



Appellant-Defendant Justin Scott Elser appeals his convictions, following a jury trial, for two counts of Class C felony Child Molesting,<sup>1</sup> for which he received two consecutive sentences of six years, with four years executed and two years suspended to probation on each. Upon appeal, Elser claims that Final Instruction 8, which erroneously stated that the required *mens rea* for all elements of the offense of child molesting was “knowing,” constituted fundamental error. Elser additionally claims that there was insufficient evidence to support his conviction in Count I and that certain conditions of his probation are unconstitutionally vague. Concluding that there was no fundamental error and that there was sufficient evidence to support Elser’s conviction, but that certain conditions of his probation are unconstitutionally vague, we affirm in part and remand with instructions.

### **FACTS AND PROCEDURAL HISTORY**

Between October 2007 and February 2008, Elser lived in Huntington with his longtime friend L.L. and her husband and family, including her children C.L., born April 2, 1998, and J.Y., born March 10, 1999. Elser was unemployed at the time, so he served as babysitter. L.L. often worked at night.

According to C.L., who was nine years old at the time Elser lived at her home, on one occasion when she was asleep on the floor of an upstairs bedroom, she awoke to find him rubbing her vagina, beneath her clothing, with his fingers. On one or two other occasions when C.L. was asleep in a downstairs bedroom, she awoke to find Elser

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<sup>1</sup> Ind. Code § 35-42-4-3(b) (2007).

rubbing both her vagina and her breasts, beneath her clothing. Elser told C.L. to keep these incidents a secret. C.L. later reported the incidents to her grandmother.

Elser babysat L.L.'s children on December 31, 2007 while L.L. worked at a Huntington bar. L.L. left her home at approximately 4:00 p.m. that day and was later joined by her husband around 8:00 that night. The two did not return home until approximately 7:00 a.m. the next morning.

According to J.Y., who was eight years old, on this "day of the ball drop," Tr. p. 236, Elser used his hand to touch her "private area" where she "go[es] pee," beneath her clothes. Tr. p. 238. On another occasion, Elser touched J.Y.'s breasts on the outside of her clothes and on yet another occasion, her bottom, also on the outside of her clothes. J.Y. subsequently reported the incidents to her grandmother. Elser left L.L.'s home immediately thereafter.

On February 22, 2008, the State charged Elser with two counts of Class C felony child molesting, with Count I alleging C.L. to be the victim and Count II alleging J.Y. to be the victim. During the August 13-14, 2008 jury trial, defense counsel made no objection to the court's final jury instructions. The jury found Elser guilty as charged, and the judge entered judgment of conviction on both counts. At a September 15, 2008 sentencing hearing the trial court sentenced Elser on each count to six years, with four years executed and two years suspended to probation on each, and it ordered the sentences to be served consecutively. With respect to Elser's probationary term, the trial court ordered that he receive sex offender treatment and imposed seventeen "Sex Offender Special Stipulations." App. p. 23. This appeal follows.

## DISCUSSION AND DECISION

### I. Jury Instructions

Elser first claims that Final Instruction 8 constituted fundamental error because it erroneously instructed the jury that the required *mens rea* for every material element of the crimes charged was “knowing.” In order to preserve an alleged error as it pertains to a jury instruction, a party is required to make a timely objection to the proposed instruction. *See Mitchell v. State*, 742 N.E.2d 953, 955 (Ind. 2001). Elser acknowledges that no such objection was made, so he argues that Final Instruction 8 constituted fundamental error. The fundamental error doctrine has extremely narrow applicability. *See Carter v. State*, 754 N.E.2d 877, 881 (Ind. 2001). A fundamental error is “a substantial, blatant violation of basic principles of due process rendering the trial unfair to the defendant.” *Id.* (internal quotation omitted). It applies only when the actual or potential harm “cannot be denied.” *Id.* (internal quotation omitted). The error must be “so prejudicial to the rights of a defendant as to make a fair trial impossible.” *Id.* (internal quotation omitted).

