

## MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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Jesse Brockman,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff,*

June 29, 2022

Court of Appeals Case No.  
21A-CR-1374

Appeal from the LaPorte Superior  
Court

The Honorable Jaime M. Oss,  
Judge

Trial Court Cause No.  
46D01-1909-F2-1293

**Robb, Judge.**

## Case Summary and Issues

[1] Following a jury trial, Jesse Brockman was found guilty of dealing in methamphetamine, a Level 2 felony; two counts of failure to report a dead body, both Class A misdemeanors; two counts of reckless homicide and four counts of dealing in a controlled substance resulting in death, all Level 1 felonies; and dealing in a schedule I controlled substance, a Level 5 felony. Brockman now appeals, raising multiple issues for our review which we restate as: (1) whether the trial court abused its discretion in admitting certain evidence; (2) whether the trial court abused its discretion in denying Brockman's motion for a mistrial; and (3) whether there was sufficient evidence to support Brockman's convictions. Additionally, we address whether the trial court's merger of certain convictions remedies any double jeopardy violation.

[2] We conclude the following: the trial court did not abuse its discretion in admitting evidence; the trial court did not abuse its discretion in denying Brockman's motion for mistrial; there was sufficient evidence to support Brockman's convictions for dealing in a schedule I controlled substance and dealing in a controlled substance resulting in death related to etizolam but there was insufficient evidence to support Brockman's convictions of dealing in methamphetamine and dealing in a controlled substance resulting in death related to methamphetamine; and the trial court's merger of certain convictions is not a sufficient double jeopardy remedy. Accordingly, we affirm in part and reverse and remand in part.

## Facts and Procedural History

- [3] On September 24, 2019, Officers Mark Raymond and Michael Ortega of the Michigan City Police Department were dispatched to room 120 of the ABC Motel to conduct a welfare check on Zackary Granzo. When the officers knocked on the door there was no response. However, Officer Raymond was able to see into the room through a gap in the drapes and observed a woman lying on one of the beds. The woman's skin was discolored, there was vomit around her mouth, and she did not appear to be breathing. Officer Raymond could also see a man slumped over in a chair near the foot of the bed.
- [4] At the officers' request, the manager of the motel opened the door and officers entered the room. Upon entry, officers identified the man slumped over in the chair as Brockman. Brockman told Officer Raymond that the woman, identified later as Christina Rossetti, "had overdosed approximately ten hours prior and there was nothing that he could do." Transcript, Volume II at 199. Brockman was then removed from the room and sent to the hospital.
- [5] While inspecting the room, Officer Ortega discovered that there was someone under the covers in the second bed. Officer Ortega removed the top sheet and observed a deceased man with discolored skin and vomit around his mouth. The man was identified as Granzo. Officers then obtained a warrant to search

the motel room and discovered 1.17 grams of etizolam,<sup>1</sup> thirteen grams of methamphetamine, syringes, a pipe, latex gloves, and digital scales.

[6] Later that day, after being released from the hospital, Brockman waived his *Miranda* rights and spoke to police. Brockman told police that the drugs in the motel room were his and referred to it as “my stuff[.]” Tr., Vol. III at 149; Exhibits (CD/Audio Disks), Volume I, Exhibit 21R (Video at 41:33, 55:57). However, when asked where he got the methamphetamine, he stated that “I can get it but [Granzo] always gets it[.]” Ex., Vol. I, Exhibit 21R (Video at 41:47), and that they “go together” to get it in Michigan City, *id.* (Video at 42:00-42:17). Brockman told police that he and Granzo would get the methamphetamine from “Patrick” who would get the methamphetamine from South Bend and sell it to them for \$350 an ounce.<sup>2</sup> *Id.* (Video at 49:01-50:12). Brockman told police that Granzo got \$700 a month in disability benefits and answered affirmatively when asked if Granzo would use that money to get drugs. *See id.* (Video at 59:06-59:32). Brockman stated they would meet “Patrick” at different places around Michigan City to pick up the methamphetamine. The last time that Brockman had gotten methamphetamine from “Patrick” was about “about four days” prior to Granzo and Rossetti’s

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<sup>1</sup> The record is clear that Brockman believed that the etizolam was heroin. Etizolam is a schedule I controlled substance. *See* Ind. Code § 35-48-2-4(e).

<sup>2</sup> Although Brockman does not give the last name of “Patrick” in his interview with police, the record is clear that he is referring to the State’s witness Patrick Myhand.

deaths, *id.* (Video at 1:17:01), and it had been “two or three” days since Brockman got what he believed to be heroin, *id.* (Video at 1:17:21).

