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IN THE COURT OF APPEALS OF INDIANA

Christopher Michael Allen Harris,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 14, 2022

Court of Appeals Case No. 21A-CR-976

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause No. 79D02-2008-F5-132

Molter, Judge.

[1] While Christopher Michael Allen Harris was in Indianapolis and Kendall Hooker was staying with his friend Michael Mitchell in Lafayette, they got into

an early morning argument in a group text which escalated to Harris threatening to shoot Hooker, Hooker's grandmother, and everyone in Mitchell's apartment. At least an hour later, Harris arrived outside Mitchell's apartment, threatened to shoot him, and pointed a firearm at him. After a jury trial, Harris was convicted of Level 5 felony intimidation with a deadly weapon against Hooker, Level 5 felony intimidation with a deadly weapon against Mitchell, Level 6 felony pointing a firearm at Mitchell, Class A misdemeanor carrying a handgun without a license, and Class B misdemeanor possession of marijuana.

[2] Harris appeals his convictions arguing that the State presented insufficient evidence to support his conviction for Level 5 felony intimidation with a deadly weapon against Hooker because he claims that Hooker never saw Harris or Harris's weapon at the time of the intimidation. Harris also asserts that his convictions for Level 5 felony intimidation with a deadly weapon against Mitchell and Level 6 felony pointing a firearm violated double jeopardy because the act of pointing a firearm was used to satisfy the "use of a deadly weapon" element for the intimidation conviction. We conclude that the State presented sufficient evidence to support Harris's intimidation with a deadly weapon conviction but that his convictions for both pointing a firearm at Mitchell and intimidation with a deadly weapon against Mitchell violated double jeopardy. We therefore affirm in part and reverse in part.

Facts and Procedural History

[3] In the early morning hours of August 7, 2020, Mitchell and Hooker were visiting in Mitchell's apartment in Lafayette. Mitchell's fiancée and six children were also there. Hooker was involved in a group text chat with his long-time friend Harris and others, which led to an argument with Harris. Harris threatened "to come and shoot [Hooker] and shoot up everybody in [Mitchell's] house." Tr. Vol. 2 at 86. At first, neither Mitchell nor Hooker took the threats seriously because Harris was a friend, and he was in Indianapolis rather than Lafayette.

[4] But later that night, Harris drove from Indianapolis to Lafayette and showed up outside Mitchell's apartment. Harris was "angry" and told Hooker, "I'm in Lafayette, come outside." *Id*. at 65. Hooker knew Harris wanted to fight, so he did not go outside initially. Instead, he sent Mitchell to talk to Harris. Although Mitchell was not as close to Harris as Hooker was, Mitchell and Harris were familiar with one another.

[5] Mitchell saw Harris standing in the parking lot "directly out front of the door of [Mitchell's] building" with a gun in his hand. *Id*. at 82, 88. Mitchell told Harris to "go home" because "it wasn't worth him being there." *Id*. at 83. Harris responded by asking "Where's [Hooker] at?" *Id*. When Mitchell asked why, Harris "took his gun and pointed [it] at [Mitchell]," saying "I should blow out your bitch ass, too." *Id*. at 83–85. Mitchell understood that to mean Harris would shoot him. *Id*. at 83. Mitchell became scared when Harris pointed the

gun at him and believed that Harris was going to do something with the gun. *Id*. at 84, 88–89. When Harris looked away for a "split second," Mitchell took the opportunity to "r[u]n upstairs" back into his apartment and to lock the door. *Id*. at 84. He told Hooker not to go outside.

[6] When Mitchell got back inside the apartment, Hooker had already called the police and was speaking to them on the phone. *Id*. He called the police because Harris threatened to "kill [Hooker] or [Hooker's] grandma." *Id*. at 67–68. He was also "worried about the safety of the kids." *Id*. at 87. While speaking with the dispatch operator, Hooker stated that he was calling because Harris was threatening him and had said he was going to "shoot some shit up." State's Ex. 2 at 00:33–00:42.

[7] During the 911 call, Hooker hung up, and when the dispatch operator was able to call him back, Hooker told her that he had gone outside and that Harris had showed him his "pistol" and "pulled it out on us." *Id*. at 2:04, 2:34–:50. Hooker called the police because he did not "want to have to kill [Harris]," and preferred that Harris be "in jail than for him to die." Tr. Vol. 2 at 68, 75. Hooker had a pistol and thought he might have to use it "to protect [him]self" after speaking with Mitchell because he thought his life was threatened "[a]t that time." *Id*. at 70–72. The dispatch operator instructed Hooker and Mitchell to stay inside the apartment, and they complied.

