MEMORANDUM DECISION

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

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IN THE COURT OF APPEALS OF INDIANA

Demarco Johnson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 15, 2021

Court of Appeals Case No. 20A-CR-2119

Appeal from the Vanderburgh Circuit Court

The Honorable Kelli E. Fink, Magistrate

Trial Court Cause No. 82C01-1910-F4-6968

Bradford, Chief Judge.

Case Summary

[1] Demarco Johnson was convicted of Level 4 felony sexual misconduct with a minor, Level 5 felony incest, and Class A misdemeanor attempted invasion of privacy for acts involving his biological daughter, R.J. On appeal, Johnson contends that his sexual misconduct and incest convictions violate the prohibitions against double jeopardy, claiming that both are based on the same instance of sexual conduct with the same victim. We affirm.

Facts and Procedural History

[2] Johnson is R.J.'s biological father. In May of 2019, Johnson moved in with R.J.'s mother, then-fourteen-year old R.J., and a few other family members. R.J. described her relationship with Johnson after he moved in as "awkward" because he would "touch [her] on [her] leg or touch [her] on [her] arm, or like just touch [her] in places that just didn't feel right." Tr. Vol. IV p. 10.

[3] On May 28, 2019, R.J. was in the family home with Johnson and her grandmother, who suffered from mental illness and dementia. Johnson was playing a video game in R.J.'s mother's bedroom when R.J. asked if she could play too. Johnson then "got up," closed the bedroom door, and instructed R.J. "to get on the floor." Tr. Vol. IV p. 13. Johnson became aggressive and told R.J. to "pull down [her] pants." Tr. Vol. IV p. 13. R.J. complied with Johnson's instructions "[b]ecause he told [her] to, and [she] was kind of scared." Tr. Vol. IV p. 13.

[4] Johnson then "gave [R.J.] oral sex," placing his mouth on and moving his mouth around the outer area of R.J.'s vagina. Tr. Vol. IV p. 13. After the oral sex, Johnson subjected R.J. to sexual intercourse. When Johnson stopped, "[h]e just got up … like nothing happened." Tr. Vol. IV p. 16. R.J. noticed that "[s]emen was coming out of" Johnson's penis as he pulled it out and got up. Tr. Vol. IV p. 16. R.J. had not wanted Johnson to subject her to either act and later reported that the sexual intercourse was "[p]ainful" and "hurt." Tr. Vol. IV p. 16.

[5] R.J. did not immediately report the incident to her mother because she "was too embarrassed." Tr. Vol. IV p. 19. Later that evening, R.J. told friends who had come over for a barbeque what had happened. One of the friends "ran outside and told her mom" who reported the incident to R.J.'s mother. Tr. Vol. IV p. 20. R.J.'s mother took R.J. outside and the two discussed what had happened. When Johnson noticed R.J. speaking to her mother, he "ran out and … punched [R.J.] in the back," causing a fight to break out. Tr. Vol. IV p. 20.

[6] R.J.'s mother immediately took R.J. to the hospital where she was examined by a sexual assault nurse examiner. DNA evidence recovered during the examination revealed that "[t]he DNA profile is at least 1 trillion times more likely if it originated from [R.J.] and Demarco Johnson than if it originated from [R.J.] and an unknown, unrelated individual." State's Ex. 1.

[7] Johnson was arrested on October 2, 2019. He was subsequently charged with two counts of Level 4 felony sexual misconduct with a minor and one count of Level 5 felony incest and was alleged to be a habitual offender. At some point, Johnson violated a no-contact order by contacting R.J. and her mother. The State then amended the charging information to include a charge of Class A misdemeanor attempted invasion of privacy. Following trial, the jury found Johnson guilty of one count of Level 4 felony sexual misconduct with a minor, Level 5 felony incest, and Class A misdemeanor attempted invasion of privacy. Johnson waived jury trial on the habitual offender enhancement and, following a hearing, the trial court found him to be a habitual offender. The trial court then sentenced Johnson to an aggregate twenty-four-year term of incarceration.

Discussion and Decision

[8] The Indiana Double Jeopardy Clause provides that "No person shall be put in jeopardy twice for the same offense." Ind. Const. art. I, § 14. It, along with its federal counterpart, "stands as a bedrock principle of our fundamental law." *Wadle v. State*, 151 N.E.3d 227, 238 (Ind. 2020). "The protective scope of the Double Jeopardy Clause turns on the meaning of 'same offense'." *Id.*

[9]

> Historically, the prohibition against double jeopardy—rooted in the English common law pleas of autrefois acquit (former acquittal) and autrefois convict (former conviction)—applied as a procedural bar to successive prosecutions for the same offense.... By the mid-nineteenth century, however, this paradigm had shifted, the consequence of an expanding body of statutory law defining new—and often overlapping—criminal offenses.

Id. "To protect the interests of the accused, then, the prohibition against double jeopardy evolved beyond the procedural context to embody a substantive bar to multiple convictions or punishments for the 'same offense' in a single trial." *Id.* at 239.

