MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joshua A. Billman,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 19, 2022

Court of Appeals Case No. 21A-CR-2816

Appeal from the Wells Superior Court

The Honorable Kenton W. Kiracofe, Judge

Trial Court Cause No. 90C01-2011-F5-43

Altice, Judge.

Case Summary

[1] Joshua Billman appeals his convictions for reckless homicide, a Level 5 felony, neglect of a dependent resulting in bodily injury, a Level 5 felony, driving while suspended, a Class A infraction, and criminal recklessness, a Class B misdemeanor, claiming that the trial court abused its discretion in declining to send a transcript of a protected person hearing to the jury room during deliberations. Billman also argues that the trial court erred in sentencing him in light of double jeopardy concerns and that his eight-year aggregate sentence should have been "capped" at seven years in accordance with the limitations set forth in Ind. Code § 35-50-1-2 because his convictions "stemmed from the same criminal conduct, i.e., crashing the [vehicle]." *Appellant's Brief* at 24.

[2] We affirm in part, reverse in part, and remand with instructions that the trial court vacate the conviction and sentence for criminal recklessness.

Facts and Procedural History

[3] On October 3, 2020, Billman and Ashley Giordani were traveling in Ashley's Chevrolet Blazer along with their two minor children, six-year-old E.G. and three-year-old A.B., on Hoosier Highway in Wells County. Although Billman claimed that Ashley was driving, he was later identified as the driver. Adrienne Roth, who was driving behind Billman, saw the Blazer cross the center line.

The driver of an oncoming car applied the brakes to avoid a collision. As Roth slowed down, she observed the Blazer again drive into the opposite lane.

[4] Roth then saw that "[the Blazer] overcorrected when [it] came back and turned so sharply that the [Blazer] went up on the two driver's side wheels and drove that way straight towards a ditch on the southbound side" of the highway. *Transcript Vol. IV* at 124. The vehicle rolled after striking a ditch, and Billman, Ashley, and E.G. were ejected into a field.

[5] Roth called 911, and she and other motorists, including Morris Lewis, stopped to assist. After Morris removed A.B. from the Blazer, he approached E.G. who was bleeding from the head. At some point, E.G. told Lewis that "Josh was mad and wrecked the truck." *Id.* at 47.

[6] Trevor Spencer, another passerby who stopped at the scene, also tended to E.G. When Spencer asked E.G. what happened, E.G. replied, "My dad did this." *Transcript Vol. V* at 63. E.G. told Spencer that his father crashed the vehicle because his "parents had been fighting earlier in the day." *Id.* at 64.

[7] Emergency medical personnel Paul Goings and Jessica Ootens were summoned to the crash site. E.G. and Billman were both injured and placed in the same ambulance. Ootens asked E.G. if he had been riding in the Blazer behind his mother or his father. E.G. replied that he "was sitting behind Mom." *Transcript Vol. II* at 118. Goings and Ootens later recalled that Billman corrected E.G. during the ambulance ride. Billman stated that E.G. was seated behind him. Goings also remembered that Billman admitted driving the Blazer

"when he got into an accident." *Transcript Vol. V* at 94. Ashley was also transported to the hospital where she later died from the injuries she sustained in the crash.

[8] A subsequent forensic reconstruction of the accident was performed that considered the Blazer's path, damage, and the placement of Billman, Ashley and E.G. in the field after the rollover. It was concluded that Billman had been driving when the crash occurred. Billman, however, denied driving the Blazer when he was interviewed by police officers at the hospital, insisting that Ashley was driving. Billman asserted that Ashley suddenly "jerked" the steering wheel and drove off the road. *Transcript Vol. VI* at 5. At a subsequent interview, Billman "volunteered . . . numerous times that he had never been in the driver's seat" of the Blazer. *Id.* at 4-6.

