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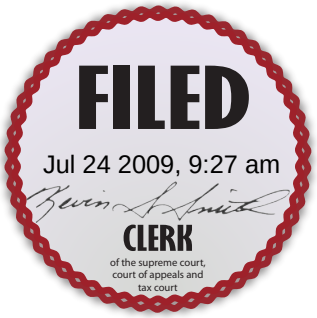

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IN THE
COURT OF APPEALS OF INDIANA

JEREMY FARMER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0806-CR-357
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0709-FC-61

July 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Jeremy Farmer pled guilty to two counts of Class C felony child molesting.[1] The trial court ordered him to pay for the victim's counseling and imposed several probation conditions recommended for sex offenders. Farmer challenges the amount of restitution ordered and argues two of the conditions of his probation are unconstitutionally vague. We affirm.

FACTS AND PROCEDURAL HISTORY

On July 15, 2007, Farmer's fiancée found him lying on top of twelve-year-old S.M. and kissing her. S.M. told authorities Farmer had squeezed her breast and had attempted to touch her vagina. She said there had been approximately twenty-five such incidents, and she remembered details of one incident at the end of 2006 or the beginning of 2007.

Farmer was charged with two counts of Class C felony child molesting, one for the July 15, 2007 incident and one for a timeframe of December 2006 to January 2007. Farmer pled guilty to both counts in exchange for a five-year cap on executed time. His sentence was otherwise left to the discretion of the trial court.[2]

S.M. requested restitution in the amount of $620 and submitted a letter from the Purdue University Marriage and Family Therapy Program in support. The letter stated:

> This letter is to confirm [S.M.'s] treatment through the Purdue Individual, Couple and Family Therapy Clinic (PICFTC). [S.M.'s] mother, [A.M.], first contacted PICFTC in January 2007 seeking therapy for [S.M.] Since then, [S.M.] has attended 28 family therapy sessions.

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[1] Ind. Code § 35-42-4-3(b).

[2] Farmer also agreed to admit to a probation violation, and the plea agreement likewise left the penalty for that violation to the court's discretion.

> As of March 19, 2008, the total fees paid for [S.M.'s] treatment was $620.00. This is based on 10 sessions at a fee of $26.00 and 18 sessions at a fee of $20.00. [S.M.] has attended 17 sessions since the disclosure of sexual assault (July 17, 2007) and paid fees totaling $340.00 during this time.

(Appellant's App. at 14.)

During the sentencing hearing, Farmer said he had received a copy of the letter and had no objection to paying restitution for S.M.'s counseling. Later in the hearing, defense counsel showed the trial court a copy of the restitution request. The trial court asked, "And you don't disagree with this?" (Sentencing Tr. at 10.)[3] Trial counsel responded, "My client has no objection." (*Id.*)

The trial court ordered an aggregate sentence of ten years with five suspended to probation. Farmer was ordered to pay $620 in restitution. The court imposed several conditions of probation, including restrictions on Farmer's contact with children and on where he could reside.

DISCUSSION AND DECISION

1. Restitution Order

Farmer argues the trial court ordered restitution in excess of its statutory authority. Farmer has waived this argument because he twice stated he had no objection to paying the restitution S.M. requested. *See Ware v. State*, 816 N.E.2d 1167, 1179 (Ind. Ct. App. 2004) (defendant waives challenge to restitution order when he does not objectt). Farmer

[3] The transcripts of the guilty plea hearing and the sentencing hearing are contained in one volume; however, the pagination starts over where the sentencing hearing begins. *See* Ind. Appellate Rule 28(A)(2) (requiring the pages of transcripts to be numbered consecutively).

counters that the restitution order was fundamental error. *See id*. (waived issue may be reviewed for fundamental error).

> "Fundamental error is error such that, if not rectified, would be a denial of fundamental due process." An improper sentence constitutes fundamental error and cannot be ignored on review. We may correct sentencing error by the trial court on appeal even though the issue was not raised below.

Id. (citations omitted).

A court may order restitution of "medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime." Ind. Code § 35-50-5-3(a)(2). Farmer argues the trial court exceeded its authority under this section because a portion of the counseling fees requested by S.M. were not incurred as a result of the crime. Farmer asserts he should not be liable for the fees attributable to the eleven counseling sessions S.M. attended prior to disclosure of the molestations, because "any therapy provided before that date could not have been directed at helping [S.M.] with this issue." (Appellant's Br. at 13.) Farmer also relies on the letter's characterization of these sessions as "family therapy sessions." (Appellant's App. at 14.)

Farmer compares his case to several cases in which we have found fundamental error in a restitution order. Each one is distinguishable.

In *Green v. State*, 811 N.E.2d 874, 877-80 (Ind. Ct. App. 2004), we reversed a restitution order because the trial court ordered Green to pay restitution to the State, but the State could not properly be considered a victim in that case. *Green* is distinguishable because S.M. is indisputably a victim who may receive restitution.

