MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Kristin A. Mulholland
LeBlanc & Mulholland, LLC
Crown Point, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ellen H. Meilaender
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Johnnie Lee Luellen,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 29, 2022

Court of Appeals Case No. 22A-CR-257

Appeal from the Lake Superior Court

The Honorable Kathleen B. Lang, Judge

Trial Court Cause No. 45G03-1701-F4-1

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Johnnie Lee Luellen, Jr. (Luellen), appeals his convictions for child molesting, Level 4 felony, Ind. Code § 35-42-4-3(b); and criminal confinement, Level 5 felony, I.C. § 35-42-3-3(b)(1)(A).

[2] We affirm.

ISSUES

[3] Luellen presents this court with two issues on appeal, which we restate as:

(1) Whether the State presented sufficient evidence beyond a reasonable doubt to sustain his convictions for child molesting and criminal confinement; and

(2) Whether the admission of the victim's father's vouching testimony constituted fundamental error after Luellen argued that the victim's family did not believe the victim.

FACTS AND PROCEDURAL HISTORY

[4] In the summer of 2016, eleven-year-old J.J., her mother, and J.J.'s younger sister were living with J.J.'s older sister, Porche, and Porche's husband, Luellen. J.J. enjoyed a good relationship with Luellen, who would take care of J.J. and her sister while their mother worked the nightshift.

[5] At one point between June 1, 2016, and August 1, 2016, Luellen came up behind J.J. when she was washing the dishes and put his arms around her, holding her too close and pushing up against her, making her uncomfortable.

On multiple occasions after that Luellen would massage J.J.'s back while she was lying on the couch. He would move his hands down to touch her bottom and would touch her "front area." (Transcript Vol. III, p. 185). Luellen would rub J.J.'s body with his hands for minutes.

[6] One evening during the summer of 2016, J.J. was crying because she missed her mother. Luellen sat down on the couch and tried to comfort her. He handed her a tissue to wipe her face. When J.J. went into the kitchen to throw the tissue away, Luellen took her hand and brought her into the laundry room where he started kissing her neck, rubbing her back and "front," while assuring her that he was trying to make her feel better. (Tr. Vol. III, p. 190). When J.J. heard Luellen unbuckle his pants, she tried to run away and scream. Luellen put his hand over her mouth, preventing her from screaming and telling her not to wake anyone. Luellen allowed J.J. to return to the living room, where he gave her a candy bar which she refused.

[7] The next morning, J.J. told her mother what had happened. J.J.'s mother confronted Luellen, who did not confirm or deny the accusations. J.J.'s mother informed J.J.'s biological father, and J.J., J.J.'s mother, and younger sister moved out of Porche's house. Approximately two weeks later, J.J.'s father reported the molestation to the police during his parenting time with J.J. because J.J.'s mother had not yet made the report.

[8] On January 17, 2017, the State filed an Information, charging Luellen with Level 4 child molesting, Level 5 felony criminal confinement, and Level 6

felony sexual battery. On November 15 through November 17, 2021, a jury trial was held. During his opening statement, Luellen informed the jury that J.J.'s mother and older sister "didn't believe her, didn't call the cops." (Tr. Vol. III, p. 41). During cross-examination of J.J.'s father, Luellen inquired whether J.J. had problems with lying in his home. J.J.'s father answered that she did while she was "going through some things" and added "[b]ut she ain't lying now. She's telling the truth." (Tr. Vol. III, p. 162). On redirect, the State sought clarification from J.J.'s father about the circumstances under which J.J. had lied in the past and her demeanor when she disclosed the molestation. After testifying that J.J. was very upset when she told him about the molestation, J.J.'s father explained that he paid attention to his children to know when they were lying and "she was absolutely telling the truth." (Tr. Vol. III, p. 163). Luellen did not object to J.J.'s father's testimony. In closing argument, Luellen again repeatedly stated that J.J.'s mother and sister did not believe her because they did not call the police. At the close of the evidence, the jury returned a guilty verdict of child molesting and criminal confinement but was hung on the sexual battery charge. On January 7, 2022, the trial court imposed concurrent sentences of ten years on the child molesting conviction and five years on the confinement conviction.

[9] Luellen now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

[10] For sufficiency of the evidence challenges, we consider only probative evidence and reasonable inferences that support the judgment of the trier of fact. *Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021). During sufficiency challenges, we will neither reweigh evidence nor judge witness credibility. *Id*. We will affirm the conviction unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. *Id.* Luellen challenges the sufficiency of the State's evidence supporting both of his convictions. We will address each argument in turn.

A. *Child Molesting*

[11] To convict Luellen of child molesting, as a Level 4 felony, the State was required to establish beyond a reasonable doubt that Luellen touched or fondled J.J., who was less than fourteen years old, with the intent to arouse or satisfy his or her sexual desires. *See* I.C. § 35-42-4-3(b). The intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points. *Bass v. State*, 947 N.E.2d 456, 460 (Ind. Ct. App. 2011). An intent to arouse or to satisfy sexual desires may be inferred from evidence that the defendant intentionally touched the child's genitals. *Winters v. State*, 727 N.E.2d 758, 761 (Ind. Ct. App. 2000), *trans. denied*.