[9] A few days after the crash, Lindsay Eads of the Wells County Department of Child Services conducted an audio and video interview of E.G. During the interview, E.G. stated that Billman had been driving when the crash occurred and that he "crashed [them] on purpose." *Exhibit* 16. E.G. explained that Billman was driving and jerked the wheel during an argument with Ashley. E.G. remarked that Billman was "psycho" because "he did it on purpose." *Id.*

[10] Billman was charged with reckless homicide, a Level 5 felony, criminal recklessness, a Class B misdemeanor, naming E.G. and/or A.B. as the victims of that offense, driving while suspended, a Class A misdemeanor, and neglect of a dependent, a Level 5 felony, naming E.G. and/or A.B. as the victims.

Thereafter, the State filed a notice of intent to introduce at trial the statements that E.G. made to various individuals at the crash scene and to others several days after the incident.

[11] On September 30, 2021, the trial court conducted a hearing on the State's notice of intent to introduce the statements. The trial court determined that E.G. qualified as a "protected person" as defined in Ind. Code § 35-37-4-6 because he was under fourteen years of age. After hearing the evidence, the trial court found that requiring E.G. to testify in the physical presence of Billman would result in serious emotional distress to E.G., "such that [E.G.] cannot reasonably communicate before a jury." *Appellant's Appendix Vol. II* at 243. Thus, E.G. was declared "unavailable" for trial purposes and the trial court ruled that his statements could be introduced at trial to the extent that they were relevant to the neglect of a dependent charge. *Id.* at 244.

[12] Billman's jury trial commenced on November 1, 2021, at which time E.G.'s interview was played to the jury where he identified Billman as the driver of the Blazer when the crash occurred. Billman also testified at trial and denied driving the Blazer, claiming that he had grabbed the steering wheel to prevent Ashley from driving off the road.

[13] During a bench conference outside the jury's presence, Billman's counsel asked to publish the transcript of E.G.'s protected person hearing, to which the State did not object. The parties and the trial court also discussed Billman's request to allow the transcript of that hearing to be sent back to the jury room during

deliberations. The trial court denied Billman's request, and the following exchange occurred when the jury returned:

> [THE COURT]: ... [Defense counsel], you may call your next witness.
>
> [DEFENSE COUNSEL]: Your Honor, at this time – I know there's been some discussion about the child's testimony outside the presence of the jury – at this moment, we would move to introduce the transcript of the questions that were asked to the child and the answers that the child provided.
>
> THE COURT: [Prosecuting attorney]?
>
> [PROSECUTING ATTORNEY]: There's no objection necessary. It's part of the questioning.
>
> THE COURT: Ladies and gentlemen of the jury, let me – um – ladies and gentlemen, previously you have seen – uh – uh – we've discussed the statement . . . so there – there was a video and then statements made [sic] Deputy Ryan Mounsey, Jennifer Hupfer, and Season Rose. Uh – we held a hearing, as I mentioned in that previous advisement – um – where I determined the admissibility of that statement.
>
> The Defense is now presenting to you, a – um – transcript of that hearing – of the child's portion of that hearing. [Defense counsel] is going to distribute that to you. *This is not like an exhibit; this will not be going back with you to the jury room, so you have to read it in court now, so we'll give you plenty of time to do that. . . . I will give you time here in the courtroom to review this . . . transcript.*
>
> [DEFENSE COUNSEL]: Thank you, your Honor. I'm going to pass out a transcript of those questions and answers.

(Transcript distributed to the jury)

THE COURT: And I'm gonna go off – we'll go off record. Is that okay? Yeah. Okay. We'll go off.

(Off record at 2:10 p.m.)

(Back on the record at 2:29 p.m.)

THE COURT: All right. We're back on the record. I – I – I'm gonna ask you again, just for the record, all of you have had an opp – is there anyone who needs additional time to review that . . . All right. Seeing none, then, [Defense counsel], if you would collect those transcripts. Thank you.

All the transcripts have been collected?

[DEFENSE COUNSEL]: Correct, your Honor.

