MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

John Loren Williams,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 21, 2023

Court of Appeals Case No. 22A-CR-1682

Appeal from the Porter Superior Court

The Honorable Jeffrey W. Clymer, Judge

Trial Court Cause No. 64D02-2007-MR-5252

Memorandum Decision by Judge Riley.
Judges Bradford and Weissmann concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, John Loren Williams (Williams), appeals his convictions for felony murder, Ind. Code § 35-42-1-1(2); aggravated battery, a Level 3 felony, I.C. § 35-42-2-1.5; and his adjudication as an habitual offender, I.C. § 35-50-2-8.

[2] We affirm.

ISSUES

[3] Williams presents this court with two issues on appeal, which we restate as follows:

(1) Whether the trial court abused its discretion by admitting the co-conspirator's statements; and
(2) Whether Williams' convictions for felony murder and aggravated battery violated the prohibition against double jeopardy.

FACTS AND PROCEDURAL HISTORY

[4] Around noon on January 29, 2020, Williams contacted Kyle Levitt (Levitt) via Facebook messenger, inquiring about the purchase of marijuana and marijuana wax from Levitt. Levitt agreed to sell Williams the illegal substances for $70. Although no specific time for the purchase was set, Williams "essentially, prolonged" the time at which he was to arrive at Levitt's apartment throughout the afternoon and evening. (Transcript Vol. IV, p. 222). During that same time period, Williams was also messaging Travis Thompson (Thompson). He asked

Thompson if he had a "pew pew machine" Williams could borrow. (State's Exh. Vol. XII, p. 44). When Thompson asked why Williams needed the gun, Williams explained that he intended to "rob a soft ass dealer." (State's Exh. Vol. XII, p. 44). They discussed what the "take" would be, where the robbery would occur, how to get there, whether the dealer would be armed, and the means to accomplish the robbery. (State's Exh. Vol. XII, p. 44). After concluding that the dealer would not be armed, Williams and Thompson decided that they did not need the weapon. Williams suggested to make it look like a "home invasion." (State's Exh. Vol. XII, p. 45). They agreed that after the dealer opened the door, Williams and Thompson would "over power [sic] him." (State's Exh. Vol. XII, pp. 47-48). Williams then identified the target as Levitt.

[5] Later that evening, Williams' girlfriend, Shayli Chambers (Chambers), drove Williams to a gas station, Wal-Mart, and a fast-food restaurant before picking up Thompson and driving both Williams and Thompson to Levitt's residence. Prior to leaving with Williams and Chambers, Thompson informed his wife that he was "just gonna go grab this weed. I'll be right back." (Tr. Vol. V, p. 126). During the drive to Levitt's home, Chambers asked Williams if they were going to get marijuana, to which Williams responded, "something like that," and clarified that he was "going to takeoff [sic] with [Levitt's] belongings." (Tr. Vol. V, p. 189). When they arrived at Levitt's residence, Williams asked Thompson, "are you ready?" and they exited Chambers' vehicle. (Tr. Vol. V,

p. 192-93). Chambers parked on the side of Levitt's apartment building and waited for Williams and Thompson to return.

[6] Williams and Thompson knocked on Levitt's door. When Levitt opened the door, Williams punched him in the face. Williams restrained Levitt's arms over his head and pushed him into the bedroom. Levitt tried to escape the room, but Thompson said, "no no, just don't" and hit him in the face. (Tr. Vol. IV, pp. 228-29). Williams continued to attack Levitt, with Levitt attempting to break free. During the struggle, Levitt's nightstand was overturned, and Levitt's hunting knife fell on the floor. Levitt grabbed the knife and swung at Williams. Although he missed Williams, he struck Thompson. Thompson yelled, "he just f*&%ing stabbed me" and ran out of Levitt's apartment. (Tr. Vol. IV, p. 232). Williams followed Thompson, taking the marijuana and wax with him. Levitt locked the doors behind them.

[7] Williams ran to Chambers' vehicle, informing her that they needed to go get Thompson. When they arrived at the front of the building, Thompson was lying on the sidewalk. Williams attempted to pick up Thompson and place him in the vehicle, but he could not lift Thompson. When Chambers informed Williams that she was leaving, Williams jumped into the car and left Thompson on the sidewalk, where he ultimately succumbed as a result of the knife having cut one of his femoral arteries. Thompson's body was later discovered by a passerby on her way home from work.

