IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

BRIAN MITCHELL LEE,

Appellant/
Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/
Cross-Appellant.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D15-0943 & 15-0945

Opinion filed November 28, 2016.

An appeal from the Circuit Court for Escambia County.
Terry D. Terrell, Judge.

Nancy A. Daniels, Public Defender, and A. Victoria Wiggins, Assistant Public Defender, Tallahassee, for Appellant/Cross-Appellee.

Pamela Jo Bondi, Attorney General, and Heather Flanagan Ross, Assistant Attorney General, Tallahassee, for Appellee/Cross-Appellant.

BILBREY, J.

Brian Mitchell Lee appeals his convictions following a jury trial, for traveling to meet a minor after use of a computer service to seduce, solicit, or lure

the minor to engage in sex, in violation of section 847.0135(4)(a), Florida Statutes (2013); unlawful use of a two-way communications device to facilitate the commission of a felony, in violation of section 934.215, Florida Statutes (2013); and use of a computer service to seduce, solicit, or lure a minor to engage in sex, in violation of section 847.0135(3)(a), Florida Statutes (2013). Appellant argues that the elements of the unlawful use of the cell-phone and use of the computer service to solicit offenses are subsumed by the elements of the travel after solicitation offense, and therefore the convictions and sentences for all three offenses constitute double jeopardy. Because the information in this case did not allege distinct acts, the verdict form did not separate the acts, and the evidence presented to the jury was such that we cannot clearly determine that the acts underlying Appellant's conviction were separate, we are compelled to agree and reverse Appellant's convictions and sentences for counts II and III in this case. We reject the other issues raised by the Appellant and the State's cross-appeal of the Appellant's downward departure sentence without comment. See State v. Wiley, 179 So. 3d 481 (Fla. 1st DCA 2015) rev. granted 2016 WL 934496 (Fla. Mar. 7, 2016) (requiring prosecutor to object to a downward departure after it is granted to be able to preserve the issue for appellate review).

The State charged Appellant with travel after solicitation (Count I), "on or about January 2, 2014." Counts II and III charged Appellant with use of the

computer service, etc., and use of the two-way communications device "on one or more occasions between December 22, 2013, and January 1, 2014." The charges arose from Appellant's electronic correspondence with an Escambia County Sheriff's investigator posing online as a 14-year-old boy. The investigator responded to Appellant's internet advertisement on Craigslist for legal sexual activity between adults, but the investigator on December 22, 2013, informed Appellant that he was communicating with an underage boy. Appellant persisted with frequent messages several times per day with increasingly graphic and explicit suggestions of sexual activity, between December 22, 2013, and January 1, 2014. The only gap in communications was during Christmas Eve and Christmas Day. None of the messages dated January 2, 2014, contained any reference to sexual activity, but January 2, 2014, was the date Appellant traveled to meet the investigator's fictitious persona. Appellant was arrested when he arrived at the agreed-upon meeting place. Following a jury trial, the Appellant was convicted and sentenced on all three counts.

As explained by the Florida Supreme Court:

> The most familiar concept of the term "double jeopardy" is that the Constitution prohibits subjecting a person to multiple prosecutions, convictions, and punishments for the same criminal offense. The constitutional protection against double jeopardy is found in both article I, section 9, of the Florida Constitution and the Fifth Amendment to the United States Constitution, which contain double jeopardy clauses. Despite this constitutional protection, there is no constitutional prohibition against multiple punishments for different

> offenses arising out of the same criminal transaction as long as the Legislature intends to authorize separate punishments.

Valdes v. State, 3 So. 3d 1067, 1068 (Fla. 2009) (footnote omitted). Accordingly, the starting point for a double jeopardy determination is whether the multiple convictions are for "the same criminal offense."

The test to determine if two convictions are for the "same offense" was set out in Blockburger v. United States, 284 U.S. 299 (1932). The "Blockburger test" is codified in Florida in section 775.021(4), Florida Statutes, which provides:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; . . . For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
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> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

§ 775.021(4), Fla. Stat. (2013).

