

Case Summary

Larry M. Gonzalez (“Gonzalez”) appeals one of his four convictions for Child Molesting, presenting the sole issue of whether that conviction is supported by sufficient evidence.¹ We reverse the challenged conviction and affirm the remaining three convictions.

Facts and Procedural History

Sometime between November 3, 2002 and April 29, 2009, Gonzalez committed sexual acts upon V.M., the daughter of Gonzalez’s live-in girlfriend. On August 5, 2009, Gonzalez was charged with four counts of Child Molesting. At the conclusion of a jury trial conducted on January 19 and 20, 2010, Gonzalez was convicted as charged. He received forty year sentences for each of his two Class A felony convictions and six year sentences for each of his Class C felony convictions. The sentences are to be served concurrently, providing for an aggregate sentence of forty years. Gonzalez now appeals.

Discussion and Decision

When reviewing the sufficiency of the evidence to support a conviction, we will consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

In order to convict Gonzalez of Child Molesting as a Class A felony, as charged, the

¹ Gonzalez was convicted of four counts of Child Molesting, Indiana Code Section 35-42-4-3, two as Class A felonies and two as Class C felonies. He does not challenge the sufficiency of the evidence in support of three of his convictions.

State was required to establish beyond a reasonable doubt that Gonzalez, a person at least twenty-one years of age, performed deviate sexual conduct against V.M., a child under fourteen years of age. Ind. Code § 35-42-4-3(a)(1). Deviate sexual conduct is defined in Indiana Code Section 35-41-1-9 as “an act involving (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object.”

Gonzalez concedes that the State established one act of Child Molesting as a Class A felony by establishing that he digitally penetrated V.M.’s vagina. However, he alleges that the State failed to establish the occurrence of an act involving his sex organ and V.M.’s mouth, so as to support the additional conviction for Child Molesting as a Class A felony. He contends that the evidence presented at trial indicated only that his penis was touching V.M. under her bottom lip, an area in proximity to the mouth, but not the mouth.

The evidence of Gonzalez’s conduct toward V.M. is derived from her testimony. V.M., then aged ten, testified as follows:

Prosecutor: And when his [Gonzalez’s] private would come out of his underwear, you said he would try to get it to go into your mouth?

V.M.: Yes.

Prosecutor: How did he try to make it go into your mouth?

V.M.: He would push my head down under the covers and he pushed really hard.

Prosecutor: And did his private go in your mouth?

V.M.: No.

Prosecutor: Did it go up to your mouth?

V.M.: Yes.

Prosecutor: What part of – so his private was touching what part of your mouth?

V.M.: Under my bottom lip.

Prosecutor: And what happened when his private would touch underneath your bottom lip?

V.M.: It would – something would come out of it.

(Tr. 109.) V.M. testified to having been touched under her bottom lip, not upon her mouth. We thus agree with Gonzalez that the State failed to establish the occurrence of an act involving his sex organ and V.M.'s mouth.

The State correctly observes that there is no element of penetration in the statutory provision at issue. However, “[c]onviction of child molesting by deviate sexual conduct explicitly requires an act involving the sex organ of one and the mouth or anus of another.” Downey v. State, 726 N.E.2d 794, 796 (Ind. Ct. App. 2000), trans. denied. We must read a criminal statute as written and strictly construe it against the State. Id.

In addition to the events underlying Gonzalez’s three unchallenged convictions, a separate act of inappropriate touching took place when Gonzalez placed his penis near V.M.’s mouth. However, the evidence was insufficient to permit the jury to conclude beyond a reasonable doubt that Gonzalez engaged in an act involving his penis and V.M.’s mouth. Accordingly, we reverse one of Gonzalez’s Class A felony convictions. His remaining Class A felony conviction and Class C felony convictions are affirmed.

Affirmed in part, reversed in part.

NAJAM, J., and DARDEN, J., concur.