

STATEMENT OF THE CASE

Michael Heffern appeals his convictions for murder, a felony, and robbery, as a Class B felony, following a jury trial. Heffern presents the following issues for review:

1. Whether the trial court properly allowed the State to amend the charging information, changing count 2 from robbery resulting in serious bodily injury to robbery while armed with a deadly weapon.
2. Whether the trial court abused its discretion when it admonished the jury regarding police officers' statements on a videotape and corresponding transcript admitted into evidence but did not give a similar preliminary or final instruction.
3. Whether the evidence was sufficient to support Heffern's convictions.
4. Whether the entry of judgment of conviction for murder and robbery with a deadly weapon violated Heffern's constitutional right to be free from double jeopardy.

We affirm.

FACTS AND PROCEDURAL HISTORY

In September 2008, Heffern was staying at the home of Joseph Randall, who lived at 117 South Munson Avenue in Portland. On the evening of September 7, Heffern, Addison Pijnapples,¹ her husband Tom Smith, and Rod Berry were at the home of Tina Whiting, a neighbor of Randall. The group snorted crushed Valium and then drove to Ohio, where Berry purchased one or two thirty-packs of beer.

After having dinner with his girlfriend, Randall went to Whiting's home to watch a football game on television. Randall's young daughter, Heffern, Pijnapples, her husband Tom Smith, and Rod Berry were also there. At some point, while Randall was

¹ Addison's last name is spelled "Pijnappels" in the transcript. We adopt the spelling "Pijnapples" as used in a prior consolidated appeal in which both Heffern and Addison were appellants. See Smith v. State, 2009 Ind. App. Unpub. LEXIS 1158, No. 38A05-0812-CR-720 (Aug. 26, 2009).

watching television, Heffern and Whiting were talking in the kitchen. Whiting told Heffern “about a guy that she was having problems with,” and Heffern “asked her if she wanted him to beat him up for her, get him to leave him [sic] alone or leave her alone.” Transcript at 30. Whiting told Heffern that if he beat up the guy “he might have some pills [Heffern] could take from him.” Id. Randall then left the apartment with his child.

Heffern told Pijnapples, Smith, and Berry that Shawn Buckner had raped Whiting. Heffern also talked to them about “going to get Shawn so he could beat his ass.” Id. at 268. The group continued to ingest Valium pills, drank beer, and discussed a plan to beat up Buckner and take prescription pills from him. Specifically, Whiting and Pijnapples were to offer to have a joint sexual encounter with Buckner in order to lure him to Whiting’s apartment. The three men were to wait in hiding in the apartment and, when Buckner arrived, Heffern wanted to “initiate the action” against Buckner because he wanted to “beat up Shawn.” Id. at 275.

Whiting and Pijnapples left to find Buckner. About the same time, Berry moved his car from in front of Whiting’s home so that Buckner would not know that anyone else was there. Whiting and Pijnapples found Buckner at his uncle’s home, helping his uncle clean copper for resale. Buckner said he was busy and asked them to come back in twenty minutes. When the women returned thirty minutes later, Buckner washed his hands and told his uncle that the women had asked if Buckner wanted to “have a threesome.” Transcript at 42. Buckner borrowed twenty dollars from his uncle and left with Whiting and Pijnapples.

Whiting, Pijnapples, and Buckner arrived at Whiting's home, where Heffern, Smith, and Berry were hiding in a back room. When Whiting gave a previously agreed upon code word, the men came out of hiding, and Heffern began punching Buckner. Buckner tried to escape, but Berry grabbed him and began hitting Buckner as well. At one point Smith pushed Buckner to the kitchen floor. Heffern, Berry, and Smith kicked and punched Buckner's head and body numerous times while he was on the floor. During the assault, Buckner moaned. The men then removed Buckner's clothing and took twenty dollars they had found in his sock. Smith gave the money to Pijnapples and told her to buy more beer. Smith threatened to cut off Buckner's penis, but Heffern would not allow it.

