MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Marr Peter Brown,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 28, 2021

Court of Appeals Case No. 21A-CR-272

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D06-1812-F1-21

Brown, Judge.

[1] Marr Peter Brown appeals his conviction and sentence for attempted murder. Brown raises three issues which we restate as:

I. Whether the trial court erred in refusing his proposed jury instructions regarding self-defense;

II. Whether the evidence is sufficient to disprove his claim of self-defense; and

III. Whether his sentence is inappropriate in light of the nature of the offense and his character.

On cross-appeal, the State argues that we should remand for entry of conviction on the jury's verdict of guilty of criminal recklessness and the imposition of an amended sentence. We affirm in part, reverse in part, and remand.

Facts and Procedural History

[2] In September 2017, James Walker met Brown and developed a business relationship with him in which Walker would sell marijuana for Brown. At some point, Brown believed Walker owed him $100,000. In 2018, they had a disagreement over their relationship and money.

[3] In the summer of 2018, Walker encountered Brown and Brown's "baby mama" at the Burlington Coat Factory store in Fort Wayne. Walker confronted Brown and asked: "How you gonna try to put a hit on me when we was having business relationship?" Transcript Volume 2 at 215. Brown did not say anything, and Walker said, "The dude you tried to pay to kill me came to me and told me you tried to pay him to kill me." *Id.* at 216. Walker did not take a

fighting stance, threaten Brown, or physically contact Brown. Walker "just was verbally cussing him out." *Id.*

[4] On December 19, 2018, Walker, who was unarmed, went to Kroger with his niece, Chaquasha Smith, and her three-month-old baby. Walker began shopping and, while he was holding the baby, encountered Brown at the end of an aisle. Walker laughed and said, "Yeah, I talked to your people. You're trying to kill me. I talked to your people." *Id.* at 220. Brown looked at Walker and smiled, and Walker went his way and continued to shop. Walker encountered Brown again and said:

> Bro, how you gonna try to get somebody to try to kill me when we was doing business together? You didn't hold up to your end and I did what I did and you got mad because you didn't hold up to your end of the deal, so you felt I took something from you, I felt I didn't. I felt you owe me.

Id.

[5] Brown became mad, said "[o]kay," and put his hand in his hoodie pocket. *Id.* Walker looked at him, became mad, set the baby down, and "confronted him again and [Brown] shot" him. *Id.* The first shot struck Walker in the back of the arm, and he "took off running . . . to try to get out of harm's way." *Id.* at 222. Brown chased Walker and shot him in the back of the leg from behind. At some point, Walker fell to the ground, noticed he was shot in the leg, and began crawling away. Brown left Walker for a period of time. Walker turned around to try to see where Brown was and saw him walking towards him.

Brown extended his arm, pointed the gun at Walker's face, and attempted to fire, but the gun "must have malfunctioned." *Id.* at 224.

[6] Tony Banks, who was in the store with two of his children and their mother, Cassandra Brown ("Cassandra"), was "right next" to Walker when he was shot and saw the second shot. Transcript Volume 3 at 54. Banks started yelling at Brown "and asking him like what's wrong with him, why he's shooting, my kids are right here." *Id.* at 44. Brown left the store and was later taken into custody.

[7] The first bullet shattered the bone in Walker's upper arm. The second bullet struck the main artery in his leg and stomach. Walker's stomach and arm were reconstructed, and he underwent eight surgeries and spent almost two months in the hospital. His leg is partially paralyzed "until the nerves grow back, because it hit the main artery." Transcript Volume 2 at 227.

