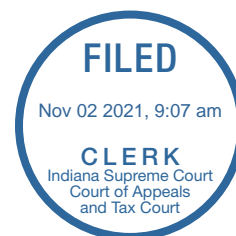


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

A.M.,
Appellant-Respondent,

v.

State of Indiana,
Appellee-Petitioner.

November 2, 2021

Court of Appeals Case No.
21A-JV-630

Appeal from the Marion Superior
Court

The Honorable Geoffrey A.
Gaither, Judge
The Honorable Duane Merchant,
Magistrate

Trial Court Cause No.
49D09-2101-JD-24

Weissmann, Judge.

[1] The juvenile court entered two true findings against A.M. for acts that would have constituted rape and criminal confinement if committed by an adult. A.M. appeals, arguing that these findings violate Indiana’s substantive double jeopardy principles. We accept the parties’ agreement that A.M.’s dual true findings are a double jeopardy violation and, therefore, reverse and remand with instructions to vacate the criminal confinement finding.

Facts

[2] M.O. was sleeping overnight on the couch at her aunt’s house, where A.M. lived. Both M.O. and A.M. were 15 years old. In the middle of the night, M.O. awoke to A.M. touching her legs and butt. She told him to stop, and he did. But about 15 minutes later, he came back. A.M. climbed on top of M.O., who was lying on her stomach. M.O. testified, “[A.M] came up behind me and he put his arm in back and he covered my mouth up and . . . was holding my neck and he moved my panties to the side and then he put his penis inside of me.” Tr. Vol. II, p. 16. A.M. held M.O. down and penetrated her for about thirty or forty seconds while she struggled to make him stop. M.O. did not speak during the encounter because she was frightened. Immediately after, M.O. texted her mom about the assault and then left.

[3] The State alleged A.M. was a delinquent child, as he committed acts that would constitute rape, a Level 3 felony, and criminal confinement, a Level 6 felony, if

committed by an adult. The juvenile court entered a true finding as to both allegations.¹ A.M. now appeals.

Discussion and Decision

[4] A.M. argues that the true findings for both rape and criminal confinement violate substantive double jeopardy under *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020). A.M. asks that we remand with instructions to vacate the criminal confinement finding. The State does not oppose this request. We reverse and remand to the juvenile court to enter a true finding as to the rape charge only.²

[5] When a single criminal act implicates multiple statutes, *Wadle* requires a multi-step analysis to evaluate whether multiple charges violate substantive double jeopardy. 151 N.E.3d 227 (Ind. 2020). First, we look to the statutes. *Id.* If the statutes explicitly allow for multiple punishments, there is no double jeopardy violation. *Id.* at 248. If the statutes are unclear, we apply our included-offense statutes. *Id.* (citing Ind. Code § 35-31.5-2-168). If either offense is inherently or factually included in the other, there may be a double jeopardy violation. *Id.* We then proceed to the second step of *Wadle* and ask whether the defendant's

¹ The Order misstates the criminal confinement allegation as “criminal mischief.” Appellant’s App. Vol. II, p. 20. Both parties agree this was a scrivener’s error. The delinquency petition, preliminary inquiry report, initial hearing and factfinding hearing orders, and predispositional report all identify the second allegation as criminal confinement, not criminal mischief. *Id.* at 16, 19, 33, 54, 60, 72. Because we remand to the trial court to vacate the criminal confinement finding, there is no need to correct this error.

² Both parties assume that the substantive double jeopardy framework our Supreme Court promulgated in *Wadle* applies in the juvenile context. Though neither *Wadle* nor its twin, *Powell v. State*, explicitly mention the juvenile system, we accept the parties’ agreement without further analysis because the parties failed to brief the issue. *Id.*; 151 N.E.3d 256 (Ind. 2020).

actions are “so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.” *Wadle*, 151 N.E.3d at 249. If the facts show only a single crime occurred, entering judgment on the included offense violates substantive double jeopardy. *Id.* at 256.

[6] Following *Wadle*, the parties first look to the relevant statutes. The juvenile court found that A.M. committed acts that would have constituted rape, a Level 3 felony, and criminal confinement, a Level 6 felony, if he were an adult. A person commits Level 3 felony rape under Indiana Code § 35-42-4-1 when they “knowingly or intentionally [have] sexual intercourse with another person . . . when . . . the other person is compelled by force or imminent threat of force” A person commits Level 6 felony criminal confinement under Indiana Code § 35-42-3-3 when they “knowingly or intentionally confine[] another person without the other person’s consent”

[7] Neither statute clearly allows for multiple punishment. It is also not obvious that either offense is included in the other. An included offense is 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 offenses otherwise included therein;
- (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.

Ind. Code § 35-31.5-2-168. Looking at the rape and confinement statutes alone, none of these subsections clearly apply.

[8] The State notes, however, that the confinement is an included offense of rape *as it was charged*. *Id.* at 253. “An offense may be factually included if the charging information for another offense alleged all of its elements.” *Kerner v. State*, No. 29A-CR-2377, slip op. at 26 (Ind. Ct. App. Oct. 22, 2021) (citing *Larkin v. State*, 173 N.E.3d 662, 668 (Ind. 2021)) (cleaned up). In the petition alleging A.M. to be a delinquent child, the facts underpinning the confinement charge are as follows: “[A.M.] did knowing (sic) or intentionally place his forearm against the back of MO’s neck thus confining her to the couch . . . without her permission.” App. Vol. II, p. 16. These are the same facts—and the only facts in the record—that satisfy the force element of the rape charge. *See Appellee’s Br.*, p. 11. Therefore, the criminal confinement charge is factually included in the rape charge.

[9] Finally, both parties agree that A.M.’s actions were so compressed as to constitute a single transaction. Following this analysis, A.M.’s dual true findings violate Indiana’s prohibition on substantive double jeopardy. We therefore reverse the criminal confinement finding and remand to the juvenile court to vacate that finding.

Mathias, J., and Tavitas, J., concur.