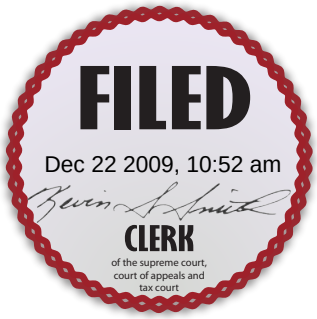


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| SANTOS REYES, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0904-CR-339 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa F. Borges, Judge
Cause No. 49G04-0806-FB-137503

**December 22, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Following a jury trial, Appellant-Defendant Santos Reyes was convicted and sentenced to an aggregate term of fifteen years in the Department of Correction for two counts of Class B felony Sexual Misconduct with a Minor (Counts I, III);[1] one count of Class B felony Rape (Count II);[2] one count of Class B felony Criminal Deviate Conduct (Count IV);[3] and one count of Class C felony Sexual Misconduct with a Minor (Count V).[4] Upon appeal, Reyes challenges the admissibility of certain prior bad act evidence, claims that he received multiple convictions for the same offenses in violation of double jeopardy principles, and argues that his aggregate fifteen-year sentence is inappropriate. We affirm in part, reverse in part, and remand with instructions.

## FACTS AND PROCEDURAL HISTORY

In June of 2008, B.M. lived with her aunt, who was married to Reyes. B.M. was fourteen years old at the time and Reyes was thirty-four.[5] On the morning of June 4, 2008, B.M., who was lying asleep on her back, awoke to find Reyes picking up her left leg and placing it over his shoulder. B.M. told Reyes "No," and to "get off" of her, but Reyes responded by repeating, "One time." Tr. pp. 53-54. Reyes removed his penis from the front opening in his underwear, moved B.M.'s panties to the side, and placed his penis in B.M.'s vagina. B.M. fought Reyes by scratching him with her fingernails, pushing him, pulling his hair, and begging him to get off of her. As B.M. fought Reyes,

[1] Ind. Code § 35-42-4-9 (2007).

[2] Ind. Code § 35-42-4-1 (2007).

[3] Ind. Code § 35-42-4-2 (2007).

[4] Ind. Code § 35-42-4-9.

[5] Reyes's birth date was later determined to be May 27, 1974.

he held her wrists together with one of his hands. Reyes tried to kiss B.M.'s lips and neck, but B.M. kept moving her head to avoid him. At some point, Reyes also placed his fingers inside B.M.'s vagina. After approximately ten to twenty minutes, Reyes stopped, got up, dressed, and left. B.M., who was fairly certain that Reyes had ejaculated inside of her, took a shower and tried to clean Reyes's skin out of her fingernails.

Shortly after the incident, B.M. reported it to her friend S.O., and in a letter to her aunt. B.M.'s aunt spoke to Reyes, who admitted having placed his penis and fingers in B.M.'s vagina. B.M.'s aunt reported the incident to authorities, who arrested Reyes that day. Investigating Officer Gregory Norris of the Indianapolis Metropolitan Police Department, who met Reyes the day he was arrested, observed that Reyes had sustained multiple scratch marks on his body, specifically on his back and arm. A subsequent medical evaluation of B.M. revealed no abnormal findings, and tests of her clothing and person were negative for the presence of seminal material. DNA tests of material collected from underneath B.M.'s fingernails did not match Reyes.

Prior to trial, Reyes filed a motion in limine seeking to exclude any alleged prior bad acts, which the trial court granted. At trial, defense counsel asked B.M. whether she had never liked Reyes, and B.M. responded by stating that she and Reyes had "never really had any problems really." Tr. p. 73. But when defense counsel asked S.O. whether B.M. did not like Reyes, S.O. agreed that B.M. had never liked him. This caused the State to argue that defense counsel had opened the door to prior bad acts evidence. The trial court agreed and permitted B.M. to testify that she and Reyes had had a problem

in the past, namely in the summer of 2006, when Reyes had "grabbed" her breasts over her shirt. Tr. p. 102.

The jury found Reyes guilty as charged.[6] During Reyes's March 25, 2009 sentencing hearing, the trial court entered judgment of conviction and sentenced Reyes on Counts I through IV to concurrent terms of fifteen years, and on Count V to a concurrent term of four years, to be served in the Department of Correction. This appeal follows.

## DISCUSSION AND DECISION

### I. Admissibility of Prior Bad Act Evidence

Reyes first argues that the trial court abused its discretion in admitting evidence relating to his prior bad act of touching B.M.'s breasts. According to Reyes, the introduction of this prior bad act evidence permitted the jury to engage in the "forbidden inference" of assessing his present guilt based upon his past propensities. *See Hicks v. State*, 690 N.E.2d 215, 218-19 (Ind. 1997). The State responds by arguing that Reyes "opened the door" to this evidence and that, even if erroneous, the admission of such evidence was harmless.

