MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Macquillie I. Woodard,
Appellant / Cross-Appellee-Defendant,

v.

State of Indiana,
Appellee / Cross-Appellant-Plaintiff

July 21, 2021

Court of Appeals Case No.
20A-CR-2263

Appeal from the
Allen Superior Court

The Honorable
David M. Zent, Judge

Trial Court Cause No.
02D06-2008-F4-82

Crone, Judge.

Case Summary

[1] Macquillie I. Woodard appeals his conviction for Level 4 felony unlawful possession of a firearm by a serious violent felon, and the State cross-appeals the trial court's decision to vacate Woodard's conviction for Level 5 felony battery with a deadly weapon on double-jeopardy grounds. We affirm Woodard's unlawful-possession conviction. However, we find Woodard's convictions do not constitute double jeopardy and that the trial court therefore erred in vacating his battery conviction. We remand this case so the court can reinstate Woodard's Level 5 felony battery conviction and sentence him accordingly.

Facts and Procedural History

[2] In 2020, Marquayle Martin and his long-time girlfriend, Amanda Burton, lived with their four children in Fort Wayne. Sometime that May, Martin's father, Woodard, gave Burton an at-home DNA test and asked her to call the test maker because he had a question.[1] Burton, however, did not call the company.

[3] On the morning of June 24, Woodard called Martin and asked him to bring the test back to him. Martin said he would later that day but got busy and forgot. Around 10 p.m. that night, Woodard called Martin and yelled at him for not

[1] Woodard wanted to see if the DNA test could be used to determine if his other son's child was "a part of [the] family." Tr. Vol. I p. 69.

bringing the test back. Martin hung up the phone. About fifteen minutes later, Martin heard "a lot of banging" on his front door and knew it was his father. Tr. Vol. I p. 78. When Martin opened the door, his father was standing there and asked, "Where's my sh** at?" *Id.* at 79. Martin did not know where the test was, so Burton retrieved it and handed it to Woodard, at which point he said, "Bit**, I don't want that sh** from you." *Id.* at 80. A verbal argument between Woodard and Martin ensued, and Woodard asked Martin if he wanted to "step outside." *Id.* at 85. Martin declined, and as he got ready to shut the door, Woodard pulled out his gun and shot into the house. The bullet struck Martin, entering "the right side of [his] rib" and exiting his back. *Id.* at 89.

[4] The State charged Woodard with Level 4 felony unlawful possession of a firearm by a serious violent felon and Level 5 felony battery with a deadly weapon. At the request of the parties, a bifurcated trial was held to avoid any prejudice to Woodard from being called a "serious violent felon." During the first phase, the jury was asked to determine whether Woodard committed Level 5 felony battery and whether he knowingly or intentionally possessed a firearm. The jury found Woodard guilty of Level 5 felony battery and that he knowingly or intentionally possessed a firearm. Before proceeding to the second phase, Woodard stipulated he had a prior conviction that qualified as a "serious violent felony" under Indiana Code section 35-47-4-5:

> Out of the presence of the Jury, the Defendant stipulates that he has a prior qualifying conviction under I.C. 35-47-4-5 in that on or about the 19th day of May, 1994, in the County of Allen and in the State of Indiana, said Defendant, MacQuillie I Woodard,

> was convicted by the Allen Superior Court, Fort Wayne, Indiana, of Burglary, a Class B Felony, Cause 02D04-9403-CF-131 and on or about the 28th day of January, 1993, in the County of Allen and in the State of Indiana, said defendant, MacQuillie I Woodard, was convicted by the Allen Superior Court, Fort Wayne, Indiana of Burglary, a Class B Felony in Cause 02D04-9210-CF-541[.]

Appellant's App. Vol. II p. 64. The stipulation was signed by Woodard, his attorney, the State, and the trial court. *Id.* When the trial court asked Woodard if he agreed with the stipulation, Woodard responded, "So, they ain't gotta have another trial." Tr. Vol. II p. 38. The court then dismissed the jury, entered judgment of conviction, and set a sentencing hearing.

