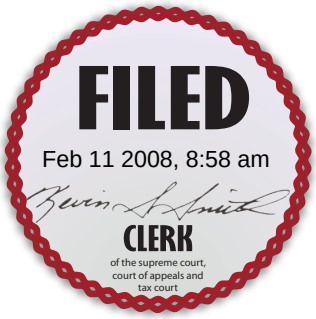

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IN THE COURT OF APPEALS OF INDIANA

CHARLES A. KOOTZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0705-CR-427
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya W. Pratt, Judge
Cause No.49G01-0607-FC-133518

February 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Charles Kootz was convicted of child molesting, a Class C felony, sexual misconduct with a minor, a Class C felony, and two counts of child solicitation, both Class D felonies; determined to be a repeat sexual offender; and sentenced to an aggregate term of fifteen years. Kootz argues that insufficient evidence supports his convictions and that the trial court improperly sentenced him. Concluding sufficient evidence exists and the trial court properly sentenced Kootz, we affirm.

Facts and Procedural History

On July 7, 2006, Kootz and Baretta Calvert were living together in Indianapolis. D.W., D.S., and Z.W. received permission from their parents to spend the night at Calvert's house. Calvert was acquainted with D.W.'s mother, and told the parents of D.S. and Z.W. that he was D.W.'s uncle. Kootz arrived home around 7:00 p.m. Calvert asked the boys if they wanted back rubs, and Kootz asked them if they wanted to have their legs rubbed. Calvert rubbed the boys' backs and Kootz rubbed their legs. While Kootz was rubbing D.S.'s legs, his hand went under D.S.'s shorts and moved up to the bottom of his boxer shorts. D.S. felt uncomfortable and moved.[1] Kootz used lotion when rubbing D.W.'s legs, and "started getting close to [D.W.'s] private," at which point D.W. pushed Kootz's hand away, told him "no," and got up and walked away. Id. at 60-61. Also, while the boys were watching television, Kootz "unfolded [D.S.'s] pants and said [']nice tan line.[']" Id. at 92.

[1] In its brief, the State claims that D.S. told Kootz to stop. The prosecutor asked D.S. "Did you say anything?", to which D.S. responded, "No." Transcript at 82. We urge the State to represent the evidence accurately.

Kootz then took the boys on motorcycle rides. After returning from the last ride, Kootz gave D.S. money and asked him if he wanted another leg rub. D.S. declined. The next morning, Kootz asked D.W. if he wanted another back rub. While Kootz was rubbing D.W.'s back, he pulled D.W.'s shorts down, "said [D.W.] had a nice butt, and [D.W.] pulled [his shorts] back up, and then [Kootz] pulled [the shorts] back down and kissed [D.W.'s] butt." Id. at 63. Kootz also asked D.W. if he would "like a blow job or anything like that." Id. at 71.

That same morning, D.S. woke up to find Kootz sucking on D.S.'s thumb. Kootz then put some money in the waistband of D.S.'s shorts, patted D.S. on the back, and kissed him on the head. D.S. then woke up D.W., and the boys woke up Calvert, who drove them home. D.S and D.W. told D.W.'s mother what had happened, and she called the police.

On July 21, 2006, the State charged Kootz with four counts of child molesting, three counts involving D.S and one count involving Z.W.; sexual misconduct with a minor, involving D.W.; and three counts of child solicitation, two counts involving D.S. and one count involving D.W. On October 4, 2006, the State filed a notice that it was seeking a repeat sex offender sentencing enhancement.

On April 9, 2007, the trial court held a jury trial. The jury returned guilty verdicts for one count of child molesting with regard to D.S., one count of sexual misconduct with a minor with regard to D.W., and two counts of child solicitation with regard to D.S. Kootz subsequently admitted to being a repeat sex offender. On April 20, 2007, the trial court held

a sentencing hearing at which it sentenced Kootz to eight years with two years suspended for child molesting, enhanced by four years due to Kootz's status as a repeat sex offender; eight years with two years suspended for sexual misconduct with a minor; and three years with one year suspended for each count of child solicitation. The trial court ordered that the sentence for child molestation run consecutively to the sentence for one count of child solicitation, resulting in an aggregate sentence of fifteen years, with three years suspended.[2] Kootz now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

When reviewing a claim of insufficient evidence, we will not reweigh evidence or judge witnesses' credibility. Grim v. State, 797 N.E.2d 825, 830 (Ind. Ct. App. 2003). We will consider only the evidence favorable to the judgment and the reasonable inferences drawn therefrom. Id. We will affirm a conviction if the lower court's finding is supported by substantial evidence of probative value. Id. Our supreme court has recently summarized our standard of review when assessing claims of insufficient evidence.