[7] On September 25, 2019, the State charged Brockman with dealing in methamphetamine, a Level 2 felony, and two counts of failure to report a dead body, Class A misdemeanors. The State later amended the charging information to add four counts of dealing in a controlled substance resulting in death, Level 1 felonies (two counts related to dealing in methamphetamine and two counts related to dealing in a schedule I controlled substance); two counts of reckless homicide, Level 5 felonies; and dealing in a schedule I controlled substance, a Level 5 felony.

[8] Forensic pathologist Dr. John Feczko performed the autopsies on both Granzo and Rossetti. Granzo’s toxicology report indicated that he had a blood alcohol level of .15 and 550 nanograms of amphetamine, 5,300 nanograms of methamphetamine, and nine nanograms of etizolam per milliliter of blood in his system. Dr. Feczko determined that “the methamphetamine, amphetamine, and ethanol related [substance was] the cause of death.” Tr., Vol. III at 124. In Dr. Feczko’s opinion, the etizolam was not relevant and had no impact on Granzo’s death; however, he stated that he was not familiar with the exact interaction between etizolam and methamphetamine or amphetamine. Rossetti’s toxicology report indicated that she had a blood alcohol level of .044 and 980 nanograms of amphetamine, 20,000 nanograms of methamphetamine, and thirty-five nanograms of etizolam per milliliter of blood in her system. Dr. Feczko determined that Rossetti’s cause of death was “drug overdose,

amphetamine and methamphetamine related.” *Id.* at 130. Dr. Feczko was unaware if there would be a negative interaction between the etizolam, methamphetamine and amphetamine in Rossetti’s system.<sup>3</sup>

[9] On October 2, 2019, Brockman reached out to police and gave them a second interview, again waiving his *Miranda* rights. During the interview, Brockman and police discussed setting up a sting operation on the drug dealer who sold Brockman what he had believed to be heroin. The following exchange took place:

Brockman: I really want to cook this guy Blue man, I really do. I want to for me, not for you all, not for the State, not for nothing but selfish ass reasons of my own.

Detective: He dealt dope that killed people.

Brockman: Yes, he did. People that I love. I loved that girl.

Detective: So, hopefully I get in your phone today and I can get his number and hopefully do a lot with his number. I’m just saying if we are going to try this, tomorrow will be the day cause [sic] we can’t stretch this much further.

Brockman: No, you got to (indiscernible).

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<sup>3</sup> Although Rossetti had a higher amount of etizolam in her system than Granzo, Dr. Feczko indicated that it was still within a normal range.

Detective: So we will have to come up here in the morning, just like today. 8:00 o'clock, get you on the phone with him, see what he says.

Brockman: Alright. We will pretend (indiscernible).

Detective: We will give it that right amount of time that you say it took to get there. We will call him back, again we will see where he tells us to go. We'll have (indiscernible).

Mr. Brockman: He's watching, he's gonna know. You have to tell him what you are driving, he'll be like ok, I see you. Alright, so don't be taking no brand new, f\*\*\*ing black Explorer.

Detective: We don't do that. Did he ever think you drove like a rental car?

Brockman: I have drove rental cars, I've drove nice ass cars, he knows (indiscernible).

Detective: I love those cars, we can get access to rental cars, that's what we use for something like that, regular cars.

Brockman: Get like a Subaru Outback or Forrester, something like that. He's seen me in that a number of times. Christina's mom's [car] was taken there a number of times.

Detective: I can get my hands on that.

Brockman: He's seen that, he's seen a Crown Vic and like other sh\*t. I went in a brand new 2019 Dodge Dakota pick-up for two months when I totaled my Impala. He knew me from way back when.

Detective: Alright. I'll talk it over with my team. See if we can get something to pop off his phone number, when we get your phone and we'll have some analysts work on that. If we are going to do it, it will be tomorrow. So, if they come to your cell tomorrow and wake you up, you know it's go time. We will probably just sit down here for a couple of hours, make phone calls and see if we can get him.

Brockman: He will be expecting me to get 7 to 10 [grams]. That's usually where I stayed at.

Detective: 7 to 10.

Brockman: Yup. \$420 to \$700, \$600. \$420 to \$600.

Detective: Ok.

Brockman: That's what I would always buy at every time, anything else that that would be odd to him. So that's what you'll be able to get him with, like 7 to 10 grams.

