MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Daniel Carroll Stovall,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 4, 2022

Court of Appeals Case No. 22A-CR-224

Appeal from the Marion Superior Court

The Honorable Grant W. Hawkins, Judge

Trial Court Cause No. 49D31-2001-F1-1682

Mathias, Judge.

[1] Daniel Carroll Stovall appeals his convictions for two counts of Level 1 felony child molesting, two counts of Level 4 felony child molesting, and two counts

of Level 4 felony incest.[1] Stovall raises a single issue for our review, which we restate as the following two issues:

I. Whether his convictions violate his right to be free from double jeopardy under *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

II. Whether his convictions violate his right to be free from substantive double jeopardy under Indiana law.

[2] We affirm in part, reverse in part, and remand with instructions to vacate Stovall's Level 4 felony child molesting convictions.

Facts and Procedural History

[3] N.S. is Stovall's biological daughter, but she was adopted at a very young age and has lived with her adopted father most of her life. In December 2019, when N.S. was twelve years old, she met Stovall for the first time. On January 11, 2020, N.S. spent the night with her biological mother in a hotel room in Indianapolis. N.S.'s biological mother invited Stovall to spend the night too.

[4] That night, N.S. woke up because Stovall was touching her. He initially touched her back, but then placed his hand inside her shorts, placed his finger inside her vagina, and began to move his finger "in and out." Tr. Vol. 2, p. 234.

[1] Stovall does not appeal his adjudication for being a habitual offender.

He then moved his finger to her anus and again penetrated her. While doing so, Stovall kissed N.S. on her upper lip.

[5] N.S. got out of the bed, went to the bathroom, and texted her twenty-year-old sister to "come get me . . . ASAP." *Id.* at 235. N.S.'s sister arrived sometime between three and four in the morning, and N.S. left with her. On the way out of the hotel, N.S. told her sister what had happened. The two went to N.S.'s aunt's house, and N.S. told her aunt what had happened as well. N.S.'s aunt contacted authorities.

[6] On January 14, 2020, the State charged Stovall as follows:

- Count I: Level 1 felony child molesting alleging that, on or about January 12, 2020, Stovall, while at least twenty-one years of age, did perform or submit to other sexual conduct with N.S., a child under the age of fourteen years;
- Count II: Level 1 felony child molesting alleging that, on or about January 12, 2020, Stovall, while at least twenty-one years of age, did perform or submit to other sexual conduct with N.S., a child under the age of fourteen years;
- Count III: Level 4 felony child molesting alleging that, on or about January 12, 2020, Stovall did perform or submit to fondling or touching with N.S., a child under the age of fourteen years, with the intent to arouse or satisfy the sexual desires of either Stovall or N.S.;
- Count IV: Level 4 felony child molesting alleging that, on or about January 12, 2020, Stovall did perform or submit to fondling or touching with N.S., a child under the age of fourteen years, with the intent to arouse or satisfy the sexual desires of either Stovall or N.S.;
- Count V: Level 4 felony incest alleging that, on or about January 12, 2020, Stovall, being at least eighteen years of age, did engage in other sexual conduct with N.S., a person under sixteen years of age, knowing that N.S. was related to Stovall biologically;

> Count VI: Level 4 felony incest alleging that, on or about January 12, 2020, Stovall, being at least eighteen years of age, did engage in other sexual conduct with N.S., a person under sixteen years of age, knowing that N.S. was related to Stovall biologically.

The State later amended the information to further allege that Stovall was a habitual offender.

[7] At Stovall's ensuing jury trial, N.S., her sister, her aunt, and investigators testified. During its closing argument, the State explained the six molestation and incest charges as follows:

> Count I and II are child molesting. Count I refers specifically to [Stovall] inserting his finger into [N.S.'s] vagina[;] Count II specifically refers to him putting his finger into her anus . . . . Did knowingly or intentionally perform or . . . admit to other sexual conduct, which is the penetration of a sex organ or an anus by . . . the finger. We have proven both Count I and Count II . . . .
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> Count III is child molesting. It's a little different. Again, Count III specifically deals with the vagina[;] Count IV deals with the anus, and in th[ese two C]ount[s] we have to prove an additional allegation of the intent to arouse or satisfy . . . sexual desires. How do you know . . . that he did this . . . with the intent to arouse either her or his sexual desires? From his own conduct, that he's moving his finger in and out as explained to you by a [twelve-]year old, and the fact that he kissed her on the top lip[;] that is how we know. He is guilty of Count[s] III and IV . . . .
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> Lastly, Counts V and VI, incest. The Defendant, being over 18 years of age, [and] she has to be under 16 . . . , we have proven to you that she is [twelve], did knowingly or intentionally engage in other sexual conduct, again, the same conduct, placing his finger

> in her vagina or her anus. Count V is her vagina[;] Count VI is her anus.

