

# MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

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Tony R. Noffsinger,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

March 20, 2023

Court of Appeals Case No.  
22A-CR-2092

Appeal from the Grant Circuit  
Court

The Honorable Mark E. Spitzer,  
Judge

Trial Court Cause No.  
27C01-1806-F1-2

**Memorandum Decision by Judge Riley.**  
Chief Judge Altice and Judge Pyle concur.

**Riley, Judge.**

## STATEMENT OF THE CASE

- [1] Appellant-Defendant, Tony Noffsinger (Noffsinger), appeals his convictions for two Counts of child molesting, Level 1 felonies, Ind. Code § 35-42-4-3(a); and sexual misconduct with a minor, a Level 5 felony, I.C. § 35-42-4-9(a).
- [2] We affirm in part and reverse in part.

## ISSUES

- [3] Noffsinger presents this court with two issues, which we restate as:
- (1) Whether the State proved beyond a reasonable doubt that he committed two acts of Level 1 felony child molesting in 2018 before his victim turned the age of fourteen; and
  - (2) Whether the State proved beyond a reasonable doubt that he committed sexual misconduct with a minor before the putative victim turned the age of sixteen.

## FACTS AND PROCEDURAL HISTORY

- [4] Noffsinger is the cousin of Father, who is married to Mother. Father and Mother have a child, A.B., born October 29, 2004. Mother also has a child from a previous relationship, V.G., born February 12, 2001. In 2014, Father and Mother were living with A.B. and V.G. in a home located in the 3600 block of South Nebraska Street in Marion, Indiana. Beginning in January 2014, Father and Mother allowed Noffsinger, who would turn forty that year, to move into their home because he had no other place to stay. Noffsinger

occupied the only bedroom on the ground floor of the home, and he would frequently spend time in his room with A.B. and V.G. with the door closed. Noffsinger's bedroom door could be locked from the outside and from the inside.

[5] After he moved into the home, Noffsinger began touching A.B. inappropriately, such as touching her buttocks when the two were alone together. During the summer of 2014, Noffsinger found out that A.B. liked a boy. Noffsinger offered to teach A.B. how to kiss the boy “correctly” and kissed A.B. on the mouth. (Transcript Vol. II, p. 181). In the fall of 2014 or in the early months of 2015, Noffsinger had A.B. perform oral sex on him for the first time. From that occasion when A.B. was either nine or ten years old until she was the age of thirteen in 2018, Noffsinger had A.B. perform oral sex on him on up to thirty occasions. During the same time period, he performed oral sex on A.B. on approximately ten occasions. These offenses took place in Noffsinger's bedroom, in the bedroom A.B. shared with V.G., and, on one occasion, at a home in the neighborhood A.B. visited with Noffsinger. After he ejaculated, Noffsinger would then tell A.B., “good job[.]” (Tr. Vol. II, p. 194). Noffsinger also told A.B. not to tell anyone what he was doing, or he would kill her.

[6] When A.B. was in the fifth or sixth grade, Noffsinger drove A.B. to the local library to check out a book so that she could study for an impending test on state capitols. In the parking lot of the library, Noffsinger had A.B. raise her shirt and bra so that he could touch her chest with his hands. Inside the library, Noffsinger put his hand in A.B.'s pants and touched her vagina. Noffsinger

then left the library with A.B. and drove her to a wooded area, where he had A.B. lower her pants and he inserted his penis into her anus. This caused A.B. substantial pain. A.B. told Noffsinger to stop, but he did not.

[7] On May 28, 2018, Father, Mother, A.B., and V.G. attended a family function without Noffsinger. At the function, A.B. disclosed Noffsinger's molestation to a relative, who told Mother. Mother immediately contacted law enforcement. When Father learned of A.B.'s disclosures, he left the family gathering and attempted to return home to confront Noffsinger but was prevented from doing so by law enforcement.

