MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Cale E. Winternheimer,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 12, 2021

Court of Appeals Case No.
21A-CR-248

Appeal from the
Vanderburgh Superior Court

The Honorable
Robert J. Pigman, Judge

Trial Court Cause No.
82D03-1904-F4-2903

Kirsch, Judge.

[1] At the conclusion of Cale E. Winternheimer's ("Winternheimer") bench trial, the trial court found Winternheimer guilty but mentally ill of Level 4 felony

attempted arson,[1] Level 6 felony criminal recklessness,[2] and Class B misdemeanor criminal mischief.[3] On appeal, Winternheimer raises one issue, which we restate as whether Winternheimer's convictions for criminal recklessness and criminal mischief violate Indiana's prohibition on double jeopardy.

[2] We affirm.

Facts and Procedural History

[3] On the evening of April 24, 2019, the Evansville chapter of the Grim Reapers Motorcycle Club ("the Club") hosted a charity pool tournament with approximately twenty attendees. *Tr. Vol. II* at 36. One of the attendees, Wayne Forston ("Forston"), was sitting on a barstool just inside the Club's door. *Id*. at 39; *Ex. Vol. III* at 10. Although Winternheimer knew nothing about the Club and had not met any of its members, he drove his truck to the Club with a large can of gas and Molotov cocktails. *Tr. Vol. II* at 62, 69, 93-94. He exited his truck and set the can of gas near the exterior in front of the Club's door before repeatedly ringing the doorbell. *Id*. at 37, 94. Two Club members opened the door but refused to let Winternheimer enter. *Id.* at 37-38, 82. After confirming that Winternheimer had backed away somewhat from the Club, the members

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[1] *See* Ind. Code § 35-43-1-1(a)(2); Ind. Code § 35-41-5-1.

[2] *See* Ind. Code § 35-42-2-2(b)(1).

[3] *See* Ind. Code § 35-43-1-2(a).

closed the door. *Ex. Vol. III, State's Ex. 1* at 17:05-17:85. The can of gas remained beside the door. *Id*. at 17:35.

[4] Moments later, Winternheimer drove his truck forward and smashed into the wall of the Club. *Id*. at 17:50-17:55. The force of the truck broke part of the wall and knocked over Forston's barstool. *Tr. Vol. II* at 39-40. Meanwhile, Winternheimer stepped out of his truck and threw a burning piece of paper at the gas can, but the paper soon extinguished and did not ignite the gas can. *Ex. Vol. III, State's Ex. 1* at 17:55-18:05.

[5] On April 29, 2019, the State charged Winternheimer with Level 4 felony attempted arson, Level 6 felony criminal recklessness, and Class B misdemeanor criminal mischief. *Appellant's App. Vol. 2* at 14-15. The criminal recklessness information alleged that Winternheimer did "recklessly, knowingly, or intentionally with a deadly weapon, perform an act, that created a substantial risk of bodily injury to . . . Wayne Forston." *Id*. at 14. The criminal mischief information alleged that Winternheimer did "recklessly, knowingly or intentionally damage or deface the property of [the Club]." *Id*. The State also alleged that Winternheimer was an habitual offender. *Id*. at 16.

[6] Before trial, Winternheimer raised an insanity defense and was evaluated by two psychologists. *Id*. at 27-29, 41. One psychologist determined that Winternheimer's ability to appreciate the wrongfulness of his actions was impaired by a serious mental disorder; the other psychologist believed

Winternheimer was legally sane at the time of the incident. *Appellant's Conf. App. Vol. 2* at 34, 40.

[7] At the beginning of the August 10, 2020 bench trial, the State agreed to drop the habitual offender allegation, and Winternheimer waived his right to jury trial. *Tr. Vol. II* at 4-5. Winternheimer testified that he drove his truck into the Club because he wanted to kill himself. *Id*. at 81-82, 91. The two psychologists who had earlier evaluated Winternheimer reiterated their conclusions at trial about Winternheimer's mental state at the time he drove his truck into the Club. *Id*. at 106-07, 118. During its closing argument, the State explained that the act of ramming the truck into the exterior wall of the club "caused severe damage to the door and the exterior wall while also endangering everyone that was inside." *Id*. at 136. After taking the matter under advisement, the trial court found Winternheimer guilty but mentally ill of each charge. *Id*. at 140.

