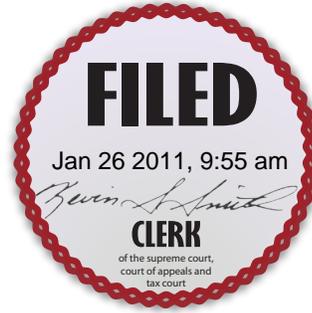


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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GENE HOOKS, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 82A01-1005-CR-220

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APPEAL FROM THE VANDERBURGH SUPERIOR COURT  
The Honorable J. Douglas Knight, Judge  
Cause No. 82D02-0906-FA-537

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**January 26, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

Gene Hooks appeals his convictions for two counts of Class C felony child molesting. We affirm.

### Issues

Hooks raises two issues, which we revise and restate as:

- I. whether the trial court abused its discretion when it did not strike the testimony of an alleged victim;
- II. whether the trial court abused its discretion by failing to strike the testimony of an alleged victim's mother or admonish the jury regarding it; and
- III. whether the evidence is sufficient to sustain Hooks's convictions.

### Facts

Hooks and his wife, Maxine, often babysat for their daughter Aleta's children, including I.W., who was born in December 2001, and C.H., who was born in May 1995. In July 2008, Aleta's fiancé, Maurice, walked into I.W.'s bedroom and saw her "humping" a pillow with her hand near her genital area. Tr. p. 19. I.W. told Maurice that Hooks had "messed" with her. *Id.* at 47. I.W. told Aleta that Hooks had put his "thing" or "private" on her "private." *Id.* at 48. According to I.W., Hooks took her into the laundry room, had her stand on a stepping stool, removed her pants, placed cocoa butter on her genital area, and rubbed his penis on her genitals. After he stopped, he would give I.W. some toilet paper and tell her to wipe off the cocoa butter.

Later, Maxine went to Maurice's residence to talk to Aleta and the girls. While Maxine was questioning C.H., C.H. said that Hooks had also touched her. According to

C.H., Hooks started touching her when she was five years old. C.H. said that, when Hooks and Maxine lived in an apartment, he would put C.H. on his lap, pull her pants down, put cocoa butter on her, and rub his penis on her inner thigh. When Hooks and Maxine moved into a new house, he would put her on the step stool in the laundry room, put cocoa butter on her, and rub his penis against her vagina. Afterwards, Hooks would give her a paper towel, and she would clean the cocoa butter and “white gooey stuff” off of herself. Id. at 194. Hooks stopped touching C.H. when she was eleven. When she was five years old, C.H. drew a picture of what was happening and gave it to Maxine, but Maxine told C.H. to stop lying.

In 2001, Maxine and Hooks adopted twin sons belonging to Maxine’s cousin, Helen. In 2006 through mid-2008, Maxine and Hooks also took care of two more of Helen’s children, including her daughter L.Y., who was born in June 1998, while Helen was incarcerated. After Helen learned of C.H. and I.W.’s allegations, L.Y. told Helen that Hooks had also touched her.

The State charged Hooks with: Count 1, Class A felony child molesting for having sexual intercourse with L.Y.; Count 2, Class C felony child molesting for touching or fondling C.H. with the intent to arouse or satisfy his or the child’s sexual desires; Count 3, Class C felony child molesting for touching or fondling I.W. with the intent to arouse or satisfy his or the child’s sexual desires; Count 4, Class A felony child molesting for having sexual intercourse with C.H.; and Count 5, Class A felony child molesting for having sexual intercourse with I.W.

During the trial, C.H. and I.W. testified regarding Hooks's actions. Aleta and Helen also testified regarding their daughters' statements. L.Y. then testified that, in Hooks's bedroom, Hooks removed his pants and her pants and put cocoa butter on her "nana," which was her "girl part." *Id.* at 283. L.Y. said that Hooks touched her "nana" with his "peter," which is a boy's private part. *Id.* at 293. However, L.Y. was unresponsive to further questioning. Hooks asked that L.Y.'s testimony be stricken as unresponsive. Noting that L.Y. had only answered a fraction of the questions asked and that most of her answers were barely audible or inaudible, the trial court stopped the direct examination of L.Y. because it "determined that her testimony [was] of insufficient probative value and [had] resulted in inadequate probative evidence to support Count I." *Id.* at 305. The trial court granted a directed verdict regarding Counts 1.<sup>1</sup>

During the jury's deliberations, the jury asked if it could consider L.Y.'s testimony, and the trial court responded, "no." *Id.* at 476. The jury also asked if it could consider Helen's testimony, and the trial court responded, "yes." *Id.* at 477. Hooks did not object to the trial court's response to the question about Helen's testimony. The jury found Hooks guilty of the remaining charges, Count 2 and Count 3. The trial court sentenced him to an aggregate sentence of twelve years. Hooks now appeals.

## **Analysis**

### ***I. Striking of L.Y.'s Testimony***

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<sup>1</sup> The trial court also granted a directed verdict on Counts 4 and 5, which alleged sexual intercourse with I.W. and C.H.