The men wrapped Buckner in blankets and carried him to Berry's Jeep. The men then left the apartment in the Jeep, with Berry driving, Heffern and Smith as passengers, and Buckner moaning loudly in the back. Smith called Buckner a child molester. In the rear view mirror, Berry saw Heffern reach back and punch Buckner rapidly at least ten times. Buckner stopped moaning. At some point Berry stopped the Jeep on a secluded road near a cornfield. After Heffern and Smith opened the Jeep's back hatch and removed Buckner, Berry drove down the road to find a place to turn the vehicle around. When he returned to the site where the others had exited the vehicle, Berry saw no one beside the road. He stopped the Jeep and waited, but when no one appeared, he exited the vehicle.

Berry walked into the cornfield, looking for Heffern and Smith. Eventually he saw two silhouettes, Heffern and Smith. Buckner was lying on the ground nearby. Smith

handed Berry a knife, told Berry he had stabbed Buckner, and instructed Berry to do the same. Buckner was not making any noise, and Berry believed him to be dead. Berry stabbed Buckner in the lower side twice. Berry left the knife on Buckner's chest and walked back to the Jeep. Smith and Heffern followed a minute later. As Berry drove, he began to worry that leaving the knife at the scene could implicate him, but Smith said he had the knife and showed Berry that it was sticking out of his pocket.

When the men arrived at Whiting's home, Whiting and Pijnapples were not yet there. Although it appeared that the home had been cleaned some since the struggle, the men worked to clean the scene of any evidence of Buckner's beating and gathered anything with blood on it. When Whiting and Pijnapples arrived, all five took off any item of clothing that could have come into contact with Buckner. They placed the clothing and items from the house tainted by the struggle into a trash bag. When Smith and Berry later left, Heffern was burning something, not food, on the grill.

Taking the trash bag with them, Berry and Smith drove to a gas station where Smith bought gas for Berry's Jeep. Berry and Smith threw the knife over a bridge. They then drove to the country and burned the trash bag and its contents in a cornfield. From Whiting's home, Heffern went to see Sierra Ferrara, the mother of his children. When she saw scrapes on his knuckles, he said that he had been in a fight on the way to her house. Some days later, Heffern called Ferrara and told her that, if police questioned her, she should say that Heffern had spent the night with her on September 7.

Two or three days after the murder, Berry, Smith, and Pijnapples used Berry's Jeep to move Buckner's body from the cornfield. They buried the body behind a barn

belonging to a friend. Berry had told the friend that they were burying a dog. A missing persons report was filed regarding Buckner, and police officers found the burial site on or around September 10.

On September 11, the State charged Heffern with murder, a felony, and robbery resulting in bodily injury, as a Class B felony. The robbery charge alleged in part that Heffern had knowingly taken property, money, from Buckner “by using force, to-wit: by punching, kicking, and choking; said act resulting in bodily injury to Shawn M. Buckner, to-wit: lacerations and bruising” Appellant’s App. at 14. On October 14, 2009, the State moved to amend the robbery count to charge robbery resulting in serious bodily injury, a Class A felony. Heffern filed a motion to strike the amendment. Following a hearing, the trial court denied that motion.

On December 10, 2009, the State filed a second amendment to the robbery charge (“Second Amendment”).² The Second Amendment alleged that Heffern had knowingly taken property from Buckner “by using force, while armed with a deadly weapon, to-wit: a knife” *Id.* at 113. And on January 21, 2010, the State amended the information by adding count 3, which alleged that Heffern had committed felony murder. Heffern filed a motion to strike the amendment adding count 3. After a hearing, the trial court denied that motion.

On June 4, 2010, Heffern filed a motion objecting to the admission of portions of the transcript of police interrogations and videotapes of those interrogations. The jury trial commenced on June 14, at which time the trial court overruled Heffern’s objection

² The Second Amendment was originally filed December 7, 2009, but it erroneously referred to the defendant by the wrong name. The State corrected that typographical error by filing a corrected version of the Second Amendment on December 10.

but agreed to give a “limiting instruction and admonishment[.]” Transcript at 5. The trial proceeded through June 17. Following deliberations, the jury returned a verdict finding Heffern guilty on all three counts. The court entered judgment on the verdict as to murder and robbery and sentenced Heffern to an aggregate term of seventy-five years. Heffern now appeals.

