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# IN THE
# COURT OF APPEALS OF INDIANA

Zachary Fix,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff*

September 27, 2021

Court of Appeals Case No. 20A-CR-1566

Appeal from the Madison Circuit Court

The Honorable Andrew Hopper, Judge

Trial Court Cause No. 48C03-1803-F2-792

**May, Judge.**

[1] Zachary Fix appeals following his convictions of Level 2 felony burglary while armed with a deadly weapon,[1] Level 5 felony robbery,[2] and Level 6 felony theft.[3] He raises three issues, which we revise and restate as:

1. Whether the State presented sufficient evidence that Fix committed Level 2 felony burglary while armed with a deadly weapon based on evidence that he broke and entered the victim's home unarmed but subsequently obtained and used a deadly weapon against the victim;

2. Whether Fix's multiple convictions violate the Indiana Constitution's prohibition against double jeopardy; and

3. Whether the trial court's imposition of consecutive sentences was authorized by law.

We affirm in part, reverse in part, and remand for further proceedings.

# Facts and Procedural History[4]

[2] In 2017, Robert Mudd, who has a medical condition that causes progressive paralysis, lived alone in his home in Alexandria, Indiana. At the time relevant

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[1] Ind. Code § 35-43-2-1 (2014).

[2] Ind. Code § 35-42-5-1 (2017).

[3] Ind. Code § 35-43-4-2 (2014).

[4] We held oral argument on July 26, 2021, in the Indiana Court of Appeals Courtroom. We commend counsel for their able presentations.

to this case, Mudd retained the ability to move his arms and left hand, but he was generally confined to a hospital-style bed located in his living room and required substantial care. His father, Larry Mudd ("Larry"),[5] would visit him twice a day, once at 6:30 a.m. and again at 8:00 p.m. Larry would lock the back door every night when he left Mudd's house, and he would unlock the back door every morning. Pizza Hut would deliver Mudd lunch daily, and the restaurant instructed its drivers to enter Mudd's house through the back door to deliver food to him.

[3] During the early morning hours of July 7, 2017, Fix and Bobby Yeagy developed a plan to steal items that could then be traded or sold for drugs. Fix mentioned to Yeagy that a friend he met in prison told him about Mudd, and Fix thought Mudd would be an easy target. Yeagy was also familiar with Mudd because he had worked as a delivery driver for Pizza Hut and had delivered orders to Mudd. At approximately 3:00 a.m., Fix cut the power and cable lines into Mudd's house. Fix also disabled an outdoor surveillance camera. Mudd was awake at the time, and he heard Fix and Yeagy enter his house through the back door shortly after the power went out.

[4] Both Fix and Yeagy used flashlights to see as they walked through Mudd's house. They approached Mudd, and Fix shined his flashlight in Mudd's face. Fix and Yeagy searched the area around Mudd's bed and asked Mudd if he had

[5] Larry Mudd passed away a few months prior to trial and, therefore, did not testify.

any money. They found Mudd's wallet and asked Mudd for the PIN associated with his debit card. Fix threatened to kill Mudd if Mudd told them an incorrect PIN, but Mudd still relayed a false PIN. At some point, Fix shined his flashlight away from Mudd. Mudd then pulled out a handgun, which he kept hidden under his bedsheets, and pointed it at Fix. Fix saw the handgun and wrestled it away from Mudd's hand. Fix then hit Mudd across the side of the head with the handgun, resulting in a laceration above Mudd's left eye. Fix pulled the bedsheets off Mudd and took a cell phone Mudd had hidden under his leg. Fix also took Mudd's Life Alert pendent and a necklace Mudd was wearing.

[5] While Fix was occupied with Mudd, Yeagy searched the kitchen and the spare bedroom looking for Mudd's medications. Yeagy and Fix then searched the remainder of Mudd's house and collected all the items they wanted to steal into laundry baskets. They asked Mudd questions about certain items in his house, and they asked him to provide the combinations to open various safes. Before Yeagy and Fix left Mudd's house, Fix gave Mudd two Xanax pills to make him tired and warned Mudd that they would be coming back. Throughout the entire encounter, Fix repeatedly threatened to kill Mudd. Mudd was unable to contact anyone after Yeagy and Fix left his house because he was without power or a cell phone.