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[2] The abstract of judgment indicates that the trial court sentenced Kootz to twelve years with two years suspended for child molesting, eight years with two years suspended for sexual misconduct with a minor, and three years with one year suspended for each count of child solicitation. The abstract then states: "counts 5, 7, 8, [sic] to run concurrent to each other court [sic] 2 to run consecutive to count 8 for a total of 12 years." Appellant's App. at 18. It is clear from its statements at the sentencing hearing that this statement in the abstract of judgment is referring to the executed portion of Kootz's sentence, and that it should have indicated that Kootz's total sentence is fifteen years, with three years suspended and twelve years executed. In his brief, Kootz also refers to his sentence as being fifteen years with twelve years executed. See Appellant's Brief at 6. We remand with instructions that the trial court correct the abstract of judgment to accurately reflect Kootz's sentence.

> 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.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

B. Evidence Supporting Kootz's Convictions

In order to sustain Kootz's convictions of child molesting as a Class C felony and sexual misconduct with a minor as a Class C felony, there must be evidence that Kootz "perform[ed] or submit[ed] to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desire of either the child or the older person." Ind. Code §§ 35-42-4-3(b), 35-42-4-9(b).[3] Kootz argues that insufficient evidences exists to support a finding that he touched D.W. or D.S. with the intent to arouse or satisfy the sexual desire of either the children or himself. "[M]ere touching alone is not sufficient to constitute the crime of child molesting." Haun v. State, 792 N.E.2d 69, 72 (Ind. Ct. App. 2003). However, direct evidence is not required in order to establish the

[3] The child molesting statute also requires that the child be under fourteen years of age and that the defendant be older than the child. The sexual misconduct with a minor statute requires that the child be at

defendant's intent. Winters v. State, 727 N.E.2d 758, 761 (Ind. Ct. App. 2000), trans. denied. Instead, "[t]he intent element of child molesting may be inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points." Haun, 792 N.E.2d at 72.

Kootz relies primarily on Clark v. State, 695 N.E.2d 999, 1002 (Ind. Ct. App. 1998), trans. denied, where a panel of this court concluded insufficient evidence existed to support a conviction for child molesting where the evidence indicated the defendant hung a child upside down from a nail and tickled her under her arms and on her ribs. The court stated that "[a]lthough the foregoing facts clearly raise questions concerning the propriety of [the defendant's] behavior, standing alone, they do not constitute substantial evidence of probative value on the element of intent." Id.

Kootz argues also that no evidence exists that he touched the boys' sexual organs. Kootz's statement is accurate, but not determinative. Neither the plain language of the statutes, see Ind. Code §§ 35-42-4-3(b), 35-42-4-9(b) (indicating that the defendant must have performed or submitted to "any fondling or touching" (emphasis added)), nor caselaw indicate that the touching must involve a sexual organ. As we have previously recognized, "[b]ecause the inner thigh is in close proximity to the genitals, an erogenous zone, [touching the inner thigh] may itself be the source of sexual gratification." Nuerge v. State, 677 N.E.2d 1043, 1049 (Ind. Ct. App. 1997), trans. denied. In Nuerge, we concluded sufficient evidence existed as "[t]he natural and usual sequence to which [the defendant's] conduct points is that

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least fourteen but less than sixteen years old and that the defendant be at least twenty-one. Kootz does not

he intended to satisfy his or [the victim's] sexual desires by kissing the child's inner thigh and placing his hand in side the bottom of her shorts." Id. Similarly, in Altes v. State, 822 N.E.2d 1116, 1121-22 (Ind. Ct. App. 2005), trans. denied, we found sufficient evidence to satisfy the intent element where the victim

> was sitting on the living room couch with [the defendant]. [The victim] stated that at one point, [the defendant] asked her if he could give her a foot massage, to which she consented. She explained that although he initially started rubbing her feet with his hand, he moved on to her legs and eventually, started rubbing her bottom. During trial, she clarified that he was touching her on her skin, underneath her t-shirt and underwear.