DISCUSSION AND DECISION

Issue One: Amendment to Charging Information

Heffern contends that the trial court erred when it permitted the State to amend the robbery charge pursuant to the Second Amendment. The State counters that Heffern waived his challenge to the Second Amendment because he did not object to the same at trial.³ We must agree with the State. The failure to object to the amendment of a charging information at trial results in waiver of the issue on appeal. See Fowler v. State, 878 N.E.2d 889, 892 (Ind. 2008) (holding that defendant had preserved for appeal his challenge to amendment of charge by timely objecting in the trial court). Heffern has waived his challenge to the Second Amendment.

Heffern seeks to avoid waiver by invoking the fundamental error doctrine.

Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. It is error that makes “a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm.”

³ In the Statement of the Case in his appellate brief, Heffern states that he had filed a motion to strike the Second Amendment. In support, he cites the motion to strike that he had filed in objection to the amendment adding count 3 to the charging information. Given that Heffern admits in the Argument section of his brief that he did not object to the Second Amendment, we assume that the erroneous statement in his statement of the case was not intended to mislead.

Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006) (quoting Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002)) (alterations original). Heffern's argument in support of his fundamental error is, in its entirety, as follows:

Here for over two-thirds (2/3) of the time before his trial, from September, 2008, until June, 2010, while he was incarcerated and under prosecution, Mr. Heffern faced the charge of Robbery involving serious bodily injury. Only six months before his trial was the charge changed to Robbery with a Deadly Weapon. As noted previously, this is a different element in the offense of Robbery and was an entirely new element in Mr. Heffern's case.

Appellant's Brief at 17. The thrust of Heffern's complaint is that he had only six months to prepare his defense based on the amended charge. But Heffern has not shown or even discussed why having six months to adjust his defense resulted in "an undeniable and substantial potential for harm." Cooper, 854 N.E.2d at 835. Thus, Heffern has not demonstrated that the trial court fundamentally erred when it allowed the State to prosecute him based on the charge in the Second Amendment.

Issue Two: Admonishment

Heffern next contends that the trial court abused its discretion when it did not give preliminary or final limiting instructions to the jury regarding certain evidence admitted over his objection. Our standard of review of a trial court's findings as to the admissibility of evidence is an abuse of discretion. Roush v. State, 875 N.E.2d 801, 808 (Ind. Ct. App. 2008). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Heffern argues that the trial court abused its discretion in admitting the video recording and corresponding transcript of Heffern's September 12 interrogation by police. Specifically, Heffern contends that those exhibits contain statements by police

officers “who commented on guilt or innocence of Mr. Heffern, credibility of witnesses, and other matters prohibited by [Evidence Rule] 704(b).” Appellant’s Brief at 12. Heffern is correct about the admissibility of the officer’s statements. See Washington v. State, 808 N.E.2d 617, 624-25 (Ind. 2004) (“although a trial court has no affirmative duty to consider giving an admonishment in the absence of a party’s request, it is error to admit statements by an interrogating officer without any limiting instruction or admonishment.”). On appeal he argues that the trial court should have given a preliminary or final limiting instruction in addition to the admonition. We cannot agree.

In support of his argument, Heffern relies in part on Evidence Rule 105. That rule provides: “When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly.” Evid. R. 105. Our supreme court discussed the meaning of this rule:

The Indiana version of Rule 105 is apparently the only in the nation to use the term “admonish” rather than “instruct.” Cf., e.g., Fed. R. Evid. 105. Judge Miller has opined that the distinction is intended to enable a party to request a limiting admonition at the time the evidence is offered, rather than waiting until the jury instructions. 12 R. Miller, Indiana Practice § 105.104 at 109-10 (2d. ed. 1995). Thus, a limiting admonition under Rule 105 (usually during trial) is to be distinguished from a limiting instruction (usually after evidence has been presented). Id., see also Ind. Crim. Rule 8; Ind. Trial Rule 51(C) (outlining requirements for preserving challenge to a jury instruction).

Humphrey v. State, 680 N.E.2d 836, 839 n.7 (Ind. 1997). See also Martin v. State, 736 N.E.2d 1213, 1218 n.8 (Ind. 2000). “Rule 105 does not preclude trial courts from giving a limiting admonition or instruction sua sponte as a matter of discretion,¹ but by its plain terms imposes no affirmative duty to do so.” Humphrey, 680 N.E.2d at 839.

