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IN THE
COURT OF APPEALS OF INDIANA

Espedicto Padilla Carranza,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 28, 2022

Court of Appeals Case No. 21A-CR-1742

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No. 29D01-1911-F1-9945

Weissmann, Judge.

[1] In *Wadle v. State*, 151 N.E.3 227 (Ind. 2020), and *Powell v State*, 151 N.E.3d 256 (Ind. 2020), our Supreme Court established two new tests for analyzing substantive double jeopardy claims—the *Wadle* "multiple statutes" test and the *Powell* "single statute" test. Here, we are asked to apply *Powell* to convictions requiring a *Wadle* analysis. Applying the proper test, we conclude there was no double jeopardy violation and, therefore, affirm the convictions and their corresponding sentences.

Facts

[2] One night in 2019, Espedicto Padilla Carranza molested his eight-year-old daughter, MNP, by inserting his fingers inside her vagina and rubbing his penis on the outside of her vagina. The State charged Carranza with two counts of child molesting under Indiana Code § 35-42-4-3 (Child Molesting Statute). Count I alleged a Level 1 felony for "other sexual conduct" under subsection (a). Count II alleged a Level 4 felony for "fondling or touching" under subsection (b).

[3] After a jury trial, Carranza was convicted on both counts. The trial court then sentenced him to 35 years on Count I and 8 years on Count II, to be served consecutively. In explaining this enhanced sentence, the court identified the following "substantial aggravating factors": Carranza's lack of remorse, non-acceptance of responsibility, and betrayal of his daughter's trust; the emotional trauma caused to MNP; and the commission of the offenses in the presence of

his eleven-year-old son, who was asleep in the same room when the molesting occurred. Tr. Vol. III, p. 178.

[4] Asserting his right to maintain his innocence, Carranza objected to the trial court considering lack of remorse and non-acceptance of responsibility as aggravating factors. The court, however, assured Carranza that the remaining factors supported imposition of the same 43-year sentence. Tr. Vol. III, p. 181. Carranza now appeals.

Discussion and Decision

I. Double Jeopardy

[5] Carranza argues that his two child molesting convictions constitute double jeopardy. This presents a question of law that we review de novo. *Wadle*, 151 N.E.3d at 237; *Powell*, 151 N.E.3d at 262.

A. The *Wadle* "Multiple Statutes" Test Applies to Carranza's Double Jeopardy Claim

[6] In *Wadle* and *Powell*, our Supreme Court adopted two new tests for addressing claims of "substantive double jeopardy" (*i.e.*, claims concerning multiple convictions in a single prosecution, as opposed to "procedural double jeopardy" claims, which concern convictions for the same offense in successive prosecutions). *Wadle*, 151 N.E.3d at 248-49; *Powell*, 151 N.E.3d at 263. The *Wadle* test applies "when a single criminal act or transaction violates multiple statutes with common elements[.]" 151 N.E.3d at 247. The *Powell* test

applies "when a single criminal act or transaction violates a single statute and results in multiple injuries." 151 N.E.3d at 263.

[7] Carranza's convictions were for violating two subsections of the Child Molesting Statute. That statute provides, in pertinent part:

> (a) A person who, with a child under fourteen (14) years of age, knowingly or intentionally performs or submits to . . . other sexual conduct (as defined in IC 35-31.5-2-221.5) commits child molesting, a Level 3 felony. However, the offense is a Level 1 felony if:
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> > (1) it is committed by a person at least twenty-one (21) years of age.
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> ***
>
> (b) A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Level 4 felony.

Ind. Code § 35-42-4-3.

[8] Subsection (a) of the Child Molesting Statute incorporates by reference Indiana Code § 35-31.5-2-221.5. That statute, in turn, defines "other sexual conduct" to mean "an act involving: (1) a sex organ of one . . . 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. A finger qualifies as an "object" in this context. *Seal v. State*, 105 N.E.2d 201, 209 (Ind. Ct. App. 2018), *trans. denied.*

[9] Because both of Carranza's convictions fall under the Child Molesting Statute, he urges us to apply the *Powell* "single statute" test to his double jeopardy claim. But as Carranza acknowledges, this Court recently held the *Wadle* "multiple statutes" test applied where two child molesting convictions fell under "separate statutory provisions, each defining a separate crime." *Koziski v. State*, 172 N.E.3d 338, 342 (Ind. Ct. App. 2021), *trans. denied.*

[10] The defendant in *Koziski* was convicted of two counts of child molesting under subsection (a) of the Child Molesting Statute; however, the "other sexual conduct" required for each fell under separate subsections of Indiana Code § 35-31.5-2-221.5. *Id.* Specifically, the defendant was convicted under subsection (1) for licking the victim's vagina (an act involving "a sex organ of one person and the mouth . . . another person"), and under subsection (2) for putting his finger inside the victim's vagina (an act involving "the penetration of the sex organ . . . of a person by an object").

