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IN THE COURT OF APPEALS OF INDIANA

C.W.,	)	
	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A04-0909-JV-541
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn Moores, Judge
The Honorable Scott B. Stowers, Magistrate
Cause Nos. 49D09-0901-JD-134, 49D09-0903-JD-717

April 27, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

C.W. appeals his adjudication as a delinquent child for committing attempted robbery[1] which would have been a Class C felony if committed by an adult, sexual battery[2] which would have been a Class D felony if committed by an adult, and criminal confinement[3] which would have been a Class D felony if committed by an adult. He raises three issues, which we restate as:

I. Whether the State presented sufficient evidence to support the juvenile court's true finding for sexual battery;

II. Whether the juvenile court's true findings of sexual battery and criminal confinement constituted double jeopardy under the Indiana Constitution because the same evidence was used to support both; and

III. Whether C.W.'s due process rights were violated when the State could not produce a surveillance tape of the area near where the attempted robbery occurred.

We affirm.

FACTS AND PROCEDURAL HISTORY

I. Facts Concerning Cause Number 49D09-0903-JD-717

C.W. was born on June 27, 1996. On March 5, 2009, C.W. was walking home from the bus stop with C.D., J.B., and others. C.W. and J.B. started "feeling on" the girls and grabbing their "butts." *Tr.* at 5. The girls told C.W. and J.B. to stop, but they would not. The others walked ahead, and C.D. was left behind with C.W. and J.B. C.D. tried to run away, but C.W. grabbed her by her backpack and swung her around. He then pushed

[1] *See* Ind. Code §§ 35-42-5-1, 35-41-5-1.

[2] *See* Ind. Code § 35-42-4-8.

[3] *See* Ind. Code § 35-42-3-3.

her up against a wall. C.D. continued to try to get away and to tell C.W. to stop, but he did not do so. C.W. told C.D., "You gonna kiss me," to which C.D. responded that she would not. *Id*. at 6. C.W. did not listen to C.D.'s protests and would not let her escape. As C.D. struggled to escape, C.W. grabbed her "butt" and breasts and stuck his tongue into her mouth. *Id*. at 6-7. He then let C.D. go, and she ran to her home.

C.D. felt violated after the incident and told two friends, R.H. and M.B., about what had happened. As she told them, she kept spitting and looked as though she was about to cry. *Id*. at 28. C.D. then told her mother, her mother's boyfriend, and eventually, the police about the incident. Indianapolis Metropolitan Police Detective Laura Smith ("Detective Smith") spoke with C.W., and he admitted that he and J.B. had held C.D. up against a wall and that he had touched her "butt" and chest.

II. Facts Concerning Cause Number 49D09-0901-JD-134

On November 4, 2008, B.T., who was a student at Fall Creek Valley Middle School, was in the locker room waiting for the bell to ring. While waiting, he removed his iPod from his pocket to move it to a more comfortable position. Shortly thereafter, he was walking in the school hallway, when someone covered his eyes and put an arm around his neck while someone else patted him down, asking, "Where is it? Give it here." *Id*. at 120. B.T. heard two voices saying these things. B.T. was scared that the individuals would take his iPod or hurt him. After about ten seconds, they fled and left B.T. alone. C.S., who was a few feet away in the hallway at the time of the incident, saw that B.T.'s assailants were C.W. and another student, G.L. When C.W. and G.L. released B.T., C.S. saw that B.T.'s face was red like it had been held, and B.T. told him he did not

want to talk about what had occurred. *Id*. at 129-30.

B.T. then walked to his next class and sent a text message to his father to tell him what had happened. B.T. initially told his father that the individuals tried to take his cell phone because he was not allowed to take his iPod to school. B.T. was later summoned to the assistant principal's office and told her what had occurred. Two weeks later, C.S. also told school officials what he had observed. Lawrence Police Department Detective Tom Buell ("Detective Buell") interviewed C.W. about the incident, and C.W. admitted that he and G.L. had grabbed B.T. intending to steal his iPod. *Id*. at 155.

A digital recorder was located in the "mall" or common area where the students walked between classes. *Id*. at 143. On approximately December 5, 2008, Michael Fishburn ("Fishburn"), the coordinator of safety and security for the Metropolitan School District of Lawrence Township, and Detective Buell viewed the recording of the mall from the date and time of the assault of B.T., and the assault did not appear on the recording. Although both C.W. and B.T. appeared on the recording, the digital recorder did not film the actual area where the assault was alleged to have occurred. Prior to trial, C.W. subpoenaed the digital recording; however, Fishburn was not able to provide a copy because the recording no longer existed as it had been recorded over or deleted as a routine matter.

