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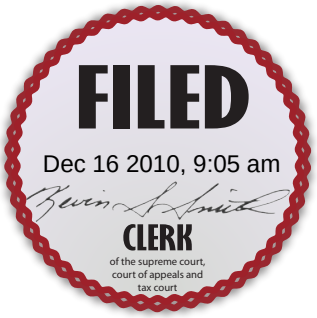

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IN THE COURT OF APPEALS OF INDIANA

CARLOS MORALES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1005-CR-599
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable James B. Osborn, Judge
Cause No. 49F15-0911-FD-91440

December 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a bench trial, Appellant-Defendant Carlos Morales was convicted of Class D felonies Sexual Battery[1] (Count I) and Criminal Confinement[2] (Count II). Upon appeal, Morales contends that his convictions violate double jeopardy and that there is insufficient evidence to support his conviction for sexual battery. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

C.C. is a housekeeper at an Indianapolis apartment complex. On October 28, 2009, she was replacing the toilet paper in a bathroom stall of the men's restroom when she heard the restroom door open and saw Morales standing in the doorway. Morales approached the bathroom stall where C.C. was standing and held the stall door open. C.C. attempted to exit the stall, turning sideways so that her back faced Morales. As C.C. passed by Morales, he grabbed her from behind and touched her body in various places, including her breast, upper thigh, legs, stomach, and "lower areas." Tr. p. 14. C.C. was shocked and scared by Morales's actions and pushed him away multiple times with her arm. C.C. broke free from Morales and exited the restroom. Morales touched C.C.'s buttocks as she left. C.C. went to the women's restroom, locked herself inside, waited for Morales to leave, and reported the incident to her boss.

On November 2, 2009, the State charged Morales with Class D felonies sexual battery and criminal confinement. Morales was found guilty as charged in an April 22, 2010 bench

[1] Ind. Code § 35-42-4-8 (2009).
[2] Ind. Code § 35-42-3-3 (2009).

trial during which the trial court stated, *inter alia*, as follows:

> [T]he touching was … in a manner that I think anybody would consider to be sexual in nature—touching the breast, touching the thighs, touching of the stomach, touching the rear end. I don't think that was, there wasn't any evidence of violence with regard to that. [I]t would be clearly what I would consider to be fondling—and with the intent to satisfy whoever the person was's sexual desires. So I don't think there's a problem with seeing that a sexual battery was committed in this particular case. I do think that by virtue of—of grabbing a person and holding onto a person and not immediately releasing them, that that is the use of force. It may not be the strongest amount of force that I've ever heard of, but clearly—at least in my view, it's force as well. As to the criminal confinement, again, it's clear to me from the facts that [C.C.] didn't feel that she was free to leave, that she had to struggle to get away. Now, perhaps she could have struggled a little harder; she could have yelled; she could have done some other things that—that may have gotten her out of the situation more quickly, but she's not necess—she's not required to do that. [S]he didn't put herself in this position; she didn't ask to be handled in the way she was. [A]nd she certainly give [sic] consent to, to be held in the area. So, I—I think that a confinement occurred as well.

Tr. p. 75.

The trial court entered judgment of conviction and sentenced Morales to concurrent terms of 365 days, with 146 days executed and 219 days suspended to probation, for each count. This appeal follows.

DISCUSSION AND DECISION

I. Double Jeopardy

Morales first contends that his convictions for sexual battery and criminal confinement violate double jeopardy principles. Morales points to *Griffin v. State*, 583 N.E.2d 191, 194 (Ind. Ct. App. 1991), and *Wells v. State*, 568 N.E.2d 558, 563 (Ind. Ct. App. 1991), in support of his claim. In *Wells*, this court vacated a defendant's confinement conviction

where the only confinement alleged was that which was necessary to effectuate his additional acts of robbery and attempted rape. 568 N.E.2d at 563. In *Griffin*, this court, citing *Wells*, similarly held that confinement was an included offense of attempted rape where the only confinement alleged was that which was necessary to effectuate the rape. 583 N.E.2d at 195. Based upon *Griffin* and *Wells*, Morales argues that any confinement of C.C. was simply necessary to effectuate his sexual battery.

Article I, Section 14 of the Indiana Constitution provides that "No person shall be put in jeopardy twice for the same offense." In *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), the Supreme Court developed a two-part test for Indiana double jeopardy claims, holding that

> two 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.

(Emphasis in original).

The two-part *Richardson* test is not the exclusive measure of double jeopardy violations, however. *See Guyton v. State*, 771 N.E.2d 1141, 1143 (Ind. 2002). As enumerated in Justice Sullivan's concurrence in *Richardson* and seemingly adopted in *Guyton*, five additional categories of double jeopardy exist, "Category 3" of which includes the following: "Conviction and punishment for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted and punished." *Richardson*, 717 N.E.2d at 55-56 (Sullivan, J., concurring), *cited in Guyton*, 771 N.E.2d at

1143. In evaluating the instant case under this category, we are guided by Justice Boehm, who proposed in his concurring opinion in *Guyton* that courts consider the statutes, charging instruments, evidence, and arguments of counsel in order to determine whether the facts establishing one crime are the same as the facts establishing one or more elements of another. 771 N.E.2d at 1154 (Boehm, J., concurring).