[6] Yeagy and Fix loaded the stolen items into Yeagy's car. They drove to the home of Yeagy's grandmother and unloaded the stolen items into the garage. Approximately thirty minutes later, they returned to Mudd's house and

proceeded to steal more of his property. After about forty-five minutes, Fix and Yeagy left Mudd's house. Prior to leaving, they instructed Mudd to blame the robbery on a "black man with dreads, stocky build." (Tr. Vol. II at 180.) In total, Fix and Yeagy stole twelve firearms; thousands of rounds of ammunition; various tools, including a screw gun and a Caterpillar jump starter; a replica Tommy gun; batteries; several credit and debit cards; various medications, including Xanax and Klonopin; syringes; cameras; a safe; and various other pieces of property. Mudd later estimated that Fix and Yeagy stole $11,000 worth of property from his house. Larry discovered Mudd and the ransacked house approximately two hours after Fix and Yeagy left, and he contacted the police.

[7] The stolen credit cards were used on July 9, 2017, and July 11, 2017. These transactions included charges from Oakwood Resort in Syracuse, Indiana; Finishline.com; and Amazon.com. Two of the Finish Line purchases used the e-mail address zachafix@gmail.com. Destini Lanning, the mother of Fix's daughter, texted Fix in July 2017 to ask for assistance in meeting her rent payment. Fix responded that he would help Lanning with her rent payment if she would sell Xanax pills for him. Lanning did not reply to Fix's text, and her father covered her rent payment. Lanning mentioned the text conversation to some of her coworkers, and one of Lanning's coworkers contacted the police.

[8] Two friends of Fix and Yeagy, Nathaniel Kissick and Christopher Myers, visited Fix and Yeagy in mid-July 2017 at Yeagy's grandmother's garage. Kissick observed "a pile of stuff" in the garage's back right corner. (Tr. Vol. III

at 136.) Fix and Yeagy showed Kissick and Myers several firearms, and they bragged that they had stolen the guns from a handicapped person. Fix also told Kissick and Myers that he had almost been shot during the robbery. Around this time, Yeagy also posted pictures of various guns on Snapchat. Fix and Yeagy later sold some of the stolen guns to Keith Irwin, who bought ten firearms for a total between $800 and $1000. Officers also executed a search warrant on Yeagy's grandmother's house in connection with a separate robbery case and discovered several of the items stolen from Mudd's house.

[9] On March 26, 2018, the State charged Fix with Level 2 felony burglary while armed with a deadly weapon, Level 3 felony robbery resulting in bodily injury,[6] Level 3 felony armed robbery,[7] and Level 6 felony theft.[8] The trial court held a jury trial from February 24, 2020, to February 27, 2020. While Fix was present during jury selection, he absconded following the first day of trial, and the trial court resumed trial with Fix being tried in absentia. At the conclusion of Fix's trial, the jury returned a verdict of guilty on all counts.

[10] The State eventually apprehended Fix, and the trial court held a sentencing hearing on July 28, 2020. At sentencing, the State asked for entry of judgment of conviction for Level 2 felony burglary while armed with a deadly weapon,

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[6] Ind. Code § 35-42-5-1 (2017).

[7] Ind. Code § 35-42-5-1 (2017).

[8] The State also charged Yeagy with similar offenses. Yeagy agreed to testify against Fix and chose to plead guilty pursuant to a plea agreement. The trial court eventually sentenced Yeagy to a term of thirty years, with twelve years executed and eighteen years suspended to probation.

Level 5 felony robbery as a lesser included offense of Level 3 felony robbery resulting in bodily injury, and Level 6 felony theft. The State explained:

> The State's, for count one (1) [Level 2 felony burglary while armed with a deadly weapon], the State is recommending thirty (30) years executed [in the] Department of Corrections. For count two (2) [Level 3 felony robbery resulting in bodily injury], the State is requesting that the court enter the conviction as a lesser included offense, uh, robbery as a level five (5) felony. The State believes that the element, um, as, as was charged and the way that it was, uh, that the jury found him guilty for, uh, that the element of using or threatening, I'm sorry, the element of, uh, resulting in bodily injury to Robert Mudd. There was one (1) action. There's one (1) action that constitutes arming himself and causing bodily injury. It's when he grabbed the gun and hit him over the head with it. None of the other guns that Mr. Fix and Mr. Yeagy stole constitute while armed with a deadly weapon because the law is clear on that. If you go in to steal a weapon you are not armed with that weapon unless you use it in a manner, and this what we argued to the jury during closing statements, unless you use it in a manner, uh, that, um, that would suggest you're armed with it, more than just possessing it and the only gun that they used that was armed was the one that they took from him and hit him over the head with it. That was one action and so I don't know that robbery while armed with a deadly weapon would jusiti, [sic] should be, uh, entered as a conviction and the conviction for robbery resulting in bodily injury, the State believes, uh, we can only ask for a consecutive sentence on [sic] if the court enters it as a level five (5).
>
> * * * * *
>
> And for count three (3) [Level 3 felony armed robbery], um, we are just not asking for a judgment of conviction to be entered at this time, um, um, not dismissing it either should the, uh, any

> court of appeal decision, um, cause us to have to re visit [sic] um, what conviction should be entered and the sentencing then we can address at that time, but, um we're not asking for a judgment at this time and for count four (4), [Level 6 felony] theft, uh, the State is recommending two in [sic] a half (2 ½ ) years consecutive and even though some cases suggest that a burglary and theft should not be consecutive, this case is different because the theft, a second theft occurred when they went back in and stole a whole bunch more stuff, um, a half hour, hour later after they had already gone through the first time and that's a separate incident, separate act for which the State believes justifies a consecutive sentence. Uh, so count one (1) thirty (30) years. Count two (2) as level five (5), six (6) years. Count three (3) no judgment at this time and count four (4), two in [sic] a half (2 ½) years, all consecutive for a total of thirty-eight in [sic] a half (38 ½) years.

(Tr. Vol. V at 112-15.) Fix objected to the imposition of consecutive sentences. The trial court noted its agreement with the State's position and entered judgment of conviction for Level 2 felony burglary while armed with a deadly weapon, Level 5 felony robbery, and Level 6 felony theft. The trial court then sentenced Fix to thirty years of imprisonment for burglary with a deadly weapon, six years for robbery, and two-and-a-half years for theft. The trial court ordered all the sentences to run consecutively for an aggregate sentence of thirty-eight years and six months.

# Discussion and Decision

# I. Burglary While Armed with a Deadly Weapon

[11] Fix argues the State presented insufficient evidence to sustain his conviction of burglary while armed with a deadly weapon. When we review a challenge to the sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *McGill v. State*, 160 N.E.3d 239, 246 (Ind. Ct. App. 2020). We evaluate the evidence and draw all reasonable inferences in the light most favorable to the verdict. *Id*.

[12] However, resolution of Fix's sufficiency challenge turns on our interpretation of Indiana's burglary statute. Even if framed as a challenge to the sufficiency of the evidence, we apply a de novo standard of review to questions of statutory interpretation. *Dobeski v. State*, 64 N.E.3d 1257, 1259 (Ind. Ct. App. 2016).

> When faced with a question of statutory interpretation, we first examine whether the language of the statute is clear and unambiguous. If it is, we need not apply any rules of construction other than to require that words and phrases be given their plain, ordinary, and usual meanings. Where a statute is open to more than one interpretation, it is deemed ambiguous and subject to judicial construction. Our primary goal in interpreting a statute is to ascertain and give effect to the legislature's intent, and the best evidence of that intent is the statute itself. We presume that the legislature intended for the statutory language to be applied in a logical manner in harmony with the statute's underlying policy and goals. Additionally, the rule of lenity requires that penal statutes be construed strictly against the State and any ambiguities resolved in favor of the accused, . . . but statutes are not to be overly narrowed so as to exclude cases they fairly cover.

*Id*. at 1259-60 (internal citations and quotation marks omitted) (ellipsis in original). Our interpretation of a statute may also be informed by the common law background of the legal concept the statute is meant to codify. *See Sanchez v. State*, 749 N.E.2d 509, 512-13 (Ind. 2001) (examining common law origins and history of intoxication as a defense).

