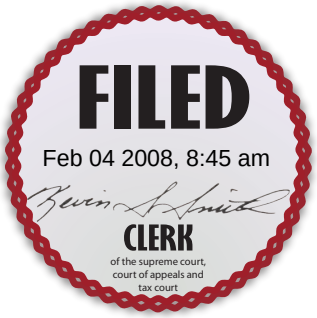

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IN THE
COURT OF APPEALS OF INDIANA

FABRIAN MOORE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0706-CR-328
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 6
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0604-FB-64709

February 4, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Fabrian Moore (Moore), appeals his convictions and sentence for rape, as a Class B felony, Ind. Code § 35-42-4-1; and sexual battery, as a Class D felony, I.C. § 35-42-4-8.

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

ISSUES

Moore raises three issues on appeal, which we restate as:

(1) Whether the evidence is sufficient to support his convictions for rape and sexual battery;

(2) Whether his convictions for rape and sexual battery violate the Indiana Constitution's prohibition against double jeopardy; and

(3) Whether his sentence is inappropriate in light of the nature of his offenses and his character.

FACTS AND PROCEDURAL HISTORY

In early 2006, Moore was working for Indiana Mentor, an organization that offers services to, among others, adults and children with developmental disabilities or acquired brain injury. One of the people Moore was assisting at the time was L.B., an adult woman who functions at the level of an eight-year-old child. L.B. required assistance with day-to-day activities like banking, transportation, and cooking and had to have someone spend the night in her home.

On March 31, 2006, the day before L.B. was to move out of her apartment, Moore picked her up from work. Moore and L.B. returned to L.B.'s apartment and began watching television. At some point, Moore picked L.B. up off the couch and carried her to her bedroom. Moore put L.B. on the bed and took off her clothes. Despite L.B.'s repeated physical and verbal resistance, Moore forced her to perform oral sex on him and had sexual intercourse with her. L.B. then took a shower, and Moore gave her a ride to her mother's house. Once at her mother's house, L.B. made two telephone calls—one to her boyfriend and one to a friend—before telling her mother what had happened with Moore. When questioned by investigators, Moore denied having sex with L.B., but DNA testing indicated otherwise.

On April 13, 2006, the State filed an information charging Moore with Count I, rape, as a Class B felony, I.C. § 35-42-4-1; Count II, criminal deviate conduct, as a Class B felony, I.C. § 35-42-4-2; Count III, sexual battery, as a Class D felony, I.C. § 35-42-4-8; Count IV, criminal confinement, as a Class D felony, I.C. § 35-42-3-3; Count V, criminal deviate conduct, as a Class B felony, I.C. § 35-42-4-2; and Count VI, criminal deviate conduct, as a Class B felony, I.C. § 35-42-4-2. On March 19 and 20, 2007, a jury trial was held, and after the presentation of evidence was complete, the trial court granted a directed verdict in favor of Moore as to Count V. The jury found Moore not guilty of Counts II, IV, and VI but guilty of Count I, rape, and Count III, sexual battery. On May 18, 2007, the trial court sentenced Moore to fifteen years in the Department of Correction followed by three years of sex

offender probation for the rape conviction and a concurrent sentence of one-and-a-half years for the sexual battery conviction.

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

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

Moore first contends that the evidence is insufficient to support his convictions for rape and sexual battery beyond a reasonable doubt. Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 213-14 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. at 214. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

Moore argues that neither of his convictions can stand because his encounter with L.B. was consensual. We find that there is substantial evidence to the contrary. The record indicates that when L.B. was questioned at trial about putting her mouth on Moore's penis, she testified, "I didn't want to, but he, he made me." (Transcript p. 134). When pressed further, L.B. stated, "I said no, and he, he had me do it. He told me do it anyway." (Tr. p. 134). L.B. also testified that she told Moore that she did not want to have sex with him, stating, "I told him, no, I didn't want to. He, he didn't listen to that." (Tr. p. 138). L.B.

testified that she told Moore "no" a total of four times. Finally, when asked whether she ever tried to push Moore off of her, L.B. stated that she couldn't and that Moore was "too big." (Tr. p. 138).

Moore asks that we disregard L.B.'s testimony, urging that L.B. simply does not want her mother and her boyfriend to know that she had consensual sex with another man. This is nothing more than a request for us to judge the credibility of a witness, which, as stated above, this court does not do. *Perez*, 872 N.E.2d at 213-14. We conclude that the evidence is sufficient to support Moore's convictions for rape and sexual battery.

II. *Double Jeopardy*

Moore also argues that even if there is sufficient evidence to support his convictions, the two convictions violate the double jeopardy clause of the Indiana Constitution. We agree.

Article I, § 14 of the Indiana Constitution states, in part, "No 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. *Simms v. State*, 791 N.E.2d 225, 230 (Ind. Ct. App. 2003). Moore contends that his convictions violate 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.'" *Spivey v. State*, 761 N.E.2d 831, 832 (Ind. 2002) (quoting *Richardson v. State*, 717 N.E.2d 32, 53 (Ind. 1999)). "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." *Id*.

Here, we need look no further than the trial court's jury instructions. The court's rape instruction provided that in order to convict Moore, the State was required to prove:

1. the Defendant, Fabrian Moore,
2. did knowingly,
3. have sexual intercourse with [L.B.], a member of the opposite sex,
4. when [L.B.] was compelled by force or imminent threat of force.