Detective: Well it's been a minute since you've been to him, so we'll probably shoot for the higher amount.

Brockman: Yeah. Shoot for the higher amount. I could even tell him 12 or something like that. Double it up,  $6 \times 7 = 42$ , so yeah.

Detective: \$840 for double.

Brockman: So that would be 14, right and that would be \$840, \$420, \$840, yup, that would be a half ounce.

Detective: Alright.



Brockman: Exactly, and hopefully he's still got that blue sh\*t, there's something in that man.

Detective: Yeah. Obviously. Alright. I appreciate it.

Ex., Vol. I, Exhibit 23R (Video at 31:42-34:52).<sup>4</sup>

[10] On April 8, 2021, the State filed a notice of its intent to use evidence under Indiana Evidence Rule 404(b) to “prove opportunity, intent, preparation, plan (common scheme), knowledge, absence of mistake, and/or lack of accident.” Amended Appendix of Appellant, Volume 3 at 3. The State intended to introduce: (1) prior evidence of dealing methamphetamine; (2) prior evidence of dealing heroin and/or etizolam; and (3) prior evidence of using methamphetamine and heroin and/or etizolam. *See id.* at 2-3. Brockman filed a motion in limine seeking to exclude the State’s intended 404(b) evidence. The trial court held a hearing, at which Brockman stated he did not intend to present any defense other than a general denial of the charges. *See Tr.*, Vol. II at 15. The trial court granted Brockman’s motion in limine.

[11] After jury selection was completed for Brockman’s trial, the State requested that the motion in limine be clarified. The trial court asked Brockman to clarify whether he was conceding ownership of the drugs in the motel room.

Brockman stated that he was “not contesting that he had some ownership in the

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<sup>4</sup> At trial, Brockman objected to the statements he made to police about contacting Blue and setting up a controlled buy with police.

drugs. What he’s contesting is the delivery of the drugs[.]” *Id.* at 89. The trial court then modified its ruling on the motion in limine and allowed the State to present its designated evidence to the extent that it could prove plan, identity, and opportunity. *See id.* at 115.

[12] At trial, the State presented testimony from Tabatha Butts, Keri Bross,<sup>5</sup> Patrick Myhand, and David Floyd over Brockman’s objection. Butts testified that she had done drugs with Brockman, Granzo, and Rossetti multiple times and had seen them do heroin and methamphetamine together. Butts also testified that Brockman would get the heroin from Chicago and that either she or Granzo would go with him, but Rossetti did not like going. *See Tr.*, Vol. III at 204. She further testified that Brockman would do the transaction, but the heroin would be for Brockman, Granzo, and Rossetti to use together. *See id.* at 205.

[13] Bross testified that she did drugs with Brockman, Granzo, and Rossetti while they lived at the ABC Motel. Bross stated that she knew Brockman was purchasing methamphetamine and heroin “for himself and for [Rossetti]” but she did not know if the drugs Brockman got were also for Granzo. *See id.* at 245. She testified that Brockman would get heroin from Chicago and methamphetamine from Myhand who would get it in South Bend. Bross was unsure whether Brockman had ever gone with Myhand to purchase the methamphetamine, but she knew Granzo had.

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<sup>5</sup> After the events of this case, Bross changed her last name to Kohn.

[14] Myhand testified that he would deliver methamphetamine to Granzo “wherever they were staying” or Granzo would drive with him to South Bend. Tr., Vol. IV at 73. Generally, Myhand would stay after the transaction and get high with Granzo, Rossetti, and Brockman at the motel. Myhand stated that Brockman would provide the heroin. Myhand first testified that he never sold methamphetamine to Brockman only to Granzo; however, he later clarified that there were certain times that Brockman would purchase from him. *See id.* at 70, 77. The last time Myhand sold Granzo, Brockman, and Rossetti methamphetamine was two or three days prior to Brockman’s arrest. Myhand testified that the sale took place at the ABC Motel, and he believed Granzo handed him the money “because that’s how it usually went.” *Id.* at 76-77. Myhand did drugs with them that same day. Myhand testified that he used methamphetamine and six to eight hours later took a light grey drug he believed to be heroin or fentanyl. According to Myhand, he passed out within seconds of taking the light grey drug and woke up with Brockman sitting over him, ice down his pants, and a cold cloth over his head.

