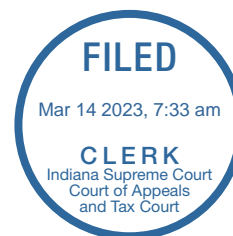


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Joe M. Delgado,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff.

March 14, 2023

Court of Appeals Case No.
21A-CR-2206

Appeal from the Miami Superior
Court

The Honorable J. David Grund,
Judge

Trial Court Cause No.
52D01-2103-F3-76

Memorandum Decision by Judge Pyle

Judges Robb and Weissmann concur.

Pyle, Judge.

Statement of the Case

[1] Joe Delgado (“Delgado”) appeals his convictions, following a jury trial, of Level 3 felony aggravated battery,¹ Level 4 felony possessing material capable of causing bodily injury by an inmate,² and Level 6 felony criminal organization activity,³ as well as the aggregate sentence imposed thereon. He argues that: (1) his convictions for Level 3 felony aggravated battery and Level 4 felony possessing material capable of causing bodily injury by an inmate violate Indiana’s prohibition against double jeopardy; (2) the trial court abused its discretion when it denied his motion for a mistrial; and (3) his aggregate sentence is inappropriate. Concluding that Delgado’s convictions do not violate Indiana’s prohibition against double jeopardy, the trial court did not abuse its discretion when it denied his motion for a mistrial, and his sentence is not inappropriate, we affirm Delgado’s convictions and sentence.

[2] We affirm.

Issues

1. Whether Delgado’s convictions for Level 3 felony aggravated battery and Level 4 felony possessing material

¹ IND. CODE § 35-42-2-1.5.

² I.C. § 35-44.1-3-7.

³ I.C. § 35-45-9-3(c).

capable of causing bodily injury by an inmate violate Indiana's prohibition against double jeopardy.

2. Whether the trial court abused its discretion when it denied Delgado's motion for a mistrial.
3. Whether Delgado's sentence is inappropriate.

Facts

[3] The facts most favorable to the judgement reveal that in October 2020, twenty-three-year-old Delgado and Richard Toth ("Toth") were both incarcerated at the Miami Correctional Facility. Delgado was a member of a prison gang, and Toth and his cellmate were storing knives in their cell for Delgado's gang. After correctional officers had confiscated the knives from Toth's cell, Delgado demanded payment for them from Toth. Toth agreed to pay Delgado fifty dollars.

[4] On October 29, 2020, Toth went to Delgado's cell to pay for the knives. As soon as Toth walked into Delgado's cell, Delgado gave Toth a "sickening smile[.]" (Tr. Vol. 2 at 200). Another inmate closed the cell door, punched Toth in the face, and knocked Toth to the ground. While on the ground, Toth saw Delgado pull a knife, which had been made from the lining of light fixtures, out of a laundry bag. Delgado placed the knife's blade on Toth's pinky finger and "hammer fist[ed] and smashe[d] it about five times." (Tr. Vol. 2 at 203). When the other inmate told Delgado that he did not think that the knife's blade would go through the bone of Toth's finger, Delgado "stomp[ed] on it about three to five times[.]" cutting off the tip of Toth's finger. (Tr. Vol. 2 at 203).

- [5] After Delgado had cut off Toth's fingertip, Delgado gave Toth a hair tie to put on his finger to stop the blood flow. Delgado then told Toth to clean up the blood in Delgado's cell. As Toth was cleaning up the blood, Toth reached for his fingertip. Delgado told Toth that the fingertip belonged to Delgado and placed it in a sandwich baggie. Delgado told Toth that Toth "shouldn't have fucked with" Delgado's gang. (Tr. Vol. 2 at 205).
- [6] The State charged Delgado with Level 3 felony aggravated battery, Level 4 felony possessing material capable of causing bodily injury by an inmate, and Level 6 felony criminal organization activity. At Delgado's August 2021 trial, the jury heard the evidence as set forth above.
- [7] In addition, at the beginning of his trial testimony, Toth volunteered that Delgado had stabbed Toth's cellmate in the eye. Delgado's counsel objected, both counsels approached the bench, and Delgado moved for a mistrial. The trial court took a brief recess to meet with both counsels, and Delgado again moved for a mistrial. The State responded that the jury had notified the bailiff that it had been unable to hear or understand Toth's testimony because he had been sitting too far from the microphone. The State asked the trial court to give the jury a limiting instruction.
- [8] The trial court took a brief recess to review the record and research the issue. After considering the matter, the trial court returned to the courtroom and stated as follows:

I would note that the witness's testimony was very difficult to hear. The - one of the jurors had commented to the bailiff prior to the witness's testimony about the prior bad act, that they were having trouble hearing him. I myself had trouble hearing him and had to go back and review the record to confirm what was said by the witness and what was the statement that the defense moved for a mistrial in regard to[.]

(Tr. Vol. 2 at 191).

[9] The trial court further told counsels that it had researched the issue and found a similar case, *Banks v. State*, 761 N.E.2d 403 (Ind. 2002), wherein a witness had volunteered at trial that the defendant had committed an unrelated criminal act. In addition, the trial court explained that in *Banks*, the trial court had denied Banks' mistrial motion and had admonished the jury to disregard the witness' remark about Banks' unrelated criminal act. The trial court further explained that our Indiana Supreme Court had affirmed on appeal the trial court's denial of Banks' mistrial motion. *See id.* Concluding that the facts in *Banks* were similar to the facts before it, the trial court denied Delgado's motion for a mistrial, called the jury back into the courtroom, and instructed the jury as follows:

Ladies and gentlemen of the jury, you are hereby admonished to disregard the last testimony of this witness. You must not allow this matter, his last statement to influence your decision in this case. You must not discuss or mention this matter in your discussions with one another. You must base your verdict solely upon the proper evidence in the case and the final instructions that the Court has as to the law in this case.

(Tr. Vol. 2 at 196).

[10] The jury convicted Delgado as charged. At the September 2021 sentencing hearing, Delgado's presentence investigation report ("the PSI") revealed that Delgado has a criminal history that includes four juvenile delinquency adjudications for committing offenses that would have been Class A misdemeanor resisting law enforcement, Class B misdemeanor criminal mischief, and Level 6 felony criminal recklessness if committed by an adult. Further, as a juvenile, Delgado had one suspended commitment and one commitment to the Department of Correction ("the DOC"). Delgado's adult criminal history includes two Level 3 felony convictions for robbery taking property by force or threatening the use of force while armed. In addition, Delgado has misdemeanor convictions for resisting law enforcement and operating a vehicle while intoxicated endangering a person. Delgado was serving the sentences for the Level 3 felony convictions when he committed the offenses in this case.

[11] In addition, the PSI also included a letter that Toth's mother ("Toth's mother") had written. In this letter, Toth's mother explained that "the trauma of the attack ha[d] impacted [Toth's] life every day since [the attack had] happened." (App. Vol. 2 at 115). According to Toth's mother, Toth was "a constant prisoner of his thoughts, suffer[ed] from anxiety, and ha[d] clinical depression because of the attack on him." (App. Vol. 2 at 115). Toth's mother further explained that Toth was "unable to sleep for more than an hour at a time, and often w[o]ke[] up to horrible nightmares." (App. Vol. 2 at 115). In addition,

Toth's mother explained that Toth did "not sleep in his own room, but rather sle[pt] in the living room where he [was] around family." (App. Vol. 2 at 115).

[12] At the end of the sentencing hearing, the trial court stated as follows:

I think in looking at [the PSI] and looking at the crime itself, I believe the crime is one that was especially heinous in light of the charged offenses and the elements of the offenses that were required to be proven. This wasn't an incident where a fight occurred and through the course of that fight or that battery, there was a permanent disfigurement, loss of a body – bodily member. This was an intentional act where a person's - you intentionally severed this person's finger. It didn't occur in the course of a fight. That wasn't the outcome of a fight that occurred. That was an intentional act that occurred and was your intent in going in there, and I think that makes this particularly heinous.