The admission of evidence is left to the sound discretion of the trial court, and this court will not reverse that decision absent an abuse of discretion. *Weis v. State*, 825 N.E.2d 896, 900 (Ind. Ct. App. 2005). An abuse of discretion occurs when the trial

[6] The charging information shows that Reyes was charged in Count IV with Class B felony criminal deviate conduct, but the verdict form for Count IV finds him guilty of Class B felony sexual misconduct with a minor. Given our resolution of this appeal, specifically the vacation of Count IV, this discrepancy is immaterial.

court's decision is against the logic and effect of the facts and circumstances before it. *Id.*

Indiana Evidence Rule 404(b), which is designed to prevent the jury from using the "forbidden inference," provides as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." *See Hicks*, 690 N.E.2d at 218-19 (citing Rule 404(b)). Significantly, however, otherwise inadmissible evidence may become admissible where the defendant "opens the door" to questioning on that evidence. *Jackson v. State*, 728 N.E.2d 147, 152 (Ind. 2000). "[T]he evidence relied upon to 'open the door' must leave the trier of fact with a false or misleading impression of the facts related." *Ortiz v. State*, 741 N.E.2d 1203, 1208 (Ind. 2001) (internal quotation omitted).

Prior to trial, the trial court granted Reyes's motion in limine seeking to exclude Reyes's alleged prior bad acts on Rule 404(b) grounds, so B.M.'s testimony regarding Reyes's prior bad act was otherwise inadmissible. During trial, however, defense counsel elicited testimony from S.O. contradicting B.M.'s testimony that she did not have a history of disliking Reyes. In arguing that defense counsel had "opened the door," the prosecutor informed the court that, in compliance with the motion in limine, she had coached B.M. to avoid references to her history of "issues" with Reyes. The trial court was within its discretion to conclude that defense counsel's eliciting S.O.'s testimony that B.M. had in fact never liked Reyes left the jury with the misleading impression that B.M.'s statement to the contrary was a misrepresentation rather than a simple effort to comply with the motion in limine. The trial court was especially justified in seeking to

remedy the jury's potential misapprehension of B.M.'s testimony given the primacy of her credibility to the State's case.

Even if it were error to admit Reyes's prior bad act evidence, however, we must conclude it was harmless. Errors in the admission of evidence are harmless unless the error affects the substantial rights of the parties. *Jones v. State*, 780 N.E.2d 373, 377 (Ind. 2002). The challenged evidence was B.M.'s testimony that Reyes had in the past touched her breasts over her clothing. We are unable to see how the simple addition of one more allegation by B.M. against Reyes regarding a considerably less egregious act somehow buttressed the credibility of her claims or served to prejudice the jury against him with respect to the instant charges. Accordingly, we conclude that any error in the admission of this evidence did not affect Reyes's substantial rights and was therefore harmless.

## II. Double Jeopardy

Reyes argues, and the State concedes, that he received five separate convictions and sentences based upon the same two acts, and that three of his convictions therefore violate double jeopardy principles. The State suggests that this court remand with instructions to vacate Reyes's convictions and sentences for Counts I, IV, and V.

### A. Actual Evidence Test

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). In articulating the "actual evidence test" as a method for evaluating double jeopardy claims, the *Richardson* court explained as follows:

> Under this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. 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.

717 N.E.2d at 53. Significantly, "under the *Richardson* actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense." *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002).

Reyes points to the actual evidence test in arguing that his dual convictions for Counts I and II, both of which relate to his act of sexual intercourse with B.M., and Counts III and IV, both of which relate to his act of digitally penetrating B.M.'s vagina, violate double jeopardy. Yet each of Counts II and IV, as charged,[7] requires evidence of force or imminent threat of force, which neither Count I nor Count III requires, so we are

[7] We recognize that Reyes was charged in Count IV with criminal deviate conduct, but found guilty in Count IV of sexual misconduct with a minor. Given our ultimate determination that Count IV violates double jeopardy whether it is criminal deviate conduct or sexual misconduct with a minor, this discrepancy is inconsequential.

unpersuaded that the actual evidence test operates to invalidate any of Reyes's convictions in Counts I through IV.

### B. Category 3

Nevertheless, the two-part *Richardson* test is not the exclusive measure of double jeopardy violations. *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).

Here, as the State concedes, and as the charging instruments, evidence, and arguments of counsel show, there were only two underlying acts at issue in the instant case: Reyes's sexual intercourse with B.M., and his digital penetration of her vagina. Yet Reyes received multiple punishments for each act. Under Counts I and II the act at issue was the sexual intercourse which constituted the sexual misconduct with a minor conviction (Count I) and served as an element of rape (Count II). Under Counts III and

IV, the act at issue was the digital penetration which constituted another sexual misconduct with a minor conviction (Count III) and served as an element of criminal deviate conduct (Count IV).[8] Because Reyes was convicted of crimes in Counts I and III based upon the very same acts which served as elements of his crimes in Counts II and IV, under Category 3, above, his dual convictions for Counts I and II and for Counts III and IV violate double jeopardy.

