

IN THE COURT OF APPEALS OF IOWA

No. 3-303 / 92-1172

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STATE OF IOWA,
Plaintiff-Appellee,

vs.

DOUGLAS MARVIN WISE,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Roger F. Peterson, Judge.

Douglas Marvin Wise appeals from his conviction, following a bench trial, of indecent contact with a child in violation of Iowa Code section 709.12 (1991). **REVERSED AND REMANDED FOR DISMISSAL.**

Linda Del Gallo, State Appellate Defender, and Patricia J. Cone-Fisher, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Julie Halligan Brown, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Thomas Bower, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

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SACKETT, J.

Defendant Douglas Marvin Wise, following a finding by the trial court that he had committed sexual abuse in the second degree in violation of Iowa Code section 709.3(2) (1991), and of indecent contact with a child in violation of Iowa Code section 709.12 (1991), appeals the conviction under section 709.12. Defendant contends the trial court erred in finding him guilty of indecent contact with a child because indecent contact with a child is not a lesser-included offense of lascivious acts with a child. We reverse and remand for dismissal of indecent contact with a child.

The State filed a trial information charging defendant with one count of sexual abuse in the second degree in violation of Iowa Code section 709.3(2) and one count of lascivious acts with a child in violation of Iowa Code section 709.8. Defendant waived his right to a jury trial. The matter was tried to the court. The trial court found defendant guilty of one count of sexual abuse in the second degree and one count of indecent contact with a child. At the close of the State's case, defendant moved for a directed verdict of acquittal contending the State failed to prove beyond a reasonable doubt he committed the crimes with which he was charged. The motion was overruled.

Defendant contends his conviction of indecent contact with a child should be reversed and the second count of the information should be dismissed because indecent contact

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with a child is not a lesser-included offense. The State responds only that error was not preserved on this issue by defendant's motion for acquittal, but to preserve error it was necessary that defendant file a motion in arrest of judgment and the failure to do so resulted in the issue being waived. Defendant responds that the trial court's finding the State had failed to prove defendant committed the crime of lascivious acts with a child acquitted defendant of the crime of lascivious acts with a child. Defendant contends the trial court erred in finding him guilty of indecent contact with a child because the crime is not a lesser-included offense of lascivious acts with a child and the State did not charge defendant with the crime of indecent contact with a child. Iowa Code section 709.8 (1991) defines the crime of lascivious acts with a child:

> It is unlawful for any person eighteen years of age or older to perform any of the following acts with a child with or without the child's consent unless married to each other, for the purpose of arousing or satisfying the sexual desires of either of them:
>
> 1. Fondle or touch the pubes or genitals of a child.
>
> 2. Permit or cause a child to fondle or touch the person's genitals or pubes.
>
> 3. Solicit a child to engage in a sex act.
>
> 4. Inflict pain or discomfort upon a child or permit a child to inflict pain or discomfort on him or her.

Iowa Code section 709.12 (1991) defines the crime of indecent contact with a child:

> A person eighteen years of age or older is upon conviction guilty of an aggravated misdemeanor if the person commits any of the following acts with a child, not the person's spouse, with or without the child's consent, for

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the purpose of arousing or satisfying the sexual desires of either of them:

1. Fondle or touch the inner thigh, groin, buttock, anus, or breast of the child.

2. Touch the clothing covering the immediate area of the inner thigh, groin, buttock, anus or breast of the child.

3. Solicit or permit a child to fondle or touch the inner thigh, groin, buttock, anus, or breast of the person.

4. Solicit a child to engage in any act prohibited under section 709.8, subsection 1, 2, or 4.

In State v. Jeffries, 430 N.W.2d 728 (Iowa 1988), the court said:

> [U]nder the legal test, the lesser offense is necessarily included in the greater offense if it is impossible to commit the greater offense without also committing the lesser offense. If the lesser offense contains an element not required for the greater offense, the lesser cannot be included in the greater. This is because it would be possible in that situation to commit the greater without also having committed the lesser. In using this test, we look to the statutory elements rather than to the charge or the evidence.

See Jeffries 430 N.W.2d at 740-41.

When Iowa Code sections 709.8 and 709.12 are placed side by side for examination, it is clear indecent contact with a child (section 709.12) is not a lesser-included offense of lascivious acts with a child (section 709.8) because the offense does not meet the "legal" or "element" test of Jeffries. The indecent contact statute prohibits the touching, fondling, or touching the clothing covering the inner thigh, groin, buttock, anus, or breast. Whereas the lascivious acts statute prohibits the fondling or touching of the pubes or genitals. Clearly, the touching

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or fondling of a breast is only an element of the indecent contact statute. Further, although the inner thigh, groin, buttock and anus are anatomically near the pubes and genitals, the areas are not the same.

In addition, the indecent contact statute prohibits the touching of the delineated body area over clothing, whereas the lascivious acts statute lacks similar language. The lascivious acts statute only prohibits fondling or touching.

The conviction failed to follow an appropriate charge. State v. Key, 467 N.W.2d 583, 585 (Iowa App. 1991). Reversed and remanded for dismissal.

REVERSED AND REMANDED FOR DISMISSAL

Schlegel, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting):

I respectfully dissent.

In this case, the defendant was charged with committing lascivious acts with a child. The trial court found him guilty of indecent contact with a child. The defendant now claims indecent contact with a child is not a lesser included offense of lascivious acts with a child, but failed to file a motion in arrest of judgment.

Iowa Rule of Criminal Procedure 23(3)(a) and (b) requires a defendant to file a timely motion in arrest of judgment in order to avoid the pronouncement of a legal judgment. When the court, in a bench trial, makes a finding regarding the charges filed against a defendant, the defendant must file a motion in arrest of judgment in order to preserve error. Failure to file a motion in arrest of judgment results in a waiver.

In this case, the defendant failed to file such a motion and thus, failed to preserve error on this issue.