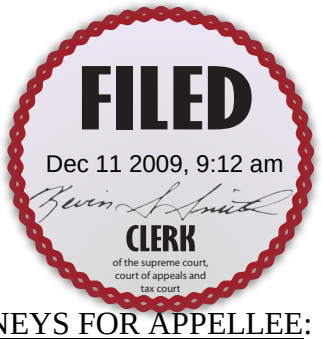

ATTORNEY FOR APPELLANT:

S. NEAL ZILIAK
Noblesville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN McLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ROBERT WARNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A04-0907-CR-420
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven Nation, Judge
Cause No. 29D01-0508-FC-130

December 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary and Issue

Robert Warner appeals his conviction of class B felony criminal deviate conduct, asserting that the trial court committed fundamental error in instructing the jury that a child under the age of sixteen cannot consent to deviate sexual conduct or sexual intercourse. We affirm.

Facts and Procedural History

On January 18, 2005, Warner spoke to M.N. on the telephone about a mutual friend. Warner told M.N. that he was sixteen years old and a high school sophomore. He was actually seventeen and a senior. Warner asked to meet M.N., and she agreed. She took her dogs for a walk in her neighborhood, and Warner met her. Warner told M.N. that she looked "innocent" and asked if she was a virgin. Tr. at 381. She told him that she was only thirteen and that she was a virgin. Warner asked her if she would be his girlfriend, and she agreed.

On January 21, 2005, Warner and M.N. met at an ice-skating rink. M.N. believed that they were going to go to the mall and have dinner. Instead, after they got in Warner's car, he called his home and learned that his mother was out. Warner took M.N. to his house. He left her in the living room and went upstairs. Then he called M.N. She went upstairs and found him lying naked on the bed. M.N. "freaked out and went into the bathroom" and locked the door. *Id*. at 386. Warner told her to come out, and that "it was going to be okay." *Id*. at 387. M.N. unlocked the bathroom door and came out. Warner was still naked. He asked her if she "was ready." *Id*. at 388. M.N. started crying and said "no." *Id*. Warner said, "[E]ither you're ready or I'm going to make you be ready." *Id*. Warner told M.N. to take her pants off

and get on top of him, and she obeyed. When she "got on top of him, he pushed [her] down on him." *Id*. She was in pain and told him that it hurt. He told her to "shut up." *Id*. Afterward, Warner took her back to the skating rink and told her "not to tell anyone or he was going to kill [her]." *Id*. at 389.

Warner called M.N. the following day and asked to see her again. M.N. told him that she was scared of him. Warner apologized and said that "it would not happen again." *Id*. at 391. M.N. agreed to see him. In the following months, Warner fondled M.N., put his penis in her mouth, and Warner and M.N. had sexual intercourse multiple times. M.N. was "scared to say no to him" because "he made [her] the first time." *Id*. at 395, 403.

Warner also had anal sex with M.N. twice. The first time, she told him she did not want to do it, but he disregarded her refusal and penetrated her anus, causing her to scream in pain and ask him to stop. He did not. As a result, M.N. suffered pain and discomfort for months. While at dinner with her parents for her fourteenth birthday, M.N. began crying due to the pain. She explained to her parents that she was in pain, but did not explain the cause. Her father gave her some medicinal cream for the pain.

On the second occasion, Warner was at M.N.'s house. They were watching television with M.N.'s father, and he fell asleep on the floor. Warner told M.N. that he wanted to have sex with her. She got on her knees on the couch and he pulled her pants off and penetrated her anus again. M.N. was in pain and wanted to scream out, but her head was pushed down in a pillow. Her father remained asleep.

In April 2005, M.N. and her family went to Florida on vacation. Warner gained entrance to M.N.'s home and took a pair of her underwear and a photograph of her from the home. That summer, Warner told M.N. to make "videos of [herself] in the bathtub fingering herself and he wanted [her] to moan a lot." *Id*. at 437. M.N. did not want to make a video, but she did because she "didn't want him to get mad at [her]." *Id*.

On August 2, 2005, the State charged Warner with two counts of class C felony sexual misconduct with a minor and one count of class D felony possession child pornography. On June 30, 2006, Warner waived juvenile court jurisdiction, and the State charged him with eight counts of class B felony child molesting and one count each of class B felony criminal deviate conduct, class C felony sexual misconduct with a minor, class D felony residential entry, and class A misdemeanor conversion. Of particular relevance here is the class B felony criminal deviate conduct charge, which is based on the instances of anal sex.