### *A. Common Law Background of Burglary*

[13] The offense of burglary emerged from the common law, which defined the offense as follows: "[T]he breaking and entering of the dwelling house of another, at night, with the intent to commit a felony therein." 3 Charles E. Torcia, Wharton's Crim. L. § 316 (15th ed. 2020) [hereinafter Wharton's]. These elements illustrate that, under the traditional approach, the offense of burglary "is in fact a rather unique type of attempt law, as all the required elements merely comprise a step taken toward the commission of some other offense." 3 Wayne R. LaFave, Substantive Crim. L. § 21.1(g) (3d ed. 2020) [hereinafter Subst. Crim. L.]. Indeed, at common law, the substantive offense of burglary was created "to overcome certain defects in the law of attempt" in that, under the early common law, "conduct did not constitute an attempt unless it was very close to consummation of the intended crime; and the penalties for attempt were disproportionately low." Wharton's § 316.

[14] Even as the law of attempt broadened and legislatures drafted penal statutes, the offense of burglary was not subsumed by the law of attempt, perhaps "reflect[ing] a considered judgment that especially severe sanctions are appropriate for criminal invasion of premises under circumstances likely to

terrorize occupants." Model Penal Code § 221.1 explanatory cmt. The preservation of the offense has drawn criticism. *See, e.g.*, Subst. Crim. L. § 21.1(g) (asserting that the common law approach "might have filled a void in the law of attempts during an earlier period," but "it is doubtful that the offense is any longer required to punish or deter such preliminary conduct" because "[a]n expanded law of attempts is now available to reach such conduct"). In any case, although the offense is attempt-like, "[u]nlike the usual attempt," burglary "is generally held not to merge into a completed offense[.]" *Id*. That is because "[t]he historical principle underlying the law of burglary is protection of the right of habitation," with the offense "designed to protect . . . the integrity of the home." 13 Am. Jur. 2d Burglary § 3; *see also* Wharton's § 316 ("It is an offense against the security of habitation or occupancy rather than against ownership or property." (footnote omitted)). Thus, whereas burglary typically addresses the intrusion itself, other offenses address the conduct committed within the premises. *See* Subst. Crim. L. § 21.1(g). Therefore, burglary is "complete upon entry with the requisite intent[.]" 13 Am. Jur. 2d Burglary § 1.

### *B. Indiana Burglary Statute*

[15] Of course, although the common law developed a traditional definition for burglary, it is up to our legislature to define crimes. *See, e.g., Higdon v. State*, 173 N.E.2d 58, 60 (Ind. 1961) (noting that it is a "fundamental concept of criminal jurisprudence in this state . . . that a crime is defined . . . only by act of the legislature"). Indiana Code section 35-43-2-1 provides:

> A person who breaks and enters the building or structure of another person, with intent to commit a felony or theft in it, commits burglary, a Level 5 felony. However, the offense is:
>
> > (1) a Level 4 felony if the building or structure is a dwelling;
> >
> > * * * * *
> >
> > (3) a Level 2 felony if it:
> >
> > > (A) is committed while armed with a deadly weapon; or
> > >
> > > (B) results in serious bodily injury to any person other than the defendant[.]

Thus, our legislature followed the common law approach insofar as it chose to criminalize burglary rather than rely on principles of attempt, but our legislature did not fully adopt the common law definition. For example, our legislature expanded the scope of the offense by eliminating the requirements that the offense involve a dwelling and occur at night. *See id*. Our legislature also broadened the intent requirement, establishing liability if the person intends to commit only a misdemeanor theft. *See id*.

[16] Like the common law, our burglary statute is chiefly concerned with what happens at the threshold of the premises, not on what happens therein. *See Swaynie v. State*, 762 N.E.2d 112, 114 (Ind. 2002). As the Indiana Supreme Court explained, the "criminal transgression addressed by the proscription on

burglary is the breaking into and entering of a building or structure of another person with the intent to commit [a certain type of offense]. *Id*. Therefore, the "criminal transgression of burglary is committed . . . at the moment the building or structure is broken into and entered," with "culpability . . . established at the point of entry regardless of whether the underlying intended [offense] is ever completed." *Id*.; *see Williams v. State*, 771 N.E.2d 70, 75 (Ind. 2002) ("When [the defendant] broke into the apartment, the burglary was complete.").

