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IN THE
COURT OF APPEALS OF INDIANA

MELVIN BISHOP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-1101-CR-1
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
Cause No. 49G02-0912-FB-102807

September 9, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Melvin Bishop appeals his convictions for Rape,[1] a class B felony, Sexual Misconduct with a Minor,[2] a class B felony, and Sexual Misconduct with a Minor,[3] a class C felony. Specifically, Bishop argues that the evidence was insufficient to support the conviction for rape, and that double jeopardy principles preclude convictions and sentences on both sexual misconduct offenses. In the alternative, Bishop argues that if the convictions were proper, the trial court should have ordered the sentences to run concurrently in light of the "episodic nature" of the crimes. Appellant's Br. p. 16-17.

While we conclude that the evidence was sufficient to support Bishop's rape conviction, we are compelled to vacate the conviction and sentence that was imposed for sexual misconduct with a minor, a class C felony, on double jeopardy grounds. Thus, we affirm in part, reverse in part, and remand this cause with instructions that the trial court vacate the conviction and sentence on this offense.

FACTS

Mary Rice and Bishop had a daughter together named A.Cr. Thereafter, Rice gave birth to another daughter, S.M., whom Bishop had not fathered. In 2009, S.M. was fourteen years old. Although Bishop was not S.M.'s biological father, S.M. had known Bishop since she was five years old and considered Bishop as a father figure. S.M. often referred to him as "dad." Tr. p. 26-27, 219.

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[1] Ind. Code § 35-42-4-1.

[2] I.C. § 35-42-4-9.

[3] I.C. § 35-42-4-9.

In 2009, Bishop was thirty-eight years old and was living with Donna Cash and her two daughters, A.C. and S.C., in Marion County. Sometime in November 2009, S.M. met Cash and S.C. at a school choir recital. Thereafter, S.M. began "hanging out" with Bishop, Cash, and S.C. at their residence. On December 26, 2009, S.M spent the night with S.C., Bishop, and Cash, at their mobile home. Earlier that evening, S.M. and S.C. were in the living room with Cash and Bishop. Bishop periodically "wrestled" with S.M. and S.C. Tr. p. 177. At some point, Bishop tried to pull down S.M.'s shirt and attempted to "get in her pants." Id. at 47. Bishop grabbed S.M.'s shirt collar and pulled it down, stating, "let me see." Id. at 48. Bishop tried to pull S.M.' s pants down by grabbing her waistband. S.M. was wearing two tank tops, a brown jacket, her bra, pajama pants, shorts and her underwear. S.M. repeatedly told Bishop to stop.

Cash fell asleep around 11:00 p.m., but woke up and moved to a bed in the living room. Bishop told S.M. that there were no blankets and she could sleep with him on the couch. While drifting in and out of sleep, S.M. felt Bishop's hand on her thigh, close to her knee. Thereafter, S.M. felt Bishop's right hand move around her waistband while trying to get beneath S.M.'s layers of clothing. Bishop then placed his hand under S.M.'s clothes and inserted his fingers into her vagina. Bishop turned and faced S.M., flipped her over, and pulled down her pants. At some point, Bishop pushed his own pants down and rolled on top of S.M. Bishop put his penis inside of S.M.'s vagina and pushed "really hard." Tr. p. 55. S.M. testified that it "hurt really bad." Id. Bishop moved

around on top of S.M. for about three minutes. Bishop stopped after S.M. told him to, and he told her that he had nearly ejaculated. Id. at 56.

Approximately two minutes later, S.M. picked up her cellphone and went to the bathroom. S.M. noticed that blood was streaming from her vagina. S.M. was in pain and tried to call Rice. Rice did not answer, so S.M. sent her a text message stating that "[Bishop] just raped me in my sleep . . . and I can't stop bleeding mommy help me." Id. at 58. While S.M. remained in the bathroom, Bishop asked if she was "okay" and stated that he was sorry. Id. at 61. Rice texted S.M. and inquired as to where everybody was in the mobile home and whether Bishop was with anybody. Rice then picked up her husband and contacted the police.

S.M. left the bathroom and went to lie down in S.C.'s room. Bishop entered the room, repeatedly hugged S.M., and apologized to her. Bishop told S.M. not to tell anyone about what had occurred. S.M. changed clothes and placed her bloody ones on a mattress in S.C.'s room.