Tr. Vol. 3, pp. 188-89.

[8] The jury found Stovall guilty as charged, and the trial court then found him to be a habitual offender. The court entered judgment of conviction against Stovall on all counts and ordered him to serve an aggregate term of fifty-six years in the Department of Correction. This appeal ensued.

Standard of Review

[9] On appeal, Stovall challenges only whether the entry of judgment of conviction on each of his molestation and incest counts violates his federal or state right to be free from double jeopardy. We review these issues de novo. *See, e.g.*, *Wadle v. State*, 151 N.E.3d 227, 237 (Ind. 2020).

I. Federal Double Jeopardy Analysis

[10] We first address Stovall's argument that his convictions violate his federal right to be free from double jeopardy. As we have explained:

> The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Double jeopardy protection under the Constitution is evaluated under the "same elements" test set out in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). That test provides: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be

> applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not." *Blockburger*, 284 U.S. at 304. In other words, the *Blockburger* test contemplates whether a defendant can be convicted for conduct in a single incident under two separate statutory provisions. *See id. The same elements test does not apply in cases where multiple offenses based on separate acts*, especially on separate dates, *have been charged under the same statute*. *See id.*

Rexroat v. State, 966 N.E.2d 165, 168 (Ind. Ct. App. 2012) (emphases added and original emphasis removed), *trans. denied*.

[11] Stovall asserts that, under the *Blockburger* test, Count II should be vacated because it consists of the same statutory elements as Count I; Count IV should be vacated because it consists of the same statutory elements as Count III; and Count VI should be vacated because it consists of the same statutory elements as Count V.[2] But Stovall's argument disregards clear precedent that "[t]he same elements test does not apply in cases where multiple offenses based on separate acts . . . have been charged under the same statute." *Id.* And that is what happened here—Counts I, III, and V were based on Stovall's digital penetration of N.S.'s vagina, while Counts II, IV, and VI were based on his digital penetration of her anus. Therefore, Counts I and II do not overlap; Counts III

[2] Stovall additionally asserts that Counts III and IV should be vacated under a federal double jeopardy analysis because they are lesser included offenses to Counts I and II. We need not consider Stovall's additional federal analysis, however, as we resolve that argument under our state analysis.

and IV do not overlap; and Counts V and VI do not overlap. Stovall's argument under *Blockburger* fails.

II. State Double Jeopardy Analysis

[12] Stovall also asserts that his convictions violate his right to be free from substantive double jeopardy under Indiana law.[3] Specifically, he asserts that his Level 4 felony child molesting convictions under Counts III and IV and his Level 4 felony incest convictions under Counts V and VI are included offenses to his convictions for Level 1 felony child molesting under Counts I and II. In *Wadle*, our Supreme Court established a two-step test[4] for determining substantive double jeopardy claims under Indiana law. 151 N.E.3d at 248-49. We address each step in turn.

***Wadle* Step 1(A): Legislative Intent under the Statutes of Conviction**

[13] In *Wadle*, our Supreme Court explained that the first step in the relevant analysis is to determine whether our legislature intended for multiple

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[3] In this part of his brief on appeal, Stovall additionally asserts that his multiple convictions violate the "actual evidence test" articulated by the Indiana Supreme Court in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). However, our Supreme Court has since expressly overruled *Richardson*. *Wadle*, 151 N.E.3d at 235. We therefore do not consider Stovall's *Richardson* argument. Similarly, the State devotes a significant portion of its brief on appeal to our Supreme Court's double jeopardy analysis in *Powell v. State*, 151 N.E.3d 256 (Ind. 2020). The analysis in *Powell* applies "when a single criminal act or transaction violates a single statute but harms multiple victims." *Wadle*, 151 N.E.3d at 247 (explaining *Powell*). Stovall does not argue on appeal that his convictions violate the test articulated in *Powell*, and, therefore, we do not consider any such argument. *See also Koziski v. State*, 172 N.E.3d 338, 341-42 (Ind. Ct. App. 2021) ("Because the convictions fall under separate statutory provisions," albeit subdivisions within the same statute, "each defining a separate crime, the *Wadle* 'separate statutes' test is a better fit than the *Powell* 'single statute' test."), *trans. denied*.

