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IN THE
COURT OF APPEALS OF INDIANA

State of Indiana,
Appellant-Plaintiff,

v.

Jarod Deangelo Johnson,
Appellee-Defendant.

February 23, 2022

Court of Appeals Case No. 21A-
CR-1726

Appeal from the Lake Superior
Court

The Honorable Salvador Vasquez,
Judge

Trial Court Cause No.
45G01-2104-F1-27

Riley, Judge.

STATEMENT OF THE CASE

- [1] Appellant-Plaintiff, the State of Indiana, brings this interlocutory appeal of the trial court's grant of Appellee-Defendant's, Jarod Johnson (Johnson), Motion to Dismiss.
- [2] We reverse and remand for trial.

ISSUE

- [3] The State presents this court with one issue, which we restate as: Whether Indiana's double jeopardy statute barred it from prosecuting Johnson on state criminal charges following his acquittal in federal court on a charge stemming from the same incident.

FACTS AND PROCEDURAL HISTORY

- [4] The background for the instant charges as outlined in the probable cause affidavit filed in Cause 45G01-2104-F1-027 (F1-27) is as follows. On April 15, 2019, Johnson was scheduled to go on trial for serious felony charges involving "Amber," a woman known to T'Anna Green (Green). (Appellant's App. Vol. II, p. 12). Late on April 14, 2019, as Green walked home from her job, her path was blocked by a car in which Johnson's brother, Jaron Johnson (Jaron), and Johnson's mother, Patricia Carrington (Carrington), were riding. Jaron exited the car and forced Green into the backseat. Green was driven around for a period of time, and her eyes were covered with socks. The car stopped eventually, and Johnson entered the vehicle. Johnson demanded to know where Amber was and told Green that if he went to prison, he would "kill all of

you[.]” (Appellant’s App. Vol. II, p. 12). Green later reported that “she knows his distinctive voice and the things he was saying to her confirmed to her that it was [Johnson] speaking.” (Appellant’s App. Vol. II, p. 12). Green would not divulge Amber’s whereabouts. The car stopped again, and Green was dragged to a deserted area, where Johnson told her to “give me the address or I’m going to do to you what I did to Amber.” (Appellant’s App. Vol. II, p. 12). Green heard Carrington say, “Yeah, bitch,” and then Green was shot. Green heard Johnson say, “Ma, she ain’t dead[.]” after which Green heard several more gunshots and felt herself being shot again. (Appellant’s App. Vol. II, p. 12). Green was then left alone in the deserted area but was later able to make it to a house where she secured help. Subsequent investigation showed that Johnson’s ankle monitor pinged in the area where Green reported being shot around the time she reported the shooting had occurred. Police found duct tape, blood, and four shell casings in that area, and Green identified Johnson, Jaron, and Carrington from photo arrays.

[5] On April 16, 2019, the State filed an Information in Cause 45G01-1904-F1-16 (F1-16), charging Johnson with attempted murder, two Counts of kidnapping, aggravated battery, battery by means of a deadly weapon, battery resulting in serious bodily injury, and intimidation. On May 16, 2019, Johnson was indicted in the United States District Court for the Northern District of Indiana on a single federal kidnapping charge. On May 22, 2019, the State moved to dismiss the F1-16 charges due to the federal charge having been filed, and the trial court granted that motion. Prior to Johnson’s federal trial, Jaron and

Carrington each pleaded guilty to one charge of federal kidnapping relating to the events of April 14 to April 15, 2019. On March 26, 2021, after a jury trial, Johnson was acquitted on the federal kidnapping charge.

[6] On April 12, 2021, the State re-filed an Information in F1-27, charging Johnson with offenses identical to those it had charged in F1-16, except that it omitted the two kidnapping charges. On May 3, 2021, Johnson filed his Motion to Dismiss, arguing that, pursuant to Indiana's double jeopardy statute, his acquittal on the federal kidnapping charge barred his prosecution on the F1-27 charges. On July 23, 2021, the trial court held a hearing on Johnson's motion and issued its Order dismissing the State's charges. The trial court ruled as follows:

6. A number of documents and exhibits were submitted by [Johnson] and the State of Indiana in support of their respective position. All documents indicate that the underlying events in both the state court and federal court involved the same conduct and circumstances.

