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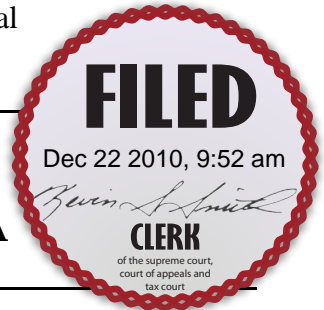
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**IN THE  
COURT OF APPEALS OF INDIANA**

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FRANCISCO CONTRERAS,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 49A02-1004-CR-426

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Robert Altice, Judge  
Cause No. 49G02-0402-FA-32017

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**December 22, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Francisco Contreras appeals his convictions for three counts of Class A felony child molesting and two counts of Class C felony child molesting. We affirm.

### **Issues**

Contreras raises two issues, which we restate as:

- I. whether his right to confrontation under the Sixth Amendment and Article 1, Section 13 of the Indiana Constitution was violated by a DNA analyst's testimony; and
- II. whether the evidence is sufficient to sustain his Class C felony child molesting convictions.

### **Facts**

In July 2002, Contreras touched twelve-year-old E.C.'s breasts, inserted his fingers in her vagina, and had sexual intercourse with her. Contreras ejaculated on E.C.'s legs and the sheets on the bed. Two weeks later, E.C. told her friend that Contreras had been molesting her. Her friend told E.C.'s mother. E.C.'s mother and the children then moved out of the house, but a few months later, they moved back in with Contreras. Contreras again touched E.C.'s breasts and inserted his fingers in her vagina.

In February 2004, the State charged Contreras with three counts of Class A felony child molesting for performing deviate sexual conduct on and having sexual intercourse with E.C. in 2002 when she was twelve years old. The State also charged Contreras with two counts of Class C felony child molesting for touching or fondling E.C. when she was twelve years old "with the intent to arouse or satisfy the sexual desires of [E.C.]."

Appellant's App. p. 25. A warrant was issued for Contreras's arrest, and he was eventually found in Mexico and returned to Indiana in 2009.

A jury trial was held in March 2010. Contreras and the State stipulated to the following facts:

1. That in 2003 Judith Macechko was employed at the Indianapolis/Marion County Forensics Services Agency (crime lab) as a duly qualified serologist.
2. That on May 20, 2003, Judith Macechko received from the property room:

- Item 1 – One Barbie bedspread
- Item 2 – One Barbie pillowcase
- Item 3 – One Barbie bedsheet
- Item 4 – White underpants
- Item 5 – Blue shorts

\* \* \* \* \*

4. Analysis of the items resulted in the following:

- Item 1 – Seminal material identified/preliminary exam indicates the presence of blood.
- Item 2 – Not examined
- Item 3 – Seminal material identified.
- Item 4 – No seminal material found. No indication of saliva
- Item 5 – No seminal material found.

\* \* \* \* \*

6. Samples from items 1 and 3, the Barbie bedspread and the Barbie sheet were packaged for DNA testing.

State's Exhibit 6. This stipulation was admitted without objection and read to the jury.

Tonya Fishburn, a forensic scientist with the Indianapolis Marion County crime lab, testified regarding DNA analysis of the evidence. Fishburn testified that, in general, evidence first goes to the serology section of the lab, where the serologist determines if

bodily fluids are present on the evidence, determines the type of bodily fluid, and cuts out the area containing the bodily fluid for DNA analysis. Fishburn testified that Contreras, in the absence of an identical twin, was the source, to a reasonable degree of scientific certainty, of the sperm fraction of several DNA samples found on E.C.'s bedspread.

During deliberations, the jury pointed out that, although the charging informations for the Class C felony child molesting charges alleged that Contreras touched E.C. with the intent to arouse or satisfy E.C.'s sexual desires, the preliminary instructions alleged a touching with the intent to arouse or satisfy the sexual desires of E.C. or Contreras. The trial court instructed the jury to follow the charging informations. The jury found Contreras guilty as charged. The trial court sentenced Contreras to an aggregate sentence of fifty years in the Department of Correction.

