

STATEMENT OF THE CASE

Bryan Claywell appeals his conviction following a bench trial for child molesting as a class A felony.¹

We reverse.

ISSUES

1. Whether a fundamental error occurred when the trial court allowed a child to testify prior to determining her competency.
2. Whether there is sufficient evidence to support the conviction.

FACTS

A.L. was born on December 20, 2004, to A.L. (“Father”) and A.M. (“Mother”). Father and Mother separated in August of 2005. Thereafter, A.L. resided with Mother, and Father exercised visitation.

Mother began a relationship with Claywell in February of 2008. Mother and Claywell lived together “on and off” from the spring of 2008 until February of 2009. (Tr. 111). Claywell often cared for A.L. while Mother was at work or school.

Father noticed a change in A.L.’s behavior after Claywell moved in with Mother. A.L. began to act “terrified” when he had to return to Mother’s residence. (Tr. 18). Mother also noticed a change in A.L.’s behavior. “[H]e had a lot of anxiety. He would scream and cry . . . when it was time for him to come home” after visiting Father. (Tr.

¹ Ind. Code § 35-42-4-3.

114). “He didn’t want anyone to watch him get dressed, anyone in the bathroom with him.” (Tr. 114).

In March of 2009, Father observed A.L. imitating sexual intercourse with a pillow. Subsequently, A.L. informed Father that he “wanted to play with [his] pee pee” (Tr. 21). Father explained to A.L. that his penis is a “private part, and the only people that should see that is your mommy or daddy helping you get dressed or in the tub, or if you get hurt and a doctor must examine you” (Tr. 21). Father then asked A.L. whether “anybody else bothered [him],” to which A.L. replied that Claywell had “pulled on it, and kissed it.” (Tr. 22).

A.L. also displayed inappropriate behavior with Mother. She “would wake up, [and] find him on top of [her] pretty much initially going through the acts of having sex or trying to have sex.” (Tr. 121). Mother woke up to find A.L. “trying to stick his hands down [her] pants.” (Tr. 121).

On April 16, 2009, the State charged Claywell with one count of class A felony child molesting for performing or submitting to sexual intercourse with A.L.; and two counts of class A felony child molesting for performing or submitting to deviate sexual conduct with A.L. The State filed an amended information on May 5, 2009, charging Claywell with three counts of class A felony child molesting for performing or submitting to deviate sexual conduct with A.L. Specifically, the State charged Claywell with Count I, committing an act involving Claywell’s penis and A.L.’s anus; Count II,

committing an act involving Claywell's mouth and A.L.'s penis; and Count III, committing an act involving Claywell's penis and A.L.'s mouth.

The trial court held a bench trial on November 9, 2009. A.L. testified at trial without objection.

At the conclusion of the State's case-in-chief, Claywell moved for a directed verdict. The trial court granted Claywell's motion as to Counts I and II but denied the motion as to Count III, which charged that Claywell "did perform or submit to deviate sexual conduct, an act involving the sexual organ, that is: penis of . . . Claywell and the mouth of A.L., with A.L." (App. 25).

The trial court found Claywell guilty of Count III. Following a sentencing hearing on November 18, 2009, the trial court sentenced Claywell to thirty years.

Additional facts will be provided as necessary.

DECISION

1. Competency

Claywell asserts that the trial court abused its discretion in allowing A.L. to testify. Specifically, he argues that A.L. was not a competent witness, noting that A.L.'s testimony often was contradictory and confused.

We first note that Claywell failed to object to A.L.'s testimony. Failure to object to testimony generally waives any error regarding its admission. *Hollen v. State*, 740 N.E.2d 149, 155 (Ind. Ct. App. 2000), *adopted on trans.*, 761 N.E.2d 398 (Ind. 2002). Claywell, however, argues that the doctrine of fundamental error applies.

The fundamental error exception to the waiver rule is extremely narrow. *Glotzbach v. State*, 783 N.E.2d 1221, 1225-26 (Ind. Ct. App. 2003). “To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible.” *Id.* at 1226. Fundamental error occurs when there is a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error denies the defendant fundamental due process. *Id.* “The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule.” *Purifoy v. State*, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005), *trans. denied*. A defendant asserting fundamental error must show greater prejudice than ordinary reversible error because no objection has been made. *Id.*

Indiana Evidence Rule 601 provides that “[e]very person is competent to be a witness except as otherwise provided in these rules or by act of the Indiana General Assembly.” A determination of a witness’ competency lies within the sound discretion of the trial court. *Aldridge v. State*, 779 N.E.2d 607, 609 (Ind. Ct. App. 2002), *trans. denied*. Thus, it is within the discretion of the trial court to determine whether a child is competent to testify based upon the judge’s observation of the child’s demeanor, responses to questions posed to her by counsel and the court. *Harrington v. State*, 755 N.E.2d 1176, 1181 (Ind. Ct. App. 2001).

