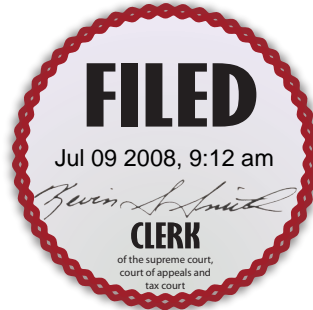


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JONATHAN J. BIRK,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 32A05-0710-CR-597

APPEAL FROM THE HENDRICKS CIRCUIT COURT
The Honorable Jeffrey V. Boles, Judge
Cause No. 32C01-0703-FB-4

JULY 9, 2008

PETITION FOR REHEARING - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

We grant rehearing to address Birk's contention that the trial court erred in denying his motion to sever. In our memorandum decision, we concluded that the trial court did not abuse its discretion in denying the motion because the evidence for each charge was not complex and the trier of fact's ability to distinguish the evidence and apply the law intelligently was shown by its verdict. We held that under these circumstances, the jury could make a fair determination as to Birk's guilt. *See Birk v. State*, No. 32A05-0710-CR-597 (Ind. Ct. App. April 28, 2008).

We write to acknowledge Birk's well-written and well-reasoned petition for rehearing, which sets forth the distinctions between the voyeurism and sexual misconduct charges. After reading the petition and the cases cited therein, we find that granting the motion to sever would have been appropriate, if not necessary, in this case. Nevertheless, the error, if any, in denying the motion was harmless because as we explained in our memorandum decision, the fact that the jury could distinguish the evidence and apply the law intelligently is shown by their verdict convicting Birk of two of the sexual misconduct charges and acquitting him of one of those charges as well as the voyeurism charge.

We affirm Birk's convictions.

BAILEY, J., and CRONE, J., concur.