[8] On November 20, 2020, the trial court imposed a nine-year sentence for the attempted arson and concurrent terms of eighteen months and six months for the criminal recklessness and criminal mischief convictions respectively. *Id*. at 153; *Appellant's App. Vol. 2* at 73. Winternheimer now appeals.

Discussion and Decision

[9] Winternheimer alleges his convictions for criminal recklessness and criminal mischief violate Indiana's prohibition on double jeopardy because criminal mischief is a lesser included offense of criminal recklessness and that Indiana law forbids entry of judgment of conviction on an offense and a lesser included

offense. Winternheimer contends that criminal mischief is a lesser included offense of criminal recklessness because it differs from criminal recklessness only in that it involves a lesser harm – damage to property – compared to the kind of harm at issue in criminal recklessness – substantial risk of bodily injury.

[10] In *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), the Indiana Supreme Court ruled that Indiana's prohibition on substantive double jeopardy[4] is no longer rooted in the Indiana Constitution but is based on the legislature's intent as expressed in Indiana statutory law.[5] Under this new rule, there are two types of substantive double jeopardy claims: 1) when a single criminal act or transaction violates a single statute but harms multiple victims; and (2) when a single criminal act or transaction violates multiple statutes with common elements and harms one or more victims. *Wadle*, 151 N.E.3d at 247. The parties agree that this case implicates the latter scenario. In either circumstance, the dispositive question is one of statutory intent. *Id*. When multiple convictions for a single act implicate more than one statute, we first look to the statutory language itself. *Id*. at 248. "If the language of either statute clearly permits multiple punishment, either expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy." *Id*. But if the

[4] "Substantive double jeopardy" refers to multiple convictions or punishments for the same offense in a single trial. *Wadle v. State*, 151 N.E.3d 227, 239 (Ind. 2020).

[5] In *Wadle*, the Supreme Court ruled that the double jeopardy prohibition in the Indiana Constitution "should focus its protective scope exclusively on successive prosecutions for the 'same offense.'" *Wadle v. State*, 151 N.E.3d 227, 246 (Ind. 2020).

statutory language is not clear, we apply our included-offense statutes to determine statutory intent. *Id*.

[11] Under Indiana Code section 35-38-1-6, a trial court may not enter judgment of conviction and sentence for both an offense and an "included offense." One type of included offense is an offense that differs from the greater offense "only in the respect that a less serious harm or risk of harm to the same person, property, or public interest . . . ." Ind. Code § 35-31.5-2-168(3). An offense is "factually included" in another offense when "the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense." *Wadle*, 151 N.E.3d at 251 n.30.

[12] "If neither offense is an included offense of the other (either inherently or as charged), there is no violation of double jeopardy." *Id*. at 248. If the underlying facts of the two offenses, as set forth in the charging information and as adduced at trial, show two separate and distinct crimes, there is no violation of substantive double jeopardy, even if one offense is included in the other. *Id*. at 235, 249.

[13] Applying the *Wadle* test, we first observe that neither the criminal recklessness statute nor the criminal mischief statute clearly permits multiple convictions, either expressly or by unmistakable implication. *See* Ind. Code §§ 35-42-2-2(b)(1); 35-43-1-2(a). Therefore, we must determine whether criminal mischief is a lesser included offense of criminal recklessness, either inherently or as charged. Level 6 felony criminal recklessness is established by proof that a

person, while armed with a deadly weapon, knowingly, or intentionally performed an act that created a substantial risk of bodily injury to another person. Ind. Code § 35-42-2-2(a), (b)(1). Class B misdemeanor criminal mischief is established by proof that a person recklessly, knowingly, or intentionally damaged or defaced property of another person without the other person's consent. Ind. Code § 35-43-1-2(a).

