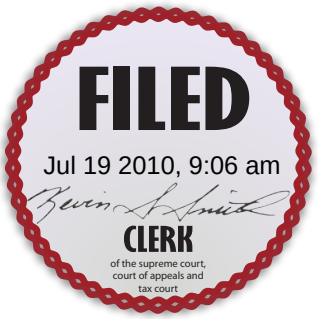

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IN THE
COURT OF APPEALS OF INDIANA

OLIVIA VANBUSKIRK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0912-CR-1208
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa F. Borges, Judge
Cause No. 49G04-0806-FA-150574

July 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Olivia Vanbuskirk appeals her conviction for child molesting as a class A felony.[1] Vanbuskirk raises one issue, which we revise and restate as whether the evidence is sufficient to sustain her conviction. We affirm.

The facts most favorable to the conviction follow. Between 2005 and 2008, D.H. ("Mother") and her three daughters, including B.H., lived sporadically with Mother's stepmother, Vanbuskirk, who was born on July 7, 1956, and Mother's father, David Vanbuskirk ("Grandfather"). During this time, B.H. was five, six, or seven years old. B.H. experienced redness and itching in her vaginal area but was not diagnosed with "having female troubles." Transcript at 134. Vanbuskirk used her fingers to touch B.H. on her "[p]rivate area," where she goes to the bathroom, on more than one occasion, which hurt B.H. Id. at 141. B.H.'s private area itched or hurt, which had something "to do with" Vanbuskirk touching B.H. Id. at 150.

B.H. could take a bath by herself but Vanbuskirk and Grandfather would "always give her baths." Id. at 108. B.H. needed to walk through Vanbuskirk's room to take a bath or shower because the shower in one of the bathrooms in Vanbuskirk's home did not work. During one bath, B.H. told Vanbuskirk that she "could do it by [herself,]" but Vanbuskirk ignored her. Id. at 145. Vanbuskirk put her finger one and a half to two inches inside B.H.'s "private area," which made B.H. feel uncomfortable. Id.

Vanbuskirk and Grandfather would also "always have [B.H.] sleep in their bed . . . ." Id. at 108. In 2005, Mother observed B.H. in Vanbuskirk's bed but "didn't think

[1] Ind. Code § 35-42-4-3 (2004) (subsequently amended by Pub. L. No. 216-2007, § 42 (eff. July 1, 2007)).

nothing [sic] about it . . . it's her grandparents." Id. at 120. Mother also observed B.H. in bed with Vanbuskirk and Grandfather and asked them why B.H. was in the bed and "they said she just got cold." Id. at 118. During one of the times when B.H. was in Vanbuskirk's bed and was wearing a nightgown and underwear, Vanbuskirk touched B.H. under her underwear and "move[d] her hand." Id. at 144. Grandfather was present in the bedroom when Vanbuskirk touched B.H. and told her something which made B.H. afraid to tell anyone about the incident.

During the period when Mother and B.H. were living with Vanbuskirk and Grandfather, Mother had to bring clothes to school for B.H. because she had "messed on herself." Id. at 118. After Mother and her daughters stopped living with Vanbuskirk, Mother noticed that B.H. was "not pottying on herself anymore at school, she was outgoing, she wanted to be around people, she was a lot happier." Id. at 119.

When B.H. was not living with Vanbuskirk, B.H. would occasionally spend the night at Vanbuskirk's house. When B.H. came home from Vanbuskirk's house, she would act weird, "jump" or "move . . . her waist down and . . . up," and did not want to be by herself. Id. at 108. After visiting Vanbuskirk's house, B.H. also "backed off away from people" and "really didn't want to be around anybody else." Id. at 114. At some point, B.H. decided that she did not want to stay all night. Id. at 122.

Vanbuskirk and Grandfather would "always buy [B.H.] stuff," and B.H. "would get upset when somebody asked her about it." Id. at 87. When B.H.'s older sister, C.H., asked B.H. "why they got her all that stuff," B.H. "got nervous at first because [she]

thought . . . if . . . C.H. would tell [Mother] then they would kill [Mother] and [B.H.]." Id. at 90, 168. B.H. told C.H. what had happened, and CPS arrived at Mother's home that evening.

During police questioning, Vanbuskirk initially denied that any penetration occurred, but later admitted that there would have been at least one time that her index finger would have been inserted into B.H.'s vagina. Vanbuskirk agreed that she inserted "one and a half to two inches" of her finger into B.H.'s vagina. Id. at 73. Vanbuskirk told the police that she inserted her finger into B.H.'s vagina for "[b]athing, cleansing B.H." and "to get her clean, that [B.H.] had been having some problems with yeast infections and she wanted to get up in there and get her vaginal area cleaned out." Id. at 73, 76.

On June 23, 2008, the State charged Vanbuskirk with Count I, child molesting as a class A felony, and Count II, child molesting as a class C felony. At the jury trial, Vanbuskirk testified that she had a yeast infection in the past and that she treated it by either going to her doctor and obtaining a prescription or going to the drugstore and obtaining an over the counter medication. Vanbuskirk also indicated that she used a "cream" and a "little capsule thing" which comes with a "little applicator." Id. at 215-216. When asked if she ever inserted her finger in B.H.'s vagina, Vanbuskirk testified: "I don't recall inserting it; it may have when I was giving her a bath but not . . . that was it, not for any other reason." Id. at 213-214.

