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**IN THE
COURT OF APPEALS OF INDIANA**

ARTERTEO HERNANDEZ,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 49A04-0612-CR-695

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Evan Goodman, Judge
Cause No. 49F15-0606-FD-116010

July 16, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Arterteo Hernandez (Hernandez), appeals his convictions for Count I, sexual battery, a Class D felony, Ind. Code § 35-42-4-8; Count II, residential entry, a Class D felony, I.C. § 35-43-2-1.5; and Count III, criminal confinement, a Class D felony, I.C. § 35-42-3-3.

We affirm in part, reverse in part, and remand.

ISSUE

Hernandez raises two issues on appeal, which we restate as follows:

- (1) Whether the trial court abused its discretion by excluding evidence of the victim's mental health history; and
- (2) Whether Hernandez's convictions for sexual battery and criminal confinement violate his protection against double jeopardy.

FACTS AND PROCEDURAL HISTORY

On June 23, 2006, Christal Passmore (Christal) was drinking with a few friends in front of her apartment in Indianapolis. Christal and Hernandez had met three times prior to that evening and Hernandez had also made his desire to be Christal's boyfriend known and tried to kiss her. The evening of June 23, Hernandez drank with the group. Christal knew Hernandez had been drinking before he arrived at her apartment. He touched Christal's shoulders repeatedly until Christal and another man at the gathering asked Hernandez to stop. Later that evening, the party moved to Christal's back patio. The party broke up at approximately 10:30 that night. Christal entered her apartment, locking the patio door behind her.

When Christal came inside, her mother, Pauline Passmore (Pauline), was asleep on the living room couch. Christal stopped in her son's room to check on him and her eleven-year-old nephew, J.A., who was also spending the night. J.A. asked for permission to sleep in the living room with Pauline. Christal said yes.

Before J.A. got to the living room, Hernandez entered the living room. Hernandez kissed Pauline and touched her body with his hands waking her. Hernandez had turned Pauline so she was laying flat on her back. He held her right shoulder down with his left hand and held his right hand over her mouth. Pauline attempted to escape Hernandez's hold, but could not. Still holding Pauline down by the shoulder, Hernandez pulled down his pants, exposing his penis; he then grabbed Pauline's hand and forced her to rub his penis. Then, he put his leg in between Pauline's legs and climbed on top of her. Witnessing the encounter, J.A. called for Christal. Hernandez forced Pauline to rub his penis once more before laying down on the floor next to Pauline pretending to be asleep. When Christal entered the room, Hernandez fled through the patio door. Christal wanted to call the police, but Pauline was ashamed and asked Christal not to call.

Approximately an hour later, Hernandez returned and attempted to open the patio door. J.A., who was still in the living room with Pauline, alerted Christal who immediately called 9-1-1. When the officers arrived Hernandez was sitting in front of Christal's apartment.

On June 26, 2006, the State filed an Information charging Hernandez with Count I, sexual battery, a Class D felony, I.C. § 35-42-4-8; Count II, residential entry, a Class D felony, I.C. § 35-43-2-1.5; and Count III, criminal confinement, a Class D felony, I.C. §

35-42-3-3. October 11, 2006, a jury trial was held. Prior to trial, the State filed a Motion *in Limine* to exclude any evidence regarding Pauline's mental health history and any related medications she may have taken on June 23, 2006. Pauline testified outside the presence of the jury she suffered from paranoid schizophrenia and depression. She also testified she had been on medication for fifteen years to control the symptoms, which included difficulty focusing, confusion, memory loss, hearing voices, and a belief she could speak to Jesus; since going on medication, she has not experienced any symptoms attributed to her paranoid schizophrenia. The trial court ruled that neither Pauline's mental illness nor medication affected her ability to recall events from June 26, 2006, but that she could be cross-examined about memory loss not related to her mental illness. At the close of evidence, the jury found Hernandez guilty on all Counts. On November 3, 2006, rejecting Hernandez's contention that his convictions for sexual battery and criminal confinement should be merged, the trial court sentenced Hernandez to three years for each conviction, with one year suspended on each sentence. All sentences were ordered served concurrently for a total executed sentence of two years.

Hernandez now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Admission of Evidence

Hernandez first contends the trial court abused its discretion by excluding evidence that Pauline suffered from paranoid schizophrenia and was on medication as a result. Specifically, Hernandez claims the jury should have been advised Pauline suffered from paranoid schizophrenia and was on medication in order to properly weigh

her credibility. The State, however, argues that Hernandez did not present any evidence to indicate Pauline's mental illness or the medication she took as a result impacted her memory, and thus the evidence was irrelevant and highly prejudicial. Thus, the State contends the trial court did not abuse its discretion by excluding the evidence at trial.

