First District Court of Appeal
State of Florida

No. 1D19-498

DENISE WILLIAMS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Leon County.
James C. Hankinson, Judge.

November 25, 2020

PER CURIAM.

Denise Williams appeals her convictions for first-degree murder and conspiracy to commit murder, arising from the death of her husband, Mike Williams. She raises multiple grounds for reversal of her convictions, and she also challenges her sentence. We write to address three of her arguments: (1) The trial court erred in denying her motion for judgment of acquittal on the charge of principal to first-degree murder; (2) The trial court erred in denying her motion for judgment of acquittal on the charge of conspiracy to commit murder; and (3) The trial court erred in denying her motion to compel the State to elect between two mutually exclusive charges. Because we agree that the evidence presented at trial could not support her conviction for first-degree murder as a principal, we reverse that conviction. Finding no merit

in her other arguments on appeal, we affirm her conviction and thirty-year sentence for conspiracy to commit murder.

I. Facts

In the early morning hours of December 16, 2000, Brian Winchester and Mike Williams met to go duck hunting at Lake Seminole, like they had so many times before. Only this time, Brian planned to murder Mike.

Brian and Mike, along with their respective spouses, Kathy Winchester and Denise Williams, were lifelong friends that often socialized with each other. In 1997, Brian's and Denise's friendship evolved into a love affair, and they began to see each other regularly. As their relationship continued, they wanted to spend more time with each other. But Denise refused to divorce Mike, for fear of having to share custody of their child. Instead, according to the State's theory of the case, Brian and Denise hatched a plan to kill Mike. This would allow them to be together and collect on Mike's life insurance policy.

Brian was the only witness who directly connected Denise to Mike's murder. He explained that he and Denise started thinking of ways to be together about a year to a year and a half before Mike's murder. Brian described their planning as "very mutual," but he also admitted that he "instigated a lot of it." They rejected several plans, including staging a robbery of Mike's office, before deciding to make Mike's death look like a hunting accident.

Brian explained that he planned to fake an accident in which both Mike and he would fall into the water, but he would be the only survivor. Brian asserted that Denise liked this particular idea because Mike's survival then would be up to God and she could feel better about herself if it were more like an accident and less like a murder. For their plan to work, the trip had to occur during duck hunting season and before one of Mike's life insurance policies lapsed. Denise also wanted the duck hunting trip to happen soon so she would not have to go on an anniversary trip with Mike.

Initially, Brian and Denise chose December 9, 2000, as the date for the hunting trip, and Brian made plans with Mike to go

hunting on that day. But the night before the trip, Mike called Brian to tell him that Denise would not let him go. Soon after, Brian talked to Denise, and she explained that she had gotten cold feet at the last minute. Brian recalled:

> [W]e talked about it and we had several, you know, more conversations that, you know, look, this is - - either we're going to go forward with this or we're not. I mean, we're either going to be together or we're not. You know, like I said, the policy is ending. You've got that anniversary trip coming up next weekend. You know, duck season is going to be ending soon. Do you want this to happen or not? You know, I don't want to set these plans up if this isn't something, you know - - this isn't something that you need to be wishy-washy about, I guess, basically.

Brian and Denise met several times over the next week to discuss what to do next. Brian testified that "it was decided again that, yes, this is what were [sic] gonna do."

The next week, Brian told Mike that he had a secret hunting spot and that Mike would need to bring his waders. They met at a parking lot and drove separate cars to Lake Seminole. Normally, Brian and Mike would have talked on the phone during the drive over to the lake. But Brian told Mike that his cell phone battery was dead. Brian was concerned that if Mike called, the police later would be able figure out from cell phone data that Brian had been with Mike that morning.

Brian persuaded Mike to put on his waders before getting into the boat. According to Brian, falling into the water with waders on could be dangerous and lead to drowning. Brian hoped that after he pushed Mike into the water, Mike's waders would fill up with water, he would be unable to keep himself above the surface, and he would drown. When the two men arrived at a deep area of the lake in the boat, Brian indeed pushed Mike overboard. But Mike managed to remove his waders and swim over to a tree trunk, where he called out for help. Brian panicked and then loaded a gun he had brought with him on the boat. Brian circled the boat around Mike twice before shooting Mike in the head and killing him. Brian

loaded Mike's body into his truck, drove home, returned to bed with his wife to establish an alibi, and later drove to a secluded area near his home to bury Mike's body. Brian testified that he did all of this on his own. Denise was not there for any of it, and she was not on the phone with Brian while he murdered Mike or disposed of the body. Brian later would join the search party trying to locate Mike.