[4] Some post-*Wadle* opinions of our Court describe this as a three-step test. *See, e.g.*, *id.* at 342.

punishments. *Id.* at 248. To do so, we initially consider the language of the statutes of conviction:

> When multiple convictions for a single act or transaction implicate two or more statutes, we first look to the statutory language itself. (The mere existence of the statutes alone is insufficient for our analysis.) If the language of either statute clearly permits multiple punishment, either expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy.

Id. (footnote omitted).

[14] Here, the State charged Stovall under Indiana Code section 35-42-4-3(a) (2019) for the Level 1 felony child molesting allegations; section 35-42-4-3(b) for the Level 4 felony child molesting allegations; and section 35-46-1-3 for the Level 4 felony incest allegations. Those statutes provide in relevant part as follows:

> [I.C. § 35-42-4-3](a) A person who, with a child under fourteen (14) years of age, knowingly or intentionally performs or submits to sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5[5]) commits child molesting, a Level 3 felony. However, the offense is a Level 1 felony if:
>
> > (1) it is committed by a person at least twenty-one (21) years of age . . . .

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[5] "Other sexual conduct" includes "the penetration of the sex organ or anus of a person by an object," I.C. § 35-31.5-2-221.5, and our case law has interpreted a finger to be an "object" under that statute, *see, e.g.*, *Seal v. State*, 105 N.E.3d 201, 209 (Ind. Ct. App. 2018), *trans. denied*.

> (b) A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Level 4 felony. . . .
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> * * *
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> [I.C. § 35-46-1-3](a) A person eighteen (18) years of age or older who engages in sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) with another person, when the person knows that the other person is related to the person biologically as a parent, child, grandparent, grandchild, sibling, aunt, uncle, niece, or nephew, commits incest, a Level 5 felony. However, the offense is a Level 4 felony if the other person is less than sixteen (16) years of age.

I.C. §§ 35-42-4-3, -46-1-3.

[15] The statutes under which Stovall was convicted do not "expressly or by unmistakable implication" permit multiple punishments. *Wadle*, 151 N.E.3d at 248. Indiana Code section 6-7-3-20, by contrast, expressly permits multiple punishments by allowing "the imposition of an excise tax on the delivery, possession, or manufacture of a controlled substance[ ]in addition to any criminal penalties." *Id.* at 248 n.22 (quoting I.C. § 6-7-3-20). Nothing in the language of the statutes under which Stovall was convicted expresses or unmistakably implies any such similar intent by our legislature. Indeed, in *Koziski v. State*, 172 N.E.3d 338, 342 (Ind. Ct. App. 2021), *trans. denied*, we held, in this part of the *Wadle* analysis, that Indiana Code section 35-42-4-3 does not "clearly permit[] (or prohibit[]) multiple punishment[s] for multiple acts of

molestation against the same victim in a single encounter." And the same is true for the statutory language prohibiting incest. Thus, the statutes under which Stovall was convicted do not end our double jeopardy analysis under *Wadle*.

***Wadle* Step 1(B): Legislative Intent for Included Offenses**

[16] Having determined that the statutes under which Stovall was convicted do not speak to multiple punishments, we must next consider whether the multiple convictions at issue are within our legislature's intent to be considered included offenses to each other. As further explained by our Supreme Court in *Wadle*:

> If . . . the statutory language is not clear, a court must then apply our included-offense statutes to determine statutory intent. . . . Under Indiana Code section 35-38-1-6, a trial court may not enter judgment of conviction and sentence for both an offense and an "included offense." An "included offense," as defined by our legislature, is an offense
>
> > (1) that "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) that "consists of an attempt to commit the offense charged or an offense otherwise included therein," or
> >
> > (3) that "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.[6]