[8] Responding officers followed a blood trail from Thompson's body to Levitt's apartment. After entering the apartment, officers located Levitt, who was transported to the Valparaiso Police Department for questioning. When the officers noticed that Levitt's facial injuries worsened, they transported Levitt to the hospital for medical treatment. Levitt had incurred multiple fractures around his eye that required reconstructive surgery to remove bone fragments and to insert plates and pins required to place Levitt's eye back into position. He also suffered bruising and abrasions to his face, chest, and back.

[9] On July 14, 2020, the State filed an Information, charging Williams with Count I, felony murder; Count II, robbery, a Level 2 felony; Count III, attempted robbery, a Level 2 felony; Count IV, robbery, a Level 3 felony; Count V, attempted robbery, a Level 3 felony; Count VI, aggravated battery, a Level 3 felony; Count VII, robbery, a Level 5 felony; Count VIII, attempted robbery, a Level 5 felony; and Count IX, battery, a Level 5 felony. The State also alleged Williams to be an habitual offender. On April 4 through April 14, 2022, the trial court conducted a jury trial. During the proceedings, the State sought to admit the Facebook messages exchanged between Williams and Thompson through Thompson's wife's testimony, to which Williams objected. The State argued that Williams' messages were admissible as statements of a party opponent pursuant to Indiana Evidence Rule 801(d)(2)(A) and that Thompson's statements were admissible as statements made by a co-conspirator under Evidence Rule 801(d)(2)(E). In response, Williams contended that the messages were not properly authenticated, were unfairly prejudicial, and did

not demonstrate an agreement to commit robbery. The trial court overruled Williams' objections and admitted the messages. At the close of the evidence, the jury returned a guilty verdict for felony murder, attempted robbery, as Level 2, 3, and 5 felonies, aggravated battery, as a Level 3 felony, and battery as a Level 5 felony, as well as finding Williams to be an habitual offender. At the sentencing hearing, the trial court vacated Williams' convictions for attempted robbery as Level 2, 3, and 5 felonies, and battery as a Level 5 felony due to double jeopardy concerns. The court sentenced Williams to fifty-five years for felony murder, enhanced by twenty years for his habitual offender adjudication, and sixteen years for aggravated battery, with sentences to be served consecutively.

[10] Williams now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Admission of Evidence*

[11] Williams first contends that the trial court abused its discretion by admitting the Facebook messages exchanged between Williams and Thompson pursuant to the co-conspirator exception to the hearsay rules. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Tinker v. State*, 129 N.E.3d 251, 255 (Ind. Ct. App. 2019), *trans. denied*. A trial court abuses its discretion when the admission of evidence is clearly against the logic and effect of the facts and circumstances. *Id*. In reviewing a trial court's ruling, we will not reweigh the evidence and will view conflicting evidence in the light most

favorable to the trial court's ruling, deferring to the trial court's factual determinations unless clearly erroneous. *Hansbrough v. State*, 49 N.E.3d 1112, 1114 (Ind. Ct. App. 2016), *trans. denied*. We affirm "a trial court's decision regarding the admission of evidence if it is sustainable on any basis in the record." *Holloway v. State,* 69 N.E.3d 924, 931 n.5 (Ind. Ct. App. 2017) (citing *Barker v. State*, 695 N.E.2d 925, 930 (Ind. 1998)), *trans. denied*.

[12] In deciding whether to admit an out-of-court statement, a trial court must answer two preliminary questions: Is the statement hearsay, and, if so, does an exception apply? *D.R.C. v. State*, 908 N.E.2d 215, 226 (Ind. 2009). As to the first question, the State, Williams, and trial court agreed that the Facebook messages the State proffered for admission through Thompson's wife's testimony constituted hearsay statements. *See* Evid. R. 801(c) ("Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). What divided the parties was whether the messages sent by Thompson to Williams properly fell within the hearsay exception of co-conspirator statements.[1] Supporting the trial court's decision, the State insists that Thompson's messages to Williams are admissible because, as a co-conspirator, he sent those messages in furtherance of the conspiracy to rob Levitt. Williams, on the other hand, argues that the record lacks any evidence "to establish the existence of a

[1] In his appellate brief, Williams does not challenge the trial court's admission of the Facebook messages sent by himself to Thompson as statements made by a party opponent pursuant to Evidence Rule 801(d)(2)(A).

conspiracy independent of the proffered co-conspirator's statements."[2] (Appellant's Br. p. 13).

[13] To be admissible under Indiana Rule of Evidence 801(d)(2)(E),

> the co-conspirator's statement must be made in furtherance of the conspiracy. [T]he co-conspirator's statement does not by itself establish ... the existence of the conspiracy .... Rather, the State must introduce independent evidence of the conspiracy before a co-conspirator's statement will be admissible as non-hearsay.