[12] Focusing on the fact that the State only offered J.J.'s testimony to satisfy its burden and the lack of physical or forensic evidence, or other witnesses to support J.J.'s claims, Luellen contends that this "minimal evidence" was

insufficient to prove that his "alleged actions were done with the specific attempt to arouse sexual desires." (Appellant's Br. pp. 10, 11).

[13] It is well-established in Indiana's jurisprudence that "[t]he testimony of a sole child witness is sufficient to sustain a conviction for molestation." *Hoglund v. State*, 962 N.E.2d 1230, 1238 (Ind. 2012). In light of Luellen's conviction, it is clear that the jury found J.J. to be a credible witness. J.J. testified that on multiple occasions while she was lying on the couch, Luellen would massage her back, placing his hands underneath her clothing and moving them down to her bottom, touching her "front area." (Tr. Vol. III, p. 185). He would rub her body with his hands and fingers for minutes. Because these touches occurred multiple times and lasted for minutes, a reasonable inference can be made that the touches were not accidental, but rather intentional. As Luellen's hands moved to rub J.J.'s bottom and "front area" under her clothing, it can be further inferred that this was done with the intent to arouse or satisfy sexual desires. *See Bass*, 947 N.E.2d at 460 (To prove an intent to arouse or satisfy sexual desires, it is not necessary to touch the breasts or genitals); *Altes v. State*, 822 N.E.2d 1116, 1121-22 (Ind. Ct. App. 2005) (A child's bottom is close enough to the genital area to be considered an erogenous zone), *trans. denied*. Accordingly, we find that there is sufficient evidence from which a reasonable factfinder could have concluded that Luellen committed the act of child molesting.

B. *Criminal Confinement*

[14] To establish beyond a reasonable doubt that Luellen committed criminal confinement, the State was required to prove that he knowingly or intentionally confined J.J. without her consent. *See* I.C. § 35-42-3-3. To "confine" is statutorily defined as "to substantially interfere with the liberty of a person." I.C. § 35-42-3-1.

[15] In support of his argument that the State failed in its burden of proof, Luellen contends that "[t]he State produced no evidence that [Luellen] confined [J.J.] beyond the alleged act of fondling her," nor did the State present any "direct evidence that [Luellen] restrained J.J.'s liberty" beyond that necessary to commit the crime of child molesting. (Appellant's Br. pp. 11,12). Asserting that Luellen's argument is "not, strictly speaking, a sufficiency argument," as "the genesis of that doctrine shows that it is a double jeopardy argument that addresses whether there can be a separate conviction of confinement in addition to the conviction for the other offense," the State encourages this court to perform a double jeopardy review under the framework set forth in *Waddle v. State*, 151 N.E.3d 227 (Ind. 2020). (Appellee's Br. p. 13). The State misconstrues Luellen's argument. Luellen merely wants this court to apply the established caselaw, which provides that "in order to prove confinement beyond the main crime charged, there must be something more than the act necessary to effectuate the crime." *Cunningham v. State*, 870 N.E.2d 552, 553 (Ind. Ct. App. 2007). In other words, if the confinement is more extensive than necessary to commit the main offense, then conviction for confinement may be

proper. *Williams v. State*, 889 N.E.2d 1274, 1281 (Ind. Ct. App. 2008), *trans. denied*.

[16] The evidence reflects that when J.J. became upset because she missed her mother, Luellen tried to comfort her and handed her a tissue to wipe her face. When J.J. stood up from the couch to throw the tissue away, Luellen "got up, he grabbed [her] hand and just pulled [her] in the kitchen." (Tr. Vol. III, p. 191). "He cut the light off in the kitchen, and [they] just went straight to the laundry room." (Tr. Vol. III, p. 191). Luellen then began kissing and fondling her. When J.J. heard Luellen unbuckle his pants, she tried to scream and run away, but Luellen grabbed her and put his hand over her mouth to prevent her from screaming. By removing J.J. from the living room to the laundry room and then by grabbing her to prevent her from running away and putting his hand over her mouth to prevent her from screaming, Luellen substantially interfered with J.J.'s liberty and kept her in a place where she did not want to be. *See Hopkins v. State*, 747 N.E.2d 598, 606 (Ind. Ct. App. 2001) ("Any amount of force can cause confinement because force, however brief, equals confinement."), *trans. denied; Hatton v. State*, 439 N.E.2d 565, 567-68 (Ind. 1982) (finding sufficient evidence of confinement where the defendant grabbed the victim by the arm as she tried to exit the car). The acts of grabbing her arm and placing his hand over her mouth after he finished kissing and fondling J.J. were more than necessary to commit child molesting and were sufficient to establish the criminal confinement charge. Moreover, "criminal confinement of a child may be proven by the child's uncorroborated testimony alone if the jury finds

that said testimony establishes the guilt of the defendant beyond a reasonable doubt." *Hicks v. State*, 631 N.E.2d 499, 502 (Ind. Ct. App. 1994), *trans. denied*. Clearly, the jury found J.J.'s testimony credible and sufficient to show guilt beyond a reasonable doubt. We will not reweigh that evidence as Luellen requests.

