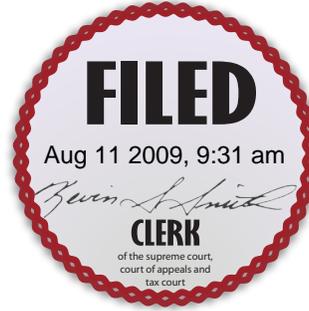


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DEXTER L. BURNS, )  
 )  
 Appellant-Defendant, )  
 )  
 vs. ) No. 02A05-0905-CR-244  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Plaintiff. )

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Frances C. Gull, Judge  
Cause No. 02D04-0808-FA-30

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**August 11, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Dexter L. Burns was convicted of child molesting<sup>1</sup> as a Class A felony and child molesting<sup>2</sup> as a Class C felony after a jury trial and was found to be a repeat sexual offender.<sup>3</sup> The trial court sentenced him to thirty years for the Class A felony conviction, enhanced by ten years for being a repeat sexual offender, and to four years for the Class C felony conviction, to be served consecutively for an aggregate sentence of forty-four years. Burns appeals, raising the following consolidated issue: whether sufficient evidence was presented to support his two child molesting convictions.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

When K.C. was eleven years old, her mother had a party at their home in Fort Wayne, Indiana. Sometime during this party, Burns, a family friend, who was thirty-nine years old at the time, showed K.C. pictures of nude adults on his cell phone and told her that she was “old enough” to see them. *Tr.* at 50. In the early morning hours following the party, K.C.’s mother and step-father left to take a friend home, leaving K.C., her brother, and her sister in the care of Burns. The children were upstairs in their bedroom at the time.

After K.C.’s mother and step-father left, Burns went upstairs and entered the children’s room and told K.C. that her mother had sent him up to check on her. He knelt over K.C.’s bed and pulled down her shorts and underwear. Burns used his hand to touch

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

<sup>2</sup> See Ind. Code § 35-42-4-3(b).

<sup>3</sup> See Ind. Code § 35-50-2-14.

the outside and inside of K.C.'s vagina. K.C. told Burns to stop, but he did not. Afterwards, Burns told K.C. to come downstairs, and when they were downstairs, he had her pull down her shorts and underwear, so he could "see how big [she] got." *Id.* at 46. When K.C. went back upstairs to her bedroom, Burns followed her and again touched the outside of her vagina.

On a separate date, Burns, K.C., and members of her family were at the home of her step-father's mother. K.C. went to the kitchen for a glass of water, when she entered the room, Burns was also there. He placed his hands on her buttocks, and then used his hand to touch K.C.'s chest underneath her clothes, moving his hand around on her chest. K.C. told him to stop and attempted to leave the room, but Burns pulled her back into the kitchen by the back of her shirt.

K.C. reported these incidents to her school guidance counselor on November 16, 2007. The counselor informed the authorities and K.C.'s mother, and K.C. talked to her mother about the incidents when she got home from school that day. She told her mother that, on the first occasion, Burns stuck his fingers in and out of her vagina and that, on the second occasion, he had fondled her breasts. *Id.* at 71, 74. On November 29, 2007, K.C. was interviewed by an employee of the Child Advocacy Center. During this videotaped interview, K.C. told the employee that Burns had touched her "area," the name she used for her vagina. *State's Ex. 1.* She stated that Burns had used his whole hand to touch both the outside and the inside of her "area." *Id.* K.C. also reported that, during the second incident, Burns placed his hand under her shirt and bra and moved his hand around on her chest. *Id.*

On August 20, 2008, the State charged Burns with child molesting as a Class A felony and child molesting as a Class C felony. The State also filed an information alleging that Burns was a repeat sexual offender. A jury trial was held on January 14-15, 2009, and K.C.'s videotaped interview was introduced into evidence. At the conclusion of the trial, the jury found Burns guilty of both child molesting charges. Burns then stipulated to the facts supporting the repeat sexual offender information, and the jury found him to be such. The trial court sentenced him to thirty years for the Class A felony child molesting conviction, enhanced by ten years for being a repeat sexual offender, and four years for the Class C felony child molesting conviction, with the sentences to run consecutively, for a total sentence of forty-four years. Burns now appeals.

### **DISCUSSION AND DECISION**

Burns argues that the State failed to present sufficient evidence to support his convictions for child molesting. Our standard of review for sufficiency claims is well settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Williams v. State*, 873 N.E.2d 144, 147 (Ind. Ct. App. 2007). We will consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. *Id.*; *Robinson v. State*, 835 N.E.2d 518, 523 (Ind. Ct. App. 2005). We will affirm the conviction if sufficient probative evidence exists from which the fact finder could find the defendant guilty beyond a reasonable doubt. *Williams*, 873 N.E.2d at 147; *Robinson*, 835 N.E.2d at 523.

