ATTORNEY FOR APPELLANT

Cara Schaefer Wieneke
Wieneke Law Office, LLC
Brooklyn, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Tiffany A. McCoy
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Jason E. Morales,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 25, 2021

Court of Appeals Case No. 20A-CR-913

Appeal from the Vigo Superior Court

The Honorable John T. Roach, Judge

Trial Court Cause No. 84D01-1807-F2-2337

Weissmann, Judge.

[1] Jason E. Morales's computer contained pornographic material in violation of the terms of his parole. After his parole officer confiscated the computer, an agitated Morales attempted to destroy the incriminating electronic evidence by breaking into and setting fire to the parole offices. This act landed Morales three new felony convictions, a habitual offender finding, and another thirty-six years in prison.

[2] Morales appeals his convictions for Level 2 felony burglary and two counts of Level 4 felony arson, claiming the trial court improperly instructed the jury and that some of his convictions violate double jeopardy principles. We reverse one of Morales's arson convictions because it subjects him to double jeopardy but otherwise affirm the trial court's judgment.

Facts

[3] Morales's doomed enterprise began when his parole officer, Travis Carter, conducted a routine search of Morales's home. Officer Carter found a flash drive hidden in Morales's dresser and evidence of a pornographic file on his laptop computer. The terms of Morales's parole barred him from viewing pornography. Officer Carter confiscated the laptop, angering Morales.

[4] That evening Morales told his girlfriend he was worried about the discovery of the pornographic materials, but he had a plan. Morales said he was "gonna burn the parole office up." Tr. Vol. IV, pp. 55, 57.

[5] A few hours after that conversation—and fourteen hours after Officer Carter seized the laptop—Morales used a pry bar to force open the door to the Vigo

County Community Corrections Building. Once inside, Morales pried open the door to Officer Carter's office as well as some file cabinets therein, although nothing apparently was taken. Before leaving, Morales ignited several fires in the parole offices with the use of an accelerant. Approximately sixty people were in the building when the fires were set, but no one was hurt.

[6] Officer Carter and others watched security video footage and identified Morales as the intruder. Officers found a blue pry bar in Morales's car. The paint from the pry bar matched that collected at the parole offices. Morales initially denied being at the scene but later told police he was across the street from the Community Corrections building when the fires occurred.

[7] The State charged Morales with Level 2 felony burglary and three counts of Level 4 felony arson and alleged he was a habitual offender. The trial court dismissed one of the arson counts, and the jury returned verdicts of guilty as to the remaining counts. The trial court sentenced Morales to a total of thirty-six years imprisonment.

Discussion and Decision

[8] Morales raises two issues on appeal. First, he claims the trial court improperly rejected one of his proposed jury instructions. Second, he asserts a double jeopardy violation arising from his convictions for arson and burglary.

I. Instruction

[9] Morales first challenges the trial court's rejection of his "reasonable theory of evidence" instruction. A trial court has discretion when instructing the jury and will be reversed only for an abuse of that discretion. *Winkleman v. State*, 22 N.E.3d 844, 849 (Ind. Ct. App. 2014), *trans. denied*. A trial court abuses its discretion by rejecting an instruction that correctly states the law, is supported by the evidence at trial, and contains directives not covered by other instructions. *Id.*; *McCowan v. State*, 27 N.E.3d 760, 763-64, 766 (Ind. 2015).

[10] Morales's requested instruction provided:

> In determining whether the guilt of the accused is proven beyond a reasonable doubt, you should require that the proof be so conclusive and sure as to exclude every reasonable theory of innocence.

[11] App. Vol. V, p. 78. Morales claims his proposed instruction was mandatory under *Hampton v. State,* 961 N.E.2d 480, 491 (Ind. 2012). In that case, the Indiana Supreme Court ruled an instruction identical to Morales's should be given, when requested, if the only evidence tending to prove the crime's *actus reus* is circumstantial. The *actus reus* is the wrongful act necessary to commit the crime. Wayne R. LaFave & Austin W. Scott, *Criminal Law* § 6.7 at 586 (2d ed. 1986).

[12] Morales argued at trial and asserts again on appeal that the evidence of his commission of the crimes was purely circumstantial. The trial court did not

mention direct or circumstantial evidence when rejecting the instruction. Instead, the trial court declined Morales's instruction because the other instructions conveyed its substance. Tr. Vol. IV, pp. 164-65. Morales claims *Hampton* requires his "reasonable theory of innocence" instruction even under those circumstances.

[13] Morales's argument, planted entirely in *Hampton's* soil, cannot bloom. The State presented a combination of circumstantial and direct evidence of his criminal act. Circumstantial evidence is "based on inference and not on personal knowledge or observation." *Hampton*, 961 N.E.2d at 489 (citing *Circumstantial Evidence*, *Black's Law Dictionary* (9th ed. 2009)). Conversely, direct evidence "is based on personal knowledge or observation" and, "if true, proves a fact without inference or presumption." *Id.* (citing *Gambill v. State*, 675 N.E.2d 668, 675 (Ind. 1996)).

