MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brian James Long,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 25, 2021

Court of Appeals Case No. 21A-CR-764

Appeal from the Hamilton Superior Court

The Honorable William Hughes, Judge

Trial Court Cause No. 29D03-1910-F5-8910

Bailey, Judge.

Case Summary

[1] Brian J. Long ("Long") appeals his convictions, following a bench trial, of domestic battery resulting in bodily injury to a household member less than fourteen years of age, a Level 5 felony,[1] and domestic battery against a household member less than fourteen years of age, a Level 6 felony.[2]

[2] We affirm in part, reverse in part, and remand with instructions.

Issues

[3] Long raises two issues which we restate as follows:

I. Whether the State provided sufficient evidence to support his convictions of domestic battery.

II. Whether his convictions for both Count I and Count IV constitute substantive double jeopardy.

Facts and Procedural History

[4] Long was married to Rachel Long ("Rachel"), and the two of them had a son born of the marriage, E.L. Long also had a daughter, G.L., from a previous marriage, who lived with him and Rachel part-time. Rachel had two children

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[1] Ind. Code § 35-42-2-1.3(a)(1), (c)(5)(A) (2019).

[2] I.C. § 35-42-2-1.3(a)(1), (b)(4).

from a previous marriage, daughter E.D. and son G.D., who also lived with her and Long.

[5] On October 16, 2019, Long, Rachel, and all four of the children were eating dinner together at Long's and Rachel's home. On that date, E.L. was two years old, G.L. was thirteen years old, E.D. was eighteen years old, and G.D. was eleven years old. G.D. was about five feet tall and weighed approximately 100 pounds. G.D. took the medication, Vivance, for his Attention Deficit Hyperactivity Disorder ("ADHD"), and one side effect of the medicine was that it suppressed G.D.'s appetite. It was common for G.D. to not finish a meal, and the normal family discipline for a child who did not finish dinner was to disallow snacks for the rest of the evening.

[6] At dinner, Long—who was five foot ten inches tall and weighed approximately 300 pounds—began to argue with G.D. because G.D. had not finished his dinner after everyone else was done eating. The argument escalated and Long pushed G.D. with both hands, which caused G.D. to stumble backwards. G.D. ran upstairs to his room and as Long began to follow him, Rachel stepped in front of Long and stated, "Stop. Don't touch my son." Tr. at 40. Rachel then went upstairs to G.D.'s room to console him. Shortly thereafter, Long went to G.D.'s room and told him to take out the trash; he did this with Rachel's help. Meanwhile, E.D. and G.L. stated that they were leaving the home to get ice cream. After taking out the trash, G.D. stated that he wanted to go with E.D. and G.L., and he began to put on his shoes.

[7] When Long, who had been sitting in the living room, heard G.D. state that he wanted to go with his sisters to get ice cream, Long jumped up and "very aggressively" walked over to G.D. *Id*. at 43. Long grabbed G.D. by the arm and told G.D. he was not going anywhere but up to bed. Rachel once more tried to intervene between Long and G.D., and Long then pushed G.D. to the floor in the living room. G.D. was laying on the floor flailing his arms and legs to move away from Long and stating, "Get away from me," as Long walked up to stand in front of G.D. *Id*. at 46. Long then "forcefully" kicked G.D. in his right shin. *Id*. at 82. E.D. then came into the living room, helped G.D. up from the floor, and led him outside the house. E.D. and G.L. then called the police. E.D. then drove herself, G.L., and G.D. away from the home and met the police a few streets away. G.D. suffered an abrasion of about one and one-half inches on his shin.

[8] The State charged Long with Count 1, domestic battery by "grabbing and/or shoving and/or kicking" in a rude, insolent, or angry manner a household member less than fourteen years of age and resulting in bodily injury, a Level 5 felony; Count II, battery by "grabbing and/or shoving and/or kicking" in a rude, insolent, or angry manner a person less than fourteen years of age and resulting in bodily injury, as a Level 5 felony;[3] Count III, domestic battery by "grabbing and/or shoving and/or kicking" in a rude, insolent, or angry manner a household member in the physical presence of a child less than sixteen years

[3] I.C. § 35-42-2-1(c)(1), (g)(5)(B).

of age, a Level 6 felony;[4] Count IV, domestic battery by "grabbing and/or throwing" in a rude, insolent, or angry manner a household member less than fourteen years of age, a Level 6 felony; and Count V, domestic battery by "grabbing and/or throwing" in a rude, insolent, or angry manner a household member less than fourteen years of age in the physical presence of a child less than sixteen years of age, a Level 6 felony.[5] App. at 22-23.