[8] On December 28, 2018, the State charged Brown with Count I, attempted murder as a level 1 felony, and Count II, criminal recklessness as a level 6 felony.[1] On July 8, 2020, A-Aaa Bail Bonds, Inc., d/b/a Markey Bonding and Allegheny Mutual Casualty Company filed a Motion to Surrender Defendant

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[1] Count I alleged that Brown "did attempt to commit the crime of MURDER, to wit: with intent to kill another human being, to wit: J.W., said Defendant engaged in conduct constituting a substantial step toward the commission of the crime of MURDER, to wit: by discharging a firearm at or in the direction of J.W., being contrary to the form of the statute in such case made and provided." Appellant's Appendix Volume 2 at 20. Count II, alleged that Brown "did while armed with a deadly weapon, to wit: a firearm, recklessly, knowingly, or intentionally perform an act, which act created a substantial risk of bodily injury to citizens located inside of the Kroger store . . . ." *Id.* at 21.

and for Release from Bail Bond and alleged that Brown changed his residence "without notifying the Surety in violation of the terms and conditions" of the bail bond agreement. Appellant's Appendix Volume 2 at 61. On July 20, 2020, the court entered an order releasing Markey Bonding and Allegheny Mutual Casualty Company from the bail bond, and ordering that Brown be remanded to the Allen County Jail.

[9] In November 2020, the court held a jury trial. The State introduced and the court admitted a DVD containing video surveillance from December 19, 2018. The video shows Walker and Brown meet, Walker place the baby into the car seat in the grocery cart and approach Brown, Walker and Brown stand near each other for approximately fifteen seconds, and Brown suddenly shoot Walker who appears to be standing still. The video also shows Walker fall out of view behind a grocery aisle after the shot and Brown pursue him down the aisle, walk away for approximately ten seconds before returning to the aisle where Walker was located for a few seconds, and then walk away again. The video also shows other people running away from the area of the shooting. Fort Wayne Police Detective Stephen Tegtmeyer testified that one shot was fired through the hoodie and "without sound and better video, I can't tell you if both shots were fired through that hoodie." Transcript Volume 3 at 41.

[10] Banks testified that there was no physical contact between Walker and Brown, and that Walker was on the ground on his back when Brown fired the second shot. Cassandra testified that Walker was in Brown's face but she did not see any physical contact between Walker and Brown. When asked what happened

next, she said she remembered Brown grabbing his gun. She also stated that Walker fell onto her cart when he was shot and was "inches away from [her] kids." *Id.* at 66. When asked if she knew the gunshots were being fired close to her, she answered: "Yes, way, way too close to my children." *Id.* She testified that she felt like she and her children were in danger.

[11] Anitra Woodson testified that she had known Brown since 2012 and he was the father of her two children. She described two prior encounters between Brown and Walker.[2] When asked a juror question regarding why she did not file a police report if she was concerned about Walker, she answered: "I personally wasn't concerned about him because I had – I know that he know my family and I know that he wouldn't do nothing to me personally, so I left that decision up to [Brown] to contact somebody if he felt any harm." *Id.* at 207. Anitra's parents testified regarding prior encounters with Walker.[3] Anitra's father

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[2] Anitra testified regarding an incident occurring months earlier in which she was in a vehicle with Brown, Walker and another individual screeched to a stop beside them, the individual beside Walker "did a motion of like a gun," and Walker sped away. Transcript Volume 3 at 181. She also described a verbal encounter between Brown and Walker at the Burlington Coat Factory in which Walker said he heard Brown was looking for him and said "Here I am, I'm right here. You want to do something, do something." *Id.* at 186. She also testified that Walker said: "You want to do something, come outside. Come outside. Let's go. Let's go." *Id.* She stated that Walker's friend approached her and Brown, said "let's go," and reached up his jacket revealing a gun. *Id.* at 187.