The offenses proscribed by sections 847.0135(4) and 934.215, Florida Statutes (Counts I and II in this case, respectively), have been deemed the same for purposes of double jeopardy analysis, because "the unlawful use of a two-way

communications device does not contain any elements that are distinct from the offense of traveling to meet a minor." Hamilton v. State, 163 So. 3d 1277, 1279 (Fla. 1st DCA 2015). Likewise, in Mizner v. State, 154 So. 3d 391, 399 (Fla. 2d DCA 2014), dual convictions for unlawful use and traveling to meet a minor based on the same acts were reversed because "the proof of the unlawful use of a two-way communications device was subsumed within the proof of the solicitation and traveling offenses in this case." Other recent cases have followed in this determination that violations of sections 847.0135(4) (traveling after solicitation) and 934.215 (unlawful use of communications device) are not separate offenses when the same acts are involved because proof of unlawful use is subsumed within the proof of the travel. See Holt v. State, 173 So. 3d 1079 (Fla. 5th DCA 2015); Holubek v. State, 173 So. 3d 1114 (Fla. 5th DCA 2015).

While the offense described by section 934.15 is subsumed within the proof of the offense described by section 847.0135(4), the case law thus far has involved violations of those statutes alleged to have occurred on the same day or span of days. Thus, the actions supporting the charges have been considered the same acts, committed "in the course of one criminal episode or transaction." See § 775.021(4), Fla. Stat. For example, in Mizner, the State "charged each of the offenses over the same time period, from November 1, 2011, to November 4, 2011." Id. at 400. The Mizner court rejected the State's argument that the

multiple uses of communications devices prevented that offense from being subsumed into the single charge for travel after solicitation. Id.

In Hamilton, the cell phone uses occurred "over three to four days in May of 2012" and the last element of the travel after solicitation occurred on May 4, 2012. Id. at 1278. Even though the acts resulting in the charges "spanned more than one day," the court in Hamilton found that the State had "charged them as occurring during a single criminal episode" and thus vacated the conviction for the violation of section 934.15. Id. at 1278-79.

The actions supporting the dual charges in Holt were both alleged to have occurred "on or about March 14, 2013." Id. at 1081. Because both the charging document and the jury verdict form lacked any clear language to show that the charges were based on two distinct acts, "the State charged the offenses as occurring during a single criminal episode, and we may not assume they were predicated on different acts." Id. at 1080; see also Partch v. State, 43 So. 3d 758, 762 (Fla. 1st DCA 2010) ("The ambiguous wording of the charging information and the jury verdict makes it impossible for this court to know if the jury convicted appellant for one act ... or two distinct acts" when the evidence at trial showed overlapping acts). Similarly, in Holubek the unlawful use of a two-way communications device and the travel to meet the "minor" arose out of the same criminal episode, between "the evening of March 14, 2013, and early morning

hours of March 15, 2013." Id. at 1115. See Meythaler v. State, 175 So. 3d 918 (Fla. 2d DCA 2015) (noting that State could have avoided double jeopardy issue by amending the information to allege additional communications on different dates); see also Anderson v. State, 190 So. 3d 1120 (Fla. 1st DCA 2016).

Likewise, the Florida Supreme Court has found that the offenses of use of a computer service to solicit a minor or supposed minor, and traveling after such solicitation, are "the same" for purposes of double jeopardy analysis because "the statutory elements of solicitation are entirely subsumed by the statutory elements of traveling after solicitation." State v. Shelley, 176 So. 3d 914, 919 (Fla. 2015). Accordingly, in order to survive a double jeopardy challenge when a conviction for travel after solicitation has been obtained, convictions for the lesser felonies of unlawful use and solicitation must be based on conduct that is not "in the course of one criminal transaction or episode," as contemplated by section 775.021(4). See Hartley v. State, 129 So. 3d 486 (Fla. 4th DCA 2014) (solicitation acts charged as separate counts for each date; travel after solicitation charged on only one of the dates and sufficient solicitation occurred that date to support travel offense).

