

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

J.M.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 20, 2024

Court of Appeals Case No.
23A-JV-1400

Appeal from the Delaware Circuit
Court

The Honorable Amanda L.
Yonally, Magistrate

Trial Court Cause No.
18C02-2211-JD-154

Memorandum Decision by Judge Brown
Judges Riley and Foley concur.

Brown, Judge.

[1] J.M. appeals his adjudication as delinquent for committing an act which if committed by an adult would constitute child molesting as a level 4 felony. We affirm.

Facts and Procedural History

[2] In May 2021, L.M., J.M.'s father, married D.M., I.B.'s mother. In October 2021, L.M., D.M., J.M., and I.B. were living together. That month, J.M., who was born in December 2005, touched I.B., who was born in February 2008, on the chest over her clothes while they were watching a movie and while she was on the floor and he was on his bed. When J.M. touched her, I.B. "just sat there" because she did not know what to do and "was in a state of shock." Transcript Volume II at 22.

[3] Sometime later, J.M. touched I.B. on her chest, thighs, and butt. During that second incident, J.M. told I.B. that he was sorry. At some point, J.M. stated that "this needs to stop," and I.B. agreed and told him that she was not the one "who did it." *Id.* at 26. "[A]nother incident" occurred two weeks later, and I.B. did not know what to do.¹ *Id.*

[4] In August 2022, J.M. and I.B. were watching a movie, and I.B. was lying on the couch. J.M. moved next to her and "proceeded to touch" her. *Id.* at 27.

¹ At the factfinding hearing, I.B. testified that she did not recall where J.M. touched her during this incident. The prosecutor asked: "But it was, as you said before, it was the same types of areas? Would you remind the Court where those were?" Transcript Volume II at 26. I.B. answered: "My chest, my thighs, and my butt." *Id.*

I.B. asked J.M. what he was doing, he apologized, and they both then went to their rooms. The next day, I.B. sent a text message to her cousin whom she had told about “the other incidents” and told her that “it happened again.” *Id.* I.B. did not tell her mother about the incidents “[b]ecause [she] was afraid [her mother and J.M.’s father] were going to get divorced, especially with them being so close to having a baby.” *Id.*

[5] J.M. told his father that he had touched I.B.’s chest “over her shirt” four times and apologized to her. *Id.* at 46. J.M.’s father reported J.M. and the “inappropriate touching” to the Department of Child Services (“DCS”). *Id.* at 45.

[6] On November 28, 2022, the State filed a petition alleging J.M. was a delinquent for committing acts which would constitute child molesting as a level 4 felony and battery as a class B misdemeanor if committed by an adult.

[7] On April 25, 2023, the court held a factfinding hearing. The State presented I.B.’s testimony. I.B. declined to discuss what occurred in October 2021 stating that she did not feel comfortable answering the question. The court reminded I.B. that she was under oath and required to answer the question truthfully. The court later allowed the prosecutor to treat I.B. as a hostile witness. I.B. testified that J.M. touched her chest over her clothes and she didn’t know what to do and “was in a state of shock.” *Id.* At 22. The State also presented the testimony of D.M., L.M., and Delaware County Sheriff’s Detective John

Branson. After the State rested, J.M.’s counsel asked for a directed verdict, and the court denied the request.

[8] The prosecutor indicated that “the one in October” constituted a molestation and “the one in August is a battery.” *Id.* at 50. In her argument, J.M.’s counsel stated that her understanding was that “the one date that puts [I.B.] at thirteen is October of 2021” and “[t]hat is the date the State is charging with a level four.” *Id.* at 51. The court took the matter under advisement. On May 4, 2023, the court entered an order finding that J.M. committed the acts of child molesting as a level 4 felony and battery as a class B misdemeanor if committed by an adult.

[9] On May 24, 2023, the court held a dispositional hearing. The court indicated that, if J.M. successfully completed probation, he would have the opportunity to petition the court for an expungement. On June 2, 2023, the court entered a dispositional order that adjudicated J.M. as a delinquent, ordered that he be placed on formal probation until his eighteenth birthday, imposed a ninety-day commitment to the Delaware County Juvenile Detention Center, suspended the commitment pending compliance with probation, and ordered that he participate in counseling intake and engage in recommended therapeutic services.

Discussion

[10] J.M. argues that the evidence was insufficient to show that he committed an act that would constitute child molesting as a level 4 felony if committed by an

adult because the evidence “showed only that an act occurred” and that it “did not show the requisite intent to arouse or satisfy desires.”² Appellant’s Brief at 9. He asserts there is no testimony that he kissed I.B., touched her underneath her clothes, rubbed his genitals against hers, or told her to touch his penis. He also argues that the court committed “reversible error when it found sufficient evidence of child molesting against a juvenile defendant on the same scale as an adult defendant.” *Id.* at 13. He asserts that “the two-year age gap between [him] and I.B. is close enough that they are peers.” *Id.* at 14.

