

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.

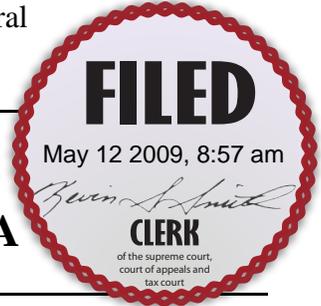
ATTORNEY FOR APPELLANT:

ELLEN M. O'CONNOR
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

J.S,)
)
Appellant-Respondent,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Petitioner.)

No. 49A02-0810-JV-950

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn Moores, Judge
The Honorable Gary Chavers, Magistrate
The Honorable Geoffrey Gaither, Magistrate
Cause No. 49D09-0712-JD-3843

May 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

J.S., a minor, appeals the trial court's delinquency finding and raises the following restated issues:

- I. Whether the State presented sufficient evidence to sustain the trial court's true findings for Class B and Class C felony child molesting if committed by an adult; and
- II. Whether J.S.'s double jeopardy protections were violated.

We affirm.

FACTS AND PROCEDURAL HISTORY

As of 2008, Mrs. S had operated a daycare business in her home for more than thirteen years. The children that attended her daycare played and napped on the main floor of the home, where the kitchen and living room area were located. The children were not permitted upstairs, and that stairway was blocked by a gate. Every day, Mrs. S left for ten minutes or so in the afternoon to pick up other children from school and bring them back to her daycare; however, according to Mrs. S, her adult daughter or another adult was in charge of the children during her brief absence.

In November 2007, one of the children in her care was four-year-old N.R., the victim in this case. N.R.'s mother and step-father are Mr. and Mrs. H. The H family and the S family were friends; they attended the same church, camped together, and one family was in the other's 2007 wedding.

On the evening of November 5, 2007, after coming home from daycare, N.R. reported to her mother that Mrs. S's then-twelve-year-old son, J.S., had pulled down her pants and his pants during a game of hide and seek and put his private part on hers while the two were in

J.S.'s bedroom, which is located upstairs in the home. She also stated that J.S. had put his private part in her mouth and told her to suck it. N.R. stated that these things occurred while Mrs. S was out of the house picking up additional children from school.

Later that night, N.R.'s mother telephoned Mr. and Mrs. S, asking them to come over to discuss a matter that N.R. had said occurred that day involving their son, J.S. Shortly thereafter, Mr. and Mrs. S, along with J.S., arrived as requested, and Mr. and Mrs. H shared what their daughter had reported to her mother. According to Mr. and Mrs. H, J.S. initially denied any inappropriate touching, but, in response to his father's questioning, J.S. eventually admitted to taking down N.R.'s pants and his own pants and touching her. Several days later, the parties' pastor told Mr. and Mrs. S that they needed to report the molestation allegations; otherwise, he would do so. Mr. S reported the allegations to authorities.

In December 2007, the State filed a delinquency petition in juvenile court alleging that J.S. committed two criminal acts on November 5, 2007, which if committed by an adult would be felonies, namely Class B felony child molesting¹ for performing sexual deviate conduct with N.R. and Class C felony child molesting² for fondling her with the intent to arouse or satisfy his sexual desires.

On March 10 and April 14, 2008, the trial court conducted a child hearsay hearing pursuant to Ind. Code section 35-37-4-6(e) to determine the admissibility of N.R.'s out-of-court statements. N.R. testified that, while Mrs. S was gone from the daycare, she and J.S.

¹ See Ind. Code § 35-42-4-3(a).

² See Ind. Code § 35-42-4-3(b).

were in his bedroom, and J.S. touched her private part with his private part while her pants were down on her legs and that he put his private part in her mouth. N.R.'s mother testified to what her daughter had reported to her about the events of November 5, 2007. Six weeks after the incidents, N.R. told her step-father about what had happened with J.S., and on or about that same date, N.R. told her grandmother about J.S. touching her private part and putting his private part into her mouth. During the months of December 2007 and February 2008, N.R. attended several counseling sessions with social worker Kaye Holland at the Wishard Pediatric Unit of Hope, and during her third and fourth visits, N.R. disclosed a bad touch by J.S. and that his private part touched her mouth. Thereafter, J.S.'s mother testified that in November 2007 there were six children attending her daycare, including N.R., none of the children were ever allowed upstairs in the home, and there was always a supervising adult present at the daycare when she would leave to pick up other children from school. The court also heard evidence that N.R. was interviewed on November 9, 2007, by Jessica Irish, a forensic child interviewer at the Child Advocacy Center, but did not report or disclose any of the allegations against J.S. to the interviewer.