Here, the State alleged that the unlawful-use and solicitation acts occurred over a 12-day span of dates, and the travel after solicitation occurred only on day 13, immediately following the 12-day span. The travel after solicitation offense requires proof of prior seduction, solicitation, luring, or enticement, which

culminated in the travel. § 847.0135(4)(a), Fla. Stat. (2013). In this case, none of the text messages dated January 2, 2014, the day the travel occurred, were sexually explicit and none contained content constituting seduction or solicitation. Accordingly, the "after solicitation" element of the travel offense must have been based on the texts leading up to January 2, the date the final element of the offense occurred. Indeed, the State's closing argument explicitly tied all of the text messages into the traveling count and did not attempt to differentiate any solicitations of the "minor" separate from the solicitation necessary to support the traveling after solicitation count.

In our recent case McCarter v. State, ---So. 3d---, 41 Fla. L. Weekly D2100c, 2016 WL 4708570 (Fla. 1st DCA Sept. 8, 2016), we did not find a double jeopardy violation where clearly distinct acts of solicitation were proven. In McCarter the proof at trial of the soliciting a minor charge consisted of multiple requests via social media for nude pictures of a minor while the solicitation in the traveling after solicitation charge consisted of messages via smart phone to arrange in-person meetings for sexual activity with the minor. McCarter is consistent with cases from other courts where a double jeopardy violation was not found so long as the evidence at trial clearly distinguished between separate offenses, as compared to here where the evidence did not.

In Fravel v. State, 188 So. 3d 969, 972 (Fla. 4th DCA 2016), convictions for

two counts of fraudulent use of personal identification were affirmed over a double jeopardy challenge where the evidence at trial showed two different banks and therefore "clearly distinguished between two separate counts." In Nicholson v. State, 757 So. 2d 1227 (Fla. 4th DCA 2000), the convictions for two counts of throwing deadly missile were affirmed over a double jeopardy challenge based on the proof at trial of two bricks thrown into two windows. In Nicholson "the evidence at trial clearly distinguished between the two separate offenses." Id. at 1228. In Vizcon v. State, 771 So. 2d 3, 6 (Fla. 3d DCA 2000), convictions for 29 counts of money laundering were affirmed over a double jeopardy challenge with a citation to Nicholson's requirement that the evidence at trial clearly distinguish separate offenses to avoid double jeopardy.

In this case, although the proof at trial of text messages over several days established multiple uses of Appellant's cell phone to facilitate a felony and also established multiple solicitations, we cannot presume with certainty that Appellant was not convicted of the same act in all three counts. The information in this case did not allege distinct acts; the verdict form did not separate the acts; and the evidence presented to the jury could support, but did not require, the jury to find that the acts underlying Appellant's conviction were separate. Therefore we find that a double jeopardy violation has occurred.[1]

[1] The dissent discusses Hammel v. State, 934 So. 2d 634, 635 (Fla. 2d DCA 2006),

We have considered the other issues raised by Appellant, and the sentencing issue raised by the State's cross-appeal, but find no reversible error on any of those grounds. For the reasons discussed above, the convictions and sentences for unlawful use of a two-way communications device (Count II) and for use of a computer service to seduce, solicit, lure, etc. a person believed to be a child (Count III) are REVERSED. The conviction and sentence for traveling to meet a minor after using of computer to seduce, solicit or lure the minor (Count I) is AFFIRMED. See Shelley, 176 So. 3d at 290-91 (holding that when dual convictions violate double jeopardy, the lesser offense should be reversed and the greater offense affirmed). The case is remanded for resentencing of Appellant with a corrected Criminal Punishment Code scoresheet.

AFFIRMED in part, REVERSED in part, and REMANDED with instructions.

