



## STATEMENT OF THE CASE

Appellant-Defendant, Tyson G. Keplinger (Keplinger), appeals his conviction for conspiracy to commit murder, a Class A felony, Ind. Code §§ 35-41-5-2; 35-42-1-1 and attempted murder, a Class A felony, I.C. §§ 35-41-5-1; 35-42-1-1.

We affirm.

## ISSUES

Keplinger raises two issues for our review, which we restate as follows:

- (1) Whether the trial court committed fundamental error in instructing the jury;  
and
- (2) Whether his conviction for attempted murder and conspiracy to commit murder violate Indiana's Double Jeopardy Clause.

## FACTS AND PROCEDURAL HISTORY

On February 10, 2009, Emily Meyers (Meyers), Keplinger's girlfriend at the time, was arrested for dealing drugs during a controlled buy with Jason Chapman (Chapman). Chapman had been working as a confidential informant for the Huntington City Police Department. Upon learning that Chapman was the confidential informant, she and Keplinger devised a plan to kill Chapman.

Keplinger contacted Damon Gee (Gee), whom he had met while he was at the Wabash Correctional Facility, and offered to pay him \$6,000 to kill Chapman. Keplinger gave Gee an initial \$700 on March 20, 2009 and another payment of \$1,800 dollars on March 30, 2009. Keplinger also drove Gee to Chapman's home and provided Gee with a photocopy of a

yearbook picture of Chapman so that Gee would be able to identify Chapman. On the back of the photocopy, Keplinger wrote Chapman's address with directions to his house and Chapman's phone number so that Gee could call Chapman's house to make sure Chapman was there. Additionally, Keplinger wrote "has to be done by thirtieth," meaning Keplinger wanted Gee to kill Chapman by March 30, 2009, because Meyer had a court date around that time. (Transcript pp. 361-62).

On April 13, 2009, Keplinger paid Gee with a forged check he had stolen from the home of Donald Wood and Darlene Richardson. Keplinger wrote the check for \$3,500 and signed it "Donald Woods," and gave it to Meyer. The next day, Gee was arrested in Fort Wayne for cashing the forged check. Gee told police that Keplinger and Meyer had hired him to kill Chapman. Gee then agreed to work with law enforcement to continue with Keplinger and Meyer's plan to kill Chapman.

On April 15, 2009, Gee was released from jail and met with Huntington City Police Department Detectives Chad Hacker (Detective Hacker) and Matt Hughes (Detective Hughes). The Detectives had Gee arrange a meeting with Keplinger and Meyer so he could discuss the plan to kill Chapman and get the remaining balance of the money he was owed. During their meeting, Gee was equipped with a wire transmitter recorder. The Detectives recorded ten different phone calls between Gee and Keplinger. Over the course of the calls, Gee and Keplinger talked about additional money that Keplinger owed Gee. Keplinger also told Gee where Chapman worked and that he worked the second shift. At one point, Gee had told Keplinger that he had already shot and killed Chapman, but then later clarified that he

had not yet killed Chapman. Finally, Keplinger reiterated that he wanted Chapman killed as soon as possible, and that if Gee did not kill Chapman soon, he was going to kill him himself.

Later that day, Keplinger, Meyer and Gee met at a gas station in Huntington County. During their meeting, Keplinger and Meyer discussed how to find Chapman, and how they would get the rest of the money to pay Gee. They agreed to drive to Warren to figure out where Chapman worked.

On April 16, 2009, the State filed an Information charging Keplinger with Count I, conspiracy to commit murder, a Class A felony, I.C. §§ 35-41-5-2; 35-42-1-1 and Count II, attempted murder, a Class A felony, I.C. §§ 35-41-5-1; 35-42-1-1. On March 23-26, 2009, a three-day jury trial was held and Keplinger was found guilty of both Counts. On May 2, 2010, the trial court sentenced Keplinger to thirty years on Count I, with ten years added for aggravating circumstances, and thirty years on Count II. The trial court ordered the sentences to run concurrently for an aggregate sentence of 40 years.

Keplinger now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Jury Instruction*

Keplinger argues that the trial court committed fundamental error when instructing the jury. Specifically, he contends that the trial court erred when it defined “knowingly” but did not define “intentionally,” despite the fact that both charged crimes require specific intent.

