

STATEMENT OF THE CASE

Quanardel Wells appeals his conviction for intimidation, as a Class C felony,¹ as well as the fees imposed by the trial court during sentencing. Wells raises three issues for our review, which we restate as the following two issues:

1. Whether the same evidence that the State used to support Wells' conviction for intimidation was also used to support his conviction for criminal deviate conduct, as a Class A felony.
2. Whether the trial court committed reversible error when it assessed fees against Wells without first inquiring into his ability to pay.

We affirm in part and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

On October 1, 2008, Wells abducted K.R., a sixteen-year-old girl, near the intersection of 16th Street and Colorado Street in Indianapolis. Wells pulled K.R. into his truck and brandished a knife. Wells ordered K.R. to perform oral sex on him and told her he would kill her if she did not. Over the next three hours, Wells repeatedly ordered K.R. to perform oral sex on him under threat of death. At the end of the ordeal, Wells told K.R. that if she swallowed his semen he would let her go. He then told her he would kill her if she did not. K.R. complied, and Wells let her out of his truck near the location where he had abducted her. K.R. promptly called her mother and police.

The State charged Wells with multiple counts and, after a jury trial, he was convicted of most of those charges. At the subsequent sentencing hearing, the court

¹ Wells was convicted of several crimes, including Class A felony criminal deviate conduct, and sentenced to an aggregate term of eighty years. He does not challenge the legitimacy of any of his convictions other than his intimidation conviction, and he does not challenge the appropriateness of his sentence.

ordered Wells to serve an aggregate term of eighty years. The court also assessed a supplemental public defender fee of \$100 and a sexual assault victims assistance (“SAVA”) fee of \$250. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Double Jeopardy

Wells first contends that the State used the same evidence to support both his conviction for intimidation and his conviction for criminal deviate conduct in violation of Indiana’s Double Jeopardy Clause. See Richardson v. State, 717 N.E.2d 32 (Ind. 1999).

As our Supreme Court has explained:

In Richardson, we reviewed the history of the Indiana Constitution’s Double Jeopardy Clause to ascertain and articulate a single comprehensive rule synthesizing and superseding previous formulations and exceptions. We explained that 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.” [Richardson, 717 N.E.2d at 49]. In the present case the defendant claims a violation of the Indiana Double Jeopardy Clause not under the statutory elements test but under the actual evidence test. To show that two challenged offenses constitute the same offense under the actual evidence test, “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.” Id. at 53.

Application of the actual evidence test requires the reviewing court to identify the essential elements of each of the challenged crimes and to evaluate the evidence from the jury’s perspective, considering where relevant the jury instructions, argument of counsel, and other factors that may have guided the jury’s determination. Richardson, 717 N.E.2d at 54 n. 48; see, e.g., Burnett v. State, 736 N.E.2d 259, 262-63 (Ind. 2000). The Richardson actual evidence test was carefully and deliberately crafted to provide a general formulation for the resolution of all actual evidence test claims. The language expressing the actual evidence test explicitly requires evaluation of whether 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. The test is not merely whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish one of the essential elements of a second challenged offense. In other words, 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. Application of this principle has been articulated in different ways. Compare Richardson, 717 N.E.2d at 54 (“the defendant has demonstrated a reasonable possibility that the evidentiary facts used by the jury to establish the essential elements of robbery were also used to establish the essential elements of the class A misdemeanor battery”), with Chapman v. State, 719 N.E.2d 1232, 1234 (Ind. 1999) (“the same evidence used by the jury to establish the essential elements of murder was also included among the evidence establishing the essential elements of robbery as a Class A felony”).

Spivey v. State, 761 N.E.2d 831, 832-33 (Ind. 2002) (footnote omitted). “To establish that two offenses are the same offense under the actual evidence test, the possibility must be reasonable, not speculative or remote.” Griffin v. State, 717 N.E.2d 73, 89 (Ind. 1999). We review whether multiple convictions violation the prohibition against double jeopardy de novo. Goldsberry v. State, 821 N.E.2d 447, 458 (Ind. Ct. App. 2005).

Here, the charging information alleged, in relevant part, as follows:

COUNT I [Criminal Deviate Conduct, as a Class A felony]

QUANARDEL WELLS, on or about or between October 01, 2008[,] and October 02, 2008, did knowingly or intentionally cause [K.R.] to perform or submit to deviate sexual conduct, an act involving the PENIS of QUANARDEL WELLS, and the MOUTH OF [K.R.], when [K.R.] was compelled by deadly force or the threat of deadly force and/or while armed with a deadly weapon to submit to such deviate sexual conduct;

* * *

COUNT IV [Intimidation, as a Class C felony]

QUANARDEL WELLS, on or about or between October 01, 2008[,] and October 02, 2008, did communicate to [K.R.], another person, a threat to commit a forcible felony, that is: SLIT and/or CUT [K.R.'s] THROAT, with the intent that [K.R.] engage in conduct against her will, that is: TO SWALLOW THE SEMEN OF QUANARDEL WELLS, and while making said threat did draw or use a deadly weapon, that is: A KNIFE AND/OR BLADE

Appellant's App. at 84-86.