Authorities found Mike's truck and boat trailer at the Lake Seminole boat launch. They also found his boat on the shore nearby. A few weeks after he went missing, searchers found Mike's waders and jacket in the lake. Various search and rescue teams continued to search Lake Seminole for Mike until at least February 2001.

While the search for Mike continued, and nineteen days after Mike's disappearance, Denise filed claims for the life insurance money. In June 2001, she petitioned for Mike's death certificate, which she obtained in July 2001.

When asked about Denise's participation in Mike's murder, Brian explained that "Denise really didn't have to do a whole lot, other than come up with an alibi for herself and make sure that Mike went." After the murder, Brian and Denise had limited contact with each other to avoid arousing suspicion.

Mike's mother, Cheryl, urged newspapers and the police to continue the investigation into Mike's disappearance. This led to two confrontations with Denise. The first confrontation, in August 2001, occurred after the local newspaper published an article about missing locals that mentioned Mike. Denise screamed at Cheryl, saying she never wanted to hear Mike's name again or see Mike's picture in the paper because she had to "get on with her life." Denise told Cheryl that if she persisted in trying to persuade the police to launch a criminal investigation, Cheryl would not be allowed to see her granddaughter. The second confrontation occurred in January 2005 when Brian and Denise came to Cheryl's house. Denise told her if she stopped pushing for an investigation, Cheryl could see her granddaughter. Cheryl's other son was present and told them that he and Cheryl just wanted to know what Brian and Denise had done to Mike. Brian and Denise

became mad and left. After that visit, Denise did not allow Cheryl to see her granddaughter again.

Brian separated from his wife almost a year after the murder, and they divorced in 2003. Two years later, Brian and Denise married. They were together for seven years before they separated. Denise filed for divorce in 2015.

During the divorce proceedings, police officers told Brian that Denise planned to tell them what really happened to Mike once the divorce was completed. After Denise refused to answer his calls, Brian kidnapped her. He broke into Denise's car and lay in wait until she got into the car to drive to work. He was armed with a gun. Denise persuaded him to let her go, and she contacted authorities. Brian was arrested for armed kidnapping and faced life in prison. He was also charged with trying to tamper with witnesses in the kidnapping case.

About a week after Brian's arrest for the kidnapping, Denise called Brian's ex-wife, Kathy, and asked her to "tell [Brian's father] to get a message to Brian that I'm not talking." Kathy eventually started working as a confidential source for police and recorded phone conversations she had with Denise. In one conversation, Kathy pretended that Brian told her that "ya'll planned it" and that Brian's father told her to take that secret to the grave. Denise never refuted Kathy's allegations and seemed more concerned about what Brian may have divulged.

While Brian was in jail on the kidnapping charge, he entered a proffer agreement with the State. In exchange for his cooperation in finding Mike's body and telling the State what happened, the State agreed to not recommend a life sentence on the kidnapping charge[*] and not to reference the alleged witness tampering at sentencing. The State also agreed not to use any of Brian's testimony against him in the future so long as the State determined such testimony was truthful.

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[*] The State requested a forty-five-year sentence. Before Denise's trial, Brian was sentenced to twenty years' imprisonment followed by fifteen years' probation for the kidnapping.

II. Analysis

Of the issues raised by Denise on appeal, we first address her challenges to the sufficiency of the evidence to sustain her convictions. We then explain why we reject her contention that she is entitled to a new trial based on the trial court's refusal to compel the State to elect which charge to put to the jury: principal to first-degree murder or accessory after-the-fact to murder.

A. Sufficiency of the Evidence

Denise argues that the trial court should have granted her motions for judgment of acquittal on the murder and conspiracy charges against her. For the reasons explained below, we agree that the State failed to prove that Denise acted as a principal to first-degree murder, and we reverse that conviction. But we hold that the trial court properly denied the motion for judgment of acquittal on the conspiracy charge.