[9] Long waived his right to a jury trial and had a bench trial on March 9, 2021. At trial, G.D., Rachel, E.D., G.L., and two law enforcement officers testified for the State. G.D. testified that, when he was flailing on the floor in the living room and Long was standing next to him, he hit Long somewhere on Long's body—possibly in the groin area—before Long kicked him. Rachel, E.D., and G.L. testified that they witnessed Long kick G.D. while G.D. was on the floor of the living room, but none of them witnessed G.D. hit Long. Rachel and E.D. testified that, before Long kicked G.D., Long did not behave as if he had just been hit in the groin. G.D. testified that the kick hurt him, Rachel testified that Long kicked G.D. "pretty powerfully," Tr. at 46, E.D. testified the kick was "forceful," *id*. at 82, and G.L. testified "it looked like [the kick] really hurt," *id*. at 99.

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[4] I.C. § 35-42-2-1.3(a)(1), (b)(2).

[5] I.C. § 35-42-2-1.3(a)(1), (b)(2).

[10] In her closing argument, the prosecutor stated that Counts I through III related to Long kicking G.D., and Counts IV and V related to Long pushing G.D. while they were in the kitchen. The court found Long guilty of Count I, based on the "knowing … **kick** to … [G.D. who was] under the age of fourteen" and which "resulted in injury." *Id*. at 133 (emphasis added). The court found Long not guilty of Count II due to "potential double jeopardy." *Id*. at 134. The trial court merged the conviction for Count III with that of Count I.[6] The court found Long not guilty of Count V, the incident that "allegedly occurred … between the island and buffet" in the kitchen, which the court found did not exceed "the bounds of reasonable discipline." *Id*. at 134. Regarding Count IV, the trial court stated that "there was not sufficient evidence to support a finding on Count 4 for the … first battery," i.e., the incident "that occurred in the kitchen at the beginning," but "[t]here is sufficient [evidence] to find guilt on Count 4 as to the second battery, **the kicking**." *Id*. at 134-35 (emphasis added).

[11] On April 16, 2021, following a sentencing hearing, the court entered an order sentencing Long to three years to be served in community corrections, suspended to probation, for Count I and one year to be served in community corrections, suspended to probation, for Count IV. The court ordered the two sentences to run concurrently. Long now appeals his convictions.

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[6] The basis for the merger of Counts I and III is unclear. However, while the Abstract of Judgment states regarding Count III, "Conviction Merged," App. at 20, 131, it does not appear that a formal judgment of conviction was entered on Count III. *See* Tr. at 134 (trial court finding "Count 3 … is also merged into Count 1").

Discussion and Decision

Sufficiency of the Evidence

[12] Long alleges the State failed to provide sufficient evidence to support his convictions. Specifically, he asserts that he raised the defense of "parental discipline privilege" pursuant to Indiana Code Section 35-41-3-1, and the State failed to disprove at least one element of that defense. Appellant Br. at 7-8.

[13] We review an allegation that the State failed to refute a claim of parental privilege in a battery of a child prosecution under the same standard of review applicable to any sufficiency of the evidence claim. *Hanks v. State*, 119 N.E.3d 1067, 1069 (Ind. Ct. App. 2019) (citing *Willis v. State*, 888 N.E.2d 177, 182-83 (Ind. 2008)), *trans. denied*. That is,

> we consider only the probative evidence and reasonable inferences supporting the fact-finder's decision. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, and not ours, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id*. To preserve this structure, when we are confronted with conflicting evidence, we consider it most favorably to the fact-finder's decision. *Id*. We affirm a conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence; rather, the evidence is sufficient if an inference reasonably may be drawn from it to support the fact-finder's decision. *Id*. at 147.