[15] Floyd testified that he had done drugs with Brockman and Rossetti. Floyd would sometimes trade his methamphetamine for Brockman’s and Rossetti’s heroin. *See id.* at 141. Floyd claimed to have personally taken Brockman to Chicago multiple times and to South Bend once to pick up heroin. Floyd testified that Granzo would sometimes get methamphetamine from him and sometimes from Brockman. *See id.* at 146-47. Floyd also stated that Granzo got heroin from Brockman and that he had not seen Granzo get his drugs from

anyone else. Floyd testified against Brockman in exchange for the State not prosecuting him for two armed robberies that he had committed. While testifying, Floyd stated that Brockman “was supposed to be in these armed robberies with [him].” *Id.* at 157. Brockman immediately objected and moved for a mistrial which was denied. However, following the challenged statement, the trial court stated, “I’m striking the witness’s last answer. The jury is admonished not to consider it at all[.]” Tr., Vol. IV at 161.

[16] The jury found Brockman guilty of all charges. In its sentencing order, the trial court ordered Brockman’s sentences to be served concurrently and “[m]erged” Brockman’s reckless homicide convictions with his two dealing in a controlled substance (etizolam) resulting in death convictions and his two dealing in a controlled substance (methamphetamine) resulting in death convictions.<sup>6</sup> Appealed Order at 1-2. In total, Brockman was sentenced to thirty years to be served in the Indiana Department of Correction. Brockman now appeals. Additional facts will be provided as necessary.

## Discussion and Decision

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<sup>6</sup> Brockman was sentenced to seventeen and one-half years for dealing in methamphetamine, one year for each of his failure to report a dead body convictions, thirty years for each of his dealing in a controlled substance resulting in death convictions, and three years for dealing in a schedule I controlled substance. The trial court did not impose a sentence for the convictions that were merged.

## I. Admission of Evidence

### A. Standard of Review

[17] The trial court has broad discretion in ruling on the admissibility of evidence. *Small v. State*, 632 N.E.2d 779, 782 (Ind. Ct. App. 1994), *trans. denied*. We will disturb its ruling only upon a showing of abuse of that discretion. *Id.* An abuse of discretion may occur if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Baxter v. State*, 734 N.E.2d 642, 645 (Ind. Ct. App. 2000).

### B. Prior Bad Acts

[18] Pursuant to Indiana Evidence Rule 404(b)(1), “[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” This restriction prevents the jury from indulging in the “forbidden inference” that a criminal defendant’s “prior wrongful conduct suggests present guilt.” *Fairbanks v. State*, 119 N.E.3d 564, 568 (Ind. 2019) (citation omitted), *cert. denied*, 140 S. Ct. 198 (2019). However, prior bad acts may be admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Ind. Evidence Rule 404(b)(2).

[19] Here, the State presented the testimony of Butts, Floyd, Bross, and Myhand regarding Brockman’s prior crimes or bad acts. Brockman argues this testimony was impermissible under Rule 404(b). When a defendant objects to the

admission of evidence on the grounds that it violates Rule 404(b), we (1) determine whether the evidence of prior bad acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of such evidence against its prejudicial effect. *Monegan v. State*, 721 N.E.2d 243, 248 (Ind. 1999).

- [20] We note that Brockman does not argue that the testimony of Butts, Floyd, Bross, and Myhand was irrelevant. And given that the testimony pertained to Brockman's history of purchasing drugs, we conclude that the evidence was highly relevant to his charges. Thus, the first prong is satisfied.
- [21] We find the second prong satisfied as well. Here, the issue is whether Brockman "delivered" the drugs to Granzo and Rossetti. All those who testified had taken drugs with, purchased drugs with, or provided drugs to Brockman, Granzo, and Rossetti. Their testimony provided insight regarding the trio's drug use and drug purchasing habits and shows plan, identity, and opportunity. Thus, we find that the probative value of Brockman's bad acts, as they related to his prior purchases of drugs, outweighed the prejudicial effect it may have had on the jury. *See id.*
- [22] Brockman also contends that the testimony of Butts, Floyd, Bross, and Myhand was impermissible under Rule 404(b) because he "did not present a defense

other than denying the charges.”<sup>7</sup> Appellant’s Brief at 24. In *Wickizer v. State*, our supreme court held that Rule 404(b)’s intent exception is available only “when a defendant goes beyond merely denying the charged culpability and affirmatively presents a *claim of particular contrary intent*.” 626 N.E.2d 795, 799 (Ind. 1993) (emphasis added). The *Wickizer* court reasoned that to allow other bad acts evidence to prove intent when a defendant merely denies involvement in a crime would often produce the “forbidden inference.” *Id.*