## **Analysis**

### ***I. Right to Confrontation***

Contreras argues that his right to confrontation under the Sixth Amendment and Article 1, Section 13 of the Indiana Constitution was violated by Fishburn's testimony. According to Contreras, Fishburn testified regarding Macechko's findings and he was unable to cross examine Macechko. Contreras did not make this objection at trial and, in fact, stipulated to the admission of facts regarding the serologist's findings. The State contends that Contreras invited any error by his stipulation, but Contreras implies that the testimony resulted in fundamental error.

In Kingery v. State, 659 N.E.2d 490, 494 (Ind. 1995), our supreme court noted that the defendant invited "the very error he now claims is fundamental." The court held that

“[a] party may not invite error, then later argue that the error supports reversal, because error invited by the complaining party is not reversible error.” Kingery, 659 N.E.2d at 494. “This type of invited error is not fundamental error.” Id. At other times, however, our supreme court has addressed a defendant’s fundamental error argument despite invited error. Roach v. State, 695 N.E.2d 934, 941-42 (Ind. 1998), reh’g granted on other grounds, 711 N.E.2d 1237 (Ind. 1999). Despite Contreras’s stipulation and invited error, we will address his argument.

Because Contreras did not object at trial, he must demonstrate that the admission of Fishburn’s testimony resulted in fundamental error. The fundamental error exception is “extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.” Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010). The error claimed must either “make a fair trial impossible” or constitute “clearly blatant violations of basic and elementary principles of due process.” Id. This exception is available only in “egregious circumstances.” Id.

The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. “A witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.” Pendergrass v. State, 913 N.E.2d 703, 705 (Ind. 2009) (citing Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004)), cert.

denied. Similarly, Article 1, Section 13(a) of the Indiana Constitution provides: “In all criminal prosecutions, the accused shall have the right to . . . meet the witnesses face to face . . . .” Our Supreme Court has held that “Indiana’s confrontation right contains both the right to cross-examination and the right to meet the witnesses face to face.” Brady v. State, 575 N.E.2d 981, 988 (Ind. 1991).

Here, Contreras argues that Fishburn testified that Macechko, the serologist, found bodily fluids, specifically sperm, on E.C.’s bedding. Contreras complains about numerous incidents where Fishburn testified regarding “sperm cells” and “sperm fractions.” Appellant’s Br. p. 12. According to Contreras, “Macechko’s out-of-court statements regarding the results of her serology testing, which were conveyed to the jury through Fishburn’s testimony, were made for the purpose of establishing or proving some fact-the presence of potentially incriminating bodily fluid on E.C.’s bedding-and the declarant, Macechko, would reasonably have believed her statement would be used” by the prosecution. Appellant’s Br. p. 12-13.

Fishburn testified that, generally, evidence first goes to the serology section of the lab, where the serologist determines if bodily fluids are present on the evidence, determines the type of bodily fluid, and cuts out the area containing the bodily fluid for DNA analysis. With regard to the evidence in this case, she testified that she analyzed the samples provided to her. Specifically, she testified that she used the following process:

Originally the evidence is treated with chemicals that release the DNA, this is called the extraction step and once the DNA is released it goes through a wash step to remove

any non-DNA that might be in the sample so I end up with purified DNA. Whenever there is a sample that may have sperm in it, I do what's called a "differential extraction." Basically I'm able to separate the sperm cells from the non-sperm cells in the sample. So the non-sperm cells would be called the "epithelial fraction," and the sperm cells would be called the "sperm fraction." So once I make that separation and that extraction then I determine how much DNA actually I have in the sample and then those regions that I talked about earlier, where those repeats occurring, I'll target in on those regions of the DNA and I make millions of copies of those regions and this allows me to actually be able to detect how many repeats are at those regions. And so then I'll create a DNA profile and then I'll make the comparison to the standards in the case.