[8] The police arrived and detained Harris outside the apartment complex. Harris consented to a search of his vehicle, and the police discovered a small bag of

marijuana and a digital scale in the center console. The police also discovered a firearm located in front of Harris's car underneath a bush. The magazine of the gun was loaded, and a bullet was in the chamber. Although Harris "denied ever having [a] gun" to the police, the recovered gun was later connected to him through DNA. Tr. Vol. 2 at 30, 55.

[9] The State charged Harris with two counts of Level 5 felony intimidation with a deadly weapon, one count of Level 6 felony criminal recklessness with a deadly weapon, one count of Level 6 felony pointing a firearm, one count of Class A misdemeanor carrying a handgun without a license, and one count of Class B misdemeanor possession of marijuana. A jury convicted Harris of all charges. At the sentencing hearing, the trial court vacated Harris's conviction for Level 6 felony criminal recklessness with a deadly weapon and sentenced him to an aggregate sentence of six years with two years executed in the Department of Correction, one year in community corrections, and three years suspended to probation. Harris now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

[10] Harris challenges the sufficiency of the evidence to support his conviction for Level 5 felony intimidation with a deadly weapon with Hooker as the victim. When there is a challenge to the sufficiency of the evidence, "[w]e neither reweigh evidence nor judge witness credibility." *Gibson v. State*, 51 N.E.3d 204, 210 (Ind. 2016). Instead, "we consider only that evidence most favorable to the

judgment together with all reasonable inferences drawn therefrom." *Id.* (quotations omitted). "We will affirm the judgment if it is supported by substantial evidence of probative value even if there is some conflict in that evidence." *Id.* (quotations omitted). Further, "[w]e will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Love v. State*, 73 N.E.3d 693, 696 (Ind. 2017).

[11] To convict Harris of Level 5 felony intimidation with a deadly weapon, the State was required to prove that he (1) communicated a threat to commit a forcible felony to Hooker (2) with the intent that Hooker be placed in fear that the threat would be carried out, and (3) while committing the offense, Harris drew or used a deadly weapon. Ind. Code § 35-45-2-1(a)(4), (b)(2)(A). Harris only challenges whether the evidence was sufficient to show that he drew or used a deadly weapon while committing the offense and does not dispute that he communicated a threat to Hooker with the intent that Hooker be placed in fear that the threat would be carried out. Appellant's Br. at 7–9.

[12] The evidence most favorable to the verdict presented at trial, which included the trial testimony and the 911 call made by Hooker, showed that, while in a group text chat with Hooker, Harris threatened "to come and shoot [Hooker] and shoot up everybody in [Mitchell's] house." Tr. Vol. 2 at 86. Although Harris lived in Indianapolis, he arrived outside of Mitchell's apartment sometime later that night. When Harris arrived in Lafayette, he continued to communicate with Hooker. Harris was "angry" and told Hooker to come outside, but because Hooker knew that Harris wanted to fight, he did not

initially go outside. Mitchell went outside and observed Harris holding a gun in his hand, and after a brief conversation, Harris pointed the gun at Mitchell and said, "I should blow out your bitch ass, too." Tr. Vol. 2 at 83.

[13] When Mitchell returned to the apartment, Hooker was calling 911. Hooker testified that he called the police because Harris threatened to "kill [Hooker] or [Hooker's] grandma." *Id.* at 67–68. He was also "worried about the safety of the kids." *Id*. at 87. While speaking with the dispatch operator, Hooker stated that he was calling because Harris was threatening him and had said he was going to "shoot some shit up." State's Ex. 2 at 00:33–00:42. Hooker also told the dispatch operator that, when he had hung up during the 911 call, he had gone outside and that Harris had showed him his "pistol" and "pulled it out on us." *Id*. at 2:04, 2:34–2:50. Notably, the State emphasized the 911 call in its closing argument, and the jury specifically requested the opportunity to listen to the recording again during their deliberations. Tr. Vol. 2 at 98, 117. This evidence was sufficient to support the conviction.

[14] Even setting aside Hooker's statement to the 911 operator that he saw Harris display his pistol, the jury could still reasonably infer from other evidence that Harris's conduct in threatening Hooker and drawing his pistol was sufficiently compressed in time as to constitute a continuous chain of events sufficient to satisfy the elements of the crime. Our court's decision in *Rhodes v. State*, 144 N.E.3d 787 (Ind. Ct. App. 2020), is illustrative.

[15] In that case, Rhodes was convicted for intimidation of his estranged wife, and his conviction was enhanced because he drew a deadly weapon while committing the offense. *Id.* at 790. Rhodes called his wife, threatened to kill her, and showed up at the house where she was staying five to ten minutes later. *Id*. Although there was no evidence that Rhodes's wife saw that he had a gun, their daughter was also at the house, and she warned her mother that she had looked out the window and saw her father holding a rifle. *Id.* at 789. The police arrived before anyone was hurt, and Rhodes was convicted after a bench trial, with the trial judge explaining: "So when you show up at the door, the context is that it's going to be perceived as a very real threat to kill somebody or to harm somebody." *Id*. at 789–90.