Dowell v. State, 155 N.E.3d 1284, 1286 (Ind. Ct. App. 2020).

[14] Under Indiana Code Section 35-41-3-1, "[a] person is justified in engaging in conduct otherwise prohibited if he has legal authority to do so." One such potential justification is what is sometimes called the "parental discipline privilege" under which a parent has legal authority to "apply such reasonable force" upon his or her child as the parent "reasonably believes to be necessary for ... proper control, training, or education." *Hanks*, 119 N.E.3d at 1069 (quotation marks omitted) (quoting *Willis*, 888 N.E.2d at 182). When a defendant asserts the parental discipline privilege as a defense to a battery charge,

> "the State must disprove at least one element of the defense beyond a reasonable doubt." [*Willis*, 888 N.E.2d at 182.] Thus, "the State must prove that either: (1) the force the parent used was unreasonable or (2) the parent's belief that such force was necessary to control [the] child and prevent misconduct was unreasonable." *Id*. The State may refute the defense "by direct rebuttal or by relying upon the sufficiency of the evidence in its case-in-chief." *Id*. Ultimately, "[t]he decision of whether a claim of parental privilege has been disproved is entrusted to the fact-finder." *Id*.

Id. at 1070.

[15] In determining whether the particular force used constitutes "reasonable" parental discipline, the fact-finder should balance several factors, including:

> a) whether the actor is a parent; (b) the age, sex, and physical and mental condition of the child; (c) the nature of his offense and his apparent motive; (d) the influence of his example upon other children of the same family or group; (e) whether the force or

> confinement is reasonably necessary and appropriate to compel obedience to a proper command; (f) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.

Id. (citations omitted). This list of factors is non-exhaustive, and "obviously, not all of the listed factors may be relevant or applicable in every case." *Willis*, 888 N.E.2d at 182.

[16] Here, the evidence supports the trial court's decision that Long committed domestic battery[7] when he kicked G.D., and that such action was not justified as reasonable force used by a parent pursuant to Indiana Code Section 35-41-3-1. As to the first factor, Long was a stepparent to G.D. However, there was uncontradicted evidence that, at the time of the incident, Long was a five-foot-ten-inch, 300-pound adult, while G.D. was a five-foot, 100-pound eleven-year-old[8] child; that factor weighs against the reasonableness of Long's actions. Moreover, G.D.'s "offense" of failing to eat all of his dinner while on medication that suppressed his appetite was minor. And Rachel testified that the usual punishment for a child in the household who failed to eat all of his dinner was to deny the child snacks for the rest of that evening. Yet four

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[7] Long does not dispute that the State proved the elements of domestic battery **by kicking** as a Level 5 and/or Level 6 felony; i.e., that Long kicked then eleven-year-old G.D., a member of his household, in a rude, insolent, or angry manner that resulted in bodily injury. I.C. § 35-42-2-1.3(a)(1) and (b)(4) [Level 6 felony] and/or (c)(5)(A) [Level 5 felony]. Rather, he asserts that his otherwise prohibited actions against G.D. were justified because he had legal authority to take such actions under the parental discipline privilege. I.C. § 35-41-3-1.

[8] Long mistakenly states in his brief that G.D. was thirteen years old at the time of the incident. Appellant's Br. at 9.

witnesses testified that, in response to eleven-year-old G.D.'s assertion that he was going with his siblings to get ice cream after having not eaten all of his dinner, Long did not simply tell G.D. that he could not have snacks for the rest of the evening. Rather, in addition to making that statement, Long also pushed G.D. to the floor and forcefully kicked G.D. while G.D. was flailing on the floor. The evidence shows that Long's kick hurt G.D. and left an abrasion on his leg.

[17] There is some conflicting evidence regarding whether G.D. hit Long in the groin before Long kicked G.D. However, under our standard of review, we consider the conflicting evidence in the light most favorable to the judgment. *See Dowell*, 155 N.E.3d at 1286. The testimonial evidence from Rachel and E.D. supports the conclusion that G.D. did not hit Long in the groin.[9]

[18] The State presented sufficient evidence to support Long's convictions of domestic battery by kicking G.D. The State also presented sufficient evidence that the kicking which constituted the battery was not reasonable force for which there was legal authority under the parental discipline privilege and which would therefore be justifiable under Indiana Code Section 35-41-3-1.

