MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Brandon J. Neubeck,

Appellant-Defendant

v.

State of Indiana,

Appellee-Plaintiff

February 16, 2024

Court of Appeals Case No.
23A-CR-1258

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause No.
02D05-2001-F4-11

Memorandum Decision by Judge Vaidik
Judges May and Kenworthy concur.

Vaidik, Judge.

Case Summary

[1] Brandon J. Neubeck was convicted of two counts of Level 4 felony child molesting. He now appeals, arguing the trial court committed fundamental error in admitting some evidence and the evidence is insufficient to support one of his convictions. We affirm.

Facts and Procedural History

[2] A.F. has two daughters, M.N. (born in July 2006) and K.H. (born in February 2008). In 2010, A.F. began dating Neubeck. Neubeck eventually moved in with A.F. and her daughters, and Neubeck and A.F. had two children of their own. In 2017, A.F. and Neubeck split up, and A.F. and the four children moved in with A.F.'s mother.

[3] In the summer of 2019, M.N. told her mother that Neubeck had inappropriately touched her when she was younger, and A.F. called the police. Patricia Smallwood conducted forensic interviews of M.N. and K.H. at a child-advocacy center in July 2019. M.N. was twelve, and K.H. was eleven.

[4] In January 2020, the State charged Neubeck with two counts of Level 4 felony child molesting, one for each girl. The charges alleged that between July 2014 and July 2017, Neubeck touched or fondled each girl with the intent to arouse or satisfy sexual desires.

[5] A three-day jury trial was held in March 2023. M.N., who was sixteen, was the first witness to testify. She stated that Neubeck touched her inappropriately twice. The first time, M.N. said she was around ten years old when she was awoken by a thunderstorm and went to her mother and Neubeck's bedroom. M.N. got in their bed but soon realized that only Neubeck was in the bed. According to M.N., Neubeck covered her with a blanket, slid his hand underneath her underwear, and "stuck a finger" "in [her] vaginal area." Tr. Vol. II pp. 167, 168. M.N. got up, said she had to use the restroom, and returned to her bedroom. M.N. said she experienced vaginal redness and pain afterward.

[6] The second time, M.N. said she and Neubeck were lying on a sectional in their living room when he put a blanket over her and "reached his hand up through [her] legs and under [her] underwear and just placed his hand there." *Id.* at 170. According to M.N., Neubeck's "fingers kind of slipped inside but didn't really go inside but they were just placed there." *Id.* M.N. kicked Neubeck and then got up.

[7] K.H., who was fifteen, was the second witness to testify at trial. She stated that Neubeck touched her inappropriately once when she was nine or ten years old. K.H. said she and Neubeck were sitting at opposite ends of a couch when he asked her to get under a blanket with him. They moved together, and K.H. laid down between Neubeck's legs. Neubeck then "rubbed" K.H.'s "[v]agina" with his hand over her clothes. *Id.* at 197. K.H. told Neubeck to stop.

[8] Later in the trial, Smallwood testified that she separately interviewed M.N. and K.H. at the child-advocacy center. Without any objection from Neubeck, the following colloquy occurred between the State and Smallwood:

> Q I can't ask you what M.N. told you during the interview because that would be hearsay, but did she make a disclosure of a sexual abuse?
>
> A Yes.
>
> Q And who did she disclose had – had done that?
>
> A Her step-dad, Brandon.
>
> * * * *
>
> Q Did K.H. make a disclosure of sexual abuse?
>
> A She did.
>
> Q And who did she disclose had done that?
>
> A Brandon, her step-dad.

Id. at 246-47, 248.

[9] Finally, Morgan Enterline, a Family Case Manager with the Indiana Department of Child Services, testified that she observed the forensic interviews in real time from a different room at the child-advocacy center. Similar to

Smallwood, Enterline testified, again without any objection from Neubeck, about her observations of the interviews:

> Q And during M.N.['s] interview did she make a disclosure of sexual abuse?
>
> A Yes.
>
> Q And who did she say had abused her?
>
> A Brandon Neubeck.
>
> * * * *
>
> Q And during the interview did K.H. make a disclosure of sexual abuse?
>
> A She did.
>
> Q And who did she say had abused her?
>
> A Brandon Neubeck.

Tr. Vol. III pp. 63, 64.

[10] Neubeck took the stand in his own defense and denied the allegations. The jury found Neubeck guilty as charged, and the trial court sentenced him to sixteen years.

[11] Neubeck now appeals.

Discussion and Decision

I. The trial court did not commit fundamental error in admitting testimony from two witnesses that the victims disclosed Neubeck sexually abused them

[12] Neubeck contends the trial court erred when it allowed Smallwood and Enterline to testify that M.N. and K.H. had disclosed sexual abuse by him because the statements constitute inadmissible hearsay. Neubeck acknowledges that he did not object to these statements at trial and therefore must establish fundamental error on appeal.

