ATTORNEY FOR APPELLANT:

PAULA M. SAUER
Danville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

NEIL A. SHORT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A01-1002-CR-54
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Karen M. Love, Judge
Cause No. 32D03-0902-FC-10

September 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Neil A. Short appeals his conviction by jury of sexual misconduct with a minor, a class C felony.[1] We affirm.

Issues

Short raises two issues for our review:

I. Whether the trial court erred in instructing the jury; and

II. Whether there is sufficient evidence to establish venue.

Facts and Procedural History

In 2008, ten-year-old C.T. lived in Short's house with her two younger brothers; her mother, Marti; her mother's boyfriend, Brian; and Brian's mother, Karla, who was Short's girlfriend. C.T. called fifty-one-year-old Short Papaw and thought of him as her grandfather.[2] In November 2008, C.T. told her cousin, twelve-year-old A.K., that Short had come into the bedroom while she was sleeping at his house, put his hand down her pants, and touched her vagina. A.K. went home and told her mother, Tina, what had happened to C.T. Tina contacted Marti that same night.

Marti immediately moved out of Short's house with her three children. She and the children stayed with Tina for a few days and then moved in with a friend in Lizton. Marti reported the molestation to the Lizton Police Department. A Lizton Police Officer referred Marti to the Brownsburg Police Department, where Detective Sergeant Jennifer Pyatt

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[1] Indiana Code section 35-42-4-3.

[2] Short was the biological grandfather of C.T.'s younger brothers.

interviewed C.T. The Hendricks County Department of Child Services also investigated the case, and a DCS case manager interviewed C.T.

Short was charged with sexual misconduct with a minor as a class C felony. At trial, C.T. testified Short touched her vagina with his hand. Short did not testify. The jury convicted him, and he appeals.

Discussion and Decision

Jury Instructions

Short first contends the trial court erred in instructing the jury as follows over his objection:

> You are the exclusive judges of the evidence, the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; the manner and conduct of the witnesses while testifying; any interest, bias, or prejudice the witness may have; any relationship with other witnesses or interested parties; and the reasonableness of the testimony of the witness considered in the light of all of the evidence in this case.
>
> You should attempt to fit the evidence to the presumption that the defendant is innocent and the theory that every witness is telling the truth. You should not disregard the testimony of any witness without a reason and without careful consideration. <u>If you find conflicting testimony you must determine which of the witnesses you will believe and which of them you will disbelieve.</u>
>
> In weighing the testimony to determine what or whom you will believe, you should use your own knowledge, experience and common sense gained from day to day living. The number of witnesses who testify to a particular fact or the quantity of evidence on a particular point need not control your determination of the truth. You should give the greatest weight to that evidence that convinces you most strongly of its truthfulness.

(Tr. 224-25 – Preliminary Instruction Number 13 and Tr. 558-560 – Final Instruction

Number 13) (emphasis added). Specifically, Short argues the "mandatory language contained in the instruction lowered the standard of proof required for conviction and invaded the province of the jury." Appellant's Br. 5.

Instructing the jury lies within the sole discretion of the trial court. Massey v. State, 803 N.E.2d 1133, 1137 (Ind. Ct. App. 2004). Jury instructions are to be considered as a whole and in reference to each other. Id. An error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. Id. Before a defendant is entitled to a reversal, he must affirmatively show that the erroneous instruction prejudiced his substantial right. Id.

We now turn to Short's specific contentions. First, the mandatory language in the instruction does not lower the burden of proof required for conviction. The jury was instructed multiple times that Short could only be convicted if the State proved his guilt beyond a reasonable doubt. Appellant's App. 78, 80, 82, 84, 115, 117, 118, 119. The jury was also instructed not to single out any certain sentence or individual point or instructions and ignore others. Appellant's App. 75, 111.

Second, the mandatory language in the instruction does not invade the province of the jury. Instructions concerning the credibility of witnesses should not comment upon the weight to be given to the testimony of any particular witness. Sweany v. State, 607 N.E.2d 387, 389 (Ind. 1993). Such instructions must also be general in nature and should not single out any particular witness for closer scrutiny. Id. The instruction to which Short objects does not violate either of these basic principles.