1. Principal to First-Degree Murder

By statute, a person who "commits any criminal offense against the state," and one who "aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed," are both subject to the same charge, conviction, and punishment for the offense as a principal in the first degree. § 777.011, Fla. Stat. (2000). Denise argues that there was not enough evidence to support her conviction as a principal to first-degree murder. She asserts that we should interpret the statute as requiring proof of (1) an intent to commit the crime and (2) the commission of a *physical act* in furtherance of that intent. She contends that communication alone cannot support a conviction as a principal. To address this argument, we must examine what conduct this "principal" statute criminalizes.

And to do that, we look to the original meaning of the statutory terms, which pre-date statehood by a hundred years or more. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1767 (2020) (Alito, J., dissenting) (noting that "when textualism is properly understood, it calls for an examination of the social context in

which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment"). Rather than simply "slicing" up the statute into pieces and defining each word individually and abstractly, we consider what ordinary people at the time of enactment would have understood the terms and phrases in a statute to have been referencing, in the particular context of the circumstances in which those terms and phrases had been used. *Id.* at 1766–67 (collecting linguistic scholarship on how the meaning of language derives from the context in which a particular shared linguistic community "uses words and phrases in context" (citation omitted)). Denise's reading of the statute, as it turns out, runs contrary to that original meaning. Nonetheless, under the original meaning of the terms, Denise is correct that the State did not present sufficient evidence to support a conviction under the statute.

Section 777.011 represents a combination of three historically separate forms of criminal offense; they find their origins in ancient English common law. The forms were as follows: (1) principal in the first degree; (2) principal in the second degree; and (3) accessory before the fact. *See Potts v. State*, 430 So. 2d 900, 901 & nn.2–3 (Fla. 1982); *see also id.* (tracing section 777.011 back to language in earlier laws). A principal in the first degree historically was the absolute perpetrator of the crime, the one we typically would consider to have committed the crime. *See id.* at 901 (defining this principal as the one "who actually committed the offense"). Here, that would be Brian, who shot and killed Mike.

Comparatively, a principal in the second degree historically was one remove from the absolute perpetrator; this one was "actually or constructively at the scene of the crime and aided or abetted in its commission." *Id.* By definition, then, the key components of a second-degree principal were presence and contemporaneity; that is, this principal would be with the primary perpetrator, in real time, actively assisting, directing, or encouraging the primary perpetrator as the crime is being committed.

"Presence" did not have to "be an actual immediate standing by, within sight or hearing of the fact; but there [could also be] a constructive presence, as when one commits a robbery or murder,

and another keeps watch or guard at some convenient distance." 4 WILLIAM BLACKSTONE, COMMENTARIES *34 (hereinafter, Blackstone, *Commentaries*); *cf. Staten v. State*, 519 So. 2d 622, 624 (Fla. 1988) (holding that driver who waited outside during fatal robbery and then drove his cohorts away as planned was a principal to the crimes). Still, if a person were not present, either actually or constructively, then he would be an accessory, not a principal. *Cf.* 4 Blackstone, *Commentaries* *36–37 (noting that absence is necessary for someone to be an accessory, because otherwise, presence would make the person a principal).

Of course, a person just standing by at the scene of an ongoing crime would not necessarily have been a principal; to be criminally culpable, the person also had to have actively participated in the offense *at the time it occurred* by working together with the absolute perpetrator—that is, there must be contemporaneity. 4 Blackstone, *Commentaries* *34 (explaining that the second-degree principal is "present, aiding and abetting the fact to be done"); *Neumann v. State*, 156 So. 237, 239 (Fla. 1934) ("A principal in the second degree is one who 'aids in the commission of a felony' . . . by being present, aiding and abetting the commission of the felony *at the time it is perpetrated.*" (emphasis supplied)); *see also Ryals v. State*, 150 So. 132, 132 (Fla. 1933) (noting that the rule in Florida is that a second-degree principal "must not only be present aiding or abetting the killing by the actual perpetrator, but must also be a participant in the felonious design with which the killing is done"); *cf. Staten*, 519 So. 2d at 624 (explaining that "to be guilty as a principal for a crime *physically committed by another*, one must intend that the crime be committed and do some act to assist the other person in *actually committing the crime*" (emphasis supplied)).