[23] However, our supreme court has refused to extend *Wickizer* to other Rule 404(b) exceptions, *Fairbanks*, 119 N.E.3d at 570, concluding that the concerns that led to the narrow construction of the intent exception were not applicable to other 404(b) exceptions, *see Hicks v. State*, 690 N.E.2d 215, 222 n.12 (Ind. 1997) (finding that “motive and most other collateral issues are unlike intent” and less likely to produce the forbidden inference); *Goodner v. State*, 685 N.E.2d 1058, 1061 n.3 (Ind. 1997) (finding the “[o]ther exceptions under 404(b) necessarily involve a different set of issues”). Therefore, we conclude that the trial court did not abuse its discretion when it permitted testimony of prior bad acts to prove plan, identity, and opportunity.

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<sup>7</sup> Brockman relies only on *Burgett v. State*, 758 N.E.2d 571 (Ind. Ct. App. 2001), *trans. denied*, to support his argument. In *Burgett*, the State introduced evidence of prior bad acts to prove motive. The *Burgett* court stated, “The exceptions in Evid. R. 404(b) are only available when a defendant goes beyond merely denying the charged crimes and affirmatively presents a specific claim contrary to the charge[,]” seemingly extending the *Wickizer* rule to *all* Rule 404(b) exceptions. *Id.* at 580 (citation omitted). However, *Burgett* was decided before *Fairbanks*, wherein our supreme court explained the *Wickizer* rule does not apply to all 404(b) exceptions. *See Fairbanks*, 119 N.E.3d at 570. Therefore, we choose to disregard *Burgett* and follow supreme court precedent.

## C. Statements to Police

[24] Brockman also argues that a portion of his statements to police on October 2, 2019, found in State’s Exhibit 23R, were not relevant and therefore impermissible. “Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence; and . . . the fact is of consequence in determining the action.” Evid. R. 401. In general, relevant evidence is admissible, and irrelevant evidence is inadmissible. Evid. R. 402. “A trial court’s discretion is wide on issues of relevance and unfair prejudice.” *Snow v. State*, 77 N.E.3d 173, 176 (Ind. 2017).

[25] On October 2, 2019, Brockman met with police for a second time and discussed contacting Blue to set up a controlled buy. Brockman contends that these statements were not relevant and were unfairly prejudicial.<sup>8</sup> However, during the conversation Brockman confirmed that he purchased the etizolam, or what he believed to be heroin, that Rossetti and Granzo took before they died. This is confirmed by him stating the name of the dealer he procured the drug from, his belief that the drug he purchased killed them, and his acknowledgment that the coloring of the drug was different than normal heroin. Therefore, the trial court did not abuse its discretion by determining the statements were relevant.

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<sup>8</sup> Brockman also contends that the statements could be prejudicial because they “could have misled the jury about Mr. Granzo’s and Ms. Rossetti’s actual cause of death[.]” Appellant’s Br. at 36. However, we conclude that the trial court did not abuse its discretion in admitting the evidence because the probative value associated with confirming Brockman’s purchasing and ownership of the etizolam outweighs any prejudice regarding the cause of death.



## II. Motion for Mistrial

[26] Brockman argues the trial court erred by failing to grant his motion for a mistrial. The grant or denial of a motion for mistrial rests within the sound discretion of the trial court and we therefore review the trial court's decision only for an abuse of discretion. *Brittain v. State*, 68 N.E.3d 611, 619 (Ind. Ct. App. 2017), *trans. denied*. The trial court is entitled to great deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of a given event and its probable impact on the jury. *Id.* at 620. To prevail on appeal from the denial of a motion for mistrial, a defendant must demonstrate that the statement in question was so prejudicial and inflammatory that he was placed in a position of grave peril. *Id.* The gravity of peril is measured by the probable persuasive effect of the statement on the jury. *Smith v. State*, 140 N.E.3d 363, 373 (Ind. Ct. App. 2020), *trans. denied*. Granting a mistrial “is an extreme remedy that is warranted only when no other action can be expected to remedy the situation.” *Kemper v. State*, 35 N.E.3d 306, 309 (Ind. Ct. App. 2015), *trans. denied*.

[27] Here, Floyd testified against Brockman and in exchange the State did not prosecute him for two armed robberies he committed. While testifying, Floyd stated that Brockman “was supposed to be in these armed robberies with [him].” Tr., Vol. IV at 157. Brockman immediately objected and moved for a mistrial which was denied. He now contends that Floyd's testimony “was extremely inflammatory and prejudicial[.]” Appellant's Br. at 45. However, following the challenged statement, the trial court stated, “I'm striking the

witness's last answer. The jury is admonished not to consider it at all[.]” Tr., Vol. IV at 161.