The manner of instructing a jury is left to the sound discretion of the trial court. *Patton v. State*, 837 N.E.2d 576, 579 (Ind. Ct. App. 2005). When reviewing the jury

instructions, we consider them as a whole and in reference to each other. *Id.* at 396. We will not reverse the ruling of the trial court unless the jury instructions, taken as a whole, misstate the law or mislead the jury. *Id.* Before a defendant is entitled to a reversal, he must affirmatively show that the erroneous instruction prejudiced his substantial rights. *Id.*

We note, and Keplinger aptly points out, that he failed to object to the trial court's final jury instructions. A defendant who fails to object to a jury instruction at trial waives any challenge to that instruction on appeal, unless giving the instruction was fundamental error. *Wright v. State*, 730 N.E.2d 713, 716 (Ind. 2000). The fundamental error doctrine is extremely narrow. *White v. State*, 846 N.E.2d 1026, 1033 (Ind. Ct. App. 2006), *trans. denied*. Fundamental error is defined as an error so prejudicial to the right of a defendant a fair trial is rendered impossible. *Id.* To qualify as fundamental, an error "must constitute a blatant violation of basic principles, the harm, or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." *Id.* (quoting *Spears v. State*, 811 N.E.2d 485, 489 (Ind. Ct. App. 2004)).

Here, Final Instruction No. 5 states that "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." (Appellant's App. p. 20). Keplinger is correct that the necessary *mens rea* for attempted murder is specific intent: "An instruction which correctly sets forth the elements of attempted murder requires an explanation that the act must have been done with the specific intent to kill." *Guyton v. State*, 771 N.E.2d 1141, 1144 (Ind. 2002). Additionally, conspiracy to commit murder is also a specific intent crime, as the underlying felony, murder, requires

specific intent. I.C. §§ 35-41-5-2; 35-42-1-1. Keplinger is also correct to indicate that a trial court should define both “knowingly” and “intentionally” to a jury. *Potter v. State*, 684 N.E.2d 1127, 1134 (Ind. 1997) (holding that the defendant did not show sufficient prejudice for reversal when the trial court failed to instruct the jury on the definitions of “knowingly” and “intentionally,” as the instructions tendered adequately informed the jury that the defendant had to commit the crimes with a knowing or intentional state of mind). He is incorrect, however, that this instruction constituted fundamental error.

In this case, the trial court instructed the jury on conspiracy to commit murder in Preliminary Instruction No. 5, which states, in relevant part, as follows:

Sometime between February and April 2009, in Huntington County, Indiana, Tyson G. Keplinger, *with the intent to knowingly kill* another human being, agreed with another person to commit murder and Tyson G. Keplinger performed one or more of the following overt acts in furtherance of the agreement, to wit: paid money or provided identifying information about the intended victim.

(Appellant’s App. p. 34) (emphasis added). In Preliminary Instruction No. 6, the trial court then defined conspiracy, in relevant part, as follows:

Before you may convict the Defendant of Count I, Conspiracy to Commit Murder, a class A felony, the state must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. agreed with another person, either Emily Meyer or Damon Gee, to commit the crime of murder
3. *with the intent to commit* the crime, and
4. Tyson Keplinger performed an overt act in furtherance of the agreement by paying money or providing identifying information about the intended victim, Jason Chapman.

(Appellant's App. pp. 35-36) (emphasis added). Additionally, with respect to Count II, attempted murder, the trial court then gave Preliminary Instruction No. 7, which states, in relevant part: "Sometime between February and April 2009, in Huntington County, Indiana, Tyson G. Keplinger, *with the intent to kill* another human being, took a substantial step toward the commission of the crime of murder." (Appellant's App. p. 37) (emphasis added).

Finally, the trial court set forth the statutory elements of attempted murder in Preliminary Instruction No. 8, which reads, in pertinent part:

Before you may convict the defendant of Count II, Attempted Murder, the [S]tate must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. acting *with the specific intent* to kill Jason Chapman
3. engaged in conduct constituting a substantial step toward the commission of the intended crime of killing Jason Chapman.

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In the alternative to the elements listed above there is also a basis of criminal liability called aiding, inducing or causing Attempted Murder. This is better known as "accomplice liability."

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Before you may convict the Defendant under an aiding, inducing or causing basis of liability, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. *knowingly or intentionally*

3. aided, induced or caused Emily Meyer to engage
4. in conduct that constituted a substantial step toward killing Jason Chapman
5. and both Emily Meyer and Tyson Keplinger acted with the specific intent to kill Jason Chapman.

(Appellant’s App. pp. 38-40) (emphasis added). Despite the fact that the trial court should have defined “intentionally,” when read together and taken as a whole, the jury instructions adequately informed the jury that Keplinger had to commit the crimes with a knowing *or intentional* state of mind. As such, we find no fundamental error.

## II. *Double Jeopardy Clause*

Keplinger also claims that his conviction for attempted murder and conspiracy to commit murder violate Indiana’s double jeopardy clause in Article I, Section 14 of the Indiana Constitution. Specifically, he argues that “the charging information makes clear that the crux of both the ‘substantial step’ for attempted murder and the ‘overt act’ for conspiracy was the fact that Keplinger agreed to pay Damon Gee \$6,000 to murder Jason Chapman.” (Appellant’s Br. p. 10).

