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IN THE
COURT OF APPEALS OF INDIANA

JOSE CRUZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1012-CR-1343
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt M. Eisgruber, Judge
The Honorable Steven J. Rubick, Magistrate
Cause No. 49G01-1002-FC-12922

August 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Jose Cruz appeals his conviction for child molesting as a class C felony.[1] Cruz raises two issues, which we revise and restate as:

I. Whether his confrontation rights were violated; and

II. Whether the evidence is sufficient to sustain his conviction.

We affirm.

The relevant facts follow. On December 21, 2009, A.R., who was seven years old, her mother, and her two younger sisters went to St. Vincent's Primary Care Center in Indianapolis to obtain some paperwork regarding some lab work. A.R., her mother, who was holding a seven-month-old baby, and Am.R., A.R.'s sister, were seated on a bench in a waiting room area when Cruz, who was forty-one years old, approached them pushing a stroller with a child in it. A.R. and her mother recognized Cruz because they attended the same church.

Cruz began to talk to A.R. and Am.R. Cruz asked A.R. and Am.R. their names and ages and where they attended school. A.R.'s mother was unable to watch A.R. and Am.R. during the entire time Cruz was speaking with them because she was holding the baby who was very active and demanded almost all of her attention. For part of the time Cruz was speaking to A.R., Am.R. helped her mother with the baby who was crying and screaming. A stroller, a baby carrier, and A.R.'s sister were located between where A.R. and her mother were seated. At some point, Cruz knelt to speak with A.R., put his hand on A.R.'s leg, and told her to look at the baby. Cruz slowly moved his hand up A.R.'s leg and touched her vagina. A.R. did not initially react to Cruz touching her because she

[1] Ind. Code § 35-42-4-3(b) (Supp. 2007).

was scared and did not know what to do. When A.R.'s mother stood up to get some papers, A.R. also stood up and followed her mother. In total, Cruz spoke with A.R. or her sister for about fifteen minutes.

A.R. told her mother that Cruz had touched her vagina. A.R. was very scared and started crying. A.R.'s mother hugged A.R. and noticed that A.R. was shaking, and A.R.'s mother had never seen A.R. react like that before. The police were contacted.

Indianapolis Police Officer Billy Murphy arrived at the scene, detained Cruz, and obtained a statement from A.R. A.R. told Officer Murphy that she was touched on the leg and pointed to the area Cruz touched her. Later, at Sergeant Jan Faber's office, A.R. was interviewed by Lilly Hawkins, a child forensic interviewer, and Sergeant Faber watched the interview from a separate room. During the interview, Sergeant Faber heard A.R. state that Cruz had touched her vagina or vaginal area.

In February 2010, the State charged Cruz with child molesting as a class C felony. At trial, A.R. testified regarding the events and Cruz's actions described above. During cross-examination, the following exchange occurred between Cruz's counsel and A.R.:

> Q. . . . Was he still next to his stroller while he was kneeling down talking to you?
>
> A. Kneeling, standing up.
>
> Q. He was standing?
>
> A. Yes. He was talking to me and then he was like - -
>
> Q. Kind of stooped down to your eye level a little bit?
>
> A. Yes.

Q. He wasn't quite kneeling but stooped down. Was [sic] his knees on the ground, do you know, or was he just bent over looking at you in your eyes when he was talking to you?

A. Putting his knees on the ground, and like you said, on the ground too.

Transcript at 61-62. Later during cross-examination, the following exchange occurred:

Q. Okay. Do you remember telling Ms. Hawkins that Mr. Cruz touched your breasts?

A. No, I didn't tell her.

Q. You didn't tell her that? And I believe breasts – I apologize – you refer to breasts as "pecho"?

A. Yes.

Q. You didn't tell her that he touched your breasts?

A. No.

Q. Do you remember telling [] Hawkins that --

Id. at 66. The prosecutor objected and stated that "the first thing is I was preemptively objecting because what I believe was about to be asked was he was about to quote the statement, and I don't believe there's been a proper foundation laid to do that." Id. at 67. Cruz's counsel stated that A.R. "can testify to what she said or did not say on that date, and then on impeachment of a third party, I can bring [] Hawkins in and get to the details." Id. at 68. The prosecutor stated that it was fine if defense counsel wanted to "use what [Hawkins] remembers about the exact thing . . . as long as the foundation is laid at that point . . . ." Id. Defense counsel stated: "I just want to make sure that I can ask – I mean, it's my understanding that I have to get a denial on what she said to [Hawkins]. You're saying I can get it in by [Hawkins] without going through that, and

that's okay, but I don't want to get objected to." Id. at 69. The prosecutor commented that "[t]here will have to be a foundation made at that point, . . . [A.R. has] answered that no, she didn't say that, and if he needs to at that point refute that through that witness, I can't do anything if the evidence reflects – at this point I'm objecting as the foundation for this witness." Id. The court sustained the State's objection.

Cruz's counsel then stated that he had "one more line of questioning" for A.R. which was "in regards to [whether A.R.] had told [] Hawkins that she believed [Cruz] was getting up, faking getting up when he touched her knee" and that "today she says directly the opposite." Id. at 70. The prosecutor stated that "if that question is asked in the proper form, it's fine, but quoting from a transcribed statement is not the way to do that." Id. The court agreed, and Cruz's counsel stated: "Okay. I'll act like I'm not reading from this but I'll ask the question." Id. When cross-examination of A.R. continued, Cruz's counsel asked A.R.:

> Q. Okay. Have you ever told anyone in the past that [] Cruz touched your breasts?
>
> A. No.
>
> Q. Okay. You've testified here today that when [] Cruz touched you, he looked back at you, correct?
>
> A. When he touched me?
>
> Q. Like he looked at you?
>
> A. Yes.
>
> Q. Although he was looking at his child, you believed he was looking at you?

A. I saw him too. Well, he put his hand, I saw his face and he was acting like he was looking at the baby, but he wasn't and he was staring at me, and then I felt that he was touching me really so I looked down with my eyes then I saw that he was touching me.

Q. And then that's when he got up?

A. No.

Q. Okay. Have you ever told anyone that he leaned on your knee hard when he was getting up?

A. My dad and my mom.

Q. Okay.

Id. at 73-74.

Later during the trial, Cruz's counsel indicated that he planned to elicit testimony from Hawkins regarding A.R.'s prior statements to Hawkins during the forensic interview. The prosecutor stated: "Given that, I think we could probably save a hearing outside the presence of the jury if . . . by putting [] Hawkins on the stand and give an offer of proof as to the State's position to that testimony prior to (inaudible) coming in." Id. at 142. Outside the presence of the jury, the State called Hawkins to the stand, and the court stated "[w]e'll deal with this as an offer of proof . . . ." Id. at 143. Hawkins testified that she was a forensic child interviewer and worked for the prosecutor's office and that she conducted a forensic interview with A.R. When asked whether she had an opportunity to review the video, audio, or transcript of the interview, Hawkins indicated that she had not. The State asked Hawkins whether she had "any independent recollection of what was said by [A.R.] in that interview," and Hawkins stated "[j]ust very little." Id. at 145. The State asked Hawkins about her independent recollection of

A.R.'s interview statements, and Hawkins stated that "while waiting in the waiting room, [A.R.] was touched" and that A.R. "said that her leg was touched and her 'cosita,' which in Spanish she had the name for her vagina, was touched." Id. at 145-146. The State asked "[a]nd those are the areas of her body that you recall being touched," and Hawkins stated "Yes." Id. at 146.

