



Defendant-Appellant Jimmy Troutman (“Defendant”) appeals from his conviction after a jury trial of sexual battery, a Class D felony; Ind. Code §35-42-4-8, and the finding that he is a habitual offender.

The facts most favorable to the jury’s verdict reveal that on March 19, 2004, at approximately 4:30 p.m., Brenda S. asked her thirty-one-year-old neighbor, A.E., to come over to her apartment because Defendant, the apartment complex maintenance man, was coming to her apartment to repair a showerhead in Brenda’s standup shower. Brenda testified that she did not want to be alone in her apartment while Defendant was there.

A.E. went over to Brenda’s apartment with her two small children, ages three and five. The two women drank some coffee while waiting for Defendant to arrive. Defendant had a cup of coffee with them after he arrived and then proceeded to repair the showerhead. Brenda received a phone call from her ex-husband and was engaged in that phone conversation for approximately an hour.

Defendant asked A.E. to help him by holding the showerhead in place while he was on the other side of the wall fixing it. A.E. and her children entered the bathroom area and A.E. assisted Defendant. A.E. was alone when she stepped into the shower to hold the showerhead. She raised her hands up and held the showerhead in place for approximately fifteen to twenty minutes. Defendant then entered the shower directly behind A.E. and put his hands on the showerhead as well. Defendant’s hips were pressed directly against A.E. for approximately four to five seconds. A.E. could detect that

Defendant was aroused. Defendant's left arm moved up A.E.'s left side where he cupped her left breast for three to four seconds. A.E. asked Defendant to stop and he complied.

A.E. tried to exit the shower, but Defendant blocked her with his arm. A.E. testified that she did not scream because she did not want to alarm her young children, and she was unsure of what Defendant might do. Defendant again slid his left hand up A.E.'s left side and cupped her left breast for another three to four seconds. A. E. told Defendant to move his hand immediately. A.E. then exited the shower and took her children into Brenda's family room. Brenda noticed that A.E. looked "white as a ghost" when she entered the family room. Defendant followed behind A.E. and asked Brenda if she would walk with him to his vehicle. Brenda returned approximately five minutes later, at which time A.E. informed Brenda what had happened. A.E. called and reported what had happened to the landlord and then the police.

On June 14, 2005, the State charged Defendant with sexual battery, a Class D felony. On October 26, 2005, the State filed an information alleging Defendant's status as a habitual offender due to a conviction in 1993 for felony prescription drug offenses, a 2002 felony theft conviction, and a 2003 felony burglary conviction.

Prior to trial, the trial court indicated to counsel that it was a two-phase trial, and that reference should not be made to the second phase of the trial during the first phase. However, Defendant admitted to a 2002 theft conviction and a 2003 burglary conviction during the guilt, or first, phase of the trial. On cross-examination, the State offered and the trial court admitted Exhibits 3 and 4. Those exhibits were informations, guilty pleas,

and abstracts of judgment for those convictions. At the end of the first phase of the trial, the jury found Defendant guilty of the offense of sexual battery.

After the jurors left the courtroom, the trial court advised counsel that phase two could be handled through a trial, stipulation, bench trial, or an acknowledgement of the habitual offender convictions. Defendant's counsel indicated that they chose to acknowledge. Defendant signed a waiver of jury trial form on the habitual offender allegation. The trial court asked Defendant if he understood he had a constitutional right to a jury trial. The trial court then found that Defendant knowingly, intelligently, and voluntarily waived his right to a jury.

Defendant's sentencing hearing was held on December 12, 2005. The trial court stated that the jury returned a guilty verdict for sexual battery, and that the court entered judgment of conviction on the habitual offender allegation. The trial court sentenced Defendant to 730 days for Court I and 545 days for Court II for a total of 1275 days with 910 days executed and 365 days suspended.

Defendant first argues that the evidence is insufficient to sustain his conviction for sexual battery. More specifically, Defendant alleges that the State failed to prove beyond a reasonable doubt that Defendant used force or the threat of force, and that he had an intent to satisfy his sexual desires.

When a Defendant challenges the sufficiency of the evidence, a court on review does not reweigh the evidence presented at trial or judge the credibility of the witness. *See Weis v. State*, 825 N.E.2d 896, 905 (Ind. Ct. App. 2005). The conviction must be affirmed if the finder-of-fact heard evidence of probative value from which it could have

inferred the defendant's guilt beyond a reasonable doubt. *Id.* When making this determination, only the evidence, and all reasonable inferences to be drawn from that evidence, favorable to the judgment are to be considered. *Id.*

In order to establish that Defendant had committed the offense of sexual battery, the State had to prove beyond a reasonable doubt that Defendant touched A.E. with the intent to arouse or satisfy his own sexual desires, and that A.E. was compelled to submit to the touching by force or threat of force. *See* Ind. Code §35-42-4-8.

First, Defendant argues that the State failed to prove beyond a reasonable doubt that he compelled A.E. to the touching by force or threat of force.