[3] Layne Woodson, Anitra's father, testified that two to three months before the shooting Walker pulled up in a vehicle with a gun in his lap and said: "Pop, I pulled up on him on Coliseum, I coulda got him, Pop. I coulda got him," and "[b]ut the only reason I ain't get him, 'cause [Anitra] and [her child] was [sic] in the car." Transcript Volume 3 at 217. During Layne's testimony and before he indicated what Walker had said to him, the prosecutor objected on the basis of hearsay, and Brown's counsel stated that this testimony was "not proof necessarily of the truth of what he was saying, but the fact that it was a threat . . . ." *Id.* at 213. The court allowed the testimony. Gwendolyn Woodson, Anitra's mother, testified that she spoke with Walker at a store probably one or two years before the shooting and Walker said: "Well, I walked up to the car, I was gonna cap him . . . but I noticed that your daughter and grandson was in the car, so I kind of

testified that he did not call the police to indicate that Walker was threatening members of his family. Anitra's mother indicated that she did not advise Anitra against being around Brown nor advise her or Brown to obtain a protective order against Walker or report the encounter to the police.

[12] Brown testified that he was from Jamaica, owned a restaurant, and went to college at Ivy Tech and Purdue University Fort Wayne. He stated he met Walker in September 2017. When asked if he had a permit to carry a handgun, he stated that he was "a lifetime firearm holder for the state of Indiana." Transcript Volume 3 at 239. He testified that there was an incident in which Walker pulled alongside his vehicle and said "I heard you was looking for me," and Walker and his friend both had guns. *Id.* at 242. He testified that an incident occurred at Burlington Coat Factory three weeks before the shooting in which Walker said, "This is my city" and "what he's gonna do to" him, and he replied: "I already tell you, I don't have any problem with you, you know. This is not the time or place for what you're trying to do, so you need to keep it moving." *Id.* at 245. He stated that Walker kept following him, put his hands on him, pushed him off the cart, his son tried to hit Walker and said "[s]top," and Walker said, "You're lucky, n-----, your son tell me to stop." *Id.* He testified that Walker's friend reached for his weapon and that Walker "pounced on him as to put his weapon back down in his waist." *Id.* Walker then said to

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dismissed it and walked away." *Id.* at 228. The prosecutor renewed his objection to the testimony, defense counsel stated that it was relevant to "state of mind," and the court allowed the testimony. *Id.* at 229.

his friend: "Come on, man, come on, let's just go. Let's go. Eff this n-----. You better not come outside." *Id.* at 246. Brown testified to another incident at the Kroger store three days before the shooting in which he and Anitra drove into the parking lot and observed Walker exiting the store pushing a cart, Walker "dipped in his waist for his firearm," and Anitra sped around him. *Id.* at 247.

[13] With respect to the day of the shooting, he testified that Walker was irate and angry and yelled, "Yeah, I got you now." Transcript Volume 4 at 3. Brown stated he said, "Man, this is not the time or place. You need to keep it moving with your family." *Id.* Walker replied: "Oh, yeah n-----? What you talking about?" *Id.* He stated that, when he saw Walker put the baby down, he thought he was not going to "give this guy my back anymore" and stopped. *Id.* He testified that Walker came at him "very quickly," "seemed very mad," was cussing him out, and said "N-----, I got you where I want you now." *Id.* at 4. He testified that he walked away three times, and Walker put his hands on him. He also testified he shot Walker through his clothes when Walker reached underneath his coat and he believed Walker was reaching for a weapon. He stated that Walker "fell on a cart and then he faced me" and "as he faced me, he reached back underneath his clothes . . . and that's when I fired the second time in his leg." *Id.* at 5. He also stated:

> And when I went back there, I saw him crawling away, so I said, "Okay. He's not gonna trick no one." That's when there was somebody that came out and said, "Hey, man." They thought I was going down there to try to maybe do something to him, but I just went there to make sure he was no more trick to me . . . .

Id. at 6.

[14] On cross-examination, Brown stated that he was not a dealer, he and Walker never had a "drug relationship," he never called the police despite the previous encounters with Walker, and he left the scene because he was worried the police would shoot to kill the person involved with the shooting. *Id.* at 15. When asked a jury question regarding why he did not leave after the first shot, he answered: "Well, in my mind, I'm thinking, because he reached, he was going to try to shoot me, too. So I made sure I stayed with him to make sure he's not gonna try to shoot me, 'cause he was quite a while – it was quite a walkway for me to turn the corner to reach to where I would need to go to leave so, had I turned my back, he could have done anything, so I stayed with him to make sure he's not gonna try to retaliate." *Id.* at 30.