The prosecutor stated: "My objection would be I don't know that this witness could lay a foundation for [defense counsel] to question her regarding what was specifically said. We do not have – we do not have a subscribed witness to the testimony that he – we don't have any authentication for it." Id. Cruz's counsel stated that "Hawkins can be refreshe[d]" and could look at the transcript of the interview and "recall whether or not she remembers that, and we do it all the time. She just says she hasn't read it yet. If she read[s] it, she may remember the entire conversation." Id. at 148. The State argued that Cruz was "asking this court to . . . allow him to use an uncertified, undocumented, unauthenticated, unviewed or reviewed transcript to fresh one witness' recollection of another witness' testimony" and that the "transcripts are inadmissible evidence." Id. The court sustained the State's objection and found that Cruz could not use a transcript of A.R.'s interview to refresh Hawkins's memory. Cruz's counsel stated: "I anticipated asking and [] Hawkins testifying, being refreshed regarding that [A.R.] advised [Hawkins] twice in her statement that she was touched in her breast area, as well as [A.R.] told [Hawkins] she believed that [] Cruz was getting up off his knee and that's when he touched her, and he was acting like he was getting up . . . ." Id. at 152. The court stated that the testimony that Cruz's counsel referenced does not "materially

contradict the testimony that has been provided so it would not be proper impeachment." Id. at 153.

On November 3, 2010, the jury found Cruz guilty as charged. The court sentenced Cruz to four years, with two years to be served on home detention and two years suspended to probation.

I.

The first issue is whether Cruz's confrontation rights were violated. The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." Pendergrass v. State, 913 N.E.2d 703, 705 (Ind. 2009) (citing Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004)), cert. denied, 130 S. Ct. 3409 (2010). Similarly, Article 1, Section 13(a) of the Indiana Constitution provides: "In all criminal prosecutions, the accused shall have the right to . . . meet the witnesses face to face . . . ." The Indiana Supreme Court has held that "Indiana's confrontation right contains both the right to cross-examination and the right to meet the witnesses face to face." Brady v. State, 575 N.E.2d 981, 988 (Ind. 1991); see McCarthy v. State, 749 N.E.2d 528, 533 (Ind. 2001).

The right to adequate and effective cross-examination is fundamental and essential to a fair trial. Howard v. State, 853 N.E.2d 461, 465 (Ind. 2006). "It includes the right to

ask pointed and relevant questions in an attempt to undermine the opposition's case, as well as the opportunity to test a witness' memory, perception, and truthfulness." Id. at 465. This right, however, is subject to reasonable limitations placed at the discretion of the trial judge. Smith v. State, 721 N.E.2d 213, 219 (Ind. 1999). "'[T]rial judges retain wide latitude . . . to impose reasonable limits . . . based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" Id. (quoting Thornton v. State, 712 N.E.2d 960, 963 (Ind. 1999)). It is also true that violations of the right to cross-examine are subject to harmless-error analysis. Id. (citations omitted); see also Koenig v. State, 933 N.E.2d 1271, 1273-1274 (Ind. 2010) (holding that a denial of the right to confrontation is subject to harmless error analysis). To determine whether an error is harmless, courts look to several factors, including the strength of the prosecution's case, the importance of the witness' testimony, whether the testimony was corroborated, the cross-examination that did occur, and whether the witness's testimony was repetitive. Smith, 721 N.E.2d at 219.

Cruz argues that the court denied his constitutional right to confrontation when it refused to allow defense counsel to question Hawkins regarding inconsistencies between A.R.'s trial testimony and her statements during a prior interview. Cruz argues that he "attempted to impeach A.R.'s credibility with prior inconsistencies during cross examination, . . . but the court thwarted this right, forcing him to attempt impeachment through a third party later during trial." Appellant's Brief at 7. Cruz argues that "[w]hen such impeachment was attempted, [he] was foreclosed from confrontation and cross