Burns first contends that insufficient evidence was presented to support his conviction for child molesting as a Class A felony. In order to convict Burns of Class A

felony child molesting as charged, the State was required to prove that he was at least twenty-one years old and performed or submitted to deviate sexual conduct with K.C., a child who was less than fourteen years old. Ind. Code § 35-42-4-3(1)(1). Burns argues that there was not sufficient evidence from which a reasonable jury could conclude that he committed an act of deviate sexual conduct. He asserts that K.C.'s description of what occurred was not sufficiently specific to establish this necessary element of the crime and therefore, his conviction should be reversed.

“Deviate sexual conduct” is defined as “as an act involving . . . the penetration of the sex organ or anus of a person by an object.” Ind. Code § 35-41-1-9. The definition of the term “object” includes the use of a person’s fingers. *D’Paffo v. State*, 778 N.E.2d 798, 802 (Ind. 2002). Proof of even the slightest penetration is sufficient to sustain a conviction for child molesting. *Spurlock v. State*, 675 N.E.2d 312, 315 (Ind. 1996).

Here, K.C. testified at trial that Burns touched her with his hand on the inside of the part of her body “where somebody pees from.” *Tr.* at 43-44. The recording of K.C.’s interview with the employee at the Child Advocacy Center was also admitted into evidence. In that interview, K.C. reported that Burns used his entire hand to touch the outside and the inside of her “area,” which was the name she used for her vagina. *State’s Ex. 1*. K.C.’s mother testified that K.C. had told her that Burns had put his hands down her pants and stuck his fingers “in and out of her vagina.” *Tr.* at 71. Additionally, a nurse who examined K.C. testified that K.C. had disclosed that Burns had touched her inside her “area” with his finger and that it felt weird and that it hurt. *Id.* at 101, 108. We conclude that sufficient evidence was presented to prove that Burns performed deviate

sexual conduct and to support his conviction for Class A felony child molesting. Burns's argument is merely a request for us to reweigh the evidence and judge the credibility of the witnesses, which we cannot do. *Williams*, 873 N.E.2d at 147.

Burns next argues that insufficient evidence was presented to support his conviction for child molesting as a Class C felony. In order to convict Burns of Class C felony child molesting as charged, the State was required to prove that he performed or submitted to touching or fondling with K.C., who was then under the age of fourteen, with the intent of arousing or satisfying the sexual desires of either K.C. or himself. Ind. Code § 35-42-4-3(b). Burns specifically contends that the State failed to prove that he fondled or touched K.C. with the intent of arousing or satisfying the sexual desires of K.C. or himself. He asserts that no evidence was presented to allow the jury to conclude that the touching was done with the requisite intent.

Mere touching alone is not sufficient to prove the crime of child molesting. *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000). The State must also prove beyond a reasonable doubt that the act of touching was accompanied by the specific intent to arouse or satisfy sexual desires. *Clark v. State*, 695 N.E.2d 999, 1002 (Ind. Ct. App. 1998), *trans. denied*. "The intent to arouse or satisfy the sexual desires of the child or the older person may be established by circumstantial evidence and may be inferred 'from the actor's conduct and the natural and usual sequence to which such conduct usually points.'" *Kanady v. State*, 810 N.E.2d 1068, 1069-70 (Ind. Ct. App. 2004) (quoting *Nuerge v. State*, 677 N.E.2d 1043, 1048 (Ind. Ct. App. 1997), *trans. denied*).

Here, the evidence presented showed that Burns initially touched K.C. on her

buttocks, and then he used his hand to fondle her bare chest underneath both her shirt and bra by moving his hand around. Evidence was also presented that K.C. told him to stop and attempted to get away, but he told her to come back and pulled her back in to the kitchen by the back of her shirt. *Tr.* at 49; *State's Ex.* 1. These facts support a reasonable inference that the fondling was done with the intent to arouse or satisfy his sexual desires. The fact that Burns moved his hand around on K.C.'s chest indicated that the touching was prolonged. This court has previously found that less invasive conduct constituted sufficient evidence to support convictions for child molesting. *See Cruz Angeles v. State*, 751 N.E.2d 790, 798 (Ind. Ct. App. 2001) (finding that sufficient evidence was presented to support defendant's conviction where he touched victim's chest over her t-shirt), *trans. denied*. We conclude that sufficient evidence was presented to support Burns's conviction for child molesting as a Class C felony.

Affirmed.

NAJAM, J., and BARNES, J., concur.