“The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict.” *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. 2003). “Instruction of the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion.” *Id.* at 1163-64. In reviewing a trial court’s decision to give or refuse tendered jury instructions, this court considers the following: (1) whether the instruction correctly states the law; (2) whether there is

evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is not covered by the other instructions given. *See id.* at 1164. Jury instructions “are to be read together as a whole and not as single units, and a single instruction need not contain all the law applicable to the case.” *Hurt v. State*, 570 N.E.2d 16, 18 (Ind. 1991).

Indiana Code section 35-42-4-3(b) provides that a person who performs any fondling or touching of a child under fourteen years of age, with intent to arouse or to satisfy the sexual desires of either the child or himself, commits Class C felony child molesting. Final Instruction 8 stated as follows:

The culpability required for the offense charged is knowingly.

A person engages in conduct “knowingly” if, when he engages in the conduct, he is aware of a high probability that he is doing so.

The culpability requirement for this offense is required with respect to every material element of the prohibited conduct.

App. p. 34. According to Elser, the language of Final Instruction 8 erroneously suggested that the *mens rea* of “knowingly” extended to all elements of the offense, including the element of “to arouse or to satisfy ... sexual desires.” *See* Ind. Code § 35-42-4-3(b). As the Supreme Court has observed, the mental state necessary for the “arouse” element is the heightened “intentionally,” distinct from the lesser “knowingly” mental state necessary for the other elements of the offense. *See Louallen v. State*, 778 N.E.2d 794, 797-98 (Ind. 2002).

While the language in Final Instruction 8 erroneously suggested that the *mens rea* of “knowingly” applied to all elements of the offense of child molesting, we cannot conclude that it constituted fundamental error. Here Final Instructions 4, 5, 6, and 7

stated contrary to Final Instruction 8 that the “arouse” element must have been committed with the *mens rea* of intent. As the jury was instructed, the instructions were to be interpreted together rather than individually. See *Hurt*, 570 N.E.2d at 18. We acknowledge that Final Instructions 5 and 7 were also somewhat confusing in their suggestion that the “knowingly” *mens rea* somehow also applied to the “intent to arouse” element of the offense. Obviously, more precise instructions defining and distinguishing the separate *mens reas* of “knowledge” and “intent” would have been preferable. Here, however, Elser’s theory of defense was not that the acts or elements at issue lacked intent, but rather that he had not committed the alleged acts at all. We therefore cannot conclude that these jury instructions, which, on the whole, emphasized the mental element of “intent” for the “arouse” element, were so prejudicial that Elser’s right to a fair trial was denied. We award no relief on this basis. See *Medina v. State*, 828 N.E.2d 427, 431 (Ind. Ct. App. 2005) (finding harmless error where the jury instruction completely omitted *mens rea* element of Class A felony child molesting upon grounds that the defendant was not prejudiced by the omission because “remanding the case for retrial would merely allow [the defendant] to present the same defense [i.e., denial] that was already rejected by a jury”), *trans. denied*.

## **II. Sufficiency of the Evidence**

Elser challenges the sufficiency of the evidence to support his conviction for Count I, child molesting with respect to C.L. In making this challenge, Elser points to C.L.’s apparently contradictory allegations that Elser had molested her during the time he

lived at her house, which the record demonstrates was from October 2007 to February 2008, and that the molestation had occurred during the spring and summer time.

Our standard of review for sufficiency-of-the-evidence claims is well-settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.* It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

As Elser acknowledges, time is not of the essence in cases involving child molesting. *Hillenburg v. State*, 777 N.E.2d 99, 103 (Ind. Ct. App. 2002), *trans. denied*. The exact date of the offense “becomes important only in circumstances ‘where the victim’s age at the time of the offense falls at or near the dividing line between classes of felonies.’” *Id.* (quoting *Love v. State*, 761 N.E.2d 806, 809 (Ind. 2002)). Here, C.L. was nine years old at the time of the alleged crime, well under the fourteen-year dividing line, so the exact time of the crime is not relevant for purposes of determining the proper class of felony at issue.<sup>2</sup> Importantly, apart from her inability to connect the incidents alleged

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<sup>2</sup> Indiana Code section 35-42-4-3(b) criminalizes inappropriate touching of “a child under fourteen (14) years of age.”

