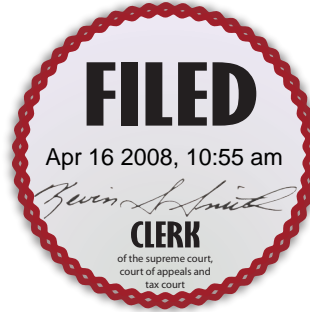


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DANIEL HARVEY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A03-0706-CR-270

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0507-FA-35

April 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Daniel Harvey appeals his two convictions and sentences for child molesting,¹ one as a Class A felony, and the other as a Class C felony. He raises three issues that we restate as:

- I. Whether there was sufficient evidence to support his Class A felony conviction;
- II. Whether fundamental error resulted from the introduction of testimony that Child Protective Services had previously “substantiated” an allegation of child molestation; and
- III. Whether the court erred in not considering Harvey’s alleged mental illness during sentencing, and whether his sentence was appropriate based on the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 2004, Harvey, the live-in boyfriend of six-year-old T.W.’s mother, occasionally babysat for T.W. and her siblings while her mother was away. T.W. reported that, during those times, Harvey sometimes put her on his lap, moved back and forth, and touched her private part while he played with his private part. T.W. went to the hospital, and Child Protective Services (“CPS”) investigated, and told T.W.’s mother to keep T.W. away from Harvey.

In 2005, T.W. reported that while she, her family, and Harvey lived in a hotel in Merrillville, Indiana, Harvey again touched her private part and, on this occasion, put white stuff from his private part on her stomach. *Tr.* at 66. T.W. also reported that Harvey penetrated her with his finger and his private part. *Tr.* at 215-16.

¹ See IC 35-42-4-3; IC 35-41-1-9.

Harvey was charged with two counts of child molesting. Trial was held, and the jury returned a guilty verdict on both counts. The trial court sentenced Harvey to thirty years on the Class A felony, but suspended ten years and ordered that sentence be served concurrently to four years for the Class C felony. Harvey now appeals. Additional facts will be added as necessary.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Harvey claims that there was insufficient evidence to prove that he committed child molesting as a Class A felony because there was no evidence of any criminal deviate conduct. When we review sufficiency of the evidence claims, we do not assess the weight of the evidence or judge the credibility of witnesses. *Stewart v. State*, 768 N.E.2d 433, 435 (Ind. 2002). We look to whether there was probative evidence and reasonable inferences sufficient for the trier of fact to conclude that the defendant is guilty beyond a reasonable doubt. *Id.*

In order for the jury to find Harvey guilty of child molesting as a Class A felony, the State had to prove that he engaged in deviate sexual conduct with T.W. IC 35-42-4-3. Deviate sexual conduct is defined as “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.” IC 35-41-1-9. Harvey claims that the State failed to prove that he engaged in deviate sexual conduct because it never put forth any evidence that he had contact with T.W.’s mouth or anus. Harvey also complains that T.W.’s testimony only

suggested he may have touched her private parts and put “white stuff” on her, but nothing more. *Tr.* at 66.

We disagree with Harvey’s characterization of the evidence presented. During the cross-examination of CPS agent Tina Kozlowski, Kozlowski testified that she spoke with T.W., and T.W. told her that Harvey partially penetrated her sex organ with both his finger and his sex organ. *Tr.* at 214-16. Our Supreme Court has already held that a finger is an object within the meaning of IC 35-41-1-9 (*Stewart v. State*, 555 N.E.2d 121, 126 (Ind. 1990), *abrogated on other grounds*), and that the slightest penetration is sufficient. *Dinger v. State*, 540 N.E.2d 39, 40 (Ind. 1989). Therefore, the evidence presented was sufficient for the jury to find Harvey guilty of child molesting as a Class A felony.

II. Fundamental Error

Harvey claims that CPS’s agent Kozowski’s testimony that CPS had already “substantiated . . . Mr. Harvey for child molesting . . . [with T.W. as] . . . the victim” constituted fundamental error, which entitles him to a new trial. *Tr.* at 201. Harvey did not object to this testimony at trial; therefore, in order to avoid waiving the issue, the only error that would entitle Harvey to relief must be fundamental. *See Bear v. State*, 772 N.E.2d 413, 421 (Ind. Ct. App. 2002), *trans. denied*. Fundamental error occurs when the error is such a blatant violation of basic rules and principles that it would constitute the denial of the defendant’s due process rights. *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002). The error must be so prejudicial to the rights of the defendant that it is impossible for him or her to receive a fair trial. *Id.*

Here, we do not find that Kozlowski's testimony constituted fundamental error. The jury had already heard that Harvey had inappropriate contact with T.W. from T.W., and Kozlowski's testimony only restated those allegations. Kozlowski's testimony was not so prejudicial as to deny Harvey a fair trial because the evidence before the jury and CPS would lead either to conclude that Harvey had physically molested T.W. This testimony did not amount to fundamental error.

III. Sentence

Harvey also argues that the trial court abused its discretion in sentencing him to the crime's advisory thirty years with ten years suspended because it did not consider his mental health as a mitigator. Further, Harvey contends that, based on the nature of the offense and his character, the sentence was inappropriate.

A sentencing decision is within the sound discretion of the trial court. *Edwards v. State*, 842 N.E.2d 849, 854 (Ind. Ct. App. 2006), *trans. denied* (citing *Jones v. State*, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003)). We can review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the weight given to those reasons. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007). If the sentence imposed is lawful, this court will not reverse unless the sentence is inappropriate based on the character of the offender and the nature of the offense. Ind. Appellate Rule 7(B).

After Harvey was convicted and before he was sentenced, he argued that his mental health was in question and that he should be examined to determine his competency to participate at his sentencing hearing. He claimed that previous unrelated

charges against him were dropped due to his documented brain damage and inability to assist in his own defense, and that, in this case, he should be granted a new trial. The trial court took the matter seriously and appointed two psychiatrists to examine Harvey's mental health. Dr. R. Bhawani Prasad and Douglas W. Caruana examined Harvey and gave conflicting reports. *Tr.* at 363-64. The trial court recognized the conflicting reports and appointed a third psychiatrist, Dr. Jill Miller. *Appellant's App.* at 105. Dr. Miller reported that Harvey was fit to stand trial and for the purposes of his sentencing hearing. *May 8, 2007 Tr.* at 8. The trial court accepted Dr. Miller's assessment, and advised the Department of Correction to provide Harvey any mental health treatment that might be necessary, but ultimately held that Harvey was fit to participate in his trial and his sentencing hearing. *Id.* at 20. We cannot find any abuse in it doing so.

As for the appropriateness of Harvey's sentence, Harvey was sentenced to serve a total of twenty years for his Class A and Class C child molesting convictions. Harvey's character was reflected in his criminal history, which included misdemeanor convictions for public intoxication, failure to maintain financial responsibility, resisting law enforcement, battery against a law enforcement officer, and reckless driving. The natures of the offenses do not need to be repeated because Harvey received the statutory minimum sentence he could receive for a Class A child molesting conviction. *See* IC 35-50-2-2(b). We do not find Harvey's sentence to be inappropriate.

Affirmed.

RILEY, J., and MAY, J., concur.