Here, on June 4, 2010, Heffern filed his objection to the admission of certain portions of the of his interrogations by police and the corresponding portions of video recording:

6) OBJECTION: The statement of the officer is inadmissible pursuant to Rule 704(b) of the Indiana Rules of Evidence. IRE 704(b) provides that a witness may not testify to opinions concerning intent, guilt, innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions. Smith v. State, 721 N.E.2d 213 (Ind. 1999); Lampkin v. State, 778 N.E.2d 1248 (Ind. 2002)[.] The defendant would assert that portions of the transcript and corresponding portions of the video recording of the interrogation of the Defendant are inadmissible pursuant to IRE 704(b)

Appellant's App. at 173. At the start of trial,⁴ the trial court ruled on Heffern's objection as follows:

Court: Last night after we adjourned for the evening I read through the second two interviews that were presented to the court concerning Mr. Welch's [defense counsel's] objection to the admission of the portions of transcribed [sic] video. The State and Mr. Welch, did you get my email?

Mr. Welch: No.

Court: Check your email each evening when you go home if you can because my understanding is that the State no longer intends to offer into evidence any portion of the first interview from September 10.

Mr. Welch: Ok.

Court: That regarding the second interview of that same date they will be offering the portion from Question 699 on [sic] which does not include any portion that you had objected to in your pleading. That they still intend to offer into evidence the entirety of the September 12th interview. Now I have looked at each of the questions that you've referred to in your objection. I think your objection is well taken but, well taken, it's not you know it's not frivolous in any way. I'm going to overrule your

⁴ The Transcript indicates that the trial was held June 14 through 17, 2010. However, the first page of Transcript states that the parties "reappear[ed]," indicating that the proceedings on at least the first day of trial, during which the jury was empanelled are not in the transcript. Transcript at 4 (emphasis added). Thus, the transcript before the court appears to be incomplete..

objection. I am going to include a limiting instruction and admonishment that the jurors will not consider any statement made by law enforcement officers as evidence in the case. That during the course of investigation of a possible crime law enforcement may make false statements in order to obtain information. Only the statements made by Mr. Heffern can be considered as evidence. Nothing that the police officers say or both [sic] their own statements or any statement they attribute to anybody else should be deemed reliable or considered as evidence. That will be the crux of the limiting instruction I plan to give. Ok.

Mr. Welch: I would just ask the Court to note my objection, on the record, to each portion indicated in the motions.

Court: Absolutely.

Mr. Welch: Thank you your Honor.

Court: We'll show your objection made and a continuing objection. You do not need to raise it later. I'll consider it preserved for appellate review.

Transcript at 4-5 (emphasis added).

Later, when the State offered into evidence a videotape of the September 12 police interview with Heffern (Exhibit 87) and the corresponding transcript (Exhibit 88), the trial court admonished the jury as follows:

Alright. Ladies and gentlemen, a copy of State's Exhibit 88 [transcription] is being provided to you to assist you in your examination of State's Exhibit 87 [videotape of police interview]. Once again, it is important that you understand that the exhibit you're about to review must be reviewed cautiously. It does again contain statements by police officers during an interview conducted with the Defendant, Michael Heffern. The statements of Mr. Heffern may be considered by you as evidence in the case. I will remind you though that nothing that law enforcement officer [sic] say during the interview should be considered as any evidence of any wrongdoing by Mr. Heffern. Including both their own statements and any statements that they attribute to another party. The reason for this is, once again, because law enforcement, when investigating possible crimes, may make false statements in an effort to obtain information. Therefore, the statements and comments of the officers in these exhibits are not to be considered by you as evidence.

Transcript at 230-31. However, the trial court did not give a preliminary or final limiting instruction regarding Exhibit 87 or Exhibit 88.

Heffern contends that the trial court committed reversible error when it failed to give a limiting preliminary or final instruction regarding Exhibits 87 and 88. But where “the claimed error is failure to give an instruction, ‘a tendered instruction is necessary to preserve error because, without the substance of an instruction upon which to rule, the trial court has not been given a reasonable opportunity to consider and implement the request.’ ” Fry v. State, 748 N.E.2d 369, 373 (Ind. 2001) (quoting Scisney v. State, 701 N.E.2d 847, 848 n.3 (Ind. 1998)). Because Heffern did not tender a proposed limiting instruction regarding the statements by law enforcement in Exhibits 87 and 88, he has waived any claim of error by failing to give an instruction on that subject. See id.

