MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jamie B. Rund,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 12, 2023

Court of Appeals Case No. 23A-CR-320

Appeal from the Brown Circuit Court

The Honorable Mary Wertz, Judge

Trial Court Cause No. 07C01-2111-F5-540

Memorandum Decision by Judge Mathias
Chief Judge Altice and Judge May concur.

Mathias, Judge.

[1] When the Indiana Supreme Court overturned *Richardson v. State* and held that Indiana's substantive double jeopardy protections are not of a constitutional dimension but are, rather, statutory, the Court necessarily changed the test for reversible error in substantive double jeopardy appeals from a reasonable possibility test to the probable impact test under Indiana Appellate Rule 66(A). *See Wadle v. State*, 151 N.E.3d 227, 240 (Ind. 2020). As our Supreme Court has held:

> When an appellate court must determine whether a non-constitutional error is harmless, Rule 66(A)'s "probable impact test" controls. Under this test, the party seeking relief bears the burden of demonstrating how, in light of all the evidence in the case, the error's probable impact undermines confidence in the outcome of the proceeding below. Importantly, this is not a review for the sufficiency of the remaining evidence; it is a review of what was presented to the trier of fact compared to what should have been presented. And when conducting that review, we consider the likely impact of the improperly admitted or excluded evidence on a reasonable, average jury in light of all the evidence in the case. Ultimately, the error's probable impact is sufficiently minor when—considering the entire record—our confidence in the outcome is not undermined.

Hayko v. State, 211 N.E.3d 483, 492 (Ind. 2023) (citations omitted).

[2] Here, the prosecutor was less than artful in his parsing of some evidence during his closing statement in support of the State's charges against Jamie B. Rund for

Level 5 felony intimidation and Level 5 felony criminal recklessness.[1] But we are not convinced that the prosecutor's passing inartfulness rises to the level of reversible error under the probable impact test. Nor are we persuaded by Rund's argument that the trial court abused its discretion when it admitted certain evidence into the record. Accordingly, we affirm Rund's convictions.

Facts and Procedural History

[3] In the evening hours of November 7, 2021, Michael Peaslee was driving to his house in Brown County with his two sons in his car. He noticed a man, later identified as Rund, following him on a dirt bike. Rund followed Peaslee for approximately twenty-five minutes.

[4] Upon pulling into their driveway, Peaslee and his sons went inside their house. Peaslee observed Rund drive past the house at first, but then Rund "turned around and c[a]me back." Tr. Vol. 3, p. 154. Peaslee went back outside as Rund came to a stop in front of Peaslee's house. Rund loudly asked Peaslee who he was, and Peaslee identified himself. Rund then said that Peaslee had been "messing with him." *Id.* at 155. Peaslee, who did not recognize Rund, told Rund there were two Michael Peaslees living on that same road, but Rund stated he had found the one he "was looking for." *Id.* at 156. Rund then said "he was the Grim Reaper, and he was there to kill [Peaslee], and he pulled a

[1] Rund does not appeal his convictions for Level 6 felony resisting law enforcement or Class A misdemeanor operating a vehicle while intoxicated.

gun over his back" and pointed it at Peaslee. *Id.* at 157. The gun was an AR-15. When Peaslee saw Rund point the AR-15 at him, he told his boys to "get down," and Peaslee "got down low in the house." *Id.* at 157-58. Rund then fired four shots at Peaslee's house. Bullets came through the front wall of the house and did property damage inside the house, but neither Peaslee nor his sons were injured.

[5] Local law enforcement officers responded to multiple 9-1-1 calls of shots fired in the area. As Brown County Sheriff's Deputy Nicholson Briles arrived on the scene, he observed Rund fleeing in the opposite direction on the dirt bike. Having been informed that a dirt bike was involved in the shooting, Deputy Briles pursued Rund. Rund did not attempt to pull over at any point. Instead, some ways away, Rund crashed while trying to take a turn.

[6] Deputy Briles secured the scene while he waited for backup to arrive and assist him. After backup arrived, Deputy Briles approached Rund and immediately noticed that Rund's breath smelled of alcohol and his speech was slurred. Deputy Briles then patted Rund down and found a loaded, thirty-round AR-15 magazine in one of Rund's front pockets. And, although Deputy Briles did not locate a firearm on Rund, Morgantown Police Department Officer John Bise, who was assisting at the scene, located an AR-15 with a black sling attached to it along the side of the same road and about one-quarter of a mile away from where Rund had crashed. The AR-15 had a loaded magazine with four rounds missing.

