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IN THE  
COURT OF APPEALS OF INDIANA

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Fredrick Austin,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff*

December 28, 2022  
Court of Appeals Case No.  
22A-CR-1240  
  
Appeal from the  
Marion Superior Court  
  
The Honorable  
James Osborn, Judge  
  
Trial Court Cause No.  
49D21-2101-F1-1903

**Vaidik, Judge.**

[1] Fredrick Austin appeals his convictions on two counts of Level 1 felony child molesting, arguing the evidence is insufficient to support them. We agree. To convict Austin of Level 1 felony child molesting as charged in this case, the State was required to prove beyond a reasonable doubt that he engaged in “other sexual conduct” with H.A., a child under fourteen. Ind. Code § 35-42-4-

3(a)(1); Appellant’s App. Vol. II pp. 35-36. As relevant here, “other sexual conduct” is defined as “an act involving . . . the penetration of the sex organ or anus of a person by an object.” I.C. § 35-31.5-2-221.5(2). The only evidence the State points to in support of the convictions is H.A.’s testimony that Austin used his “whole hand” to rub “up and down” on the “outside” of her “private part” and that it made her feel “tingly.” Tr. Vol. II pp. 181-83, 188-91. While “the slightest penetration of the sex organ, including penetration of the external genitalia, is sufficient” to prove “other sexual conduct,” *Boggs v. State*, 104 N.E.3d 1287, 1289 (Ind. 2018), the evidence here doesn’t establish even “slight” penetration.

[2] The State relies heavily on *Hale v. State*, 128 N.E.3d 456 (Ind. Ct. App. 2019), *trans. denied*, but that case is distinguishable. In *Hale*, we affirmed Level 1 felony child-molesting convictions where the victim said the defendant touched her vagina not just with his hand but with individual fingers, that it was like he was “trying to find something,” that he was “pressing down really hard,” and that it “hurt.” *Id.* at 461-63. There is no such evidence in this case.

[3] We therefore reverse the Level 1 felony convictions. As requested by Austin, we remand this matter to the trial court with instructions to replace the two Level 1

felony convictions with two convictions for Level 4 felony child molesting (“fondling or touching”) and to re-sentence Austin accordingly.<sup>1</sup>

[4] Reversed and remanded.

Riley, J., and Bailey, J., concur.

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<sup>1</sup> At trial, the court granted the State’s request to instruct the jury on the included offense of attempted child molesting, which would also be a Level 1 felony. *See* I.C. § 35-41-5-1(a). On appeal, the State doesn’t argue that the Level 1 felony child-molesting convictions should be or could be replaced with Level 1 felony attempted child-molesting convictions. In any event, for the same reason the evidence doesn’t establish penetration, it doesn’t establish attempted penetration.