

IN THE COURT OF APPEALS OF IOWA

No. 2-006 / 10-2088
Filed February 1, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSE MARIA GODINEZ JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II,
Judge.

Defendant appeals from two convictions for third-degree sexual abuse.

AFFIRMED.

Jose M. Godinez Jr., Coralville, pro se.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, John P. Sarcone, County Attorney, and Michael T. Hunter, Assistant
County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Danilson and Bower, JJ.

EISENHAUER, P.J.

Jose Maria Godinez Jr. appeals from the denial of his motion to correct an illegal sentence. He claims the court erred in not merging two convictions and in failing to find a violation of the prohibition against double jeopardy. We review the merger claim for correction of errors at law. *State v. Anderson*, 565 N.W.2d 340, 342 (Iowa 1997). The double jeopardy claim is reviewed de novo. *State v. Harriman*, 737 N.W.2d 318, 319 (Iowa Ct. App. 2007).

Godinez plead guilty to two counts of third-degree sexual abuse. His sole claim on appeal is the two sex acts occurred within ten minutes of each other and therefore should merge or be deemed a violation of the prohibition against being tried twice for the same offense.

His double jeopardy claim fails because *State v. Constable*, 505 N.W.2d 473, 477-78 (Iowa 1993), holds distinct acts of physical contact meeting the definition of “sex act” permit separate charges.

His merger claim is based on Iowa Code section 701.9 (2007), which states no defendant “shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted.” This claim fails for the same reason as his double jeopardy claim. “Where the alleged acts occur separately and constitute distinct offenses there can be no complaint that one is a lesser included offense of the other.” *State v. Spilger*, 508 N.W.2d 650, 651-52 (Iowa 1993) (citing *Constable*, 505 N.W.2d at 478).¹

AFFIRMED.

¹ Godinez also claims counsel was ineffective for failing to raise these issues. Because we have addressed and resolved the issues on the merits, we need not address this claim.