

Case Summary

Carl Hoover (“Hoover”) appeals his conviction for Child Seduction, a Class D felony,¹ upon which his conviction was entered as a Class A misdemeanor. We affirm.

Issues

Hoover presents four issues for review:

- I. Whether the trial court abused its discretion by admitting testimony from Hoover’s mental health counselor and State’s Exhibit 1, a treatment summary;
- II. Whether the trial court abused its discretion by excluding a witness;
- III. Whether the trial court abused its discretion by refusing Hoover’s proffered instruction on the parental privilege defense; and
- IV. Whether there is sufficient evidence to sustain his conviction.

Facts and Procedural History

When K.H. was four years old, she moved with her mother and her step-father into the home of her step-grandparents, Carl and Betty Hoover. When K.H.’s mother and step-father moved out, K.H. remained. She was raised by her step-grandparents.

There were several occasions over a two-year period of time when K.H. was aged sixteen to eighteen that Betty was away from the residence and Hoover was responsible for waking K.H., who has a significant hearing impairment. Hoover, clad in his underwear, would enter K.H.’s bedroom, climb into K.H.’s bed, and get under the covers. Hoover would then touch K.H. underneath her clothing, specifically, underneath her bra, pajama pants, and panties.

On November 18, 2008, Hoover was charged with Child Seduction, as a Class D

¹ Ind. Code § 35-42-4-7.

felony. On May 11, 2010, he was brought to trial before a jury. He was convicted as charged. The trial court entered a judgment of conviction for Child Seduction, as a Class A misdemeanor, and sentenced Hoover to 365 days imprisonment, all suspended to probation. He now appeals.

Discussion and Decision

I. Alleged Privileged Communications

After K.H. alleged that Hoover had touched her inappropriately, Hoover voluntarily sought counseling. His therapist, Jennifer Williams, testified at trial, and State's Exhibit 1, in which Williams summarized Hoover's "treatment attendance and progress," was admitted over Hoover's objection as to privilege. (Ex. Vol., pg. 3.) The letter had been prepared for Hoover's attorney, at Hoover's request, with a copy provided to a deputy prosecutor responsible for evaluating potential charges. In the letter, Williams repeated Hoover's claim that he had awakened K.H. by employing "a tickling routine" but had touched her without "sexual intent." (Ex. Vol., pg. 3.)

Hoover now claims that the admission of Williams' testimony and State's Exhibit 1 erroneously allowed confidential communications "to be placed before the jury." Appellant's Brief at 6. A trial court has broad discretion in ruling on the admissibility of evidence, and we will disturb its ruling only upon a showing of abuse of discretion. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997). Furthermore, although Hoover objected to the admission of State's Exhibit 1, he lodged no contemporaneous objection to Williams' testimony, and must show fundamental error to obtain a reversal based upon her testimony. Goodwin v. State,

783 N.E.2d 686, 687 (Ind. 2003). Fundamental error is error of such magnitude that the defendant could not have received a fair trial. Brown v. State, 799 N.E.2d 1064, 1068 (Ind. 2003).

At the outset, we acknowledge the existence of a counselor-client privilege. Indiana Code Section 25-23.6-6-1 provides in relevant part:

Matters communicated to a counselor in the counselor's official capacity by a client are privileged information and may not be disclosed by the counselor to any person, except under the following circumstances: . . .

- (6) If the counselor has the express consent of:
 - (A) the client[.]

Accordingly, although counselor-client communications are privileged, an exception to the privilege exists where the client has consented to disclosure. With regard to State's Exhibit 1, Williams testified that Hoover gave his permission for her to transmit the treatment summary letter both to his attorney and to a deputy prosecutor. Under these circumstances, Hoover's communication to his counselor regarding a tickling routine was not protected by the counselor-client privilege.

Additionally, while Hoover makes a bald assertion that Williams' testimony should have been excluded in its entirety, he fails to explain how he was prejudiced. Indeed, Williams' testimony essentially repeated the theory of Hoover's defense, that is, he tickled K.H. in an effort to awaken her, sometimes inadvertently touching her underclothing on the outside. Williams further testified that Hoover did not display the characteristics of a sex offender. Hoover has failed to demonstrate an abuse of discretion in the admission of State's Exhibit 1 or fundamental error in the admission of Williams' testimony.