The Court is going to find the following aggravating factors, one being Mr. Delgado's criminal history. In looking at each of the felony convictions, there is some form of a violent offense within each felony conviction. Mr. Delgado's currently serving a sentence for two counts of armed robbery, those two counts being crimes of violence.

The other aggravating factor would be that the harm, injury, or loss or damage suffered by the victim of the offense was significant and greater than the elements necessary to prove the commission of the offense, that being the harm of the victim, the anxieties, depression suffered, and further the harm being that this severing, complete loss of a finger is, as I said, heinous and greater than what's necessary to prove the elements of the offense.

(Tr. Vol. 3 at 61-62).

[13] The trial court found no mitigating factors. Thereafter, the trial court sentenced Delgado to twelve (12) years for the Level 3 felony aggravated battery conviction, six (6) years for the Level 4 felony possessing material capable of

causing bodily injury by an inmate conviction, and one (1) year for the Level 6 felony criminal organization activity conviction. The trial court further ordered the twelve-year sentence and the six-year sentence to run consecutively to each other and concurrently with the one-year sentence, resulting in an aggregate sentence of eighteen (18) years.

[14] Delgado now appeals his convictions and sentence.

Decision

[15] Delgado argues that: (1) his convictions for Level 3 felony aggravated battery and Level 4 felony possessing material capable of causing bodily injury by an inmate violate Indiana’s prohibition against double jeopardy; (2) the trial court abused its discretion when it denied his motion for a mistrial; and (3) his sentence is inappropriate. We address each of his contentions in turn.

1. Double Jeopardy

[16] Delgado first argues that his convictions for Level 3 felony aggravated battery and Level 4 felony possessing material capable of causing bodily injury by an inmate violate Indiana’s prohibition against double jeopardy. We disagree.

[17] Whether convictions violate double jeopardy is a pure question of law, which we review de novo. *Morales v. State*, 165 N.E.3d 1002, 1007 (Ind. Ct. App. 2021), *trans. denied*. The Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” Ind. Const. art. 1, §14. Delgado specifically argues that his two convictions violate Indiana’s prohibition against double jeopardy under the actual evidence test established by our supreme court

in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). However, before Delgado had committed the offenses in this case, the Indiana Supreme Court “expressly overrule[d] the *Richardson* constitutional tests in resolving claims of substantive double jeopardy” and adopted an analytical framework to be applied where, as here, “a defendant’s single act or transaction implicates **multiple** criminal statutes (rather than a single statute)[.]” *Wadle v. State*, 151 N.E.3d 227, 235 (Ind. 2020) (emphasis in the original).

[18] Our supreme court summarized the *Wadle* analytical framework as follows:

[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. 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. 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.

Wadle, 151 N.E.3d at 253.

[19] Applying the *Wadle* analytical framework to the facts of this case, we note that the jury convicted Delgado of aggravated battery pursuant to INDIANA CODE § 35-42-2-1.5, which provides that “[a] person who knowingly or intentionally inflicts injury on a person that . . . causes: . . . (2) protracted loss or impairment of the function of a bodily member or organ; . . . commits aggravated battery, a Level 3 felony.” The jury also convicted Delgado of possessing material capable of causing bodily injury by an inmate pursuant to INDIANA CODE § 35-44.1-3-7, which provides that “[a] person who knowingly or intentionally while incarcerated in a penal facility possesses a device . . . that: (1) is used . . . in a manner that is readily capable of causing bodily injury commits a Level 5 felony. However, the offense is a Level 4 felony if the device . . . is a deadly weapon.” These statutes do not clearly permit multiple punishments, either expressly or by unmistakable implication.

[20] With no statutory language clearly permitting multiple convictions, we move to the second step of the *Wadle* analysis: determining whether either offense is included in the other (“either inherently or as charged”) under the included offense statute, INDIANA CODE § 35-31.5-2-168. *See Wadle*, 151 N.E.3d at 227. If not, there can be no double jeopardy. *See id.*

[21] INDIANA CODE § 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.