A child’s competency to testify at trial is established by demonstrating that he or she (1) understands the difference between telling a lie and telling the truth, (2) knows he or she is under a compulsion to tell the truth, and (3) knows what a true statement actually is.

Kien v. State, 866 N.E.2d 377, 385 (Ind. Ct. App. 2007), *trans. denied*. ““To be qualified to testify, a child need not be a model witness, have an infallible memory, or refrain from making inconsistent statements.”” *Id.*

In this case, the State called A.L. as a witness. After the trial court administered the oath to A.L., the State questioned him as follows:

Q All right, the Judge just asked you if you promised to tell the truth when you put your right hand up, okay? Do you remember that?

A Yes.

....

Q All right. So when the Judge asked you to tell the truth, do you know what that means?

A Yes.

Q All right. . . . [D]o you know what the difference is between a truth and a lie?

A Yes.

Q All right. Let's practice, okay?

A Okay.

Q Let's see. Let's say I told you that your shirt right there was the color red. Do you see your shirt?

A Yes.

....

Q If I told . . . you [sic] was a bright red shirt you had on under your sweater, would that be the truth or would that be a lie?

A A lie.

Q Okay. And what would the truth be?

A Uh—

Q What if I asked you what color your shirt was? Do you know what color shirt you're wearing?

A Green.

Q And what happens, do you know that we're in court right now?

A Yes.

Q And you know that you promised to tell [the] truth?

A Yes.

Q And not to lie?

A Yes.

Q And what happens if you tell a lie in court?

A You get in trouble.

Q All right. So do you promise to tell everybody here the truth and the Judge?

A Yes.

Q Do you promise to tell the Judge the truth?

A Yes.

(Tr. 44-46).

Here, the record shows that A.L. appeared to know the difference between a truth and a lie; that he should tell the truth; and what constitutes a true statement. *See, e.g.,*

Aldridge, 779 N.E.2d at 609-10 (finding that the defendant failed to show the child witness was incompetent to testify and that the trial court abused its discretion in overruling his objection to the child's testimony where the child stated that it was a lie to call a red item "green"). We therefore find no fundamental error in allowing A.L. to testify.

As to A.L.'s testimony, any ambiguity or inconsistency in his testimony "goes to his credibility, not his competency."² See *Harrington*, 755 N.E.2d at 1181. The trial court was free to disregard A.L.'s testimony if the trial court felt he was not a credible witness; however, there was no error in the determination of A.L.'s competency. See *id.*

2. Sufficiency

Claywell asserts that there is insufficient evidence to support his conviction. We agree.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

² For example, Claywell cites to a portion of A.L.'s testimony where he denied sleeping in a bed when asked in whose bed he sleeps at night; and initially denied that Father had touched his "butt" with his hand before answering that Father had touched him with "[h]is hand." (Tr. 66).

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted). A conviction of child molesting may rest solely upon the uncorroborated testimony of the alleged victim. *Baber v. State*, 870 N.E.2d 486, 490 (Ind. Ct. App. 2007), *trans. denied*.

Indiana Code section 35-42-4-3(a) provides, in relevant part, that a person at least twenty-one (21) years of age who, “with a child under fourteen (14) years of age, performs or submits to . . . deviate sexual conduct commits child molesting” as a class A felony. As charged in Count III of this case, deviate sexual conduct is an act involving “a sex organ of [Claywell] and the mouth of [A.L].” *See* I.C. § 35-41-1-9.

A.L. testified, in relevant part, as follows:

Q . . . Did any other part of his body ever touch your pee pee?

A No.

. . . .

Q Did he ever touch it with his mouth?

A Yep.

Q Really?

A Yes.

Q Where’s your mouth at? Right there?

A Yes.

Q . . . Tell us about how he touched it with your mouth?

A I can’t remember.

Q You can't remember? Does that mean you don't want to talk about it?

A Yes.

....

Q ... But will you tell us about it anyway, please?

A Yes.

Q Will you tell us what happened when he touched it with his mouth?

A No.

....

Q Did it really happen?

A Yes.

Q All right. Well, I know it's not fun to talk about but will you tell the Judge, please, how it happened and where it happened at?

A Yes.

....

A Right here.

Q What happened right there?

A I don't know.

Q When you say I don't know, again is that you don't want to talk about it?

A Yes.

Q What happened right there? What part of his body—is that where his mouth touched it?

A Yes.

Q What was his mouth doing?

A I don't know.

Q Did it go—did it touch it with the outside of his mouth or the inside of his mouth?

A Outside of his mouth.