The evidence at trial was likewise divided. K.R. first testified that Wells had demanded oral sex from her and told her that he would kill her if she did not perform oral sex on him. Later, K.R. testified, Wells told her to "swallow it [the semen] all or he would kill me." Transcript at 71. K.R. expressly testified that, while Wells repeatedly ordered her to perform oral sex on him, he only ejaculated one time.

The State's closing argument also mirrored the distinctions within the charging information. Specifically, the State presented the following closing argument, in relevant part:

Wells is charged in count one with criminal deviate conduct Once in that truck where she was for over two hours she was forced to over and over again perform oral sex on him. . . . She did not want to do it, but she did not have a choice. We have charged count one as being compelled by deadly force or the threat of deadly force. He threatened her: Do this or I will kill you. Do this or I will hurt you. Do this or I will slit your throat.

* * *

Intimidation. He threatened her. He told her if she did not swallow his semen, he would slit her throat. He needed to make sure that all the evidence that this ever occurred was gone.

Id. at 463, 465. And the court's final instructions on criminal deviate conduct and intimidation mirrored the statutory elements for the alleged crimes.

Based on the State's allegations, its arguments at trial, and the actual evidence presented, we hold that there is no reasonable possibility that the jury conflated the evidence of the two crimes. The State alleged and presented evidence to show that Wells compelled K.R. to perform oral sex on him over the course of at least two hours under the threat of deadly force. The State independently alleged and presented evidence to show that Wells used a deadly weapon to communicate a threat to K.R. in order to have K.R. swallow his semen. Wells' argument on appeal that the jury may have used the same evidence to support each of the State's allegations is mere speculation, which is insufficient to demonstrate reversible error. See Griffin, 717 N.E.2d at 89.

Issue Two: Fees

Wells also asserts that the trial court abused its discretion when it assessed the \$100 supplemental public defender fee² and the \$250 SAVA fee against him. Wells claims that the fees were erroneously assessed because the court did not hold a hearing regarding Wells' ability to pay those amounts. Sentencing decisions, including decisions to impose restitution, fines, costs, or fees, are generally left to the trial court's discretion. Kimbrough v. State, 911 N.E.2d 621, 636 (Ind. Ct. App. 2009). If the court imposes fees within the statutory limits, there is no abuse of discretion. Id.

Indiana law requires the trial court to hold a hearing to determine a defendant's ability to pay the supplemental public defender fee. Ind. Code § 35-33-7-6(c); see Berry v. State, ___ N.E.2d ___, No. 57A03-1011-CR-579 (Ind. Ct. App. June 17 2011), not yet certified. It is not disputed that the trial court here did not hold such a hearing. Indeed,

² In its brief, the State asserts that Wells is correct that "the court exceeded its authority to impose a fee greater than \$100 . . ." Appellee's Br. at 10. The State's attempt to concede the issue is based on an apparent misreading of the record, and we do not consider it. See Appellant's App. at 15-16.

“[t]he State agrees that a supplemental public defender fee was improper.” Appellee’s Br. at 7. We agree and, therefore, vacate that fee and remand with instructions that the trial court hold a hearing to determine whether Wells is able to pay a supplemental public defender fee.

However, the statute that authorizes the SAVA fee does not require the trial court to hold a hearing on Wells’ ability to pay before imposing that fee. Rather, Indiana Code Section 33-37-5-23(b) states that a trial court “shall assess a [SAVA] fee of at least two hundred fifty dollars (\$250) and not more than one thousand dollars (\$1,000) against an individual convicted in Indiana of . . . (2) Criminal deviate conduct.” Further, although Indiana Code Section 33-37-2-3 generally does require a hearing on the defendant’s ability to pay costs and fees, “a hearing is not required when the trial court appoints pauper counsel” Maroney v. State, 849 N.E.2d 745, 748 (Ind. Ct. App. 2006) (quotation omitted). Wells acknowledges that he received pauper counsel. As such, a hearing on his ability to pay the SAVA fee was not required, and we affirm the trial court’s imposition of the \$250 SAVA fee.

Conclusion

In sum, the State did not support two of Wells’ convictions with the same actual evidence. And although we affirm the trial court’s imposition of the \$250 SAVA fee, we must vacate the \$100 supplemental public defender fee and remand with instructions that the court hold a hearing on Wells’ ability to pay before assessing a defender fee.

Affirmed in part and reversed and remanded in part.

ROBB, C.J., and CRONE, J., concur.