[22] Subsection (1) is not implicated here. Level 3 felony aggravated battery is not established by proof of Level 4 felony possessing material capable of causing bodily injury by an inmate because Level 3 felony aggravated battery requires a knowingly or intentionally inflicted injury that causes protracted loss or impairment of the function of a bodily member or organ and Level 4 felony possessing material capable of causing bodily injury by an inmate does not. Likewise, Level 4 felony possessing material capable of causing bodily injury by an inmate is not established by proof of Level 3 felony aggravated battery because Level 4 felony possessing material capable of causing bodily injury by an inmate requires a person incarcerated in a penal facility to possess a device that is a deadly weapon and Level 3 felony aggravated battery does not.

[23] Subsection (2) does not apply either because Delgado was not charged with or convicted of any attempt crime. Further, subsection (3) does not apply because Level 3 felony aggravated battery and Level 4 felony possessing material capable of causing bodily injury by an inmate differ in more respects than just the degree of harm or culpability required. As just noted, each offense requires some conduct the other does not.

[24] Because neither Level 3 aggravated battery nor Level 4 felony possessing material capable of causing bodily injury by an inmate is included in the other, either inherently or as charged, Delgado's convictions do not constitute double jeopardy under *Wadle*. See *Diaz v. State*, 158 N.E.3d 363, 370 (Ind. Ct. App. 2020) (holding that Diaz's convictions for murder and Level 5 felony robbery did not constitute double jeopardy under *Wadle*).⁴

2. Motion for Mistrial

[25] Delgado next argues that the trial court abused its discretion when it denied his motion for a mistrial because, according to Delgado, Toth's volunteered testimony concerning Delgado's alleged prior bad act was inadmissible pursuant to Indiana Evidence Rule 404(b). The denial of a motion for a mistrial rests within the sound discretion of the trial court, and we review the trial court's decision only for an abuse of that discretion. *Brittain v. State*, 68 N.E.3d 611, 619 (Ind. Ct. App. 2017), *trans. denied*. Further, the trial court is entitled to great deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of a given event and its probable impact on the jury. *Id.* at 620. To prevail on appeal from the denial of a motion for mistrial, a defendant must demonstrate that the statement in question was so prejudicial that he was placed in a position of grave peril. *Id.*

⁴ Because neither Level 3 felony aggravated battery nor Level 4 felony possessing material capable of causing bodily injury by an inmate is included in the other, we need not further examine the facts of the case under the third step of the *Wadle* test. See *Diaz*, 158 N.E.3d at 370.

The gravity of the peril is measured by the challenged conduct's probable persuasive effect on the jury's decision, not the impropriety of the conduct. *Mickens v. State*, 742 N.E.2d 927, 929 (Ind. 2001). Granting a mistrial "is an extreme remedy that is warranted only when no other action can be expected to remedy the situation." *Kemper v. State*, 35 N.E.3d 306, 309 (Ind. Ct. App. 2015), *trans. denied*. Further, a timely and accurate admonishment is presumed to cure any error in the admission of evidence. *Banks*, 761 NE.2d at 405. In addition, "[w]e presume the jury followed the trial court's admonishment and that the excluded testimony played no part in the jury's deliberation." *Francis v. State*, 758 N.E.2d 528, 532 (Ind. 2001).

[26] Here, our review of the record reveals that the trial court, which was in the best position to evaluate the circumstances of Toth's volunteered statement and its probable impact on the jury, observed that Toth's statement had been very difficult to hear. One of the jurors had told the bailiff that the jury had had difficulty hearing Toth. The trial court further noted that it had also had difficulty hearing Toth and had reviewed the record to confirm what Toth had said. Thereafter, the trial court admonished the jury to disregard Toth's statement, to not allow the statement to influence its decision in the case, and to base its verdict upon the proper evidence in the case and the final instructions regarding the law in the case. This timely and accurate admonishment, which we presume that the jury followed, cured any error in the admission of evidence. *See Banks*, 761 N.E.2d at 405 (concluding that the trial court's admonishment to the jury to disregard a witness' remark about the defendant's

prior unrelated criminal act sufficiently dispelled any grave peril and justified denial of the defendant's motion for a mistrial). The trial court did not abuse its discretion in denying Delgado's motion for a mistrial.

