MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Bradley Adam Marshall,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

December 27, 2022

Court of Appeals Case No.
22A-CR-1600

Appeal from the
Hamilton Superior Court

The Honorable
Jonathan M. Brown, Judge

Trial Court Cause No.
29D02-1807-F4-5059

Vaidik, Judge.

Case Summary

[1] Bradley Adam Marshall appeals his conviction for Level 5 felony child seduction, arguing the evidence is insufficient to support it. We affirm.

Facts and Procedural History

[2] In March 2013, Marshall started dating the mother of M.H., a girl born in March 2001. M.H. and her mother moved in with Marshall six months later, and Marshall and M.H.'s mother got married in March 2015. When M.H. was 14 years old, her relationship with Marshall "started to change." Amended Tr. Vol. III p. 137. One night, M.H. and Marshall were watching a movie together on the couch when she glanced over at him and saw that he was masturbating. Marshall tried moving closer to M.H., but she got up and left the room. After that incident, Marshall began masturbating in front of M.H. on an almost daily basis. Sometimes, he would ejaculate on her.

[3] According to M.H., Marshall asked her for "specific sex acts" three times. *Id.* at 141. On the first occasion, Marshall asked M.H. for a "hand job." *Id.* When M.H. hesitated, Marshall told her that her mother wasn't doing it so she should. M.H. did so but almost "gagg[ed]." *Id.* at 145. M.H. couldn't remember when this incident occurred but believed it was when she was "under 16" or "sometime around age 15 or 16." *Id.* at 144, 159.

[4] On the second occasion, Marshall asked M.H. to perform oral sex on him. When M.H. hesitated this time, Marshall offered her gifts in return. M.H.

performed oral sex on Marshall, and he ejaculated in her mouth. M.H. ran into the bathroom to "thr[o]w up." *Id.* at 145. M.H. couldn't remember when this incident occurred but also believed it was when she was "under 16" or "sometime around 15 or 16." *Id.* at 146, 159.

[5] On the third occasion, Marshall "begg[ed]" M.H. for sexual intercourse. *Id.* at 148. When M.H. said she didn't want to have sex with Marshall, he again told her that her mother wasn't doing it so she should. Marshall tried to insert his penis into M.H.'s vagina through her underwear. Marshall's penis did not go all the way in, but it did go "between . . . the lips of [her] vagina." *Id.* at 149. Again, M.H. couldn't remember when this incident occurred but believed it was "after" she turned 14 and "before" she turned 18 or when she was "sometime around age 15 or 16" but "not when [she] was 17." *Id.* at 147, 160.

[6] In July 2018, M.H.'s mother saw text messages on M.H.'s phone from Marshall and contacted authorities. Later that month, the State charged Marshall with three counts: Count 1: Level 4 felony sexual misconduct with a minor (which required M.H. to be at least 14 but less than 16 years old[1]); Count 2: Level 5 felony child seduction (which required M.H. to be at least 16 but less than 18 years old); and Count 3: Level 5 felony child solicitation (which required M.H. to be at least 14 but less than 16 years old). A jury trial was held in May 2022. The jury found Marshall guilty of Count 2 but not guilty of Counts 1 and 3. The

[1] The sexual-misconduct-with-a-minor statute was amended in 2019. The statute now provides that the victim just needs to be under 16 years old. *See* Ind. Code § 35-42-4-9.

trial court sentenced Marshall to five years, with three years executed (one year in prison and two years on work release) and two years suspended to probation.

[7] Marshall now appeals.

Discussion and Decision

[8] Marshall contends the evidence is insufficient to support his conviction for Level 5 felony child seduction. When reviewing sufficiency-of-the-evidence claims, we neither reweigh the evidence nor judge the credibility of witnesses. *Willis v. State*, 27 N.E.3d 1065, 1066 (Ind. 2015). We only consider the evidence supporting the verdict and any reasonable inferences that can be drawn from the evidence. *Id.* A conviction will be affirmed if there is substantial evidence of probative value to support each element of the offense such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

[9] To convict Marshall of Level 5 felony child seduction as charged here, the State had to prove that Marshall was a stepparent to M.H., that he engaged with M.H. in sexual intercourse or "other sexual conduct,"[2] and that M.H. was at least 16 but less than 18 years old. Ind. Code § 35-42-4-7(m), (q)(2); Appellant's Amended App. Vol. II p. 25. Although not charged here, child seduction is a

[2] "Other sexual conduct" is defined as "an act involving: (1) a sex organ of one (1) 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. § 35-31.5-2-221.5.