7. The plain language of [Indiana Code section] 35-41-4-5 requires a comparison of the conduct alleged to constitute an offense in Indiana with the conduct alleged to constitute an offense in another jurisdiction. In this case, [the federal kidnapping case].

8. In this Motion to Dismiss, [Johnson] carries the burden of proof by a preponderance of the evidence that the subsequent prosecution is barred by double jeopardy and therefore in violation of [section] 35-41-4-5.

9. This [c]ourt now finds that [Johnson] has met [his] burden of proof.

10. Both the state and federal prosecutions involve the same conduct and series of events that occurred over a relatively short period of time on April 14, 2019.

(Appellant’s App. Vol. II, pp. 240-41).

[7] The State now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[8] The State appeals following the trial court’s grant of Johnson’s Motion to Dismiss the pending state criminal charges against him. A defendant has the burden of proof on a motion to dismiss criminal charges to show all the facts necessary to support his motion. *Swenson v. State*, 868 N.E.2d 540, 541-42 (Ind. Ct. App. 2007). Because the State appeals from a matter upon which the defendant had the burden of proof, it appeals from an adverse judgment. *Smith v. State*, 993 N.E.2d 1185, 1189 (Ind. Ct. App. 2013), *trans. denied*. We will reverse the trial court’s adverse judgment if its findings are clearly erroneous, meaning they are not supported by substantial evidence of probative value, or if “we are left with a definite and firm conviction that a mistake has been made.” *Id.* In addition, inasmuch as resolution of the issue before us entails statutory construction, those are matters which we review *de novo*. *Ladra v. State*, 177 N.E.3d 412, 415 (Ind. 2021).

II. *Analysis*

[9] The State contends that it is not barred from prosecuting Johnson on charges of attempted murder, aggravated battery, battery by means of a deadly weapon, battery resulting in serious bodily injury, and intimidation following his acquittal on the federal kidnapping charge. State and federal governments are considered to be separate or “dual” sovereigns. *Smith*, 993 N.E.2d at 1189. Our Indiana state and federal Constitutions do not bar overlapping convictions between dual sovereign entities. *See Dill v. State*, 82 N.E.3d 909, 911 (Ind. Ct. App. 2017), *trans. denied*. However, our state legislature has provided protection against multiple prosecutions from different jurisdictions through Indiana’s double jeopardy statute, which provides:

In a case in which the alleged conduct constitutes an offense within the concurrent jurisdiction of Indiana and another jurisdiction, a former prosecution in any other jurisdiction is a bar to a subsequent prosecution for the *same conduct* in Indiana, if the former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 of this chapter.

Ind. Code § 35-41-4-5 (emphasis added). Put another way, a prior conviction or acquittal in another jurisdiction bars a subsequent Indiana state prosecution for the “same conduct.” *See id.*; *see also State v. Allen*, 646 N.E.2d 965, 967-68 (Ind. Ct. App. 1995), *trans. denied*. The determination of whether a prosecution is barred pursuant to Indiana’s double jeopardy statute because it is based upon the same conduct does not entail application of the ‘actual evidence’ or ‘statutory elements’ tests formerly deployed when we engaged in

constitutionally-based double jeopardy analysis following *Richardson v. State*, 717 N.E.2d 32, 49-50 (Ind. 1999). *Smith*, 993 N.E.2d at 1190. Rather, Indiana’s double jeopardy statute requires us to consider the “‘overt acts’ alleged in the sister jurisdiction’s charge in juxtaposition with the allegation in the State’s charge.” *Brewer v. State*, 35 N.E.3d 284, 286 (Ind. Ct. App. 2015) (quoting *Allen*, 646 N.E.2d at 972). Our approach to this analysis has also been characterized by this court as “comparing the statutory charges brought and the evidence in support of the allegations.” *Dill*, 82 N.E.3d at 912. Therefore, our analysis centers on comparing the substance of the specific factual allegations contained in the charging instruments to determine if the offenses alleged therein are based on the same conduct. *See Smith*, 993 N.E.2d at 1190 (“The plain language of the statute requires a comparison of the conduct alleged to constitute an offense in Indiana with the conduct alleged to constitute an offense in another jurisdiction[.]”).

