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IN THE
COURT OF APPEALS OF INDIANA

D.D.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0904-JV-00150
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Peter J. Nemeth, Judge
The Honorable Barbara J. Johnston, Magistrate
Cause No. 71J01-0712-JD-001007

August 25, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The St. Joseph Probate Court found that D.D. was a delinquent child for committing acts that, if committed by an adult, would be three counts of Class B felony child molesting and one count of Class C felony child molesting. The trial court also ordered that D.D. be placed in the custody of the Indiana Department of Correction ("DOC"). D.D. appeals and presents two issues for our review, which we renumber and restate as:

I. Whether the evidence was sufficient to support the trial court's finding that D.D. was a delinquent child;

II. Whether D.D. was subject to double jeopardy; and

III. Whether the trial court erred in placing D.D. in the custody of the DOC.

We affirm.

Facts and Procedural History

In the summer of 2007, fourteen-year-old D.D., who lived in Peoria, Illinois, came to stay with his cousin, P.D., and her family in South Bend, Indiana. P.D. had a son, D.C., who was seven years old at the time. While in South Bend, D.D. engaged in sexual conduct with D.C. Specifically, D.D. touched D.C. on his penis and the "inside" of his "butt." Tr. p. 25. D.C. explained that D.D. used his hand's to "play" with D.C.'s penis. Tr. p. 26. D.D. also told D.C. to suck his penis, and D.C. indicated that D.D.'s penis was erect when he did so. Further, D.D. sucked D.C.'s penis.[1] D.C. testified that this touching occurred more than one time.

[1] The original transcript of the fact-finding hearing indicated that the prosecuting attorney asked D.C. during re-direct examination, "And [D.D.] started (unintelligible), right?" Tr. p. 49. On June 26, 2009, the State filed a motion with the trial court seeking to correct the transcript pursuant to Indiana Appellate Rule 32. The trial court directed the court stenographer to confirm or deny the accuracy of the transcript.

D.C.'s mother was eventually told that "something happened in the past" with D.D., and asked her son if anything had happened between him and D.D. When asked this, D.C. began to cry because he thought he would be punished. When his mother assured him that he would not be punished, he told her that D.D. had molested him.

On December 13, 2007, the State filed a petition alleging that D.D. was a delinquent child for committing what would be four counts of child molesting if committed by an adult. Specifically, the State alleged that D.D. engaged in three acts of deviate sexual conduct with D.C. that would constitute Class B felony child molesting if committed by an adult, by performing oral sex on D.C., making D.C. perform oral sex on him, and inserting his finger into D.C.'s anus. The State also alleged that D.D. fondled or touched D.C. with the intent to arouse or gratify his sexual desire, which would be Class C felony child molesting if committed by an adult. A fact-finding hearing was held on October 3 and 21, 2008. On October 23, 2008, the trial court entered an order finding that the State had proven the allegations beyond a reasonable doubt and found D.D. to be a delinquent child. The trial court held a dispositional hearing on January 30, 2009, at the conclusion of which it placed D.D. in the custody of the DOC. D.D. now appeals.

I. Sufficiency of the Evidence

D.D. first claims that the evidence is insufficient to support the trial court's delinquency finding. When the State seeks to have a juvenile adjudicated as a delinquent

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The trial court then reviewed the transcript and the recording of the hearing and, on July 9, 2009, entered an order finding that the transcript inaccurately reflected the question posed by the prosecuting attorney and that the actual question posed to D.C. was "And [D.D.] sucked your penis, right?" D.C. responded in the affirmative to the prosecuting attorney's question.

child for committing an act which would be a crime if a committed by an adult, the State must prove every element of the crime beyond a reasonable doubt. J.S. v. State, 843 N.E.2d 1013, 1016 (Ind. Ct. App. 2006), trans. denied. When reviewing a juvenile adjudication, this court will consider only the evidence and reasonable inferences supporting the judgment and will neither reweigh evidence nor judge the credibility of the witnesses. Id. If there is substantial evidence of probative value from which a reasonable trier of fact could conclude that the juvenile was guilty beyond a reasonable doubt, we will affirm the adjudication. Id.