Further, again, Rule 105 imposes no affirmative duty on the court to instruct the jury on that issue. Humphrey, 680 N.E.2d at 839. In any event, at the time the exhibits were offered, the trial court admonished the jury that law enforcement officers investigating a crime may make false statements in order to obtain information; statements made by law enforcement officers or attributed to third parties by law enforcement officers could not be considered; and only Heffern’s statements in the exhibits could be considered as evidence. That admonishment adequately addressed the basis of Heffern’s objection and instructed the jury accordingly on what it could consider as evidence. Heffern has not shown that he was prejudiced by the trial court’s admonishing the jury without also giving a similar preliminary or final instruction.

Heffern also argues that the trial court “was required by the law of the case doctrine to follow what it had said it would do[,]” namely, to give a limiting instruction to the jury regarding Exhibits 87 and 88. Heffern misunderstands that doctrine. “The law of the case doctrine mandates that an appellate court’s determination of a legal issue binds the trial court and ordinarily restricts the court on appeal in any subsequent appeal involving the same case and relevantly similar facts.” Hopkins v. State, 782 N.E.2d 988, 990 (Ind. 2003) (citation omitted) (emphasis added). That doctrine does not bind a trial court by its prior rulings.

Heffern observes that a trial court is free to reconsider its prior rulings and argues that there is no indication in the record that the trial court “explicitly overruled its previous statement that it would issue a limiting instruction.” Appellant’s Brief at 21. We cannot determine from the transcript whether the trial court originally intended to give both preliminary and final jury instructions as well as an admonition or, instead, whether the court used “limiting instruction and admonishment” synonymously. Regardless, we have already determined that the trial court’s admonishment to the jury at the time the evidence was admitted was sufficient. And, again, Heffern tendered no language for such a preliminary or final instruction. Thus, whether the trial court followed through with its original intent in advising the jury is of no moment.

Nevertheless, Heffern maintains that he “was prejudiced by the failure to give a limiting instruction.” Appellant’s brief at 21. In support, he cites Smith v. State, 721 N.E.2d 213, 216 (Ind. 1999), where the supreme court held:

Although a trial court has no affirmative duty to consider giving an admonishment absent a party’s request to do so, see Humphrey v. State,

680 N.E.2d 836, 839-40 (Ind. 1997), the lack of an admonishment in this case combined with the fact that the statements appear to be assertions of fact by the detective, not mere questions, renders their admission error.

But in Smith, the defendant objected on the basis of hearsay, not under Rule 704(b). Moreover, the admission of evidence constituted reversible error in that case because the jury received absolutely no instruction on how to consider the detective's statement. Here, the trial court admonished the jurors at the time the evidence was admitted, instructing them that statements by law enforcement officers in Exhibits 87 and 88 could not be considered as evidence. Smith is inapposite, and Heffern's contention is without merit. Heffern has not shown that the trial court was required to have given a preliminary or final limiting instruction regarding the statements made by police in Exhibits 87 and 88.

Issue Three: Sufficiency of Evidence

Heffern next contends that the evidence is insufficient to support his convictions for robbery with a deadly weapon and murder. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Robbery with a Deadly Weapon

Heffern contends that the evidence is insufficient to support his conviction for robbery with a deadly weapon. Specifically, he argues that there is no evidence that he or anyone else was armed with a knife until the time of the murder. We cannot agree.

To prove robbery, as a Class B felony, the State was required to show beyond a reasonable doubt that Heffern knowingly took property from Buckner by use of force and while armed with a deadly weapon. See Ind. Code § 35-42-5-1(1). A defendant may be convicted as a principal if he knowingly or intentionally aided, induced, or caused another person to commit the offense. Ind. Code § 35-41-2-4.

In Heffern's September 10 interview with police, Heffern stated that Smith took twenty dollars that he found in Buckner's sock while Heffern, Smith, and Berry were beating Buckner in Whiting's kitchen. Heffern also stated that, during that beating, Smith had threatened to cut off Buckner's penis, but Heffern had stopped him. The jury could have reasonably inferred that Heffern and the others who jointly attacked Buckner were armed with a knife at the time of the robbery. And the jury could have found Heffern culpable as a principal for robbery based on accomplice liability. See Ind. Code § 35-41-2-4. Thus, the evidence is sufficient to support Heffern's conviction for robbery while armed with a deadly weapon.

