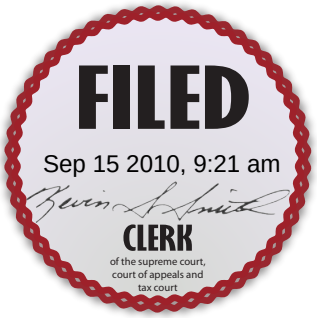

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IN THE
COURT OF APPEALS OF INDIANA

GEORGE D. HARDING II,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A05-1003-CR-202
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Cause No. 18C02-0803-FC-21

September 15, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant George D. Harding II appeals his convictions on two counts of Sexual Misconduct with a Minor,[1] a class C felony, claiming that double jeopardy principles bar a conviction on one of the counts. Harding also maintains that the trial court erred in refusing to give his instruction on the lesser-included offense of sexual battery. Concluding that Harding's convictions are not barred by double jeopardy concerns and that the trial court properly refused to give an instruction on sexual battery, we affirm.

FACTS

Harding and M.M.'s mother began dating in 2002 and married two years later. Sometime in 2007, all three began living together in Muncie, along with M.M.'s two siblings.

In September 2007, when M.M. was fourteen years old, forty-year-old Harding would enter M.M.'s bedroom during the night and feel M.M.'s chest and vaginal area over her clothing. These incidents occurred nearly twenty times until February 2008, at which time M.M. reported the offenses to her high school counselor.

After hearing about these incidents, M.M.'s mother ordered Harding to leave the residence. A report was filed with Child Protective Services and the authorities interviewed both Harding and M.M. Thereafter, the State charged Harding with two counts of sexual misconduct with a minor. The two charging informations were worded the same and read as follows:

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[1] Ind. Code § 35-42-4-9(b)(1).

> [B]etween September 1, 2007 and February 29, 2008 in Delaware County, . . . Harding, . . . being at least 21 years of age, to-wit: Forty . . . years of age, did perform fondling or touching with M.M. a child at least fourteen . . . years of age but less than sixteen . . . years of age, to-wit: fourteen . . . years of age, with the intent to arouse or satisfy the sexual desires of the defendant. . . .

Appellant's App. p. 12.

At a jury trial that commenced on November 9, 2010, the trial court informed the jury in its preliminary instructions that Count II "is the same offense that, which is charged in Count I, it's just simply at different times. Different offenses need to be established between that time frame." Tr. p. 108. The prosecutor stated during opening argument that the evidence would establish that Harding "did this over a period, fifteen to twenty times" and that the fondling occurred in different ways on "multiple occasions." Id. at 114.

M.M. testified that the fondling occurred approximately twenty times between September 2007 and February 2008. Although Harding did not commit these acts "every night," they happened on "several occasions." Id. at 184, 191. M.M. also testified that some nights Harding would touch only her chest, at other times he would fondle her vaginal area, and on other occasions he would touch both areas. M.M. was also "afraid" of Harding. Id. at 192-93.

The prosecutor argued during closing argument that the evidence showed that Harding fondled M.M. between fifteen and twenty times during the period spanning September of 2007 and February of 2008. The prosecutor also explained to the jury that

"the reason for the two Counts, is for over a period of time, fifteen to twenty incidences." Id. at 211.

During argument on final instructions, Harding's counsel requested, but did not tender, an instruction on sexual battery as a lesser-included offense. The trial court denied counsel's oral request for such an instruction.

Prior to deliberations, the trial court instructed the jury that, in order to find Harding guilty on both counts:

> [T]here would have to be two separate incidences. All right. That's what the statute would require. Just simply two, separate incidences between that period of time, and that's what the State would be required to establish, beyond a reasonable doubt.

Id. at 215. Thereafter, the jury returned a verdict of guilty on both counts.

On March 18, 2010, the trial court sentenced Harding to seven years on each count. The trial court ordered these sentences to run consecutively, resulting in an aggregate sentence of fourteen years of incarceration. Harding now appeals.

DISCUSSION AND DECISION

I. Double Jeopardy

Harding argues that one of his convictions must be set aside because a conviction on both counts violated his right against double jeopardy under Article 1, Section 14 of the Indiana Constitution.[2] More specifically, Harding maintains that the "actual evidence test and the statutory elements test both determined that his convictions . . . were based upon the same evidence or offense." Appellant's Br. p. 13.

[2] This section provides that "[n]o person shall be put in jeopardy twice for the same offense."

In resolving this issue, we note that in Richardson v. State, 717 N.E.2d 32 (Ind. 1999), our Supreme Court interpreted Article I, Section 14 of the Indiana Constitution to prohibit multiple convictions based upon the same statutory elements or the same evidence as follows:

> [T]wo or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.
>
> . . .
>
> To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate 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. at 49-50, 53.

In this case, Harding claims that one of his convictions must be set aside because "the elements used to establish the essential elements of Count 1 are the exact same elements used to establish the essential elements of Count 2." Appellant's Br. p. 8. Harding is correct, in that the State was required to prove that between September 1, 2007, and February 29, 2008, he fondled or touched M.M., a child at least fourteen years of age, but less than sixteen years of age, with the intent to arouse or satisfy his sexual desires. See I.C. § 35-42-4-9(b)(1).