Hooks argues that the trial court abused its discretion when it failed to strike L.Y.'s testimony. To overturn the denial of a motion to strike, a trial court must have committed an abuse of discretion. Nationwide Ins. Co. v. Heck, 873 N.E.2d 190, 195 (Ind. Ct. App. 2007). We will reverse such an exercise of discretion only when the decision is clearly against the logic and effect of the facts and the circumstances before the trial court. Id. However, no error in the admission of evidence is grounds for setting aside a conviction unless such erroneous admission appears inconsistent with substantial justice or affects the substantial rights of the parties. See Ind. Trial Rule 61.

According to Hooks, the trial court abused its discretion when it failed to strike L.Y.'s testimony from the record. L.Y. was unresponsive during much of the direct examination. Hooks asked that L.Y.'s testimony be stricken as unresponsive. Noting that L.Y. had only answered a fraction of the questions asked and that most of her answers were barely audible or inaudible, the trial court stopped the direct examination of L.Y. because it "determined that her testimony [was] of insufficient probative value and [had] resulted in inadequate probative evidence to support Count I." Tr. p. 305. The trial court granted a directed verdict regarding Count 1, which alleged sexual intercourse with L.Y. Additionally, during the jury's deliberations, the jury asked if it could consider L.Y.'s testimony, and the trial court responded, "no." Id. at 476.

Although the trial court did not officially strike L.Y.'s testimony, it did inform the jury that it could not consider her testimony, which is exactly what would have happened if the trial court had stricken the testimony. "We presume that the jury follows the trial court's instructions." Morgan v. State, 903 N.E.2d 1010, 1019 (Ind. Ct. App. 2009),

trans. denied. Even if the trial court should have stricken L.Y.'s testimony, the alleged error did not affect Hooks's substantial rights given the trial court's instruction that the jury could not consider her testimony.

## *II. Admission of Helen's Testimony*

Hooks also argues that the trial court should have admonished the jury to disregard Helen's testimony regarding L.Y.'s statements to her. Helen testified at the jury trial before L.Y. testified. Her testimony established the circumstances under which L.Y. was living with Hooks and Maxine, the circumstances under which L.Y. told her of the alleged abuse by Hooks, details of the alleged abuse, and events that occurred after L.Y. told the police of the alleged abuse. Although the charges related to L.Y. were removed from the jury and the jury was instructed not to consider L.Y.'s testimony, the trial court instructed the jury that it could consider Helen's testimony. Hooks did not object to Helen's testimony, ask the trial court to strike Helen's testimony, ask the trial court to admonish the jury regarding Helen's testimony, or object to the trial court's instruction to the jury regarding Helen's testimony.

Hooks relies on Bobbitt v. State, 266 Ind. 164, 361 N.E.2d 1193 (1977), for the proposition that Helen's testimony should have been stricken. In Bobbitt, our supreme court held that, when testimony is elicited regarding an exhibit and the exhibit is subsequently not admitted into evidence, it would be proper for the trial court to strike any testimony concerning the exhibit and admonish the jury. Bobbitt, 266 Ind. at 175, 361 N.E.2d at 1199. However, our supreme court went on to note that the appellant did not make a request of the trial court to strike the testimony or admonish the jury. The

court held that “[e]rror not raised by proper objection at trial will not be considered on appeal unless the failure to consider it would deny an appellant fundamental due process” and any error in the failure to strike the testimony did not rise to the level of fundamental error. *Id.* More recently, our supreme court has reiterated that “[f]ailure to object at trial waives the issue for review unless fundamental error occurred.” *Treadway v. State*, 924 N.E.2d 621, 633 (Ind. 2010). However, Hooks makes no claim of fundamental error regarding Helen’s testimony. Consequently, Hooks’s claim regarding Helen’s testimony is waived.

### *III. Sufficiency of the Evidence*

Hooks also claims that the evidence is insufficient to sustain his convictions for two counts of Class C felony child molesting. When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). “We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence.” *Id.* We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

The State was required to demonstrate beyond a reasonable doubt that Hooks performed or submitted to fondling or touching of I.W. and C.H. with the intent to arouse or to satisfy the sexual desires of either the child or Hooks. Ind. Code § 35-42-4-3(b). According to Hooks, the evidence is insufficient because: (1) he has a venereal disease and there was no evidence that either I.W. or C.H. contracted the venereal disease; (2)

I.W. and C.H.'s older sister did not report any abuse or witness any abuse; (3) other witnesses testified that I.W. and C.H. later denied any abuse; and (4) one witness heard Aleta and Helen say they were "going to get" Hooks. Tr. p. 379. The jury was presented with this evidence and found I.W. and C.H. credible. Hooks's arguments are merely requests that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. I.W. and C.H. each testified that Hooks placed cocoa butter on their genital areas and then rubbed his penis on their genitals. The evidence is sufficient to sustain Hooks's convictions.

### **Conclusion**

Any error in the trial court's failure to strike L.Y.'s testimony was harmless given the trial court's later instruction to the jury not to consider her testimony. Hooks's argument that the trial court should have stricken Helen's testimony or admonished the jury is waived by Hooks's failure to object at trial or argue fundamental error on appeal. Further, the evidence is sufficient to sustain Hooks's convictions for two counts of Class C felony child molesting. We affirm.

Affirmed.

BAKER, J., and VAIDIK, J., concur.