Transcript Vol. VI at 145-46 (emphases added).

[14] The jury found Billman guilty of all charges on November 4, 2021. At the sentencing hearing on December 8, 2021, the State conceded—and the trial court found—that the evidence at trial established that Billman committed the offense of driving while suspended as a Class A infraction rather than the Class A misdemeanor that was charged. Thus, the trial court amended the judgment to reflect the same.

[15] Billman was sentenced to four years of incarceration for reckless homicide, four years for neglect of a dependent, and 180 days for criminal recklessness.

He was also fined $500 for driving while suspended. The trial court ordered Billman to serve his sentence for criminal recklessness concurrently with the sentences imposed for reckless homicide and neglect of a dependent that were ordered to be served consecutively, for an aggregate sentence of eight years in the Indiana Department of Correction.

[16] Billman now appeals.

Discussion and Decision

I. Protected Persons Hearing Transcript

[17] Billman contends that the trial court abused its discretion in refusing to send the transcript of E.G.'s protected persons hearing to the jury room during deliberations. Billman claims that the trial court's refusal to do so "violated his fundamental rights." *Appellant's Brief* at 15.

[18] We initially observe that renewed access to evidence during jury deliberations is not typically granted as a matter of right. *Carey v. State*, 389 N.E.2d 357, 360 (1979). The jury's access to—and use of evidence—such as witness testimony, is generally within the trial court's discretion. *Thacker v. State*, 709 N.E.2d 3, 7 (Ind. 1999); *Parks v. State*, 921 N.E.2d 826, 831 (Ind. Ct. App. 2010), *trans. denied*. The only exceptions to this discretion are created by Ind. Code § 34-36-1-6 and Indiana Jury Rule 28. I.C. § 34-36-1-6 requires the re-presentation of evidence only when a jury reports a "disagreement . . . as to any part of the

testimony," in which case the "information required" shall be given to the jury in open court after notice to the parties. And Jury R. 28 provides that

> If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.

[19] As neither of the above circumstances occurred here, we review the trial court's decision regarding the hearing transcript for an abuse of discretion. *See Thacker*, 709 N.E.2d at 7. An abuse of discretion occurs "only when the decision is clearly against the logic and effect of the facts and circumstances" before the trial court. *Shinnock v. State*, 76 N.E.3d 841, 843 (Ind. 2017).

[20] We have previously determined that three factors bear on the decision to send exhibits or transcripts to the jury: 1) whether evidence will aid the jury in a proper consideration of the case; 2) whether any party will be unduly prejudiced; and 3) whether the evidence may be subjected to improper use by the jury. *Mays v. State*, 907 N.E.2d 128, 132-33 (Ind. Ct. App. 2009), *trans. denied.*

[21] In this case, the trial court may have anticipated that sending the protected persons hearing transcript to the jury would unduly emphasize the questions and answers during that hearing. Permitting the jury to read the protected person hearing transcript in the same setting and in a similar manner that it

considered other witness testimony—that is, in the courtroom—would avoid undue emphasis on what transpired during the protected person hearing.

[22] Billman has also not shown how he may have been prejudiced by the trial court's refusal to permit the jurors to review the transcript during their deliberations. To be sure, the trial court instructed the jurors at trial to "read the transcript" and it granted them all the time that they needed to do so. *Transcript Vol. VI at* 145-46. The jury took approximately twenty minutes to read the fourteen-page transcript and there is nothing to suggest that the jurors were inattentive or not focused on reviewing the document. The trial court specifically noted that none of the jurors had requested additional time to review the transcript.

[23] For all these reasons, Billman has not shown that the trial court abused its discretion in refusing to send the transcript to the jury for use during deliberations. Thus, Billman's claim that his fundamental rights were violated fails.