Q Outside of his mouth? Will you open your mouth . . . for me, okay? . . . Show me where it touched in his mouth. Where did your pee pee go in his mouth?

A I don't know.

Q You don't know or you don't want to talk about it?

A I don't want to talk about it.

Q Will you please look at the Judge and open your mouth and show him where it touched?

A (Indicating).

Q Right there? How far did it go in? If that was your finger, did it go all the way in?

A Yes.

Q How long did that happen for?

A I don't know.

(Tr. 100-04) (emphasis added).

In finding Claywell guilty of Count III, the trial court stated as follows:

I'll allow Count Three to go forward based on the redirect testimony of [A.L.] in which he did indicate, and I think his reaction to the question told

of his—it was an emotional reaction from a four-year-old, I thought, more emotional than many of the reactions that he had in answering a lot of the questions, and the State was able to distinguish between something he couldn't remember and something he didn't want to talk about, and the thing he did talk about was a penis in his mouth. He spoke of not touching his mouth, he actually demonstrated in court as the prosecutor has indicated, his finger went in his mouth, specifically in the left side of his mouth. I think that was very telling evidence.

(Tr. 232-33).

In this case, the evidence does not support a reasonable inference that Claywell committed deviate sexual conduct by performing or submitting to an involving his penis and the mouth of A.L. beyond a reasonable doubt. When asked to describe an incident involving Claywell's penis and A.L.'s mouth, A.L. responded that he could not remember. The remainder of A.L.'s testimony only described incidents involving A.L.'s penis and Claywell's mouth.

The State maintains that during A.L.'s testimony, "the prosecutor reversed the act from [Claywell] placing his penis in A.L.'s mouth to the other way around." State's Br. at 11 n.3. We, however, decline to presume the State's questions were in error, particularly where State continued to refer to an act involving Claywell's mouth.

The State also argues that "A.L.'s demonstration of the incident combined with his original statement that [Claywell] touched his mouth with his penis was sufficient to sustain a conviction" under Count III. State's Br. at 13. The record, however, does not reflect or describe such a demonstration. Rather, the transcript only reflects that in response to questions regarding where A.L.'s "pee pee" went "in [Claywell's] mouth,"

A.L. indicated to his own mouth. (Tr. 103). Again, we cannot say that this establishes that Claywell committed deviate sexual conduct by performing or submitting to an involving his penis and the mouth of A.L. beyond a reasonable doubt. We therefore reverse Claywell's conviction.

Reversed.

CRONE, J., concurs in result without separate opinion.

BAKER, C.J., concurs in result with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

BRYAN CLAYWELL,)	
)	
Appellant-Defendant,)	
)	
vs.)	
)	
STATE OF INDIANA,)	No. 49A02-0912-CR-1214
)	
Appellee-Plaintiff.)	

BAKER, Chief Judge, concurring.

In light of the record before us, I am reluctantly compelled to concur with the result reached by the majority. I write separately, however, to address the State’s contention that the trial court’s apparent dismissal of the wrong count only amounts to harmless error.

At trial, A.L. testified that Claywell touched his “butt” with “his hands,” which did not satisfy the requirements of the offense that was charged in Count I. Tr. p. 68, 105. Moreover, A.L. denied that he touched Claywell’s penis with his mouth as set forth in

Count III. Rather, A.L. testified that he touched Claywell's penis "with his hands" because Claywell "made him" do it. Id. at 63-64. However, A.L.'s testimony on redirect examination established that Claywell placed his mouth on A.L.'s penis as alleged in Count II. Tr. p. 101-04.

Given this testimony, I can only surmise from the transcript that the trial court intended to grant Claywell's motion for a directed verdict on Counts I and III. However, the trial court's possible confusion may have resulted—at least in part—from the deputy prosecutor's concession during argument that a judgment on the evidence was "warranted as to counts one and two." Id. at 185.

The trial court's statement following counsel's arguments on the motion made it clear that it had relied on A.L.'s redirect examination testimony when determining that the "case could proceed on Count Three." Id. at 187. In my view, it is quite telling that the questions the State posed to A.L. on redirect examination focused on the charges that were alleged in Counts I and II. And A.L. testified during that line of questioning that Claywell placed his mouth on A.L.'s penis, which was the precise charge that was alleged in Count II.

Notwithstanding such confusion, I cannot agree with the State's assertion that the trial court's dismissal of the "wrong count" amounted to harmless error. Appellee's Br. p. 13. In short, the record establishes that no reasonable person would be able to find Claywell guilty of Count III. Had the State objected, moved to correct the trial court's apparent dismissal of the incorrect count and presented the issue on cross-appeal if the

purported error not been corrected, the result in this case might be different. However, given the circumstances here, I must agree with my colleagues' decision to reverse Claywell's conviction.