### *i. Entry*

[17] With the foregoing background in mind, we turn to the State's contention that, under Indiana Code section 35-43-2-1(3)(A), a person commits burglary with a deadly weapon if the person enters the premises without a weapon and later picks up a deadly weapon—as loot or otherwise—while within the premises. Indiana's burglary statute does not specifically provide that a person will be liable for acts committed after the breaking and entering. *See* Ind. Code § 35-43-2-1. However, had the Indiana General Assembly wished to extend liability this far, it could have easily drafted the burglary statute to encompass conduct that takes place after the breaking and entering. For example, our legislature could have adopted the approach of Model Penal Code Section 221.1., under which the offense of burglary is elevated even if the person becomes armed "in flight after the . . . commission" of burglary. Likewise, the armed burglary statutes of some of our sister states expressly contemplate the situation whereby a burglar obtains a weapon while inside the burglarized structure. *See*, *e.g.*, Alaska Stat. Ann. § 11.46.300 (West 1978) (offense becomes burglary in the first

degree if the person is armed with a firearm "in effecting entry or while in the building or immediate flight from the building"); *see also* S.C. Code Ann. § 16-11-311 (1995) and Wash. Rev. Code Ann., § 9A.52.020 (West 1996).

[18] However, Indiana's statute defines the offense as breaking and entering with the requisite intent, Ind. Code § 35-43-2-1, and we have interpreted this to mean that a burglary is complete at the time of the breaking and entering. *See Smith v. State*, 671 N.E.2d 910, 912 (Ind. Ct. App. 1996) (holding defendant's convictions for theft and burglary did not violate prohibition against double jeopardy because burglary was complete upon entry into dwelling and State was not required to prove theft to support burglary conviction). "Armed" is not defined in the chapter of the Indiana Code criminalizing burglary and trespass. Therefore, we interpret it according to its plain and ordinary meaning. *See State v. McHenry*, 74 N.E.3d 577, 580 (Ind. Ct. App. 2017) ("The term 'armed,' however, has not been legislatively defined in Indiana for purposes of the burglary statute," and "there is nothing in our burglary statute to indicate that this term is meant to have anything other than a plain and ordinary meaning."), *trans. denied*. Black's Law Dictionary (11th ed. 2019) defines "armed" as "equipped with a weapon" or "involving the use of a weapon." Fix was not equipped with a weapon at the time that he broke and entered Mudd's house.

### *ii. Results of Criminal Act*

[19] Although Indiana Code Section 35-43-2-1 does not specifically provide that a person is liable for conduct committed after breaching the threshold, the State argues that the legislature intended to extend culpability in this way. For

support, the State points out that burglary is elevated to a Level 2 felony if the offense "results in serious bodily injury to any person other than a defendant." Ind. Code § 35-43-2-1(3)(B). According to the State, because the aggravating "event[] of injury . . . do[es] not have to occur as an integral part of the breaking and entering," it follows that the aggravating "event[] of . . . being armed" also does not have to coincide with the breaking and entering. (Appellee's Br. at 23.)

[20] However, the State's argument conflates key concepts, drawing no distinction between the voluntary acts comprising the offense (*e.g.*, breaking and entering while armed) and the result of those acts (*e.g.*, a victim sustains injury). Generally, a person is criminally culpable only when his criminal conduct is both (1) the cause in fact and (2) the proximate cause of the result. *Cannon v. State*, 142 N.E.3d 1039, 1043 (Ind. Ct. App. 2020). The distinction between the criminal act and the corresponding result is important, especially because the result need not coincide with the act. *See Reaves v. State*, 586 N.E.2d 847, 850-51 (Ind. 1992) (holding defendant guilty of felony murder when bedridden victim died of a pulmonary embolism three weeks after a robbery when portions of a blood clot in the victim's leg broke off during the robbery and traveled to the victim's pulmonary arteries). Thus, the offense of burglary is elevated so long as the injury resulted from the criminal conduct, even if the victim is not injured by the breaking and entering (*e.g.*, being struck by a swinging door). *See, e.g., Vaillancourt v. State*, 695 N.E.2d 606, 612 (Ind. Ct. App. 1998) (identifying sufficient evidence that the "offense [of burglary]

resulted in serious bodily injury" when, after entering the premises, the defendant struck the victim and the victim sustained a concussion), *trans. denied*.

