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**IN THE
COURT OF APPEALS OF INDIANA**

JUAN J. GUZMAN,)
)
Appellant-Defendant,)
)
vs.) No. 20A03-0602-CR-62
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0501-FA-12

November 16, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Juan J. Guzman appeals his conviction for child molesting, as a class A felony.¹

We affirm.

ISSUE

Whether the trial court erred in instructing the jury.

FACTS

Guzman was C.L.'s mother's boyfriend and father to two of C.L.'s half-brothers. On or about January 1, 2005, then eight-year-old C.L. went to a party at Guzman's house, where she was going to stay the night, along with Guzman's sons and daughter.

After C.L. went to bed, Guzman came in the bedroom and pulled down C.L.'s pants and underwear. Guzman also "pulled down his pants and his underpants" (Tr. 273). Guzman then put "his wiener in [C.L.'s] vagina." (Tr. 273). Afterwards, Guzman touched C.L.'s "butt" with his "wiener." (Tr. 275). The next morning, Guzman "woke up, and he pulled down [C.L.'s] pants and his pants, and he put his wiener on [her] butt again." (Tr. 278).

On January 31, 2005, the State charged Guzman with child molesting, as a class A felony. The State tried Guzman before a jury on December 19 and 20 of 2005, and the jury found Guzman guilty. On January 19, 2006, the trial court sentenced Guzman to forty years in the Department of Correction.

Additional facts will be provided as necessary.

¹ Ind. Code § 35-42-4-3.

DECISION

Guzman asserts the trial court erred in instructing the jury. The pertinent instruction reads as follows:

In order to convict the Defendant of the offense charged herein, the State must have proved each of the following elements:

The Defendant,

1. performed or submitted to sexual intercourse with [C.L.];
2. when [C.L.] was a child under fourteen (14) years of age;
3. and Defendant was at least 21 years of age.

If the State failed to proved [sic] each of these elements beyond a reasonable doubt, you *should* find the Defendant not guilty.

If you find that the State proved each of these elements beyond a reasonable doubt you should find the Defendant guilty of Child Molesting, a Class A felony.

(App. 64) (emphasis added).

“Jury instructions are within the discretion of the trial court and will not be reversed unless the instructions, when taken as a whole, misstate the law or mislead the jury.” *Burgett v. State*, 758 N.E.2d 571, 577 (Ind. Ct. App. 2001), *trans. denied*. We note that Guzman did not object to the trial court’s instruction. Failure to object to a jury instruction results in waiver on appeal, unless giving the instruction was fundamental error. *Id.*

The fundamental error exception to the waiver rule is extremely narrow. *Glotzbach v. State*, 783 N.E.2d 1221, 1225-26 (Ind. Ct. App. 2003). “To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible.” *Id.* at 1226. Fundamental error occurs when there is a

blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error denies the defendant fundamental due process. *Id.* “When determining whether a defendant suffered a due process violation based on an incorrect jury instruction, we look to the erroneous instruction not in isolation, but in the context of all relevant information given to the jury, including other instructions.” *Dickenson v. State*, 835 N.E.2d 542, 549 (Ind. Ct. App. 2005), *trans. denied*. “We find no due process violation where all such information, considered as a whole, does not mislead the jury as to a correct understanding of the law.” *Id.*

Article 1, Section 19 of the Indiana Constitution provides as follows: “In all criminal cases whatever, the jury shall have the right to determine the law and the facts.” Guzman contends the given instruction constitutes fundamental error because it “failed to instruct the jury as to their duty to acquit in the absence of proof beyond a reasonable doubt to any essential element of the crime charged” by using the word “‘should’ rather than the mandatory ‘must.’” Guzman’s Br. 2, 6. Thus, Guzman argues, the instruction “impinge[d] upon the role of a jury as judges of the law and the facts, contrary to Article 1, Section 19 of the Indiana Constitution.” Guzman’s Br. 2.

In *Holmes v. State*, 671 N.E.2d 841, 849 (Ind. 1996), *cert. denied*, 522 U.S. 849 (1997), the Indiana Supreme Court reviewed whether an instruction providing that the jury “‘should find the defendant not guilty’ of a particular charge if the State failed to prove each element beyond a reasonable doubt” lacked sufficient binding force. The Court “agree[d] that the term ‘should’ lacks that absolute quality present in other terms, such as ‘must.’” *Id.* Nevertheless, the Court found that “it does adequately instruct the

jury on what the law contemplates as the proper course for the jury in the event there is a failure of proof by the prosecution.” *Id.*

Furthermore, the trial court in this case also gave the following additional instructions:

You are the exclusive and sole judges of what facts have been proven and you may also determine the law for yourselves. This statement does not mean that you have the right to disregard the law or to set it aside and make your own law. You should determine the law as it is enacted by the legislature of this State and considered and interpreted by the higher courts of record and in that way you have a right to determine the law for yourselves, but not make your own laws. The instructions of the Court are your best source in determining what the law is.

You are to consider all the instructions as a whole and are to regard each with the others given to you. Do not single out any certain sentence or any individual point or instruction and ignore the others.

(App. 71, 83). The trial court also outlined the essential elements of child molesting. Thus, viewing the jury instructions as a whole, the trial court properly instructed the jury.

Based on the foregoing, we find that the trial court did not commit fundamental error in instructing the jury.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.