

STATEMENT OF THE CASE

Appellant-Defendant, Matthew P. Philbee (Philbee), appeals his conviction for Counts I & III, child molesting, Class A felonies, Ind. Code § 35-42-4-3; Count IV, child molesting, a Class C felony, I.C. § 35-42-4-3; and Count V, vicarious sexual gratification, a Class D felony, I.C. § 35-42-4-5.

We affirm.

ISSUE

Philbee raises one issue on appeal, which we restate as: Whether the State presented sufficient evidence beyond a reasonable doubt to sustain Philbee's conviction for two Counts of child molesting as Class A felonies.

FACTS AND PROCEDURAL HISTORY

In the summer of 2010, Julia Kelly (Kelly) babysat six-year old M.K. M.K. usually arrived at Kelly's home at 8:30 a.m.. Because Kelly had a two-year old child and would start her day after the child woke up, she left the front door unlocked so M.K. could enter the residence and lie down or watch television.

In July of 2010, thirty-three-year-old Philbee stayed at Kelly's house. Philbee would help watch the children when Kelly needed a break. On the morning of July 30, 2010, Kelly was in her bedroom watching television. She noticed M.K. walk past her bedroom, carrying a blanket and giving her a look that gave Kelly "a bad feeling." (Transcript p. 11). Kelly looked into the living room and saw Philbee sitting on the couch with his shorts unbuttoned and his hands in his pants. M.K., facing Philbee, was

on her knees between Philbee's legs. Kelly told M.K. to get out of the living room. Kelly went back into her bedroom and sent a text message to her fiancé describing what she had just witnessed and asking him to come home immediately. Philbee entered Kelly's bedroom, lit a cigarette, and told her that "I don't know what I was thinking." (Tr p. 15). When Kelly's fiancé came home, he made Philbee leave the residence.

The police were notified. Nurse Sharon Robinson at the Fort Wayne Sexual Assault Treatment Center examined M.K. During the genital examination, M.K. "took her fingers and separated her labia majors and put her finger inside the internal female sex organ and stated that [Philbee's] pee pee was in here." (Tr. p. 91) M.K. also "spread her butt cheeks and said that he put . . . his pee pee [] in [M.K.'s anus]." (Tr. p. 92). M.K. was also interviewed by Patricia Smallwood (Smallwood) at the Child Advocacy Center. M.K. told Smallwood that Philbee had abused her on "multiple occurrences" which "she described [] in great detail." (Tr. p. 53). During the interview, M.K. demonstrated that Philbee had placed his penis in her vagina by using anatomically correct dolls.

When police interviewed Philbee, he initially denied all sexual contact with M.K. Later, he stated that M.K. wanted him to touch her but he refused. However, he admitted to touching M.K. on another day and that he had fondled M.K.'s vaginal area.

On August 26, 2010, the State filed an Information charging Philbee with Counts I-III, child molesting, Class A felonies, I.C. § 35-42-4-3; Count IV, child molesting, a Class C felony, I.C. § 35-42-4-3; and Count V, vicarious sexual gratification, a Class D felony, I.C. § 35-42-4-5. On May 9, 2011, the trial court conducted a bench trial. At the

close of the evidence, the trial court found Philbee guilty of Counts I, III, IV, and V. On June 13, 2011, after a sentencing hearing, the trial court sentenced Philbee to concurrent terms of forty years on Count I, forty years on Count III, four years on Count IV, and one and a half years on Count V.

Philbee now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Philbee contends that the State failed to present sufficient evidence beyond a reasonable doubt to sustain his conviction for two Counts of child molesting as Class A felonies. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* at 213. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

To convict Philbee under Count I, child molesting, a Class A felony, the State was required to establish beyond a reasonable doubt that Philbee, who was at least twenty-one years of age, performed or submitted to sexual intercourse with a child of under fourteen years of age. *See* I.C. § 35-42-4-3. Sexual intercourse is defined as “an act that includes any penetration of the female sex organ by the male sex organ.” I.C. § 35-41-1-26. To

convict Philbee of Count III, child molesting, a Class A felony, the State was required to prove that Philbee, who was at least twenty-one years of age, performed or submitted to deviate sexual conduct with a child of under fourteen years of age. *See* I.C. § 35-42-4-3. Sexual deviate conduct means “an act involving (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object. I.C. § 35-4-1-9.

With respect to both Counts, Philbee specifically contends that the State presented insufficient evidence to establish the element of penetration. A conviction of child molesting may rest solely on the uncorroborated testimony of the victim. *Baber v. State*, 870 N.E.2d 486, 489 (Ind. Ct. App. 2007), *trans. denied*. Here, M.K. testified at trial. Describing the molestation, she stated that Philbee’s penis touched her “inside [her] pee pee.” (Tr. p. 33). She added that at other times, Philbee put “his hand” “inside [her] private.” (Tr. p. 37). M.K. also testified that Philbee “forced [her] to put [her] mouth” on his penis. (Tr. p. 39).

Philbee now disputes M.K.’s testimony, claiming that “M.K. in the interview and her testimony meant inside or outside her underwear not inside or outside her sex organ.” (Appellant’s Br. p. 4). We disagree. In her testimony, M.K. was very clear that penetration had occurred; she described in detail the sexual acts she had to submit to and which she was forced to perform on Philbee. We conclude that the State presented sufficient evidence beyond a reasonable doubt to establish the element of penetration in Count I and III.

CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to sustain Philbee's conviction.

Affirmed.

FRIEDLANDER, J. and MATHIAS, J. concur