As has already been suggested above, the terms "aid" and "abet" historically referred to an offense committed by this type of principal and captured the "presence" and "contemporaneity" components inherent in the concept. *Cf. Montague v. State*, 17 Fla. 662, 665 (1880) (noting that such a principal had to be "present, aiding and abetting at the commission of the act"); *see* 4 Blackstone, *Commentaries* *34. While present at the scene of an ongoing crime, then, the person would be a principal if he or she assisted in some way ("aid") or gave encouragement ("abet"). *Cf.* 4

Blackstone, *Commentaries* *36–37 (explaining that a "procurer" of a crime, who otherwise would be an accessory before the fact, would become a principal if the person were "present" and, ostensibly, abetting); *cf. Abet*, BLACK'S LAW DICTIONARY (6th ed. 1990) ("To encourage, incite, or set another on to commit a crime.").

Another remove from the absolute perpetrator was the accessory before the fact. This one could not be a principal of a crime because, historically, he would not have been "present at its commission." *See Potts*, 430 So. 2d at 901 (explaining that "the accessory before the fact was treated quite differently" from principals in the first and second degree). Since the early days of statehood, Florida has had a statute on the books to ensure that an accessory before the fact nonetheless would be treated as a principal. *See* ch. 1637, subch. 11, §§ 3–4, Laws of Fla. (1868); Rev. Gen. Stat. 5007–5008, at 2488–89 (1920) (requiring that an "accessory before the fact," who "counsels, hires or otherwise procures a felony to be committed," be punished as if he were the "principal felon"). The choice of the terms "counsels," "hires," and "procures" for use in the early statutes was by no means haphazard; those terms were endemic to the ancient English common law in the treatment of the accessory before the fact. *See, e.g., The Case of Macdaniel* (1792) 168 Eng. Rep. 60, 62; Foster 121, 125; *R v. Bernard* (1860) 175 Eng. Rep. 709, 710; 1 Foster and Finlason 240, 242 (defining an accessory before the fact as a person "who, being absent at the time of the offence committed, doth yet procure, counsel, command or abet another to commit a felony"); 4 Blackstone, *Commentaries* *36.

Blackstone went on to illustrate what was meant by terms like these, as follows: "If A then advises B to kill another, and B does it in the absence of A, now B is principal, and A is accessory in the murder." 4 Blackstone, *Commentaries* *37; *see also id.* (referring to an accessory before the fact as one who "commands or counsels another to commit an unlawful act"). Historically, then, for a person to be culpable as an accessory before the fact—that is, absent from the scene and not actively participating at the time the crime was committed—he would have had to have done more than simply provide some assistance in advance. *Cf. Bernard*, 175 Eng. Rep. at 710 (explaining that a crime being accomplished by a principal in "strict conformity with the plans and instructions of

the accessory" is key to the accessory's culpability as such). Terms like "counsel," "hire," and "procure," which Blackstone and ancient cases routinely used together with terms like "command" and "advise," reflect this: An accessory before the fact would be the instigator, the promotor, the goader, or the push behind the crime—the one who set or keeps everything in motion.

In 1957 the Legislature combined these different concepts of criminal liability into a single statute that became what is the current version of section 777.011, Florida Statutes. *See* ch. 57-310, Laws of Fla. It did so with the express purpose of eliminating the distinction between accessory before the fact and principal (both first and second degree) for charging, conviction, and punishment purposes. *See id.* (stating that "the legal distinctions between accessory before the fact, principal in the first degree and principal in the second degree serve no useful purpose"). The Legislature in turn repealed two statutes that made such distinctions and created the new one that combined the three forms into one. *Compare id.*, §§ 1–2 (repealing §§ 776.01, 776.02, Fla. Stat. (1953) and combining "aids, abets, counsels, hires, or otherwise procures" in one new statute that would become section 777.011) *with* § 776.01, Fla. Stat. (1955) (providing that one who "*aids* in the commission of a felony," and one who is an accessory before the fact, would both be punished as a "principal felon" (emphasis supplied)); § 776.02, Fla. Stat. (1955) (providing that a person who "counsels, hires or otherwise procures a felony to be committed" could be charged and convicted as an accessory before the fact).