[14] Morales's statement to his girlfriend that he would burn the parole office was direct evidence of the *actus reus*. *See Thompson v. State*, 728 N.E.2d 155, 158-59 (Ind. 2000) (labeling as direct evidence accused's pre-murder statements indicating he would kill victim); *see also Cox v. State*, 475 N.E.2d 664, 667-68 (Ind. 1985) (finding accused's statements admitting guilt are direct evidence). *Hampton* does not apply because the *actus reus* evidence was not solely circumstantial. As Morales offers no other basis for finding the trial court abused its discretion in rejecting his "reasonable theory of evidence" instruction, we find no error.

II. Double Jeopardy

[15] Morales next claims his convictions for arson and burglary violate common law double jeopardy principles. Although we reject that claim, we *sua sponte* find his two convictions for arson violate the statutory prohibition against substantive double jeopardy.

A. Arson and Burglary

[16] Morales's double jeopardy claim rests on his argument that the prosecution twice relied on his use of an accelerant and ignition source to convict him: first, to prove he committed arson and, second, to enhance his burglary conviction to a Level 2 felony by establishing he was armed with a deadly weapon. *See* Ind. Code § 35-31.5-2-86(a)(2) (defining "deadly weapon" as including "chemical substance" readily capable of causing serious bodily injury in the manner it is used, could ordinarily be used, or was intended to be used); Ind. Code § 35-43-2-1(3)(A) (defining burglary as a Level 2 felony if "committed while armed with a deadly weapon").

[17] The Indiana Supreme Court ruled decades ago that enhancement of one offense based on the same act used to convict the defendant of a second offense violates common law double jeopardy principles. *See, e.g.*, *Kingery v. State*, 659 N.E.2d 490, 496 (Ind. 1995); *Moore v. State*, 652 N.E.2d 53, 60 (Ind. 1995). But those decisions predate the Indiana Supreme Court's decision in *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), which dramatically altered our substantive double jeopardy analysis.

[18] Morales suggests *Wadle* preserved common law double jeopardy claims. Panels of this Court have split on this issue. Some have found *Wadle* does not circumscribe all common law double jeopardy claims. *See, e.g.*, *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*.

[19] Others have found *Wadle* engulfed all double jeopardy claims, including those previously arising under the common law. *See, e.g.*, *Woodcock v. State*, case number 20A-CR-432, 2021 WL 325844 at *3 (Ind. Ct. App. Jan. 28, 2021) (ruling "the common law rules are incorporated into the *Wadle* analysis and no longer exist independently"); *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*"). We subscribe to the latter view for the reasons expressed in *Jones*. 159 N.E.3d at 61-62. Therefore, we analyze Morales's double jeopardy claim under the analysis required by *Wadle*.

[20] Determinations of double jeopardy claims are questions of law that we review *de novo*. *Id.* at 237. Where, as here, a defendant's single act or transaction is

charged under multiple statutes, *Wadle* first requires us to review the charging statutes to determine if they allow multiple punishments. 151 N.E.3d at 253. Indiana's arson statute provides, in pertinent part:

> A person, who, by means of fire, explosive, or destructive device, knowingly or intentionally damages . . . (2) property of any person under circumstances that endanger human life [or] (3) property of another person without the other person's consent if the pecuniary loss is at least five thousand dollars ($5,000) . . . commits arson, a Level 4 felony.

Indiana Code § 35-43-1-1(a)

[21] This portion of this statute "does not define different . . . crimes that might be called 'arson endangering life' or 'arson causing pecuniary loss' or 'arson of a dwelling.'" *Matthews v. State*, 849 N.E.2d 578, 586-87 (Ind. 2006). Instead, "it defines . . . [what is now Level 4] felony arson as knowingly or intentionally damaging one person's property by fire with any one of the alternative criteria in subsections (a)(1)-(4)." *Id.* at 587. If only one person's property is damaged by fire, only one Level 4 felony arson occurs "even if more than one of the circumstances set forth in subsection (a)(1)-(4) are found." *See id.* Based on *Matthews*, we conclude the arson statute does not permit multiple punishments

"expressly or by unmistakable implication" under these circumstances. *See Wadle,* 151 N.E.3d at 253.[1]

[22] Whether Indiana's burglary statute permits multiple punishments is a closer question. Indiana Code § 35-43-2-1 specifies that "[a] person who breaks and enters the building or structure of another person, with intent to commit a felony or theft in it, commits burglary, a Level 5 felony." However, the offense is a Level 2 felony if "committed while armed with a deadly weapon." I.C. § 35-43-2-1(3)(A).