I. The *Wadle* Approach

[10] In *Wadle*, the Supreme Court recognized that "[s]ubstantive double jeopardy claims come in two principal varieties: (1) when a single criminal act or transaction violates a single statute but harms multiple victims, and (2) when a single criminal act or transaction violates multiple statutes with common elements and harms one or more victims." *Id.* at 247. This case implicates the latter.

[11] "When multiple convictions for a single act or transaction implicate two or more statutes, we first look to the statutory language itself." *Id.* at 248. "If the language of either statute clearly permits multiple punishment, either expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy." *Id.* "If, however, the statutory language is not clear, a court must then apply our included-offense statutes to determine statutory intent." *Id.*

[12] Under Indiana Code section 35-38-1-6, a trial court may not enter judgment of conviction and sentence for both an offense and an "included offense." An "included offense," as defined by our legislature, is an offense

> (1) 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,"
>
> (2) that "consists of an attempt to commit the offense charged or an offense otherwise included therein," or
>
> (3) that "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."

Ind. Code § 35-31.5-2-168. "If neither offense is an included offense of the other (either inherently or as charged), there is no violation of double jeopardy." *Wadle*, 151 N.E.3d at 248. "If, however, one offense is included in the other (either inherently or as charged), the court must then look at the facts of the two crimes to determine whether the offenses are the same." *Id.* This brings us to the second step of our inquiry.

[13] "Once a court has analyzed the statutory offenses charged, it must then examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial." *Id.* at 249. "Based on this information, a court must ask whether the defendant's actions were 'so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.'" *Id.* (quoting *Walker v. State*, 932 N.E.2d 733, 735 (Ind. Ct. App. 2010)).

[14] "If the facts show two separate and distinct crimes, there's no violation of substantive double jeopardy, even if one offense is, by definition, 'included' in

the other." *Id.* "But if the facts show only a single continuous crime, and one statutory offense is included in the other, then the prosecutor may charge these offenses only as alternative (rather than as cumulative) sanctions." *Id.* "The State can rebut this presumption only by showing that the statute—either in express terms or by unmistakable implication—clearly permits multiple punishment." *Id.* at 250.

II. The Instant Matter

[15] Again, Johnson contends that his convictions for Level 4 felony sexual misconduct with a minor and Level 5 felony incest resulted in a violation of the prohibitions against double jeopardy. According to *Wadle*, there is no violation of double jeopardy "if neither offense is included in the other (either inherently or as charged)." *Id.* at 253. We review both the relevant statutes and the charging information to determine whether an offense is included in the other. *Id.*

[16] The statutes at issue in this case provide as follows:

> A person at least eighteen (18) years of age who knowingly or intentionally performs or submits to sexual intercourse or other sexual conduct (as defined in [Ind. Code §] 35-31.5-2-221.5) with a child less than sixteen (16) years of age, commits sexual misconduct with a minor, a Level 5 felony. However, the offense is:
>
> > (1) a Level 4 felony if it is committed by a person at least twenty-one (21) years of age[.]

Ind. Code § 35-42-4-9(a).

> A person eighteen (18) years of age or older who engages in sexual intercourse or other sexual conduct (as defined in [Ind. Code §] 35-31.5-2-221.5) with another person, when the person knows that the other person is related to the person biologically as a … child … commits incest, a Level 5 felony.

Ind. Code § 35-46-1-3(a). "'Other sexual conduct' means an act involving: (1) the sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-31.5-2-221.5.

[17] Further, the charging information for the sexual misconduct with a minor and incest charges read as follows:

> Count 1:
>
> The undersigned says that in Vanderburgh County, State of Indiana, on or about May 28, 2019, Demarco Delray Johnson, a person at least twenty-one (21) years of age, did perform sexual intercourse with [R.J.], a child at least fourteen (14) years of age but less than sixteen (16) years of age, contrary to the form of the statutes in such cases made and provided by [Ind. Code §] 35-42-4-9(a) and [Ind. Code §] 35-42-4-9(a)(1) and against the peace and dignity of the State of Indiana.…
>
> Count 3:
>
> The undersigned says that in Vanderburgh County, State of Indiana, on or about May 28, 2019, Demarco Delray Johnson being at least eighteen years of age, did engage in sexual intercourse or other sexual conduct with another person, to-wit: [R.J.]; knowing that said other person is related to the defendant biologically as a child, contrary to the form of the statutes in such

> cases made and provided by [Ind. Code §] 35-46-1-3 and against the peace and dignity of the State of Indiana.

Appellant's App. Vol. II p. 26.

[18] Applying *Wadle* to the statutes at issue in this case, we conclude that Level 5 felony incest is not an inherently included offense of Level 4 felony sexual misconduct with a minor. Likewise, applying *Wadle* to the charging informations at issue in this case, we conclude that Level 5 felony incest is not an included offense of Level 4 sexual misconduct with a minor as charged. The statutes and charging informations, while sharing the common element of requiring a sex act, do not protect against the same criminal conduct and the elements of each required the State to prove different elements. Because neither offense is an included offense of the other, there is no violation of double jeopardy. *See Wadle*, 151 N.E.3d at 248.

[19] The judgment of the trial court is affirmed.

Robb, J., and Altice, J., concur.