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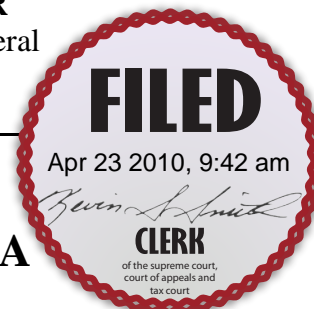
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**IN THE  
COURT OF APPEALS OF INDIANA**

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HERMAN P. JOHNSON,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 49A02-0908-CR-819

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Mark D. Stoner, Judge  
Cause No. 49G06-0903-FA-034012

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**April 23, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Herman Johnson appeals his convictions for Class A and Class C felony child molesting. We hold that (I) the trial court did not err in denying Herman's *Batson* challenge and (II) there is sufficient evidence to sustain Herman's convictions. We affirm.

## Facts and Procedural History

Johnson was forty-five years old and lived in Indianapolis. One day he went to the movies with his ten-year-old niece E.B. and his girlfriend Wanda. Afterward the three returned to Johnson's house. E.B. and Johnson began playing chess. Wanda left after ten or fifteen minutes. E.B. and Johnson then decided to play a card game. E.B. went to the back room to look for a deck of cards, and Johnson followed her.

While they were in the back room, Johnson lifted E.B. from behind, pulled up her shirt and bra, and touched her breast. Wanda soon returned. Johnson instructed E.B. not to tell anyone that he had picked her up. E.B. came to the front of the house to see Wanda. E.B. did not tell her what had happened. Wanda left again five minutes later.

E.B. continued to look for cards. She could not find any and returned to the back room. Johnson picked E.B. up again and touched her vagina over her clothing. E.B. then went to another room to resume her search. She again found no cards and returned to the back room. Johnson came in and placed E.B. on the bed. Johnson pulled down her pants and underwear, inserted his finger into her vagina, and moved his finger "[i]n and out." Tr. p. 26. E.B. told Johnson that he was hurting her, but Johnson said he did not care.

E.B. started kicking. Johnson pinned her down and began licking the inside of her vagina.

Soon E.B.'s mom called, and E.B. spoke to her briefly on the phone. At some point E.B. and Johnson left and went to Safeway. They also stopped at a laundromat so E.B. could go to the bathroom. Johnson gave E.B. his cell phone before she went in. E.B. called her mom while in the restroom and told her what Johnson had done. E.B. and Johnson then returned to the house, and E.B.'s mother was there when they arrived. E.B. left with her mother. They picked up E.B.'s father, and E.B. explained to her parents what had happened. Authorities were ultimately notified.

The State charged Johnson with Class A felony child molesting, Class C felony child molesting, and Class C felony criminal confinement. The first child molesting count alleged that Johnson, "being at least twenty-one (21) years of age, did perform or submit to deviate sexual conduct, an act involving a sex organ, that is: vagina of E.B. and the mouth of Herman Johnson, with E.B., a child who was then under the age of fourteen (14) years." Appellant's App. p. 20. The second count alleged that Johnson "did perform or submit to any fondling or touching with E.B. . . . with intent to arouse or satisfy the sexual desires of E.B. and/or the sexual desires of Herman Johnson." *Id.* at 20-21. Johnson was brought to trial in July 2009.

During voir dire, the State questioned jury pool members on the quantum and quality of proof they would require in order to convict the defendant. The trial record does not identify jurors by name or number but does reflect the following discussions:

[STATE]: Okay. So let's say I can give you one person who is going to be able to tell you what happened. And she is going to come in and talk to you

about it and you believe her. I'm asking you to make a leap now. Okay. I'm going to ask you that you've heard the evidence and you believe what she told you. Okay. Beyond a reasonable doubt. There is . . . You don't doubt that she . . . What she told you is the truth. With only hearing her testimony could you convict the defendant?

UNKNOWN JUROR: No.

[STATE]: No. If you believe what she says, can you convict the Defendant?

UNKNOWN JUROR: I don't know.

[STATE]: Fair enough.

UNKNOWN JUROR: No.

UNKNOWN JUROR: It depends on what she says.

UNKNOWN JUROR: I . . .

UNKNOWN JUROR: That doesn't mean she gave you enough information that I can make that decision.

[STATE]: Well, assume that she gave you the information that leads you to believe that it happened and that you do not doubt that he molested her.

UNKNOWN JUROR: (indiscernible) yes.

[STATE]: Okay.

UNKNOWN JUROR: (indiscernible)

[STATE]: Okay. So you are selected from our jury and I'm going to talk along [sic] long time and we are going to be here until 2:00 in the morning tomorrow night when you finally get done. And you guys had parked your car out in the alley behind the City-County Building and you go out to your car. And a guy walks up to you and puts a gun to your face and says, "Give me all your money." You are the only one there. You do the smart thing and you give him the money and you come back around the City-County Building to the front and that gentleman is standing out there and you say, "Officer. Officer, I was just robbed." And he says, "Did anybody see it?" And you said, "No. I was the only one there." Were you robbed? Yes. Right? You were the only one and you were robbed, you gave him money because he stuck a gun in your face, right? How many witnesses do you have?

