did not intend to convict Mendez of these charges, we take the abstract of judgment at its word.

[21] Accordingly, while we affirm Mendez's convictions, we remand this case to the trial court to issue a new abstract of judgment listing Counts II and IV as vacated—not merged.

Riley, J., and Bradford, J., concur.