

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Anthony E. Custer,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff.

August 31, 2022

Court of Appeals Case No.
21A-CR-2860

Appeal from the Whitley Circuit
Court

The Honorable Matthew J.
Rentschler, Judge

Trial Court Cause No.
92C01-2105-F1-579

Pyle, Judge.

Statement of the Case

- [1] Anthony Custer (“Custer”) appeals his conviction, following a jury trial, for Level 1 felony attempted murder.¹ Custer argues that there was insufficient evidence to support his conviction. Concluding that there was sufficient evidence to support his conviction, we affirm the trial court’s judgment.
- [2] We affirm and remand.

Issue

Whether there is sufficient evidence to support Custer’s conviction.

Facts

- [3] Custer and Beth Argerbright (“Argerbright”) were in a long-term relationship that spanned at least a decade. During this relationship, Argerbright and Custer had been married and divorced. In early 2020, Argerbright agreed to be a confidential informant for the Whitley County Drug Task Force (“the DTF”). Argerbright acted as a confidential informant during multiple controlled buys where Argerbright purchased methamphetamine from Custer. As a result of her participation with the DTF, the DTF arrested Custer and the State charged him with Level 2 felony dealing in methamphetamine in March 2020. Custer posted bond in May 2020 but was remanded to custody in October 2020 after

¹ IND. CODE § 35-42-1-1; I.C. § 35-41-5-1.

the trial court had revoked his bond. Custer was aware that Argerbright was the informant who had helped the DTF gather evidence against him.

[4] In March 2021, Custer met Joshua Craig (“Craig”) in the Whitley County Jail. Custer and Craig became friends. Custer began talking to inmates about the specifics of his case and his anger with Argerbright. In early April 2021, Custer began to talk with Craig about his case. Specifically, Custer told Craig that he wanted to kill Argerbright. Custer explained that he needed to find someone who would be willing to kill Argerbright for money and that other inmates had offered names of people who might be able to help. Craig, who wanted to learn if Custer was serious or not, offered a fictional person to Custer who could help Custer kill Argerbright. Craig explained that his cousin Trent Smith (“Smith”) would be willing to kill Argerbright for \$3,500. When Custer seemed agreeable to making a plan, Craig was alarmed and reached out to the jail staff in order to warn them about Custer’s intentions.

[5] The jail staff, after briefly talking with Craig, connected him with Whitley County Sheriff’s Department Detective Cory Patrick (“Detective Patrick”). Detective Patrick, after a brief talk with Craig, provided Craig with a recording device. Detective Patrick instructed Craig to record Custer if Custer spoke about attempting to hire someone to kill Argerbright. Craig returned the recording device the next day and told Detective Patrick that Custer no longer wanted to kill Argerbright.

[6] In May 2021, Custer again began talking about wanting to find someone to help him kill Argerbright. In response, Craig reached out to Detective Patrick once more. Detective Patrick, through the jail staff, provided Craig with another recording device. Detective Patrick explained to Craig that Craig should record Custer if he started to talk about a specific plan to kill Argerbright.

[7] Later that month, Craig met with Custer alone. Craig and Custer placed a towel over the window of the cell. Then, Craig activated the recording device hidden in his shoe and began to review the plan Custer had created to kill Argerbright. In this recording, Custer explained how Craig should instruct Smith to kill Argerbright. Custer told Craig that he should have Smith reach out to Argerbright and offer her some methamphetamine. However, Custer told Craig that Smith should mix some fentanyl into the methamphetamine before giving it to Argerbright. Custer explained that “it needs to have some fatty in it.” (State’s Ex. 1). When Craig asked if Smith should use only methamphetamine, Custer explained that “that won’t kill [Argerbright], [Argerbright has] tried.” (State’s Ex. 1). Custer explained that Smith needed to mix fentanyl with methamphetamine, or just use pure fentanyl, because that would do the job quicker. When asked about how much fentanyl to use, Custer explained that Smith must “use a half of a gram or enough to do the job.” (State’s Ex. 1). Custer continued by stating, “[i]f [Smith] can’t do that, I don’t want him to even try.” (State’s Ex. 1). Custer emphasized that “[Smith’s] gotta do it right the first time or fucking forget it. I don’t want to spend \$500 to get it done almost[.]” (State’s Ex. 1).