UNKNOWN JUROR: Zero.

[STATE]: You do. One. Zero. Really zero because you are the only one. Do you want the State of Indiana to file charges and have that guy found guilty?

UNKNOWN JUROR: Yes.

[STATE]: How many witnesses do I have? If the jury believes you, is he guilty of robbery?

UNKNOWN JUROR: Yes.

[STATE]: Okay. Anybody else have a problem with that, that I'm not going to be able to give you much physical evidence? Do you guys want me to have DNA in this case?

UNKNOWN JUROR: Yes.

[STATE]: You want me to have DNA in this case?

UNKNOWN JUROR: It would be nice.

[STATE]: Well, I agree. You know what, I would be thrilled if I had some DNA, right, because then I would . . . I mean, if I had . . . if I had semen . . . . You understand why I'm not going to have some sort . . .

UNKNOWN JUROR: Yes.

[STATE]: . . . of evidence, certainly no semen because there is no allegation of intercourse or any ejaculation right?

UNKNOWN JUROR: Yes.

*Id.* at 215.

The jury venire contained only two African-American panelists, Ms. Gillenwaters and Mr. Swan. The State moved to peremptorily disqualify both jurors. Johnson objected pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), arguing that the State had used its peremptory challenges in a racially discriminatory manner. The State offered two race-neutral explanations for the strikes:

Specifically to Ms. Gillenwaters, she specifically said that she would like to have DNA in a case like this, and understand that this is a case of oral sex and that there is no DNA. We struck her for that reason. Mr. Swan specifically stated that he would not be able to convict on single witness testimony. And obviously that is an issue in this case, that is the reason for the strike of Mr. Swan.

*Id.* at 233-34. The trial court accepted the State's explanations and found as follows:

Well, the Court does in terms of its notes does reflect that Mr. Swan did indicate that he could not convict based on the single eyewitness. Ms. Gillenwaters did indicate that she would like to have DNA on that. The . . . Ms. Gillenwaters particularly was the only individual that, from the panel, that indicated that sediment [sic]. The Court does accept the race neutral strike from both . . . from the State of Indiana as to both.

*Id.* at 234.

The jury convicted Johnson of Class A and Class C felony child molesting but acquitted him of Class C felony criminal confinement. Johnson now appeals.

### **Discussion and Decision**

Johnson raises two issues: (I) whether the trial court erred in denying his *Batson* challenge and (II) whether there is sufficient evidence to sustain his child molesting convictions.

#### **I. *Batson* Challenge**

Johnson first argues that the trial court erred by denying his objection pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, the United States Supreme Court held that a prosecutor's use of peremptory challenges to strike potential jurors solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Jeter v. State*, 888 N.E.2d 1257, 1262-63 (Ind. 2008), *cert. denied*, 129 S. Ct. 645 (2008). *Batson* set forth a three-step process for challenging the State's allegedly discriminatory exercise of peremptory strikes. *Id.* at 1263. The party raising the *Batson* challenge must first make a prima facie showing that the other party exercised a peremptory challenge on the basis of race. *Id.* (citing *Batson*, 476 U.S. at 96). The burden then shifts to the party exercising the peremptory strike to present a race-neutral explanation for striking the juror. *Id.* (citing *Batson*, 476 U.S. at 97). Finally, the trial court must decide whether the party making the *Batson* challenge has carried its burden of proving purposeful discrimination. *Id.* (citing *Batson*, 476 U.S. at 98). "Upon appellate review, a trial court's decision concerning whether a peremptory challenge is discriminatory is given great deference, and will be set aside only if found to

be clearly erroneous.” *Forrest v. State*, 757 N.E.2d 1003, 1004 (Ind. 2001); *see also Killebrew v. State*, --- N.E.2d ---, ---, 2010 WL 1328270 at \*1-2 (Ind. Ct. App. Apr. 6, 2010).

The parties do not dispute that the first two *Batson* requirements were satisfied in this case. Johnson made a prima facie showing of racial discrimination when the State struck the only two prospective African-American jurors on the panel. *See, e.g., Graham v. State*, 738 N.E.2d 1096, 1100 (Ind. Ct. App. 2000), *reh’g denied*. Next, the State offered two facially race-neutral explanations for its peremptory challenges: Mr. Swan said he would not be able to convict on the testimony of a single witness, and Ms. Gillenwaters preferred seeing DNA evidence which the State would be unable to provide.

At issue in this case is the third and final *Batson* step. Johnson argues that the trial court erred by crediting the State’s race-neutral explanations and finding that the peremptory challenges were not exercised in a racially discriminatory manner. Johnson maintains that the State’s race-neutral explanations for disqualifying Mr. Swan and Ms. Gillenwaters are not supported by the record. He relies on the two excerpts quoted above, which allegedly involved Mr. Swan and Ms. Gillenwaters respectively. “Regarding being able to convict upon testimony from a single eyewitness, Swan’s answers go from ‘No’ to ‘I don’t know’ to ‘No’ to ‘It depends on what she says’ to ‘Yes.’ Swan ended by indicating he could indeed convict upon testimony from a single eyewitness.” Appellant’s Br. p. 11-12 (citations omitted). And “[f]rom Gillenwaters’ responses to the State’s questions and points, it is clear that Gillenwaters understood why

there would be no DNA evidence in this particular trial and did not have a problem with it.” *Id.* at 13.

