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IN THE
COURT OF APPEALS OF INDIANA

JAMES S. MILLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0903-CR-121
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0801-FD-11

September 2, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

James Miller appeals his conviction for Sexual Battery,[1] a class D felony, challenging the sufficiency of the evidence as the sole issue on appeal.

We affirm.

The facts most favorable to the conviction reveal that on New Year's Eve, 2007, J.H. and a group of friends celebrated at the Neon Armadillo, located in Fort Wayne. The group included Justin Gettys, sisters, Arias and Marilyn Sweat, William Harris, and Miller, who was Marilyn's boyfriend. J.H. knew Justin, Arias, and William; she did not know Miller prior to the evening's gathering.

Over the course of the evening, the group, except for Gettys who was working as the disc jockey for the bar, drank alcohol, talked, and danced. J.H. danced with members of the group, including dancing alone with Miller several times during the night. While J.H. and Miller were dancing, Miller kissed J.H. J.H. pushed him away, reminded him that his girlfriend was present, and told him that his behavior was inappropriate. Miller responded that his girlfriend "would never know." *Transcript* at 86.

As the bar was closing, sometime between 2:30 and 3:00 a.m., Miller grabbed J.H.'s hand and led her toward the restrooms. J.H. described it as a "firm grab" and stated that she "felt like [she] was being dragged." *Id*. at 89. Miller initially led J.H. to the men's restroom and J.H. told him that she could not go in there. Miller then led J.H. into the women's restroom and pulled her into an empty stall, locking the door behind them. Miller pushed

[1] Ind. Code Ann. § 35-42-4-8 (West, PREMISE through Public Laws approved and effective through 4/20/2009).

J.H. against the wall and exposed his erect penis. He told J.H. that he wanted a "blow job" and then grabbed her by the neck and tried to pull her head down toward his penis. *Id*. at 91. J.H. told him "no, I don't want to do this" and she tried to pull away. *Id*. Miller then tried to unbutton J.H.'s pants, but she pulled back. When J.H. pulled back, Miller groped her breasts from the outside of her shirt and tried to force J.H.'s hand to touch his penis. J.H. pulled from Miller's grasp, ducked under his arm, unlocked the stall door, and exited the restroom. J.H. testified that during the encounter she was scared and that she "felt trapped" because Miller was "so much taller than [her]." *Id*. at 103.

Once she got away from Miller, J.H. ran sobbing from the restroom and found her friend, Gettys. J.H. told Gettys that Miller had tried to rape her. Gettys reported the incident to the bar's security personnel, and police were summoned. In the meantime, several bar patrons searched for Miller and found him in the men's restroom. Miller denied having been in the women's restroom and that he had touched J.H. J.H. gave a statement to the responding police officer in three separate intervals, and each time, the details of her account stayed the same.

The incident in the restroom was overheard by Marjorie Minnick, a waitress who was counting her tips in one of the other stalls. Minnick testified that she heard J.H. say "no, don't, stop." *Id*. at 110. When Minnick next saw J.H. minutes later, J.H. was upset and crying.

On January 7, 2008, the State charged Miller with sexual battery as a class D felony. A jury trial was held January 8, 2009, at the conclusion of which the jury found Miller guilty

as charged. At a February 2, 2009, sentencing hearing, the trial court sentenced Miller to two years, with one year executed and one year of probation.

On appeal, Miller argues that the evidence is insufficient to support his conviction. When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the conviction, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id*. at 126 (*quoting Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

Sexual battery is defined as follows:

> (a) A person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is:
>
> > (1) compelled to submit to the touching by force or the imminent threat of force; . . .
>
> commits sexual battery, a Class D felony.

I.C. § 35-42-4-8. On appeal, Miller challenges as lacking the State's evidence with respect to the element of submission to the touching by force or the imminent threat of force.

Although an element of the offense of sexual battery is that the victim was "compelled to submit to the touching by force or the imminent threat of force," the force need not be physical or violent, but may be implied from the circumstances. *Chatham v.* State, 845 N.E.2d 203 (Ind. Ct App. 2006). Evidence that a victim did not voluntarily consent to a

touching does not, in itself, support the conclusion that the defendant compelled the victim to submit to the touching by force or threat of force. *Id*. "[I]t is the victim's perspective, not the assailant's, from which the presence or absence of forceful compulsion is to be determined." *Id*. at 207. "This is a subjective test that looks to the victim's perception of the circumstances surrounding the incident in question." *Id*. "The issue is thus whether the victim perceived the aggressor's force or imminent threat of force as compelling her compliance." *Id*.

In the present case, J.H. testified that Miller unwillingly "dragged" her to the restroom and once inside a locked bathroom stall, demanded that she perform oral sex, and exposed his erect penis. *Transcript* at 89. Miller grabbed J.H. by the neck and tried to force her head down to accomplish the specified act. J.H. testified that she was "[h]orrified" and that she was scared of Miller. *Id*. at 92. J.H. further testified that she felt like she could not get away because Miller was so much taller than her. J.H.'s testimony, by itself, established all of the essential elements of sexual battery. *See Baltimore v. State*, 878 N.E.2d 253, 258 (Ind. Ct. App. 2007) ("[a] conviction may be sustained on the uncorroborated testimony of a single witness or victim"), *trans. denied*. From the evidence, the jury could reasonably have concluded that the force Miller used on J.H. was intended to compel her to submit to touching that was intended to satiate his sexual desires. Miller's arguments to the contrary are simply requests that we reweigh the evidence. This we will not do. The evidence is sufficient to sustain Miller's conviction for sexual battery as a class D felony.

Judgment affirmed.

BAKER, C.J., and RILEY, J., concur.