In *Rich v. State*, 890 N.E.2d 44, 48 (Ind. Ct. App. 2008), *trans. denied* 898 N.E.2d 1223 (Ind. 2008), we concluded the trial court erred by ordering restitution to burglary victims for installation of a security system because it was an upgrade to the victims' property and did not fit any of the categories of restitution authorized by Ind. Code § 35-50-5-3. Farmer, however, does not dispute that counseling fees are authorized by subsection (a)(2), which allows for restitution of "medical and hospital costs."

In *Ware*, 816 N.E.2d at 1179-80, we found fundamental error where the trial court ordered Ware to pay for "any counseling" the victim received. The statute permits recovery only of costs incurred up to the time of sentencing; therefore, an unspecified, perpetual obligation to pay for counseling is impermissible. *Id*. at 1180. Similarly, in *Johnson v. State*, 845 N.E.2d 147, 153-54 (Ind. Ct. App. 2006), *trans. denied* 860 N.E.2d 587 (Ind. 2006), we remanded for clarification of a restitution order requiring Johnson to pay an unspecified amount for the victim's counseling, to be paid "if requested." Farmer's case is distinguishable from *Ware* and *Johnson* because he was not ordered to pay an unspecified amount, nor was he ordered to pay expenses incurred after sentencing.

Unlike the cases Farmer cites, the restitution he was ordered to pay was not patently outside the scope of the restitution statute. Instead, Farmer challenges the sufficiency of the evidence supporting the amount of restitution. Had Farmer lodged an objection at sentencing, the State would have had an opportunity to offer additional evidence connecting S.M.'s counseling sessions to the molestations. We have declined to find fundamental error in similar circumstances. *See Davis v. State*, 772 N.E.2d 535, 540-41 (Ind. Ct. App. 2002) (finding Davis waived his argument that the evidence was

insufficient to support the restitution award because he did not object to the evidence in the trial court), *trans. denied* 792 N.E.2d 34 (Ind. 2003). Farmer represented that he was willing to pay for S.M.'s counseling, and the restitution order to that effect is not fundamental error. *See Kingery v. State*, 659 N.E.2d 490, 494 (Ind. 1995) ("A party may not invite error, then later argue that the error supports reversal, because error invited by the complaining party is not reversible error. . . . This type of invited error is not fundamental error."), *reh'g denied*.

2. Conditions of Probation

The State argues Farmer waived review of the conditions of his probation because he did not object to them in the trial court. The State relies on *Harvey v. State*, 751 N.E.2d 254 (Ind. Ct. App. 2001), and *Robinette v. State*, 641 N.E.2d 1286 (Ind. Ct. App. 1994).

Harvey filed a motion for bond reduction. The trial court granted the motion and ordered her to submit to random drug testing while on bond. Harvey made no objection to this condition of her bond until the time came for a drug test. Harvey's bond was revoked for failure to comply with the drug testing condition. She argued on appeal that the trial court could not require random drug testing, but we found she had waived the issue by not objecting at the bond reduction hearing. *Harvey*, 751 N.E.2d at 259.

In *Piercefield v. State*, however, we held that cases involving bond conditions were inapposite to appeals of probation conditions:

> Piercefield argues one of the specific terms of his probation is entirely overly broad and vague, and is nearly impossible to comply with. The State argues that Piercefield waived any argument regarding this probation

> condition because he did not object to the condition during sentencing to preserve the issue and he signed the probation terms. For support of this proposition, the State cites to cases involving appeals of bond conditions. We find those cases inapplicable and disagree with the State's position. Instead, we liken the appeal of this probation condition to an appeal of a sentence, which we may review "without insisting that the claim first be presented to the trial judge." *Kincaid v. State*, 837 N.E.2d 1008, 1010 (Ind. 2005). We also find that Piercefield's signature on the probation terms does not serve as a waiver to challenge any terms on appeal, and we will consider his challenge.

877 N.E.2d 1213, 1218 (Ind. Ct. App. 2007), *trans. denied* 891 N.E.2d 34 (Ind. 2008).

Robinette pled guilty to battery and received a suspended sentence. As a condition of probation, he was ordered to have no contact with his estranged wife or her mother. Robinette violated this condition twice, and the trial court revoked his probation. Robinette appealed, arguing the condition was invalid because it unconstitutionally infringed on his right of privacy in marriage. We held he had waived his argument. *Robinette*, 641 N.E.2d at 1288. We noted he had not objected to the condition when it was imposed, and to that extent, *Robinette* and *Piercefield* appear to be at odds. However, Robinette also had not challenged the condition at his probation revocation hearing. Therefore, Farmer's case more closely resembles *Piercefield*.

Farmer argues two of the conditions of his probation are unconstitutionally vague. "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*. "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*.

The first condition Farmer challenges is a restriction on his residency: "You shall not reside within one thousand (1,000) feet of school property, a youth program center or public park and you shall not establish a residence within one (1) mile of the victim of your sex offense in accordance with IC 35-42-4-11(c)." (Appellant's App. at 24.)[4] Farmer compares this condition to conditions we found unconstitutionally vague in *McVey* and *Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App. 2004).

