MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Gustavo Colindres-Aldana,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff.

December 12, 2022

Court of Appeals Case No. 22A-CR-802

Appeal from the Marion Superior Court

The Honorable James Osborn, Judge

Trial Court Cause No. 49D21-2007-F1-21769

Pyle, Judge.

Statement of the Case

[1] Gustavo Colindres-Aldana ("Colindres-Aldana") appeals, following a jury trial, his conviction for Level 1 felony child molesting.[1] Colindres-Aldana argues that there was insufficient evidence of penetration to support his conviction. Concluding that the evidence is sufficient, we affirm the trial court's judgment.

[2] We affirm.

Issue

> Whether there is sufficient evidence to support Colindres-Aldana's Level 1 felony child molesting conviction.

Facts

[3] The facts most favorable to the verdict follow. When M.P. was seven years old, she lived in a house in Marion County, Indiana with her brother, her mother ("Mother"), and Mother's boyfriend. During that time period, between 2017 to 2018, Colindres-Aldana rented a room in the basement of Mother's house, and he lived there for four or five months. At that time, Colindres-Aldana was forty-eight or forty-nine years old.

[4] During the time that Colindres-Aldana lived in the house with M.P., Colindres-Aldana inappropriately touched M.P. multiple times. During one incident, which occurred in the kitchen, Colindres-Aldana "crouch[ed] down" as M.P.

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[1] IND. CODE § 35-42-4-3. The jury also found Colindres-Aldana guilty of two counts of Level 4 felony child molesting, but he does not challenge these convictions on appeal.

was standing and used his "hand" to touch M.P.'s "vagina" on the "outside" of her clothes. (Tr. Vol. 2 at 190). He also "mov[ed] his hand" while touching her vagina. (Tr. Vol. 2 at 191).

[5] A second inappropriate touching incident occurred in the living room while M.P. was sitting on a couch. Colindres-Aldana touched M.P. "[o]ver [her] clothes" and "put his hand on [M.P.'s] vagina." (Tr. Vol. 2 at 195). Colindres-Aldana also "put [M.P.'s] hand on his private part[,]" which M.P. described as the body part where boys go "[p]ee." (Tr. Vol. 2 at 195, 196).

[6] During a third inappropriate touching incident, Colindres-Aldana touched M.P.'s vagina under her clothes. After Colindres-Aldana called M.P. into the kitchen, he "crouch[ed] down" by her as she was standing. (Tr. Vol. 2 at 198). He then put his "hand" under her clothes and "touch[ed] [her] vagina again" "on the skin." (Tr. Vol. 2 at 198). M.P. felt "real scared" and her body felt "[v]ery weird." (Tr. Vol. 2 at 198, 199).

[7] In February 2020, M.P., after attending a good touch/bad touch presentation at her school, told her school social worker that Colindres-Aldana had touched her. The school contacted Mother, Department of Child Services, and the police. Thereafter, the State charged Colindres-Aldana with Count 1, Level 1 felony child molesting; Count 2 through 4, Level 4 felony child molesting; Count 5, Level 5 felony criminal confinement; Count 6, Class A misdemeanor intimidation; and Count 7, Level 4 felony child molesting.

[8] The trial court held a two-day jury trial in February 2022. At the time of the trial, M.P. was eleven years old. When M.P. testified about the incident when Colindres-Aldana touched her vagina under her clothes, she initially stated that she "d[id]n't remember it clearly[.]" (Tr. Vol. 2 at 198). However, she then testified that Colindres-Aldana had called her into the kitchen, where she was "standing up and he was crouching down," and that he then used "[h]is hand" to "touch[] [her] vagina again." (Tr. Vol. 2 at 198). When the prosecutor asked M.P. whether "it [was] on the skin of [her] vagina, or something else[,]" M.P. responded, "I think it was on the skin." (Tr. Vol. 2 at 198).

[9] During the State's closing argument, when arguing about the Level 1 felony child molesting charge in Count 1, the prosecutor told the jury that it should look to the evidence that Colindres-Aldana "put[] his finger inside of [M.P.'s] clothing" and "on the skin of her vagina." (Tr. Vol. 3 at 26). The prosecutor also pointed out that the law in Indiana was that "the slightest penetration of the female sex organ [wa]s enough to constitute child molesting" and that, therefore, "when we're talking about the skin of [M.P.'s] vagina, we are talking about penetration." (Tr. Vol. 3 at 26). During Colindres-Aldana's closing argument, he argued that the evidence to support his Level 1 felony charge was lacking because M.P. had not specifically stated that Colindres-Aldana had penetrated her vagina and had not "sa[id] anything like inside of her vagina." (Tr. Vol. 3 at 33).