[14] *M.T.V. v. State*, 66 N.E.3d 960, 964 (Ind. Ct. App. 2016), *trans. denied* (internal citation omitted). Before the statements of a co-conspirator are admissible into evidence, the trial court must determine, by a preponderance of the evidence, that the declarant and the defendant were involved in a conspiracy, and that the statement was made during and in furtherance of that conspiracy. *Wright v. State*, 690 N.E.2d 1098, 1105 (Ind. 1987); *Siglar v. State*, 541 N.E.2d 944, 949 (Ind. 1989); *Lopez v. State*, 527 N.E.2d 1119, 1132 (Ind. 1988). A statement is made in the course of a conspiracy when it is "made between the beginning and ending of the conspiracy[.]" *Houser v. State*, 661 N.E.2d 1213, 1219 (Ind. Ct.

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[2] While Williams also appears to argue that the trial court admitted Thompson's messages as evidence of a conspiracy to purchase marijuana and not as evidence of a conspiracy to rob Levitt, we note that the trial court's ruling reflected their admission as "[t]he statement of [Thompson] are statements of a co-conspirator" without further specification. (Tr. Vol. V, p. 123). The trial court's reasoning for the admission of the Facebook messages is not relevant to this court's determination of admissibility since we may affirm the trial court's ruling on any reasonable basis apparent in the record, whether or not relied on by the parties or the trial court. *Jeter v. State*, 888 N.E.2d 1257, 1267 (Ind. 2008) ("On review of a claim challenging the admissibility of evidence, this [c]ourt will uphold a correct legal ruling even when based on incorrect, or absent, legal reasoning below.")

App. 1996), *trans. denied*. And a statement is in furtherance of a conspiracy when the statement is "designed to promote or facilitate achievement of the goals of the ongoing conspiracy[.]" *Leslie v. State*, 670 N.E.2d 898, 901 (Ind. Ct. App. 1996) (quoting *United States v. Tracy*, 12 F.3d 1186, 1196 (2nd Cir. 1993)), *trans. denied*. To prove a conspiracy, the State need not prove the existence of a formal express agreement. *Porter v. State*, 715 N.E.2d 868, 870 (Ind. 1999). "It is sufficient if the minds of the parties meet understandingly to bring about an intelligent and deliberate agreement to commit the offense." *Id*. at 870-71. The existence of the conspiracy may be shown by direct or circumstantial evidence, and the evidence need not be strong. *Lopez*, 527 N.at 1132; *Wallace v. State*, 426 N.E.2d 34, 41 (Ind. 1981).

[15] In the instant case, the record reflects that during the course of the afternoon in which Williams was prolonging the meeting time with Levitt, Williams was exchanging Facebook messages with Thompson. Thompson's wife confirmed that Williams and Thompson were in communication prior to Chambers picking up Thompson and that Thompson told her that he was going to "grab this weed" prior to leaving the house. (Tr. Vol. V, p. 126). Chambers testified that during the drive to Levitt's home, Chambers asked Williams if they were going to get marijuana, to which Williams responded, "something like that," and clarified that he was "going to takeoff [sic] with [Levitt's] belongings." (Tr. Vol. V, p. 189). After picking up Thompson and after arriving at Levitt's residence, Chambers informed the jury that Williams asked Thompson, "are you ready?" before exiting Chambers' vehicle. (Tr. Vol. V, p. 192-93). When

Levitt answered the door, Williams attacked him without provocation. During the ensuing struggle, Thompson prevented Levitt's escape, telling him, "no, no just don't" and punched him in the face. (Tr. Vol. IV, pp. 228-29).

[16] While we agree with Williams that no items of value were taken from Levitt's home, except for the marijuana and wax, and no weapons were brandished during the attack, the existence of the conspiracy does not turn on the success of its underlying plan or whether weapons were involved. Here, we find that the independent evidence was sufficient to establish the existence of a robbery conspiracy between Williams and Thompson by a preponderance of the evidence for the purposes of Evidence Rule 801(d)(2)(E). *See Wright*, 690 N.E.2d at 1105. Thompson's and Chambers' testimony inferred that Williams and Thompson planned to take off with Levitt's belongings, while Levitt's testimony demonstrated that Williams and Thompson acted in concert during the attempted robbery. As such, any statements or assertions made by Thompson in furtherance of that conspiracy are not hearsay and the trial court did not abuse its discretion by admitting into evidence Thompson's Facebook messages to Williams.[3]