[8] Craig next asked Custer what Smith should do with Argerbright after giving her the methamphetamine and fentanyl mixture. Custer replied, “boot [Argerbright] out on a road somewhere, [a] gravel road or something that’s hardly ever traveled. They’ll find [Argerbright’s] fatass dead. They’ll suspect foul play but do an autopsy and find out that [Argerbright] overdosed.” (State’s Ex. 1). Custer suggested Elkhart as a potential location to leave Argerbright’s body. He also explained that Smith should not leave Argerbright anywhere near her home because her parents may have placed cameras outside. Furthermore, in the recording, Custer angrily stated:

[Argerbright] brought this shit on herself bro by fucking putting me here. That’s how I see it. [Argerbright] is getting everything that [Argerbright has] got coming to that fat bitch. [Argerbright] quit answering my fucking phone calls. [Argerbright] quit putting money on my books. [Argerbright is] out getting high, sucking dick, fucking whoever. Fuck you bitch. You could have done all that shit and not put me here. But no, you had to fucking put me here. Put me in a position, you fat fucking ignorant bitch. I told [Argerbright] once again you did some shit [and] you didn’t think it all the way through. It seems to be a fucking habit of [Argerbright’s].

(State’s Ex. 1). Custer also told Craig that he “want[ed] [Argerbright] to pay the piper” and that he “want[ed] [Argerbright] to fucking pay.” (State’s Ex. 1).

[9] Custer and Craig agreed that Custer would ask his nephew and power of attorney, Troy Tracy (“Tracy”), to place \$400 on Craig’s commissary account. Custer explained to Craig that he would use his nephew in order to “put a degree of separation between [us][.]” (State’s Ex. 1). Custer instructed Craig to

take the \$400 that Tracy had put on Craig's commissary account and give it to Smith, who would then use the money to buy the fentanyl and overdose Argerbright. Custer explained to Craig that he would pay Smith the remaining \$3,000 after Smith had killed Argerbright and he had been released from jail. At multiple points during the conversation, Craig asked Custer if he was sure about doing this. Custer consistently replied in the affirmative, stating "100%" and "all in bro." (State's Ex. 1). When Craig asked Custer about when they should start Custer's plan, Custer replied, "[i]t's gotta be soon because [the prosecutor] might bring me that deal by [next week][.]" (State's Ex. 1). Custer continued by saying, "[a]s long as [Argerbright]'s dead, I'll be out soon, like real soon." (State's Ex. 1). After this conversation, Craig returned the recording device to Detective Patrick.

[10] Later that week, Custer asked Tracy to put \$400 on Craig's commissary account in order to pay for a toolbox. Detective Patrick, who had reviewed the recording that Craig had given him, began monitoring Craig's commissary account. When Detective Patrick saw the money come into Craig's account, he intercepted the transaction.

[11] In May 2021, the State charged Custer with Level 1 felony attempted murder and Level 2 felony conspiracy to commit murder. In November 2021, the trial court held a jury trial. During this trial, the jury heard the facts as set forth above. Additionally, Craig testified that Custer became more serious about killing Argerbright as his Level 2 felony dealing case continued to progress. Craig testified that Custer believed that the State would drop the charges against

him if Argerbright was dead. Craig also testified that Custer had made comments “probably every day” about wanting Argerbright dead. (Tr. Vol. 2 at 202). Craig also testified that Custer had given him only \$400 because Custer had previously given Craig \$100. Craig further testified that Custer had told him to hurry and to be careful about what he said on the jail phone with Smith. Finally, Craig testified that he never prompted Custer to develop a plan to kill Argerbright or initiated any conversation about Argerbright with Custer.

