MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Timothy Leavell,
Appellant-Defendant,

v.

State of Indiana,
Appellant-Plaintiff.

April 12, 2024

Court of Appeals Case No.
23A-CR-2247

Appeal from the
Vanderburgh Circuit Court

The Honorable
David D. Kiely, Judge

Trial Court Cause No.
82C01-2201-F2-482

Memorandum Decision by Senior Judge Shepard
Judges Bradford and Kenworthy concur.

Shepard, Senior Judge.

Statement of the Case

[1] Timothy Leavell appeals from his convictions of one count of Level 2 felony attempted burglary, two counts of Level 5 felony intimidation, and one count of Class B misdemeanor criminal mischief, contending that his convictions violate the Indiana constitution's prohibition against double jeopardy. Agreeing in part with Leavell's argument, we reverse in part; however, we otherwise affirm.

Facts and Procedural History

[2] Kathryn Brown, Leroy Butler, and Brown's children were at home when Brown heard her dog barking in the fenced-in backyard and someone cursing and screaming outside. Brown opened the back door where she saw Leavell standing next to her fence. The two exchanged words about whether Brown's dog bit him, and Leavell threatened to shoot Brown. Brown saw Leavell reach into his pocket and she became frightened when she saw a silver-colored object. Brown retreated into the home with her dog and shut and locked the door.

[3] Leavell entered the backyard, grabbed a shovel, and began bashing the shovel against the back door of the house. When the outer pane of the door's double-paned window shattered, Brown alerted Butler, who was upstairs, that someone

was trying to shoot her. Butler came downstairs armed with a handgun, heard Leavell threatening Brown, and saw him trying to break through the second pane of the window. Brown called 911 while Butler ordered Leavell to "just get away from my door." Tr. Vol. II, p. 104. However, when Leavell continued to hit the glass with the shovel, Butler shot at him once, hitting Leavell in the neck. Leavell fled but was apprehended nearby.

[4] The State charged Leavell with several offenses based on the events described above. A jury found him guilty of attempted burglary, two counts of intimidation, and one count of criminal mischief. The trial court sentenced Leavell to seventeen and one-half years for attempted burglary, three years executed on each of the intimidation counts, and 180 days executed on the criminal mischief offense. Five and one-half years of the concurrent sentences were suspended to probation.

Discussion and Decision[1]

[5] Leavell appeals, saying his convictions arising from "a single criminal act—Leavell using a shovel to attempt to enter Brown and Butler's home—[violate] multiple statutes with common elements." Appellant's Br. p. 8. There is no dispute that his double jeopardy argument is governed by our Supreme Court's decision in *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), as opposed to *Powell v.*

[1] Leavell concedes that his intimidation of Brown was completed by the time he began damaging the door of the house. *See* Appellant's Br. pp. 10-11. Thus, we need not complete the analysis as to this conviction.

State, 151 N.E.3d 256 (Ind. 2020) (single criminal act or transaction violates single statute but harms multiple victims).

[6] The three-step *Wadle* analysis for such claims was recently adjusted in *A.W. v. State*, No. 23S-JV-40, 2024 WL 1065820 (Ind. March 12, 2024), as to the second step of the analysis. Thus, we also look to *A.W.* for guidance.

[7] The first step in the *Wadle* analysis begins with the statutory language of the offenses. "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." *Wadle*, 151 N.E.3d at 248. Neither party argues that our analysis ends at this step, and we agree. *See* Appellant's Br. p. 9; Appellee's Br. p. 9.

[8] Under the second step, "a court must then apply our included-offense statutes to determine statutory intent." *Wadle*, 151 N.E.3d at 248.

> An "included offense," as defined by the General Assembly, 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. "If neither offense is an included offense of the other (either inherently or as charged), there is no violation of double jeopardy" and the analysis ends—full stop. *Wadle*, 151 N.E.3d at 248. But if one offense is included in the other, the court must proceed to Step 3. *See id.*

A.W., 2024 WL 1065820, at * 5.

[9] The Supreme Court clarified that "when assessing whether an offense is factually included, a court may examine only the **facts as presented on the face of the charging instrument**." *Id.* at *6. Noting that "[d]ouble jeopardy outcomes should not turn solely on the facts the prosecutor elects to include or exclude in the charging instrument. . . . Step 2 as currently understood confers an asymmetrical benefit to the State." *Id. A.W.* removed that asymmetrical benefit by holding that "where ambiguities exist in a charging instrument about whether one offense is factually included in another, courts must construe those ambiguities in the defendant's favor and thus find a presumptive double jeopardy violation at Step 2. . . . which the State can later rebut . . . at Step 3." *Id.*

[10] Thus, we engage in the adjusted Step 2 analysis here. As charged, the State alleged that Leavell committed Level 2 felony attempted burglary by "knowingly taking a substantial step toward the commission of said crime of Burglary by attempting to break and enter the dwelling of another with the intent to commit a felony therein, to wit: Intimidation and/or Intimidation with a Deadly Weapon or Battery with a Deadly Weapon while armed with a deadly weapon. . . ." *See* Appellant's App. Conf. Vol. II, p. 32. And as

charged, the State alleged that Leavell committed Class B misdemeanor criminal mischief by recklessly, knowingly, or intentionally damaging or defacing the property of Butler and/or Brown without their consent. *See id.* at 33. Per *A.W.*, we find the charging information language to be ambiguous, and as such, leads us to find a presumptive double jeopardy violation.

[11] According to *A.W.*, "[i]f a court has found that one offense is included in the other—either inherently or as charged—the court must then (and only then) 'examine the **facts underlying those offenses**, as presented in the charging instrument and as adduced at trial.'" 2024 WL 1065820, at *9 (quoting *Wadle*, 151 N.E.3d at 249). We must then "probe the underlying facts—as presented in the charging instrument and adduced at trial—to determine whether a defendant's actions were 'so compressed in terms of time, place, and singleness of purpose, and continuity of action as to constitute a single transaction.'" *Id.* (quoting *Wadle*, 151 N.E.3d at 249).

[12] When comparing the evidence at trial to support Leavell's attempted burglary and criminal mischief convictions, we conclude the State presented evidence the crimes were committed by Leavell's use of a shovel— both to attempt to break into the Brown/Butler house and to deface it. Thus, the criminal mischief conviction is included in the attempted burglary offense and must be vacated due to a double jeopardy violation.

[13] Leavell's argument concerning his Level 5 felony Intimidation conviction does not fare as well because it does not survive our Step 2 analysis. Intimidation as

a Level 5 felony requires evidence of the communication of a threat which places the victim in fear; whereas, attempted burglary does not. *See* Ind. Code § 35-45-2-1 (2022) (intimidation); I.C. § 35-43-2-1 (burglary); Ind. Code § 35-41-5-1 (2014) (attempt). And unlike attempted burglary, intimidation does not require an attempted breaking and entering of a dwelling. *See* I.C. § 35-45-2-1. We find no double jeopardy violation in that regard.

Conclusion

[14] In light of the foregoing, we conclude that Leavell's conviction for Class B misdemeanor criminal mischief must be vacated due to a double jeopardy violation. However, the trial court's judgment is affirmed in all other respects. Therefore, we affirm in part, and reverse and remand in part.

[15] Affirmed in part, and reversed and remanded in part.

Bradford, J., and Kenworthy, J., concur.

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