Rice sent a text message to S.M., informing her that police officers were surrounding the mobile home. S.M. woke up S.C. and told her that the police were on their way. Several police officers entered the residence and Rice followed. The officer found S.M. in S.C.'s bedroom. S.M. appeared "pale," "shaking" and "panicked." Tr. p. 124.

The paramedics and police officers examined S.M. and instructed Rice to take her to the hospital. However, after learning that Community East Hospital did not treat

sexual assault victims, S.M. and Rice returned to the residence. Detective Anna Humkey was there and observed that S.M. was pale and appeared shaken. While Detective Humkey and S.M. walked through the residence and gathered various pieces of evidence, another officer took blood samples from S.M. and collected various articles of her clothing. Thereafter, Detective Humkey sent Rice and S.M. to Riley Hospital (Riley) in Indianapolis for an examination.

While at Riley, Nurse Stephanie Sciadone noticed blood spots where S.M. had been sitting in the waiting room. S.M. was in pain and had to undergo surgery for the removal of a blood clot in her vagina. It was determined that S.M.'s vagina was torn and required sutures to close the wound. S.M. also sustained other wounds and bruising on the outside of her genitals.

Dr. Marley Bradley observed that S.M.'s injuries were consistent with forced sexual intercourse, and Dr. Ralph Hicks noted that S.M.'s injuries were probably the result of sexual abuse. Dr. Hicks also opined that it was uncommon for sexual assault victims to have sustained such severe injuries and it would have taken significant force to have caused S.M.'s injuries. S.M. bled for three more days after the examination and experienced pain for an additional week.

Nurse Laura Maloy examined Bishop at Wishard Hospital. It was determined that Bishop's clothing contained both blood and semen stains. S.M.'s DNA was discovered on Bishop's fingernail scrapings and in his underwear.

On December 29, 2009, the State charged Bishop with the following offenses:

Count I—Rape, a class B felony;
Count II—Sexual Misconduct with a Minor, a class B felony;
Count III—Sexual Misconduct with a Minor, a class B felony;
Count IV—Sexual Misconduct with a Minor, a class C felony.

Following a three day jury trial that commenced on November 29, 2010, Bishop was convicted on all counts. However, the trial court vacated the conviction under Count II and merged it with the rape conviction.

On December 8, 2010, the trial court sentenced Bishop to twenty years for rape, and to ten years on Count III that was ordered to run consecutively to the sentence for rape. Bishop was also sentenced to two years on Count IV that was ordered to run concurrently with the sentences that were imposed on Counts I and III. Thus, Bishop received an aggregate thirty-year term of imprisonment. He now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence—Rape

Bishop argues that there was insufficient evidence to prove that he had committed rape. More particularly, Bishop argues that the conviction must be vacated because the State failed to prove that Bishop "compelled [S.M.] by force or imminent threat of force" to engage in sexual intercourse. Appellant's Br. p. 10.

When reviewing sufficiency of the evidence claims, we consider only the probative evidence and reasonable inferences that support the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient

to support a conviction. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). We will affirm the defendant's conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000).

The rape statute, Indiana Code section 35-42-4-1, provides in relevant part that

> (a) [A] person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when:
>
> (1) the other person is compelled by force or imminent threat of force;
>
> (2) the other person is unaware that the sexual intercourse is occurring; or
>
> (3) the other person is so mentally disabled or deficient that consent to sexual intercourse cannot be given;

commits rape, a Class B felony.

In construing this statute, it has been determined that the force necessary to sustain a rape conviction may be inferred from the circumstances. Although the force need not be physical, a rape conviction can be supported by the use of actual force as well. Bryant v. State, 644 N.E.2d 859, 860-61 (Ind. 1994). It is the victim's perspective—and not the assailant's—from which the presence or absence of forceful compulsion is to be determined. Tobias v. State, 666 N.E.2d 68, 72 (Ind. 1996). Thus, the issue is whether the victim perceived the aggressor's force or imminent threat of force as compelling her compliance. Id.

In this case, the evidence showed that while S.M. was sleeping on the couch, Bishop forcefully flipped S.M. onto her back and pulled her pants down. Tr. p. 55.

Bishop then pushed down his own pants and rolled on top of S.M. Bishop brutally forced his penis inside S.M.'s vagina that caused severe pain. And Dr. Hicks testified that the force was significant to have caused S.M.'s injuries. Id. at 433. S.M.'s genitals were bruised and she bled profusely. Two witnesses observed that S.M. appeared meek, visibly shaken, and pale. Id. at 124, 574. S.M. screamed in pain during the examination and she required stitches to heal her wounds. Id. at 292.