[12] Argerbright testified that while Custer was out on bond from May 2020 to October 2020, she and Custer had seen one another and been intimate during this time period. However, Argerbright also testified that she had been worried about her safety after she had been told that Custer would be out on bond. Additionally, Tracy testified that he had been Custer’s power of attorney. Tracy also testified that Custer had asked him to put \$400 in Craig’s commissary account to pay for a toolbox. Tracy further testified that he had taken \$400 to the Whitley County Jail and had placed the money on Craig’s account.

[13] In his defense, Custer testified that Craig had initiated the conversations about Argerbright. Custer also testified that on the day of the recording and in the days following it, he had asked Craig for the money back. However, Craig refused. Custer further testified that the money he had sent to Craig’s commissary account had been for a toolbox that was valued at \$999. Custer testified that he had been planning to give this toolbox to Tracy for helping him.

Custer further testified that he had never received the toolbox that he had purchased from Craig.

[14] Custer also testified that he had never wanted Argerbright to be killed. He stated that he “let [his] anger get the best of [him] and [he] [had] run off at the mouth.” (Tr. Vol. 3 at 81). Custer further testified that he had “said a lot of things [that he] regret[ted] saying[.]” (Tr. Vol. 3 at 81). On cross-examination, Custer admitted that he had said everything in the recording “[i]n anger” but he had “meant none of it.” (Tr. Vol. 3 at 82-83).

[15] At the conclusion of the jury trial, the jury found Custer guilty of both counts. At sentencing, the trial court merged the two convictions. The trial court also sentenced Custer to thirty-five (35) years to be served in the Indiana Department of Correction (“the DOC”).

[16] Custer now appeals.

Decision

[17] Custer argues that the evidence was insufficient to support his conviction. Our standard of review for sufficiency of the evidence claims is well settled. We consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not reweigh the evidence or judge witness credibility. *Id.* We will affirm the conviction unless no reasonable fact finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* at 146-47. The evidence is sufficient if an inference may be reasonably drawn from it to support the verdict. *Id.* at 147.

[18] Custer first challenges his attempted murder conviction by arguing that the State failed to prove the specific intent element of attempted murder. In order to convict Custer of attempted murder, the State had to prove that he engaged in conduct that constituted a substantial step toward the knowing or intentional killing of another human being. IND. CODE §§ 35-41-5-1; 35-42-1-1. A conviction for attempted murder requires proof of a specific intent to kill. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). Intent to kill may be inferred from the nature of the attack and the circumstances surrounding the crime. *Elliott v. State*, 786 N.E.2d 799, 803 (Ind. Ct. App. 2003) (internal citations omitted), *reh'g denied*.

[19] Here, our review of the record reveals ample evidence of Custer's specific intent to kill Argerbright. Specifically, Custer had made plans with Craig to orchestrate Argerbright's killing. In the recording made by Craig, Custer specifically stated that he wanted Argerbright dead for putting him in jail. Custer also stated that he wanted Argerbright dead so he could get out of jail because Custer had believed that, without her testimony, his Level 2 felony for dealing methamphetamine would be dismissed. Furthermore, Custer had told Craig how to instruct Smith to get Argerbright to use drugs, how much fentanyl to give Argerbright to kill her, where to dump her body after she overdosed, and he provided Smith with the money needed to purchase the fentanyl. The specific intent required to support Custer's attempted murder charge can be inferred from the facts and circumstances surrounding Custer's plan.

[20] Custer also contends that the statements he made were “essentially, blowing off steam[,]” and were not statements of his intention to kill Argerbright. (Custer’s Br. 13). Custer further argues that his statements to Craig were “means of passing the time only” because he had previously spoken to Craig about having Argerbright killed and had withdrawn that plan. (Custer’s Br. 14). However, the jury heard these same arguments at Custer’s trial and weighed them against the State’s evidence. Ultimately, Custer’s argument amounts to a request to reweigh the evidence, which we will not do. *See Drane*, 867 N.E.2d at 146.