[10] Here, Johnson was charged in the federal case with kidnapping, 18 U.S.C. 1201(a)(1), in relevant part as follows:

On or about April 14, 2019, and continuing to on or about April 15, 2019, . . . [Johnson] did unlawfully and willfully seize, confine, kidnap, abduct, and carry away, and held [Green], an adult person, for information concerning a witness in a criminal case, and otherwise. In committing and in furtherance of the commission of the offense, [Johnson] did willfully use a means, facility, and instrumentality of interstate commerce[.]

(Appellant’s App. Vol. II, p. 47). Thus, the overt acts alleged in the federal charge were that Johnson unlawfully and willfully seized, confined, kidnapped, abducted, carried away, and held Green, and that, in doing so, he used a means, facility, and instrumentality of interstate commerce. Although the United States also alleged that Johnson committed these acts “for information concerning a witness in a criminal case[,]” motive is not an element of the federal kidnapping offense. (Appellant’s App. Vol. II, p. 47). *See* 18 U.S.C. 1201(a)(1). Therefore, we conclude that portion of the federal charge was mere surplusage.

i. *Attempted Murder*

[11] The State charged Johnson with attempted murder as follows:

[O]n or about April 14, 2019, . . . Johnson, while acting with the intent to kill, did knowingly attempt to kill another human being, to wit: [] Green, by shooting and wounding [] Green with a deadly weapon, to wit: a firearm[.]

(Appellant’s App. Vol. II, p. 10). The United States’ federal kidnapping charge made no reference to Johnson’s alleged intent to kill, shooting or wounding Green, or his use of a firearm. These are the operative allegations of the State’s attempted murder charge, and they are not the same overt acts alleged in the federal kidnapping case. Therefore, we conclude that the State is not statutorily barred from prosecuting Johnson for attempted murder following his acquittal on the federal kidnapping charge.

ii. *Aggravated Battery*

[12] The State charged Johnson with aggravated battery as follows:

[O]n or about April 14, 2019, . . . Johnson did knowingly or intentionally inflict injury on [] Green that created a substantial risk of death[.]

(Appellant’s App. Vol. II, p. 10). The federal kidnapping charge did not allege any physical injury to Green, let alone one that created a substantial risk of death. Because the United States did not allege that Johnson injured Green and created a substantial risk of her death, we conclude that the State’s charge is not based on the same conduct as the federal charge and that the State may prosecute Johnson for the alleged aggravated battery offense.

iii. *Battery by Means of a Deadly Weapon*

[13] The State’s Information charged Johnson with battery by means of a deadly weapon as follows:

[O]n or about April 14, 2019, . . . Johnson did knowingly or intentionally touch [] Green in a rude, insolent, or angry manner, by shooting and wounding [] Green, said touching being committed with a deadly weapon, to wit: a firearm[.]

(Appellant’s App. Vol. II, p. 10). Comparing the allegations of the federal kidnapping charge to the State’s Information for battery by means of a deadly weapon, we see no reference in the federal charge to a knowing or intentional shooting or wounding by Johnson of Green with a firearm. Therefore, the two

charging instruments are not based on the same conduct, and the State's prosecution of this charge may go forward.

iv. *Battery Resulting in Serious Bodily Injury*

[14] The State's battery resulting in serious bodily injury charge provided as follows:

[O]n or about April 14, 2019, . . . Johnson did knowingly or intentionally touch [] Green in a rude, insolent, or angry matter, resulting in serious bodily injury to [] Green[.]

(Appellant's App. Vol. II, p. 10). Again, the United States did not allege that Johnson had knowingly or intentionally touched Green in a manner resulting in injury to her. Therefore, we conclude that the federal kidnapping allegation and the State's battery resulting in serious bodily injury charge are not based on the "same conduct" for purposes of Indiana Code section 35-41-4-5.

v. *Intimidation*

[15] Lastly, the State charged Johnson with intimidation as follows:

[O]n or about April 14, 2019, . . . Johnson did communicate a threat to [] Green, another person, with the intent that said other person engage in conduct against the will of said other person, to-wit: reveal the location of another person, and in committing said act the defendant drew or used a deadly weapon, to-wit: a firearm[.]