> If neither offense is an included offense of the other (either inherently or as charged), there is no violation of double jeopardy. If, however, one offense is included in the other (either inherently or as charged), the court must then look at the facts of the two crimes to determine whether the offenses are the same. *Richardson [v. State]*, 717 N.E.2d [32, 67 (Ind. 1999),] (Boehm, J., concurring). *See also Bigler v. State*, 602 N.E.2d 509, 520 (Ind. Ct. App. 1992) (noting that "analysis of legislative intent" in Indiana, unlike the federal *Blockburger* test, "does not end with an evaluation and comparison of the specific statutory provisions which define the offenses")

151 N.E.3d at 248 (emphasis added; footnotes omitted).

[17] We thus turn to whether our legislature intended for Level 4 felony child molesting, as charged here, to be an included offense to Level 1 felony child molesting, as charged here. The State asserts that the Level 4 offense cannot be an included offense because it contains different statutory elements than the Level 1 offense. *See* I.C. § 35-42-4-3(a), (b). In particular, the Level 4 offense, unlike the Level 1 offense, requires the State to show that the defendant acted with the "intent to arouse or to satisfy the sexual desires of either the child or the older person." I.C. § 35-42-4-3(b). Insofar as the State's argument here is that the offense under subdivision (b) is not inherently included in the offense under subdivision (a), we agree with the State, and that conclusion has long

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[6] There is no dispute that subdivisions (2) and (3) of Indiana Code section 35-31.5-2-168 are not at issue here.

been supported by our precedent. *See Hawk v. State*, 506 N.E.2d 71, 74 (Ind. Ct. App. 1987) ("touching or fondling with the requisite intent is not statutorily or inherently included in the child molestation-sexual intercourse crime."), *trans. denied*.

[18] However, both our legislature and our Supreme Court's analysis in *Wadle* demand more than simply comparing the statutory elements and determining whether one offense is or is not inherently included in the other. Our legislature's stated intent in determining whether one offense is included in another also encompasses considering whether the lesser offense would be "established by proof" of the same or fewer material elements of the greater offense. I.C. § 35-31.5-2-168(1). And *Wadle* also directs us to consider the offenses "as charged." 151 N.E.3d at 248.

[19] Indeed, our Supreme Court made clear in *Wadle* that the Indiana's substantive double jeopardy analysis is "unlike the federal *Blockburger* test" in exactly this respect. *Id.* (quoting *Bigler*, 602 N.E.2d at 520). As we explained in *Bigler*:

> The [*Blockburger*] test emphasizes the statutory elements of the two crimes, notwithstanding a substantial overlap in the proof offered to establish the crimes; it identifies legislative intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. . . .
>
> In Indiana, analysis of legislative intent does not end with an evaluation and comparison of the specific statutory provisions which define the offenses. Indiana Code [section] 35-38-1-6 precludes a judgment of conviction and sentence on an included offense. For our purposes, an offense may be included if it is

> established by proof of the same material elements or less than all the material elements required [for the greater offense] . . . . Hence, *the factual bases alleged by the State in the information and upon which the charges are predicated* must also be examined.

602 N.E.2d at 520-21 (emphasis added; quotation marks omitted).

[20] Accordingly, the State also asserts that, because the charging information here merely tracked the relevant statutes and did not state the factual bases upon which the charges were predicated, the offenses "as charged" do not demonstrate any included offenses. In other words, the State's argument is that a Level 4 felony child molesting offense can *never* be an "included offense" to Level 1 felony child molesting under Indiana Code section 35-31.5-2-168(1) so long as the State drafts the charging information to merely track the statutes. We reject the State's argument for two interrelated reasons.

[21] First, Indiana Code section 35-31.5-2-168(1) demonstrates our legislature's intent to look beyond the statutory elements when determining if an offense is an included offense. Indiana Code section 35-31.5-2-168(1) directs us to consider not just the "material elements" of the two offenses but whether the State "*established by proof* . . . the same material elements." (Emphasis added.) That is, our legislature's expressly stated intent is to look at the State's factual predicate to determine if one offense is included in the other, regardless of how the State may have drafted the information.

[22] Second, while *Wadle* says to consider the offenses "as charged," it is clear from the overall context of our Supreme Court's opinion that "as charged" means the

factual predicate for the charges, not whether the State drafted the information to specifically identify those facts. Indeed, and again, *Wadle* makes clear that Indiana's substantive double jeopardy analysis is unlike *Blockburger* in exactly this respect, and *Wadle* quotes with approval from *Bigler*, in which we held that part of our legislature's intent is to consider the factual predicates for the charges. *Bigler*, 602 N.E.2d at 520-21. The State's argument, on the other hand, would simply turn our substantive double jeopardy analysis into a *Blockburger* analysis.[7] The State's argument is therefore inconsistent with Indiana law.