[23] The language of this statute establishes that a burglary does not occur unless the breaking and entering is accompanied by the intent to commit a different crime—that is, another felony. Hence, the burglary statute necessarily contemplates the potential commission of a second offense, for which a second punishment would be appropriate. In this sense, the burglary statute is similar to the tax statutes cited by *Wadle* as examples of statutes permitting multiple punishments. 153 N.E.3d at 248 n22 ("[O]ur tax code, for example, expressly permits the imposition of an excise tax on the delivery, possession, or

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[1] We note that Indiana Code § 35-43-1-1 explicitly provides for multiple punishments under other circumstances. Where multiple people suffer "a bodily injury or serious bodily injury that is caused by" arson charged under Indiana Code § 35-43-1-1, subsection (e) of that statute authorizes a separate count of arson for each such person. The State did not allege any bodily injury. Instead, the two counts of arson were charged under Indiana Code § 35-43-1-1(a)(2) (endangering human life) and Indiana Code § 35-43-1-1(a)(3) (pecuniary damage of at least $5,000). App. Vol. II, p. 39. In the next section of this opinion, we address whether Morales's multiple arson convictions violated his right against double jeopardy under *Powell v. State*, 151 N.E.3d 256 (Ind. 2020).

manufacture of a controlled substance, 'in addition to any criminal penalties' imposed under Title 35.").

[24] But burglary does not *require* commission of a second offense. Proof of mere intent to commit a felony at the time of the breaking and entering is sufficient to prove burglary. *Moffatt v. State*, 542 N.E.2d 971, 975 (Ind. 1989). The prosecution may prove the accused committed the intended felony within the structure, a different felony within the structure, or no felony at all. Burglary occurs in each of those scenarios so long as the accused broke and entered the structure with the intent to commit any felony. *See Jones v. State*, 519 N.E.2d 1233, 1235 (Ind. 1998) ("[P]roof of burglary with the intent to commit theft does not necessitate proof of theft, only proof of intent to commit theft."); *Smith v. State*, 671 N.E.2d 910, 912 (Ind. Ct. App. 1996) ("[I]t was not necessary for the State to prove that [defendant] committed theft or any other felony because the burglary was completed upon [defendant's] breaking and entering with intent to commit a felony.").

[25] Where, as here, "the statutory language is not clear [as to whether multiple punishments are permitted], *Wadle* requires a reviewing court "to apply our included-offense statutes to determine statutory intent." *Id.* at 249. Indiana Code § 35-31.5-2-168 defines "included offense" as one 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.

[26] Morales's intent to commit arson was an element of the burglary count, but the two offenses are not the same. Arson, as charged here, requires intentional damage to property that either endangers human life or results in pecuniary loss of at least $5,000. I.C. § 35-43-1-1(a). Burglary requires the breaking and entering of a building or structure with the intent to commit a felony or theft in it. I.C. § 35-43-2-1. Given these disparate material elements, arson cannot be the lesser included offense of a burglary in which the intended felony is not arson. *See* I.C. § 35-31.5-2-68(1).

[27] Where arson is the intended felony of the burglary, however, we must consider whether the burglary subsumed the arson—that is, whether the burglary required proof of all of the elements of arson. If so, the arson indisputably would be a lesser included offense of the burglary. *See*, *e.g.*, *Vincent v. State*, 639 N.E.2d 315, 317 (Ind. Ct. App. 1994) (finding residential entry was a lesser included offense of burglary because burglary required proof of all elements of residential entry).

[28] Morales's burglary conviction did not require proof of the arson—only proof of Morales's intent to commit arson when he was breaking and entering. *See*

Jones, 519 N.E.2d at 1235 (finding proof of all elements of intended felony not required to prove burglary). Just as theft is not inherently a lesser included offense of burglary with intent to commit theft, arson is not a lesser included offense of burglary with intent to commit arson under I.C. § 35-31.5-2-68(1). *See id.*

[29] Neither is arson a lesser included offense of burglary under the other subsections of the lesser included offense statute. No attempted crime was charged, and the differences between Level 4 felony arson and Level 2 felony burglary vary in more ways than just level of harm or culpability. I.C. § 35-31.5-2-68(2), -(3). As arson is not a lesser included offense of burglary with intent to commit burglary, no double jeopardy violation has occurred from Morales's convictions for both offenses. *See Wadle*, 151 N.E.3d at 253.

B. Dual Arson Convictions

[30] Although we reject Morales's common law claim, we *sua sponte* address a different double jeopardy issue: whether his convictions for two counts of arson for setting the same fires violate the statutory prohibition on substantive double jeopardy. The arson convictions differed in only one respect. One was based on arson "under circumstances that endanger life" under Indiana Code § 35-43-1-1(a)(2), and the other was based on arson damaging the property of Vigo County with a pecuniary loss of at least $5,000.00 under Indiana Code § 35-43-1-1(a)(3).