[28] We presume the jury followed the trial court's admonishment and that the excluded testimony played no part in the jury's deliberations. *Duncanson v. State*, 509 N.E.2d 182, 186 (Ind. 1987); *see also Stokes v. State*, 919 N.E.2d 1240, 1243 (Ind. Ct. App. 2010) (“[A] timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement.”), *trans. denied*. Therefore, the trial court did not abuse its discretion in denying the extreme remedy of a mistrial under these circumstances.

### III. Sufficiency of the Evidence

[29] Brockman argues that there was insufficient evidence to find him guilty of dealing in methamphetamine, dealing in a schedule I controlled substance, and dealing in a controlled substance resulting in death.<sup>9</sup>

[30] To convict Brockman of dealing in methamphetamine the State was required to show that Brockman knowingly or intentionally delivered methamphetamine. Ind. Code § 35-48-4-1.1(a)(1). Similarly, to convict Brockman of dealing in a schedule I controlled substance the State was required to show that Brockman

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<sup>9</sup> Brockman does not challenge his two convictions of failure to report a dead body. He does challenge the sufficiency of the evidence of his two reckless homicide convictions; however, because we are remanding with instructions for the trial court to vacate those convictions due to double jeopardy concerns, we need not address his argument.

knowingly or intentionally delivered a schedule I controlled substance. Ind. Code § 35-48-4-2(a). Pursuant to Indiana Code section 35-42-1-1.5, a person commits dealing in a controlled substance resulting in death when they “knowingly or intentionally manufacture[] or deliver[] a controlled substance<sup>[10]</sup> . . . that, when the controlled substance is used, injected, inhaled, absorbed, or ingested, results in the death of a human being who used the controlled substance[.]”

### A. Standard of Review

[31] When reviewing the sufficiency of the evidence required to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). Instead, we consider only the evidence supporting the verdict and any reasonable inferences that can be drawn therefrom. *Morris v. State*, 114 N.E.3d 531, 535 (Ind. Ct. App. 2018), *trans. denied*. We consider conflicting evidence most favorably to the verdict. *Silvers v. State*, 114 N.E.3d 931, 936 (Ind. Ct. App. 2018). “We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt.” *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). The evidence need not overcome every reasonable hypothesis of innocence; it is sufficient if an

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<sup>10</sup> “Controlled substance” includes schedule I controlled substances under Indiana Code section 35-48-4-2 and methamphetamine pursuant to Indiana Code section 35-48-4-1.1. *See* Ind. Code § 35-42-1-1.5(a)(2) & (4).

inference may reasonably be drawn from the evidence to support the verdict. *Silvers*, 114 N.E.3d at 936.

## **B. Joint Possession/Delivery**

[32] Brockman argues that he jointly possessed the etizolam and methamphetamine with Granzo and Rossetti and that the State failed to show that he delivered the drugs. Under Indiana Code section 35-48-1-11, delivery means “an actual or constructive transfer from one (1) person to another of a controlled substance,” regardless of an agency relationship.

[33] Brockman contends that he, Granzo, and Rossetti lived together and jointly possessed the drugs for their own personal consumption. In *Walmsley v. State*, a dealer dropped off a combination of fentanyl and heroin to the home of the defendant and his wife. 131 N.E.3d 768, 769 (Ind. Ct. App. 2019), *trans. denied*. The defendant injected his wife with her consent, and she later died. We concluded that evidence showed the moment the drug dealer dropped off the drug at the couple’s home, they jointly acquired possession of the drug and thus the defendant did not “deliver” the drug to his wife when he injected her. *Id.* at 773.

[34] In *Walmsley*, we stated:

[W]hen two or more people jointly acquire possession of a drug for their own use, intending only to share it together, they do not “deliver” the drug when they inject or hand the drug to the other person, since they acquired possession from the outset[.]