[23] Still, in support of its argument on this issue, the State relies on the recent opinion of our Court in *Koziski*, but that opinion demonstrates that the State's position here is incorrect. In *Koziski*, the State charged the defendant with two counts of Level 1 felony child molesting, one for "licking [the victim's] vagina" and one under different statutory language for "putting his finger inside [her] vagina." 172 N.E.3d at 343. We explained why those two offenses were not within our legislature's intent to be included within each other:

> Subsection (1) [of Indiana Code section 35-31.5-2-168] is not implicated here. Neither form of "other sexual conduct"—an act involving "a sex organ of one (1) person and the mouth or anus of another person" and an act involving "the penetration of the sex organ or anus of a person by an object"—is established by

[7] Indeed, the State's argument would create problems under *Blockburger*—as explained above, we have concluded that there is no *Blockburger* issue precisely because the factual predicates for otherwise-identically worded charges were different, and *Blockburger* does not apply when multiple charges under one statute are premised on different facts. The State's argument on appeal thus would have it both ways—to avoid *Blockburger* by considering the predicate facts and also to avoid Indiana substantive double jeopardy law by ignoring those facts.

> proof of the other. The first is not established by proof of the second because the first requires contact between one person's sex organ and another person's mouth or anus—here, [the defendant] licking [the victim's] vagina—and the second does not. Likewise, the second is not established by proof of the first because the second requires the penetration of a person's sex organ or anus by an "object"—here, [the defendant] putting his finger inside [the victim's] vagina—and the first does not. . . .
>
> Because neither of [the defendant's] offenses is included in the other, his convictions do not constitute double jeopardy under *Wadle*, and there is no need to *further* examine the specific facts of the case under the [next] step of the [*Wadle*] test. . . .

Id. (emphasis added; footnote omitted).

[24] The State reads *Koziski* to stand for the proposition that, any time there is different statutory language, there can never be a double jeopardy issue. But that is not what *Koziski* says, and, as explained above, that reading would be contrary to both Indiana Code section 35-31.5-2-168(1) and *Wadle*. Contrary to the State's reading, *Koziski* is consistent with both the Indiana Code and Indiana precedent. Indeed, *Koziski* expressly considers the factual predicates underlying the State's two charges to determine if those factual predicates are the same. *Id.*; *see Bigler*, 602 N.E.2d at 520-21. Having determined that the State's two charges were based on different factual predicates, we then concluded that there was no need to "further" examine the specific facts of the case under *Wadle*'s next step. *Koziski*, 172 N.E.3d at 343.

[25] Here, and unlike in *Koziski*, the factual predicate underlying the State's charge in Count I (Level 1 child molesting) and Count III (Level 4 child molesting) was the same factual predicate—Stovall's penetration of N.S.'s vagina with his finger. Likewise, the factual predicate underlying the State's charge in Count II (Level 1 child molesting) and Count IV (Level 4 child molesting) was also the same factual predicate—Stovall's penetration of N.S.'s anus with his finger. For these offenses, then, we must continue the *Wadle* analysis to determine if his multiple convictions were in violation of his substantive double-jeopardy rights.

[26] However, we agree with the State that Counts V and VI, the incest allegations, were not "included" offenses to the child molesting charges as intended by our legislature under Indiana Code section 35-31.5-2-168(1). Again, that statute states that our legislature intends an offense to be "included" if the offense is "established by proof of *the same* material elements *or less* than all the material elements" of the greater offense. (Emphases added.) The charge of incest requires the State to establish not the "same" or "less" than the molestation charges—it requires the State to establish something else, namely, that the defendant "knows that the [victim] is related to the [defendant] biologically" within a certain degree. I.C. § 35-46-1-3. And nothing about the proof of that biological relationship would speak to Stovall's convictions for child molestation.

[27] Therefore, we conclude that our legislature's intent demonstrates that incest is not included within Stovall's Level 1 or Level 4 child molesting allegations. Thus, for his claim of double jeopardy on his incest convictions, we conclude

that there is no double jeopardy violation under Indiana law, and for those convictions our analysis ends there. *See Koziski*, 172 N.E.3d at 343.

