MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Richard Howard Thomas, Jr.,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

February 23, 2024
Court of Appeals Case No.
23A-CR-1021

Appeal from the Vanderburgh Circuit Court

The Honorable Ryan C. Reed, Magistrate

Trial Court Cause No.
82C01-2204-F1-2171

Memorandum Decision by Judge Mathias
Judges Tavitas and Weissmann concur.

Mathias, Judge.

[1] Richard Howard Thomas, Jr. appeals his convictions for three counts of Level 3 felony attempted aggravated battery, as lesser-included offenses to three counts of Level 1 felony attempted murder; Level 3 felony criminal confinement; Level 3 felony possession of methamphetamine; and Level 4 felony unlawful possession of a firearm by a serious violent felon. Thomas raises two issues for our review, which we restate as follows:

> 1. Whether the trial court erred when it permitted Thomas's out-of-court statements to investigating officers to be admitted into evidence.
>
> 2. Whether the trial court abused its discretion when it instructed the jury on Level 3 felony attempted aggravated battery as lesser-included offenses.

[2] We affirm.

Facts and Procedural History

[3] On April 16, 2022, the Vanderburgh County Sheriff's Department received a report of a disturbance at a Quality Inn and Suites hotel in northern Vanderburgh County. Two officers, Deputy Lucas Ray and Deputy Amanda Jung, were dispatched to the scene, and Indiana State Police Trooper William Campbell arrived shortly thereafter to assist them.

[4] Upon arriving at the hotel, the three officers were directed to room 306. At the door to that room, the officers knocked and announced their presence. They

then heard a woman scream for help from inside the room. Trooper Campbell attempted to kick the door in, and, in response, a gun was fired inside the room. The officers again yelled to open the door, and they heard a male voice inside the room. A second gunshot was fired from inside the room, and this time the bullet came through the door and hit the wall across the hallway behind the three officers. The officers backed away from the hotel room door but continued to attempt to engage with those inside by yelling to have them come out. However, "every time" the officers yelled, they "would hear a gunshot." Tr. Vol. 2, p. 116.

[5] A seven-and-one-half-hour standoff ensued. SWAT teams from the Evansville Police Department and the Indiana State Police arrived to assist at the scene, as did hostage negotiators and other law-enforcement units. Eventually, SWAT officers accessed the room, where they located and secured Thomas and his girlfriend, Christina Zeller. Officers arrested Thomas. They then seized a .22-caliber handgun and what they believed to be methamphetamine from the room.

[6] Officers read Thomas his *Miranda* rights and transported him to the Vanderburgh County Jail. There, Thomas asked to speak to the investigating officer, Vanderburgh County Sheriff's Detective Jackie Juncker. Detective Juncker met with Thomas and immediately re-advised him of his *Miranda* rights. Thomas then told Detective Juncker that he knew that law enforcement had arrived at his hotel room door; that he had "started shooting at the door when they wanted to come inside" because "he didn't want them coming in the

room"; that the methamphetamine in the hotel room was his; and that he had "last used" methamphetamine the day before. *Id.* at 232-33. He also stated that the handgun was his; that Zeller was in the room with him; and that he knew Zeller wanted to leave the room, but he would not allow her to do so. *Id.* at 233-34.

[7] Also during the interview, Thomas stated that he "had been up for several days[.]" Tr. Vol. 3, p. 108. He feared that Zeller "was being raped in police custody[.]" *Id.* at 109. He asked for water, but he refused to drink from an open cup because he "didn't want water that had something in it," and Detective Juncker provided him with a sealed can of soda. *Id.* at 111-12. He also told Detective Juncker that Zeller had "fiberoptics" in her "ear." *Id.* at 112. Because of these unusual statements, Detective Juncker later told Zeller that she believed Thomas to have been "under the influence of [m]ethamphetamine" at the time of his statements. *Id.* at 114-15.

[8] The State charged Thomas in relevant part with three counts of Level 1 felony attempted murder; Level 3 felony criminal confinement; Level 3 felony possession of methamphetamine; and Level 4 felony unlawful possession of a firearm by a serious violent felon. At his ensuing jury trial, numerous officers who were at the hotel scene, including Officers Campbell, Ray, and Jung, testified. Detective Juncker also testified and, over Thomas's objection, informed the jury what Thomas had told her following his arrest.

[9] A key part of Thomas's defense was to focus on the State's requirement to prove his specific intent to kill in support of the three attempted murder allegations. *See* Tr. Vol. 2, p. 107. Accordingly, following the close of the evidence, the State asked the court to also instruct the jury on attempted aggravated battery as "inherently less[e]r included offenses" to the three attempted murder charges. Tr. Vol. 3, p. 28. Thomas objected on the ground that instructing the jury on attempted aggravated battery "changes the entire theory of our defense." *Id.* The court overruled Thomas's objection and instructed the jury on attempted aggravated battery.

[10] Thereafter, the jury found Thomas guilty of three counts of Level 3 felony attempted aggravated battery; Level 3 felony criminal confinement; Level 3 felony possession of methamphetamine; and Level 4 felony unlawful possession of a firearm by a serious violent felon. The trial court entered its judgment of conviction and sentenced Thomas accordingly. This appeal ensued.