In short, the State proved that Bishop compelled S.M. by force or imminent threat of force, to engage in sexual intercourse with him. As a result, we conclude that the evidence was sufficient to support Bishop's conviction for rape.

II. Sexual Misconduct, Count III

Bishop claims that the sexual misconduct offense charged in Count III must be vacated because the evidence showed that he "used his fingers to assist in the act of intercourse." Appellant's App. p. 17 (emphasis added). Thus, Bishop maintains that he did not commit an act of criminal misconduct apart from the rape.

To convict Bishop of the charged offense, the State was required to prove that Bishop knowingly performed or submitted to deviate sexual conduct with S.M., where Bishop was over twenty-one years of age, and S.M. was at least fourteen years of age, but less than sixteen years of age. I.C. § 35-42-4-9(a)(1). "Deviate sexual conduct" means an act that involves the "penetration of the sex organ or anus of a person by an object." Ind. Code § 35-41-1-9.

The information charging Bishop with this offense provides that

> Melvin Bishop, . . . being at least . . . 21 years of age, did perform or submit to deviate sexual conduct by inserting an object, that is: Fingers(s), into the vagina of S.M., a child who was at least . . . 14 years of age, but under the age of . . . 16.

Appellant's App. p. 33

In support of the contention that he did not commit a separate criminal act alleged in Count III, Bishop directs us to Thompson v. State, 674 N.E.2d 1307 (Ind. 1996), where the defendant challenged the sufficiency of the evidence of digital penetration to support the criminal deviate conduct conviction. After considering the victim's testimony at trial, it was determined that the "defendant was using his fingers to assist in the rape; this did not constitute a separate act of criminal conduct." Id. at 1311.

Unlike the victim's testimony in Thompson, the evidence in this case established that Bishop committed the offense as charged when he "digitally penetrated" S.M. with his fingers. More particularly, S.M. testified that Bishop initially placed his right hand on her leg, put his hand underneath her clothing, and inserted his fingers in her vagina. Tr. p. 54. The swabs from Bishop's right hand contained S.M.'s DNA Id. at 534. The evidence did not demonstrate that Bishop used his fingers to assist in the rape of S.M. In other words, Bishop's digital penetration of S.M.'s vagina constituted a separate and distinct criminal act. Thus, Bishop's assertion that his conviction for sexual misconduct that was alleged in Count III must be set aside, fails.

III. Sexual Misconduct, Count IV

Bishop also contends that the sexual misconduct conviction in Count IV must either be vacated or modified from a class C felony to a class D felony. Bishop maintains that convicting and sentencing him for both this offense and the sexual misconduct conviction under Count III violates the prohibition against double jeopardy.

Article I, section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Two or more offenses are the same offense 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 v. State, 717 N.E.2d 32, 49 (Ind. 1999). We review de novo whether convictions violate double jeopardy principles. Goldsberry v. State, 821 N.E.2d 447, 458 (Ind. Ct. App. 2005).

The standard for evaluating an alleged double jeopardy violation is well-settled:

> 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.

Id.

The "statutory elements test" referenced in Richardson is the same test enunciated in Blockburger v. United States. Brown v. State, 912 N.E.2d 881, 896 (Ind. Ct. App. 2009), trans. denied. That is, multiple convictions will not be precluded if each statutory

offense requires proof of an additional fact that the other does not. Robinson v. State, 835 N.E.2d 518, 522 (Ind. Ct. App. 2005).

Again, the information charging Bishop with the offense in Count III alleged that he committed the offense by inserting his "fingers into S.M.'s vagina." Appellant's App. p. 33. And the information in Count IV provided that

> Melvin Bishop, . . . being at least . . . 21 years of age, did perform or submit to any fondling or touching with S.M., a child who was at least . . . 14 years of age, but under the age of . . . 16, with intent to arouse or satisfy the sexual desires of S.M. and/or the sexual desires of Melvin Bishop.

Id.