II. *Admission of Father's Vouching Testimony*

[17] Luellen contends that J.J.'s father's testimony, vouching that J.J. was telling the truth, was erroneously admitted by the trial court in violation of Indiana Evidence Rule 704(b). During his cross-examination, J.J.'s father was asked by Luellen whether J.J. had problems with lying, to which father answered that J.J. did when she was "going through some things" and added, "but she ain't lying now. She's telling the truth." (Tr. Vol. III, pp. 154-55). On redirect, when asked about J.J.'s demeanor during her disclosure of the molestation, J.J.'s father bolstered his previous vouching testimony by clarifying that he paid attention to discern when his children were lying and that "she was absolutely telling the truth." (Tr. Vol. III, pp. 162-63).

[18] Pursuant to Indiana Evidence Rule 704(b), "a witness may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; [or] whether a witness has testified truthfully." "The jury, not the witness, is responsible for deciding the ultimate issues in a trial, and opinion testimony concerning guilt invades the province of the jury in determining what weight to place on a witness' testimony." *Williams v. State*,

43 N.E3d 578, 581 (Ind. 2015). In other words, such testimony usurps the jury's "right to determine the law and the facts," and is therefore inadmissible. Ind. Const. art. I, § 19. The Indiana Supreme Court has found that this prohibition against vouching extends to opinions supporting child witness testimony in child molestation cases. *Hoglund*, 962 N.E.2d at 1237.

[19] Although the State concedes that father's testimony amounted to impermissible vouching that his daughter was being truthful, Luellen did not request the testimony to be stricken nor did he object to any of the statements made in front of the jury. Therefore, Luellen has waived any claim that the vouching testimony was improperly admitted. *See, e.g., Orr v. State*, 968 N.E.2d 858, 860 (Ind. Ct. App. 2012) (A defendant must object to an alleged error to preserve the issue for appeal). Nevertheless, Luellen tries to avoid the consequences of waiver by invoking the doctrine of fundamental error. "The fundamental error exception is extremely narrow[ ] and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Mise v. State*, 142 N.E.3d 1079, 1085 (Ind. Ct. App. 2020), *trans. denied*. "Harm is not shown by the fact that the defendant was ultimately convicted; rather harm is found when error is so prejudicial as to make a fair trial impossible." *Hoglund*, 962 N.E.2d at 1239. The fundamental error exception is "available only in egregious circumstances" and "is meant to permit appellate courts a means to correct the most egregious and blatant trial errors that otherwise would have been procedurally barred, not to provide a

second bite at the apple for defense counsel who ignorantly, carelessly, or strategically fail to preserve an error." *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014), *reh'g denied*.

[20] While we agree with the State that father's challenged testimony amounted to impermissible vouching for J.J.'s truthfulness, it was nevertheless admissible because Luellen 'opened the door' to such testimony when he argued that J.J.'s own family did not believe her claims of molestation. "Opening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence otherwise would have been inadmissible." *Sampson v. State*, 38 N.E.3d 985, 992 n.4 (Ind. 2015). Evidence which opens the door "must leave the trier of fact with a false or misleading impression of the facts related." *Cameron v. State*, 22 N.E.3d 588, 593 (Ind. Ct. App. 2014). When that happens, the State may introduce otherwise inadmissible evidence if it "is a fair response to evidence elicited by the defendant." *Id*.

[21] Here, Luellen opened the door to father's testimony by declaring, in his opening statement, that J.J.'s mother and older sister, who knew her well and knew her "credibility and honesty," "didn't believe her, didn't call the cops." (Tr. Vol. III, pp. 41-42, 43). In closing argument, Luellen again emphasized this claim by repeatedly asserting that the jury should not believe J.J. because her own mother and sister did not believe her and her father said that she lies. Thus, Luellen's opening statement necessarily left the jury with the impression

that J.J.'s own family did not believe the allegations of child molesting and, at that point, the State was entitled to elicit testimony of family members that they did believe J.J.

[22] Furthermore, J.J. testified consistently and unequivocally that Luellen had touched and fondled her bottom and genital area. She was subjected to an extensive cross-examination and did not waiver in her testimony. Given the substantial evidence of guilt and the instruction informing the jury that it was the judge of the credibility of the witnesses, the admission of the brief vouching testimony did not make it impossible for Luellen to receive a fair trial. *See Hoglund*, 962 N.E.2d at 1240 (holding that the erroneous admission of vouching evidence in a child molesting case did not constitute fundamental error because the State presented substantial evidence of guilt through the victim's testimony). Accordingly, we conclude that the trial court did not commit fundamental error by failing to exclude father's vouching testimony.

CONCLUSION

[23] Based on the foregoing, we hold that the State presented sufficient evidence beyond a reasonable doubt to sustain Luellen's convictions for child molesting and criminal confinement. In addition, we hold that no fundamental error occurred when the trial court admitted father's vouching testimony.

[24] Affirmed.

[25] May, J. and Tavitas, J. concur