[21] Custer also argues that the State failed to prove that Custer had taken a substantial step towards the attempted murder of Argerbright. Whether a step is substantial “must be determined from all the circumstances of each case.” *Zickefoose v. State*, 388 N.E.2d 507, 510 (Ind. 1979). A step’s substantiality is generally a fact question based on the totality of the circumstances. *State v. Lewis*, 429 N.E.2d 1110, 1116 (Ind. 1981), *cert. denied*. The substantial step requirement is a minimal one, often defined as any overt act in furtherance of the crime. *B.T.E. v. State*, 108 N.E.3d 322, 327 (Ind. 2018) (internal quotation marks and citations omitted). Still, the overt act must go “beyond mere preparation.” *Jackson v. State*, 683 N.E.2d 560, 566 (Ind. 1997). But this requirement is not so strict that it forecloses some “preventative action by police and courts to stop the criminal effort at an earlier stage.” *Zickefoose*, 388 N.E.2d at 509. We focus on “the substantial step that the defendant has completed, not on what was left undone.” *Id.* at 510.

[22] Again, our review of the record reveals that Custer had planned to pay Craig and his fictional friend, Smith, a total of \$3,500 to kill Argerbright. Custer had clear instructions for Craig to pass along to Smith. This included the type of drug to use, the amount of the drug to use, where to dump Argerbright's body, how Custer would pay Craig in order to finance the drug purchase, and how Custer would pay Smith the remaining balance after Custer had left the jail. Custer then set the plan in motion by arranging for and making an initial \$400 payment to Craig's commissary account. Based on the totality of the circumstances, we conclude that Custer's initial \$400 payment to Craig to cover the cost of the fentanyl that would be used to kill Argerbright was a substantial step towards the attempted killing of Argerbright.

[23] Custer argues that the \$400 payment was not a substantial step towards the killing of Argerbright because the money was to be used to purchase a toolbox that Custer hoped to give to Tracy as a reward for acting as his power of attorney. However, Custer presented this evidence to the jury during his testimony and the jury weighed it accordingly. Custer's argument amounts to a request to reweigh the evidence, which we will not do. *See Drane*, 867 N.E.2d at 146.

[24] Based on our review of the evidence presented at the jury trial, we conclude that there was sufficient evidence from which a reasonable factfinder could have found Custer guilty of attempted murder. Accordingly, we affirm the judgment of the trial court. However, Indiana law precludes convictions for both conspiracy to commit murder and attempted murder. *See INDIANA CODE* § 35-

41-5-3(a) (“A person may not be convicted of both a conspiracy and an attempt with respect to the same underlying crime.”). Because the trial court entered judgment of conviction on both counts and the merger did not vacate either of those judgments, we remand to the trial court to vacate the Level 2 felony conspiracy to commit murder conviction. *See Gregory v. State*, 885 N.E.2d 697, 703 (Ind. Ct. App. 2008) (finding merger does not vacate judgment of convictions), *trans. denied*.

[25] Affirmed and remanded.²

Robb, J., and Weissmann, J., concur.

² Custer also argues that the trial court abused its discretion when it allowed the jury, during its deliberations, to listen to the entire recorded conversation between Custer and Craig “without instruction.” (Custer’s Br. 19). In support of this argument, Custer directs us to Indiana Evidence Rule 106. Indiana Evidence Rule 106 provides “[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.” Custer cites to this rule to support his assertion that the jury should not have had access to the entire recorded conversation without instruction. However, Custer fails to cite to any authority explaining how Rule 106 supports his argument nor does he cite to any authority explaining what instructions should have been given to the jury.

Custer also argues that the trial court committed fundamental error when it presented the jury with instructions for attempted murder and conspiracy to commit murder “back to back.” (Custer’s Br. 22). However, Custer provides no cogent argument pointing to any cases or authorities that support this claim. Thus, he has waived these arguments on appeal. *See* Ind. Appellate Rule 46(A)(8).