[16] Rhodes, like Harris here, argued that he did not draw his weapon while committing the intimidation because "his threatening phone call to [his wife] was physically separated in time and distance from the separate acts of possession of the gun at [his wife's] location." *Id.* at 790. We acknowledged that "[a]n enhanced conviction cannot stand if there is a break in the chain of events between the intimidation and the drawing of the weapon," but we held that the evidence was sufficient to conclude that Rhodes's threats followed by his appearance with a firearm outside the location where his wife was staying was "one continuous chain of events." *Id.* at 790–91.

[17] The same is true here. As the State notes, the precise timeline is not entirely clear, Appellee's Br. at 9, but the jury could reasonably infer from the evidence that Harris's threats against Hooker continued largely uninterrupted,

including—just as in *Rhodes*—when he showed up outside where Hooker was staying, continued making threats, and drew his firearm, all of which prompted Hooker to call 911 just as Rhodes's wife did.

[18] In short, there was sufficient evidence from which the jury could reasonably infer that Harris threatened Hooker while drawing or using a deadly weapon. We, therefore, conclude that Harris's conviction for Level 5 felony intimidation with a deadly weapon against Hooker was supported by sufficient evidence.

II. Double Jeopardy

[19] Harris next argues that his convictions for both Level 5 felony intimidation with a deadly weapon and for Level 6 felony pointing a firearm—where Mitchell was the victim for both charges—violate double jeopardy, requiring that his conviction for pointing a firearm must be vacated.[1] We agree.

[20] When a single act or transaction implicates multiple statutes, *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), requires that we engage in a multi-step process to determine whether the convictions comport with double jeopardy principles. *Id.* at 235. The first step is to review the two statutes under which Harris was convicted. If the language of the statutes "clearly permits multiple punishment," then there is no double jeopardy violation. *Id.* at 248.

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[1] Harris acknowledges that his sentences for these two convictions were ordered to run concurrently. However, a double jeopardy violation "cannot be remedied by the 'practical effect' of concurrent sentences or by merger after conviction has been entered." *Hines v. State*, 30 N.E.3d 1216, 1221 (Ind. 2015).

[21] Intimidation with a deadly weapon requires (1) a person to communicate a threat to commit a forcible felony to another person (2) with the intent that the other person be placed in fear that the threat would be carried out, and (3) while committing the offense, the person drew or used a deadly weapon. Ind. Code § 35-45-2-1(a)(4), (b)(2)(A). Pointing a firearm requires a person to knowingly or intentionally point a firearm at another person. Ind. Code § 35-47-4-3(b). Neither of these statutes expressly authorizes multiple punishment for the same criminal act. Nor are they part of a statutory scheme that requires multiple punishment. Because neither statute clearly permits multiple punishment, either expressly or by unmistakable implication, we must move to the next step in the *Wadle* analysis. 151 N.E.3d at 248.

[22] We next consider, under Indiana's included offense statutes, whether one charged offense is included in another charged offense. *Id.* (citing Ind. Code § 35-38-1-6; Ind. Code § 35-31.5-2-168). An offense may be "included" either inherently or factually included as charged. *Id*. If neither statute is "included," then there is no double jeopardy violation. *Id*. But if one of the statutes is "included," then the court moves to the final step of considering the facts of the case. *Id*. at 248-49.

[23] Under Indiana Code section 35-38-1-6, a trial court may not enter judgment of conviction and sentence for both an offense and an "included offense." An "included offense," is an offense

> (1) that "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) that "consists of an attempt to commit the offense charged or an offense otherwise included therein," or
>
> (3) that "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."

Ind. Code § 35-31.5-2-168.

[24] Here, the two offenses are not inherently included under Indiana Code section 35-31.5-2-168. Neither offense constituted an attempt to commit the other, nor did they differ from each other only in the degree of harm or culpability required. Each offense also required proof of something the other did not. Harris's intimidation offense required that he communicate a threat, which was not required for his offense of pointing a firearm. Ind. Code § 35-45-2-1(a)(4). His offense for pointing a firearm required that he point a firearm at another person, which was not required for his intimidation offense. Ind. Code § 35-47-4-3(b). To be sure, Harris's intimidation offense included drawing or using a firearm, but it did not require *pointing* the firearm at another person. "[T]he salient character of drawing a weapon is the common-sense understanding of bringing it forth and preparing it for use." *Rhodes v. State*, 144 N.E.3d 787, 790 (Ind. Ct. App. 2020) (citing *United States v. Suggs*, 624 F.3d 370, 374 (7th Cir. 2010)) (internal quotations omitted). Because one offense does not include all

the elements of the other, the crimes are not inherently included offenses. *See Wadle*, 151 N.E.3d at 251 n.30.