***Wadle* Step 2: Whether the Trial Facts Demonstrate a Single Continuous Crime**

[28] Having determined that Stovall's convictions on the Level 4 felony child molesting convictions are within our legislature's intent for included offenses as they have identical factual predicates to the Level 1 offenses, we proceed to the final step of *Wadle*'s analysis as to Stovall's Level 4 felony child molesting offenses. As our Supreme Court explained:

> Once a court has analyzed the statutory offenses charged, it must then examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial. Based on this information, a court must ask whether the defendant's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction."
>
> If the facts show two separate and distinct crimes, there's no violation of substantive double jeopardy, even if one offense is, by definition, "included" in the other. But if the facts show only a single continuous crime, and one statutory offense is included in the other, then the prosecutor may charge these offenses only as alternative (rather than as cumulative) sanctions. . . .

151 N.E.3d at 249 (citations and footnotes omitted). Importantly:

> This approach substantially mirrors the analytical framework we use to determine whether a party is entitled to an included-offense instruction at trial. *See Wright v. State*, 658 N.E.2d 563,

> 567 (Ind. 1995) (explaining that, "if a trial court has determined that an alleged lesser included offense is either inherently or factually included in the crime charged, it must look at the evidence presented in the case by both parties"). This is important because the standard used to identify an included-offense at trial effectively delineates the scope of the double-jeopardy protection on appeal. *See Moore v. State*, 698 N.E.2d 1203, 1208 (Ind. Ct. App. 1998) ("In light of the well-settled prohibition against convictions for both a greater offense and its included offense, if a *Wright* analysis determines that crime 'B' is an included offense of crime 'A', then double jeopardy precludes convictions for both.").

Id. at 249 n.25 (emphases omitted).

[29] Here, again, the factual predicate underlying Count I and Count III was Stovall's digital penetration of N.S.'s vagina, and the factual predicate underlying Count II and Count IV was Stovall's digital penetration of her anus. The penetration of N.S.'s vagina and anus with Stovall's finger was used to support both the "other sexual conduct" elements of the Level 1 felonies and the "touching or fondling" elements of the Level 4 felonies. The State's closing argument to the jury made clear that the penetrations themselves were the State's evidence of Stovall's intent to commit the acts under the Level 1 felonies as well as, in significant part, the State's evidence of Stovall's intent to arouse or satisfy sexual desires under the Level 4 felonies. Further, as the Level 4 felonies were the same acts as the Level 1 felonies, they were of course "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction" with the Level 1 felonies. *See id.* at 249.

[30] Accordingly, Stovall's Level 4 felony child molesting convictions were a single continuous crime with his Level 1 felony child molesting convictions. We therefore reverse his Level 4 felony child molesting convictions as contrary to Stovall's right to be free from double jeopardy under Indiana law.

Conclusion

[31] For all of the above reasons, we affirm Stovall's two convictions for Level 1 felony child molesting and his two convictions for Level 4 felony incest. However, Stovall's two convictions for Level 4 felony child molesting violate his right to be free from double jeopardy under Indiana law. Therefore, we reverse those convictions and remand with instructions for the trial court to vacate Stovall's two Level 4 felony child molesting convictions. As Stovall's sentences on the two Level 4 felony child molesting convictions were ordered to run concurrent with his sentences on his two Level 1 felony child molesting convictions, Stovall's aggregate sentence remains unchanged and resentencing is unnecessary.

[32] Affirmed in part, reversed in part, and remanded with instructions.

Robb, J., concurs.
Tavitas, J., concurs in part and dissents in part with opinion.

IN THE
COURT OF APPEALS OF INDIANA

Daniel Carroll Stovall,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

Court of Appeals Case No.
22A-CR-224

Tavitas, Judge, concurring in part and dissenting in part.

[33] I concur with the majority's conclusion that Stovall's convictions for Count III, child molesting, a Level 4 felony, and Count IV, child molesting, a Level 4 felony violate the prohibition against double jeopardy. I conclude, however, that Count V and Count VI, the incest convictions suffer from the same obstacle. As with Count III and Count IV, the incest convictions are also based upon the same factual predicate underlying the convictions in Count I and Count II. Accordingly, I would also vacate Count V and Count VI, the incest convictions. Because the sentences for Count V and Count VI were ordered to run concurrent with Stovall's sentence for Count I, Stovall's sentence would remain unchanged. For these reasons, I concur in part and dissent in part.