II. Exclusion of Witness

Hoover next alleges that the trial court erred “in granting the State’s motion in limine excluding witness Pat Calvin.” Appellant’s Brief at 7. An offer of proof is the method by which the proponent of evidence preserves any error in its exclusion. Noble v. State, 725 N.E.2d 842, 846 (Ind. 2000). When the proponent does not make an offer of proof, he has not adequately preserved the exclusion of the witness’ testimony as an issue for appellate review. Id. The Rules of Evidence require that the substance of the evidence be made known to the trial court and that the offer to prove identify the grounds for admission and the relevance of the testimony. Id. (citing Ind. Evidence Rule 103(a)). Hoover failed to submit an offer of proof and has not preserved the exclusion of Calvin’s testimony for appellate review.²

III. Instruction on Parental Privilege

Hoover contends that the trial court abused its discretion by refusing to give his final jury instruction that incorporated the language of Indiana Code Section 35-41-3-1, which provides:

A person is justified in engaging in conduct otherwise prohibited if he has legal authority to do so.

The purpose of jury instruction is to inform the jury of the law applicable to the facts without misleading it and to enable the jury to comprehend the case clearly and arrive at a just, fair,

² During a pretrial conference, Hoover’s attorney and the Prosecutor indicated that Calvin is the mother of one of K.H.’s childhood friends, Sara Gibson. Apparently, Gibson had spent the night with K.H. on one or more occasions, albeit several years before the time period covered in the charging information. The trial court excluded Calvin as a witness based upon a determination of lack of relevance.

and correct verdict. Overstreet v. State, 783 N.E.2d 1140, 1163 (Ind. 2003). Jury instruction is reviewed for an abuse of discretion. Id. at 1163-64. A trial court abuses its discretion by refusing to give a tendered instruction if: (1) the tendered instruction correctly states the law; (2) evidence supports the tendered instruction; and (3) the substance of the tendered instruction is not covered by other instructions. Id. at 1164.

Hoover claims that “the court failed to instruct the jury on parental privilege despite the fact there was sufficient evidence to support that the touching complained of in this matter arose to the level of battery.” Appellant’s Brief at 9. However, Hoover was not charged with the offense of battery, to which a defense of parental privilege might arguably have been applicable.

The jury was charged with determining whether or not Hoover touched K.H. with intent to gratify sexual desires. See Ind. Code § 35-42-4-7 (providing that a person who engages with a child in sexual intercourse, deviate sexual conduct, or any fondling or touching with the intent to arouse or satisfy the sexual desires of either the child or the adult, commits child seduction). A parent does not have legal authority to engage in touching of a child with intent to gratify sexual desires. Hoover’s proffered instruction would not have informed the jury of the law applicable to the facts presented. The trial court did not abuse its discretion by refusing Hoover’s misleading instruction.

IV. Sufficiency of the Evidence

To prove that Hoover committed Child Seduction, as charged, the State was required to show that Hoover, being at least eighteen years of age and the guardian or custodian of

K.H., a child aged sixteen but less than eighteen years of age, fondled or touched K.H. with the intent to arouse or satisfy the sexual desires of either K.H. or himself. Ind. Code § 35-42-4-7; App. 31. Hoover asserts that there is an absence of proof that he acted with the required intent to arouse or satisfy sexual desires.

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). The intent element may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual consequences to which that conduct usually points. Bowles v. State, 737 N.E.2d 1150, 1152 (Ind. 2000). Here, the State produced evidence that Hoover, sometimes in pajamas and sometimes wearing only his underwear, entered K.H.'s room while she was sleeping, lay down beside her and got underneath the covers. K.H. testified that Hoover touched her underneath her bra and underwear, that the touching made her uncomfortable, and that she "knew that it was wrong." (Tr. 362.) The touching occurred on multiple occasions, typically when all other family members were out of the house. On this record, the jury could reasonably have found that the State proved intent to gratify sexual desires beyond a reasonable doubt.

Conclusion

The trial court did not abuse its discretion in its evidentiary rulings. There is sufficient evidence to support Hoover's conviction for Child Seduction.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.