[7] The officers arrested Rund and obtained a search warrant for his house in Morgantown. In executing that warrant, officers seized multiple loaded magazines for an AR-15. Officers also seized shell casings that had ".223 REM" written on them, which was writing consistent with writing found on the bullets in the magazine of the AR-15 that officers had recovered following Rund's crash. Tr. Vol. 4, pp. 65-66. Officers did not locate an AR-15 inside Rund's residence. Officers also did not see evidence of any other person living at that residence.

[8] The State charged Rund in relevant part with Level 5 felony intimidation and Level 5 felony criminal recklessness. The State's amended charging information for both charges tracked the relevant statutory language:

Count 1 [Level 5 felony intimidation]:

> On or about November 7, 2021[,] in Brown County, State of Indiana, Jamie B. Rund did communicate a threat to Michael A. Peaslee, another person, by drawing or using a deadly weapon with the intent that Michael A. Peaslee be placed in fear that the threat will be carried out, all in violation of I.C. 35-45-2-1(a)(4) [(2021)] and I.C. 35-45-2-1(b)(2)(A) [(2021)].

Count 2 [Level 5 felony criminal recklessness]:

> On or about November 7, 2021[,] in Brown County, State of Indiana, Jamie B. Rund did recklessly, knowingly, or intentionally perform an act that created a substantial risk of bodily injury to another person by shooting a firearm into an inhabited dwelling or other building or place where people are

> likely to gather, all in violation of I.C. 35-42-2-2(a) [(2021)] and I.C. 35-42-2-2(b)(2)(A) [(2021)].

Appellant's App. Vol. 2, p. 109.

[9] At his ensuing jury trial, Peaslee and several officers testified to their observations and experiences during the evening of November 7, 2021. The trial court also admitted, over Rund's objections, the evidence seized from his residence pursuant to the search warrant. And the prosecutor asserted as follows during his closing statement to the jury:

> Criminal recklessness. The Defendant recklessly, knowingly, or intentionally performed an act that created a substantial risk of bodily injury to another person. *Here, that act is the four shots into the house*. The other person would be Mike Peaslee or either one of his sons or all three of them. And *the act was committed by shooting a firearm into an inhabited dwelling* or other building or place where people are likely to gather. Inhabited dwelling is an inhabited home where you live, that's dwelling. Okay? That's where Mike Peaslee and his sons lived and they were there inhabited. So we've met that element.
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> * * *
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> Intimidation: the Defendant *communicated a threat* to Michael Peaslee. "Are you Michael Peaslee?" Yeah. Who wants to know or whatever it was the answer was. "Well, I'm the Grim Reaper and "I'm here to kill you." *So it was to Michael Peaslee with the intent Mike Peaslee be placed in fear that the threat will be carried out*. Well, he sure scared him into thinking it would be carried out, because *then* he kind of tried to carry it out. And then, if the threat is to unlawfully injure the person threatened or another person or commit a crime, unlawful injury would be kill—"I'm

> going to kill you," that's an unlawful injury. That also happens to be a crime—murder. *And while committing the offense, the Defendant drew or used a deadly weapon. He did both. Lowered it from his shoulder strap from the street, you know for a fact it was him from the street, and then he . . . used it—bang, bang, bang, bang*. We've proved that beyond a reasonable doubt.

Tr. Vol. 4, pp. 160-61 (emphases added).

[10] The jury found Rund guilty of the two Level 5 felonies. The trial court entered its judgment of conviction and Rund's sentence accordingly. This appeal ensued.

1. Rund has not demonstrated reversible error from his alleged double jeopardy violation.

[11] On appeal, Rund first asserts that his two Level 5 felony convictions violate Indiana's substantive prohibitions against double jeopardy. We review such questions de novo. *Carranza v. State*, 184 N.E.3d 712, 715 (Ind. Ct. App. 2022). As we have explained, our Supreme Court's analysis in *Wadle v. State* applies "when a single criminal act or transaction violates multiple statutes with common elements." *Id.* (quoting *Wadle*, 151 N.E.3d at 247).