MAKAR, J., CONCURS, and ROWE, J., CONCURS in part and DISSENTS in

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for the contention that each break allowing a defendant to "pause, reflect, and form a new criminal intent" can be charged separately. We agree that no double jeopardy violation occurs where the information charges separate acts following temporal breaks like in Hammel. Here however, Appellant was not charged with separate acts but with overlapping acts, such that we cannot be clear that the jury did not convict him of the same act. Duke v. State, 444 So. 2d 492 (Fla. 2d DCA 1984), and the related cases discussed by dissent concerning temporal breaks are consistent with State v. Meshell, 2 So. 3d 132 (Fla. 2009), where dual convictions for lewd and lascivious battery were affirmed where the acts occurred within seconds of each other, but the information alleged different anatomical combinations. No such allegations were present in the information here.

part.

ROWE, J., concurring in part and dissenting in part.

I concur with the majority's affirmance of Brian Mitchell Lee's conviction for traveling to meet a minor and the trial court's imposition of a downward departure sentence. However, I disagree with the majority's conclusion that the decisions in State v. Shelley, 176 So. 3d 914 (Fla. 2015), and Hamilton v. State, 163 So. 3d 1277 (Fla. 1st DCA 2015), compel this Court to vacate Lee's convictions for solicitation of a minor and unlawful use of a two-way communications device. Because the evidence presented to the jury demonstrated that Lee committed distinct criminal acts, separated by multiple temporal breaks during which he had the opportunity to form a new criminal intent between offenses, his convictions do not violate double jeopardy.

I. Facts

In December 2013, Lee placed ads on Craigslist, seeking an encounter with a younger male. An investigator, acting as a fourteen-year-old male named "Matt," responded to the ad on December 22, informing Lee that he was "kinda young" and that he was "not 18 yet." Lee, undeterred by "Matt's" response, stated, "I understand the situation. I am willing to meet you. Would rather we set up a place to meet in a public area like a parking lot just to meet and talk in person. Then we can go somewhere private if you like." The following day, "Matt" informed Lee that he was a sexually inexperienced fourteen-year-old.

After a three-day break in their conversation over Christmas, Lee resumed communication on December 26 and stated that he wanted to show "Matt" "[h]ow to make love and not just sex. Lots of foreplay and body contact. Try not to orgasm too soon." After expressing his desire for "inexperienced guys," Lee stated that he wanted to figure out a time and place for them to meet. When "Matt" said that he would have to walk to the meet, Lee offered to pick him up and explained, "We can either play in the back seat of my truck or go back to my place. . . . It is your first time that you will remember forever. So want you to make the decision as to when and how that happens."

The following day, Lee assured "Matt" that there was nothing illegal about them meeting or being friends. Lee also explained in explicit detail how he wanted to touch, kiss, and undress "Matt" and asked for a picture of "Matt" wearing nothing but briefs. Lee attempted to reassure "Matt" about their age difference during this conversation: "[F]or right or wrong, I have rationalized that it is morally ok if you are the one who instigates it. Clearly doesn't make it legal. But I think it is almost preferable for a young guy to be able to experiment and play safe and learn from an older person. . . ." Lee admitted that he had "always been attracted to adolescent males" but he denied ever initiating such a relationship. Later that same day and into the early hours of the following morning, Lee described a sexual scenario that he wanted to act out with "Matt."