[25] "An offense is 'factually included' 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.* at 151 N.E.3d at 251 n.30 (citation omitted). Here, the means used to prove intimidation with a deadly weapon—using or pointing a firearm at Mitchell—included all the elements of pointing a firearm. Mitchell testified that after he went downstairs, he saw Harris standing in the parking lot "directly out front of the door of [Mitchell's] building," and Harris had a gun in his hand. Tr. Vol. 2 at 82, 88. Mitchell told Harris to "go home" because "it wasn't worth him being there." *Id.* at 83. Harris responded by asking "Where's [Hooker] at?" *Id.* When Mitchell asked why, Harris "took his gun and pointed [it] at [Mitchell]" and said, "I should blow out your bitch ass, too." *Id.* at 83–85. Therefore, the evidence presented at trial to support the offense of intimidation with a deadly weapon was the same as the evidence to support pointing a firearm.

[26] Recently, in *Phillips v. State*, 174 N.E.3d 635, 647 (Ind. Ct. App. 2021), we noted that the evidence at trial is crucial to the "factually included" inquiry. In *Phillips*, we held that convictions for possession and dealing of methamphetamine were factually included. *Id.* This court explained that "offenses could be factually included depending on the manner in which the State charged the defendant and the evidence produced at trial. In other words, a prosecutor cannot secure two convictions for the same act using the exact

same evidence." *Id*. In concluding that the two offenses were factually included, we found that the prosecutor there used the same evidence to prove both convictions and referenced the same evidence "during closing statements." *Id*.

[27] Here, looking to the State's closing argument, when it discussed the elements necessary to convict Harris of intimidation with a deadly weapon, it clearly shows that Harris's act of pointing the firearm at Mitchell was the factual basis for meeting the drawing or using a deadly weapon element and convicting Harris of intimidation with a deadly weapon:

> *[W]hile committing the offense, the Defendant drew or used a deadly weapon*. Okay? The State will—has put in front of you that on August 7th, 2020, the Defendant came up from Indianapolis to Michael Mitchell's home. Okay? And he brought a gun with him. He made a threat with that gun. *He pointed that gun at Mr. Mitchell*. Okay? Mr. Mitchell was placed in fear. You heard him testify. He was placed in fear. He saw the gun. *He saw the gun pointed at him*."

Tr. Vol. 2 at 98 (emphases added). When discussing the elements to convict for pointing a firearm, the State referenced the same act of pointing a firearm underlying the conviction: "Count Number IV: The Defendant knowingly or intentionally pointed a firearm at Michael Mitchell. Michael Mitchell testified that that's exactly what happened." *Id*. at 99. Therefore, Harris's very same act of pointing a firearm at Mitchell was used by the State to secure both convictions.

[28] Further, we have previously rejected the State's argument that a double jeopardy violation may be avoided where different evidence could or might have formed a basis for a conviction. *See Ervin v. State*, 114 N.E.3d 888, 893–94 (Ind. Ct. App. 2018) (finding that a double jeopardy violation occurred when the jury instructions, charging information, and closing argument did not show that the State relied on "distinct" facts to support each conviction), *trans. denied*; *Bradley v. State*, 113 N.E.3d 742, 752–53 (Ind. Ct. App. 2018) (same, and rejecting State's argument that other evidence "might" have formed basis for conviction), *trans. denied*.

[29] Because we determine that Harris's pointing a firearm conviction was based on the same evidence as the conviction for intimidation with a deadly weapon, we proceed to the final step in the *Wadle* analysis. In this step, we must examine the underlying facts to determine whether 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." *Wadle*, 151 N.E.3d at 253. The evidence at trial demonstrated that Harris's offense of pointing a firearm and his offense of intimidation with a deadly weapon were simultaneous, occurred solely in the area outside of Mitchell's apartment, and were in furtherance of Harris's efforts to threaten Mitchell. His offenses therefore constituted a single transaction under *Wadle*, meaning his convictions for both Level 5 felony intimidation with a deadly weapon against Mitchell and pointing a firearm violated double jeopardy. Accordingly, we affirm Harris's conviction for Level 5 felony intimidation with a deadly weapon, but we reverse Harris's conviction

for Level 6 felony pointing a firearm and remand with instructions to vacate that conviction.[2]

[30] Affirmed in part and reversed in part.

Robb, J., and Riley, J., concur.

[2] Harris also argues that *Wadle* did not expressly overrule *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002), and that, alternatively, his convictions also violate double jeopardy under *Guyton*. Because we have found that Harris's convictions violate double jeopardy under *Wadle*, we do not reach this argument or the argument as to whether *Wadle* implicitly overruled the common law double jeopardy protections described in *Guyton*.