Consistent with Indiana Code section 35-42-4-8, Morales was charged with having committed sexual battery by touching C.C. with intent to arouse or satisfy his own sexual desires and compelling C.C. to submit to such touching by force or imminent threat of force. *See* Ind. Code § 35-42-4-8. The charging information did not specify the means of force Morales was alleged to have used. With respect to criminal confinement, Morales was charged with having knowingly confined C.C. without her consent. *See* Ind. Code § 35-42-3-3.

At trial, the State, in establishing the force element of its sexual battery charge, argued that Morales committed sexual battery when he touched and fondled C.C. "while he had her in his grasp." Tr. p. 69. The State argued that Morales committed the additional crime of criminal confinement by "not only the stopping and holding her in that place, but also holding her in that place while she was trying to get free and then leave." Tr. p. 68.

In finding Morales guilty of criminal confinement, the trial court relied upon the evidence that C.C. was not free to leave Morales's grasp and had to struggle to do so. In finding Morales guilty of sexual battery, the trial court relied upon this same evidence to establish the force element of the offense, specifically that Morales grabbed C.C. and did not

immediately release her. The State's argument and trial court's judgment demonstrate that the same evidence which constituted Morales's confinement conviction also established the force element of his sexual battery conviction. In other words, Morales's confinement of C.C. was necessary to effectuate his sexual battery of her. We must therefore conclude that Morales's convictions for both sexual battery and criminal confinement violate prohibitions against double jeopardy.[3] Accordingly, we reverse and remand with instructions to vacate Morales's conviction and sentence for Count II, criminal confinement.

II. Sufficiency of the Evidence

Morales additionally challenges the sufficiency of the evidence to support his conviction for sexual battery. Morales claims that there was no evidence of his intent to arouse his sexual desires, nor was there evidence that C.C. experienced fear at the time of the incident.

In evaluating the sufficiency of the evidence to support Morales's conviction, we do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State,* 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id*. We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the

[3] The State asserts that Morales waived his double jeopardy claim because he failed to raise it below. Generally, if a party fails to raise an objection before the trial court, the objection is waived on appeal. *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002). However, the Indiana Supreme Court has provided an exception to the waiver rule for fundamental error. *Id*. Whether double jeopardy constitutes fundamental error must be decided on a case-by-case basis. *Taylor v. State*, 717 N.E.2d 90, 96 n. 7 (Ind. 1999). We choose to discuss the double jeopardy issue in this case on the merits.

defendant was guilty of the crime charged beyond a reasonable doubt. *Id*. It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

1. Intent to Arouse

At trial, C.C. testified that Morales touched and rubbed her breast, thigh, legs, stomach, "lower areas," and buttocks. Tr. pp. 14. When asked whether Morales touched her vaginal region, C.C. answered, "Not—no, not really. Just, like, the top part. Because I had on a big shirt, and my hand was full, so it was kind of—in the way, sort of." Tr. p. 14. According to Morales, this statement is too equivocal to demonstrate that he touched C.C.'s genitals or support an inference that his touching was intended to arouse or satisfy his sexual desires. Regardless of whether Morales specifically touched C.C.'s genitals, he touched and rubbed her breast, areas close to her genitals, and her buttocks. This supports the reasonable inference that his touchings were with the intent to arouse his sexual desires. *See Altes v. State*, 822 N.E.2d 1116, 1122 (Ind. Ct. App. 2005) (finding reasonable inference of intent to arouse where defendant's touching was close enough to the female genitals to constitute a source of sexual gratification), *trans. denied*.

2. Fear

Morales also claims that there was insufficient evidence that C.C. was placed in fear. Fear is not an element of sexual battery. While it may be relevant to demonstrate the use or threat of force, *see Chatham v. State*, 845 N.E.2d 203, 207 (Ind. Ct. App. 2006), here there

was ample evidence of force, namely Morales's confining C.C. while he fondled her. In any event, C.C. testified that she was scared at the time of the incident. Morales's claim on this ground warrants no relief.

III. Conclusion

We have concluded that Morales's convictions for both criminal confinement and sexual battery violate double jeopardy and that there is sufficient evidence to support the sexual battery conviction. Accordingly, we reverse and remand with instructions to vacate the criminal confinement conviction.[4]

The judgment of the trial court is affirmed in part, reversed in part, and remanded.

KIRSCH, J., and CRONE, J., concur.

[4] As a practical matter, this opinion does not affect Morales's sentence, since the sentences imposed on each count were run concurrently.