[11] Here, the path to *Wadle* is easier than in *Koziski* because Carranza's convictions were based on separate subsections of the primary charging statute rather than a statutory definition incorporated by reference therein. Carranza was convicted under subsection (a) of the Child Molesting Statute for inserting his fingers inside MNP's vagina (an act of "other sexual conduct" involving "the penetration of the sex organ . . . of a person by an object"), and under subsection (b) for rubbing his penis on the outside of MNP's vagina (an act of "fondling or touching . . . with intent to arouse or to satisfy [his] sexual desires"). Though both fall under the Child Molesting Statute, "[w]e 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." *Id.* We conclude *Wadle* applies to Carranza's claim.

B. Carranza's Child Molesting Convictions Do Not Constitute Double Jeopardy

[12] *Wadle* requires a multi-step analysis to evaluate substantive double jeopardy claims that arise when a single criminal act implicates multiple statutes. 151 N.E.3d at 235. First, we look to the statutes. *Id.* If they explicitly allow for multiple punishments, no double jeopardy occurs, and our inquiry ends. *Id.* at 248. If the statutes are unclear, we apply Indiana's included-offense statute. *Id.* (citing Ind. Code § 35-31.5-2-168). If either offense is included in the other, we proceed to the second step and ask whether the defendant's actions are "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Id.* at 249. If the facts show only a single crime, judgment may not be entered on the included offense. *Id.* at 256.

[13] Neither subsection (a) nor subsection (b) of the Child Molesting Statute clearly permits multiple punishments for multiple acts of molestation. We therefore turn to our included-offense statute. 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
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> (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.

[14] Our included-offense statute is not implicated here because child molesting under subsection (a) of the Child Molesting Statute is not established by proof of child molesting under subsection (b) and visa versa. *See* Indiana Code § 35-31.5-2-168(1). Unlike subsection (a), subsection (b) does not require proof of "other sexual conduct" (here, Carranza inserting his fingers in MNP's vagina). Ind. Code § 35-42-4-3. And unlike subsection (b), subsection (a) does not require proof of fondling or touching (here, Carranza rubbing his penis on MNP's vagina). *Id.* Carranza also was not convicted of an attempt crime, and subsections (a) and (b) of the Child Molesting Statute differ in respects other than degree of harm or culpability. *See* Indiana Code § 35-31.5-2-168(2), (3).

[15] Because neither of Carranza's offenses is included in the other, his dual convictions do not constitute double jeopardy under *Wadle*. We therefore affirm both of Carranza's child molesting convictions.

II. Sentencing

[16] Carranza also argues that the trial court erred in sentencing him to a combined 43 years of imprisonment because it considered improper aggravating factors. "[S]entencing decisions rest within the sound discretion of the trial court and

are reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. When imposing a sentence for a felony offense, a trial court must enter a sentencing statement explaining the reasons it imposed a particular sentence. *Id.* A trial court may abuse its discretion by failing to enter this statement, by overlooking reasons that are clearly supported by the record and advanced for consideration, or by considering reasons that are not supported by the record or are improper. *Id.* at 490-91.

[17] Carranza claims the trial court abused its discretion by considering lack of remorse and non-acceptance of responsibility as aggravating factors at sentencing. As it relates to the court's initial sentencing statement, we agree. "A court may not enhance a sentence for lack of remorse based on a defendant's good-faith assertion of innocence." *Hollen v. State*, 740 N.E.2d 149, 158 (Ind. Ct. App. 2000), *trans. granted*, *opinion adopted*, 761 N.E.2d 398 (Ind. 2002).

[18] Our inquiry, however, does not end there. "When a trial court improperly applies an aggravator but other valid aggravating circumstances exist, a sentence enhancement may still be upheld." *Hackett v. State*, 716 N.E.2d 1273, 1278 (Ind. 1999). "The question we must decide is whether we are confident the trial court would have imposed the same sentence even if it had not found the improper aggravator." *Baumholser v. State*, 62 N.E.3d 411, 417 (Ind. Ct. App. 2016).

[19] Here, we can easily answer that question in the affirmative. After Carranza objected to the trial court considering lack of remorse and non-acceptance of responsibility as aggravating factors, the court expressly stated that the remaining aggravating factors still supported the 43-year sentence. Tr. Vol. III, p. 181. Based on the foregoing, we cannot conclude that the court abused its discretion in sentencing Carranza. Carranza's sentence therefore is affirmed.

[20] Affirmed.

Najam, J., and Vaidik, J., concur.