[31] As questions of double jeopardy implicate fundamental rights, we routinely address specific double jeopardy violations even when the parties have not begun the conversation. *See Whitham v. State*, 49 N.E.3d 162, 168 (Ind. Ct. App. 2015) (reversing *sua sponte* five convictions on double jeopardy grounds), *trans. denied*; *Williams v. State*, 892 N.E.2d 666, 668 (Ind. Ct. App. 2008) (reversing *sua sponte* attempted theft conviction on double jeopardy grounds), *trans. denied*.

[32] For this analysis, *Wadle* is not our guide. *Wadle* applies when a single criminal act or transaction violates multiple statutes with common elements. But where, as here, a single criminal act or transaction violates a single statute and results in multiple consequences, *Wadle's* sister—*Powell v. State*, 151 N.E.3d 256 (Ind. 2020)—controls. The question is not whether one offense is included in the other (arson is clearly the same as arson). *Powell,* 151 N.E.3d at 263. Instead, *Powell* requires us to ask whether "the same act may be twice punished" as "two counts of the *same* offense." *Id.* (emphasis in original).

[33] We first must review the text of the arson statute to determine whether it, "expressly or by judicial construction," fragments criminal acts into "a unit of prosecution": that is, whether "the statute permits punishment for a single course of criminal conduct or for certain discrete acts within that course of conduct." *Id.* at 264. Arson charged under the first portion of the statute—Indiana Code § 35-43-1-1(a)(1)-(4)—establishes one offense with varying consequences. *Matthews*, 849 N.E.2d at 587. Yet, where multiple people suffer "a bodily injury or serious bodily injury that is caused by" arson, Indiana Code

§ 35-43-1-1(e) authorizes a separate count of arson for each such person even when the accused sets a single fire.[2]

[34] When, as here, a statute permits more than one reasonable interpretation under this analysis, *Powell* deems it ambiguous. 151 N.E.3d at 268. *Powell* then requires us to determine whether the facts, "as presented in the charging instrument and as adduced at trial," establish Morales's criminal acts as a single offense or indicate several distinguishable offenses. *Id.* This assessment hinges on whether the acts are "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Id.*

[35] Morales set a series of fires within the parole offices during a thirty-minute period immediately after burglarizing the building in the middle of the night. Those fires simultaneously damaged the building and endangered human life. He was charged with and convicted of arson under Indiana Code § 35-43-1-1(a)(2) and -(3). Our Supreme Court in *Matthews* determined multiple arsons charged under those subsections constitute one transaction. 849 N.E.2d at 587. The facts of this case, as charged and as proven, establish that the two arson counts are a single offense.

[36] We therefore conclude Morales impermissibly was convicted of two counts of arson for setting fires with multiple consequences already encompassed in each

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[2] Subsection (e) is not at issue here because the fires caused no bodily injury. Instead, the two counts of arson for which Morales was convicted were charged under Indiana Code § 35-43-1-1(a)(2) (endangering human life) and Indiana Code § 35-43-1-1(a)(3) (pecuniary damage of at least $5,000). App. Vol. II, p. 39.

individual count. *See Matthews*, 849 N.E.2d at 587. The trial court's entry of concurrent sentences for the arson convictions did not cure this double jeopardy violation. *See Hines v. State*, 30 N.E.3d 1216, 1221 (Ind. 2015) (double jeopardy violation "cannot be remedied by the 'practical effect' of concurrent sentences or by merger after conviction has been entered"). One of Morales's arson convictions must be vacated.

[37] We reverse the trial court's judgment in part and remand with instructions to the trial court to vacate one of the arson convictions. Finding no other double jeopardy violation and no instructional error, we otherwise affirm the trial court's judgment.

Mathias, J., concurs.
Altice, J., concurs with a separate opinion.

IN THE
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Jason E. Morales, *Appellant-Defendant,* v. State of Indiana, *Appellee-Plaintiff.*	Court of Appeals Case No. 20A-CR-913

Altice, Judge, concurring.

[38] I write separately to acknowledge my prior concurrences in *Shephard* and *Rowland*. Both cases came down within a month of the sea change in Indiana double jeopardy jurisprudence brought on by *Wadle*, and neither engaged in any analysis regarding whether *Wadle* left standing our common law double jeopardy principles. They merely stated that it did. *See Shepard*, 155 N.E.3d at 1240 (noting that "it is our understanding that *Wadle* left Indiana's common law double jeopardy jurisprudence intact"); *Rowland*, 155 N.E.3d at 640 (stating that *Wadle* "appears to have left undisturbed" the common law rules).

[39] The subsequent line of cases, which all held otherwise, thoroughly analyzed the issue. I am persuaded by these cases, particularly the detailed analysis in *Jones*, 159 N.E.3d at 61-62. Therefore, I now fully concur in the case at hand.