

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Bobby E. Lucas,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 21, 2022

Court of Appeals Case No.
21A-CR-2521

Appeal from the Decatur Superior
Court

The Honorable Matthew D.
Bailey, Judge

Trial Court Cause No.
16D01-2102-F5-165

Altice, Judge.

Case Summary

[1] Following a jury trial, Bobby E. Lucas was convicted of Level 5 felony stalking, Level 6 felony invasion of privacy, and Class A misdemeanor distribution of an intimate image. On appeal, Lucas advances several arguments, which we restate as follows:

1. Do the separate convictions for the crimes of stalking and invasion of privacy constitute a double jeopardy violation?
2. Has the State presented sufficient evidence to convict Lucas of distribution of an intimate image?
3. Is Lucas's sentence inappropriate?

[2] On the double jeopardy issue, we reverse and remand with instructions to vacate Lucas's conviction for Level 6 felony invasion of privacy. On all other issues, we affirm.

Facts & Procedural History

[3] Lucas and Jessica Lucas (Jessica) divorced in 2019 and have two daughters together. After a period of turmoil and an incident at a local supermarket in which Lucas yelled and spat at Jessica, Jessica applied for and was granted an ex parte protective order, which was served on Lucas on May 30, 2020. The protective order, in relevant part, prohibited Lucas from harassing, annoying, telephoning, contacting, or directly or indirectly communicating with Jessica.

[4] Despite the protective order, Lucas continued to contact, harass, and annoy Jessica. On as many as thirty occasions Lucas was seen driving past or parked

near Jessica's home. On one occasion, Lucas followed a car onto school property and shouted at the car's occupants, which included his daughters, from his car window.

[5] Lucas also repeatedly used Facebook to attempt to contact Jessica and people associated with her. Lucas posted comments directed at Jessica on photos posted to their oldest daughter's Facebook page. He also posted remarks and "meme" style posts¹ aimed at Jessica to his own Facebook page. After being blocked, Lucas created a pseudonymous account to contact his daughter, resulting in an online dispute between Lucas and the mother of Jessica's then-significant-other.

[6] Lucas also posted a photo of Jessica to his Facebook page. Jessica's uncovered upper body is depicted in the photo, with computer-generated pen strokes overlaying Jessica's nipples, shielding them from view, although portions of the nipple on the right breast are still clearly visible. In the caption accompanying this photo, Lucas wrote, "[d]on't know why I let this whore destroy me for the last 3 years, [if] anyone working at Valeo [Jessica's place of work] want the unedited version of these hit me up, Boy is David [Jessica's then-significant-

¹ A "meme" is a common format for conveying information online. The term "meme" is derived from the word "memetic" and is defined as "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media." *Meme, Merriam-Webster Dictionary* (2011). In this case, the offending "meme" style post consists of a cartoon graphic of two people engaging in sexual intercourse with customized language superimposed on it and an additional accompanying caption written by Lucas suggesting that Jessica acts promiscuously with her work colleagues.

other] gonna be pissed.” Ex. 15 (typos included in original; bracketed language added for clarity).

- [7] On February 24, 2021, the State charged Lucas with Level 5 felony stalking. On July 29, 2021, the State filed an amended charging information, adding charges for Level 6 felony invasion of privacy² and Class A misdemeanor distribution of an intimate image. On September 22, 2021, Lucas was convicted by a jury on all counts. The trial court sentenced Lucas to five years of incarceration for stalking, two years for invasion of privacy, and one year for distribution of an intimate image, all to be served concurrently. He now appeals.

Discussion & Decision

1. Double Jeopardy

- [8] Lucas argues that his dual convictions for stalking and invasion of privacy violate Indiana’s constitutional prohibition against double jeopardy. IND. CONST. art. 1, § 14. Specifically, he contends that because the two offenses “may be established by proof of the same material elements, namely that Lucas was served with a protective order, that he stalked the same victim and thereby violated the protective order,” *Appellant’s Brief* at 10, the conviction for invasion of privacy should be vacated. The State concedes and we agree that dual

² This charge was enhanced to a Level 6 felony due to a prior conviction for the same crime, notably, against the same victim (Jessica).

convictions for stalking and invasion of privacy violate Indiana’s double jeopardy principles.