[10] The trial court instructed the jury regarding the elements of the Level 1 felony child molesting and instructed them that the statutory definition of "other

sexual conduct" meant "an act involving . . . the penetration of the sex organ or anus of a person by an object." (Tr. Vol. 3 at 42). Additionally, the trial court instructed the jury that "it [wa]s well established that the female sex organ include[d] the external genitalia and that the slightest penetration of the female sex organ constitute[d] child molesting." (Tr. Vol. 3 at 42).

[11] The jury found Colindres-Aldana guilty of Counts 1 through 3 and not guilty of the remaining counts. The trial court imposed a twenty (20) year sentence for Colindres-Aldana's Level 1 felony conviction and two (2) years on each of his Level 4 felony convictions, and the trial court ordered that these sentences be served concurrently.

[12] Colindres-Aldana now appeals.

Decision

[13] Colindres-Aldana argues that the evidence was insufficient to support his conviction. Our standard of review for sufficiency of the evidence claims is well settled. We "consider only the probative evidence and reasonable inferences *supporting* the verdict." *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007) (emphasis in original). We do not reweigh the evidence or judge witness credibility. *Id.* We will affirm the conviction unless no reasonable fact finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* at 146-47. The evidence is sufficient if an inference may be reasonably drawn from it to support the verdict. *Id.* at 147. Additionally, a conviction of child

molesting may rest on the uncorroborated testimony of the victim. *Young v. State*, 973 N.E.2d 1225, 1227 (Ind. Ct. App. 2012), *reh'g denied*, *trans. denied*.

[14] To convict Colindres-Aldana for Level 1 felony child molesting, the State was required to prove beyond a reasonable doubt that Colindres-Aldana, who was at least the age of twenty-one, knowingly performed other sexual conduct with M.P., who was a child under the age of fourteen. *See* I.C. § 35-42-4-3(a). The term "other sexual conduct" means "an act involving . . . the penetration of the sex organ or anus of a person by an object." I.C. § 35-31.5-2-221.5.

[15] Our Indiana Supreme Court has held that proof of even the slightest penetration is sufficient to sustain convictions for child molesting. *Spurlock v. State*, 675 N.E.2d 312, 315 (Ind. 1996), *aff'd in relevant part on reh'g* (1997). "[P]roof of the slightest penetration of the sex organ, including penetration of the external genitalia, is sufficient to demonstrate a person performed other sexual misconduct with a child." *Boggs v. State*, 104 N.E.3d 1287, 1289 (Ind. 2018). *See also Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002) (explaining that there is no requirement that the vagina be penetrated, only that the female sex organ, including the external genitalia, be penetrated), *trans. denied*. It is "unnecessary" and "undesirable" for a child molest victim to give a "detailed anatomical description of penetration." *Spurlock*, 675 N.E.2d at 315. Whether penetration occurred is a question of fact to be determined by the jury. *Borkholder v. State*, 544 N.E.2d 571, 577 (Ind. Ct. App. 1989).

[16] Colindres-Aldana contends that the State failed to present sufficient evidence of penetration. Specifically, Colindres-Aldana suggests that the evidence was insufficient because the State did not specifically ask M.P. if penetration had occurred and because M.P. did not specifically testify that his hand or finger went inside her vagina.

[17] We acknowledge that eleven-year-old M.P. did not give explicit testimony specifying that Colindres-Aldana's hand "penetrated" or went "inside" her vagina or her external genitalia when she was seven years old. Nevertheless, the specific evidence presented in this case, including M.P.'s testimony that Colindres-Aldana touched her vagina under her clothes supports a reasonable inference that Colindres-Aldana at least slightly penetrated M.P.'s external genitalia with his hand. Specifically, M.P. testified that Colindres-Aldana put his "hand" under her clothes and "touch[ed] [her] vagina" "on the skin." (Tr. Vol. 2 at 198). M.P. further testified that she felt "real scared" and that her body felt "[v]ery weird." (Tr. Vol. 2 at 198, 199). Again, "whether penetration, no matter how slight, occurred is a question of fact to be determined by the jury." *Borkholder*, 544 N.E.2d at 577. Here, the jury was instructed that the State was required to prove the slightest degree of penetration of the female sex organ, which included the external female genitalia. Colindres-Aldana made the same penetration argument to the jury, and the jury rejected his argument. "When determining whether an element of an offense has been proven, the jury may rely on its collective common sense and knowledge acquired through everyday experiences—indeed, that is precisely what is expected of a jury."