We further note that the instruction to which Short objects is the pattern jury instruction on judging witness credibility. See Indiana Pattern Jury Instructions (Criminal) 1.17 and 13.11. The Indiana Pattern Jury Instructions are prepared under the auspices of the Indiana Judges Association and the Indiana Judicial Conference Criminal and Civil Instruction Committees. Winegeart v. State, 665 N.E.2d 893, 901, n.1 (Ind. 1996). Although the instructions are not formally approved for use, id., the preferred practice is to use them. Boney v. State, 880 N.E.2d 279, 294 (Ind. Ct. App. 2008), trans. denied.

Lastly, we note that Short's reliance on Gantt v. State, 825 N.E.2d 874 (Ind. Ct. App. 2005), is misplaced. In the Gantt case, Gantt was charged with molesting his nine-year-old stepdaughter while her mother was at work. At trial, both the victim and Gantt testified about the evening in question. The victim testified the molestation occurred, and Gantt testified it did not. Several hours after it had begun deliberations, the jury sent the following note to the trial court: "There is disagreement as to whether you must believe one witness or the other. Can you reach a verdict if you don't believe either party?" Id. at 875. In response, the trial court gave the jury an extended explanation of its interpretation of the jury's duty to determine the credibility of conflicting witnesses. In this explanation, the trial court told the jury it was required to believe one of the witnesses.

On appeal, Gantt argued the trial court erred in its response to the jury's note. This court agreed and explained as follows:

> When two witnesses give contradictory accounts, it is not true that the jury must believe one or the other. The jury may choose to believe neither witness, believe aspects of the testimony or each, or believe the testimony but also believe in a different interpretation of the facts that that espoused by the

> witnesses, among other possibilities. The trial court's instruction may have led the jury to believe that it was required to adopt wholesale one witness's account over another's.

Id. at 878.

Gantt is inapposite to the case before us. First, as the State points out, Gantt does not involve a pattern jury instruction given before deliberations. Rather, Gantt involves a trial court's extended explanation of the jury's duty in response to a deliberating juror's question. Gantt further involved the victim and the defendant giving contradictory accounts. Under those circumstances, the trial court's instruction may have led the jury to believe it had to believe one of the accounts and could not choose to believe neither witness or believe aspects in the testimony of each. Here, however, there was only one account of events. The trial court's instruction would not have led the jury to believe it had to believe any certain witness. Rather, the instruction left open the possibility that the jury could choose to believe none of the witnesses. The trial court did not err in giving this instruction.

Venue

Short also argues that the State failed to submit sufficient evidence to establish venue. A defendant has a constitutional right to be tried in the county in which an offense allegedly was committed. Neff v. State, 915 N.E.2d 1026, 1032 (Ind. Ct. App. 2009), adhered to on rehearing, trans. denied. Venue is not an element of the offense, however, and the State may establish venue by a preponderance of the evidence and need not prove it beyond a reasonable doubt. Id. The standard of review for a claim that the evidence was insufficient to prove venue is the same as for other claims of insufficient evidence. Id. That is, we do

not weigh the evidence or resolve questions of credibility. Id. Rather, we look to the evidence and reasonable inferences therefrom which support the conclusion of requisite venue. Id.

Here, Norcutt v. State, 633 N.E.2d 270 (Ind. Ct. App. 1994), is instructive. In the Norcutt case, James Freund parked his motorcycle in a garage across the alley from his house in the early morning hours of June 1992. About 6:00 that same morning, Freund received a phone call from the police department in Lansing, Michigan. The officer making the call directed Freund to file a police report with the Hammond Police Department. Norcutt, who was apprehended after wrecking the motorcycle, was convicted of burglary.

On appeal, Norcutt argued there was insufficient evidence to establish venue. This court pointed out that the Lansing Police Department directed Freund to file a report with the Hammond Police Department, and Norcutt gave a statement indicating the garage was in Hammond. Id. We concluded these facts were sufficient to establish the burglary occurred in Hammond. Further, the trial court judicially knew that Hammond is located in Lake County, and that Lake County is located in Indiana. Id. (citing Dunlap v. State, 205 Ind. 384, 180 N.E. 475, 478 (1932) (holding it is judicially known that Rensselaer is located in Jasper County)).

Here, a Lizton police officer directed C.T.'s mother to the Brownsburg Police Department, where Brownsburg Police Department Detective Sergeant Jennifer Pyatt interviewed C.T. In addition, the Hendricks County Department of Child Services also investigated the case, and a DCS case manager interviewed C.T. These facts are sufficient to

establish the offense occurred in Hendricks County. The State therefore submitted sufficient evidence to establish venue.

Affirmed.

RILEY, J., and KIRSCH, J., concur.