[8] On May 31, 2018, A.B. and V.G. were forensically interviewed. V.G. reported that on one occasion, Noffsinger had called her into his bedroom to check her for bed bugs. Noffsinger directed V.G., who is intellectually disabled, to pull up her shirt and bra and to pull down her pants and underwear, after which he touched her chest and vagina with his hand. Along with acts consistent with fondling, oral sex, and anal sex, A.B. reported that Noffsinger had attempted to place his penis in her vagina. On May 31, 2018, a search warrant was executed on Noffsinger's bedroom and the rest of the home on Nebraska Street. On June 4, 2018, Noffsinger turned himself in to law enforcement, and after receiving his *Miranda* advisements, spoke with an investigator. Noffsinger acknowledged that he would be facing molestation allegations. During the interview, Noffsinger stated that he had the habit of cleaning up his penis with tissue after sex and placing it in the trash can. When the interviewer asked Noffsinger how A.B. would know about that habit, Noffsinger ended the interview.

[9] On June 7, 2018, the State filed an Information, charging Noffsinger with seventeen offenses as follows: Counts I and II alleged oral sex with A.B. in 2014 when she was under the age of 12; Counts III and IV alleged oral sex with A.B. in 2015 when she was under 12; Counts V and VI alleged oral sex with A.B. in 2016 when she was under 12; Counts VII and VIII alleged oral sex with A.B. in 2017 when she was under the age of 14; Counts IX and X alleged oral sex with A.B. in 2018 when she was under 14; Count XI alleged that Noffsinger performed oral sex on A.B. between 2014 and 2018 when she was under 14; Count XII (amended) alleged that Noffsinger performed anal sex on A.B. between 2014 and 2018 when she was under 14; Counts XIII and XIV alleged that Noffsinger subjected A.B. to sexual intercourse between 2014 and 2018 when she was under 14; Count XV alleged the intimidation of A.B.; Count XVI alleged sexual misconduct with a minor for the touching and fondling of V.G. between 2014 and February 2017 when she was under the age of 16; and Count XVII alleged the battery of V.G., who was a disabled person in Noffsinger's care.

[10] On June 6, 2022, the trial court convened Noffsinger's three-day jury trial. A.B. testified regarding the details of the offenses, which she affirmed "started when [she was] approximately ten" and "continue[d] until [she was] thirteen years old." (Tr. Vol. II, p. 204). V.G. could not remember when the family had bedbugs or when Noffsinger had touched her under the guise of checking her for bedbugs. On cross-examination, V.G. testified that she was "either sixteen or seventeen" when Noffsinger inappropriately touched her. (Tr. Vol. II, p.

171). According to Father’s testimony, the family’s problem with bedbugs continued throughout Noffsinger’s stay at their home. Mother testified that, after reporting A.B.’s disclosures to law enforcement, she was told to keep A.B. away from the house until Noffsinger was apprehended and that Noffsinger moved out of their house “when they picked him up in June . . . around the beginning of June of 2018[.]” (Tr. Vol. II, p. 120).

[11] The jury found Noffsinger not-guilty of Counts V and VI which alleged oral sex in 2016 when A.B. was under twelve, and it found him not-guilty of subjecting A.B. to sexual intercourse as alleged in Count XIV. The jury found Noffsinger guilty of the remaining charges, namely eleven Counts of Level 1 felony child molesting of A.B., Level 6 felony intimidation of A.B., Level 5 felony sexual misconduct with V.G., and the Level 6 felony battery of V.G. On July 22, 2022, the trial court held Noffsinger’s sentencing hearing and imposed sentences of forty years each on Counts I and II and on Counts VII through XIII; sentences of fifty years, with two years suspended, on each of Counts III and IV; sentences of two and one-half years each on Counts XV and XVII; and to six years on Count XVI. The trial court ordered Noffsinger to serve his sentences for Counts I–IV, VII–XIII, and XV concurrently and to serve his sentences on Counts XVI–XVII concurrently to each other but consecutively to the other Counts, for an aggregate sentence of fifty-six years, with two years suspended.

[12] Noffsinger now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### I. *Standard of Review*

[13] Noffsinger challenges the evidence supporting three of his convictions. Our standard of review of such matters is well-established: “[W]e 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). We neither reweigh the evidence nor judge the credibility of witnesses. *Id.* Accordingly, we affirm the conviction “unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Id.*

### II. *Counts IX and X*

[14] In Counts IX and X of the Information, the State charged Noffsinger with two instances of Level 1 felony child molesting for “an act involving his penis and the mouth of A.B.”, “a child under 14 years of age[.]” (Appellant’s App. Vol. II, p. 28). Noffsinger’s challenge to these convictions is not that the State failed to prove that he committed those offenses in 2018, but that the State failed to prove beyond a reasonable doubt that he committed the offenses in 2018 before A.B. turned fourteen years old on October 29, 2018.