Level 4 felony if it involves sexual intercourse or "other sexual conduct" and the child is at least 14 but less than 16 years old. I.C. § 35-42-4-7(q)(4). On appeal, Marshall challenges only the age element.[3]

[10] Citing this Court's decision in *Barger v. State*, 576 N.E.2d 621 (Ind. Ct. App. 1991), *aff'd on reh'g*, 579 N.E.2d 621, Marshall argues that M.H.'s testimony that she was **either** 15 **or** 16 years old at the time of the incidents is insufficient to prove beyond a reasonable doubt that she was at least 16 but less than 18 years old as required by the Level 5 felony child-seduction charge. Appellant's Br. p. 13 ("As [the Court of Appeals] held and reaffirmed on rehearing in *Barger v. State*, 'either-or' evidence presented to establish the age of a victim is insufficient to support a guilty verdict when that age is an element of the offense." (footnote omitted)). But this Court's opinion in *Barger* is no longer good law. Our Supreme Court granted transfer in *Barger*, thereby vacating it. *See Barger v. State*, 587 N.E.2d 1304 (Ind. 1992), *reh'g denied*. Our Supreme Court's decision in *Barger* supports affirmance—not reversal—in this case.

[11] In *Barger*, the defendant touched or fondled the victim in January or February 1988. The victim turned 12 in February 1988. The State charged the defendant with Class D felony child molesting, which at the time required the victim to be

[3] Marshall does not contest M.H.'s testimony about the incidents, that the second incident constitutes "other sexual conduct," or that the third incident constitutes sexual intercourse.

at least 12 but less than 16 years old.[4] Although not charged, it was a Class C felony if the victim was less than 12 years old. The defendant was convicted of Class D felony child molesting and appealed, arguing the evidence was insufficient to prove beyond a reasonable doubt that the victim was at least 12 years old. Our Supreme Court affirmed:

> This case is unusual in that the molestation took place right around the victim's twelfth birthday. . . . We have the rare set of circumstances in which the State apparently cannot prove definitively whether the victim was eleven years old or twelve years old at the time of the molestation. It is thus difficult to know whether Barger is guilty of a class D or a class C felony. We do not think it follows that Barger is guilty of no felony at all.
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> We hold when it is difficult to tell whether the child molesting victim was eleven or twelve at the time of the offense, it is sufficient to charge and convict the defendant of the lesser felony, a class D felony in this case, because the child is clearly under the age of sixteen, as required for the lesser class felony. . . . The essence of the child molesting statute is that the victim be younger than some age—under sixteen or under twelve years old. There was proof beyond a reasonable doubt that the victim was under sixteen years of age at the time of the offense.

Id. at 1307-08 (footnotes omitted).

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[4] The child-molesting statute in effect today requires the victim to be under 14 years old. *See* I.C. § 35-42-4-3; *see also* I.C. § 35-42-4-9 (the sexual-misconduct-with-a-minor statute applies when the victim is under 16 years old).

[12] *Barger* applies here. M.H. testified that she was either 15 or 16 years old at the time of the incidents. If M.H. was 14 or 15, then it would be a Level 4 felony; if M.H. was 16 or 17, then it would be a Level 5 felony. The State charged Marshall with the lesser felony, which is what the State did in *Barger*. *See id.* at 1307 ("In effect, the prosecutor strictly construed the statute against the State by charging Barger with the class D felony rather than the class C felony. It is beyond question that Barger's victim was under sixteen years of age, as required for the class D felony."). Because the evidence shows that M.H. was under 18 years old at the time of the incidents as required for the lesser felony, the evidence is sufficient to support Marshall's conviction for Level 5 felony child seduction.[5]

[13] Affirmed.

Riley, J., and Bailey, J., concur.

[5] Marshall filed a reply brief acknowledging our Supreme Court's decision in *Barger*. In that brief, he asks us to "[o]verturn[]" *Barger* because it was a "judicial rewriting of the criminal code to avoid a decision which, due to the lack of foresight of the legislature in drafting the Indiana Code, would understandably be very difficult for any judge to accept." Appellant's Reply Br. 6. We can't overturn Supreme Court precedent. Thus, we follow *Barger*.