[15] During the State's rebuttal, Jason Palm, a crime scene technician, testified that his responsibility was to collect evidence at the scene and he did not locate any sort of weapon associated with Walker. Cher Richardson testified that she worked at the Burlington Coat Factory store in the last quarter of 2018 and heard two men engaging in an argument and they were both very loud.

[16] During a discussion of the jury instructions, the court referenced a page with the "standard defense of self-defense" and stated that "everyone has their own self-defense instructions," and Brown's counsel stated: "I will accept it, it's the pattern jury instruction." *Id.* at 41-42.

[17] Brown proposed the following instruction:

> When a defendant claims self-defense the following facts must exist:
>
> 1. That he was in a place he had a right to be;
>
> 2. That he acted without fault; and
>
> 3. That he had a reasonable fear or apprehension of death or great bodily harm or was in such apparent danger as caused him in good faith to fear death or great bodily injury.

Appellant's Appendix Volume 2 at 106.[4] The court refused the proposed instruction because it was covered by other instructions and it believed the jury would be confused "with the injury versus death." Transcript Volume 4 at 51.

[18] Brown also proposed the following instruction, which cited *Shepard v. State*, 451 N.E.2d 1118 (Ind. Ct. App. 1983),[5] and *Banks v. State*, 276 N.E.2d 155 (Ind. 1971):

> The existence of danger, the necessity or apparent necessity for the use of force employed by the defendant, and the amount of force necessary to employ can only be determined from the standpoint of the defendant at the time and under all existing circumstances.

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[4] The instruction cited "Shepherd v. State 451NE[2] (Ind. 1983)," Appellant's Appendix Volume 2 at 106, which appears to be a citation to *Shepard v. State*, 451 N.E.2d 1118 (Ind. 1983).

[5] This proposed instruction again cited "Shepherd v. State 451NE[2] (Ind. 1983)." Appellant's Appendix Volume 2 at 108.

Appellant's Appendix Volume 2 at 108. The prosecutor argued that this instruction was covered by the court's pattern instruction on self-defense, and the court agreed and refused the proposed instruction.

[19] Brown also proposed the following instruction, which cited *Hughes v. State*, 212 Ind. 577, 10 N.E.2d 629 (1937):

> A person has a right to act on appearance, and, if he believes in good faith, and upon reasonable grounds, from the facts and circumstances as they appear to him at the time, that he is about to be assaulted, he has a right, if it seems reasonably necessary to him at the time, to use such force as will protect him from the assault.

Id. at 110. The prosecutor asserted that this instruction was covered by the court's other instructions, and the court agreed.

[20] The court provided the following as Instruction No. 6:

> The defense of self-defense is defined by statute as follows:
>
> A person is justified in using reasonable force against another person to protect himself from what he reasonably believes to be the imminent use of unlawful force. Where a person, being without fault, and in a place where he has a right to be, is in reasonable fear or apprehension of bodily injury he may, without retreating, exercise his right of self-defense. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting himself by reasonable means necessary.
>
> Notwithstanding the above, a person is not justified in using force if
>
> 1. he is committing or escaping after the commission of a crime;

> 2. he provokes unlawful action by another person with intent to cause bodily injury to the other person; or
>
> 3. he has entered into combat with another person or is the initial aggressor, unless he withdraws from the encounter and communicates to the other person his intent to do so and the other person nevertheless continues or threatens to continue unlawful action.
>
> The State has the burden of disproving this defense beyond a reasonable doubt.

Id. at 129.