(Appellant's App. p. 145). Meanwhile, the court's sexual battery instruction provided that in order to convict Moore, the State was required to prove:

1, the Defendant, Fabrian Moore,
2. did knowingly,
3. with intent to arouse or satisfy his own sexual desires,
4. touch another person, [L.B.],
5. when [L.B.] was compelled to submit to said touching by force or imminent threat of force.

(Appellant's App. p. 147). With these instructions before the jury, there is a reasonable possibility that the exact same evidentiary facts—Moore's nonconsensual sexual intercourse with L.B.—formed the basis of both the rape conviction and the sexual battery conviction.

To the extent that the State argues that the sexual battery conviction could have been based on other touching, such as Moore taking off L.B.'s clothes or touching her vagina with

his finger, we direct it to our supreme court's recent statement that "the proper inquiry is not whether there is a reasonable probability that, in convicting the defendant of both charges, the jury used *different* facts, but whether it is reasonably possible it used the *same* facts." *Bradley v. State*, 867 N.E.2d 1282, 1284 (Ind. 2007) (emphasis in original). Here, it is reasonably possible that the jury used the same facts to find Moore guilty of both rape and sexual battery. As such, Moore is correct that the two convictions violate the double jeopardy clause of the Indiana Constitution.

When two convictions contravene double jeopardy principles, we may vacate one of the convictions or reduce either conviction to a less serious form of the offense if doing so will eliminate the violation. *Id*. at 1285. Moore was convicted of rape as a Class B felony and sexual battery as a Class D felony. Neither offense has a less serious form. *See* I.C. §§ 35-42-4-1 and 35-42-4-8. Therefore, we remand this cause to the trial court with instructions to vacate Moore's conviction and sentence for sexual battery.

III. *Sentence*

Finally, Moore argues that his sentence of fifteen years of incarceration and three years of sex offender probation for the rape conviction is inappropriate under Indiana Appellate Rule 7(B).[1] Indiana Appellate Rule 7(B) permits us to revise a sentence if, after

[1] We note that because the trial court ordered Moore's one-and-a-half-year sentence for sexual battery to run concurrently with his longer sentence for rape, our vacatur of his sexual battery conviction on double jeopardy grounds in the previous section does not affect our review of his sentence.

due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *See* Ind. Appellate Rule 7(B); *see also Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006). The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress*, 848 N.E.2d at 1080. Moore has not carried this burden.

First, with regard to the nature of the offense, the trial court properly noted that Moore committed a grave violation of his position of trust with L.B. Moore's counsel concedes that the sexual encounter between Moore and L.B. would have been inappropriate even if it had been consensual, given Moore's position of control and influence over the developmentally disabled L.B. As to Moore's character, while we acknowledge his lack of criminal history and the support he enjoys from his family and friends, we note that he initially lied to investigators about even having sex with L.B., changing his story only after a DNA test showed otherwise. Nothing about the nature of Moore's crime or his character leaves us convinced that his sentence is inappropriate.

Moore also urges that his sentence is inappropriate because it is higher than the sentence originally offered by the State via plea agreement. During a pre-trial hearing, the prosecutor stated, "My original offer was six to ten years and as of this morning I changed it to a cap of twelve." (Tr. p. 2). Moore cites our supreme court's decision in *Hill v. State*, 499 N.E.2d 1103, 1107 (Ind. 1986), for the proposition that "a more severe sentence may not be imposed upon a defendant because he foregoes the opportunity to plead guilty and exercises his right to trial[.]" However, the court continued:

> Whether the severity of a particular sentence was improperly influenced by a defendant's jury trial election requires an individualized consideration. In the present case, we are not directed to, nor do we find, anything in the record indicating that the defendant's decision to proceed with jury trial affected the severity of the sentence ultimately imposed. We do not find any indication that the trial judge was involved in the defendant's plea negotiations, nor did the judge encourage the defendant to plead guilty, or threaten him with a more severe sentence if convicted following jury trial. The record of the sentencing hearing likewise includes nothing from which we could infer that the trial judge was punishing the defendant for going to trial. Rather, the court reviewed the facts of this case against defendant's substantial history of criminal activity. Absent a significant indicia that the defendant's exercise of his jury trial right may have contributed to the severity of his resulting sentence, we will not remand for resentencing upon this issue.

Id. Moore's counsel concedes that there is no "direct evidence he was punished with a harsher sentence for exercising his right to trial." (Appellant's Reply Br. p. 2). Accordingly, we find that the fact that Moore eventually received a sentence greater than that originally offered via plea agreement does not make his sentence inappropriate.

CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to prove beyond a reasonable doubt that Moore committed rape and sexual battery. However, because there is a reasonable possibility that the jury used the same facts to find Moore guilty of both offenses, we conclude that a double jeopardy violation occurred when the trial court entered a judgment of conviction and sentenced Moore for both offenses. We must therefore remand this cause to the trial court with instructions to vacate Moore's conviction and

sentence for sexual battery. Finally, Moore has failed to persuade us that his sentence for rape is inappropriate.

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

KIRSCH, J., and MAY, J., concur.