to the proper season, C.L. did not equivocate with respect to the alleged acts which took place. A conviction may rest upon the uncorroborated testimony of the victim. *Ludy v. State*, 784 N.E.2d 459, 461 (Ind. 2003). Further, C.L.'s testimony was not uncorroborated. She testified that the incidents occurred in both an upstairs and downstairs bedroom. L.L. testified that C.L. had switched rooms during Elser's stay at their home, and Elser acknowledged as much during his own testimony. Regardless of any apparent inconsistencies in the claimed timing of Elser's molestation of C.L., the above evidence and all reasonable inferences therefrom demonstrate that Elser's conviction in Count I is supported by sufficient evidence.

### **III. Conditions of Probation**

#### **A. Waiver**

Elser additionally argues that certain conditions of his probation imposed by the trial court were unconstitutionally vague. The State responds by arguing that Elser's claim on this point is waived.<sup>3</sup> In *Piercefield v. State*, 877 N.E.2d 1213, 1218 (Ind. Ct. App. 2007), *trans. denied*, a panel of this court, analogizing an appeal of probationary conditions to an appeal of a sentence, held that a challenge to probationary conditions need not be raised before the trial court to permit appellate review. See *Kincaid v. State*, 837 N.E.2d 1008, 1010 (Ind. 2005) ("While it is, of course, true that a claim is not

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<sup>3</sup> In support of its waiver argument, the State cites *Hale v. State*, 888 N.E.2d 314, 319 (Ind. Ct. App. 2008), *trans. denied*, and *Stott v. State*, 822 N.E.2d 176, 179 (Ind. Ct. App. 2005), *trans. denied*, both of which observe that failure to object to conditions of probation at the sentencing hearing waives appellate review of those conditions. Noticeably, in spite of these holdings, both the *Hale* and *Stott* courts addressed the merits of the defendants' challenges.

normally available for review on appeal unless first made at trial, this Court and the Court of Appeals review many claims of sentencing error ... without insisting that the claim first be presented to the trial judge.”). In addition, the Indiana Supreme Court has recently held that the State may challenge the legality of a criminal sentence by appeal without first initiating a challenge in the trial court, demonstrating the importance of correcting illegal sentences, regardless of whether the claim has been raised below. *See Hardley v. State*, No. 49S05-0905-CR-209, 2009 WL 1229428, \_\_ N.E.2d \_\_ (Ind. May 5, 2009), slip op. at 1,7. Accordingly, we are compelled to address Elser’s substantive challenge to the conditions of his probation.

## **B. The Merits**

The trial court sentenced Elser to two consecutive sentences of six years, with four years executed and two suspended to probation on each. As a part of his probation, the trial court ordered Elser to comply with certain Sex Offender Special Stipulations. A trial court enjoys broad discretion when determining the appropriate conditions on probation. *McVey v. State*, 863 N.E.2d 434, 447 (Ind. Ct. App. 2007), *reh’g denied, trans. denied*. However, this discretion is limited by the principle that the conditions imposed must be reasonably related to the treatment of the defendant and the protection of public safety. *Id.* Where the defendant challenges a probationary condition on the basis that it is unduly intrusive on a constitutional right, we evaluate that claim by balancing the following factors: (1) the purpose to be served by probation, (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be enjoyed by probationers, and (3) the legitimate needs of law enforcement. *Id.*

Here, Elser does not allege that the stipulations are unduly intrusive based upon the above balancing test. Instead, Elser argues that six of the stipulations are unconstitutionally vague. A probationer has a due process right to conditions of supervised release that are sufficiently clear to inform him of what conduct will result in his being returned to prison. *Id.* (citing *U.S. v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002)). Elser requests remand for clarification of these stipulations.

### **1. Establishment of a “Dating” Relationship**

Special Stipulation 6 provides as follows:

You shall notify your probation officer of your establishment of a dating, intimate, and/or sexual relationship. You must report whether the person you are having a relationship with has children under the age of 18 years and whether the children reside in the person’s home. You shall notify any person with whom you are engaged in a dating, intimate or sexual relationship of your sex-related conviction(s).

App. p. 23.