*Id.* In reaching this conclusion, this court examined and agreed with the rationale of *United States v. Swiderski*, 548 F.2d 445, 450 (2d Cir. 1977), which held that individuals who “simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together,” are not distributors, “[s]ince [they] both acquire possession from the outset and neither intends to distribute the drug to a third person[.]” Therefore, “neither serves as a link in the chain of distribution.” *Id.*

[35] The record is clear that Brockman, Granzo, and Rossetti did drugs together frequently. Brockman told police that the drugs in the motel room were his and referred to it as “my stuff[.]” Tr., Vol. III at 149; Ex., Vol. I, Exhibit 21R (Video at 41:33, 55:57). However, the pertinent question here is whether Rossetti, Granzo, and Brockman obtained the methamphetamine and etizolam at issue “simultaneously” or whether Brockman obtained the drugs by himself and then brought the drugs to Rossetti and Granzo, thus serving as a “link in the chain of distribution.”<sup>11</sup> *Swiderski*, 548 F.2d at 450.

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<sup>11</sup> We also point to *United States v. Wright*, wherein the Ninth Circuit Court of Appeals held that when an individual procured heroin alone with the intent to use or share it with another person, the individual’s actions exceed the scope of the *Swiderski* rule. 593 F.2d 105, 108 (9th Cir. 1979). The court in *Wright* concluded:

This is not a case in which two individuals proceeded together to a place where they simultaneously purchased a controlled substance for their personal use. Here Wright operated as the link between the person with whom he intended to share the heroin and the drug itself.

*Id.*

- [36] Brockman stated that the last time he purchased methamphetamine from “Patrick” was “about four days” prior to Granzo’s and Rossetti’s deaths. Ex., Vol. I, Exhibit 21R at (Video at 1:17:01). Brockman told police that he and Granzo would generally meet “Patrick” different places around Michigan City to pick up the methamphetamine. However, he did not elaborate on where he made the last purchase from Myhand.
- [37] Myhand testified that he sold Granzo, Brockman, and Rossetti methamphetamine two to three days prior to Brockman’s arrest. Myhand further testified that the sale took place at the ABC Motel and that he did drugs with all of them that day. *See Tr.*, Vol. IV at 76-78. Thus, because Myhand brought the methamphetamine to the ABC Motel where Brockman, Granzo and Rossetti all were staying, the methamphetamine was obtained simultaneously.<sup>12</sup> *See Walmsley*, 131 N.E.3d 669.
- [38] However, a reasonable fact finder could determine that Brockman procured the etizolam, which he believed to be heroin, alone. Butts and Bross testified that Brockman would get heroin from Chicago. *See Tr.*, Vol. III at 204, 246. Floyd claimed to have personally taken Brockman to Chicago multiple times to pick

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<sup>12</sup> We also note that it is unclear who purchased the methamphetamine. Brockman told police that “I can get it but [Granzo] always gets it.” Ex., Vol. I, Exhibit 21R (Video at 41:47). And Myhand testified that Granzo usually purchased the methamphetamine from him not Brockman and the last time he sold to them he believed that Granzo handed him the money “because that’s how it usually went.” *Tr.*, Vol. IV at 76-77. However, because the record is clear that the last purchase of methamphetamine, which in turn resulted in Granzo and Rossetti’s deaths, was from Myhand and delivered to the motel where they were all staying, we need not determine who purchased it because they jointly acquired possession. *See Walmsley*, 131 N.E.3d 669.

up heroin. *See* Tr., Vol. IV at 146-47. Butts testified that sometimes Granzo would go with Brockman to Chicago to obtain the heroin, but that Rossetti did not like to go. *See* Tr., Vol. III at 204. Brockman told police that it had been “two or three” days since he had gotten what he believed to be heroin. Ex., Vol. I, Exhibit 21R at (Video at 1:17:21). There is nothing in the record indicating that either Granzo or Rossetti traveled with him on that *particular* trip. And there is no evidence suggesting the heroin was delivered to Brockman at the motel. Thus, given that witness testimony suggested that Rossetti never made the trip and that Granzo only sometimes did, it was not unreasonable for a jury to determine that Brockman obtained the etizolam by himself and brought it back to Granzo and Rossetti.

[39] We conclude that there was sufficient evidence to support Brockman’s convictions for dealing in a schedule I controlled substance but there was insufficient evidence to support Brockman’s convictions of dealing in methamphetamine and dealing in a controlled substance resulting in death related to methamphetamine. To determine whether there was sufficient evidence to support Brockman’s dealing in a controlled substance resulting in death conviction related to etizolam, we must still determine whether Granzo’s and Rossetti’s deaths were a result of taking etizolam.

### **C. Resulting in Death**

[40] Brockman argues that the State failed to show the etizolam taken by Rossetti and Granzo was the cause of their deaths. Indiana Code section 35-42-1-1.5(a)

requires that the charged drug “results in the death” of the person who took it.