Pursuant to Indiana’s Double Jeopardy provision, two or more offenses are impermissibly the “same offense” when “with respect to either the statutory elements of the charged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish elements of another offense.” *Vanzandt v. State*, 731 N.E.2d 450, 455 (Ind. Ct. App. 2000) (quoting *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 2000)), *trans. denied* (emphasis in original).

Keplinger does not challenge the “statutory elements” prong of the Double Jeopardy Clause. Instead, he directs our attention to the actual evidence test and argues that the same facts were used to establish both crimes. He then argues, in the alternative, that even if his convictions do not violate the Double Jeopardy Clause, they constitute one single crime pursuant to the continuing crime doctrine.

*A. Actual Evidence Test*

When examining the “actual evidence test,” the necessary inquiry is “whether each offense was established by separate and distinct facts.” *Vanzandt*, 731 N.E.2d at 455. Specifically,

To show that two challenged offenses constitute the “same offense” in a claim of double jeopardy, a defendant must demonstrate a reasonable probability 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 the second challenged offense.

*Id.* (quoting *Richardson*, 717 N.E.2d at 53). To determine what facts were used by the jury, we consider the evidence, charging information, final instructions, and arguments of counsel. *Goldberry v. State*, 821 N.E.2d 447, 459 (Ind. Ct. App. 2005).

With regard to the conspiracy to commit murder charge, the charging information alleged that Keplinger “agreed with another person to commit murder” and that he “performed the following overt acts in furtherance of the agreement, to wit: paid money or provided identifying information about the intended victim.” (Appellant’s App. p. 99). During the trial, the State presented evidence that Keplinger agreed with Meyer and Gee to have Chapman killed. For example, in March 2009, after Meyer was bonded out of jail,

Keplinger told her that Gee, who was not from Huntington County, would be the ideal person to hire for the hit because “he wouldn’t be a suspect.” (Tr. p. 481). Then, Keplinger provided Gee with a photocopy of a yearbook picture of Chapman so that Gee would be able to identify Chapman. Keplinger also gave Gee directions to Chapman’s house and gave him Chapman’s telephone number so that Gee could call Chapman’s house.

With respect to the attempted murder charge, the charging information stated that Keplinger “took a substantial step toward the commission of the crime murder, to wit: hired someone to have another person killed.” (Appellant’s App. p. 98). For this charge, the State set forth evidence and then argued during closing argument that Keplinger not only started the preparation to kill Chapman, but also met with Gee on April 15, 2009 and reaffirmed that he wanted Chapman murdered soon. Keplinger also gave Gee more money. Taken together, Keplinger has not shown that the State used the same facts to establish both offenses.

#### B. *Continuing Crime Doctrine*

The continuing crime doctrine “essentially provides that actions that are sufficient in themselves to constitute separate criminal offenses may be compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.” *Buchanan v. State*, 913 N.E.2d 712, 720 (Ind. Ct. App. 2009), *trans. denied*, (quoting *Riehle v. State*, 823 N.E.2d 287, 296 (Ind. Ct. App. 2005), *trans. denied*). We further stated that the doctrine “does not seek to reconcile the double jeopardy implications of two distinct chargeable crimes; rather, the doctrine defines those instances where a defendant’s conduct

amounts only to a single chargeable crime. In doing so, the doctrine prevents the State from charging a defendant twice for the same continuous offense.” *Id.*

We note that “a person conspires to commit a felony, when, with the intent to commit the felony, he agrees with another person to commit the felony.” I.C. § 35-41-5-2. While it is true that the State must prove that an overt act was performed in furtherance of the conspiracy, the conspiracy occurs at the point in time that an agreement to commit a felony with another is made. *Riehle*, 823 N.E.2d at 296.

The State presented evidence of the first and distinct crime, conspiracy, by showing that Keplinger agreed with Meyer to kill Chapman at some point before March 20, 2009, when she was released from jail. Then, Keplinger made one payment to Gee on March 20, 2009, another around March 30, and attempted to make a third on April 14. Sometime between March 20 and March 30, Keplinger provided Gee with information identifying Chapman. Despite Keplinger’s argument that the April 15, 2009 meeting was a “mere continuation of the course of conduct between Keplinger and Gee,” his actions amounted to an independent and distinct action: an agreement to commit murder, payment to commit the

murder, and providing identifying information. As such, Keplinger has not shown that his conviction violated the continuing crime doctrine.

### CONCLUSION

Based on the foregoing, we conclude that the trial court did not commit fundamental error when instructing the jury and his convictions do not violate the Double Jeopardy Clause.

Affirmed.

ROBB, C.J., and BROWN, J., concur.