MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Phillip Marlin, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 21, 2021

Court of Appeals Case No. 21A-CR-792

Appeal from the Warren Circuit Court

The Honorable Hunter J. Reece, Judge

Trial Court Cause No. 86C01-2008-F6-53

Bradford, Chief Judge.

Case Summary

[1] Following a camping trip during which then-thirty-four-year-old Phillip Marlin, Jr., twice touched then-twelve-year-old M.C. in a rude or insolent manner, the State charged Marlin with two counts of Level 6 felony battery on a person less than fourteen years old. The State also alleged that Marlin was a habitual offender. At the conclusion of trial, the jury found Marlin guilty of the two counts of Level 6 felony battery and Marlin admitted to being a habitual offender. On appeal, Marlin challenges the sufficiency of the evidence to sustain his battery convictions. We affirm.

Facts and Procedural History

[2] On July 3, 2020, M.C. went to Klumpe's Campground with her friend and her friend's family. At the time, Marlin was dating M.C.'s friend's mother.[1] At some point, M.C. and her friend decided to go swimming. When M.C. walked past Marlin, wearing only her swimsuit, Marlin "smacked" M.C. on the buttocks with sufficient force to cause M.C. to feel pain and to leave a mark on M.C.'s skin. Tr. Vol. II p. 62. M.C. eventually went to sleep, staying with her friend and friend's family in their camper.

[3] The next morning, M.C. was shown pictures that were taken of her while she slept, including a picture of Marlin laying with his head next to and his arm

[1] Marlin is now married to M.C.'s friend's mother.

around a sleeping M.C. The pictures made M.C. feel uncomfortable. M.C. and her friend subsequently told the friend's grandmother about the pictures and the friend's grandmother notified M.C.'s parents, who then notified the police.

[4] On August 17, 2020, the State charged Marlin with two counts of Level 6 felony battery on a person less than fourteen years old. The State also alleged that Marlin was a habitual offender. On April 28, 2021, the trial court conducted a jury trial, at the conclusion of which the jury found Marlin guilty of both battery counts, and Marlin admitted to being a habitual offender. The trial court subsequently sentenced Marlin to concurrent 730-day sentences for his battery convictions and imposed 1095-day sentence enhancement by virtue of Marlin's status as a habitual offender, for an aggregate 1825-day sentence with 730 days suspended to probation.

Discussion and Decision

[5] Marlin contends that the evidence is insufficient to sustain his convictions for two counts of Level 6 felony battery on a person less than fourteen years old.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling.

> Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146–47 (Ind. 2007) (cleaned up). Stated differently, "'[w]e affirm the judgment unless no reasonable factfinder could find the defendant guilty.'" *Mardis v. State*, 72 N.E.3d 936, 938 (Ind. Ct. App. 2017) (quoting *Griffith v. State*, 59 N.E.3d 947, 958 (Ind. 2016)).

[6] In order to prove that Marlin committed two counts of Level 6 felony battery on a person less than fourteen years old, the State was required to prove that he, a person over the age of eighteen, twice touched a person under the age of fourteen in a rude, insolent, or angry manner. Ind. Code § 35-42-2-1(c)(1) & (e)(3). The term "rude" has been defined as "offensive in manner or action … marked by a lack of gentleness or by the use of force." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1985 (1964). We have defined "insolent" as "boldly disrespectful in speech or behavior; impertinent; imprudent … lacking usual or proper respect for rank or position." *K.D. v. State*, 754 N.E.2d 36, 41 (Ind. Ct. App. 2001) (internal quotations omitted). Further, "[a]ny touching, however slight, may constitute battery." *Impson v. State*, 721 N.E.2d 1275, 1285 (Ind. Ct. App. 2000).