The change eliminated the statutes specific to accessory before the fact, so to drive the point home that an accessory before the fact *still* could be charged and punished as a principal (which, under the common law could not have happened), the Legislature expressly precluded the need for a principal to be "actually or constructively present at the commission of the offense." Ch. 57-310, § 1 at 608, Laws of Fla.; *see* § 777.011, Fla. Stat. At the same time, the Legislature chose to retain the ancient terms used to reference a second-degree principal ("aids" and "abets") and an accessory before the fact ("counsels, hires, or otherwise procures"), so we give them the respective meanings that they originally held.

Chapter 57-310, Laws of Florida, then, combined the two degrees of principal and accessory before the fact into one principal statute but carried forward the three distinct ways that one could be culpable for the crime, as follows:

> Whoever [1] commits any criminal offense against the state . . . or [2] aids, abets, [or 3] counsels, hires, or otherwise procures such offense to be committed . . . is a principal in the first degree . . . .

§ 777.011, Fla. Stat. The first way is the historical first-degree principal; the second identifies the historical second-degree principal; and the third describes the historical accessory before the fact. To prove culpability under this statute, the State must establish that a defendant engaged in conduct that would have fit within one of these three distinct sets of terms as they originally were understood. This means that "aids" and "abets," as those terms continue to be used in the statute, retain their historical "contemporaneity" component as applied to a second-degree principal, even while the "presence" requirement has dropped out. *Id.* (providing for punishment as a principal "whether he or she is or is not actually or constructively present at the commission of such offense").

Indeed, we see this application in *Garzon v. State*, 980 So. 2d 1038 (Fla. 2008). There, the defendant directed the commission of a home-invasion robbery through a thirty-nine-minute cell phone conversation. *Id.* at 1039. The supreme court determined that a principal instruction properly was given, despite the defendant not being "physically present at the home invasion" because the evidence pointed to the defendant being the one with whom the perpetrators were speaking via cell phone "*during* the home invasion." *Id.* at 1044 (emphasis supplied).

With all of this in mind, Denise's focus on distinguishing between acts and words is misplaced. Words of course can be used to encourage, incite, procure, and even assist. *See R v. John Royce* (1784) 98 Eng. Rep. 81, 86–87; 4 Burr. 2073, 2082–84 (holding that a defendant was properly convicted as a principal in the second degree for being present at an ongoing crime and shouting and using words of incitement, which constitute abetting). Many

actions that could fall within the terms of the statute—including abetting, counseling, hiring, and procuring—may be accomplished through words alone. We again look to *Garzon*, where the supreme court explained that "[i]f the law of principals applied, the jury could in fact convict Garzon based on [the other perpetrator's] actions, provided Garzon had a conscious intent that the criminal acts be done and that Garzon did *or said something* to aid or encourage those acts." 980 So. 2d at 1041 (emphasis supplied). This court has also previously held that a principal conviction may rest on "some act" or "some word which was intended to and which did incite, cause, encourage, assist, or advise the other person or persons to actually commit or attempt to commit the crime." *Grandison v. State*, 160 So. 3d 90, 93–94 (Fla. 1st DCA 2015) (quoting *Hall v. State*, 100 So. 3d 288, 289 (Fla. 4th DCA 2012)). For these reasons, we reject the argument that a defendant may not be found guilty as a principal based solely on communications.

Still, Denise is correct that the State failed to produce competent, substantial evidence to prove that she was a principal to murder under the statute. Her only ostensibly culpable conduct (*e.g.*, consideration of ways to kill Mike, development of an alibi, agreeing to encourage Mike to go hunting with Brian) did not constitute commanding or impelling Brian to commit the murder (the equivalent of accessory before the fact) or the assisting or encouraging of Brian at the time he actually was committing the offense (the equivalent of second-degree principal). There was nothing else presented at trial that could meet the meaning of any of the terms in section 777.011, Florida Statutes.