After the jury trial, Vanbuskirk was found guilty of Count I, child molesting as a class A felony, and not guilty of Count II, child molesting as a class C felony. The trial court sentenced Vanbuskirk to thirty years in the Department of Correction.

The issue is whether the evidence is sufficient to sustain Vanbuskirk's conviction for child molesting as a class A felony. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

The offense of child molesting as a class A felony is governed by Ind. Code § 35-42-4-3, which provides that "[a] person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if: (1) it is committed by a person at least twenty-one (21) years of age . . . ." "Deviate sexual conduct" means "an act involving . . . the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-41-1-9 (2004).

The Indiana Supreme Court has held that "'intent to arouse or satisfy sexual desires' is not an element of Ind. Code § 35-42-4-3(a)." D'Paffo v. State, 778 N.E.2d 798, 801 (Ind. 2002). The Court stated:

> What is at stake here is whether the Legislature meant to criminalize all sexual intercourse and deviate sexual conduct with children or only that performed with intent to arouse or satisfy sexual desires. We think it more likely that the Legislature meant to criminalize such conduct performed, for example, to perpetrate revenge or to coerce a parent to take some type of action, in addition to conduct performed to arouse or satisfy sexual desires.

Id. The Court acknowledged that this "interpretation of the statutory language used by the legislature can cause some difficulty when considering the definition of 'deviate sexual conduct' in the context of medical or personal hygiene related examinations and procedures." Id. at 802. The Court recognized that it was well established that a conviction of child molesting requires the State to prove beyond a reasonable doubt criminal intent on the part of the defendant. Id. "The intent element of child molesting may be established by circumstantial evidence and inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points." C.L.Y. v. State, 816 N.E.2d 894, 905 (Ind. Ct. App. 2004), trans. denied. Thus, to convict Vanbuskirk of child molesting as a Class A felony, the State needed to prove that Vanbuskirk, a person at least twenty-one years of age, performed sexual deviate conduct on B.H., a child under fourteen years of age, with criminal intent.

Vanbuskirk argues that "just as there was no sexual intent, there was no criminal intent," and "there is no evidence of criminal intent attached to any digital penetration of B.H. by . . . Vanbuskirk."[2] Appellant's Brief at 8, 10. Vanbuskirk's argument is simply

[2] Vanbuskirk argues that "[b]ecause the jury acquitted on Count II, the charge whereby the State was required to prove there was evidence of an intent to arouse or to satisfy sexual desires, Olivia Vanbuskirk maintains there was no intent to arouse or to satisfy any sexual desires in any touching and/or digital penetration." Appellant's Brief at 8. To the extent that Vanbuskirk suggests that the verdicts were

a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. See Jordan, 656 N.E.2d at 817.

The record reveals that Vanbuskirk touched B.H. on her "[p]rivate area" on multiple occasions, which hurt B.H. and made her feel uncomfortable. Transcript at 141. When B.H. was in the bathtub, B.H. told Vanbuskirk that she "could do it by [herself,]" but Vanbuskirk ignored her and put her finger "one and a half to two inches" into B.H.'s vagina, which made B.H. feel uncomfortable. Id. at 73. When B.H. was in Vanbuskirk's bed and was wearing a nightgown and underwear, Vanbuskirk touched B.H. under her underwear and "move[d] her hand." Id. at 144. Grandfather was present in the bedroom when Vanbuskirk touched B.H., and B.H. was afraid to tell anyone about the incident based upon what Grandfather told her. When C.H. asked B.H. "why they got her all that

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inconsistent, we note that the Indiana Supreme Court has recently held that "[t]he evaluation of whether a conviction is supported by sufficient evidence is independent from and irrelevant to the assessment of whether two verdicts are contradictory and irreconcilable," and "[j]ury verdicts in criminal cases are not subject to appellate review on grounds that they are inconsistent, contradictory, or irreconcilable." Beattie v. State, 924 N.E.2d 643, 648 (Ind. 2010).

Vanbuskirk also states that "[t]he jury questions suggestion [sic] they may have believed they had to convict on Count I if there was any penetration." Appellant's Brief at 10. In her reply brief, Vanbuskirk states: "Admittedly, Olivia Vanbuskirk did not request an Instruction on hygiene. However, the State does not prevail on sufficiency as a consequence of the absence of an Instruction." Appellant's Reply Brief at 3 (citation omitted). Vanbuskirk also states: "The State asserts 'any claim of error regarding jury instructions is waived' disregarding the fact that the issue raised was the sufficiency of the evidence to sustain the conviction beyond a reasonable doubt and not the failure to submit Jury Instructions." Id. at 3-4 (citations omitted). Based upon Vanbuskirk's statements in her briefs, she does not appear to argue that an error occurred because the jury was not properly instructed. Consequently, we do not address the merits of the issue.

stuff," B.H. "got nervous at first because [she] thought . . . if . . . C.H. would tell [Mother] then they would kill [Mother] and [B.H.]." Id. at 90, 168.

Based upon these facts and the facts detailed above, we conclude that the State presented evidence of probative value from which a reasonable jury could have found Vanbuskirk guilty of child molesting as a class A felony. See, e.g., Surber v. State, 884 N.E.2d 856, 869 (Ind. Ct. App. 2008) (holding that the evidence was sufficient to sustain the defendant's conviction for child molesting as a class A felony), trans. denied.

For the foregoing reasons, we affirm Vanbuskirk's conviction for child molesting as a class A felony.

Affirmed.

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