[3] Even if we were to conclude that Thompson's Facebook messages would not be admissible as co-conspirator statements—which we are not—the messages would still be admissible to provide context for Williams' messages. *See Hendricks v. State*, 162 N.E.3d 1123, 1135 (Ind. Ct. App. 2021) (finding co-actor's statements on phone call were admissible as an exception to hearsay because they were not admitted for the truth of the matter but to offer context and to make sense of defendant's statements during the call), *trans. denied.*

II. *Double Jeopardy*

[17] Next, Williams contends that his convictions for felony murder and aggravated battery violated the prohibition against double jeopardy. Whether convictions violate Indiana's prohibition against double jeopardy is a question of law reviewed *de novo*. *Wadle v. State*, 115 N.E.3d 227, 256 (Ind. 2020).

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

> [W]hen multiple convictions for a single act or transaction implicate two or more statutes, we first look to the statutes themselves. If either statute clearly permits multiple punishment, whether expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy. But if the statutory language is not clear, then a court must apply our included-offense statutes to determine whether the charged offenses are the same. *See* [I.C.] § 35-31.5-2-168. If neither offense is included in the other (either inherently or as charged), there is no violation of double jeopardy. But if one offense is included in the other (either inherently or as charged), then the court must examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial. If, based on these facts, the defendant's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction," then the prosecutor may charge the offenses as alternative sanctions

> only. But if the defendant's actions prove otherwise, a court may convict on each charged offense.

Id. at 253.

[19] Applying the test here, we first observe that neither the murder statute nor the aggravated battery statute clearly permits multiple convictions, either expressly or by unmistakable implication. *See* I.C. §§ 35-42-1-1(2); 35-42-2-1.5. With no statutory language clearly permitting multiple convictions, we move to analyzing whether aggravated battery is a lesser included offense of murder, either inherently or as charged.

[20] An offense is "inherently included" in another if it "may be established by proof of the same material elements or less than all the material elements defining the crime charged" or if "the only feature distinguishing the two offenses is that a lesser culpability is required to establish the commission of the lesser offense." *Wadle*, 151 N.E.3d at 251 n.30 (quotations omitted). An offense is "factually included" in another when "the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense." *Id.*

[21] Indiana Code section 35-38-1-6 provides: "Whenever: (1) a defendant is charged with an offense and an included offense in separate counts; and (2) the defendant is found guilty of both counts; judgment and sentence may not be entered against the defendant for the included offense." Indiana Code section 35-31.5-2-168 defines "included offense" as an offense that:

> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;
>
> (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
>
> (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

[22] No double jeopardy violation occurred. To convict Williams of felony murder, the State had to prove that Williams killed Thompson while committing or attempting to commit robbery. *See* I.C. § 35-42-1-1(2). To convict Williams of aggravated battery, the State had to prove that Williams knowingly or intentionally inflicted an injury on Levitt that created a substantial risk of death or caused serious permanent disfigurement or protracted loss of impairment of the function of the bodily member or organ. *See* I.C. § 35-42-2-1.5. "Where [] one of the material elements of both offenses is a victim, and a separate victim is alleged for each offense, it would seem by definition one offense cannot be either a factually or inherently included lesser offense of the other." *Woodcock v. State*, 163 N.E.3d 863, 875 (Ind. Ct. App. 2021), *trans. denied*; *see* Indiana Code section 35-31.5-2-168(3) (defining "included offense" in pertinent part as an offense that "differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person … is required to establish its commission"). "In effect, if there are two separate victims there cannot be a double jeopardy problem as to the offenses they might have in common." *Woodcock*, 163 N.E.3d at 875. Because Williams' offenses are not inherently or

factually included, there is no substantive double jeopardy violation and the inquiry ends. *Wadle*, 151 N.E.3d at 248. We affirm Williams' convictions for felony murder and aggravated battery.[4]

CONCLUSION

[23] Based on the foregoing, we hold that the trial court did not abuse its discretion by admitting Thompson's Facebook messages under the co-conspirator exception to the hearsay rules and that Williams' convictions for felony murder and aggravated battery did not violate the prohibition against double jeopardy.

[24] Affirmed.

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

[4] In as far as Williams analyzes his convictions for felony murder and aggravated battery through the intermediary offense of attempted robbery because the attempted robbery offense was merged into the felony murder conviction, his argument is misplaced. We could find no authority supporting such analysis and Williams has cited none.