Tr. p. 168. Fishburn then testified regarding the DNA analysis of the "sperm fractions" and the "epithelial fractions" of the evidence samples in this case. *Id.* at 169. Thus, when she was discussing sperm fractions and sperm cells, Fishburn was discussing the results of her testing, not Macechko's testing. Fishburn did not testify that Macechko found sperm on E.C.'s bedding. Rather, Fishburn testified that she separated sperm fractions and epithelial fractions as part of her own testing. Although Fishburn's testimony may have implied that Macechko found sperm on the bedding, Fishburn testified regarding her own test results. Fishburn's testimony contained no hearsay regarding Macechko's findings, and Fishburn's testimony did not result in a violation of Contreras's right to confrontation under either the Sixth Amendment or the Indiana Constitution. There was no error, much less fundamental error, and Contreras's claim fails.

## *II. Sufficiency of the Evidence*

Contreras argues that the evidence is insufficient to sustain his convictions for the two counts of Class C felony child molesting. When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. Bailey v. State, 907 N.E.2d 1003, 1005 (Ind. 2009). “We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence.” Id. We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. Id. It is well established that “circumstantial evidence will be deemed sufficient if inferences may reasonably be drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt.” Pratt v. State, 744 N.E.2d 434, 437 (Ind. 2001).

Indiana Code Section 35-42-4-3(b) governs the offense of Class C felony child molesting and provides: “A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony.” However, the charging informations against Contreras alleged only that the touching was done with the intent to arouse or satisfy E.C.’s sexual desires, not Contreras’s sexual desires. On appeal, Contreras argues that the State presented no evidence that the touching was done with the intent to arouse or satisfy E.C.’s sexual desires.

Our supreme court has held that “[t]he intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor’s conduct and



the natural and usual sequence to which such conduct usually points.” Bowles v. State, 737 N.E.2d 1150, 1152 (Ind. 2000). “The intent to arouse or satisfy sexual desires may be inferred from evidence that the accused intentionally touched a child’s genitals.” Wise v. State, 763 N.E.2d 472, 475 (Ind. Ct. App. 2002), trans. denied. It is reasonable for a jury to infer that the intent existed even without a direct showing of that element. Altes v. State, 822 N.E.2d 1116, 1121 (Ind. Ct. App. 2005), trans. denied.

Regarding the Class C felony child molesting charges, the State presented evidence that Contreras touched E.C.’s breasts in July 2002. During the same incident, Contreras also inserted his fingers in her vagina and had sexual intercourse with her. A few months later, Contreras again touched E.C.’s breasts and inserted his fingers in her vagina but did not have sexual intercourse with her. We acknowledge that clearly E.C. did not desire the sexual conduct, and we note that the question for the jury was whether Contreras intended to arouse or satisfy E.C.’s sexual desires. It is Contreras’s intent that is at issue, not E.C.’s desires. Although the jury clearly could have inferred that Contreras intended to satisfy his own sexual desires, the jury also could have inferred that Contreras intended to arouse or satisfy E.C.’s sexual desires.

Further, we note that, during the jury’s deliberations, the jury questioned whether the elements of the offense included the intent to arouse or satisfy E.C.’s sexual desires or the intent to arouse or satisfy the sexual desires of E.C. or Contreras. The trial court clarified that the elements of the offense, as charged, included only the intent to arouse or satisfy E.C.’s sexual desires. The jury was well aware of the elements necessary to find Contreras guilty beyond a reasonable doubt of that element and still found Contreras

guilty as charged. The evidence is sufficient to sustain Contreras's convictions for Class C felony child molesting.

### **Conclusion**

The DNA analyst's testimony did not result in a violation of Contreras's right to confrontation under either the Sixth Amendment or the Indiana Constitution. Further, the evidence is sufficient to sustain Contreras's Class C felony child molesting convictions. We affirm.

Affirmed.

BAKER, C.J., and VAIDIK, J., concur.