[5] At the sentencing hearing, Woodard asked the trial court to vacate his battery conviction on double-jeopardy grounds based on the Indiana Supreme Court's decision in *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020). Over the State's objection, the court vacated the battery conviction and sentenced Woodard to ten years for unlawful possession. Tr. Vol. II p. 60; Appellant's App. Vol. II p. 98.

[6] Woodard now appeals, and the State cross-appeals.

Discussion and Decision

I. Woodard's Appeal

[7] Woodard appeals his conviction for Level 4 felony unlawful possession of a firearm by a serious violent felon. To convict Woodard of this offense, the State

had to prove he knowingly or intentionally possessed a firearm after having been convicted of a qualifying felony. *See* Ind. Code § 35-47-4-5(c); Appellant's App. Vol. II p. 11. After the jury found Woodard knowingly or intentionally possessed a firearm, Woodard stipulated to the remaining element—whether he had a qualifying conviction under Section 35-47-4-5. Woodard argues the trial court should have advised him about "the various rights which would be waived by stipulating" he had a qualifying conviction. Appellant's Br. p. 15.

[8] Woodard, however, was not entitled to such an advisement. As the Indiana Supreme Court explained in *Garrett v. State*, a factual stipulation does not amount to a guilty plea. 737 N.E.2d 388, 392 (Ind. 2000). In that case, during the habitual-offender phase of trial, the defendant stipulated to the existence of the prior offenses charged by the State (as opposed to stipulating he was a habitual offender). On appeal, the defendant argued his stipulation was "tantamount to a guilty plea" and that "the trial court's acceptance of the stipulation without advising him on various rights which would be waived by pleading guilty was erroneous." *Id.* The Court explained that although a guilty plea requires trial courts to advise defendants of the rights they are waiving, a stipulation to an element of the offense does not:

> [The defendant] cites no authority to support his claim that a factual stipulation can amount to a guilty plea. As we observed in *Whatley v. State,* 685 N.E.2d 48 (Ind. 1997) "a plea of guilty is a discrete judicial event that not only admits factual matters but also embodies significant procedural consequences." *Id.* at 49. A stipulation that seeks to establish certain facts does not constitute a guilty plea. *Id.* (finding that a stipulation as to the existence of a

> defendant's prior conviction used to enhance a handgun offense did not amount to a guilty plea).

Id. Because the defendant's stipulation only acknowledged he had been convicted of the prior offenses and sentenced on certain dates, the Court concluded "it established only the fact that the prior offenses existed and did not amount to a guilty plea." *Id.*

[9] We reach the same conclusion here. Because Woodard only stipulated to an element of the offense, it did not amount to a guilty plea. Accordingly, the trial court was not required to advise him about the "various rights which would be waived by pleading guilty." *Id.* We therefore affirm Woodard's unlawful-possession conviction.

II. State's Cross-Appeal

[10] In its cross-appeal, the State contends the trial court erred in vacating Woodard's battery conviction on double-jeopardy grounds under *Wadle*. Woodard does not respond to the State's *Wadle* argument. Rather, he argues the State's cross-appeal is not authorized under Indiana Code section 35-38-4-2, the statute that sets forth the limited circumstances in which the State may appeal in criminal cases.[2] According to Woodard, "no Indiana case has authorized

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[2] Section 35-38-4-2 provides in part:

> (a) Appeals to the supreme court or to the court of appeals, as provided by court rules, may be taken by the state as of right in the following cases:

such an expansion of the State's statutory right to appeal." Appellant's Reply Br. p. 5.[3]

[11] But as the State points out, *see* Appellee's Cross-Appeal Reply Br. p. 5, this Court recently held the State has the authority under Section 35-38-4-2 to cross-appeal a trial court's merger of two counts on double-jeopardy grounds because it presents a pure question of law. *Wilcoxson v. State*, 132 N.E.3d 27, 32 & n.4 (Ind. Ct. App. 2019) (citing *State v. Monticello Devs., Inc.*, 527 N.E.2d 1111 (Ind. 1988)), *trans. denied*. Here, the State's cross-appeal asserts the trial court erred in vacating the battery conviction on double-jeopardy grounds. As in *Wilcoxson*, this is a legal question. The State's cross-appeal is properly before us.