In *McVey* this court concluded that a similar provision which also referenced a “dating” relationship was not sufficiently clear to inform the defendant of the prohibited or regulated conduct. *Id.* at 448-49. As the *McVey* court observed, “dating” may be interpreted as including the most mundane activities as going out for coffee with a friend, which would impose an unreasonable burden upon the defendant, or it could be interpreted as being limited to “intimate occasions and sexual contact,” thereby rendering the “dating” language superfluous. *Id.* Because of the lack of clarity with respect to the term “dating,” the *McVey* court remanded to the trial court to reconsider and clarify this condition with greater specificity. *Id.* at 449.

Similarly here, Elser's probationary requirements are dependent upon a proper interpretation of "dating," and the definition of "dating" is not clear from the stipulations. As the *McVey* court observed, Elser has a due process right to sufficiently clear conditions of probation such that he is informed of the conduct which will result in his being returned to prison. *Id.* at 447. We remand to the trial court to reconsider and clarify this condition with greater specificity.

## **2. "Cruising" Activity**

Special Stipulation 7 provides as follows: "You shall refrain from 'cruising' activity, frequenting areas where potential victims can be encountered." App. p. 23. Stipulation 7 appears to define "cruising" as "frequenting areas where potential victims can be encountered." Yet, phrases such as "other specific locations where children are known to congregate in your community" have been found to be unconstitutionally vague because they provide the defendant with no predictable standard for identifying forbidden places. *See Fitzgerald v. State*, 805 N.E.2d 857, 868 (Ind. Ct. App. 2004) (citing *Carswell v. State*, 721 N.E.2d 1255, 1260 (Ind. Ct. App. 1999)). We conclude that "frequenting areas where potential victims can be encountered," which is even less specific, is similarly unconstitutionally vague. We remand to the trial court to reconsider and clarify this condition.

## **3. "Enticing" Activity**

Special Stipulation 10 provides as follows:

You shall not possess any items on your person, in your vehicle, in your place of residence or as a part of your personal effects, that attract children or that may be used to coerce children to engage in inappropriate or illegal

sexual activities. You will not engage in any activities that could be construed as enticing children.

App. p. 23.

As Elser argues, prohibited items under this stipulation could range from kites and balloons to chocolate bars, and prohibited conduct could include such potentially innocuous activities as standing on one's head or juggling, any one of which could be construed as "enticing children." The State does not dispute the vague nature of this stipulation. We therefore remand to the trial court to reconsider and clarify this condition.

#### **4. Sexually Arousing Materials**

Special Stipulation 11 provides as follows:

You shall not possess any sexually arousing materials, to include, but not limited to: videos, magazines, books, internet web sites, games, sexual devices or aids, or any material which depicts partial or complete nudity or sexually explicit language or any other materials related to illegal or deviant interests or behaviors. You shall not visit strip clubs, adult bookstores, ordering of adult movies through cable TV pay-per-view network, peep shows, bars where topless or exotic dancers perform or businesses that sell sexual devices or aids. You shall not possess personal contact materials (i.e.: magazines or papers) that contain information about persons who desire to have personal relationships of any kind with others, nor will you place any ads that are sexual in content or respond by computer, telephone or Internet web sites, to any sexually solicitous ads.

App. p. 23. The *McVey* court, upon reviewing a similar provision prohibiting the possession of "pornographic or sexually explicit materials," and materials related to "illegal or deviant interests or behaviors," held that it was unconstitutionally vague. *Id.* at 447-48. In reaching this holding, the *McVey* court relied largely upon *Fitzgerald*, which had previously held that the phrase "pornographic or sexually explicit materials" was

overbroad and that the phrase “deviant interest or behaviors” provided the defendant no insight into appropriate social norms, much less deviations therefrom. *Fitzgerald*, 805 N.E.2d at 866-67. Both the *McVey* and *Fitzgerald* courts therefore remanded for clarification of the provision. *McVey*, 863 N.E.2d at 448; *Fitzgerald*, 805 N.E.2d at 867.