[9] For his acts of continuing to contact, harass, and annoy Jessica in violation of a protective order, Lucas was charged and convicted of stalking and invasion of privacy. Because Lucas’s “single act or transaction implicates multiple criminal statutes,” we must apply the analytical framework outlined by the Indiana Supreme Court in *Wadle v. State*, 151 N.E.3d 227, 237 (Ind. 2020). *Wadle* directs that, if neither statute permits multiple punishments, as is the case here,³ we must next determine whether, under Indiana’s included-offense statute, Ind. Code § 35-31.5-2-168,⁴ either offense is included in the other. The State properly concedes that invasion of privacy is a lesser-included offense of stalking and that Lucas’s actions, though ongoing, constituted a single transaction (that is, repeated harassment while violating a protective order). *See Smith v. State*, 839 N.E.2d 780, 783 n.3 (Ind. Ct. App. 2005) (vacating conviction on lesser-included offense of invasion of privacy). In light of the

³ Neither the statute for the crime of criminal stalking, Ind. Code § 35-45-10-5, nor the statute for the crime of invasion of privacy, Ind. Code § 35-46-1-15.1, authorizes multiple punishment for the same criminal act.

⁴ I.C. § 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.

clear violation of double jeopardy, we reverse and remand with instructions to vacate Lucas's conviction and sentence for Level 6 felony invasion of privacy. *See Wadle*, 151 N.E.3d at 240-53 (outlining the standard for vacating the conviction and sentence for the lesser-included offense).

2. Sufficiency

[10] Lucas argues that the State presented insufficient evidence to convict him of distribution of an intimate image. In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. *McCallister v. State*, 91 N.E.3d 554, 558 (Ind. 2018). Instead, we consider only the evidence supporting the conviction and the reasonable inferences flowing therefrom. *Purvis v. State*, 87 N.E.3d 1119, 1124 (Ind. Ct. App. 2017). If there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt, the judgment will not be disturbed. *Baumgartner v. State*, 891 N.E.2d 1131, 1137 (Ind. Ct. App. 2008). It is not necessary that the evidence overcome every reasonable hypothesis of innocence; rather, the evidence is sufficient if an inference may reasonably be drawn from it to support the conviction. *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007).

[11] The State charged Lucas with violating I.C. § 35-45-4-8, which provides in relevant part that a person commits Class A misdemeanor distribution of an intimate image when that person “(1) knows or reasonably should know that an individual depicted in an intimate image does not consent to the distribution of

the intimate image; and (2) distributes the intimate image.” The statute defines “intimate image,” in relevant part, as “exhibition of the uncovered buttocks, genitals, or female breast.” I.C. § 35-45-4-8(c). Additionally, the statute requires that an “intimate image” be “taken, captured, or recorded” by either (A) “an individual depicted in the photograph, digital image, or video and given or transmitted directly to [the accused]”; or (B) the accused “in the physical presence of an individual depicted in the photograph, digital image, or video.” I.C. 35-45-4-8(c)(2). The State argues and we agree that the photo Lucas shared fits the statutory definition of “intimate image.”

[12] Lucas bases his argument on the fact that the image that he shared of Jessica has computer-generated pen strokes overlaying most parts of the nipples. Therefore, Lucas claims, the image does not show an “uncovered” female breast. Lucas contends that because “uncovered” is not statutorily defined, we must turn to the statutory definition of one of its synonyms, “nude” or “nudity,” found in the Indiana public indecency statute, I.C. § 35-45-4-1(d),⁵ to understand what the statute means by “uncovered.” Ultimately, Lucas argues (1) that only a “female breast with less than a fully opaque covering of any part of the nipple” can qualify as an “uncovered” female breast, I.C. § 35-45-4-1(d), and (2) any less precise definition is “unconstitutionally vague.” *Appellant’s*

⁵ In relevant part, I.C. § 35-45-4-1(d) states:

(d) As used in this section, “nudity” means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

Brief at 13. Initially, we observe that Lucas has waived his constitutional argument by failing to assert it at the trial level. *See Baumgartner v. State*, 891 N.E.2d 1131, 1135-36 (Ind. Ct. App. 2008).

[13] Moreover, we observe that the Indiana Supreme Court recently addressed a challenge to this statute’s constitutionality under both Article 1, Section 9 of the Indiana Constitution⁶ and the First Amendment of the United States Constitution.⁷ *Katz*, 179 N.E.3d at 459. The *Katz* Court ruled in that context that the statute is constitutional. The Court also found that the statute’s definitions, including that of “intimate image,” are “precisely defined, with little gray area or risk.” *Id.* at 459. Here, we are satisfied that “intimate image” is sufficiently defined by the statute and that the photo Lucas shared, showing significant portions of Jessica’s uncovered breasts, fits the plain language of that definition. We also note that the photo that Lucas shared not only shows much of Jessica’s uncovered breasts, but clearly displays parts of her uncovered right nipple, satisfying Lucas’s own proffered definition of “intimate image” as well.