examination because the child forensic examiner was prevented from testifying," that "[t]his denied [] Cruz his right to confront the complaining witness and attempt to impeach her credibility," and that "[i]t was important to allow [him] to confront and cross examine A.R. and attempt to impeach her credibility because her uncorroborated testimony formed the crux of the State's case." Id. Cruz further argues that the court's ruling sustaining the State's objection regarding defense counsel's attempt to elicit testimony regarding inconsistent statements "violated Ind. Evidence Rule 612 which allows for a witness's recollection to be refreshed" and that "defense counsel had complied with Evid. R. 612(a)[2] as the writing here was actually a transcript of an interview the State had provided to the defense during discovery." Id. at 8. Cruz also asserts that the court's "denial of defense counsel's attempt to refresh the recollection of child forensic interviewer [] Hawkins precluded [] Cruz from meaningful cross examination of the State's chief witness, in violation of both the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution, improperly impeding the defendant's ability to impeach the complaining witness' credibility." Id. at 11. Cruz argues that "[t]his error was not harmless as A.R.'s testimony formed the basis of the State's case, with no other evidence presented which would establish substantial evidence of guilt." Id. at 12.

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[2] Ind. Evidence Rule 612(a) provides:

> While Testifying. If, while testifying, a witness uses a writing or object to refresh the witness's memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

The State argues both that Cruz's counsel acquiesced to a limited cross-examination of A.R. and was allowed to cross-examine A.R. to the fullest extent permissible, and asserts that "[b]ecause extrinsic evidence could not have been properly used to impeach A.R. on the collateral issue of whether Cruz touched her chest, Cruz's right to confront A.R. was not improperly abridged." Appellee's Brief at 9. The State further asserts, in response to the argument that Cruz should have been allowed to refresh the forensic interviewer's memory using the transcript of the interview, that Cruz waived that claim by failing to make a sufficient offer of proof, namely, that Cruz did not present the interviewer "with the transcript and establish[] that her memory was refreshed." Id. at 10. The State also argues that any error in the court's refusal to allow A.R. to be impeached through the child forensic interviewer was harmless. Specifically, the State argues that "[a]lthough A.R. was the victim and the only witness to the offenses, there is no evidence in the record that she said anything in her interview that contradicted her trial testimony that Cruz touched her leg and, eventually, her vagina." Id. at 11. The State argues that "Cruz's defense counsel asked A.R. on no fewer than four occasions if A.R. had told Hawkins or anyone else that Cruz had touched her chest, which raised the implication that A.R. had previously made such a claim." Id. The State also notes that "[i]n closing argument, Cruz's counsel noted that A.R.'s testimony was uncorroborated, that she had not reported to Officer Murphy that Cruz touched her vagina, and that A.R. seemed unsure about whether Cruz's touch had been accidental." Id.

An error will be found harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of

the parties. Gault v. State, 878 N.E.2d 1260, 1267-1268 (Ind. 2008). We observe that there was no alleged inconsistency in A.R.'s testimony and interview statements regarding the fact that Cruz touched A.R.'s vagina. Cruz's counsel was able to cross-examine A.R., and during closing arguments the prosecutor and Cruz's counsel argued about the reliability and strength of A.R.'s testimony. Based upon the record, we conclude that any error in refusing Cruz's attempt to refresh Hawkins's memory was harmless and did not affect Cruz's substantial rights and that Cruz's rights to cross-examine A.R. and present a defense were not substantially impaired. See Conrad v. State, 938 N.E.2d 852, 857 (Ind. Ct. App. 2010) (holding that the defendant was not deprived of his constitutional rights under the United States or Indiana Constitutions to present a defense and noting that defense counsel was able to cross-examine the witness and that the exclusion of certain evidence did not completely impair the defendant's ability to impeach the witness's testimony).

II.

The next issue is whether the evidence is sufficient to sustain Cruz's conviction. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

The offense of child molesting as a class C felony is governed by Ind. Code § 35-42-4-3(b), which provides that "[a] person who, with a child under fourteen (14) 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 child molesting, a Class C felony." In order to convict Cruz of child molesting as a class C felony, the State needed to prove that Cruz performed or submitted to any touching of either Cruz or A.R., a child under fourteen years of age, with the intent to arouse either Cruz or A.R.