[12] On the merits, *Wadle* established the new double-jeopardy framework to be applied where, as here, "a single criminal act or transaction violates multiple

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> (1) From an order granting a motion to dismiss one (1) or more counts of an indictment or information.
>
> (2) From an order granting a motion to discharge a defendant before trial for any reason, including delay commencing trial or after the defendant's plea of former jeopardy.
>
> (3) From an order granting a motion to correct errors.
>
> (4) Upon a question reserved by the state, if the defendant is acquitted.
>
> (5) From an order granting a motion to suppress evidence, if the ultimate effect of the order is to preclude further prosecution of one (1) or more counts of an information or indictment.

[3] Woodard also argues the State waived this issue because its objection to the trial court vacating the battery conviction was not "supported by the reasons for the objection." Appellant's Reply Br. p. 7. Although the State did not specify its reasons for objecting, it is apparent from the context that the State did not believe there was a double-jeopardy problem under *Wadle*. There is no waiver.

statutes with common elements." 151 N.E.3d at 247. The *Wadle* test consists of three parts:

> [W]hen multiple convictions for a single act or transaction implicate two or more statutes, we first look to the statutes themselves. If either statute clearly permits multiple punishment, whether expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy.

151 N.E.3d at 253.[4]

> But if the statutory language is not clear, then a court must apply our included-offense statutes to determine whether the charged offenses are the same. *See* [Ind. Code] § 35-31.5-2-168. If neither offense is included in the other (either inherently or as charged), there is no violation of double jeopardy.

Id.

> But if one offense is included in the other (either inherently or as charged), then the court must examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial. If, based on these facts, 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," then the prosecutor may charge the offenses as alternative sanctions

[4] As an example of a statute that clearly permits multiple punishment, the *Wadle* Court cited Indiana Code section 6-7-3-20, which expressly permits the imposition of an excise tax on the delivery, possession, or manufacture of a controlled substance in addition to any criminal penalties imposed under Title 35. 151 N.E.3d at 248 n.22.

> only. But if the defendant's actions prove otherwise, a court may convict on each charged offense.

Id.

[13] Applying the test here, we first observe that neither the unlawful-possession statute nor the battery statute clearly permits multiple punishment. The unlawful-possession statute provides that a serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon, a Level 4 felony. I.C. § 35-47-4-5. The battery statute provides that a person who knowingly or intentionally touches another person in a rude, insolent, or angry manner and commits the offense with a deadly weapon commits battery, a Level 5 felony. I.C. § 35-42-2-1(c)(1), (g)(2).

[14] Therefore, we move to the second step of the test: determining whether either offense is included in the other under the included-offense statute, Indiana Code section 35-31.5-2-168. If not, there can be no double jeopardy.

[15] Section 35-31.5-2-168 defines "included offense" as 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.

Subsection (1) is not implicated here. Unlawful possession of a firearm by a serious violent felon is not established by proof of Level 5 felony battery with a deadly weapon because unlawful possession requires the defendant to be a serious violent felon while Level 5 felony battery does not. Likewise, Level 5 felony battery is not established by proof of unlawful possession because Level 5 felony battery requires the knowing or intentional touching of another in a rude, insolent, or angry manner with a deadly weapon and unlawful possession requires no touching. Subsection (2) does not apply either, because Woodard was not charged with or convicted of any attempt crime. And subsection (3) does not apply because unlawful possession and Level 5 felony battery differ in more respects than just the degree of harm or culpability required.

[16] Because neither Level 4 felony unlawful possession of a firearm by a serious violent felon nor Level 5 felony battery is included in the other, convictions for both do not constitute double jeopardy under *Wadle*. The trial court erred in finding otherwise. We therefore remand this case so the court can reinstate Woodard's Level 5 felony battery conviction and sentence him accordingly.

[17] Affirmed in part and reversed and remanded in part.

Bradford, C.J., and Brown, J., concur.