On December 29, Lee revealed to "Matt" that he was a family doctor. The next day, while at work, Lee pressed "Matt" about when they were going to meet in person. After leaving work that day, Lee resumed communications, describing in vivid detail a fantasy about engaging in sexual conduct at a water park with "Matt," who would appear to be his son. Two days later, on January 1, 2014, Lee emailed Matt, stating "I am very professional with my patients. I would never say or do anything to let on I was aroused by a patient. And not too many patients get me aroused." In regard to his profession, Lee stated:

> Some people make jokes about pedophiles becoming doctors and teachers. But, as long as they don't act on their desires and don't make advances and seduce their patients, I don't see any harm in it. I think it actually makes me a better doctor. I screen teens for issues like depression, drug use, sexual activity and orientation. I spend a little more time with them than most doctors. But I treat them like a person and don't just push them out the door. To me, a sexual predator uses their influence to coerce a child into sexual acts. I would never do that. I am not that way. To me, the only reason I am talking with you is because you sought me out. To many, that doesn't make it right. But for me, I think there is a hough [sic] moral difference in the two.

Lee declared, "I'm putting my future in your hands. If we end up meeting and doing something and five years from now you start feeling guilty and regret doing it, you could always report me . . . . If we end up messing around some, that is great, too!!!" Lee then set a definite time to meet "Matt" at a public location. The next day, January 2, Lee traveled to meet "Matt" at a bowling alley.

II. Procedural History

Based on these conversations, Lee was charged with (1) violating section 847.0135(4)(a), Florida Statutes (traveling to meet a minor to engage in sexual conduct), based on conduct that was alleged to have occurred on January 2, 2014; (2) violating section 934.215, Florida Statutes (unlawful use a two-way communications device), based on conduct that was alleged to have occurred **on one or more occasions** between December 22, 2013, and January 1, 2014; (3) violating section 847.0135(3)(a), Florida Statutes (using a computer to solicit sexual conduct by a child) based on conduct that was alleged to have occurred **on one or more occasions** between December 22, 2013, and January 1, 2014. At trial, Lee testified. He described himself as a political activist; his defense was that he always knew that "Matt" was an uncover officer and that he continued the sexually explicit conversation in an attempt to challenge the officer's targeting of homosexuals. The jury rejected this defense and convicted Lee of all three offenses.

At sentencing, Lee's scoresheet reflected a total of eighty-eight sentencing points, which placed Lee's lowest permissible sentence at forty-five months' imprisonment. Lee presented several witnesses in support of mitigating his sentence. These witnesses included two employees, four former patients, and his brother. None of the patients, most of whom were elderly, were treated by Lee when they were an adolescent. The trial court chose to impose a downward

departure sentence, concluding that Lee suffered from depression when the incident occurred and that the care he provided his patients was so extraordinary that his patients remained or returned to him despite knowing his criminal charges. The trial court designated Lee as a sexual predator and sentenced him to two years' community control followed by thirteen years' probation on count one and to concurrent terms of two years' community control followed by three years' probation on counts two and three. Lee appealed, asserting that his convictions violate double jeopardy. The State cross-appealed, challenging the trial court's imposition of a downward departure sentence.

III. Analysis

The majority reverses Lee's convictions for unlawful use a two-way communications device and using a computer to solicit sexual conduct by a child, reasoning that "the information in this case did not allege distinct acts, the verdict form did not separate the acts, and the evidence presented to the jury was such that we cannot clearly determine that the acts underlying [Lee's] convictions were separate. . . ." (Maj. Op. 2.) I disagree with the majority's characterization of the information and the evidence presented at Lee's trial.

First, the face of the information charging Lee provides no indication that the same act of solicitation was relied on to support the charges of solicitation, use of a two-way communications device, and traveling to meet a minor. Second, the

evidence adduced at Lee's trial established that during the charged time period, multiple distinct acts of criminal solicitation occurred, with multiple temporal breaks between solicitations. These breaks provided Lee with an opportunity to form a new criminal intent between each criminal solicitation. Because Lee's convictions for traveling to meet a minor, using a two-way communication device to solicit a minor, and using a computer to solicit a minor were not based on the same conduct, Shelley does not compel reversal of Lee's convictions on double jeopardy grounds.