Fitzgerald challenged a condition that he "not be present at parks, schools, playgrounds, day care centers, or _____ (other specific locations where children are known to congregate in your community)." *Id*. at 868. The trial court used a generic form on which it could mark the conditions that would apply to Fitzgerald. The trial court did not fill in the blank or further explain the condition. We found the open-ended language problematic: "The phrase, as written, is not a separate restriction upon going to specific places where children are known to congregate. It only guides the trial court in adding additional specific locations to which Fitzgerald may not go." *Id*. We remanded for clarification of the condition. The same condition was imposed on McVey, and another panel of this Court followed *Fitzgerald* and remanded for clarification. *McVey*, 863 N.E.2d at 449-50.

[4] The trial court used a form titled "Indiana Recommended Special Probation Conditions for Adult Sex Offenders." (Appellant's App. at 24.) The form lists twenty-four possible conditions, and the trial court checks which conditions will apply to a given offender. The form used by the trial court appears to be the same one available online at http://www.state.in.us/judiciary/probation/docs.html (last visited May 15, 2009).

The condition Farmer challenges does not include the open-ended language we found problematic in *Fitzgerald* and *McVey*. In addition, Farmer's condition references Ind. Code § 35-42-4-11(c), which provides:

> An offender against children[5] who knowingly or intentionally:
> (1) resides within one thousand (1,000) feet of:
> (A) school property, not including property of an institution providing post-secondary education;
> (B) a youth program center; or
> (C) a public park; or
> (2) establishes a residence within one (1) mile of the residence of the victim of the offender's sex offense;
> commits a sex offender residency offense, a Class D felony.

(Footnote supplied.) The language of Farmer's condition substantially tracks the language of this statute. Therefore, we conclude the condition simply requires Farmer to refrain from committing the offense proscribed by Ind. Code § 35-42-4-11 and is sufficiently clear.

Next, Farmer challenges a condition that limits his contact with minors:

> You shall have no contact with any person under the age of 16 unless you receive court approval or successfully complete a court-approved sex offender treatment program, pursuant to IC 35-38-2-2.4. Contact includes face-to-face, telephonic, written, electronic, or any indirect contact via third parties.

(Appellant's App. at 26.)

Farmer also compares this condition to one we reviewed in *McVey*:

> You must never be alone with or have contact with any person under the age of 18. Contact includes face-to-face, telephonic, written, electronic, or any indirect contact via third parties. You must report any incidental contact with persons under age 18 to your probation officer within 24 hours of the contact.

[5] An "offender against children" is someone who must register as a sex or violent offender and who has been convicted of certain enumerated offenses, including child molesting. Ind. Code § 35-42-4-11(a).

863 N.E.2d at 449. McVey argued the prohibition of incidental contact was overbroad. We agreed :

> As we have observed before, child molesters molest children to whom they have access. Accordingly, probation conditions that reduce the potential for access to children are reasonable. Therefore, preventing McVey from being alone with children under eighteen years of age and from participating in activities involving children under eighteen will certainly reduce such access. Nevertheless, we agree with McVey that the additional prohibition on "incidental contacts" is overly broad. Thus, we remand to the trial court with instruction to alter the condition prohibiting McVey from being alone or hav[ing] contact with any person under the age of eighteen.

Id. (citations omitted). *McVey*, therefore, does not support Farmer's argument, because his condition does not prohibit incidental contact and he does not argue the condition is overbroad.[6]

Farmer also relies on *Hunter v. State*, 883 N.E.2d 1161 (Ind. 2008). Hunter was subject to the same probation condition we reviewed in *McVey*. Hunter lived in a recreational vehicle parked on his father's property. The RV was adjacent to a mobile home occupied by Hunter's half-sister, her husband, and her three children. Hunter was remodeling his half-sister's bathroom, and on several occasions, he was still there when the children came home from school. When that happened, he would leave immediately without interacting with the children. The State filed a petition to revoke Hunter's probation, and the trial court found he had violated his probation by having contact with the children. Our Supreme Court reversed, holding that "contact" did not ordinarily

[6] We note the form used by the trial court states it was revised in September 2007. *McVey* was decided on March 30, 2007, and transfer was denied July 25, 2007. It seems likely, therefore, that this condition was drafted with *McVey* in mind and intentionally omitted references to "incidental contact" for that reason.

mean "mere presence;" therefore, the evidence was insufficient to establish a probation violation. *Id*. at 1164.

Hunter could be read broadly to mean that a prohibition on "contact" is vague, as the Court stated that *if* the trial court had intended to prohibit *mere presence*, the prohibition on *contact* was not sufficiently clear to convey that. *Id*. However, the Court's ultimate conclusion was not that the condition was void for vagueness, but that mere presence was not sufficient to establish "contact." *Id*. In light of *Hunter*, Farmer's condition cannot be understood to prohibit mere presence.

Farmer argues the condition is vague in that it is unclear whether "contact" includes "incidental or inadvertent contact with someone under age 16." (Appellant's Br. at 20.) However, we conclude the condition as written cannot be interpreted to prohibit mere presence or incidental contact, and therefore we find no reason to remand for clarification.

Affirmed.

BAKER, C.J., and BARNES, J., concur.