[9] Thus, we need not and do not address the implication raised by Long that he would have been justified under the parental discipline privilege in kicking G.D. if G.D. had first hit Long in the groin.

Double Jeopardy

[19] Long maintains that, even if there was sufficient evidence to support his convictions, the convictions under both Counts I and IV constitute double jeopardy in violation of his constitutional rights. Claims of double jeopardy are questions of law which we review de novo. *E.g.*, *Brown v. State*, 160 N.E.3d 205, 215 (Ind. Ct. App. 2020).

[20] Under Indiana Supreme Court case law analyzing double jeopardy claims, we distinguish between procedural double jeopardy claims, where a defendant is charged with the same offense in successive prosecutions, and substantive double jeopardy claims, which are based on multiple convictions in a single prosecution. *See Hill v. Stat*e, 157 N.E.3d 1225, 1228 (Ind. Ct. App. 2020) (citing *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), and *Powell v. State*, 151 N.E.3d 256 (Ind. 2020)).

> [C]laims of substantive double jeopardy "come in two principal varieties: (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; *see also Powell*, 151 N.E.3d at 263. *Wadle* established the test for the latter scenario, *Powell* the former.

Id.

[21] Here, we are confronted with a substantive double jeopardy claim involving a single criminal act that violates multiple statutes (or subparts of the same statute) with common elements. As was the case in *Wadle*, the question here is

whether the same act may be twice punished as two counts of the same offense. 151 N.E.3d at 247. We must determine whether the applicable statute "clearly permits multiple punishments, either expressly or by unmistakable implication." *Id*. at 248. If so, both convictions may stand. *Id*. However, if the applicable statute is ambiguous, we must then "apply our included-offense statutes to determine statutory intent." *Id*. Under Indiana Code Section 35-38-1-6, a court may not enter a judgment of conviction and sentence for both an offense and an "included offense." An "included offense" is defined by statute, in relevant part, as an offense that

> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged,
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> … or
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> (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.

I.C. § 35-31.5-2-168. If the facts underlying the offenses, as presented in the charging information and as adduced at trial, show only a single act, and one offense is included in the other, the defendant may not be convicted of the lesser included offense. *Wadle*, 151 N.E.3d at 249.

[22] In Counts I and IV, the State charged Long with domestic battery as a Level 5 felony and as a Level 6 felony, respectively. As the State concedes, the

domestic battery statute does not expressly permit multiple punishments. I.C. § 35-42-2-1.3. Thus, we must determine whether the facts proving each count indicate a single transaction or, instead, distinguishable offenses. The State also concedes that both counts relate to a single act—i.e., kicking G.D.[10] Therefore, Count IV is "established by proof of the same material elements or less than all the material elements required to establish" Count I. I.C. § 35-31.5-2-168(1). Moreover, as the State also concedes, the only difference between the two charges is that Count I requires a showing of bodily injury, while Count IV does not. Therefore, Count IV differs from Count I only in that "a less serious harm … to the same person" is required to show commission of the crime alleged in Count IV. I.C. § 35-31.5-2-168(3). Thus, the Level 6 felony domestic battery in Count IV is included in the Level 5 felony domestic battery in Count I, and, under substantive double jeopardy principles, Long cannot be convicted of both counts. The conviction for the lesser-included offense in Count IV must be vacated.

Conclusion

[23] The State presented sufficient evidence to support Long's domestic battery convictions. However, because Count IV is a lesser included-offense of Count

[10] Although the Information states, and the prosecutor argued, that Court I related to the incident of Long kicking G.D. in the living room and Count IV related to the incident of Long pushing G.D. in the kitchen, the State acknowledges on appeal that the trial court clearly stated that the convictions for both Counts I and IV were based only on the kicking incident.

I, substantive double jeopardy principles require that the conviction for Count IV must be vacated.

[24] We affirm the conviction for Count I, reverse the conviction for Count IV, and remand with instructions for the court to vacate the conviction for Count IV.

Crone, J., and Pyle, J., concur.