[21] After the jury had the case, the court stated: "Mr. Brown, make sure [your attorney] can get ahold of you so we can come back here as soon as we hear from the jury." Transcript Volume 4 at 86. Brown said "[o]kay," and the court said "[m]ake sure he has a good phone number or knows where you are or something like that." *Id.* Brown failed to appear for the reading of the jury verdicts. The jury found Brown guilty as charged. The court stated that it would enter judgment of convictions on both counts.

[22] On November 25, 2020, Brown filed a Motion to Reinstate Bond and alleged that he did not appear for the reading of the jury verdicts because his phone had been turned off and he voluntarily turned himself in later that evening. The court denied the motion.

[23] On January 25, 2021, the court held a sentencing hearing. The probation officer completing the presentence investigation report ("PSI") recommended a sentence of thirty-five years for Count I and two years and 183 days for Count

II. Brown's counsel requested that the court merge the criminal recklessness conviction with the attempted murder conviction "given the circumstances of the attempt murder being the deadly weapon." *Id.* at 103. The prosecutor asked in part that "the counts run consecutively, they are separate victims, separate elements . . . ." *Id.* at 105.

[24] The court found Brown's lack of criminal history as a mitigating circumstance and his violation of bond and/or Pre-Trial Services conditions and the permanent serious injuries suffered by Walker as aggravating circumstances. The court vacated Count II and sentenced Brown to thirty-five years for attempted murder under Count I.

Discussion

I.

[25] The first issue is whether the trial court abused its discretion in instructing the jury. Generally, "[t]he purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. 2003), *cert. denied*, 540 U.S. 1150, 124 S. Ct. 1145 (2004). Instruction of the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion. *Id.* at 1163-1164. To constitute an abuse of discretion, the instruction given must be erroneous, and the instructions taken as a whole must misstate the law or otherwise mislead the jury. *Benefiel v. State*, 716 N.E.2d 906, 914 (Ind. 1999),

reh'g denied, *cert. denied*, 531 U.S. 830, 121 S. Ct. 83 (2000). We reverse the trial court only if the instruction resulted in prejudice to the defendant's substantial rights. *Batchelor v. State*, 119 N.E.3d 550, 554 (Ind. 2019).

[26] Brown argues that the "second half of the trial court's self-defense instruction" had nothing to do with his case and risked confusing the jury. Appellant's Brief at 14. He asserts that he was not committing or escaping after the commission of a crime and did not provoke unlawful action by another with intent to cause bodily injury and was not the initial aggressor. He also argues that the instruction given by the court did not adequately cover the aspect that necessity is to be determined from his standpoint or "the aspect of a person's right to act on appearance." *Id.* at 15.

[27] As for Brown's proposed instruction stating that the existence of danger and the necessity for the use of force can only be determined from the standpoint of the defendant, we note that the self-defense statute requires both a subjective belief that force was necessary to prevent serious bodily injury and that a reasonable person under the circumstances would have such an actual belief. *See Washington v. State*, 997 N.E.2d 342, 349 (Ind. 2013). We cannot say that Brown's proposed instructions correctly stated the law. *See Huls v. State*, 971 N.E.2d 739, 746 (Ind. Ct. App. 2012) (holding that the defendant's proposed instructions unduly emphasized that the validity of the use of force in self-defense "can only be determined from the standpoint of the accused" without also instructing them to equally consider whether the defendant's belief was objectively reasonable under the circumstances, his proposed instructions

incorrectly stated the law on self-defense, and the trial court did not abuse its discretion by refusing them), *trans. denied*. In light of the court's instruction regarding self-defense, we cannot say that the instructions taken as a whole misstated the law or misled the jury or that Brown's substantial rights were prejudiced.

II.

[28] The next issue is whether the evidence is sufficient to negate Brown's claim of self-defense. Brown asserts he had a right to be in the grocery store, attempted to extricate himself from Walker's presence on three or four occasions, acted without fault in defending himself, and had a reasonable fear or apprehension of death or great bodily injury.