To convict Bishop of the offense alleged in count III, the State was required to prove that he knowingly performed or submitted to deviate sexual conduct with S.M. where Bishop was over twenty-one years of age, and S.M. was at least fourteen years of age, but less than sixteen years of age. I.C. § 35-42-4-9(a)(1). Under Count IV, the State had to prove that Bishop performed or submitted to fondling or touching of S.M., with the intent to arouse or satisfy the sexual desires of either S.M. or Bishop, where S.M. was at least fourteen years old, but less than sixteen years old, and where Bishop was at least twenty-one years old. I.C. § 35-42-4-9(b)(1).

The elements of the two offenses are different because Count IV requires "intent to arouse or satisfy sexual desires," whereas Count III does not. Moreover, the offense alleged in Count III requires deviate sexual conduct, but Count IV only requires touching or fondling. Thus, each offense requires proof of an additional fact that the other does

not. Hence, there is no double jeopardy violation of the statutory elements test. Sloan v. State, 947 N.E.2d 917, 924 (Ind. 2011).

Under the actual evidence test, the evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Lee v. State, 892 N.E.2d 1231, 1234 (Ind. 2008). To show that two challenged offenses constitute the "same offense" under this test, the defendant must demonstrate a reasonable possibility that the evidentiary facts used by the factfinder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. Id. Application of this test requires the court to identify the essential elements of each of the challenged crimes and to evaluate the evidence from the factfinder's perspective. Id. To make such a determination under the actual evidence test, jury instructions, the charging informations, and counsel's arguments may be considered. Spivey v. State, 761 N.E.2d 831, 832 (Ind. 2002).

Here, Bishop characterizes the act of "digital penetration" as the facts and evidence that were used to support the sexual misconduct offense that was alleged in Count IV. Appellant's Br. p. 20. And during closing argument, the deputy prosecutor commented that

> Because he forced her to submit to sexual intercourse with him, he is guilty of Rape, count I. But in Indiana, you can't just have sex with 14 year olds. You can't put your fingers inside of a 14 year old. You can't fondle a 14 year old. So because he is guilty of Count I, he is also guilty of Count II. And because she is 14 and he fondled her and he put his fingers inside of her in her vagina, he is also guilty of Counts III, and IV.

Tr. p. 640.

Additionally, as noted above, the language of the charging information in Count IV alleges "any fondling or touching . . . with intent to arouse or satisfy the sexual desires of [Bishop]." (Emphasis added). This language tracks the text of Indiana Code section 35-42-4-9(b)(1), but does not allege any specific touching to differentiate Count IV from the touching that was incidental to that which is alleged in Counts II and III. In short, there is more than a reasonable probability here that the jury relied on the sexual intercourse, or the other deviate sexual conduct count, to convict Bishop of the offense alleged in Count IV. That said, Bishop's conviction and sentence for this offense cannot stand.

IV. Sentencing

At the outset, we note that Bishop is not claiming that the sentence imposed was inappropriate under Indiana Appellate Rule 7(B). Rather, Bishop contends that the trial court should have ordered the sentences to run concurrently because the convictions came about as the result of a single criminal episode, and "concurrent sentences would more fairly reflect the episodic nature of the crimes." Appellant's Br. p. 16-17.

The decision to impose consecutive sentences for multiple offenses is within the trial court's discretion. Kilpatrick v. State, 746 N.E.2d 52, 62 (Ind. 2001). Consecutive sentences can be ordered if aggravating circumstances are found. Gray v. State, 758 N.E.2d 519, 523 (Ind. 2001). A trial court must state its reasons for imposing

consecutive sentences, and the trial court need only find one aggravating circumstance for doing so. Owens v. State, 916 N.E.2d 913, 917 (Ind. Ct. App. 2009).

In this case, the trial court identified several aggravating factors, including Bishop's criminal history, the fact that he was on probation when he committed these offenses, and S.M.'s age, and the breach of his position of trust that he occupied with S.M., in support of the imposition of consecutive sentences. Tr. p. 718-21.

We note that Indiana Code section 35-50-1-2(c) only restricts the consecutive aggregate sentence that may be imposed when crimes of violence are not involved. Except for crimes of violence, the aggregate of the consecutive terms cannot exceed "the advisory sentence for a felony which is one class higher than the most serious of the felonies for which the person has been convicted." I.C. § 35-50-1-2(c). Bishop's convictions for rape and sexual misconduct with a minor are crimes of violence. I.C. § 35-50-1-2(a)(8), --(a) (11). Thus, contrary to Bishop's contention, the trial court was not precluded from imposing consecutive sentences on this basis.