III. Procedural Facts

The State alleged C.W. to be a delinquent child in two separate petitions resulting from the two incidents. Under cause number 49D09-0903-JD-717 ("Cause No. 717"), the State alleged C.W. to be delinquent for committing an act that would be sexual

battery as a Class D felony if committed by an adult and for committing an act that would be criminal confinement as a Class D felony if committed by an adult. Under cause number 49D09-0901-JD-134 ("Cause No. 134"), the State alleged C.W. to be delinquent for committing an act that would be attempted robbery as a Class C felony if committed by an adult. After a joint denial hearing, the juvenile court found all of the allegations under both counts to be true. A dispositional hearing was held for both cause numbers on August 24, 2009, after which C.W. was placed on suspended commitment to the Department of Correction and on probation with special conditions. C.W. now appeals.

DISCUSSION AND DECISION

Arguments under Cause No. 717

I. Sufficient Evidence

When the State seeks to have a juvenile adjudicated as a delinquent for committing an act that would be a crime if committed by an adult, the State must prove every element of the crime beyond a reasonable doubt. *M.S. v. State*, 889 N.E.2d 900, 901 (Ind. Ct. App. 2008) (citing *J.S. v. State*, 843 N.E.2d 1013, 1016 (Ind. Ct. App. 2006), *trans. denied*), *trans. denied*. When we review a juvenile adjudication, we will consider only the evidence and reasonable inferences supporting the judgment and will neither reweigh evidence nor judge the credibility of the witnesses. *Id*. If there is substantial evidence of probative value from which a reasonable trier of fact could conclude beyond a reasonable doubt that the juvenile committed the delinquent act, we will affirm the adjudication. *B.R. v. State*, 823 N.E.2d 301, 306 (Ind. Ct. App. 2005).

C.W. argues that the State failed to present sufficient evidence to support a true

finding for sexual battery which would have been a Class D felony if committed by an adult. He specifically contends that insufficient evidence was presented to show that C.D. was compelled to submit to any touching by force or the imminent threat of force. He claims that the evidence did not establish that force or the threat of force was used to compel compliance of his touching of C.D.

In order to support a true finding for sexual battery, the State was required to prove that C.W.: (1) with the intent to arouse or satisfy his own sexual desires; (2) touched C.D.; (3) when C.D. was compelled to submit to the touching by force or the imminent threat of force. *See* Ind. Code § 35-42-4-8. Evidence that a victim did not voluntarily consent to a touching does not, in itself, support the conclusion that the defendant compelled the victim to submit to the touching by force or threat of force. *Bailey v. State*, 764 N.E.2d 728, 730 (Ind. Ct. App. 2002), *trans. denied*. "In fact, not all touchings intended to arouse or satisfy sexual desires constitute sexual battery; rather, only those in which the person touched is compelled to submit by force or the imminent threat of force violate [Indiana Code section] 35-42-4-8." *Id*. However, the force need not be physical or violent, but may be implied from the circumstances. *Id*.

In the present case, C.D. testified that C.W. held her against a wall despite her protests and struggle to escape and touched her "butt" and breasts and stuck his tongue in her mouth. *Tr*. at 6-7. She stated that he would not let her leave, and when she tried, he pushed her back against the wall. *Id*. at 6. C.D. also testified that C.W. grabbed her by the backpack, swung her around, and pushed her against the wall against her will and ignored her pleas for him to stop. *Id*. Additionally, Detective Smith testified that C.W.

admitted to her that he and J.B. held C.D. against a wall while C.W. touched her breasts and "butt." *Id*. at 65-66, 74-75. We conclude that the State presented sufficient evidence that C.D. was compelled to submit to the touching by force or the threat of force. We affirm the juvenile court's true finding for sexual battery.

II. Double Jeopardy

Article 1, section 14 of the Indiana Constitution states that "[n]o person shall be put in jeopardy twice for the same offense." Two or more offenses are the same offense in violation of Article I, section 14 if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to obtain convictions, the essential elements of one challenged offense also establish the essential elements of another challenged offense. *H.M. v. State*, 892 N.E.2d 679, 681 (Ind. Ct. App. 2008), *trans. denied*. Under the actual evidence test, we examine the actual evidence presented at trial in order to determine whether each challenged offense was established by separate and distinct facts. *Id*. "To find a double jeopardy violation under this test, we must conclude that there is 'a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.'" *Id*.

C.W. argues that the juvenile court's true findings for both sexual battery and criminal confinement constitute double jeopardy under the Indiana Constitution. He contends that the true finding for criminal confinement was supported by the same actual evidence as that used to support the true finding for sexual battery. Specifically, C.W. asserts that both true findings were supported by the evidence that he grabbed C.D.'s

backpack and pushed her against a wall. He also claims that the evidence presented showed that he did not confine C.D. beyond that which was necessary to accomplish the sexual battery.