A. Convictions for Solicitation and Traveling After Solicitation

In Shelley, the supreme court held that dual convictions for solicitation under section 847.0135(3), Florida Statutes (2013), and traveling after solicitation under section 847.0135(4), Florida Statutes (2013), violate the prohibition against double jeopardy when they are based on the same conduct. Id. at 917, 919. In Shelley, the State relied on the same conduct to charge both offenses, and Shelley entered a plea to those charges. Id. at 916-17. Because Shelley's case did not proceed to trial, there was no trial record for the supreme court to consider when determining whether the facts showed that the offenses occurred in separate episodes or constituted distinct acts. Thus, the supreme court's analysis of whether a double jeopardy violation had occurred considered only the charging document and Shelley's convictions.

Here, however, Lee did not enter a plea, but proceeded to a two-day trial. Under these circumstances, our analysis is not confined to examining the charging document to assess whether multiple convictions violate the prohibition against double jeopardy. Rather, where the defendant is convicted after a jury trial, we apply the analysis approved in State v. Paul, 934 So. 2d 1167, 1173 (Fla. 2006), receded from on other grounds by Valdes v. State, 3 So. 3d 1067 (Fla. 2009), and Partch v. State, 43 So. 3d 758 (Fla. 1st DCA 2010), and evaluate the testimony at trial to determine whether multiple criminal offenses arose from separate criminal episodes or distinct criminal acts. See Nicholson v. State, 757 So. 2d 1227 (Fla. 4th DCA 2000) (holding that the appellant's convictions under identically-worded counts of throwing a deadly missile into a dwelling did not violate double jeopardy because the evidence presented at trial clearly distinguished between the two counts).

Recently, this Court relied on evidence presented at trial in a case posing precisely the same question at issue here: whether convictions for soliciting a minor and traveling to meet a minor for sex violated double jeopardy where the information charged a single count of solicitation and a single count of traveling. McCarter v. State, 2016 WL 4708570, *1 (Fla. 1st DCA Sept. 8, 2016). In McCarter, this Court reviewed the trial record in determining whether the two charged counts were based on the same conduct. The Court applied the distinct

acts analysis approved in Paul and considered whether there was a temporal break between criminal acts, intervening acts, a change in location between the acts, or whether a new criminal intent was formed. Id. Despite the solitary count of solicitation charged in the information, the Court concluded that McCarter's convictions for traveling and solicitation were not based on the same conduct. In reaching this conclusion, this Court looked beyond the charging document, considered the evidence presented at trial, and explained: "The trial record thus demonstrates that this wasn't a Shelley-type case where the State used the same solicitation to charge the defendant with both solicitation and traveling after solicitation." Id.

McCarter guides our analysis in this case. Not only did the court confront precisely the same double jeopardy question posed in Lee's case, but both cases require this Court to consider the evidence presented at trial in assessing whether multiple counts violate double jeopardy. Considering the evidence adduced at Lee's trial, it is clear that Lee's solicitation and traveling counts were not based on the same conduct; rather, the trial record reflects distinct acts of solicitation, separated by significant temporal breaks during which Lee had the opportunity to form a new criminal intent between offenses.

1. Distinct Criminal Acts of Solicitation

The transcript of Lee's trial demonstrates that the State presented unrebutted

evidence to establish multiple distinct acts of solicitation during the charged time period. Over the course of eleven days, Lee described numerous sexual fantasies that he wanted to fulfill with "Matt." On several occasions during the charged period, Lee asked to meet "Matt" in person to perform sexual acts he described in their correspondence. Moreover, Lee testified that he engaged in multiple conversations with "Matt" for about a week-and-a-half prior to traveling to meet him. As in McCarter, the evidence presented at Lee's trial establishes multiple distinct acts of criminal solicitation. Id.

