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IN THE COURT OF APPEALS OF INDIANA

TERRY KLING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0705-CR-205
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John Marnocha, Judge
Cause No. 71D02-0503-FC-91

November 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Terry Kling claims there was insufficient evidence to convict him of sexual misconduct with a minor, a Class C felony.[1] He also challenges his sentence for sexual misconduct with a minor and five counts of Class A misdemeanor contributing to the delinquency of a minor.[2] We affirm.

FACTS AND PROCEDURAL HISTORY

On March 26, 2005, Kling's daughter K.K. was having a party and sleepover for her sixteenth birthday. Initially, many guests were present, but only a few girls spent the night. These girls were K.B. (age fourteen), C.P. (age fourteen), N.B. (age sixteen), and T.U. (age fifteen). Kling's eleven-year-old daughter T.K. was also present. After the other guests left, Kling was the only adult in the home.

Kling and the girls drove to Meijer so K.K. could spend some of her birthday money. On the way, Kling reached back and tickled K.B. on her stomach. Soon after they returned home, Kling left to rent some videos. While Kling was gone, K.K. decided to drive her car around the block, and she ran into a neighbor's mailbox. She also made a hole in the garage wall as she was attempting to put the car back in the garage.

When Kling came home, he was upset about the hole in the garage and grabbed a beer. He asked the girls if they wanted one, but they declined. He then offered them other types of alcoholic drinks, including Jack Daniels, Hpnotiq, and screwdrivers. He

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[1] Ind. Code § 35-42-4-9(b).

[2] I.C. § 35-46-1-8.

suggested playing a drinking game called "quarters." (Tr. at 212.) K.B. consumed several shots and drinks until she was unsteady.

A few people began dancing. Kling danced slowly with K.B., with his arms around her waist. As they were dancing, they "French kissed," meaning their mouths were open and their tongues were touching. (*Id*. at 316.) Kling then picked up K.B. and took her to his bedroom. The lights were off and he locked the door. Several of the girls knocked on the door and called to K.B., but they got no response. K.B. testified that she remembered Kling laying her on his bed and kissing her some more before she blacked out. After about forty-five minutes, the girls saw Kling emerge from the bedroom and zip up his pants. K.B. was wearing her clothes, but C.P. said she looked "disheveled;" her hair was messed up and her clothes "moved around a little bit." (*Id*. at 285.)

The next morning, K.B. realized she was not wearing her underwear. Before she left, Kling approached her, held out his fist, and dropped her underwear in front of her.

Later that day, K.K. called the police. An officer went to K.B.'s house to get her account of what happened between her and Kling. A sexual assault examination was performed on K.B., but no DNA was recovered.

At trial, Kling conceded he was guilty of contributing to the delinquency of minors. The jury found him guilty as charged. The trial court sentenced Kling to one year for each count of contributing to the delinquency of a minor, served concurrently with each other, but consecutively to four years for sexual misconduct with a minor. Accordingly, his total sentence is five years.

DISCUSSION AND DECISION

1. Sufficiency of the Evidence

Kling argues kissing is not sexual misconduct, and the evidence is otherwise insufficient to convict him of sexual misconduct. Our standard of review is well-settled:

> When reviewing claims regarding the sufficiency of evidence, this Court neither reweighs the evidence nor judges witness credibility. We consider only the evidence supporting the verdict and all reasonable inferences drawn therefrom. If there is substantial evidence of probative value from which a jury could find guilt beyond a reasonable doubt, we will affirm the conviction.

Kirk v. State, 797 N.E.2d 837, 841 (Ind. Ct. App. 2003) (citations omitted), *trans. denied* 812 N.E.2d 798 (Ind. 2004).

Kling was convicted of violating Ind. Code § 35-42-4-9(b):

> A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) 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 satisfy the sexual desires of either the child or the older person, commits sexual misconduct with a minor. . . .

Words in a statute are given their plain meaning unless otherwise defined in the statute. *Glotzbach v. State*, 783 N.E.2d 1221, 1227 (Ind. Ct. App. 2003). Kissing is plainly a form of touching.

Kling argues kissing cannot be the basis for a conviction of sexual misconduct with a minor because "kissing is not exclusively a sexual act," and affirming his conviction would "criminalize common, innocuous activity," such as "teenagers kissing at the end of a date." (Appellant's Br. at 7.) We disagree. "Innocuous" kissing will not form the basis of a conviction under Ind. Code § 35-42-4-9 because the statute requires proof of intent to arouse or satisfy sexual desires. The touching need not be of an

exclusively sexual nature. *See Nuerge v. State*, 677 N.E.2d 1043, 1049 (Ind. Ct. App. 1997), *trans. denied* 683 N.E.2d 592 (Ind. 1997).

In *Nuerge*, we affirmed a conviction of child molesting, which also requires proof of touching with intent to arouse or satisfy sexual desires. Nuerge kissed and touched a child's inner thigh. We found the statements Nuerge made while engaging in this conduct could raise an inference he was attempting to satisfy his or the child's sexual desires. "[T]he intent element may be inferred from the natural and usual sequence to which the defendant's conduct usually points." *Id*.

There was abundant evidence from which the jury could infer Kling was kissing K.B. with the intent to arouse or satisfy his or her sexual desires. Kling was French kissing K.B. while slow dancing with her. He then took her to his darkened bedroom for an extended period of time, where they continued to kiss while lying on the bed. The door was locked, and when they came out, Kling's pants were unzipped and K.B.'s underwear was missing. These facts indicate Kling was kissing K.B. with intent to arouse or satisfy either his or her sexual desires, and the evidence was sufficient to convict Kling of sexual misconduct with a minor.

2. Appropriateness of Sentence

Kling also argues his sentence is inappropriate. We may revise a sentence if it is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We give deference to the trial court's decision, recognizing the special expertise of the trial court in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied* __ N.E.2d __ (Ind. 2007).

Although we conduct an independent review under App. R. 7(B), we "assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate." *Gibson v. State*, 856 N.E.2d 142, 147 (Ind. Ct. App. 2007). The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Kling received the presumptive sentence for the Class C felony,[3] to be served consecutively with five concurrent one-year sentences for contributing to the delinquency of a minor.[4] Kling furnished alcohol to several minors who had been entrusted to his care, then took advantage of one of those girls. His criminal record, while not lengthy, consists of alcohol-related offenses. The nature of the offense and Kling's character do not suggest a five-year sentence is inappropriate. Therefore, his sentence is affirmed.

Affirmed.

DARDEN, J., and CRONE, J., concur.

[3] At the time of his offense, a Class C felony carried a presumptive sentence of four years. Historical and Statutory Notes, Ind. Code § 35-50-2-6. Up to two years could be added for aggravating circumstances, or up to two years could be subtracted for mitigating circumstances. *Id*.

[4] For a Class A misdemeanor, the court has discretion to impose any sentence up to a year in length. I.C. § 35-50-3-2.