[13] Failure to object to the admission of evidence at trial "normally results in waiver and precludes appellate review unless its admission constitutes fundamental error." *Konopasek v. State*, 946 N.E.2d 23, 27 (Ind. 2011). "Fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to make a fair trial impossible." *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014), *reh'g denied.* To establish fundamental error, the defendant must show that, under the circumstances, the trial court erred in not sua sponte raising the issue because the alleged error constituted a clearly blatant violation of basic and elementary principles of due process and presented an undeniable and substantial potential for harm. *Id.*

[14] The State argues the statements are not hearsay because they weren't offered to prove the truth of the matter asserted. *See* Ind. Evidence Rule 801(c). Rather, they were offered to "explain[] to the jury why an investigation occurred and

that it progressed to the filing of charges." Appellee's Br. p. 15; *see Blount v. State*, 22 N.E.3d 559, 565 (Ind. 2014) ("[C]ourse-of-investigation testimony is excluded from hearsay only for a limited purpose: to bridge gaps in the trial testimony that would otherwise substantially confuse or mislead the jury."); *Kress v. State*, 133 N.E.3d 742, 746-47 (Ind. Ct. App. 2019) (explaining that if course-of-investigation evidence is not relevant, or it is relevant but the danger of unfair prejudice substantially outweighs its probative value, the evidence should not be admitted), *trans. denied*.

[15] We need not decide whether the statements were inadmissible because even assuming they were, Neubeck is not entitled to relief. Neubeck claims that fundamental error occurred because "the jury was provided with a drumbeat of repetitive and cumulative evidence, offered by professionals working in this very delicate and specialized field, that served to bolster the testimony of M.N. and K.H." Appellant's Br. p. 14. A drumbeat did not occur here. M.N. and K.H. were the first two witnesses to testify at trial, and each testified in detail about the touchings and were cross-examined by defense counsel. Later in the trial, Smallwood and Enterline testified that each girl made a disclosure of sexual abuse against Neubeck in her forensic interview. Smallwood's and Enterline's testimony about the disclosure was brief and did not elaborate on what the girls said during the interviews. In addition, their testimony was just a sliver of their entire testimony, and they were only two of the fourteen witnesses who testified at this three-day trial. Neubeck has failed to prove that the admission of Smallwood's and Enterline's statements was so prejudicial to his

rights as to make a fair trial impossible. *See Kress*, 133 N.E.3d at 747-48 (finding any error in allowing three witnesses to give general testimony about the existence of child-molesting allegations was harmless where the victim was the first witness to testify, gave specific, descriptive testimony about the touching, and was subjected to cross-examination); *see also Housand v. State*, 162 N.E.3d 508, 515 (Ind. Ct. App. 2020), *trans. denied*. The trial court did not commit fundamental error.[1]

II. The evidence is sufficient to prove that Neubeck molested K.H.

[16] Neubeck contends the evidence is insufficient to support his conviction for molesting K.H. 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 will 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

[1] Neubeck also argues the trial court committed fundamental error in allowing M.N. to testify about a conversation she had with K.H. shortly before she told her mother that Neubeck had touched her inappropriately:

> I basically was just like "I don't really want to ask you this, but I kind of need to". I ask her, I said "Did [Neubeck] touch you in any kind of way? It could be like punishing you, hitting you or just any kind of way that didn't seem right?" and she goes "Yes".

Tr. Vol. II p. 175. Neubeck claims the "Yes" answer constitutes inadmissible hearsay. Even assuming the answer was inadmissible, Neubeck has failed to establish fundamental error given that the answer is vague as to what happened and K.H. herself testified that Neubeck molested her.

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.*

[17] To convict Neubeck of Level 4 felony child molesting as charged, the State had to prove that he touched or fondled K.H., a child under fourteen, with the intent to arouse or satisfy his or K.H.'s sexual desires. Ind. Code § 35-42-4-3(b); Appellant's App. Vol. II p. 28. Neubeck argues the State failed to prove that the alleged fondling or touching was done with the intent to arouse or satisfy sexual desires. Mere touching alone is not sufficient to constitute the crime of child molesting. *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000). The State must also prove beyond a reasonable doubt that the act of touching was accompanied by the specific intent to arouse or satisfy sexual desires. *Id.* The intent element may be established by circumstantial evidence and may be inferred from the defendant's conduct and the natural and usual sequence to which such conduct usually points. *Id.* The intent to arouse or satisfy sexual desires may be inferred from evidence that the defendant intentionally touched a child's genitals. *Spann v. State*, 850 N.E.2d 411, 414 (Ind. Ct. App. 2006).

[18] Here, K.H. testified that she and Neubeck were sitting at opposite ends of a couch when he asked her to get under a blanket with him. They moved together, and K.H. laid down between Neubeck's legs. Neubeck then rubbed K.H.'s vagina with his hand over her clothes. K.H. told Neubeck to stop. When Neubeck testified, he denied the allegations and did not claim that he rubbed K.H.'s vagina over her clothes non-sexually or accidentally. These facts were sufficient to allow the jury to infer that Neubeck touched her with the intent to

arouse or satisfy his sexual desires. We therefore affirm Neubeck's conviction for molesting K.H.

[19] Affirmed.

May, J., and Kenworthy, J., concur.

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