2. Temporal Breaks Between Criminal Solicitations

In addition to demonstrating that Lee committed distinct acts of solicitation over the eleven-day period charged in the information, the evidence at trial clearly established multiple temporal breaks between criminal acts. Although the majority suggests that there was only one break in communication between Lee and "Matt," the trial transcript reveals otherwise.[2] A review of the emails admitted into evidence shows that almost thirteen hours elapsed between the first and second conversations between Lee and "Matt." The longest temporal break in communication occurred over the Christmas holiday when Lee and "Matt" did not communicate for seventy-two hours while Lee traveled out of state. Another significant break in communication occurred between December 26 and December

[2] Even if there was only a single break in communication, it would be sufficient to demonstrate that distinct acts of solicitation occurred here.

27 when over sixteen hours passed before Lee and "Matt" started a new conversation. During the next four days, there were five-hour, eleven-hour, and twelve-hour conversational breaks. The email communications show that Lee slept, worked, traveled, and socialized in between his conversations with "Matt." Thus, the record is replete with evidence of multiple, significant temporal breaks between criminal solicitations. The multiple temporal breaks between the solicitations established at Lee's trial weigh against finding a double jeopardy violation.

3. Opportunities to Form New Criminal Intent

During each of the breaks in conversation with "Matt," Lee had the opportunity to form a new criminal intent before resuming contact with the person he believed to be a fourteen-year-old boy and soliciting him for a criminal act. Minimal lapses in time are sufficient to establish that a defendant has had time to pause, reflect, and form a new criminal intent between offenses. See White v. State, 924 So. 2d 957, 957-58 (Fla. 4th DCA 2006); Burrows v. State, 649 So. 2d 902, 903 (Fla. 1st DCA 1995) (superseded by statute on other grounds by Jupiter v. State, 833 So. 2d 169 (Fla. 1st DCA 2002)); Duke v. State, 444 So. 2d 492, 494 (Fla. 2d DCA 1984); Bass v. State, 380 So. 2d 1181, 1183 (Fla. 5th DCA 1980). For example, in White, the defendant challenged his convictions for lewd and lascivious battery and lewd or lascivious molestation on double jeopardy grounds.

924 So. 2d at 957-58. The Fourth District held, "[A]s appellant waited for the victim to emerge from the bathroom, he had the time to consider what to do next and to form a new criminal intent." Id. In Burrows, the defendant argued that he should have been sentenced on only one count of sexual battery because both batteries occurred during a single criminal episode with only one victim. 649 So. 2d at 903. In that case, this Court concluded that the defendant had ample time to pause and reflect during the time he sat on the couch in between the two sexual batteries.

In Hammel v. State, a case, as here, involving the offense of solicitation of a minor, the Second District considered temporal breaks in conversations when determining whether multiple solicitation charges arose out of the same criminal episode. 934 So. 2d 634, 635 (Fla. 2d DCA 2006). Hammel was charged with and convicted of fifteen counts of using a computer to seduce a child, and he challenged his convictions on double jeopardy grounds, arguing that they arose out of a single criminal episode. Id. at 634. The charges were based on communications between Hammel and a police officer posing as a thirteen-year-old boy ("Larry") in an internet chat room over the course of forty-one days. Id. at 634-35. In rejecting Hammel's argument that his multiple convictions violated double jeopardy, the Second District observed, "The record demonstrates that each time Mr. Hammel contacted [the police officer], he had formed a new intent to

attempt to seduce "Larry" to commit an illegal act." Id. at 635.

The trial transcript in Lee's case demonstrates that Lee communicated with "Matt" multiple times over an eleven-day time span with up to a three-day temporal break in the conversation. Those breaks gave Lee ample opportunity to pause and reflect on the legality of his actions. See also Duke, 444 So. 2d at 494 (holding that "a matter of seconds" was sufficient for a defendant to form a new criminal intent between sexual battery offenses); Bass, 380 So. 2d at 1183 (holding that the time it took the defendant to drive to a more isolated location was sufficient for the defendant to form a new criminal intent between sexual battery offenses).