[7] In charging Marlin with two counts of Level 6 felony battery on a person less than fourteen years old, the State alleged as follows:

> [O]n or about July 3, 2020, at Klumpe's Campground, in Warren County, State of Indiana, Phillip R. Marlin, Jr. a person at least eighteen (18) years of age, to-wit: age thirty-four (34), did knowingly or intentionally touch Subject A, a person under the age of fourteen (14), to-wit: age twelve (12), in a rude, insolent, or angry manner, to-wit: did slap Subject A on the buttock, contrary to the form of the statutes in such cases made and provided by I.C. 35-42-2-1(c)(1) and I.C. 35-42-2-1(e)(3) and against the peace and dignity of the State of Indiana….
>
> [O]n or about July 4, 2020, at Klumpe's Campground, in Warren County, State of Indiana, Phillip R. Marlin, Jr. a person at least eighteen (18) years of age, to-wit: age thirty-four (34), did knowingly or intentionally touch Subject A, a person under the age of fourteen (14), to-wit: age twelve (12), in a rude, insolent, or angry manner, to-wit: did touch Subject A on the back and shoulder while Subject A was sleeping, contrary to the form of the statutes in such cases made and provided by I.C. 35-42-2-1(c)(1) and I.C. 35-42-2-1(e)(3) and against the peace and dignity of the State of Indiana.

Appellant's App. Vol. II p. 12. Thus, in order to prove that Marlin committed the charged offenses, the State was required to prove that he touched someone under the age of fourteen in a rude, insolent, or angry manner by touching her on the buttocks and by touching her back and shoulder while she slept. Marlin challenges the sufficiency of the evidence to prove each act.

I. Touching M.C.'s Buttocks

[8] Marlin does not dispute that he touched M.C.'s buttocks. In challenging the sufficiency of the evidence, he merely claims that "[w]hen looking at the circumstances … it cannot be said that the State proved beyond a reasonable

doubt that the smack on M.C.'s butt was rude, insulant [sic], or angry but rather was 'horseplay.'" Appellant's Br. p. 15. We disagree.

[9] The evidence shows that Marlin "smacked" M.C., who was wearing only a bathing suit, on the buttocks with enough force to cause M.C. to feel pain and to leave a mark on her skin. Tr. Vol. II p. 62. M.C. testified that she did not give Marlin permission to touch her buttocks. The jury could reasonably infer that by touching M.C.'s buttocks without her permission and with the force required to cause pain and to leave a mark on the skin, Marlin touched M.C. in a rude, insolent, or angry manner. Marlin's claim to the contrary amounts to nothing more than a request to reweigh the evidence, which we will not do. *See Bell v. State*, 31 N.E.3d 495, 499 (Ind. 2015) ("We do not reweigh the evidence or assess the credibility of witnesses in reviewing a sufficiency of the evidence claim.").

II. Touching M.C.'s Back and Shoulder

[10] Marlin also claims that "the State did not prove that [he] even touched M.C. as charged in count II," arguing that the pictures admitted into evidence do not conclusively prove that he touched M.C. Appellant's Br. p. 15. Upon review, however, we cannot agree with Marlin's representation of the evidence as one of the pictures clearly shows that Marlin touched M.C. by putting his arm around her while she was asleep and vulnerable.

[11] Again, "[a]ny touching, however slight, may constitute battery." *Impson*, 721 N.E.2d at 1285. Furthermore, noting that "because a person's apparel is so

intimately connected with the person that it is regarded as part of the purposes of the battery statute," we concluded in *Impson* that "a person may commit the 'touching' necessary for battery by touching another's apparel." 721 N.E.2d at 1285. Review of the evidence reveals that in this case, Marlin's arm touched M.C.'s pajamas and hair, if not her skin. Such a touching is sufficient to constitute a battery. *See id.*

[12] Furthermore, while M.C. may have laughed when confronted with the photographs in Marlin's presence, she testified that Marlin's actions made her upset and uncomfortable. Despite Marlin's then-girlfriend describing his actions toward M.C. while she slept as "goofing around," the jury could reasonably find that Marlin's actions qualified as an inappropriate rude or insolent touching. Tr. Vol. II p. 91. Again, Marlin's challenge to the sufficiency of the evidence to sustain his conviction amounts to nothing more than a request to reweigh the evidence, which we will not do. *See Bell*, 31 N.E.3d at 499.

[13] The judgment of the trial court is affirmed.

Robb, J., and Altice, J., concur.