Cruz argues that "[t]he State failed to prove beyond a reasonable doubt that [he] touched A.R. with the specific intent to arouse rather than mere unintentional touching." Appellant's Brief at 13. Cruz points to cases in which the defendants' actions included kissing a victim and touching her breasts, rubbing a victim's butt and putting her hand on the defendant's private over his clothes, instructing a victim to remove her clothing and perform oral sex, and performing oral sex on and rubbing the genitals of a victim, see id. at 14 (citing Williams v. State, 779 N.E.2d 610 (Ind. Ct. App. 2002); Oatts v. State, 899 N.E.2d 714 (Ind. Ct. App. 2009); Chandler v. State, 837 N.E.2d 1100 (Ind. Ct. App. 2005); and Bowles v. State, 737 N.E.2d 1150 (Ind. 2000)), and argues that "[i]n each of these instances, the defendant's intent could be reasonably inferred from the highly sexual nature of the circumstances presented" and that "[i]n contrast to the above cases, here reasonable doubt exists regarding the material element of intent." Id. at 14-15. Cruz further argues that "[i]f the jury believed the touching was intentional instead of merely accidental, then at most, the evidence presented would support a conviction for battery."

Id. at 16. Cruz asserts that "evidence of sexual intent is not so overwhelming that given the lack of supporting circumstances including the very public location and the incidental nature of the touching" that the jury "could have inferred intent . . . ." Id. Cruz requests that his conviction be reversed or that, in the alternative, his conviction be vacated and a conviction for battery as a class D felony be entered. The State argues that the jury was allowed to infer from the evidence that Cruz touched A.R.'s vagina and that he did so with the intent to arouse either his or A.R.'s sexual desires.

Mere touching alone is not sufficient to constitute the crime of child molesting. Nuerge v. State, 677 N.E.2d 1043, 1048 (Ind. Ct. App. 1997), trans. denied. The element of intent of child molesting may be established by circumstantial evidence and inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points. Cruz Angeles v. State, 751 N.E.2d 790, 797 (Ind. Ct. App. 2001) (citing Nuerge, 677 N.E.2d at 1048), trans. denied. This court has found sufficient evidence to support a finding of touching with intent to satisfy sexual desires where a defendant entered a child's bedroom and touched the child's breasts over her t-shirt. See Cruz Angeles, 751 N.E.2d at 798. We have also found sufficient evidence to support a finding of touching with intent to satisfy sexual desires where a defendant put his arm around the shoulder of a child and let his hand hang, touching her breast. See Pedrick v. State, 593 N.E.2d 1213, 1220 (Ind. Ct. App. 1992), reh'g denied.

Here, the testimony most favorable to the verdict shows that Cruz knelt to speak with A.R., put his hand on her leg, and then slowly moved his hand, which "was heavy," up A.R.'s leg and touched her vagina. See Transcript at 54. A.R. testified that she saw

and felt Cruz touch her. A.R. informed her mother that Cruz touched her and began to cry and shake, and A.R.'s mother testified that she had never seen A.R. react like that before. A.R. testified, "[w]ell, he put his hand, I saw his face and he was acting like he was looking at the baby, but he wasn't and he was staring at me" and that "then I felt that he was touching me really so I looked down with my eyes then I saw that he was touching me." Id. at 73-74.

Based upon the record, we conclude that the State presented evidence of probative value from which a reasonable jury could have inferred that Cruz touched A.R. with the intent to arouse either A.R. or Cruz and found Cruz guilty of child molesting as a class C felony. See Wise v. State, 763 N.E.2d 472, 475 (Ind. Ct. App. 2002) (holding that the evidence was sufficient to support a finding of touching with intent to satisfy sexual desires where the defendant rubbed the victim's vagina), trans. denied; Cruz Angeles, 751 N.E.2d at 797-798 (holding that there was sufficient evidence to justify the inference that the defendant touched the victims for the purpose of satisfying or arousing sexual desires where the defendant touched the victims' breasts over their clothing).

For the foregoing reasons, we affirm Cruz's conviction for child molesting as a class C felony.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.