[29] Self-defense is governed by Ind. Code § 35-41-3-2. A valid claim of self-defense is legal justification for an otherwise criminal act. *Wilson v. State*, 770 N.E.2d 799, 800 (Ind. 2002). To prevail on such a claim, a defendant must show that he: was in a place where he had a right to be; did not provoke, instigate, or participate willingly in the violence; and had a reasonable fear of death or great bodily harm. *Id.* The self-defense statute requires both a subjective belief that force was necessary to prevent serious bodily injury and that a reasonable person under the circumstances would have such an actual belief. *Washington*, 997 N.E.2d at 349. The amount of force a person may use to protect himself or herself must be proportionate to the urgency of the situation. *Harmon v. State*, 849 N.E.2d 726, 730-731 (Ind. Ct. App. 2006). However, when a person uses

more force than is reasonably necessary under the circumstances, the right of self-defense is extinguished. *Id.* at 731. The Indiana Supreme Court has stated that firing multiple shots undercuts a claim of self-defense. *See Mayes v. State*, 744 N.E.2d 390, 395 n.2 (Ind. 2001); *Randolph v. State*, 755 N.E.2d 572, 576 (Ind. 2001). When a claim of self-defense is raised and finds support in the evidence, the State has the burden of negating at least one of the necessary elements. *Wilson*, 770 N.E.2d at 800. If a defendant is convicted despite a claim of self-defense, we will reverse only if no reasonable person could say that self-defense was negated by the State beyond a reasonable doubt. *Id.* at 800-801. A mutual combatant, whether or not the initial aggressor, must declare an armistice before he or she may claim self-defense. *Id.* at 801. The standard of review for a challenge to the sufficiency of the evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. *Id.* We neither reweigh the evidence nor judge the credibility of witnesses. *Id.* If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed. *Id.*

[30] While Brown asserts the surveillance video "clearly shows Walker reaching in his clothing as if to retrieve a weapon," Appellant's Brief at 18, we note that he does not cite to the record and our review of the video reveals that Walker and Brown stood near each other for approximately fifteen seconds and Brown, without removing his hand from his pocket, suddenly shot Walker who appears to be standing still. The video also shows Walker fall out of view behind a grocery aisle after the shot and Brown pursue him down the aisle, casually walk

away for approximately ten seconds before returning to the aisle where Walker was located for a few seconds, and then walk away again. Detective Tegtmeyer testified that one shot was fired through Brown's hoodie. Walker testified that the first shot struck him in the back of the arm, he "took off running . . . to try to get out of harm's way," and Brown chased him and shot him in the back of the leg from behind. Transcript Volume 2 at 222.

[31] Based upon the evidence, the jury could find that Brown participated willingly in the violence, that he did not have a reasonable fear of death or great bodily harm, or that the amount of force he used was unreasonable under the circumstances. We conclude based upon the record that the State presented evidence of a probative nature from which a reasonable trier of fact could have determined beyond a reasonable doubt that Brown did not validly act in self-defense and that he was guilty of attempted murder. *See Wallace v. State*, 725 N.E.2d 837, 840 (Ind. 2000) (affirming the defendant's convictions for murder and attempted murder, noting the defendant claimed that he acted in self-defense, observing the trial court gave the jury a self-defense instruction and the jury nonetheless convicted the defendant, declining to reweigh the evidence, and holding that the State presented sufficient evidence to negate the defendant's claim of self-defense); *Rodriguez v. State,* 714 N.E.2d 667, 670-671 (Ind. Ct. App. 1999) (noting that the defendant's version of events differed from other testimony, declining to reweigh the evidence, and holding that sufficient evidence existed to rebut the defendant's claim of self-defense), *trans. denied*.

III.

[32] The next issue is whether Brown's sentence is inappropriate in light of the nature of the offense and his character. Brown acknowledges that the nature of the offense resulted in serious bodily injury but argues the trial court disregarded his character. He requests that his sentence be revised to the advisory sentence of thirty years with ten years suspended to probation.