Murder

Heffern next contends that the evidence is insufficient to show that he committed murder. To prove the offense of murder, the State was required to prove beyond a reasonable doubt that Heffern knowingly killed Buckner. See Ind. Code § 35-42-1-1(1).

Again, under a theory of accomplice liability, Heffern could be convicted as a principal if he knowingly or intentionally aided, induced, or caused another person to commit the offense. See Ind. Code § 35-41-2-4. Specifically, he acknowledges that under accomplice liability a defendant need not have participated in each and every element of an offense.

The evidence shows that Heffern initiated and participated in the beating of Buckner in Whiting's apartment. When Buckner failed to escape Heffern's initial attack, Heffern, Smith, and Berry kicked and punched Buckner's head and body repeatedly as he lay on the floor in Whiting's kitchen. The men then removed Buckner's clothes, wrapped him in a blanket, and carried him to Berry's vehicle. In transit, Buckner was moaning loudly. Heffner reached around and punched him several times, and the moaning stopped. When they reached a cornfield, Heffern and Smith unloaded Buckner and carried him into the cornfield while Berry turned the car around. When Berry returned, he found Heffern and Smith standing near Buckner's body a few rows into the cornfield. Smith told Berry that Buckner had already been stabbed, and then Smith gave Berry a knife and told him to stab Buckner. Berry stabbed Buckner twice in his lower side and then returned to his vehicle. Heffern and Smith soon followed. The men returned to Whiting's apartment and began cleaning up evidence related to Buckner.

Dr. Paul Mellen, a pathologist, testified that the cause of death was "blunt force injuries to the head and sharp force injuries to the neck and abdomen[.]" Transcript at 197. Buckner had twenty puncture wounds in his abdomen as well as a one-and-one-half-inch "cutting mark" on the base of the left side of the penis. He also had two cuts to

his neck: on the right side a superficial four-inch cut and on the left side a wound that “cut the greater vessels, actually cut the trachea or the windpipe area and went down as far as the cervical spine or vertebral column.” Id. at 199. Dr. Mellen testified that the wound on the left side of the neck was not survivable.

The evidence shows that Heffern punched and kicked Buckner repeatedly, and helped transport him to a cornfield. Heffern was alone with Smith next to the body when Berry turned his vehicle around. While Berry walked back to his vehicle after stabbing Buckner in the cornfield, Heffern and Smith remained in the field for several minutes. There is substantial evidence showing that Heffern assisted in punching and beating Buckner about the head. Berry testified that he only stabbed Buckner twice in the lower back, but the evidence shows multiple stab wounds, including a fatal neck wound. A jury could reasonably have inferred either that Heffern stabbed Buckner in the abdomen or neck or that he knowingly or intentionally aided, induced, or caused Smith to stab Buckner in the abdomen or neck. The evidence is sufficient to support Heffern’s conviction for murder.

Still, Heffern maintains:

There was no indication Michael Heffern knew anyone in the group had a knife until Smith, Berry, and he were at the cornfield, long after the initial confrontation occurred in Whiting’s apartment. There was no indication Mr. Heffern had any reason to suspect a deadly weapon would be used by one of the others in the group. Therefore, the judgment of conviction for murder, as against him, was not supported by sufficient evidence.

Appellant’s Brief at 25. Heffern does not explain how his alleged lack of knowledge that anyone was armed with a knife supports the reversal of his conviction for murder as an accomplice. Moreover, as discussed above, the jury could have reasonably inferred that

Heffern, as the one who had planned the assault, knew that someone had a knife. First, he did not allow Smith to carry out on his threat to cut off Buckner's penis in Whiting's kitchen. Second, he was standing by the body in the cornfield when Smith gave Berry a knife and told him to stab Buckner. Finally, Berry testified that he only stabbed Buckner twice in the lower back, but Buckner had sustained twenty stab wounds to his abdomen, a cut at the base of his penis, and two cuts on his neck, one of them fatal. Again, the jury could have reasonably inferred that Heffern either caused Buckner's death or aided, induced or caused another to kill Buckner.

