ATTORNEY FOR APPELLANT

Brian A. Karle
Ball Eggleston, PC
Lafayette, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

J.T. Whitehead
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Edward Koziski,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 2, 2021

Court of Appeals Case No.
20A-CR-1889

Appeal from the
Marion Superior Court

The Honorable
Mark Stoner, Judge

The Honorable
Jeffrey Marchal,
Magistrate

Trial Court Cause No.
49G06-1903-F1-10139

Vaidik, Judge.

Case Summary

[1] Last year, in *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), and *Powell v. State*, 151 N.E.3d 256 (Ind. 2020), our Supreme Court adopted new tests for addressing certain double-jeopardy claims. *Wadle* applies when a single criminal act or transaction leads to convictions under "multiple statutes," and *Powell* applies when a single criminal act or transaction leads to multiple convictions under "a single statute." Here, we must determine whether two convictions based on two separate provisions under the child-molesting statute should be analyzed using the *Powell* "single statute" test (because both convictions fall under the child-molesting statute generally) or the *Wadle* "multiple statutes" test (because the convictions are based on distinct statutory provisions). We conclude *Wadle* applies.

Facts and Procedural History

[2] In early 2019, Edward Koziski, who was in his late fifties, molested his roommate's twelve-year-old granddaughter, D.B., on four separate occasions. Based on these incidents, Koziski was convicted of two counts of Level 1 felony child molesting, three counts of Level 4 felony child molesting, Level 5 felony criminal confinement, Level 5 felony kidnapping, and Class A misdemeanor intimidation. On appeal, Koziski argues the two Level 1 felony child-molesting

convictions, as well as the confinement and kidnapping convictions, constitute double jeopardy. Only two of the four incidents are relevant to these claims.[1]

[3] In the first, which lasted five to ten minutes, Koziski and D.B. were on a couch together, and Koziski "licked" D.B.'s vagina and "put his finger inside." Tr. p. 13. This incident led to the two convictions for Level 1 felony child molesting.

[4] In the second, Koziski touched the outside of D.B.'s vagina with his hand, and when D.B. went outside to leave, Koziski went outside, picked her up, brought her back inside, locked the door, and said, "You're not leaving." *Id.* at 23. D.B. felt like she could not leave, and she stayed in the house until someone came to pick her up. This incident led to the conviction for one of the counts of Level 4 felony child molesting and the convictions for Level 5 felony criminal confinement and Level 5 felony kidnapping.

[5] The trial court sentenced Koziski to twenty-four years for each of the two Level 1 felony child-molesting convictions, imposed shorter terms for the other convictions, and ordered all the sentences to run concurrently.

[6] Koziski now appeals.

---

[1] The other two incidents resulted in the convictions for two of the counts of Level 4 felony child molesting and the conviction for Class A misdemeanor intimidation, none of which Koziski challenges on appeal.

Discussion and Decision

[7] Koziski contends his two convictions for Level 1 felony child molesting, as well as his convictions for Level 5 felony criminal confinement and Level 5 felony kidnapping, constitute double jeopardy. He did not raise these claims in the trial court; to the contrary, his trial attorney told the trial court there were no double-jeopardy issues. But he argues he is entitled to raise the claims on appeal, citing caselaw allowing such claims to be raised for the first time on appeal or even by this Court sua sponte because double jeopardy implicates fundamental rights. *See Howell v. State*, 97 N.E.3d 253, 263 (Ind. Ct. App. 2018), *trans. denied*; *Montgomery v. State*, 21 N.E.3d 846, 864 n.5 (Ind. Ct. App. 2014), *trans. denied*. The State argues Koziski waived his double-jeopardy claims but does not address the caselaw he cites.[2] We conclude Koziski's claims are properly before us.

[8] The framework for addressing such claims was overhauled last year. In *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), and *Powell v. State*, 151 N.E.3d 256 (Ind. 2020), our Supreme Court adopted new tests for addressing claims of "substantive double jeopardy," which concern multiple convictions in a single prosecution (as opposed to claims of "procedural double jeopardy," which concern convictions for the same offense in successive prosecutions). In *Wadle*, the Court established the test to be applied "when a single criminal act or

[2] Moreover, notwithstanding its waiver argument, the State concedes Koziski's convictions for confinement and kidnapping constitute double jeopardy and asks that the confinement conviction be vacated.

transaction violates multiple statutes with common elements[.]" 151 N.E.3d at 247 (addressing convictions under the leaving-the-scene and OWI statutes). In *Powell*, the Court established the test to be applied "when a single criminal act or transaction violates a single statute and results in multiple injuries." 151 N.E.3d at 263 (addressing two attempted-murder convictions). With this framework in mind, we turn to Koziski's claims.

I. Child Molesting

[9] Koziski first asserts that his two convictions for Level 1 felony child molesting constitute double jeopardy under the *Wadle* test. The State, on the other hand, analyzes the convictions under the *Powell* test and argues there is no double jeopardy. Therefore, our first task is to decide whether the *Wadle* test or the *Powell* test applies.