For instance, missing at trial was any evidence that Denise counseled, hired, or procured Brian to murder Mike, as those terms originally were understood to mean. This is to say, no evidence showed that Denise was the initiating, instigating, promoting, driving, or encouraging force behind the murder, like an accessory before the fact would have had to have been. *Cf. State v. Dene*, 533 So. 2d 265, 266, 269–70 (Fla. 1988) (affirming defendant's conviction as a principal to first-degree murder, even though she was not present during the commission of the crime, when she was the one that "concocted a plan" to commit a burglary); *Ehrlich v. State*, 742 So. 2d 447, 449–51 (Fla. 4th DCA 1999) (en banc) (affirming defendant's convictions as a principal to two counts of

second-degree murder and two counts of attempted second-degree murder, even though she was not present during the commission of the crimes, when she was the one that passed along the instruction to kill the victim). While Brian characterized the planning of the murder as "very mutual," he also stated that he "planned a lot of it" and that he "instigated a lot of it." Brian never testified about anything Denise did or said to incite or encourage him to commit the murder. Brian's testimony showed that Denise mostly agreed with the idea of killing Mike. As will be discussed further below, that evidence is relevant to the conspiracy charge. It does not prove that Denise was the prime mover behind the murder. Notably, Denise at one point was getting cold feet about the idea, and *Brian* had to encourage *her* to be on board before he would move forward.

Also missing at trial was any evidence that Denise aided or abetted Brian in the actual commission of Mike's murder, as *those* terms originally were understood to mean. That is, there was nothing that showed that Denise had acted as the equivalent to the old principal in the second degree by assisting or goading Brian at the time he was murdering Mike. In fact, when asked about the steps taken before Mike's death, Brian explained that "Denise really didn't have to do a whole lot, other than come up with an alibi for herself and make sure that Mike went." Neither action, though, was "some act to assist [Brian] in *actually* committing the crime." *Staten*, 519 So. 2d at 624 (emphasis supplied). Even though section 777.011 makes Denise's presence at the scene of the offense irrelevant, for her to have aided or abetted Brian under the statute, there still needed to be evidence that she assisted him in real time while the murder was occurring. There was no testimony that Denise was present at the lake while the murder happened, nor any testimony that Denise was on the phone with Brian while he was at the lake with Mike, encouraging him to go through with it or giving him advice or guidance on how to pull the murder off when things were not going as they originally had planned.

The State contends for the first time on appeal that Denise's secretly paying the premium on Mike's insurance policy was enough to support the conviction. We reject that contention. Denise's act of maintaining Mike's insurance policy did not entice or encourage Brian to commit the crime—there was no promise to

Brian that he would get the proceeds if he murdered Brian. Of course, the insurance policy premiums could not have facilitated the murder itself. It is true that under the principal statute, "[n]o distinction is made between those who are the brains of the crime and those who are the arms of the crime." *State v. Reid*, 886 So. 2d 265, 266 (Fla. 5th DCA 2004). But the evidence presented by the State shows that Brian was both. It was Brian who initiated the plan to murder Mike, who did most of the planning, and who did all of the work; and it was Brian who kept moving forward even as Denise got "cold feet."

Our review of the record unearths no evidence of conduct by Denise either that incited, instigated, or encouraged the murder of Mike; or that assisted or encouraged Brian at the time that he actually murdered Mike. Because Denise did not do or say anything to "aid" or "abet" Brian in the murder of Mike, as those terms originally were understood to mean; and she did not "counsel," "hire," or "procure" Mike's murder beforehand (*i.e.*, she did not get the ball rolling); we reverse her conviction as a principal to first-degree murder.

2. Conspiracy to Commit Murder

Denise next contends the evidence cannot sustain her conviction for conspiracy to commit murder. Because the evidence shows that Denise and Brian had an agreement to kill Mike and that Denise intended for Brian to kill Mike, we disagree.

"A conspiracy exists where there is an express or implied agreement between two or more persons to commit a criminal offense and an intention to commit the offense. The fact-finder may infer the agreement from the circumstances; direct proof is not necessary." *Moran v. State*, 278 So. 3d 905, 909 (Fla. 1st DCA 2019) (quoting *Vasquez v. State*, 111 So. 3d 273, 275 (Fla. 2d DCA 2013)); *see also Bradley v. State*, 787 So. 2d 732, 740 (Fla. 2001) (explaining that because conspiracy may be proven by circumstantial evidence, the "jury may infer that an agreement existed to commit a crime from all the surrounding and accompanying circumstances"). A defendant may be guilty of conspiracy even if she "played only a minor role in the total

operation." *Moran*, 278 So. 3d at 909 (quoting *Cummings v. State*, 514 So. 2d 406, 408 (Fla. 4th DCA 1987)).