[21] This distinction is consistent with the text of the burglary statute. The burglary offense is elevated to a Level 2 felony if it "is *committed while armed* with a deadly weapon." Ind. Code § 35-43-2-1(3)(A) (emphasis added). "Committed while" contemplates the time when the breaking and entering occurs. Just because our legislature elevated the offense of burglary where the proscribed conduct results in serious bodily injury, it does not follow that our legislature modified the time at which a burglary is deemed complete. Our Indiana Supreme Court has consistently interpreted the burglary statute to mean that the burglary offense itself is complete upon entry.[9] *See Swaynie*, 762 N.E.2d at 114 (noting that culpability for burglary "is established at the point of entry," with the "criminal transgression . . . committed . . . at the moment the building or structure is broken into and entered"); *Williams*, 771 N.E.2d at 75 ("When [the defendant] broke into the apartment, the burglary was complete."). Therefore, we are unpersuaded by the State's arguments regarding the structure of the statute. The State presented insufficient evidence to convict Fix of Level

[9] Ultimately, it is not unusual that our burglary statute does not specifically establish liability for conduct beyond the threshold; this statutory approach comports with the common law view that burglary is an attempt-like offense primarily designed to protect the "security of habitation or occupancy[.]" Wharton's § 316. Moreover, although our legislature has not broadened burglary law beyond the traditional application, it is not as though the State lacks recourse for what happens beyond the threshold. Rather, Indiana has a robust body of criminal law to address subsequent transgressions. *See, e.g.*, Ind. Code § 35-47-4-5(c) (criminalizing the knowing or intentional possession of a firearm by a serious violent felon); Ind. Code § 35-42-5-1(a) (elevating robbery to a Level 3 felony if committed while armed with a deadly weapon).

2 felony burglary while armed with a deadly weapon.[10] *See Chatham v. State*, 845 N.E.2d 203, 208 (Ind. Ct. App. 2006) (holding State presented insufficient evidence to support sexual battery conviction).

[22] Even so, "[w]hen a conviction is reversed because of insufficient evidence, we may remand for the trial court to enter a judgment of conviction upon a lesser-included offense if the evidence is sufficient to support the lesser offense." *Id*. Fix did break and enter the building or structure of another with the intent to commit a theft therein, and thus, we reverse Fix's conviction of Level 2 felony burglary while armed with a deadly weapon and remand the matter for the trial court to enter a conviction of a lesser-included form of burglary.[11] *See id*.

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[10] Fix challenges both the sufficiency of the evidence to support his conviction of Level 2 felony burglary and the trial court's giving of Final Jury Instruction 9, which stated: "A person is armed with a weapon when that person uses or involves a weapon. A person is not armed merely by virtue of possessing a weapon. Rather, there must be something more indicating the use or involvement of the weapon in the crime." (App. Vol. II at 167.) While we reverse due to the insufficiency of the evidence, we wish to note that Final Jury Instruction 9 constitutes an inaccurate statement of law because the instruction implies that mere possession of a deadly weapon is insufficient to elevate the offense to Level 2 felony burglary while armed with a deadly weapon. A person is armed when he possesses a weapon. It is immaterial whether the person uses the weapon in the process of breaking and entering. Rather, the offense is properly elevated if the person possesses a deadly weapon when he breaks and enters. *See* Ind. Code § 35-43-2-1(3)(A) (elevating burglary if "committed while armed with a deadly weapon").

[11] Burglary is a Level 5 felony, but the offense is elevated to a Level 4 felony "if the building or structure is a dwelling." Ind. Code § 35-43-2-1(1). There was testimony that the burglarized structure in the instant case was a dwelling. (*See* Tr. Vol. II at 157 (Mudd testifying that he was in his bed at the time of the burglary and that at around 3:00 a.m. "[t]he lights went off in the house.").) However, any fact that increases the mandatory minimum sentence, or the maximum sentence, is an "element" that must be found by the jury. *Alleyene v. U.S.*, 570 U.S. 99, 115-16, 133 S. Ct. 2151, 2162-63 (2013). Here, the trial court instructed the jury that in order to convict Fix of burglary, the State was required to prove:

> 1) the Defendant

(remanding case with instructions for trial court to enter conviction of Class B misdemeanor battery).