It is not a defense that the person died under the following circumstances:

(1) after voluntarily using, injecting, inhaling, absorbing, or ingesting a controlled substance . . . ; or

(2) as a result of using the controlled substance . . . *in combination* with alcohol or another controlled substance[.]

Ind. Code § 35-42-1-1.5(d) (emphasis added).

[41] The plain language of Indiana Code section 35-42-1-1.5(a) requires the State to prove a causal connection between the controlled substance delivered by the defendant and the victim’s death. *Yeary v. State*, 186 N.E.3d 662, 673 (Ind. Ct. App. 2022). However, when multiple drugs are in the victim’s system, as here, “such proof may consist of evidence that the drug distributed by the defendant was enough, by itself, to cause the death [or] that the distributed drug, while not enough to cause the death by itself, foreseeably combined with other substances to cause the death.” *Id.* at 674.

[42] Here, Dr. Feczko performed the autopsies on both Granzo and Rossetti. Dr. Feczko determined that the cause of death was an overdose, in part, on methamphetamine. *See Tr.*, Vol. III at 124, 130. Dr. Feczko determined that because of the amount of etizolam in both Granzo and Rossetti’s systems, it was not a factor in their death. However, Dr. Feczko also admitted that he was not familiar with the interaction between etizolam and methamphetamine or amphetamine. *See id.* at 125-26, 130-31. A few days prior to Granzo’s and



Rossetti's overdoses, Myhand overdosed in their motel room while taking the same drugs they consumed the day of their deaths. Myhand testified that he took methamphetamine and six to eight hours later took a "lighter grey" drug he believed to be heroin or fentanyl. Tr., Vol. IV at 78. According to Myhand, he passed out "within seconds" of taking the light grey drug and woke up with Brockman sitting over him, ice down his pants, and a cold cloth over his head. *Id.* at 79.

[43] Given the totality of the testimony, we conclude that a reasonable trier of fact could have determined that etizolam, when combined with methamphetamine, could foreseeably cause death. *Yeary*, 186 N.E.3d at 674.

#### IV. Double Jeopardy

[44] The trial court entered judgments of conviction against Brockman for, among other things, two counts of reckless homicide and four counts of dealing in a controlled substance resulting in death pursuant to the jury's verdict.<sup>13</sup> *See Am. App. of Appellant*, Vol. 3 at 237. However, in its sentencing order, the trial court "[m]erged" the two reckless homicide convictions with two of the dealing in a controlled substance resulting in death convictions.<sup>14</sup> *See id.* 237-38. We have stated that a trial court's act of merging, without also vacating, the

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<sup>13</sup> The trial court entered judgment on "Count I, Count II, Count III, Count IV, Count V, Count VII, Count VII, Count VIII, Count IX and Count X[.]" *See* Appealed Order at 1. We note that the trial court mistakenly stated Count VII twice and omits Count VI.

<sup>14</sup> The State concedes that this merger is not sufficient to cure a double jeopardy violation. Brief of Appellee at 8 n.1.

conviction is not sufficient to cure a double jeopardy violation. *Gregory v. State*, 885 N.E.2d 697, 703 (Ind. Ct. App. 2008), *trans. denied*. A double jeopardy violation occurs when judgments of conviction are entered and cannot be remedied by the “practical effect” of concurrent sentences or by merger after conviction has been entered. *Morrison v. State*, 824 N.E.2d 734, 741-42 (Ind. Ct. App. 2005), *trans. denied*. We therefore remand this cause to the trial court with an instruction to vacate Brockman’s convictions for reckless homicide.

## Conclusion

[45] We conclude the following: the trial court did not abuse its discretion by admitting evidence; the trial court did not abuse its discretion by denying Brockman’s motion for mistrial; there was sufficient evidence to support Brockman’s convictions for dealing in a schedule I controlled substance and dealing in a controlled substance resulting in death related to etizolam but there was insufficient evidence to support Brockman’s convictions of dealing in methamphetamine and dealing in a controlled substance resulting in death related to methamphetamine; and the trial court’s merger of certain convictions did not cure a double jeopardy violation. Accordingly, we affirm in part and reverse and remand in part with instructions for the trial court to reverse Brockman’s convictions of dealing in methamphetamine and dealing in a controlled substance resulting in death related to methamphetamine and to vacate Brockman’s reckless homicide convictions.

[46] Affirmed in part, reversed in part, and remanded with instructions.

Riley, J., and Molter, J., concur.