At bottom, the "essence of conspiracy is the agreement to engage in *concerted* unlawful activity." *United States v. Hartley*, 678 F.2d 961, 972 (11th Cir. 1982) (emphasis supplied) (quoting *United States v. Grassi*, 616 F.2d 1295, 1301 (5th Cir. 1980)); *see also United States v. Cole*, 755 F.2d 748, 755 (11th Cir. 1985) (explaining that there must be "an agreement or *common purpose* to violate the law" for there to be a conspiracy (emphasis supplied)). The real evil at the heart of a criminal conspiracy, shown by the preceding highlighted terms, is the agreement itself, which "remains the essential element of the crime." *United States v. Chandler*, 388 F.3d 796, 806 (11th Cir. 2004) (internal quotation and citation omitted); *see also United States v. Feola*, 420 U.S. 671, 694 (1975) (explaining that under conspiracy law, "the agreement to engage in a criminal venture" is itself a "sufficient threat to social order" to justify "imposition of criminal sanctions"); *id.* at 693 (noting that conspiracy law serves different yet complementary ends compared to "those served by criminal prohibitions of the substantive offense"). There was ample evidence, through Brian's testimony, that there was an agreement between him and Denise to accomplish the murder of Mike, and that Denise intended for the murder to occur.

Brian's testimony supported the existence of an agreement. It showed that they discussed alternative methods of killing Mike, and Denise squashed plans that she thought were too risky. Brian testified that they decided to go with the hunting accident plan because it assuaged Denise's conscience. Brian testified that Denise was not there with him at the time of the murder, but she "was in my head. Behind me." After Denise got "cold feet" and called off the first planned hunting trip, Brian met with her to see if she still wanted to go through with the murder. He did not want to stage the accident if Denise was "wishy-washy." Denise again agreed that they should proceed. There could be no doubt that, at a minimum, the multiple meetings between Brian and Denise to discuss plans for the murder made it more likely that the murder actually would occur.

This increased likelihood is precisely the public danger that conspiracy statutes seek to mitigate. "[J]oint action is, generally, more dangerous than individual action." *United States v. Mercer*, 165 F.3d 1331, 1335 (11th Cir. 1999) (internal quotation and citation omitted); *see Callanan v. United States*, 364 U.S. 587, 593–94 (1961) (observing that "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts" and that "[c]oncerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality"). Simply put, when it comes to crime, there is public danger in numbers. The Third District observed as follows:

> As with most conspiracies, the very agreement to work together to kill the victim, provided the co-conspirators with an increase in manpower, an increase in the capacity to plan, and an increase in resources. In theory, this group dynamic astronomically raised the chances that their objective would be attained (the victim would be killed), no one would back out of the plan, and if someone did back out, he would be replaced.

Calderon v. State, 52 So. 3d 813, 817 (Fla. 3d DCA 2011).

There also was evidence that Denise intended for the murder actually to happen when she entered the agreement with Brian. Brian testified that it was Denise's job to make sure that Mike went on the fateful hunting trip. Although that testimony was insufficient evidence to show that Denise committed an act that assisted Brian in "actually" murdering Mike at the time it happened and support her conviction as a principal, it was certainly enough to establish Denise's intent to engage in "concerted criminal activity" to support a conviction for conspiracy. Her payment of the extra insurance premium to extend Mike's life insurance policy; her agreement to come up with an alibi; and her preference for one plan over another all circumstantially showed her intent to participate in a conspiracy and see that its objective was accomplished.

Additionally, Denise's actions after Mike's murder provided additional "accompanying" circumstances from which the jury could infer her involvement in the conspiracy. She tried to use the promise of visitation with her daughter as an incentive to stop Cheryl's campaign to reopen the criminal investigation into Mike's disappearance. And, after Brian's arrest, Denise conveyed a message to Brian's father that she was "not talking."

