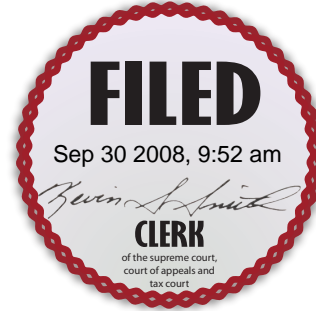


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN W. MCMASTER,)
)
 Appellant-Defendant,)
)
 vs.) No. 35A02-0712-CR-1027
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
Cause No. 35D01-0707-CM-570

September 30, 2008

MEMORANDUM DECISION ON REHEARING – NOT FOR PUBLICATION

NAJAM, Judge

The State has filed a petition for rehearing asking that we reconsider our sua sponte holding that John. W. McMaster's convictions for Public Indecency, as a Class A misdemeanor, and Battery, as a Class B misdemeanor, are barred by Double Jeopardy. See McMaster v. State, Cause No. 35A02-0712-CR-1027 (Ind. Ct. App. June 19, 2008) ("McMaster I"). In particular, the State contends that there is not a reasonable possibility that the trial court used the same facts to convict McMaster of both offenses. We agree and reverse in part our prior decision.

The relevant facts are as follows:

In the summer of 2007, the property manager of Roush Lake, a public recreation area, lodged complaints with the Indiana Department of Natural Resources ("DNR") that someone was harassing and following the lake's patrons and making rude comments to them. As a result of the complaint, on July 11, DNR Detective Sergeant Gary Whitaker and Conservation Officer Justin Blake set up an undercover operation at the recreation area's pavilion. In the investigation, Detective Whitaker monitored the radio while Officer Blake, dressed in plain clothes and wearing a body wire, talked with the lake's patrons. Officer Blake was driving a van equipped with four perimeter cameras and microphones, and he parked near the archery range parking lot southeast of the pavilion. The officers had also set up video cameras along the trail to the west of the pavilion.

At approximately 10:55 a.m., McMaster drove up to the pavilion. Officer Blake exited his vehicle and sat on a picnic table. McMaster exited his vehicle and approached Officer Blake. The two engaged in "basic conversation" about topics such as the weather, wildlife, California, and Hawaii. Transcript at 48. When McMaster brought up the topic of sexual orientation, the two men talked of that and their past sexual partners. McMaster said there was a trail west of the pavilion, and the two men walked down that trail.

McMaster stroked his genitals through his clothes as the men walked down the trail. Officer Blake asked if McMaster was "getting it ready," and McMaster answered affirmatively. Id. at 51. The men walked past the point on the trail where the video camera was located and down a mowed path before stopping. They began debating whether to walk further or to

return to the pavilion¹ when McMaster grabbed Officer Blake's genitals. Officer Blake "kind of jumped back and pulled away," and McMaster commented that Officer Blake was nervous and jumpy. Id. at 52. McMaster attempted to grab Officer Blake's genitals again, and Officer Blake backed up. McMaster then asked whether it was okay for him to grab Officer Blake, but Officer Blake did not answer.

The men returned to the pavilion. While there, McMaster grabbed Officer Blake's leg. The men continued to discuss sexual activity while McMaster fondled himself. McMaster gave Officer Blake permission to touch McMaster's genitals. McMaster said he knew of a construction site where the two could engage in sexual activity. Officer Blake agreed to follow McMaster off the property. They drove their respective vehicles, and Officer Blake pulled out in front of McMaster. Officer Blake stopped at the radio controlled flying area driveway, where another officer arrested McMaster.

The State charged McMaster with public indecency, as a Class A misdemeanor, and battery, as a Class B misdemeanor. McMaster filed a notice of intent to assert entrapment as a defense. A bench trial was held on September 11, 2007, after which the trial court took the matter under advisement. On September 17, the court found McMaster guilty as charged. . . .

McMaster I, slip op. at 2-4.

McMaster appealed his convictions and sentence, arguing in relevant part that the evidence was insufficient to support his convictions for public indecency and battery. We concluded that the evidence was sufficient to support both convictions, but we held sua sponte that Double Jeopardy barred McMaster's convictions for both public indecency and battery because there is a reasonable possibility that the finder of fact used the same evidence to support both convictions. Id. at 6. As a result, we vacated McMaster's conviction for battery. Id. at 7.