[10] As just noted, *Wadle* applies when a single criminal act or transaction leads to convictions under "multiple statutes with common elements," and *Powell* applies when a single criminal act or transaction leads to multiple convictions under "a single statute." At first blush, then, this might seem to be a *Powell* situation, since Koziski stands convicted of two Level 1 felonies under Indiana's one child-molesting statute, Indiana Code section 35-42-4-3. But that view oversimplifies things, because Koziski was actually convicted under two different statutory provisions incorporated by reference into that statute. Specifically, Section 35-42-4-3(a) provides that a person at least twenty-one years of age "who, with a child under fourteen (14) years of age, knowingly or

intentionally performs or submits to sexual intercourse **or other sexual conduct (as defined in IC 35-31.5-2-221.5)**" commits Level 1 felony child molesting. (Emphasis added.) Section 35-31.5-2-221.5, in turn, defines "other sexual conduct" as "an act involving: (1) a 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." These provisions define "multiple sets of essential elements." *Collins v. State*, 717 N.E.2d 108, 110 (Ind. 1999) (affirming separate convictions under subsections (1) and (2)). And Koziski was convicted once under each provision: under subsection (1) for licking D.B.'s vagina (an act involving "a sex organ of one (1) person and the mouth or anus of another person"), and under subsection (2) for putting his finger inside D.B.'s vagina (an act involving "the penetration of the sex organ or anus of a person by an object"). Because the convictions fall under separate statutory provisions, each defining a separate crime, the *Wadle* "multiple statutes" test is a better fit than the *Powell* "single statute" test. We don't believe the legislature's decision to delineate separate crimes in one statute as opposed to two should control which double-jeopardy test is applicable.

[11] 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.[3]

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

Id.

[12] Applying the test here, we first observe that neither the child-molesting statute nor the statute defining "other sexual conduct," both quoted above, clearly permits (or prohibits) multiple punishment for multiple acts of molestation

---

[3] 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.

against the same victim in a single encounter. *See* Ind. Code § 35-42-4-3(a); Ind. Code § 35-31.5-2-221.5.

[13] 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.

[14] 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.

I.C. § 35-31.5-2-168. Subsection (1) is not implicated here. Neither form of "other sexual conduct"—an act involving "a sex organ of one (1) person and the mouth or anus of another person" and an act involving "the penetration of the sex organ or anus of a person by an object"—is established by proof of the other. The first is not established by proof of the second because the first requires contact between one person's sex organ and another person's mouth or anus—here, Koziski licking D.B.'s vagina—and the second does not. Likewise, the second is not established by proof of the first because the second requires the

penetration of a person's sex organ or anus by an "object"—here, Koziski putting his finger inside D.B.'s vagina—and the first does not.[4] Subsection (2) does not apply either, because Koziski was not charged with or convicted of any attempt crime. And subsection (3) does not apply because, as just noted, the two forms of "other sexual conduct" differ in more respects than just the degree of harm or culpability required.

[15] Because neither of Koziski's offenses is included in the other, his convictions do not constitute double jeopardy under *Wadle*, and there is no need to further examine the specific facts of the case under the third step of the test. We affirm both of Koziski's convictions for Level 1 felony child molesting.

II. Confinement and Kidnapping

[16] Koziski also argues his convictions for Level 5 felony criminal confinement and Level 5 felony kidnapping constitute double jeopardy because both are based on the incident where he forced D.B. back into the house and locked her inside. The State agrees, and so do we.

[17] We recently applied *Wadle* to confinement and kidnapping convictions in two decisions involving co-defendants: *Jones v. State*, 159 N.E.3d 55 (Ind. Ct. App. 2020), *trans. denied*, and *Madden v. State*, 162 N.E.3d 549 (Ind. Ct. App. 2021). Jones and Madden were convicted of confinement and kidnapping for forcing a

[4] A finger qualifies as an "object" under Section 35-31.5-2-221.5(2). *See Seal v. State*, 105 N.E.3d 201, 209 (Ind. Ct. App. 2018), *trans. denied*.

woman out of a car and into a house, where they handcuffed her. In both cases we held that confinement (Ind. Code § 35-42-3-3) is an included offense of kidnapping (Ind. Code § 35-42-3-2) and that the defendants' actions were so compressed in time, place, singleness of purpose, and continuity of action that convictions for both crimes constituted double jeopardy. *Jones*, 159 N.E.3d at 66; *Madden*, 162 N.E.3d at 562. The same is true here. As the State acknowledges, Koziski forcing D.B. into the house and locking her inside was one continuous action that cannot support separate convictions for confinement and kidnapping. *See* Appellee's Br. p. 19.

[18] Koziski and the State agree the appropriate remedy is to vacate the confinement conviction. We therefore remand this matter to the trial court with instructions to vacate the conviction and sentence for Level 5 felony criminal confinement.

[19] Affirmed in part, reversed in part, and remanded.

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