We also note that the offenses that Bishop committed did not occur within a single episode of criminal conduct as defined by Indiana Code section 35-50-1-2(b), that would prohibit the trial court from imposing consecutive sentences. A single episode of criminal conduct means "offenses or a connected series of offenses that are closely related in time, place, and circumstance." I.C. S 35-50-1-2(b). We have interpreted this statute to mean that a complete account of one charge cannot be related without referring to the details of another charge. Gilliam v. State, 901 N.E.2d 72, 75 (Ind. Ct. App. 2009).

When separate and distinct offenses occur, even when they are similar acts done many times to the same victim, they are chargeable individually as separate and distinct criminal conduct. Brown v. State, 459 N.E.2d 376, 378 (Ind. 1984).

In this case, each charge was supported by different facts and each could be referred to without reference to any other. That is, the individual acts of sexual misconduct with a minor that were charged and the rape charge did not need to refer to each other to form separate charges. That being said, we reject Bishop's contention that this court's opinion in Kocielko v. State, 943 N.E.2d 1282, 1283 (Ind. Ct. App. 2011), compels a different result with regard to sentencing.

To illustrate, the evidence in Kocielko demonstrated that the defendant placed the victim's hand on his penis and subsequently penetrated her anus. The trial court imposed concurrent sentences for criminal deviate conduct and fondling for a total of fifty years. On rehearing, we declined to disturb the sentence that was imposed, observing that "the imposition of concurrent sentences, as opposed to consecutive sentences, fairly reflects the episodic nature of the crimes committed." Id.

Bishop correctly points out that the "single incident analysis" for sentencing purposes has been embraced in other contexts. See Beno v. State, 581 N.E.2d 922 (Ind.1991) (holding it improper to impose consecutive sentences for multiple drug dealing convictions based on nearly identical State-sponsored sales as part of an ongoing operation); Ind. Code § 35–50–1–2 (imposing a limitation upon the aggregate sentence to be imposed for an "episode of [nonviolent] criminal conduct"). Cf. Serino v. State, 798

N.E.2d 852, 857 (Ind. 2003) (observing that "consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person.").

However, notwithstanding our decision to allow the sentence in Kocielko to stand, our Supreme Court has also determined that even where two offenses arise from one episode of criminal conduct, a trial court is not prohibited from imposing two sentences upon two convictions, and ordering the sentences to run consecutive. See Hancock v. State, 768 N.E.2d 880, (Ind. 2002) (affirming the trial court's imposition of consecutive sentences for the separate offenses rape and criminal deviate conduct). Thus, even if it could be concluded solely for the sake of argument that the offenses in this case arose from a single episode of criminal conduct, it does not follow that the trial court was necessarily precluded from ordering Bishop to serve consecutive sentences.

In sum, the trial court found several aggravating circumstances that justified the imposition of consecutive sentences. Bishop's acts amounted to more than a single episode of criminal conduct and the violent nature of his conduct exempted his sentence from the limitations set forth in Indiana Code section 35-50-1-2(b). Therefore, but for our determination above that the conviction and sentence imposed for sexual misconduct with a minor under Count IV must be vacated, we decline to aside the remainder of Bishop's sentence.

CONCLUSION

In light of our discussion above, we conclude that the evidence was sufficient to support Bishop's conviction for rape and the sexual misconduct offense that was alleged in Count III. However, we find that the conviction for sexual misconduct with a minor, a class C felony, as alleged in Count IV, violates the prohibition against double jeopardy. Thus, we are compelled to vacate the conviction and sentence on that offense. In all other respects, we conclude that the trial court did not abuse its discretion in ordering Bishop's sentence on the sexual misconduct conviction to run consecutive to the rape charge.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions that it vacate Bishop's conviction and sentence for sexual misconduct with a minor, a class C felony.

KIRSCH, J., concurs.

BROWN, J., concurs and dissents with opinion.

IN THE
COURT OF APPEALS OF INDIANA

MELVIN BISHOP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-1101-CR-1
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

Brown, Judge, concurring in part and dissenting in part

I concur with the majority, except that I would find, as this Court found in Kocielko, 943 N.E.2d at 1283, that the episodic nature of the crimes against the single victim in a single confrontation warrants concurrent sentences, particularly given that Bishop received the maximum sentence on the rape conviction. I would remand for imposition of a concurrent ten year sentence on the class B felony sexual misconduct conviction for a total sentence of twenty years.