In June 2008, the trial court issued findings of fact and conclusions thereon, determining that N.R.'s statements to her mother, step-father, grandmother, therapist, and her videotaped statements at the Child Advocacy Center were admissible. At the July 2008 denial hearing, the above testimony was stipulated into evidence. Thereafter, J.S. presented evidence in support of his denial of the allegations. Mr. and Mrs. S testified that, from the beginning, their son had consistently denied that any inappropriate touching occurred and

further denied that he ever played hide and seek with N.R. or any of the children at the daycare. In addition to maintaining that she never left the children at her daycare unsupervised, Mrs. S testified that when she left November 5, 2007 to go pick up children and bring them to her home, her adult daughter supervised the children and that J.S. went with her that day. Both Mr. and Mrs. S stated that, contrary to the testimony of Mr. and Mrs. H, their son never admitted to pulling down his pants or N.R.'s pants. J.S. also testified that the incidents described by N.R. never occurred.

Following the hearing, the trial court issued true findings adjudicating J.S. a delinquent for committing offenses that would be Class B and Class C felony child molesting if committed by an adult. At the August 2008 dispositional hearing, the trial court placed J.S. on probation. J.S. now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

J.S. asserts that the State failed to present sufficient evidence to sustain the delinquency finding. The standard of review of a juvenile finding is the same as if the crime had been committed by an adult. *D.D. v. State*, 668 N.E.2d 1250, 1252 (Ind. Ct. App. 1996). On review, we will not reweigh the evidence or judge the credibility of the witnesses. *D.B. v. State*, 842 N.E.2d 399, 401-02 (Ind. Ct. App. 2006). Rather, we look to the evidence and the reasonable inferences therefrom that support the true finding. *Id.* We will affirm the adjudication if evidence of probative value exists from which the fact finder could find the juvenile guilty beyond a reasonable doubt. *Id.* Evidence is insufficient to convict only when

no rational fact finder could have found the defendant guilty beyond a reasonable doubt. *Bradford v. State*, 675 N.E.2d 296, 298 (Ind. 1996); *D.B.*, 842 N.E.2d at 401-02.

When the State seeks to have a juvenile adjudicated a delinquent, it must prove every element of the offense beyond a reasonable doubt. *D.B.*, 842 N.E.2d at 401. In this case, to convict J.S. of child molesting as a Class B felony, the State was required to prove that J.S. performed or submitted to deviate sexual conduct with N.R., who was under fourteen years of age at the time. Ind. Code § 35-42-4-3(a). To convict him of Class C felony child molesting, the State had to prove that he performed or submitted to any fondling or touching of N.R., who was under fourteen years of age at the time, with the intent to arouse or to satisfy his sexual desires or those of N.R. Ind. Code § 35-42-4-3(b).

J.S. argues that the evidence was insufficient to convict him for a number of reasons, including that the evidence was not sufficient to establish at what time the incidents allegedly occurred on November 5, 2007 or even that they occurred on that date at all. He also asserts that N.R.'s testimony, and the evidence overall, was inconsistent concerning whether something happened, and if it did, precisely what that something was or how many times it had happened. J.S. also reminds us that N.R. met with a forensic child interviewer, Jessica Irish, a few days after the incidents were alleged to have occurred, and N.R. told Irish that no one had touched her inappropriately. While our review of the record before us reveals that some discrepancies exist in the evidence, it was nevertheless sufficient under our standard of review to sustain the trial court's delinquency findings.