The State now petitions for rehearing, contending that Double Jeopardy is not implicated in this case. Specifically, the State observes that the case was tried to the

bench and then argues that, “[w]hile the trial court’s finding of guilt does not specify what facts the trial court considered in reaching the verdicts [sic], there is nothing to indicate in the Record on Appeal any reasonable possibility that the trial court used the same facts to convict [McMaster] of both crimes.” State’s Brief on Reh’g at 5. Upon further review of the record on appeal, we conclude that the State’s petition is well-taken.

As we stated in our memorandum decision, two offenses are the “same offense” in violation of the Indiana Double Jeopardy Clause 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. Rutherford v. State, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007). Under the “actual evidence” test, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Id. 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 all of the essential elements of a second challenged offense. Id. “[T]he ‘proper inquiry’ is not whether there is a reasonable probability that, in convicting the defendant of both charges, the [fact-finder] used different facts, but whether it is reasonably possible it used the same facts.” Bradley v. State, 867 N.E.2d 1282, 1284 (Ind. 2007) (emphasis original).

Here, Officer Blake testified that he had observed McMaster fondle himself on two occasions, while the men were on a trail and also while they were at the pavilion.

We held that that evidence was sufficient to support McMaster's conviction for public indecency, as a Class A misdemeanor. Officer Blake also testified that McMaster grabbed Officer Blake's genitals. We held that that evidence was sufficient to support either McMaster's public indecency conviction or his conviction for battery, as a Class B felony. But, as the State points out, in closing argument the State "differentiated the evidence supporting each criminal act." State's Brief on Reh'g at 5. In closing, the State argued:

The evidence has shown all the elements met for Public Indecency. It's [sic] on July 11th, 2007, in Huntington County, [McMaster] went to the Lake Roush property. That is a public place and he knowingly fondled his genitals both in the woods and then under the pavilion. The officer has testified to that fact and I believe it is corroborated on the video although the video is dark and it is not the best video you can see the shadow moving back and forth that, that is obviously what [McMaster] is doing.

The Battery was also shown that on July 11th, 2007, in Huntington County, [McMaster] went to the Lake Roush property and while he was walking with Office[r] Blake touched him, touche[d] his genitals, and he [sic], in a rude or insolent manner. . . .

Transcript at 102.

Officer Blake testified about three separate incidents of conduct by McMaster: McMaster's fondling himself on the trail, McMaster's fondling himself at the pavilion, and McMaster's grabbing the officer's genitalia. The admission of independent evidence of McMaster's various acts, by itself, does not make clear to the finder of fact which evidence supports which offense in this case. Cf. Storey v. State, 875 N.E.2d 243, 250 (Ind. Ct. App. 2007), trans. denied. But the State clarified in its closing argument that McMaster's fondling of himself, without mentioning that McMaster grabbed Officer Blake's genitalia, was the evidence that proved the public indecency charge. There is no

violation of Indiana’s Double Jeopardy Clause where the State has “carefully parsed” the evidence at trial and in closing, setting forth independent evidence to support each offense. Id.

We presume that the trial court bore the State’s closing statement in mind and did not consider the evidence of McMaster grabbing Officer Blake’s genitals as proof of both offenses. Ho. v. State, 725 N.E.2d 988, 992 n.2 (Ind. Ct. App. 2000) (“Where . . . a case is tried before the bench and not a jury, we presume that the trial judge is aware of and knows the law, and considers only that evidence properly before [it] in reaching a decision.”). In light of the State’s “careful parsing” of evidence in its closing statement, we conclude that there is not a reasonable possibility that the trial court used the evidence that McMaster grabbed Officer Blake to convict McMaster of both public indecency and battery. As a result, we grant rehearing to vacate our memorandum decision to the extent we held that double jeopardy bars McMaster’s convictions for both public indecency and battery and vacated McMaster’s battery conviction, and we affirm the trial court’s judgment of conviction and sentence.¹

Affirmed.

DARDEN, J., and BROWN, J., concur.

¹ The trial court sentenced McMaster to 365 days for public indecency and 180 days for battery, to be served concurrently. Because the sentence for battery, the conviction that we now affirm on rehearing, is shorter than the concurrent sentence for public indecency, we need not revisit McMaster’s request on appeal that we review his sentence under Indiana Appellate Rule 7(B).