Clemons v. State, 83 N.E.3d 104, 108 (Ind. Ct. App. 2017), *trans. denied*. We will not reweigh the evidence or second-guess the jury's conclusion that M.P.'s sex organ was at least slightly penetrated by Colindres-Aldana's hand. *See Drane*, 867 N.E.2d at 146. M.P.'s testimony that Colindres-Aldana's "hand" went under her clothes, "touch[ed] [her] vagina" "on the skin," and that her body felt "very weird" is sufficient evidence from which the jury could conclude beyond a reasonable doubt that the slightest penetration occurred. (Tr. Vol. 2 at 198, 199). Accordingly, we affirm Colindres-Aldana's Level 1 felony child molesting conviction.[2]

[18] Affirmed.

Bradford, C.J., concurs.

Foley, J., dissents with opinion.

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[2] We reject Colindres-Aldana's reliance on *Spurlock*, where the evidence was determined to be insufficient to establish penetration. Here, M.P. testified to facts supporting an inference of slight penetration of her external genitalia, and this evidence is sufficient to support Colindres-Aldana's Level 1 felony child molesting conviction. We also reject Colindres-Aldana's assertion that the evidence was insufficient because there was no medical evidence corroborating penetration. M.P. reported the allegation of child molesting around two years after it had occurred. Given this gap of time between the molestation and the reporting, the lack of medical evidence is of no moment in this appeal. Additionally, a conviction of child molesting may rest on the uncorroborated testimony of the victim. *Young*, 973 N.E.2d at 1227.

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Foley, Judge.

I respectfully dissent. My review of the record does not lead me to the conclusion that the evidence in this case supported a reasonable inference of penetration. If the evidence below were sufficient for such an inference, I fear, there would no longer be a distinction between child molesting involving

penetration (defined as "other sexual conduct")[3] and child molesting involving fondling or touching[4].

The majority correctly observes that proof of only the slightest penetration of the female sex organ is sufficient to sustain a conviction for child molesting under Indiana Code Section 35-42-4-3(a). The word "slightest" here, however, refers to the degree of penetration, *not* to the amount of evidence substantiating that penetration. I find no evidence of penetration in the record. The record is devoid of both physical and circumstantial evidence that would corroborate the occurrence of *any* penetration of the victim's sex organ.[5]

The cases cited by the majority all include at least one form of evidence tending to establish penetration, and thus, distinguishing them from the case at bar. *See Spurlock v. State*, 675 N.E.2d 312, 315 (Ind. 1996) (distinguishing cases where there was additional physical or corroborating evidence and concluding "[h]ere, we are confronted with a situation where the victim herself, who was of an age to understand and respond to the questions, did not state that penetration occurred and there was no medical or physical evidence of penetration . . . evidence of a touching without more does not support a conviction for child molesting as a Class A felony . . . ."); *Boggs v. State*, 104 N.E.3d 1287, 1288

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[3] I.C. § 35-42-4-3(a) and I.C. § 35-31.5-2-221.5.

[4] I.C. § 35-42-4-3(b).

[5] The majority correctly notes that our case law provides that the State is not required to make a showing of penetration of the vagina in order to satisfy the requirements of the statute.

(Ind. 2018) ("S.H. testified that Boggs put his finger "in the folds of her vagina" and touched her clitoris."); *Young v. State,* 973 N.E.2d 1225, 1227 (Ind. Ct. App. 2012) (victim's testimony: *"*My dad would rape me and finger me."); *Smith v. State*, 779 N.E.2d 111, 116 (Ind. Ct. App. 2002) ("V.D. unequivocally stated that Smith 'put his private in my private.'"); *Borkholder v. State*, 544 N.E.2d 571, 573 (Ind. Ct. App. 1989) ("Borkholder would . . . place his penis *in* her vagina . . . ." (emphasis added)).

The State was bound to prove penetration beyond a reasonable doubt. Even applying our deferential standard of review, recognizing that a conviction can be based on the testimony of a child molestation victim alone, and abstaining from re-weighing evidence, I cannot conclude that the State provided sufficient evidence to meet that burden. The inference of penetration is based solely on the testimony of the victim that Colindres-Aldana put his "hand" under her clothes and "touch[ed] [her] vagina . . . on the skin." Tr. Vol. II p. 198. Standing alone, that evidence was insufficient to give rise to a reasonable inference of penetration, no matter how slight. The legislature intended to draw a distinction between a child molestation involving a "touching" and that involving "other sexual conduct," and to hold otherwise would eliminate that distinction. Accordingly, I would reverse the trial court with respect to the Level 1 felony conviction, and, thus, I respectfully dissent.