## II. Double Jeopardy

### *A. Burglary and Robbery*

[23] Fix also argues that his convictions of burglary and robbery violate the Indiana Constitution's prohibition against double jeopardy. *See* Ind. Const. art. 1, § 14 ("No person shall be put in jeopardy twice for the same offense."). Fix recites the double jeopardy standard we utilized in *Thompson v. State*, 82 N.E.3d 376 (Ind. Ct. App. 2017), *reh'g denied*, *trans. denied*, which relied upon the double jeopardy analysis our Indiana Supreme Court laid out in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). However, in *Wadle v. State*, our Indiana Supreme Court expressly overruled *Richardson* and introduced a new framework for analyzing double jeopardy violations. 151 N.E.3d 227, 235 (Ind. 2020).

> First, a court must determine, under our included-offense statutes, whether one charged offense encompasses another

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2) knowingly or intentionally

3) broke and entered

4) the *building or structure* of Robert Mudd

5) with the intent to commit a theft[.]

(Tr. Vol. V at 50) (emphasis added). The trial court did not instruct the jury to determine whether the burglarized building or structure was a dwelling.

> charged offense. Second, a court must look at the underlying facts – as alleged in the information and as adduced at trial – to determine whether the charged offenses are the "same." If the facts show two separate and distinct crimes, there's no violation of substantive double jeopardy, even if one offense is, by definition, "included" in the other. But if the facts show only a single continuous crime, and one statutory offense is included in the other, then the presumption is that the legislation intends for alternative (rather than cumulative) sanctions. The State can rebut this presumption only by showing that the statute – either in express terms or by unmistakable implication – clearly permits multiple punishment.

*Id*.

[24] Therefore, we must assess whether Fix's burglary and robbery offenses are either inherently included offenses or factually included offenses. The General Assembly has defined an "included offense" to be 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,"
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> (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."

*Id.* at 248 (quoting Ind. Code § 35-31.5-2-168). As to burglary, Indiana's legislature provided:

> A person who breaks and enters the building or structure of another person, with intent to commit a felony or theft in it, commits burglary[;]

Ind. Code § 35-43-2-1. As to robbery, the legislature provided:

> a person who knowingly or intentionally takes property from another person or from the presence of another person:
>
> (1) by using or threatening the use of force on any person; or
>
> (2) by putting any person in fear;
>
> commits robbery, a Level 5 felony. However, the offense is a Level 3 felony if it is committed while armed with a deadly weapon or results in bodily injury to any person other than a defendant, and a Level 2 felony if it results in serious bodily injury to any person other than a defendant.

Ind. Code § 35-42-5-1.

[25] The State argues burglary and robbery are not inherently included offenses because "[t]he taking of money supports the robbery and the breaking and entering support the burglary, but neither is an element of the other crime." (Appellee's Br. at 33.) The State also argues that Fix's offenses are not factually lesser-included offenses because "the burglary charge alleged a breaking and entering while the robbery charge separately alleged that Defendant took money from Mudd by force or fear[.]" (*Id.*) We agree with the State in both respects.

[26] While the State does not rely on our opinion in *Morales v. State*, 165 N.E.3d 1002 (Ind. Ct. App. 2021), the opinion appears prescient to the question of whether robbery is an inherently included offense of burglary. One offense does not constitute an attempt of the other and the two offenses do not differ solely in degree of harm or culpability. *See id*. at 1009 ("No attempted crime was charged, and the differences between Level 4 felony arson and Level 2 felony burglary vary in more ways than just level of harm or culpability."), *trans. denied*. However, burglary requires that the perpetrator break into a building or structure with the intent to commit a felony or theft therein, Ind. Code § 35-43-2-1, and robbery is a felony. Ind. Code § 35-42-5-1. We observed in *Morales* that

> burglary does not *require* commission of a second offense. Proof of mere intent to commit a felony at the time of the breaking and entering is sufficient to prove burglary. The prosecution may prove the accused committed the intended felony within the structure, a different felony within the structure, or no felony at all. Burglary occurs in each of those scenarios so long as the accused broke and entered the structure with the intent to commit any felony.