II. Sentencing

[24] Billman argues that he should be resentenced because his convictions and sentences violate double jeopardy principles. Billman further maintains that the trial court erred in sentencing him because the three counts upon which he was convicted "all stem from the same episode of criminal conduct, i.e., crashing the Blazer." *Appellant's Brief* at 24. Therefore, the trial court was limited to the

"overall consecutive term of seven years" in accordance with the sentencing cap set forth in I.C. § 35-50-1-2. *Id.*

A. Double Jeopardy Concerns

[25] We initially observe that double jeopardy claims are reviewed de novo. *Wadle v. State*, 151 N.E.3d 227, 237 (Ind. 2020). Double jeopardy arguments are analyzed in accordance with two different tests depending on whether a defendant's criminal behavior has led to multiple convictions under more than one statute or under a single statute. *Id.* at 247; *Powell v. State*, 151 N.E.3d 256, 263 (Ind. 2020). Because Billman was convicted under multiple statutes, his double-jeopardy contentions are analyzed in accordance with *Wadle*. 151 N.E.3d at 247. And relevant here is Indiana Code § 35-38-1-6, which provides that "whenever (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."

[26] Billman maintains that double jeopardy prohibitions are implicated because criminal recklessness is a lesser included offense of reckless homicide and/or neglect of a dependent. In addressing his contentions, we first examine the text of the relevant statutes in accordance with *Wadle* to determine whether the legislature authorized multiple convictions and punishment. *Id.* at 248. If the statutes do not authorize such a result, we then examine whether criminal recklessness and neglect of a dependent are lesser-included offenses of reckless

homicide under Indiana Code § 35-31.5-2-168. *Wadle,* 151 N.E.3d at 248. If the statutory language shows either legislative authorization for multiple punishments or that criminal recklessness and neglect of a dependent are not lesser-included offenses of reckless homicide, Billman was validly convicted and punished for all three offenses. *See id.*

[27] I.C. § 35-42-1-5 provides that "[a] person who recklessly kills another human being commits reckless homicide, a Level 5 felony." I.C. § 35-46-1-4(a)(1) states in relevant part that "a person having the care of a dependent . . . who knowingly or intentionally . . . places the dependent in a situation that endangers the dependent's life or health . . . [and the offense] results in bodily injury . . . [commits neglect of a dependent] a Level 5 felony." And the criminal recklessness statute, I.C. § 35-42-2-2(a), provides 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 . . . a Class B misdemeanor."

[28] In accordance with *Wadle,* it is apparent that the statutes under which Billman was charged do not authorize multiple convictions and punishments. Thus, we turn our analysis to I.C. § 35-31.5-2-168—the lesser-included offense statute—to determine whether any of Billman's convictions violate double-jeopardy principles.

[29] First, we note that the State charged Billman with reckless homicide, naming Ashley as the victim of that offense. On the other hand, E.G. and/or A.B. were

the named victims of the criminal recklessness charge. As different victims were named in those offenses, there was no double jeopardy violation. *See, e.g., Hill v. State*, 157 N.E.3d 1225, 1229 (Ind. Ct. App. 2020) (no double jeopardy violation occurred when the defendant, who crashed his vehicle into a car carrying two women, killing them, was convicted of two counts of reckless homicide); *see also Keith v. State*, 127 N.E.3d 1221, 1231 (Ind. Ct. App. 2019) (holding that double jeopardy violations did not exist where the offenses charged involved different victims).

[30] Turning to Billman's double jeopardy contentions regarding criminal recklessness and neglect of a dependent, I.C. § 35-31.5-2-168 provides that an "included offense" is 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,
>
> (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 public interest, or a lesser kind of culpability, is required to establish its commission.