D.D. argues that D.C.'s testimony was "too inconsistent and unclear to be believed." Appellant's Br. p. 6. This is simply an invitation that we judge the credibility of a witness and reweigh the evidence. This is not our role as an appellate court. See id. In fact, it is well settled that the testimony of a child victim, even if uncorroborated, is ordinarily sufficient to sustain a conviction for child molesting. Bowles v. State, 737 N.E.2d 1150, 1152 (Ind. 2000). And to the extent that there were any inconsistencies in D.C.'s testimony, we have observed before that it is "not surprising that a young child in an adversary courtroom setting may demonstrate a degree of confusion and inconsistency." Hill v. State, 646 N.E.2d 374, 378 (Ind. Ct. App. 1995); see also Lowe v. State, 534 N.E.2d 1099, 1100 (Ind. 1989) (stating that it is not surprising that a thirteen-year-old girl, who was being cross-examined by a veteran defense attorney, would become confused at times while testifying). Here, although D.C.'s testimony may have been slightly inconsistent with regard to precisely when the molestation took place, it was

not inconsistent with regard to the facts that D.D. molested him. Any inconsistencies were for the trier of fact to consider in weighing D.C.'s testimony.

Issues of D.C.'s credibility aside, D.D. also claims that the evidence was still insufficient to prove that he committed four separate acts of child molesting.[2] We disagree. To prove that D.D. committed an act that would be Class B felony child molesting if committed by an adult, the State was required to prove that D.D. did, with a child under fourteen years of age, perform or submit to deviate sexual conduct. See Ind. Code § 35-42-4-3(a) (2004 & Supp. 2009). Deviate sexual conduct is defined as including "an act involving . . . a sex organ of one person and the mouth or anus of another person" or "the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-41-1-9 (2004).

Count I of the delinquency petition alleged that D.D. committed what would be Class B felony child molesting if committed by an adult by "sucking [D.C.]'s penis." Appellant's App. p. 6B. Here, D.C. testified that D.D. placed D.C.'s penis in D.D.'s mouth. This is sufficient to prove Count I.

Count II alleged that D.D. committed what would be Class B felony child molesting by having D.C. suck his penis. Here, D.C. testified that, at D.D.'s direction, he sucked D.D.'s penis. This is sufficient to establish that D.D. submitted to deviate sexual conduct with a child under fourteen years of age and thus committed what would be Class B felony child molesting if committed by an adult.

[2] Based on the original transcript, D.D. argues that there was no evidence that he placed his mouth on D.C.'s penis. However, the transcript, as corrected by the trial court's order, clearly shows that D.D. placed his mouth on D.C.'s penis.

Count III alleged that D.D. committed what would be Class B felony child molest by inserting his finger in to D.C's anus. D.C. testified that D.D. touched him on the "inside" of his "butt." Tr. p. 25. From this the trial court could reasonably conclude that D.D. performed sexual deviate conduct with D.C. by penetrating D.C.'s anus with his finger. This is sufficient to prove that D.D. committed what would be Class B felony child molesting if committed by an adult.

Lastly, Count IV alleged that D.D. committed what would be Class C felony child molesting by fondling or touching D.C. with the intent to arouse or satisfy D.D.'s sexual desires. This tracks the relevant statutory language. See I.C. § 35-42-4-3(b).[3] Here, D.C. explained that D.D. used his hands to "play" with D.C.'s penis. Tr. p. 26. D.D. claims that while this may prove that he touched or fondled D.C., it does not prove that he did so to arouse or satisfy his or D.C.'s sexual desires. However, the intent to arouse or satisfy sexual desires required to support a Class C felony child molesting conviction may be inferred from evidence that the accused intentionally touched a child's genitals. Spann v. State, 850 N.E.2d 411, 414 (Ind. Ct. App. 2006). In short, the evidence is sufficient to support the trial court's finding that D.D. was a delinquent child for committing these four acts of child molesting.

[3] This statute provides, "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." I.C. § 35-42-4-3(b).

II. Double Jeopardy

D.D. claims that he was subject to double jeopardy because his convictions arose out of a single incident. See H.M. v. State, 892 N.E.2d 679, 681-82 (Ind. Ct. App. 2008) (adhering to precedent holding that double jeopardy applies to juvenile delinquency adjudications) (citing D.B. v. State, 842 N.E.2d 399, 404 (Ind. Ct. App. 2006)). Although this argument is available to D.D., it is unavailing.

As noted above, D.C. testified regarding four separate acts of molestation: D.D. fondled D.C.'s penis, D.D. inserted his finger into D.C.'s anus, D.D. placed his mouth on D.C.'s penis, and D.C. placed his mouth on D.D.'s penis at D.D.'s direction. Because there was distinct evidence supporting each count of child molesting, we cannot say that there was a reasonable possibility that the evidentiary facts used to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. See Richardson v. State, 717 N.E.2d 32, 53 (Ind. 1999) (setting forth the "actual evidence" test).