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. *J.J.M. v. State*, 779 N.E.2d 602, 605 (Ind. Ct. App. 2002). In fact, not all touchings intended to arouse or satisfy sexual desires constitute sexual battery. *Id.* Only those touchings in which the person touched is compelled to submit by force or the imminent threat of force violate Ind. Code §35-42-4-8. *Id.* However, the force need not be physical or violent, but may be implied from the circumstances. *Id.* Furthermore, our legislature intended the consideration of the victim's perspective, not the assailant's, when determining whether the presence or absence of forceful compulsion existed. *Id.*

In the present case, the facts most favorable to the jury's verdict reveal that A.E. was called to her neighbor's apartment because Brenda, her neighbor, did not want to be alone when Defendant arrived to repair her shower. Defendant asked A.E. to assist in

repairing Brenda's showerhead while Brenda was talking on the phone, and A.E. complied, taking her young children with her. After some time, Defendant entered the standup shower directly behind A.E. and pressed his hips against A.E. She was aware that Defendant had become aroused. Defendant cupped her left breast. A.E. asked Defendant to stop, and Defendant complied. However, when A.E. attempted to exit the shower, Defendant blocked her in with his arm. Defendant then cupped A.E.'s left breast a second time for three to four seconds. A.E. asked Defendant to immediately stop. Defendant stopped and A.E. exited the shower taking her children to Brenda's family room. Brenda testified that A.E. looked "white as a ghost."

Defendant claims that the State's only evidence of the element of force was Defendant's act of blocking A.E. from exiting the shower. Defendant claims that the blocking occurred after the alleged touching; therefore, A.E. could not have been compelled to submit to the touching. He claims that the alleged force occurred after the touching. Defendant's argument here fails.

The evidence shows that there were two separate touchings. A.E. was compelled to submit to the second fondling because Defendant physically prevented A.E. from leaving the shower after the first fondling. A.E. testified that she did not know what Defendant would have done had she screamed. Therefore, the evidence is sufficient to support the jury's finding that A.E. was compelled to submit to the touching by force.

Defendant also attacks the sufficiency of the evidence that Defendant touched A.E. with the intent to arouse or satisfy his sexual desires.

The offense of sexual battery requires a touching with the intent to arouse or satisfy one's own sexual desires or those of the victim. Ind. Code §35-42-4-8. A person's intent may be determined from his conduct and the natural consequences thereof. *J.J.M.*, 779 N.E.2d at 606. Intent may be inferred from circumstantial evidence. *Id.* The intent to gratify must correspond with the conduct because it is the purpose or motivation for the conduct. *Id.*

In the present case, Defendant pressed his hips directly against A.E. for four to five seconds as he stood behind her in the standup shower. A.E. testified that he was aroused. The evidence showed that Defendant then fondled A.E.'s left breast on two separate occasions. The reasonable inference from that evidence and the natural and usual consequences of Defendant's conduct toward A.E. demonstrate Defendant's intent to satisfy his sexual desires.

Defendant alleges that the undisputed evidence established his impotency as a result of past heroin addiction. His argument continues that any touching could not have been conducted with the intent to arouse or satisfy Defendant's sexual desires. As a general rule, factfinders are not required to believe a witness's testimony even when it is uncontradicted. *Jones v. State*, 825 N.E.2d 926, 930-931 (Ind. Ct. App. 2005). A.E.'s testimony was that Defendant was aroused. The jury was entitled to believe A.E.'s testimony over that of Defendant.

Next, Defendant challenges the trial court's determination that he was a habitual offender. Defendant claims that no hearing was held on the issue and that the only

felonies for which evidence was presented, were not separate and unrelated within the meaning of the statute.

A habitual offender enhancement is not a separate crime and does not result in a separate sentence. *Barnett v. State*, 834 N.E.2d 169, 173 (Ind. Ct. App. 2005). It results in a sentence enhancement imposed upon the conviction of a subsequent felony. *Id.* A defendant is a habitual offender if the jury or the court finds that the State has proven beyond a reasonable doubt that the person had accumulated two prior unrelated felony convictions. Ind. Code §35-50-2-8(g).

The record reveals that the trial court informed both the State and Defendant's counsel that the trial would be a two-phase trial and that neither counsel should make reference to the second phase during the first. On direct examination at trial, Defendant admitted to a 2002 theft conviction and a 2003 burglary conviction. On cross-examination, the State moved to admit the documents relating to those convictions. The trial court admitted the exhibits over Defendant's objection.

After the jurors found Defendant guilty of sexual battery and had exited the courtroom, the trial court informed both parties that phase two of Defendant's trial could be handled in several ways. One of the options presented was for Defendant to acknowledge the convictions establishing his status as a habitual offender. Defendant's counsel indicated that Defendant chose to acknowledge the convictions. The trial judge indicated that he wanted Defendant to waive the right to a jury on the habitual offender phase, so that Defendant could have a bench trial in the event he changed his mind. Defendant signed a waiver form as to the habitual offender allegation. The trial court

then set a sentencing date. At the sentencing hearing, the trial court found that the jury returned a guilty verdict for sexual battery and stated that the court entered judgment of conviction for being a habitual offender.

The State concedes that the record appears to indicate that there was no hearing on the habitual offender allegation. As previously mentioned, the trial judge recognized Defendant's decision to acknowledge, but the judge did not find beyond a reasonable doubt that Defendant was a habitual offender. *See*, Ind. Code §35-50-2-8(g). At the sentencing hearing, the trial judge incorrectly concluded that a judgment of conviction was entered on the habitual offender allegation. The State concedes that this cause of action should be remanded for a hearing on the habitual offender allegation against Defendant. The trial court should then determine beyond a reasonable doubt if Defendant is a habitual offender.

The State correctly notes that Defendant's argument regarding sequencing of the underlying offenses being used to establish Defendant's status as a habitual offender need not be decided here because this matter is remanded for a hearing on the habitual offender allegation.

Affirmed in part, reversed and remanded in part.

VAIDIK, J., and NAJAM, J., concur.