[12] Under *Wadle*, we engage in the following multi-step analysis:

> First, we look to the statutes. If they explicitly allow for multiple punishments, no double jeopardy occurs, and our inquiry ends. If the statutes are unclear, we [then] apply Indiana's included-offense statute. If either offense is included in the other, we proceed to the [last] step and ask whether the defendant's actions are "so compressed in terms of time, place, singleness of purpose,

> and continuity of action as to constitute a single transaction." If the facts show only a single crime, judgment may not be entered on the included offense.

Id. at 716 (citing and quoting *Wadle*, 151 N.E.3d at 235, 248-49, 256).

[13] The parties here agree that the first step of the *Wadle* analysis does not resolve Rund's argument, and, accordingly, we proceed to the next step and apply Indiana's included-offense statute. As relevant here, that statute defines an "included offense" as an offense 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." I.C. § 35-31.5-2-168(1) (2021).

[14] Offenses may be "inherently included" or "factually included" offenses. *Wadle*, 151 N.E.3d at 251. The parties dispute only whether one of the offenses here was factually included in the other offense. "An offense is 'factually included' when the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense." *Id.* at 251 n.30 (cleaned up). Here, the charging instrument alleged that Rund committed Level 5 felony intimidation when he "communicat[ed] a threat" by "drawing or using a deadly weapon." Appellant's App. Vol. 2, p. 109. The charging instrument separately alleged that Rund committed Level 5 felony criminal recklessness "by shooting a firearm into an inhabited dwelling." *Id.*

[15] The parties specifically dispute whether our review for a factually included offense under *Wadle* is limited to how the prosecutor wrote the charging

information or instead requires consideration of the State's underlying proof of the offenses at trial. There is a split on our Court on this question. *Compare Mills v. State*, 211 N.E.3d 22, 34 (Ind. Ct. App. 2023), *trans. pending*, *with Harris v. State*, 186 N.E.3d 604, 611-12 (Ind. Ct. App. 2022), *trans. not sought*. However, we need not opine on that split to resolve this appeal. Rather, we assume only for the sake of argument that Rund's understanding of *Wadle* is correct. Applying that understanding, we conclude that Rund is unable to show reversible error.

[16] According to the panel opinion in *Harris*, "a prosecutor cannot secure two convictions for the same act using the exact same evidence." 186 N.E.3d at 612 (quoting *Phillips v. State*, 174 N.E.3d 635, 647 (Ind. Ct. App. 2021)). In determining whether one offense is factually included in another offense, we consider how the prosecutor parsed, or failed to parse, the evidence during closing statements. *Id.*

[17] Here, during the State's closing statement to the jury, the prosecutor emphasized that the evidence underlying the criminal recklessness charge was "the four shots into the house"; "the act was committed by shooting a firearm into an inhabited dwelling." Tr. Vol. 4, p. 160. The prosecutor then stated that the evidence underlying the intimidation charge was Rund's "communicat[ion of] a threat to Michael Peaslee," emphasizing Rund's spoken words to Peaslee prior to shooting the firearm. *Id.* at 161. The prosecutor added that Rund not only "scared [Peaslee] into thinking" the stated threat would be carried out, Rund "then" carried out the threat by actually shooting the firearm. *Id.* The

prosecutor concluded: "while commit[ing] the offense [of intimidation, Rund] drew or used a deadly weapon. He did both. Lowered it from his shoulder strap . . . and then he . . . used it—bang, bang, bang, bang." *Id.*

[18] Rund asserts that the prosecutor's statement that "then he . . . used it—bang, bang, bang, bang" while discussing the evidence of the intimidation charge shows that the same evidence of Rund *shooting* the firearm was the factual basis for both the intimidation charge and the criminal recklessness charge. *Id.* at 161. For that same reason, Rund asserts that the last step in the *Wadle* analysis is likewise violated, arguing that "the State . . . used Rund's reckless shooting to establish the drawing and use of a firearm element of intimidation" and, thus, "the shooting and threat . . . constitute a single transaction." Appellant's Br. at 18.