Because there was ample evidence of an agreement between Denise and Brian to kill Mike, we affirm Denise's conviction for conspiracy to commit murder.

B. Election Between Charges

As an independent basis for reversal, Denise argues that she is entitled to a new trial because the trial court erred when it denied her motion to compel the State to choose between two mutually exclusive counts of the indictment. We disagree.

Denise was indicted and tried on three charges: (1) principal to first-degree murder, (2) conspiracy to commit first-degree murder, and (3) accessory after the fact to first-degree murder. At the close of the State's case-in-chief, Denise asked the trial court to compel the State to elect between the charges that she acted both as a principal and as an accessory to the murder. The court denied the motion, reasoning that if the jury were to find her guilty of both crimes, the error could be cured later by vacating one of the convictions. After the jury returned guilty verdicts on both charges, the court dismissed the accessory-after-the-fact charge. Denise was thus only convicted of, and sentenced for, the principal and conspiracy charges.

Even so, Denise contends that the denial of the motion to compel was reversible error, and the only proper remedy is to grant a new trial. She relies on a series of cases involving theft-related crimes to argue that a new trial is warranted when a defendant makes a timely motion for election between charges repugnant to or inconsistent with one another. *See Pearce v. State*, 196 So. 685, 686–87 (Fla. 1940) (granting a new trial when the trial court denied a timely motion to require the State to elect between charges of embezzling a refrigerator worth $320 and embezzling

the $320 from the proceeds of the refrigerator); *Tidwell v. State*, 196 So. 837, 837 (Fla. 1940) (reaffirming that when defendants are charged with two inconsistent and repugnant counts and cannot be convicted under both, it is error to deny a timely motion to require the State to elect between the two counts); *Mayers v. State*, 171 So. 824, 825 (Fla. 1936) (applying the rule to embezzlement of stock and embezzlement of stock proceeds). But we have found no cases applying this rule to cases involving murder and accessory after the fact or, for that matter, to any non-theft-related crimes.

More importantly, all the cases granting a new trial after the erroneous denial of a motion for election were decided before the supreme court clarified that all errors, including constitutional ones, were subject to the harmless error test in *State v. DiGuilio*, 491 So. 2d 1129, 1134 (Fla. 1986). Since *DiGuilio*, all types of error, including the one alleged here, are now subject to a harmless error analysis.

But that does not end our inquiry. That all types of error are subject to harmless error analysis does not mean that per se reversible error no longer exists. Per se reversible error is still recognized in two situations: (1) when application of the harmless error test will always lead to a finding that the error is harmful and (2) when it is impossible to determine the effect of the error without speculation. *See Johnson v. State*, 53 So. 3d 1003, 1007–08 (Fla. 2010). Neither situation is present here.

Denise argues on appeal that the failure to force the State to choose "infected the fairness of the entire proceeding," because it allowed one charge to build on the other. That said, the case law Denise relies on shows that the State may present evidence of both charges in its case-in-chief and that the proper time to make a motion for election is at the close of the State's case. By that point, the jury has been exposed to all the State's evidence about both counts. Thus, the failure to make the State pick a theory is not a structural defect that will always be presumed to be harmful.

Moreover, there is no need to engage in speculation to determine whether the failure to grant the motion caused prejudice. There is no reasonable suggestion that the jury would have acquitted Denise of principal to murder if the State had

chosen to not go forward with the charge of accessory after the fact because the evidence for both charges was nearly identical. Given that the jury would have heard the same evidence, we conclude that the trial court's failure to grant Denise's motion to compel election was harmless beyond a reasonable doubt.

III. Conclusion

We conclude that although the evidence was sufficient to sustain Denise's conviction for conspiracy to commit murder, the evidence was insufficient to show that Denise met the criteria under the statute for being convicted and punished as a principal to Mike's murder. We also hold that any error caused by denying the State's motion to compel election was harmless. We reject Denise's other claims raised on appeal without further discussion. As a result, we reverse Denise's conviction and sentence for first-degree murder, but affirm her conviction and sentence for conspiracy to commit murder.

AFFIRMED in part and REVERSED in part.

RAY, C.J., and ROWE and TANENBAUM, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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