[31] There are two categories of lesser included offenses in Indiana. *Matter of K.Y.,* 175 N.E.3d 820, 824 (Ind. Ct. Ap. 2021), *trans. denied.* The first category consists of, "when by virtue of the legal definitions of the two offenses, it is

impossible to commit the greater offense without first committing the lesser or when a lesser degree of culpability is required for the lesser offense." *Meriweather v. State,* 659 N.E.2d 133, 138 (Ind. Ct. App. 1995), *trans. denied.* The second category consists of those offenses which are "included as charged." *Id.* "Included as charged" offenses are those "committed by reason of the manner in which the greater offense was committed, if within the factual allegations contained in the charging instrument." *Id.*

[32] As noted above, criminal recklessness, a Class B misdemeanor, is established by proof that a person "recklessly, knowingly, or intentionally performs an act that creates a substantial risk of bodily injury to another person." I.C § 35-42-2-2(a). Neglect of a dependent, a Level 6 felony, is established by proof that "a person having the care of a dependent who knowingly or intentionally places the dependent in a situation that endangers the dependent's life or health. . . that results in bodily injury." I.C. § 35-46-1-4(a)(1).

[33] In this case, the State—as its basis for the neglect charge—alleged that Billman placed A.B. and/or E.G. in a situation that endangered their health or lives by "*recklessly driving* [the Blazer] in which [the children] were passengers." *Appendix Vol. II* at 133 (emphasis added). Similarly, the State alleged that Billman performed the act of "*recklessly crashing [the Blazer]*" to support the criminal recklessness charge (emphasis added). *Id.* In short, the State alleged the same act to support both charges. Thus, the offense of Class B criminal recklessness is an included offense of neglect of a dependent resulting in bodily injury, a Level 5 felony.

[34] Because Billman's act of criminal recklessness was included in his act of neglecting a dependent, we now turn to the final step of the *Wadle* analysis. That is, we must examine the underlying facts to determine whether Billman's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Wadle,* 151 N.E.3d at 253.

[35] The record establishes that both of Billman's offenses were the result of one act, i.e., the act of reckless driving. Those offenses, therefore, constituted a single transaction under *Wadle,* meaning his convictions for both neglect of a dependent and criminal recklessness cannot stand. *See id.* Accordingly, we affirm Billman's conviction for reckless homicide, a Level 5 felony, neglect of a dependent as a Level 6 felony, reverse his conviction for criminal recklessness, and remand with instructions to vacate that conviction and sentence.

B. Sentencing Cap—Crimes of Violence

[36] Lastly, Billman claims that his sentences are subject to the "episode cap" set forth in I.C. § 35-50-1-2(b) and (c), because "the three Counts . . . all stem from the same episode of criminal conduct, i.e., crashing the Blazer." *Appellant's Brief* at 24. Thus, Billman asserts that his aggregate sentence must be reduced from eight to seven years.

[37] Under I.C. § 35-50-1-2(a)(5), the offense of reckless homicide is a "crime of violence." The statute goes on to provide that an "episode of criminal conduct" means "offenses or a connected series of offenses that are closely related in

time, place, and circumstance." I.C. § 35-50-1-2 (b). And "*except for crimes of violence*, the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the period described in subsection (d)." I.C. § 35-50-1-2(c) (emphasis added). Under subsection (d), the "total of the consecutive terms of imprisonment to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct may not exceed the following: . . . "(2) if the most serious crime for which the defendant is sentenced is a Level 5 felony, the total of the consecutive terms of imprisonment may not exceed seven . . . years." I.C. § 35-50-1-2(d)(2).

[38] Billman correctly posits that his convictions for reckless homicide and neglect of a dependent resulting in bodily injury—both Level 5 felonies—were the "most serious crimes" for which he was sentenced. Although he argues that I.C. § 35-50-1-2(d)(2) must limit the consecutive term of imprisonment to seven years, he overlooks the fact that reckless homicide is a crime of violence that is *not* subject to the "episode cap" in the sentencing statute. *See* I.C. § 35-50-1-2(a)(5), and (c). Therefore, Billman's total consecutive sentence was not limited to seven years and the trial court did not err in imposing the eight-year aggregate sentence.

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

Brown, J. and Tavitas, J., concur.