[19] But we cannot agree. Certainly the prosecutor's statement here was inartful, but in the context of the entire closing statement and the record as a whole, we conclude that no reasonable juror would have conflated the allegation that Rund "drew and used" the AR-15 for the intimidation charge with the shooting of the firearm that formed the factual basis for the criminal recklessness charge. *Id.* The prosecutor repeatedly stated that the criminal recklessness offense was demonstrated by "the four shots into the house" and "shooting a firearm into an inhabited dwelling." *Id.* at 160. The prosecutor further made clear that the act of intimidation was when Rund *said* he was there to "kill" Peaslee with the intent to place Peaslee in fear of that act, which act included lowering the firearm "from [Rund's] shoulder" and pointing it at Peaslee. *Id.* at 161. The

prosecutor emphasized that the reasonableness of Peaslee's fear was demonstrated when Rund "*then* . . . used" the firearm by shooting it, which use ended the act of intimidation and began the act of criminal recklessness. *Id.*

[20] Had the test for reversible error here been the *Richardson* reasonable possibility test, Rund's argument on appeal may have been successful. But the probable impact test under Appellate Rule 66(A) is a higher burden for appellants, and, applying that test here, we conclude that the likely impact of the prosecutor's inartful comment during his closing statement is not sufficient on this record to undermine our confidence in the jury's assessment of the distinct facts underlying Rund's two convictions. We therefore cannot say that Rund's convictions for Level 5 felony intimidation and Level 5 felony criminal recklessness violate Indiana's statutory double jeopardy protections.

2. The trial court did not abuse its discretion in the admission of the evidence seized pursuant to the search warrant.

[21] Rund also asserts that the trial court abused its discretion when it admitted into evidence the AR-15 ammunition seized from his home pursuant to the search warrant. A trial court has broad discretion regarding the admission of evidence, and its decisions are reviewed only for abuse of that discretion. *E.g.*, *Hall v. State*, 177 N.E.3d 1183, 1193 (Ind. 2021). We will reverse only if the trial court's ruling was clearly against the logic and effect of the facts and circumstances before it and the error affects a party's substantial rights. *Id.*

[22] Rund contends that the seized evidence should have been excluded under Indiana Evidence Rule 403. Under Rule 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." *Snow v. State*, 77 N.E.3d 173, 179 (Ind. 2017) (quotation marks omitted). As our Supreme Court has made clear:

> "Trial judges are called trial judges for a reason. The reason is that they conduct trials. Admitting or excluding evidence is what they do." *United States v. Hall*, 858 F.3d 254, 288 (4th Cir. 2017) (Wilkinson, J., dissenting). That's why trial judges have discretion in making evidentiary decisions. This discretion means that, in many cases, trial judges have options. They can admit or exclude evidence, and we won't meddle with that decision on appeal. *See Smoote v. State*, 708 N.E.2d 1, 3 (Ind. 1999). There are good reasons for this. "Our instincts are less practiced than those of the trial bench and our sense for the rhythms of a trial less sure." *Hall*, 858 F.3d at 289. And trial courts are far better at weighing evidence and assessing witness credibility. *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014). In sum, our vantage point—in a "far corner of the upper deck"—does not provide as clear a view. *State v. Keck*, 4 N.E.3d 1180, 1185 (Ind. 2014).

Id. at 177. Our trial courts have "wide discretion" in applying Rule 403. *Id.*

[23] The trial court did not abuse its discretion in applying Rule 403 here. The evidence in question consisted of numerous rounds of AR-15 ammunition, included spent rounds. Those rounds were .223 caliber rounds, and some rounds were in boxes that had a label identifying the ammunition as .223 REM

rounds, the same ammunition found in the AR-15 near the scene of Rund's crash. And notably *not* found inside Rund's residence was an AR-15 rifle. Thus, the evidence was probative to the question of whether the AR-15 found near the scene of Rund's crash was Rund's AR-15 as well as to the question of whether the rounds fired into Peaslee's house may have been fired by Rund.

[24] Rund asserts, however, that AR-15s and .223 REM ammunition are common in Brown County, and, thus, the probative value of the evidence here is low while the unfair prejudice of that evidence is substantial. But Rund's analysis goes to the weight of the evidence, not its admissibility. In any event, we agree with the trial court that the probative value of the ammunition was not substantially outweighed by the danger of unfair prejudice. The ammunition seized from Rund's residence *in the absence of a corresponding firearm* made it more probable that he owned the AR-15 found near the crash scene, and that same conclusion made the prejudice against him from the evidence not "unfair" prejudice. *See* Evid. R. 403. We therefore conclude that the trial court did not abuse its discretion in its admission of the evidence seized pursuant to the search warrant.

Conclusion

[25] For all of these reasons, we affirm Rund's convictions.

[26] Affirmed.

Altice, C.J., and May, J., concur.