[33] Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[34] Ind. Code § 35-50-2-4 provides that a person who commits a level 1 felony shall be imprisoned for a fixed term of between twenty and forty years, with the advisory sentence being thirty years.

[35] Our review of the nature of the offense reveals that Walker and Brown developed a business relationship based on drugs and had a disagreement over their relationship and money. After some previous encounters, Walker, who was unarmed, went to a Kroger store with his niece and her three-month-old baby. After some discussion, Brown fired a shot through his hoodie which struck Walker in his arm. The surveillance video shows Brown suddenly shoot Walker who appears to be standing still. Brown then chased Walker and shot him in his leg from behind. Walker began crawling away, and Brown casually

walked away for approximately ten seconds before returning to the aisle where Walker was located, extending his arm, pointing the gun at Walker's face, and attempting to fire. Walker underwent eight surgeries, he spent almost two months in the hospital, and his leg is partially paralyzed "until the nerves grow back, because it hit the main artery." Transcript Volume 2 at 227.

[36] Our review of the character of the offender reveals that Brown had no prior criminal history. The PSI indicates that Brown reported having three dependent children. Brown reported having a three-year-old and a six-month-old who live with their mother and denied being court-ordered to pay child support. He also reported having a child with another woman and that he was court-ordered to pay $204 per month in child support. Brown was part-owner of a restaurant in Fort Wayne, and the PSI indicates that he had an employment history including positions as a general laborer, crane operator, conductor trainee, and a senior phlebotomist. Brown received a high school education in Jamaica and obtained a degree in industrial manufacturing technology from Ivy Tech and a degree in general studies from Purdue University Fort Wayne. Brown violated his bail bond agreement by changing his address without notifying the surety. Brown's overall risk assessment score using the Indiana Risk Assessment System placed him in the low risk to reoffend category.

[37] After due consideration, we conclude that Brown has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of the offense and his character.

IV.

[38] We next address the issue raised by the State on cross-appeal, whether the trial court properly vacated Count II, criminal recklessness. The State argues the court erred in vacating Brown's conviction for criminal recklessness because the offenses involved different victims. In reply, Brown argues the State failed to prove that there was actual harm to any victim other than Walker and that this Court should follow *Thurman v. State*, 158 N.E.3d 372 (Ind. Ct. App. 2020).

[39] In *Wadle v. State*, the Indiana Supreme Court stated:

> [W]hen multiple convictions for a single act or transaction implicate two or more statutes, we first look to the statutes themselves. If either statute clearly permits multiple punishment, whether expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy. But if the statutory language is not clear, then a court must apply our included-offense statutes to determine whether the charged offenses are the same. *See* I.C. § 35-31.5-2-168. If neither offense is included in the other (either inherently or as charged), there is no violation of double jeopardy. But if one offense is included in the other (either inherently or as charged), then the court must examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial. If, based on these facts, the defendant's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction," then the prosecutor may charge the offenses as alternative sanctions only. But if the defendant's actions prove otherwise, a court may convict on each charged offense.

151 N.E.3d 227, 253 (Ind. 2020).

[40] We cannot say that the statutes governing attempted murder and criminal recklessness permit multiple punishments, either expressly or by unmistakable implication.[6] With no statutory language clearly permitting multiple convictions, we analyze the offenses charged under our included-offense statutes. *See Wadle*, 151 N.E.3d at 254. Ind. Code § 35-38-1-6 provides that "[w]henever: (1) a defendant is charged with an offense and an included offense in separate counts; and (2) the defendant is found guilty of both counts; judgment and sentence may not be entered against the defendant for the included offense." Ind. Code § 35-31.5-2-168 provides:

> "Included offense" means an offense that:
>
> (1) 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) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
>
> (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or