### C. Lesser-Included Offense[9]

Reyes also challenges his conviction in Count V for Class C felony sexual misconduct with a minor, which he argues is a lesser-included offense of his Class B felony convictions for sexual misconduct with a minor in Counts I and III. Under Indiana Code section 35-38-1-6 (2007), a defendant who is charged with and found guilty of an offense and an included offense may not be convicted of and sentenced for the included offense.[10] A lesser included offense is necessarily included within the greater offense if it is impossible to commit the greater offense without first having committed the lesser. *Iddings v. State*, 772 N.E.2d 1006, 1016 (Ind. Ct. App. 2002), *trans. denied*. Whether an

[8] Of course, given that the jury found Reyes guilty of sexual misconduct with a minor in Count IV, there is arguably no discernible difference between Counts III and IV.

[9] Noticeably, "lesser-included offenses" are included in Justice Sullivan's categories as Category 1. *See Richardson*, 717 N.E.2d at 55 (Sullivan, J., concurring). Further, in *Guyton*, the Supreme Court suggested that this category was presumably covered by the actual evidence test in *Richardson*. *Guyton*, 771 N.E.2d at 1143.

[10] "Included offense" is defined as an offense that "(1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged; (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission." *See* Ind. Code § 35-41-1-16 (2007).

offense is included in another within the meaning of section 35-38-1-6 requires careful examination of the facts and circumstances of each particular case. *Id.* at 1017. If the evidence indicates that one crime is independent of another crime, it is not an included offense. *Id.*

In the instant case, Reyes was charged and convicted in Count V with sexual misconduct with a minor based upon his "fondling or touching" B.M. App. p. 23. Reyes's charges and convictions for sexual misconduct with a minor in Counts I and III involved the separate acts of sexual intercourse and digital penetration of B.M.'s vagina. Yet the evidence at trial and arguments of counsel suggested that the only "fondling or touching" at issue was incident to Reyes's acts of intercourse and/or digital penetration. Significantly, the State concedes that under the facts and circumstances of this case, Count V was a lesser-included offense.

**D. Resolution**

When convictions violate double jeopardy principles, it is proper to vacate the convictions with the less severe penal consequences. *See Richardson*, 717 N.E.2d at 54-55. With the exception of Count V, all of Reyes's convictions are Class B felonies. Reyes does not specify which convictions he wishes vacated, but the State proposes that we vacate Counts I, IV, and V, and Reyes raised no objection to this proposal. This proposal preserves Reyes's rape conviction. It also preserves his Class B felony sexual-misconduct-with-a-minor conviction (Count III), which is necessary to vacate the lesser-included Class C felony conviction in Count V. In addition it removes the problematic Count IV conviction, which appears to have been mislabeled on the verdict forms.

Accordingly, we reverse in part and remand to the trial court to vacate Reyes's convictions for Counts I, IV, and V.

## III. Appropriateness

Reyes also challenges the appropriateness of his aggregate fifteen-year sentence in the Department of Correction. Article VII, Sections 4 and 6 of the Indiana Constitution "'authorize[] independent appellate review and revision of a sentence imposed by the trial court.'" *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires that we give "due consideration" to that decision and because we recognize the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). It is the defendant's burden to demonstrate that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

In the instant case, Reyes committed the Class B felonies of rape and sexual misconduct with a minor. Under Indiana Code section 35-50-2-5 (2007), the sentencing range for a Class B felony is from six to twenty years, with the advisory sentence being ten years. In sentencing Reyes to concurrent terms of fifteen years each, the trial court

concluded that Reyes's offenses warranted sentences five years in excess of the advisory sentence.

We are not persuaded that this sentence is inappropriate. Reyes forcibly raped a minor child, where she slept, in the home they shared, as she repeatedly sought to fight him off. Beyond the violent nature of his offenses, Reyes violated B.M.'s claimed trust in him, and he exposed her to the risk of a sexually transmitted disease, among other risks.[11] Reyes has a prior conviction for Class A misdemeanor operating a vehicle while intoxicated, for which he was on probation at the time of the instant offenses. The egregious nature of these offenses and the fact that they were committed while Reyes was on probation underscores the appropriateness, and perhaps relative leniency, of Reyes's fifteen-year sentence. His request for a reduction in sentence warrants no relief.

## IV. Conclusion

Having rejected Reyes's challenge to the evidence against him and to his sentence, but having concluded that Reyes's convictions for Counts I, IV, and V violate double jeopardy, we affirm in part, reverse in part, and remand to the trial court with instructions to vacate Reyes's convictions and sentences for Counts I, IV, and V.

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

NAJAM, J., and FRIEDLANDER, J., concur.

[11] Reyes's suggestion that his position of trust is already factored into his crime against a minor has been rejected by this court in a similar context. *See McCoy v. State*, 856 N.E.2d 1259, 1262 (Ind. Ct. App. 2006) (observing that child molesting statute "in no way encapsulates a 'position of trust' with the victim as a material element of the crime").