[11] “In reviewing the sufficiency of the evidence in a juvenile adjudication, ‘we neither re-weigh the evidence nor judge the credibility of the witnesses. Rather, we look only to the evidence most favorable to the trial court’s judgment and to the reasonable inferences to be drawn from that evidence.’” *K.S. v. State*, 849 N.E.2d 538, 543 (Ind. 2006) (quoting *Vance v. State*, 640 N.E.2d 51, 57 (Ind. 1994)). We affirm if there is substantial probative evidence to support the conclusion. *Id.*

[12] The offense of child molesting as a level 4 felony is governed by Ind. Code § 35-42-4-3(b), which at the time of the act, provided that “[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

² J.M. does not challenge the true finding under Count II for committing a delinquent act, which, if committed by an adult, would constitute battery.

satisfy the sexual desires of either the child or the older person, commits child molesting, a Level 4 felony.”³

[13] “Mere touching alone is not sufficient to constitute the crime of child molesting.” *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000) (citing *Clark v. State*, 695 N.E.2d 999, 1002 (Ind. Ct. App. 1998), *reh’g denied*, *trans. denied*; *Nuerge v. State*, 677 N.E.2d 1043, 1048 (Ind. Ct. App. 1997), *trans. denied*). “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.* (citing *Clark*, 695 N.E.2d at 1002). “The 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.” *Id.* (citing *Clark*, 695 N.E.2d at 1002). This Court has held that “[t]he purpose of the child molestation statute ‘is to prohibit the sexual exploitation of children by those with superior knowledge or experience who are therefore in a position to take advantage of children’s naivety.’” *T.G. v. State*, 3 N.E.3d 19, 25 (Ind. Ct. App. 2014) (quoting *C.D.H. v. State*, 860 N.E.2d 608, 612 (Ind. Ct. App. 2007), *trans. denied*), *trans. denied*. We have also stated that “‘age differential is an important factor that may and should be considered’ when determining a minor’s criminal liability under a statute proscribing lewd or

³ Subsequently amended by Pub. L. No. 78-2022, § 9 (eff. July 1, 2022).

lascivious conduct with a child.” *Id.* (quoting *C.D.H.*, 860 N.E.2d at 612 (quoting *In re P.M.*, 156 Vt. 303, 592 A.2d 862, 864 (1991))).

[14] The record reveals that J.M., who was fifteen years old in October 2021, was more than two years and two months older than thirteen-year-old I.B. That month, J.M. touched I.B. on the chest over her clothes while they were watching a movie. I.B. testified that when J.M. touched her, she “just sat there” because she did not know what to do and “was in a state of shock.” Transcript Volume II at 22. J.M. later touched I.B. on her chest, thighs, and butt. He also apologized and told I.B. that “this needs to stop,” and I.B. agreed and told him that she was not the one “who did it.” *Id.* at 26. During another incident, when J.M. touched I.B., I.B. did not know what to do. I.B. testified that she told her cousin about the incidents and was afraid to tell her mother about them. J.M.’s father testified that J.M. told him that he had touched I.B.’s chest “over her shirt” four times and apologized to her. *Id.* at 46. When asked if he reported to DCS about J.M. and the “inappropriate touching,” J.M.’s father answered affirmatively. *Id.* at 45. Based upon the record and mindful of our standard of review, we conclude that the State presented evidence of a probative nature from which a reasonable trier of fact could find that J.M.

committed an act which would constitute child molesting as a level 4 felony if committed by an adult.⁴

[15] For the foregoing reasons, we affirm the juvenile court’s adjudication of J.M. as a delinquent.

[16] Affirmed.

Riley, J., and Foley, J., concur.

⁴ To the extent J.M. cites *J.H. v. State*, 655 N.E.2d 624 (Ind. Ct. App. 1995), *trans. denied*, and *D.P. v. State*, 80 N.E.3d 913 (Ind. Ct. App. 2017), we find those cases factually distinguishable. In *J.H.*, “[t]he only consistent testimony by the boys was that J.H. flicked them with her finger on their penises and that they were clothed when this occurred.” 655 N.E.2d at 625. This Court held that “there is no natural consequence associated with a twelve-year-old girl flicking little boys on the penis hard enough to hurt them” and “[i]t is certainly mean, and it might constitute battery, but it alone is insufficient to amount to child molesting.” *Id.* at 626. In *D.P.*, D.P. was ten years old and touched four-year-old B.M. during one incident. 80 N.E.3d at 916. “That touching involved D.P. touching B.M.’s ‘hooaha’ and her ‘butt’ with his ‘hand’ while her clothes were on.” *Id.* “Although B.M. identified her ‘hooaha’ as her genital area on an anatomical drawing of a little girl by drawing a circle, there was no evidence of exactly where D.P. touched B.M., how he touched her (for example, touching or rubbing), or how long he touched her.” *Id.* (citation and footnote omitted). “Moreover, B.M. did not feel the touching.” *Id.*