*Id*. at 1008 (holding arson was not an included offense of burglary) (emphasis in original). Thus, it follows that robbery is not an inherently included offense of

burglary because the State is not required to prove that a robbery occurred to obtain a conviction of burglary.[12]

### *B. Level 3 Felony Armed Robbery*

[27] In addition to finding Fix guilty of Level 2 felony burglary while armed with a deadly weapon, the jury returned guilty verdicts on the counts of Level 3 felony robbery resulting in bodily injury and Level 3 felony armed robbery. The trial court then entered judgment of conviction on only the lesser included offense of Level 5 felony robbery so as not to run afoul of the Indiana Constitution's prohibition against double jeopardy. However, given that we must vacate Fix's conviction of Level 2 felony burglary while armed with a deadly weapon, the trial court on remand should enter judgment of conviction of Level 3 felony armed robbery and sentence Fix on that count. *See Taflinger v. State*, 698 N.E.2d 325, 328 (Ind. Ct. App. 1998) (holding defendant could be resentenced on jury verdict finding him guilty of neglect of a dependent causing serious bodily injury after defendant's attempted murder conviction was vacated).

## III. Consecutive Sentences

[28] Fix further contends that the length of his aggregate sentence exceeds the maximum aggregate sentence allowed by Indiana Code section 35-50-1-2

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[12] Fix raised for the first time at oral argument the issue of whether his robbery and theft convictions violate the Indiana Constitution's prohibition against double jeopardy. However, we need not opine on this issue because issues raised for the first time at oral argument are waived. *See Harris v. State*, 76 N.E.3d 137, 140 (Ind. 2017) ("issues are waived when raised for the first time at oral argument"). Nonetheless, as we must remand the case back to the trial court, Fix may present the issue on remand.

(2016).[13] Generally, "it is within the trial court's discretion whether to order sentences to be served concurrently or consecutively." *Myers v. State*, 27 N.E.3d 1069, 1082 (Ind. 2015), *reh'g denied*. Nonetheless, "[t]he legislature fixes penalties for crimes, and a trial court's discretion in sentencing does not extend beyond the limits prescribed by statute." *Riffe v. State*, 675 N.E.2d 710, 712 (Ind. Ct. App. 1996), *reh'g denied*, *trans. denied*.

[29] Subsection (d) of Indiana Code section 35-50-1-2 (2016) caps the aggregate sentence a trial court may impose for a single episode of criminal conduct based on the most serious crime for which the court is sentencing the offender. Subsection (b) of the same statute defines "episode of criminal conduct" as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." However, subsection (c) of the statute provides that the caps in subsection (d) do not apply in relation to crimes of violence, and subsection (a) enumerates the eighteen crimes designated crimes of violence. Robbery as a Level 3 felony is one of the enumerated crimes of violence. Ind. Code § 35-50-1-2(a)(12). Therefore, on remand, Fix's sentence associated with Level 3 felony armed robbery should not count toward the aggregate statutory cap. *See Ellis v. State*, 736 N.E.2d 731, 737 (Ind. 2000) (holding consecutive

[13] While we must remand this matter back to the trial court for resentencing, we address this issue because of the likelihood that it will reappear on remand. *See Irvine v. Irvine*, 685 N.E.2d 67, 71 (Ind. Ct. App. 1997) (addressing whether trial court could award post-judgment interest because the issue was likely to appear on remand).

sentencing between a crime of violence and an offense that is not a crime of violence is exempt from aggregate statutory cap).

# Conclusion

[30] The State did not present sufficient evidence to prove Fix committed Level 2 felony burglary while armed with a deadly weapon because Fix was not armed when he broke and entered the burglarized building, even though Fix subsequently acquired a firearm and used it against Mudd. Nonetheless, we affirm the trial court's finding that Fix can be convicted of both burglary and robbery without violating the Indiana Constitution's prohibition against double jeopardy because the two offenses are neither factually included offenses nor inherently included offenses. Therefore, the trial court on remand is to vacate Fix's conviction of Level 2 felony burglary and enter convictions of Level 3 felony armed robbery and a lower-level burglary offense. These modifications will require the court to resentence Fix, and any sentence for armed robbery will not count toward the statutory cap listed in Indiana Code section 35-50-1-2. We affirm the trial court in part, reverse in part, and remand for further proceedings consistent with this opinion.

[31] Affirmed in part, reversed in part, and remanded.

Bailey, J., and Robb, J., concur.