[14] We reject Winternheimer's claim that criminal mischief is inherently included in criminal recklessness because Winternheimer is incorrect that criminal mischief differs from criminal recklessness only in that it requires a less serious harm. *See* Ind. Code § 35-31.5-2-168(3). The harms at issue in the statutes – substantial risk of bodily harm (criminal recklessness) and damage to property (criminal mischief) – are harms of a different *kind*, not harm that varies only as to matter of degree. *See* Ind. Code §§ 35-42-2-2(a),(b)(1); 35-43-1-2(a). A person is not the same as a building or other kind of property, and it lies within the legislature's discretion to separately criminalize these different kinds of harms. *Wadle*, 151 N.E.3d at 248.

[15] The facts alleged in the charging information and the evidence adduced at trial demonstrate that the crimes were not factually included and, thus, were not the same crime. Count 2, criminal recklessness, alleged: "[Winternheimer] did recklessly, knowingly, or intentionally with a deadly weapon perform an act that created a substantial risk of bodily injury to . . . Wayne Forston . . . ." *Appellant's App. Vol. 2* at 14. Count 3, criminal mischief, alleged: "[Winternheimer] did, without the consent of [the Club], recklessly, knowingly

or intentionally damage or deface the property of [the Club] . . . ." *Id*. Thus, the charging information alleged that Winternheimer committed two distinct crimes. The evidence presented at trial established that Winternheimer's actions caused two distinct harms. Testimony and exhibits showed that Winternheimer crashed his truck into the Club's wall. *Ex. Vol. III*, *State's Ex. 1* at 17:50-17:55. This damaged the Club's property, supporting the allegation in Count 3. *Appellant's App. Vol. 2* at 14. Winternheimer's actions also caused the distinct harm of creating substantial risk of bodily injury to Forston, who was knocked off the barstool near where Winternheimer had crashed his truck. This provided evidence of the distinct harm alleged in Count 2. *Id*.; *Tr. Vol. II* at 39-40. Thus, the charging information and evidence adduced at trial showed that Winternheimer committed two distinct crimes, so his convictions for criminal recklessness and criminal mischief do not violate the Indiana prohibition on double jeopardy. *See Wadle*, 151 N.E.3d at 248 ("If neither offense is an included offense of the other (either inherently or as charged), there is no violation of double jeopardy."); *see id*. at 249 ("If the facts show two separate and distinct crimes, there's no violation of substantive double jeopardy . . . .").[6]

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[6] Winternheimer also alleges that his convictions violate the common law double jeopardy prohibition on more than one conviction based on the same act. We need not address this issue because *Wadle* subsumed double jeopardy claims rooted in Indiana's common law. We acknowledge that two panels of this court have ruled that common law double jeopardy claims survive *Wadle*: *Rowland v. State*, 155 N.E.3d 637, 640 (Ind. Ct. App. 2020) (noting *Wadle* left common law protection undisturbed); *Shepherd v. State*, 155 N.E.3d 1227, 1240 (Ind. Ct. App. 2020) (ruling "*Wadle* left Indiana's common law double jeopardy jurisprudence intact"), *trans. denied*. However, we choose to follow the six panels who have ruled that a defendant may not raise a double jeopardy claim based on Indiana's common law: *Morales v. State*, 165 N.E.3d 1002, 1007 (Ind. Ct. App. 2021); *Woodcock v. State*, 163 N.E.3d 863, 871 (Ind. 2021) (ruling "the common law rules are incorporated into the *Wadle* analysis and no longer exist independently"), *trans. denied*; *Madden v. State*, 162

[16] Affirmed.

May, J., and Vaidik, J., concur.

N.E.3d 549, 558 (Ind. Ct. App. 2021) (agreeing that *Wadle* and *Powell* "not only overruled the constitutional substantive double jeopardy test in *Richardson*, they also swallowed statutory and common law to create one unified framework for substantive double jeopardy claims); *Jones v. State*, 159 N.E.3d 55, 61 (Ind. Ct. App. 2020) (stating *Wadle* "swallowed statutory and common law to create one unified framework for substantive double jeopardy claims"), *trans. denied*; *Diaz v. State*, 158 N.E.3d 363, 368 (Ind. Ct. App. 2020) (noting *Wadle* "did away with the 'old law' on claims of substantive double jeopardy . . . including all common law rules . . . ."); *Hill v. State*, 157 N.E.3d 1225, 1229 (Ind. Ct. App. 2020) (holding common law protections "did not survive *Wadle*.").