(Appellant's App. Vol. II, p. 10). We reach the same result here as we have regarding the other charges brought by the State: The United States did not charge Johnson with kidnapping by alleging that, using a firearm, he

communicated a threat to Green so that she would reveal the location of another person. Although the federal charge included an allegation that Johnson had kidnapped Green for information concerning a witness, as noted above, the federal kidnapping statute does not require proof of motive to obtain a conviction. *See* 18 U.S.C. 1201(a)(1). In making this observation, we clarify that we are not engaging in a ‘same elements’ or ‘same evidence’ test traditionally employed under *Richardson* double jeopardy analysis and that we only consider the elements of the federal statute for purposes of determining what allegations were essential to the federal charge. *See Smith*, 993 N.E.2d at 1190. Having concluded that the state intimidation charge is not based on the same conduct as the federal kidnapping charge, we conclude that this state charge may also go forward.

[16] In reaching these conclusions, we observe, as did the trial court in its remarks from the bench, that there is scant Indiana caselaw applying section 35-41-4-5. Although both parties cite to several Indiana state cases in support of their appellate arguments, none of the authority cited by either party involves a state prosecution following a federal acquittal on charges pertaining to conduct that occurred on the same day involving the same victim over an approximately two-hour time-span. Nevertheless, our approach today is grounded in settled law, as set forth above, that Indiana statutory double jeopardy analysis centers on comparing the conduct alleged in the charging instruments. We are unconvinced by the rationale relied upon by the trial court and as argued by Johnson on appeal that the State may not prosecute him for the charged state

offenses because “both the state and federal prosecutions involve the same conduct and series of events that occurred over a relatively short period of time on April 14, 2019,” as no Indiana cases to date stand for the proposition that the Indiana double jeopardy statute bars prosecution under circumstances such as those presented here, and it is unclear to us whether the trial court’s analysis was based primarily on its comparison of the factual allegations contained in the federal and state charging instruments. (Appellant’s App. Vol. II, p. 241).

[17] In addition, we reject Johnson’s arguments that the United States’ factual summary of the federal kidnapping case proffered as part of a motion seeking the admission of statements by Jaron and Carrington and the factual bases supporting Jaron’s and Carrington’s guilty pleas show that the State is attempting to prosecute him here for the same conduct involved in the federal case. Those submissions were made for purposes other than arguing the merits of an Indiana statutory double jeopardy claim and did not constitute binding admissions or concessions on the part of the State for purposes of the issue before us. *Compare Swenson*, 868 N.E.2d at 543 (relying in part on the State’s explicit concession in responding to Swenson’s motion to dismiss that its charges were based on the same overt acts to which he had already pleaded guilty in Kentucky). Neither do we find persuasive Johnson’s argument that the State was barred from prosecuting him because it had simply re-filed the F1-16 charges, apart from omitting the two state kidnapping charges. The previous filing of the F1-16 state charges has nothing to do with a comparison of what conduct was involved in the federal kidnapping charge and the F1-27 charges.

[18] We also reject Johnson’s contention that, because the United States presented evidence and argument relating to his participation in the events which will be presented at his trial on the state charges, the state charges are based on the same conduct as the federal charge. As shown in the portions of the federal trial transcript Johnson designated in support of his Motion to Dismiss, one of Johnson’s defense theories to the federal kidnapping charge was that Green was mistaken when she identified him by his voice when he spoke to her after he got into the car. The State’s presentation of evidence of Johnson’s actions, including the shooting and infliction of injury on Green, were relevant to addressing that defense. The fact that the United States sought to contextualize Johnson’s participation in Green’s kidnapping and his actions after he was in the car, all of which was necessary to respond to Johnson’s defense theory, did not change the fact that Johnson was not charged with, and thus was not placed in legal jeopardy for, any of the conduct forming the basis of the state charges. Accordingly, we are “left with a definite and firm conviction” that the trial court erred when it concluded that the conduct alleged in the State’s F1-27 charges was the same conduct which had formed the basis for the federal kidnapping charge. *See Smith*, 993 N.E.2d at 1189.

CONCLUSION

[19] Based on the foregoing, we conclude that the State’s prosecution on the F1-27 charges is not barred by Indiana’s double jeopardy statute following Johnson’s acquittal on the federal kidnapping charge.

[20] Reversed and remanded for trial.

[21] Robb, J. and Molter, J. concur