3. Inappropriate Sentence

[27] Delgado also argues that his aggregate eighteen-year sentence is inappropriate. Indiana Appellate Rule 7(B) provides that we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. The defendant bears the burden of persuading this Court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Whether we regard a sentence as inappropriate turns on the "culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008).

[28] When determining whether a sentence is inappropriate, we acknowledge that the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. Here, the jury convicted Delgado of a Level 3 felony, a Level 4 felony, and a Level 6 felony. The sentencing range for a Level 3 felony is between three (3) and sixteen (16) years with an advisory sentence of nine (9) years. See I.C. § 35-50-2-5(b). The sentencing range for a Level 4 felony is between two (2) and twelve (12) years, and the advisory sentence is six (6) years. IND. CODE § 35-

50-2-5.5. The sentencing range for a Level 6 felony is between six (6) months and two and one-half (2½) years, and the advisory sentence is one (1) year. I.C. § 35-50-2-7(b).

[29] The trial court sentenced Delgado to twelve years for the Level 3 felony conviction, the advisory sentence of six years for the Level 4 felony conviction, and the advisory sentence of one year for the Level 6 felony conviction. The trial court further ordered the twelve-year sentence and the six-year sentence to run consecutively to each other and concurrently with the one-year sentence for an aggregate sentence of eighteen years. This eighteen-year sentence is considerably less than the potential maximum sentence of thirty and one-half years.

[30] With regard to the nature of the offense, we note, as did the trial court, that Delgado's crimes were particularly heinous. While incarcerated at the DOC, Delgado intentionally and brutally cut off the tip of Toth's finger after correctional officers had confiscated knives that Toth was holding in his cell for Delgado's prison gang. Specifically, Delgado retrieved a knife, which had been made from the lining of light fixtures, put the knife's blade on Toth's finger, pounded Toth's pinky finger about five times, and then stomped on the knife several times, cutting off the tip of Toth's finger. Delgado then told Toth to clean up the blood from his finger. When Toth attempted to retrieve his fingertip, Delgado told Toth that it belonged to him and placed it in a sandwich baggie. As a result of this incident, Toth suffers from anxiety and depression and is unable to sleep for more than one hour at a time.

[31] With regard to Delgado’s character, we note, as did the trial court, that Delgado, who was twenty-three years old when he committed the offenses in this case, has a criminal history that includes felony convictions for violent offenses. Further, Delgado was incarcerated for those offenses when he committed the offenses in this case. Delgado’s criminal history also includes misdemeanor convictions for resisting law enforcement and operating a vehicle while intoxicated endangering a person.

[32] Based on the nature of the offenses and his character, Delgado has failed to persuade this Court that his aggregate eighteen (18) year sentence for his three felony convictions committed while incarcerated in the DOC is inappropriate.⁵

[33] Affirmed.

Robb, J., and Weissmann, J., concur.

⁵ Delgado also argues that the trial court abused its discretion in sentencing him because it improperly identified as an aggravating factor that the harm, injury, or loss or damage suffered by the victim of the offense was significant and greater than the elements necessary to prove the commission of the offense. According to Delgado, “[t]he evidence establishes conclusively that the harm suffered by the victim was not greater than that required to prove the charged offense[.]” (Delgado’s Br. 35). However, even if the trial court is found to have abused its discretion during sentencing, any error is harmless if the sentence imposed was not inappropriate. *Govan v. State*, 116 N.E.3d 1165, 1177 (Ind. Ct. App. 2019), *trans. denied*. Because we have already determined that Delgado’s sentence was not inappropriate, we decline to further address this issue. *See id.*