On December 11, 2008, a jury found Warner guilty of class D felony possession of child pornography, class B felony criminal deviate conduct, and class A misdemeanor conversion. The jury was unable to reach a unanimous verdict on the remaining charges, and the trial court declared a mistrial as to those charges.

Discussion and Decision

Warner contends that his conviction for class B felony criminal deviate conduct must be reversed and his case remanded for retrial because jury instruction number 20

("Instruction 20") resulted in fundamental error.[1] The fundamental error doctrine is extremely narrow. *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002). Fundamental error is defined as an error so prejudicial to the rights of a defendant that a fair trial is rendered impossible. *Id*. To qualify as fundamental, an error "must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." *Wilson v. State*, 514 N.E.2d 282, 284 (Ind. 1987).

Warner was charged with and convicted of criminal deviate conduct, which is defined by Indiana Code Section 35-42-4-2:

> (a) A person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct[2] when:
>
> (1) the other person is compelled by force or imminent threat of force;
> (2) the other person is unaware that the conduct is occurring; or
> (3) the other person is so mentally disabled or deficient that consent to the conduct cannot be given;
>
> commits criminal deviate conduct, a Class B felony.

However, the jury was unable to reach a unanimous verdict on Warner's child molesting and sexual misconduct with a minor charges. Warner was charged with child molesting under Indiana Code Section 35-42-4-3(a), which provides that "[a] person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual

[1] Warner concedes that he did not object to Instruction 20 at trial, and therefore, to avoid waiver, he claims that the giving of the instruction is fundamental error. *See Absher v. State*, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007) (observing that failure to object at trial results in waiver unless error is so prejudicial that defendant is denied a fair trial).

conduct commits child molesting, a Class B felony." Similarly, the sexual misconduct with a minor statute makes the victim's age an element of the crime and provides that "[a] person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits sexual misconduct with a minor, a Class C felony." Ind. Code § 35-42-4-9(a).

Instruction 20 provided as follows: "The law establishes that a victim younger than sixteen (16) years of age cannot consent to deviate sexual conduct or sexual intercourse." Appellant's App. at 275. Warner argues that while Instruction 20 correctly states the law as it applies to child molesting and sexual misconduct as a minor, it incorrectly states the law as to criminal deviate conduct. He asserts that Instruction 20 prejudiced him in that it caused the jury to believe that M.N.'s age was a factor in determining whether he was guilty of criminal deviate conduct when "the jury should have been deliberating whether the State had proven beyond a reasonable doubt that Warner caused M.N. to submit to sexual deviate conduct when compelled by force." Appellant's Br. at 14.

The State does not dispute that, absent individualized questions of mental capacity or consciousness, criminal deviate conduct does not raise the issue of a victim's consent. *See Warrick v. State*, 538 N.E.2d 952, 957 (Ind. Ct. App. 1989) (holding that criminal deviate conduct requires proof of force or threats, not lack of consent). Rather, the State argues that

---

[2] "'Deviate sexual 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." Ind. Code § 35-41-1-9.

the fact that the jury did not convict Warner of eight counts of child molesting or two counts of sexual misconduct with a minor, for which M.N.'s age is a determining factor, shows that the jury was not misled into believing that M.N.'s age was relevant to the criminal deviate conduct charge. We agree.

Further, we observe that jury instructions are to be "considered as a whole and in reference to each other." *Gantt v. State*, 825 N.E.2d 874, 877 (Ind. Ct. App. 2005). "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*. Here, instruction number 8 provided the jury with the relevant text of Indiana Code Section 35-42-4-2 and explained,

> Before you may convict the Defendant, the State must have proved each of the following essential elements beyond a reasonable doubt:
>
> 1. The Defendant
> 2. knowingly
> 3. caused [M.N.] to submit to sexual deviate conduct
> 4. when [M.N.] was compelled by force.

Appellant's App. at 334. Thus, the jury was properly instructed as to the precise elements that the State was required to prove for it to find Warner guilty of criminal deviate conduct beyond a reasonable doubt. Accordingly, we conclude that Instruction 20 was not so prejudicial that Warner was deprived of a fair trial and did not result in fundamental error.

Affirmed.

RILEY, J., and VAIDIK, J., concur.