However, notwithstanding Harding's argument that a conviction on two counts of sexual misconduct with a minor violate the same elements test, our Supreme Court has determined that when separate and distinct offenses occur, even when there are similar

acts done many times to the same victim, they may be charged individually as separate and distinct acts of criminal conduct. See Riggs v. State, 508 N.E.2d 1271, 1273-74 (Ind. 1987) (holding that two charges of criminal deviate conduct and one charge of attempted deviate conduct based upon three separate incidents occurring within one thirty-minute attack did not violate double jeopardy principles). Moreover, we have determined that when a double jeopardy claim is based upon two or more counts of the same offense, the statutory elements test set forth in Richardson does not apply. Thomas v. State, 840 N.E.2d 893, 897-98, 900 (Ind. Ct. App. 2006). As a result, to determine whether Harding's rights under Article I, Section 14, were violated, we apply the actual evidence test announced in Richardson.

In this case, even though the charging informations contain identical language, the prosecutor explained during both opening and closing argument that the charges were based upon at least two separate incidents during the charged period of time. Tr. p. 114, 204, 211. Additionally, the trial court explained to the jury in both the preliminary and final instructions that the jury was required to find that two separate offenses occurred. Id. at 108, 215.

As discussed above, M.M. testified at trial that the fondling incidents occurred approximately twenty times between September 2007 and February 2008. Id. at 183. M.M. also described the different ways in which Harding had fondled her during the episodes. Id.

In light of this evidence, it is apparent that the incidents in both counts were established by separate and distinct facts when M.M. testified that Harding had fondled

her on numerous occasions, in different ways, and at different times. As a result, Harding has failed to demonstrate that there was a reasonable probability that the jury used the same evidence to support his convictions, and we conclude that Harding's convictions were not barred by double jeopardy prohibitions.

II. Jury Instruction

Harding claims that the trial court erred in refusing to instruct the jury on the lesser-included offense of sexual battery.[3] Specifically, Harding contends that the definition of a lesser-included offense was satisfied in this case and the evidence presented at trial supported his request for the instruction.

We initially observe that although Harding's counsel read portions of the sexual battery statute to the trial court, no proposed instruction was read into the record. Tr. p. 198-200. Moreover, there is no indication that Harding tendered a written instruction on sexual battery to the trial court. Id. As a result, Harding has waived the issue. See Ortiz v. State, 766 N.E.2d 370, 375 (Ind. 2002) (holding that if a defendant fails to tender a proposed instruction to the trial court, he waives review of any claim of error based upon the trial court's failure to give the instruction).

Waiver notwithstanding, we note that our Indiana Supreme Court has stated:

> A requested instruction for a lesser included offense of the crime charged should be given if the lesser included offense is either inherently or factually included in the crime charged, and if, based upon the evidence presented in the case, there existed a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense such

[3] Ind. Code § 35-42-4-8.

> that a jury could conclude that the lesser offense was committed but not the greater.

Ellis v. State, 736 N.E.2d 731, 733 (Ind. 2000) (citing Wright v. State, 658 N.E.2d 563, 567 (Ind. 1995)).

The sexual battery statute provides that:

> (a) A person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is:
>
> > (1) compelled to submit to the touching by force or the imminent threat of force . . .
>
> commits sexual battery, a Class D felony.

Indiana Code section 35-42-4-8 (emphasis added).

On the other hand, the offense of sexual misconduct with a minor reads as follows:

> (b) A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) 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 sexual misconduct with a minor, a Class D felony. However, the offense is:
>
> > (1) a Class C felony if it is committed by a person at least twenty-one (21) years of age. . . .

I.C. § 35-42-4-9(b)(1) (emphasis added).

We note that Harding does not specifically argue whether sexual battery was an inherently or factually included offense of sexual misconduct with a minor. Appellant's Br. p. 91-12. However, the sexual misconduct statute quoted above requires proof that the victim was between the ages of fourteen and sixteen years old and that the defendant

was at least twenty-one. These two elements are not included in the sexual battery statute. I.C. § 35-42-4-8(a)(1), -9(b)(1). Moreover, sexual battery as a class D felony requires the use of force or the imminent threat of force, which is also an element not present in the sexual misconduct statute. Id. Therefore, the offense of sexual battery is not established by proof of the same or fewer material elements than the offense of sexual misconduct, nor is it established with a showing of less harm or culpability. Wright, 658 N.E.2d at 566. Hence, sexual battery as a class D felony is not an inherently lesser-included offense of sexual misconduct with a minor, a class C felony.

Additionally, the evidence showed that Harding was charged with fondling M.M. with the intent to satisfy his sexual desires. Appellant's App. p. 12-13. Harding was not charged with using force or the imminent threat of force, which is an element of sexual battery. I.C. § 35-42-4-8(a)(1). Thus, because the means used to commit the sexual misconduct in this instance did not include all the elements of sexual battery, we similarly conclude that sexual battery is not a factually included offense of sexual misconduct in this case. As a result, we conclude that the trial court did not err in refusing to instruct the jury on the offense of sexual battery.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.