Based on the evidence presented at trial, Lee engaged in multiple distinct acts of solicitation, separated by multiple temporal breaks, during which Lee had the opportunity to form a new criminal intent between each offense. For these reasons, I would find that Lee's convictions for traveling and solicitation were not based on the same conduct,[3] and would affirm the judgment and sentence in his

[3] The majority contends that "the State's closing argument explicitly tied all of the text messages into the traveling count and did not attempt to differentiate any solicitations of the 'minor' separate from the solicitation necessary to support the traveling after solicitation count." Maj. op. at 8. This is a mischaracterization of the prosecutor's closing argument. The prosecutor's discussion of the charges shows that the prosecutor was referring to the definitions contained in the jury instructions the court would use to instruct the jury:

> This is Count 3, soliciting. Again, it's a lot of the same

case.

B. Traveling to Meet a Minor and Use of a Two-Way Communications Device

As to Lee's conviction for unlawful use of a two-way communications device, in violation of section 934.215, Florida Statutes (2013), that statute prohibits the use of such a device "to facilitate or further the commission of any felony offense." This Court held in Hamilton that dual convictions for traveling to meet a minor and unlawful use of a two-way communications device violate the prohibition against double jeopardy when they occur within the same criminal episode. 163 So. 3d at 1278-79. Again, applying the analysis set forth in Paul and Partch, Appellant's convictions for use of a two-way communications device and traveling to meet a minor do not violate double jeopardy because they arose from separate criminal episodes and distinct criminal acts.

First, the charging document provides no indication that the two-way

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> language as the traveling count without the actual traveling element, but again, that he used some kind of online service or data storage device to contact Investigator Ward who was posing as that 14-year-old boy. That Zach Ward was a child or a person believed by the Defendant to be a child. Again, that is the State's position is that the Defendant believed this was a 14-year-old. And that during that contact, he again seduced or solicited, et cetera that 14-year-old to engage in unlawful sexual conduct. Again, definitions follow that. The judge will instruct you on those. Exact same ones as the traveling count.

Thus, the prosecutor's statement was not a concession that the same conduct was used to support both the traveling and the solicitation charges.

communications device charge was based on the traveling offense. On the contrary, Lee was alleged to have committed the unlawful use of a two-way communications device offense "on one or more occasions between December 22, 2013, and January 1, 2014," while he was alleged to have committed the traveling offense "on or about January 2, 2014." Second, the evidence adduced at trial established multiple uses of a two-way communications device to further multiple felony solicitations in several distinct criminal episodes. See McCarter, 2016 WL 4708570, *1. Finally, the multiple breaks in the conversations provided Lee with the opportunity to a form a new criminal intent each time he used the two-way communications device. See White, 924 So. 2d at 957-58. Accordingly, I would affirm Lee's conviction for unlawful use of a two-way communications device.

C. Cross-Appeal

On cross-appeal, the State argues that the trial court abused its discretion by imposing a downward departure sentence. However, it candidly acknowledged that this argument was not preserved for appellate review under this Court's holding in State v. Wiley, 179 So. 3d 481 (Fla. 1st DCA 2015), rev. granted, 2016 WL 934496 (Fla. Mar. 7, 2016). In Wiley, this Court held that a prosecutor must object after the trial court imposes a downward departure sentence, even though the prosecutor had specifically argued against such a sentence, to preserve the issue for appeal. Id. at 482. Here, the State initially argued against the imposition of a

downward departure sentence, but the prosecutor failed to lodge an objection after the court actually imposed the sentence. Accordingly, I am compelled to agree with the majority's decision to affirm.

IV. Conclusion

Based on the evidence presented at trial, Lee committed numerous acts constituting solicitation of a minor and unlawful use of a two-way communications device prior to traveling to meet "Matt." Lee committed distinct criminal acts of solicitation separated by temporal breaks in which he had an opportunity to pause and form a new criminal intent. Because the same conduct did not form the basis of Lee's convictions, I would affirm his convictions for traveling to meet a minor, using a two-way communications device, and using a computer to solicit a minor.