According to the evidence most favorable to the verdict, N.R. told her mother on November 5, 2007, that sometime during that afternoon, J.S. had pulled down her pants and told her to lie on his bed, and N.R. demonstrated these events to her mother by lying on her stomach with her buttocks pointed up in the air. When N.R.'s mother asked her whether she had ever seen J.S.'s private part, N.R. responded, "I always cover my eyes because I don't want to see it." *Tr.* at 50. N.R. also told her mother that J.S. touched his private part to hers and that he put his private part into her mouth and told her to suck on it. Some weeks later, N.R. also told this information to her grandmother. According to social worker Holland, N.R. told her that J.S. touched her between her legs while she was lying on his bed on her stomach with her pants down. N.R. also told Holland that J.S.'s private part touched her mouth. N.R.'s mother also testified that when J.S. and his parents came to her home the night of November 5, J.S. admitted to pulling down N.R.'s pants and his own pants, and lying on top of her.

From this evidence, a rational fact finder could have found J.S. guilty of Class B and Class C felony child molesting. The trial court was in the best position to evaluate the evidence, and we will not reweigh or reassess credibility of the witnesses. *D.B.*, 842 N.E.2d at 401 (citing *C.T.S. v. State*, 781 N.E.2d 1193, 1201 (Ind. Ct. App. 2003), *trans. denied*). The evidence was sufficient to sustain the trial court's delinquency finding.

II. Double Jeopardy

J.S. contends that his adjudications for Class B and Class C felony child molesting violate the protections against double jeopardy found in Article 1, Section 14 of the Indiana

Constitution, which states that “[n]o person shall be put in jeopardy twice for the same offense.” In analyzing this subject, our Supreme Court has explained:

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.

D.B., 842 N.E.2d at 403 (quoting *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999)). If we conclude that true findings in a delinquency adjudication violate double jeopardy principles, we may reduce either true finding to a less serious classification if that will eliminate the violation, but if it will not, we must vacate one of the true findings. *H.M. v. State*, 892 N.E.2d 679, 681 (Ind. Ct. App. 2008), *trans. denied*.

To avoid a double jeopardy problem under the statutory elements test, each offense must include at least one essential element the other offense does not. Here, the State’s delinquency petition charged J.S. with acts that would constitute Class B and Class C felony child molesting if committed by an adult. More specifically, the Class B charge alleged that J.S. committed deviate sexual conduct with N.R. Ind. Code § 35-42-4-3(a). The Class C charge alleged that J.S. touched or fondled N.R. with the intent to arouse or satisfy his sexual desires. Ind. Code § 35-42-4-3(b). These are separate offenses with separate elements. For instance, the “intent to arouse or satisfy” element of subsection (b) is not found in subsection (a)’s proscription of child molesting by deviate sexual conduct. *See D’Paffo v. State*, 778 N.E.2d 800, 801 (Ind. 2002). Accordingly, there was no double jeopardy violation under the statutory elements test.

We now turn to the second consideration in the double jeopardy analysis, the actual evidence test. Under this inquiry, we examine the evidence presented to determine whether each challenged offense was established by separate and distinct facts. *D.B.* 842 N.E.2d at 404. A double jeopardy violation exists if there is a reasonable probability that the evidentiary facts used to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. *Id.*

Here, the Class B felony child molesting charge alleged that J.S. committed sexual deviate conduct by placing his penis in N.R.'s mouth. The evidence presented on this allegation included N.R.'s testimony at the child hearsay hearing that J.S. put his private part in her mouth. In addition, N.R.'s mother and grandmother testified that N.R. had told each of them that J.S. put his private part in her mouth and told her to suck it. Social worker Holland testified that N.R. reported to her that J.S.'s private part touched her mouth.

The Class C felony charge alleged that J.S. performed or submitted to touching with N.R. with the intent to satisfy his sexual desires. N.R. testified that J.S. pulled her pants "down on her legs" and touched her on her private part. *Tr.* at 24, 36. N.R.'s mother testified that N.R. had described how J.S. pulled down her pants and his own, instructed her to lie on his bed with her buttocks in the air, and he lay on top of her. N.R.'s grandmother testified that N.R. had told her that J.S. touched his private part to hers. Holland testified that N.R. told her that J.S. touched her between her legs as she lay on his bed on her stomach with her pants down. From this evidence, we conclude that separate evidence supported the true

finding for the Class B felony and the Class C felony. Accordingly, J.S.'s double jeopardy protections were not violated under either the statutory elements or actual evidence tests.

Affirmed.

RILEY, J., and MATHIAS, J., concur.