As such, this case is readily distinguishable from D.B. v. State, the case cited by D.D. in support of his argument. In D.B., the victim testified to only one instance of non-consensual sex, and this one act was used to support the allegations that D.B. had committed both rape and child molesting. 842 N.E.2d 401. On appeal, the court held that there was therefore a reasonable possibility that this one act was used to establish the essential elements of both offenses. Id. In contrast, here D.C. testified with regard to four separate acts of child molesting. We therefore reject D.D.'s claim that the trial court's delinquency findings subjected him to double jeopardy.

III. Placement

Lastly, D.D. claims that the trial court erred in placing him in the custody of the DOC. Specifically, D.D. claims that the trial court's decision to place him in the custody of the DOC was improper because such placement does not support rehabilitation and because it will make contact with his family in Illinois difficult if not impossible.

The choice of the specific disposition of a juvenile adjudicated a delinquent child is a matter within the discretion of the trial court and will be reversed if there has been an abuse of that discretion. D.B., 842 N.E.2d at 404. The trial court's discretion is subject to the statutory considerations of the welfare of the child, the safety of the community, and the policy of favoring the least harsh disposition. Id. An abuse of discretion occurs when the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Id. at 404-05.

Indiana Code section 31-37-18-6 (2008) provides:

> If consistent with the safety of the community and the best interest of the child, the juvenile court shall enter a dispositional decree that:
> (1) is:
> (A) in the least restrictive (most family like) and most appropriate setting available; and
> (B) close to the parents' home, consistent with the best interest and special needs of the child;
> (2) least interferes with family autonomy;
> (3) is least disruptive of family life;
> (4) imposes the least restraint on the freedom of the child and the child's parent, guardian, or custodian; and
> (5) provides a reasonable opportunity for participation by the child's parent, guardian, or custodian.

We have previously held that this statute requires the trial court to select the least restrictive placement in most situations. D.B., 842 N.E.2d at 405. "'However, the statute contains language which reveals that under certain circumstances a more restrictive placement might be appropriate.'" Id. (quoting K.A. v. State, 775 N.E.2d 382, 386 (Ind. Ct. App. 2002)). Specifically, placement in the least restrictive setting is required only if such a placement is "consistent with the safety of the community and the best interest of the child." Id. (quoting I.C. § 31-37-18-6). "In other words, 'the statute recognizes that in certain situations the best interest of the child is better served by a more restrictive placement.'" Id. at 406 (quoting K.A., 775 N.E.2d at 387).

The trial court here did find that a more restrictive placement was in the best interest of the child and consistent with the safety of the community. In its dispositional order, the trial court, noted that:

> [D.D.] has failed to abide by court ordered terms of probation.
>
> The present offense is serious in nature warranting placement in a secure facility.
>
> [D.D.]'s past history of delinquent acts, even though less serious, warrants placement in a secure facility.
>
> Lesser restrictive means of controlling [D.D.]'s behavior have been investigated or tried.
>
> Furthermore, [D.D.]'s right to personal freedom is outweighed by the community's right to protection.

Appellant's App. p. 10. Given the facts and circumstances of this case, we cannot say that the trial court erred.

Although he had no prior adjudications for juvenile delinquency, D.D. had not led an entirely law-abiding life. As noted in the pre-dispositional report, D.D. has used

marijuana since the age of thirteen. He also received a "station adjustment" in Illinois, which is apparently some sort of informal warning or reprimand, for confining and sexually touching a female. He was named as a suspect in a battery, which he claimed was just a school fight. He also stole and wrecked his brother's car, for which he received a traffic fine but was never criminally charged. Prior to his arrest for the present incident, D.D. did poorly in school and had numerous behavioral and attendance problems. He has received mental health treatment from various sources without significant improvement. D.D. has shown suicidal ideations in the past. D.D. completed a psychosexual assessment which recommended that he be placed with the DOC. Another test indicated that D.D. was at a high risk for future violence. A Youth Assessment and Screening Instrument indicated that D.D. was at a high risk to re-offend. D.D. refused to acknowledge his actions and blamed others for his problems. Further, while being detained for the current incident, D.D. had thirty-one incident reports in just eighty-four days. Moreover, we cannot ignore the serious nature of the acts D.D. committed, i.e., molesting his seven-year-old cousin. Plainly stated, under these facts and circumstances, we cannot say that the trial court abused its discretion in placing D.D. in the custody of the DOC.

Conclusion

There is sufficient evidence to support the trial court's determination that D.D. is a delinquent child for committing acts that would constitute four counts of child molesting if committed by an adult. D.D. was not subject to double jeopardy, and the trial court did not abuse its discretion in placing D.D. in the custody of the DOC.

Affirmed.

DARDEN, J., and ROBB, J., concur.