⁶ The free interchange clause forbids the Indiana general assembly from passing laws “restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever.” IND. CONST. art. 1, § 9. This limitation on the legislature is constrained, however, only in instances where statutes seek authority over expression “to sanction individuals who commit abuse.” *State v. Katz*, 179 N.E.3d 431, 442 (Ind. 2022) (quoting *Price v. State*, 622 N.E.2d 954, 958 (Ind. 1993)).

⁷ Under the First Amendment analysis, the statute is content-based and thus subject to strict scrutiny, which the statute passes by demonstrating that “it is justified by a compelling government interest and is narrowly drawn to serve that interest.” *Katz*, 179 N.E.3d at 455 (quoting *Brown v. Entertainment Merchs. Ass’n*, 564 U.S. 786, 799 (2011)).

[14] We additionally note that Lucas does not contest that the text that he wrote accompanying the photo clearly shows that he intended to share an intimate image and for it to harm Jessica. In the post’s caption, Lucas wrote, “[d]on’t know why I let this whore destroy me for the last 3 years, [if] anyone working at Valeo [Jessica’s place of work] want the unedited version of these hit me up, Boy is David [Jessica’s then-significant-other] gonna be pissed.” Ex. 15 (typos included in original; bracketed language added for clarity). This caption demonstrates that Lucas knew that the “individual depicted in [the] intimate image,” i.e., Jessica, did not “consent to the distribution of the intimate image.” I.C. § 35-45-4-8(d)(1). Yet, Lucas shared it anyway, and even offered to share the unedited version with any of Jessica’s co-workers who were to ask. Lucas’s intent in sharing the photo overwhelmingly satisfies the unambiguous purpose of the statute.

[15] We affirm Lucas’s conviction and sentence for Class A misdemeanor distribution of an intimate image.

3. Sentencing

[16] Lucas argues that his sentence of five years is inappropriate considering the nature of the offense and his character. Indiana Appellate Rule 7(B) authorizes this court to independently review and revise the sentence imposed if, “after due consideration of the trial court's decision,” it is determined that the sentence imposed is inappropriate when considering the nature of the offense and the character of the offender. Whether a sentence is inappropriate ultimately depends upon “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). Sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference. *Id.* at 1222. That deference should prevail “unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant’s character (such as substantial virtuous traits or persistent examples of good character).” *Gerber v. State*, 167 N.E.3d 792, 797 (Ind. Ct. App. 2021) (quoting *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015)).

[17] When reviewing a sentence, we seek to “attempt to leaven the outliers, not to achieve a perceived ‘correct’ result in each case.” *Cardwell*, 895 N.E.2d at 1225. On appeal, the defendant bears the burden of persuading the appellate court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). In determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Id.*

[18] In this case, Lucas’s sentences are to be served concurrently, the greatest of which is a five-year sentence for Level 5 felony stalking with a sentencing range between one and six years of incarceration and an advisory sentence of three years. Ind. Code § 35-50-2-6. At sentencing, the trial court found no mitigating circumstances and identified Lucas’s criminal history, his history of repeatedly violating Jessica’s protective order against him, and Lucas’s public statements

as aggravating factors, justifying a sentence of five years, two years above the advisory sentence.

[19] Lucas's sentence is not inappropriate in light of the nature of his offenses. When examining the nature of the offenses that the defendant has committed, we consider the details and circumstances of the offenses, along with the defendant's participation therein. *Lindhorst v. State*, 90 N.E.3d 695, 703 (Ind. Ct. App. 2017). Over the course of approximately six months, Lucas repeatedly harassed Jessica and her family, both in person and online. Lucas was recorded driving past and parking near her home, he has, on multiple occasions, verbally harassed Jessica and their daughters, and on one occasion he spat at Jessica. On Facebook and on other online forums, Lucas has repeatedly posted explicit content aimed at offending Jessica. Lucas's behavior exhibits neither restraint nor regard toward his victim.

[20] Similarly, Lucas's character does not suggest his sentence is inappropriate. In evaluating a defendant's character, we engage in a broad consideration of his or her qualities. *Moyer v. State*, 83 N.E.3d 136, 143 (Ind. Ct. App. 2017), *trans. denied*. Lucas has five prior convictions for battery, two of which are felonies. One of the felony battery convictions is for domestic battery. Lucas has a list of other misdemeanor convictions, including a prior conviction for invasion of privacy in which Jessica was the victim. In a telling exchange, Lucas accused Jessica of perjury at sentencing, demonstrating neither acceptance of responsibility nor remorse for his crimes.

[21] Based on the nature of the offenses and Lucas's character, the five-year sentence that the trial court imposed is not inappropriate. Thus, we decline to revise Lucas's sentence.

[22] Judgment reversed and remanded in part, with instructions to vacate Lucas's conviction for Level 6 felony invasion of privacy. Judgment affirmed on all other issues.

Vaidik, J. and Crone, J., concur.