In the same case, we also found sufficient evidence to support another conviction of child molesting where the victim

> was lying on her side on some cushions on the living room floor of [the defendant's] house, watching television. She stated that at some point, [the defendant] moved from the couch and got down behind her. [The victim] continued that [the defendant], after he laid his arm around her, started rubbing her upper body, initially over her clothes, but then he moved his hand underneath her shirt, touching her skin from her shoulders down to her waist.

Id. at 1122.

We conclude that sufficient evidence exists in this case from which a jury could conclude that Kootz touched D.S. and D.W. with the intent to satisfy or arouse the sexual desires of either Kootz or the children. Kootz's acts go well beyond the tickling in Clark, and more closely resemble the acts in Nurege and Altes. The evidence regarding Kootz's acts of massaging D.W. and sucking on D.S.'s thumb, along with his comments to the children, provide sufficient evidence from which a jury could infer Kootz's intent to arouse

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argue that insufficient evidence supports these elements.

or satisfy the sexual desires of either Kootz or the children.

Kootz makes no specific argument with regard to his convictions of child solicitation. In order to sustain Kootz's convictions of child solicitation, there must be evidence that Kootz "knowingly or intentionally solicit[ed] a child . . . to engage in: (1) sexual intercourse; (2) deviate sexual conduct; or (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person." Ind. Code § 35-42-4-6(b). "There is no requirement that a solicitor actually complete the act of meeting with his or her victim to commit the crime of child solicitation." Kuypers v. State, 878 N.E.2d 896, 899 (Ind. Ct. App. 2008). Instead, "to commit child solicitation, a person must merely 'command, authorize, urge, incite, request, or advise' a child to commit the act." Id. (quoting Ind. Code § 35-42-4-6(a)).

Here, evidence exists that Kootz asked D.S. if he wanted a back or leg rub and later gave money to D.S. and asked him if he wanted another leg rub. As discussed above, evidence supports the inference that Kootz's intent with the leg rubs was to satisfy or arouse the sexual desires of either Kootz or D.S. We conclude sufficient evidence exists to support Kootz's convictions of child solicitation.

II. Sentencing

Under Indiana Code section 35-50-1-2(c):

> [E]xcept for crimes of violence, the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

An "'episode of criminal conduct' means offenses or a connected series of offenses that are closely related in time, place, and circumstance." Ind. Code § 35-50-1-2(b).

Kootz argues that his offenses constitute a single episode of criminal conduct, and that therefore, his aggregate sentence may not exceed the ten-year advisory sentence for a Class B felony, as the most serious crime of which Kootz was convicted is a Class C felony. As Kootz's aggregate sentence was fifteen years, with three years suspended, he argues his sentence is in violation of Indiana Code section 35-50-1-2(c).

Both Kootz and the State fail to recognize that child molesting is a "crime of violence" for purposes of the statute. See Ind. Code § 35-50-1-2(a)(10). Therefore, the limitation of subsection (c) does not apply. Ind. Code § 35-50-1-2(c); Davies v. State, 758 N.E.2d 981, 989-90 (Ind. Ct. App. 2001) (recognizing that the statutory limitation regarding episodes of criminal conduct does not apply to crimes of violence), trans. denied.

We conclude the trial court properly ordered Kootz's sentences for child molesting and child solicitation to run consecutively.

Conclusion

We conclude that sufficient evidence supports Kootz's convictions and that the trial court properly sentenced Kootz. We remand for the sole purpose of instructing the trial court to correct its sentencing statement. See supra, note 2.

Affirmed in part and remanded with instructions.

FRIEDLANDER, J., and MATHIAS, J., concur.