Here, we cannot say that the phrase “sexually arousing materials” used in the stipulation at issue is any more informative with respect to the particular materials prohibited than the phrase “pornographic or sexually explicit materials” used in *McVey* and *Fitzgerald*. In addition, this stipulation includes what both the *McVey* and *Fitzgerald* courts concluded was the unconstitutionally vague language “deviant interests or behaviors.” *McVey*, 863 N.E.2d at 447-48; *Fitzgerald*, 805 N.E.2d at 867. Furthermore, as Elser points out, this stipulation places an unfairly broad prohibition on Elser’s visiting businesses which sell “sexual devices or aids,” which could extend to drug stores, and possessing materials which might contain information about persons seeking “personal relationships of any kind,” which could extend to local newspapers advertising roommate services. Accordingly, we remand for clarification of the stipulation. In doing so, we repeat the *McVey* court’s suggestion that the trial court consider the following language from *Smith v. State*, 779 N.E.2d 111, 118 (Ind. Ct. App. 2002), *trans. denied*, for purposes of defining pornographic or “sexually arousing” material with more specificity:

[T]he definition of “child pornography” found in the federal statute might be a useful tool in this endeavor. See 18 U.S.C. § 2256(8). And the trial court might prohibit Smith from possessing any materials that fall under the definition of “obscene matter.” See Ind. Code § 35-49-2-1. But whatever the court decides, the condition should be narrowly tailored to the goals of protecting the public and promoting [Elser’s] rehabilitation.

*McVey*, 863 N.E.2d at 448 (quoting *Smith*, 779 N.E.2d at 118).

## **5. Incidental Contact**

Stipulation 15 provides as follows:

You must never be alone or have contact with any person under the age of 18. Any contact with a person under the age of 18 must be supervised by an adult or approved by the Court. You must report any incidental contact with persons under age 18 to your probation officer with [sic] 24 hours of contact.

App. p. 23. Upon addressing a similar “incidental contact” provision, the *McVey* court held that it was unconstitutionally broad given that any number of slight encounters in public could trigger the reporting requirement. *Id.* at 449. We agree and therefore remand this stipulation to the trial court for clarification.

## **6. Presence at Locations Where Children Are Known to Congregate**

Stipulation 16 provides as follows: “You shall not be present at parks, schools, playgrounds, day care centers, or other specific locations where children are known to congregate in your community.” App. p. 23.

We acknowledge that phrases such as “other specific locations where children are known to congregate in your community” have been found to be unconstitutionally vague because they provide the defendant with no predictable standard for identifying forbidden places. *See Fitzgerald*, 805 N.E.2d at 868 (citing *Carswell*, 721 N.E.2d at 1260). Here, however, this phrase is adequately clarified by the preceding language suggesting that the forbidden sites at issue, where children are known to congregate, are generally “parks, schools, playgrounds, and day care centers.” This language provides Elser with a

predictable standard for identifying forbidden places and is not unconstitutionally vague.<sup>4</sup>  
*See id.* at 868; *see also Carswell*, 721 N.E.2d at 1260.

#### IV. Conclusion

Having concluded that the jury instructions did not constitute fundamental error and that there was sufficient evidence to support Elser's conviction on Count 1, we affirm the trial court on those grounds. Having further concluded, however, that certain of Elser's conditions of probation, specifically Special Stipulations 6, 7, 10, 11, and 15, were unconstitutionally vague, we remand to the trial court for clarification of those provisions.

The judgment of the trial court is affirmed in part and remanded in part with instructions.

FRIEDLANDER, J., and MAY, J., concur.

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<sup>4</sup> In reaching this conclusion, we recognize that the *McVey* and *Fitzgerald* courts reversed similar stipulations as being unconstitutionally vague. In those stipulations, however, it was unclear whether the language "other specific locations where children are known to congregate in your community" was a part of the stipulation because it was included in a parenthetical following a blank line which the trial court had not filled in. *McVey*, 863 N.E.2d at 449-50; *Fitzgerald*, 805 N.E.2d at 868. The *McVey* and *Fitzgerald* courts were therefore concerned that the prohibited locations might include parks, etc., whether or not children were known to congregate there. *McVey*, 863 N.E.2d at 450; *Fitzgerald*, 805 N.E.2d at 868. Here, it is clear that the language "other specific locations where children are known to congregate" was a clear part of the stipulation.