

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Harold Gene France,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

March 1, 2024

Court of Appeals Case No.
23A-CR-2019

Appeal from the Lake Superior Court
The Honorable Samuel L. Capps, Judge

Trial Court Cause No.
45G04-1802-F1-5

Memorandum Decision by Judge Bradford
Chief Judge Altice and Judge Felix concur.

Bradford, Judge.

Case Summary

- [1] In October of 2017, Harold France dragged fifteen-year-old W.W. into an East Chicago alleyway while holding a knife to her back, where he forced her to fellate him to ejaculation, digitally penetrated her vagina, and attempted to vaginally penetrate her with his penis. After a jury found France guilty of two counts of Level 1 felony rape, Level 1 felony attempted rape, Level 3 felony criminal confinement, Level 5 felony intimidation, and Level 5 felony battery by means of a deadly weapon, the trial court sentenced him to an aggregate term of sixty-one years of incarceration. France contends that his two convictions for rape and his conviction for attempted rape violate Indiana's prohibitions against double jeopardy. We affirm.

Facts and Procedural History

- [2] W.W. was born in December of 2001 and, in October of 2017, lived in East Chicago. On the evening of October 16, 2017, W.W. was walking home from a friend's house when she saw and felt a red jacket go over her face and heard someone (who turned out to be France) say, "Live or die?" Tr. Vol. II p. 34. As France pulled W.W. into an alleyway in a chokehold with a knife to her back, he repeated the question, and W.W. responded, "[l]ive." Tr. Vol. II p. 35. France threw W.W. to the ground, asked to see her breasts, and started ripping her jacket off. France pulled his pants down, stuck his penis in W.W.'s face, and, after repositioning her, put his hands down her pants and began

rubbing the outside of her vagina. When W.W. struggled, France threatened to stab her in her “butt hole and every other hole possible.” Tr. Vol. II p. 47.

[3] France inserted his fingers into W.W.’s vagina and ordered her to remove her pants. After W.W. had removed her pants, France unsuccessfully attempted to vaginally penetrate her with his penis. After briefly performing cunnilingus on W.W., France again unsuccessfully attempted to vaginally penetrate her with his penis. Eventually, France forced W.W. to fellate him to ejaculation while telling her that if she did not comply his friends were going to “pimp [her] out.” Tr. Vol. II p. 54. Afterwards, France told W.W. that if she told anyone about what he had done, he would find her and kill her. Authorities identified France as W.W.’s attacker from DNA in W.W.’s saliva, a genital swab, and an underwear swab.

[4] On February 23, 2018, the State charged France with two counts of Level 1 felony rape (one based on digital penetration and one based on forced fellatio), Level 1 felony attempted rape (based on France’s attempt at vaginal penetration with his penis), Level 3 felony criminal confinement, Level 5 felony intimidation, and Level 5 felony battery by means of a deadly weapon. After a jury found France guilty as charged, the trial court sentenced him to an aggregate term of sixty-one years of incarceration.

Discussion and Decision

[5] France contends that his two rape and one attempted-rape convictions violate Indiana’s prohibitions against substantive double jeopardy. A claim of double jeopardy presents a question of law that is reviewed *de novo*. *Carranza v. State*,

184 N.E.3d 712, 715 (Ind. Ct. App. 2022). Indiana’s substantive double-jeopardy analysis is limited to cases where “a single criminal act or transaction violates a single statute and results in multiple injuries,” *Powell v. State*, 151 N.E.3d 256, 263 (Ind. 2020), or “when a single criminal act or transaction violates multiple statutes with common elements and harms one or more victims.” *Wadle v. State*, 151 N.E.3d 227, 247 (Ind. 2020). Either way, “the dispositive question is one of statutory intent.” *Id.*

[6] Although the parties restrict their arguments to the question of whether the *Powell* framework permits all three of France’s Level 1 felony convictions to stand, *Powell* has no applicability in this case. *Powell* involves multiple violations of the same statutory provisions, while all three of France’s challenged convictions involved violations of separate statutory provisions.¹ *See Carranza*, 184 N.E.3d at 716 (concluding that *Wadle* applied where “convictions were based on separate subsections of the primary charging statute”). In other words, the *Wadle*—not *Powell*—test applies. France, however, does not make an argument based on the provisions of *Wadle*. To the extent that France argues that his convictions run afoul of *Powell*, that argument is misplaced, and we need not address it further.

¹ All three of the rape-related charges against France involved the same two provisions of the rape statute, Indiana Code subsections 35-42-4-1(a)(1) and 35-42-4-1(b)(2). Where the three charges differ is that Count I alleged an act involving “the penetration of the sex organ or anus of a person by an object” pursuant to Indiana Code subsection 35-31.5-2-221.5(2), Count II alleged an act involving “a sex organ of one (1) person and the mouth or anus of another person” pursuant to Indiana Code subsection 35-31.5-2-221.5(1), and Count III alleged an attempt to have sexual intercourse with W.W. pursuant to Indiana Code subsection 35-41-5-1(a).

[7] That said, even if France had properly made a *Wadle* argument, it would not have helped him:

First, we look to the statutes. [*Wadle*, 151 N.E.3d at 235.] If they explicitly allow for multiple punishments, no double jeopardy occurs, and our inquiry ends. *Id.* at 248. If the statutes are unclear, we apply Indiana’s included-offense statute. *Id.* (citing Ind. Code § 35-31.5-2-168). If either offense is included in the other, we proceed to the second step and ask whether the defendant’s actions are “so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.” *Id.* at 249. If the facts show only a single crime, judgment may not be entered on the included offense. *Id.* at 256.

Carranza, 184 N.E.3d at 716.

[8] Indiana’s rape and attempt statutes do not clearly permit multiple punishments, so we turn to Indiana’s included-offense statute, which defines “included offense,” in relevant part, as an offense 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 [or] consists of an attempt to commit the offense charged or an offense otherwise included therein[.]” Indiana Code section 35-31.5-2-168. None of France’s three offenses, as charged, is an included offense of any of the others because each required proof of a material element that the others did not: Counts I and II required proof of different varieties of “other sexual conduct,” and Count III, while it is an allegation of attempted rape, required proof of an attempt to commit rape involving sexual intercourse, not “other sexual conduct.” Because none of France’s Level 1 felony offenses, as charged, is an included offense of any the others, the analysis

would have ended with the conclusion that there has been no double-jeopardy violation pursuant to *Wadle*.

[9] The judgment of the trial court is affirmed.

Altice, C.J., and Felix, J., concur.

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