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[6] The offense under Count I, attempted murder as a level 1 felony, is governed by Ind. Code §§ 35-42-1-1 and 35-41-5-1. Ind. Code § 35-42-1-1 provides that "[a] person who . . . knowingly or intentionally kills another human being . . . commits murder, a felony." Ind. Code § 35-41-5-1 provides that "[a] person attempts to commit a crime when, acting with the culpability required for commission of the crime, the person engages in conduct that constitutes a substantial step toward commission of the crime" and that "an attempt to commit murder is a Level 1 felony." As for Count II, criminal recklessness as a level 6 felony is governed by Ind. Code § 35-42-2-2, which provided at the time of the offense that "[a] person who recklessly, knowingly, or intentionally performs an act that creates a substantial risk of bodily injury to another person commits criminal recklessness" and "[t]he offense of criminal recklessness . . . is . . . a Level 6 felony if . . . it is committed while armed with a deadly weapon . . . ."[6] (Subsequently amended by Pub. L. No. 184-2019, § 11 (eff. July 1, 2019).

> public interest, or a lesser kind of culpability, is required to establish its commission.

[41] Criminal recklessness is not established by proof of the same or less than all the material elements required to establish attempted murder, nor does it differ from attempted murder only in that a less serious harm is required to establish its commission. Criminal recklessness is not an inherently included lesser offense of murder. *See Ellis v. State*, 736 N.E.2d 731, 734 (Ind. 2000) ("We have consistently held that criminal recklessness is not an inherently included offense of attempted murder.").

[42] As noted, the two crimes were alleged to have been committed on different victims.[7] Accordingly, we cannot say that the criminal recklessness offense was an included offense of attempted murder as charged. Under *Wadle*, there is no need to further examine the specific facts of the case to determine whether Brown's actions were compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.

[43] Even if were to analyze the third step of the *Wadle* test, we still would not find a double jeopardy violation. *See Woodcock v. State*, 163 N.E.3d 863, 875 (Ind. Ct. App. 2021) (holding the defendant's convictions did not constitute double

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[7] During closing argument, the prosecutor delineated the counts, discussed the attempted murder charge as relating to the discharge of a firearm "at or in the direction of James Walker, constituting a substantial step toward the crime of murder," and stated: "Criminal recklessness, this is everybody all, all those kids, all those families, Cassandra, Tony, and their kids, Emory and Chaquasha, everybody else that you saw on that video in that area." Transcript Volume 4 at 59.

jeopardy because neither murder nor battery by a deadly weapon was included in the other either inherently or as charged and there was no need to further examine the specific facts of the case to determine whether the defendant's actions were so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction, "[b]ut even if we were to analyze the third step of the *Wadle* test, we still do not find a double jeopardy violation"), *trans. denied*.

[44] As the *Wadle* Court noted, even "[i]f 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." *Wadle*, 151 N.E.3d at 249. Thus, while Brown's actions were so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction, the attempted murder and criminal recklessness counts related to separate victims and thus were two distinct chargeable crimes. *See Woodcock*, 163 N.E.3d at 876 (holding that there was no question that the defendant's action of pulling the trigger on his gun one time and striking two separate victims with a single bullet constituted a single transaction and the murder of one victim and the battery of another victim were two distinct chargeable crimes because there were two separate victims). To the extent Brown cites *Thurman*, we note that, unlike in this case, the charging information for criminal recklessness and attempted murder in that case involved the same victims. *See Thurman*, 158 N.E.3d at 380. Because one statutory offense was not included in the other, either inherently or as charged, and because the facts show two separate and distinct

crimes, Brown's convictions of both attempted murder and criminal recklessness did not violate substantive double jeopardy.

[45] For the foregoing reasons, we affirm Brown's conviction and sentence for attempted murder, reverse the court's order which vacated the criminal recklessness conviction, and remand for an entry of judgment of conviction for criminal recklessness as a level 6 felony and to impose a concurrent advisory sentence of one year for that offense.

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

Najam, J., and Riley, J., concur.