Issue Four: Double Jeopardy

Last, Heffern contends that the entry of judgment of conviction for both robbery and murder violates his right to be free from double jeopardy.⁵ The Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” Ind. Const. art. 1, § 14. Double jeopardy analysis involves the dual inquiries of the statutory elements test and the actual evidence test. Davis v. State, 770 N.E.2d 319, 323 (Ind. 2002) (citing Richardson v. State, 717 N.E.2d 32 (Ind. 1999)). The standard for evaluating an alleged double jeopardy violation is well-settled:

In Richardson v. State (1999) Ind., 717 N.E.2d 32, our Supreme Court established a two-part test for analyzing double jeopardy claims under the Indiana Constitution and concluded:

“two or more offenses are the ‘same offense’ in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential

⁵ Heffern raises double jeopardy under both the Indiana Constitution and United States Constitution. But the cases he cites explaining the analysis pertain only to the state constitution, and he makes no independent argument under the federal Constitution. As such, we limit our review to double jeopardy under the Indiana Constitution.

elements of one challenged offense also establish the essential elements of another challenged offense.” Richardson, supra at 49.

Thus, even if there was no double jeopardy violation in the present case based upon the essential statutory elements of the crimes of forgery and theft, a violation may still have occurred if the actual evidence presented at trial demonstrates that each offense was not established by separate and distinct facts. The defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Williams v. State, 892 N.E.2d 666, 668-69 (Ind. Ct. App. 2008) (some citations and quotations omitted), trans. denied.

Again, to prove the offense of robbery with a deadly weapon, a Class B felony, the State was required to show beyond a reasonable doubt that Heffern knowingly took property from Buckner by use of force and while armed with a deadly weapon. See Ind. Code § 35-42-5-1(1). And it is sufficient if the State showed that Heffern knowingly or intentionally aided, induced, or caused another to rob Buckner. Heffern argues that the overriding cause of death was established by evidence of the stab wound to Buckner’s neck. Appellant’s Brief at 26-27. The knife that was used to inflict that wound was also used to elevate the robbery charge from a Class C felony to a Class B felony. He states that there was evidence of only one knife being used in the offenses. Thus, he concludes that the elevation of the robbery charge violates his right to be free from double jeopardy.

In support Heffern cites Walker v. State, 758 N.E.2d 563 (Ind. Ct. App. 2001), trans. denied. There, the State used Walker’s act of shooting his victim with a handgun to establish both voluntary manslaughter and robbery with a deadly weapon. We held that the evidence used to establish voluntary manslaughter was “clearly intertwined” with

the evidence used to establish robbery with a deadly weapon. Id. at 567. As such, we concluded that the elevation of the robbery charge from a Class B felony to robbery with a deadly weapon, as a Class B felony, violated double jeopardy. Id.

Here, as discussed above, the evidence shows that Heffern, Smith, or Berry was armed with a knife when they were beating Buckner in Whiting's kitchen and Smith took twenty dollars from Buckner's sock. Thus, the robbery was supported by evidence that the perpetrators were armed with a knife. But the murder was later accomplished by the use of a knife, namely, stabbing Buckner in the neck, severing his vessels and windpipe, at an entirely different location from where the beating had occurred. The evidence of being armed with a weapon is not the same as evidence of use of that same weapon. Thus, Walker is inapposite. Heffern has not shown that the elevation of the robbery charge to a Class B felony based on being armed with a deadly weapon violated his right to be free from double jeopardy.

Conclusion

Heffern waived any challenge to the State's Second Amendment of the charging information. He also has not shown that allowing that amendment constituted fundamental error. The trial court did not abuse its discretion when it admonished the jury not to consider police officers' statements in a videotaped and transcribed interview with Heffern but did not also give a similar preliminary or final instruction.

Additionally, the evidence was sufficient to support Heffern's convictions for robbery with a deadly weapon and the subsequent murder of Buckner. He initiated and participated in the severe beating of the victim. And the jury could reasonably have

inferred that he knew one of the other men was armed with a knife and that he either fatally stabbed the victim or aided, induced or caused another to do so. Finally, different evidence is required to show the fact of being armed with a knife during the robbery and the use of a knife to perpetrate the murder. Thus, Heffern's convictions for robbery with a deadly weapon and murder do not violate double jeopardy principles under the Indiana Constitution.

Affirmed.

DARDEN, J., and BAILEY, J., concur.