1. The trial court did not err when it permitted Detective Juncker to testify to Thomas's statements to her at the jail.

[11] On appeal, Thomas first asserts that the trial court violated his state constitutional rights when it permitted Detective Juncker to inform the jury of his out-of-court statements to her at the Vanderburgh County Jail. We review the trial court's determination on the admissibility of a confession the same way we review other sufficiency matters. *Wilkes v. State*, 917 N.E.2d 675, 780 (Ind. 2009). We do not reweigh the evidence, and we affirm the trial court's decision if it is supported by substantial evidence. *Id.*

[12] Thomas specifically contends that he did not voluntarily confess to Detective Juncker because he was intoxicated, and, as such, the trial court should have excluded his statements under Article 1, Section 14 of the Indiana Constitution.[1] As our Supreme Court has explained:

> Unlike the Federal Constitution, Indiana law imposes on the State the burden of proving beyond a reasonable doubt that a confession is voluntary. *Lego v. Twomey*, 404 U.S. 477, 488-89, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); *Pruitt v. State*, 834 N.E.2d 90, 114–15 (Ind. 2005) (plurality); *Miller v. State*, 770 N.E.2d 763, 767 (Ind. 2002); *Owens v. State*, 427 N.E.2d 880, 884 (Ind. 1981). In evaluating a claim that a statement was not given voluntarily, the trial court is to consider the "totality of the circumstances," including any element of police coercion; the length, location, and continuity of the interrogation; and the maturity, education, physical condition, and mental health of the defendant. *Miller*, 770 N.E.2d at 767. To determine that a statement was given voluntarily, the court must conclude that inducement, threats, violence, or other improper influences did not overcome the defendant's free will. *Clark v. State*, 808 N.E.2d 1183, 1191 (Ind. 2004).
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> Statements are inadmissible due to intoxication only when an accused is intoxicated to the point that he is unaware of what he is saying. *Pruitt*, 834 N.E.2d at 115 (plurality opinion) (citing *Williams v. State*, 489 N.E.2d 53, 56 (Ind. 1986)). Intoxication to

[1] Thomas's brief on appeal references the Fifth Amendment to the United States Constitution but does not present argument supported by cogent reasoning under that provision. *See* Ind. Appellate Rule 46(A)(8)(a). Regardless, for the same reasons we conclude that there is no violation of Article 1, Section 14, we also conclude that there is no violation of Thomas's rights under the Fifth Amendment.

> a lesser degree goes only to the weight to be given the statement. *Id.*

Id.

[13] The evidence most favorable to the trial court's judgment supports its conclusion that Thomas was not "intoxicated to the point that he [wa]s unaware of what he [wa]s saying." *See id.* Thomas was able to provide a lucid description of his and Zeller's presence in the hotel room; of the contraband with them in that room; of the arrival of law enforcement officers and their purpose in being there; of Zeller's desire to leave and his refusal to allow her to leave; and of his shooting the firearm at the officers and his use of methamphetamine. While Thomas may have also exhibited some intoxicated or delusional thinking, that evidence does not demonstrate that he lacked a full recall of the matters that had occurred. *See, e.g.*, *Pettiford v. State*, 619 N.E.2d 925, 928 (Ind. 1993) (holding under the Fifth Amendment that, although the defendant "was under some mental delusions" at the time of his confession, his confession was properly admitted as it was "obvious he had full recall of the matters which had occurred"). We also note that Thomas was fully advised of his rights, and there is no evidence of coercion or an undue influence that may have induced him into a confession.

[14] Ultimately, Thomas's argument on this issue is simply a request for this Court to disregard the evidence most favorable to the trial court's judgment and to reweigh the evidence ourselves. We will not do so. We affirm the trial court's admission of Thomas's confession.

2. The trial court did not deny Thomas his right to notice when it instructed the jury on the inherently lesser included offenses.

[15] Thomas also argues on appeal that the trial court violated his right to notice when it instructed the jury on Level 3 felony attempted aggravated battery as inherently lesser included offenses to the charges for Level 1 felony attempted murder. We generally review the trial court's manner of instructing the jury for an abuse of discretion. *Owen v. State*, 210 N.E.3d 256, 267 (Ind. 2023).

[16] Thomas does not dispute that attempted aggravated battery is, at least generally, an inherently lesser included offense to a charge of attempted murder. *See, e.g.*, *Young v. State*, 30 N.E.3d 719, 724 (Ind. 2015). Rather, Thomas's argument on appeal is that the State's request for the court to instruct the jury on attempted aggravated battery *on these facts* amounted to an unforeseeable ambush, which denied him his right to fair notice.

[17] Our Supreme Court has addressed when such an argument might be plausible:

> the State may strategically foreclose *factually* included lesser offenses by omitting the operative facts from a charging information. If the State may wield factual omissions as a sword to preclude lesser offenses [even if otherwise inherently included], an accused should be able to similarly rely on [unpleaded facts] as a shield "to limit his defense to those matters with which he stands accused." Accordingly, . . . the complete factual divergence here—between the "means used" as alleged in the murder charge (shooting) and the "means used" on which the court found attempted aggravated battery (beating)—deprived

> Defendants of "fair notice" of the charge of which they were eventually convicted.

Id. at 725 (emphases in original; citations omitted). That is, if the State alleges one *factual* theory in its charging information, it cannot seek to convict a defendant on an alternative *factual* theory even if the conviction on the alternative theory would be on an inherently lesser included offense to the crime charged. *Id.* at 725-28.

[18] But Thomas properly and candidly acknowledges that, unlike in *Young*, "there is admittedly no such divergence" here between the factual basis for the State's charges of attempted murder and Thomas's convictions for attempted aggravated battery—both were based on Thomas shooting his firearm at the officers outside the hotel room door. Appellant's Br. at 26. Accordingly, *Young* is inapposite, and the State's charges of attempted murder provided Thomas with proper notice that he might be convicted of an inherently lesser included offense on the same factual theory.

Conclusion

[19] For all of these reasons, we affirm Thomas's convictions.

[20] Affirmed.

Tavitas, J., and Weissmann, J., concur.

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