Johnson assumes that the foregoing responses were in fact provided by Mr. Swan and Ms. Gillenwaters. Unfortunately the voir dire transcript is unclear and refers to venire members only as “unknown jurors.” As a result, we cannot know which jurors were involved in the exchanges cited. The first excerpt is notably problematic, as it shows responses from potentially multiple jurors. The second colloquy may reflect responses from multiple jurors as well. Particularly during the jury selection process, we understand that it may be difficult for the court reporter to capture which member of the venire is speaking at any given time. In these situations, the appealing party should correct or supplement the record via affidavit to clarify which jurors provided the responses shown. *See* Ind. Appellate Rule 32.

Based on the record before us, and given our deferential standards in *Batson* cases, we can rely only on the trial court’s findings to determine who said what. The trial court found that “Mr. Swan did indicate that he could not convict based on the single eyewitness,” and that “Ms. Gillenwaters did indicate that she would like to have DNA on that.” The cited colloquies lend support to or are at least consistent with the trial court’s findings. The State first asks venire members if they could convict on the testimony of a single witness. An unnamed juror answers “no.” That juror may have been Mr. Swan. The State later asks if panelists would want to have DNA evidence to convict the defendant. A prospective juror answers “yes.” That juror may have been Ms.



Gillenwaters. These responses in turn substantiate the State's race-neutral explanations for disqualifying the two panelists.

Accordingly, we cannot say that the trial court erred by accepting the State's explanations, finding no purposeful discrimination, and denying Johnson's *Batson* challenge.

## II. Sufficiency of the Evidence

Johnson next argues that there is insufficient evidence to sustain his convictions. Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this Court does not reweigh the evidence or judge the credibility of the witnesses. *Lainhart v. State*, 916 N.E.2d 924, 939 (Ind. Ct. App. 2009). We will consider only the evidence most favorable to the judgment and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* A conviction may be based upon circumstantial evidence alone. *Id.* Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

Johnson was convicted of Class A and Class C felony child molesting. Indiana Code section 35-42-4-3 provides in pertinent part:

(a) A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if:

(1) it is committed by a person at least twenty-one (21) years of age;

\* \* \* \* \*

(b) A person who, with a child under fourteen (14) 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 child molesting, a Class C felony.

“‘Deviate sexual conduct’ means an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object.” Ind. Code § 35-41-1-9.

Mere touching alone is not sufficient to constitute the crime of child molesting. *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000). The State must also prove beyond a reasonable doubt that the act of touching was accompanied by the specific intent to arouse or satisfy sexual desires. *Id.* The intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor’s conduct and the natural and usual sequence to which such conduct usually points. *Id.*

Here the Class A felony child molesting count alleged that Johnson, “being at least twenty-one (21) years of age, did perform or submit to deviate sexual conduct, an act involving a sex organ, that is: vagina of E.B. and the mouth of Herman Johnson, with E.B., a child who was then under the age of fourteen (14) years.” The Class C felony child molesting count alleged that Johnson “did perform or submit to any fondling or touching with E.B. . . . with intent to arouse or satisfy the sexual desires of E.B. and/or the sexual desires of Herman Johnson.”

We find sufficient evidence to sustain Johnson’s two child molesting convictions. With regard to the Class A felony, the evidence most favorable to the verdict reveals that Johnson licked the inside of E.B.’s vagina. And with respect to the Class C felony, the evidence reveals that Johnson inserted his finger into E.B.’s vagina and moved it “[i]n

and out.” This is sufficient evidence of probative value from which the jury could conclude that Johnson touched E.B. with the intent to arouse his or her sexual desires. *See, e.g., Stanage v. State*, 674 N.E.2d 214, 216 (Ind. Ct. App. 1996) (finding evidence sufficient to sustain child molesting conviction, where victim testified that the defendant “touched her in her ‘private parts’”).

Johnson nonetheless argues that “[t]he evidence in this case does not pass the test of common sense,” Appellant’s Br. p. 14, namely because E.B. testified that she kept returning to the back room despite each alleged instance of molestation. Johnson also stresses that E.B. never told Wanda about an inappropriate touching, she never told anyone at Safeway, and she never made an allegation of digital penetration until she testified at trial. But in the words of our Supreme Court,

While equivocations, uncertainties, and inconsistencies appear, they are appropriate to the circumstances presented, the age of the witness, and the passage of time between the incident and the time of her statements and testimony. And there is clear, unequivocal testimony from the child that establishes the necessary elements of the charged offense.

*Fajardo v. State*, 859 N.E.2d 1201, 1209 (Ind. 2007). Johnson’s argument amounts to nothing more than an invitation to reweigh the evidence, which this Court cannot do.

Affirmed.

NAJAM, J., and BROWN, J., concur.