A trial court's evidentiary rulings are afforded great deference on appeal and are overturned only upon a showing of an abuse of discretion. *Willingham v. State*, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003). Put another way, a trial court's decision to admit evidence will not be reversed absent a showing of a manifest abuse of discretion resulting in the denial of a fair trial. *Id.* Indiana Evidence Rule 402 provides, "[e]vidence that is not relevant is not admissible." "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evid. R. 401. And, relevant evidence whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" may be excluded. Ind. Evid. R. 403. The balance of relevance and prejudice in evaluating proffered evidence is within the trial court's sound discretion, and we will not disturb such rulings absent an abuse of discretion. *Johnson v. State*, 734 N.E.2d 530, 532 -533 (Ind. 2000).

While generally evidence of drug use may be excluded at trial, evidence of drug use affecting a witness's ability to recall underlying events is admissible. *Williams v. State*, 819 N.E.2d 381, 386 (Ind. Ct. App. 2004). In the instant case, however, Hernandez

offered no proof that Pauline’s mental illness, or the medication she takes as a result of her mental illness, affects her memory. The trial court addressed the same, stating:

[J]ust talk about her memory loss and do you have any problems with your memory. Yes. But [do] not get into medication . . . because there’s [no] evidence that the medication is the reason for her memory loss. She had the memory loss before her medication, the memory loss after the medication. There’s no evidence that schizophrenia causes memory loss.

(Transcript p. 46). Moreover, Pauline testified that neither paranoid schizophrenia nor her depression cause her memory loss and any memory loss she experienced from the day of the instant offenses was due to her age. The prejudice from any evidence presented with respect to Pauline’s paranoid schizophrenia or resulting medication would far outweigh the impending prejudice. Therefore, we conclude the trial court did not abuse its discretion in excluding evidence of Pauline’s mental illness, or the medication she takes as a result.

II. *Double Jeopardy*

Hernandez next argues his convictions for sexual battery and criminal confinement violate Indiana’s Double Jeopardy Clause. Specifically, Hernandez argues both convictions resulted from the same act.

In *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), our Supreme Court established a two-part test for analyzing double jeopardy claims. Specifically, it held 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.”

Id.

The objective of the statutory elements test is to determine whether the essential elements of separate statutory crimes charged could be established hypothetically. *Merriweather v. State*, 778 N.E.2d 449, 453 (Ind. Ct. App. 2002). Comparing the essential statutory elements of one charged offense with the essential statutory elements of the other charged offense identifies the charged offenses. *Id.* We review the relevant statutes and the charging instruments and consider the essential statutory elements to determine the identity of the offense charged, but do not evaluate the manner or means by which the offenses are alleged to have been committed, unless the manner or means comprise an essential element. *Id.* After this court identifies the essential elements of each charged offense, we must determine whether the elements of one of the challenged offenses could, hypothetically, be established by evidence that also establishes the essential elements of the other charged offense. *Id.* at 454.

In the instant case, Hernandez was convicted of sexual battery and criminal confinement. Sexual battery is statutorily defined as “[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 [] compelled to submit to the touching by force or the imminent threat of force.” I.C. § 35-42-4-8. Criminal confinement is statutorily defined as “[a] person who knowingly or intentionally [] confines another person without the other person’s consent.” I.C. § 35-42-3-3. Clearly, the crimes of sexual battery and criminal confinement contain distinct elements, *i.e.* criminal

confinement requires proof of nonconsensual substantial interference with a person's liberty, whereas sexual battery requires proof of an intent to arouse a person's sexual desires. Therefore, convictions of sexual battery and criminal confinement do not violate Indiana's statutory elements test.

We do recognize that some amount of confinement is inherent in sexual battery. However, any confinement of a victim beyond that inherent in the force used to effectuate the battery constitutes a violation of the confinement statute apart from the violation inherent in the offense of sexual battery. Without thoroughly analyzing the facts of the instant case, Hernandez alleges the confinement was only necessary to effectuate the battery. We agree. The evidence shows Hernandez held Pauline down on the couch with his left hand and pulled down his pants and forced Pauline to rub his penis with his right hand. The confinement did not extend past the time when Hernandez battered Pauline because he left the house, and the confinement certainly did not occur before the battery, as Pauline was asleep. Thus, we conclude Hernandez did not confine Pauline beyond the confinement that occurred in his battery of Pauline, and his convictions for sexual battery and criminal confinement violate his protection against double jeopardy. Consequently, Hernandez's conviction and sentence for criminal confinement should be vacated.

CONCLUSION

Based on the foregoing, we find (1) the trial court did not abuse its discretion by excluding evidence of Pauline's mental health history; and (2) convictions for sexual battery and criminal confinement violate Hernandez's protection against double jeopardy

and should be merged. Accordingly, we remand to the trial court to vacate Hernandez's conviction and sentence for criminal confinement.

Affirmed in part, reversed in part, and remanded with instructions.

BARNES, J., and NAJAM, J., concur.