For the juvenile court to issue a true finding that C.W. committed what would be Class D felony criminal confinement if committed by an adult, the court had to find that C.W. knowingly or intentionally confined C.D. without her consent. Ind. Code § 35-42-3-3(a). For the juvenile court to issue a true finding that C.W. committed what would be Class D felony sexual battery if committed by an adult, the court had to find that C.W., with the intent to arouse or satisfy his own sexual desires or the sexual desires of another person, touched C.D. when she was compelled to submit to the touching by force or the imminent threat of force. Ind. Code § 35-42-4-8(a). We note that this case was tried before a judge, who is presumed to know the law and apply it correctly. *H.M.*, 892 N.E.2d at 682. "Generally, double jeopardy does not prohibit convictions of confinement and robbery when the facts indicate that the confinement was more extensive than that necessary to commit the robbery." *Merriweather v. State*, 778 N.E.2d 449, 454 (Ind. Ct. App. 2002). Therefore, true findings for both confinement and sexual battery would not be prohibited as long as the facts indicated that the confinement was more extensive than that necessary to commit the sexual battery.

Here, the State's evidence showed that, before C.W. began to commit the sexual battery, he physically grabbed C.D. by the backpack and swung her around and pushed her against a wall, while ignoring her attempts to get away and pleas to stop. This was an act of confinement that was more extensive than that necessary to commit the sexual

battery. This additional confinement, beyond the force and restraint C.W. used upon C.D. while he committed the sexual battery, established the separate crime. Because we presume that the trial court properly applied the law and there is evidence that C.W. confined C.D. separate from the restraint used to accomplish the sexual battery, C.W.'s true findings for criminal confinement and sexual battery do not constitute double jeopardy under the actual evidence test.

Argument under Cause No. 134

III. Right to Due Process

C.W. argues that the State's failure to preserve or destruction of allegedly material evidence violated his due process rights. He specifically contends that the digital recording of the mall area of the school at approximately the date and time of the incident was materially exculpatory evidence. Therefore, he alleges that the State's failure to preserve the recording denied him due process of law, and his true finding for attempted robbery should be reversed.

To determine whether a defendant's due process rights were violated by the State's failure to preserve the recording, we must first determine whether the recording was "potentially useful evidence" or "materially exculpatory evidence." *Terry v. State*, 857 N.E.2d 396, 406 (Ind. Ct. App. 2006), *trans. denied* (2007). Evidence is "materially exculpatory" if it "possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* When the State fails to preserve materially exculpatory evidence, a due process violation occurs regardless of

whether the State acted in bad faith. *Id*. However, evidence is merely "potentially useful" if "no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* When the State fails to preserve potentially useful evidence, a due process violation occurs only if the defendant shows the State acted in bad faith. *Id*.

In the present case, a digital recorder filmed the mall or common area through which the students traveled between classes. On approximately December 5, 2008, which was about thirty days after the incident, Fishburn and Detective Buell viewed the recording from the date and time of the incident and did not see the crime on it. Both C.W. and B.T. appeared on the recording, but no camera recorded the area where the alleged assault supposedly occurred. Although C.W. subpoenaed the recording, Fishburn was not able to provide a copy because the recording no longer existed as it had been either recorded over or deleted in the meantime as was routinely done. The juvenile court denied C.W.'s motion to dismiss due to the State's failure to produce the recording.

The evidence presented showed that the digital recorder at issue was located in the mall area, which was a common area where students passed through between classes. Fishburn and Detective Buell both testified that this digital recorder was not filming the location where the offense allegedly occurred. *Tr*. at 143, 148, 151. Fishburn also testified that, although both B.T. and C.W. appeared on the recording, it did not show any interaction between the two. *Id*. at 146. The recording was therefore not materially exculpatory as it did not "possess an exculpatory value that was apparent before the evidence was destroyed," nor was it "of such a nature that the defendant would be unable

to obtain comparable evidence by other reasonably available means." *See Terry*, 857 N.E.2d at 406.

In the absence of the recording being materially exculpatory, C.W. could prove a due process violation only by showing that the State acted in bad faith in failing to preserve the recording. *Id*. The evidence showed that the recording was either deleted or recorded over as a routine matter by the school. *Tr*. at 140. Fishburn testified that he never provided a copy of the recording to the State. C.W. has failed to prove that the recording was destroyed by the State in bad faith.

Further, even if the recording showed, as C.W. argues, him and B.T. in the hallway immediately after the offense acting calmly, it could not overcome both C.S.'s identification of C.W. as one of B.T.'s assailants and C.W.'s admission that he and G.L. tried to steal B.T.'s iPod. "[W]here the other evidence of guilt at trial is so overwhelming that the likelihood of exculpation becomes highly improbable, no due process violation results from the loss of the evidence." *Hopkins v. State*, 579 N.E.2d 1297, 1300-01 (Ind. 1991). In the present case, C.S. testified that he observed what happened and identified C.W. as one of the boys who attempted to take B.T.'s iPod. *Tr*. at 127-29. Fishburn also testified that C.W. admitted his involvement in the attempted robbery of B.T. *Id*. at 155. Therefore, even if the recording had shown what C.W. contended it did, both he and B.T. calmly walking in the hallway between classes without disruption, that evidence would not have been enough to overcome the other evidence supporting the true finding. We conclude that no due process violation occurred. Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.