[15] Where age is an element of a criminal offense, “circumstantial testimonial evidence can be sufficient to prove age.” *Brown v. State*, 149 N.E.3d 322, 323 (Ind. Ct. App. 2020) (quoting *Staton v. State*, 853 N.E.2d 470, 474 (Ind. 2006)), *trans. denied*. “In addition, a jury may use its common sense” in determining age for purposes of establishing a criminal offense. *Id.* The Indiana Supreme

Court has observed that, as a general matter, “time is not of the essence in the crime of child molesting.” *Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992). In *Barger*, the issue was whether the State proved that the victim was over the age of twelve, where that was the age that distinguished the Class D felony from the Class C felony offense and the State had only shown that the offense was committed around the time of the victim’s twelfth birthday. *Id.* at 1306. The *Barger* court observed that “[i]t is difficult for children to remember specific dates, particularly when the incident is not immediately reported as is often the situation in child molesting cases. The exact date becomes important only in limited circumstances, including where the victim’s age at the time of the offense falls at or near the dividing line between classes of felonies.” *Id.* at 1307.

[16] Here, A.B. affirmed at trial that the offenses she described in her testimony occurred between her tenth and thirteen birthdays. This evidence alone was sufficient to prove her age at the time of the challenged convictions. *See Taylor v. State*, 614 N.E.2d 944, 948 (Ind. Ct. App. 1993) (observing that a conviction may be sustained based only on the uncorroborated testimony of the victim) *trans. denied*. In addition, the evidence showed that A.B. disclosed the offenses on May 28, 2018, almost five months before her fourteenth birthday. Noffsinger moved out of the home he shared with A.B. in early June 2018, Mother had been instructed to keep A.B. away from the home until Noffsinger was apprehended, and, after A.B.’s disclosures, Father did not appear to be inclined to allow Noffsinger to have further access to A.B. The reasonable,



common-sense inference to be made from this additional evidence is that Noffsinger had no access to A.B. after June 2018 and that he had committed the offenses alleged in Counts IX and X before A.B. turned fourteen years old on October 29, 2018. Given the span of time between A.B.'s disclosures and her birthday, the concerns discussed in *Barger* are not implicated here, and, contrary to Noffsinger's assertions, the evidence supporting these convictions is unlike the evidence offered by the State to support Counts V and VI, charges of which the jury acquitted Noffsinger. We conclude that the State proved the challenged offenses beyond a reasonable doubt.

### III. *Count XVI*

[17] The State charged Noffsinger in Court XVI with sexual misconduct with a minor, alleging that, "on or about 2014 to February 11, 2017" he "did perform fondling or touching of [V.G.], a child under the age of 16, with the intent to arouse or satisfy the sexual desires of himself or the child[.]" (Appellant's App. Vol. II, p. 30). Noffsinger argues that the State failed to prove that he committed that offense before V.G. turned sixteen years old on February 12, 2017.

[18] At trial, V.G. testified that she was sixteen or seventeen years old when Noffsinger allegedly touched her inappropriately under the guise of checking her for bedbugs, and V.G. did not provide any other contradictory testimony on her age. In addition, there is no circumstantial evidence present in the record from which the jury could have reasonably concluded that the offense took place before February 12, 2017, as Father's testimony established that their

home had been infested with bedbugs before Noffsinger moved in and that the infestation continued after Noffsinger moved out, which occurred in June 2018.

[19] The State concedes, and we agree, that the evidence was insufficient to sustain Noffsinger's conviction on Court XVI. Therefore, we reverse that conviction. Given our resolution of this issue, we do not address Noffsinger's argument that the State failed to prove his intent when he touched V.G. Noffsinger does not argue that remand is necessary for resentencing, nor does he contest the appropriateness of his sentence.

## **CONCLUSION**

[20] Based on the foregoing, we conclude that the State proved beyond a reasonable doubt that Noffsinger committed the two challenged acts of Level 1 felony child molesting against A.B. before her fourteenth birthday. However, we conclude that the State failed to establish V.G.'s age for purposes of Noffsinger's Level 5 felony sexual misconduct with a minor conviction.

[21] Affirmed in part and reversed in part.

[22] Altice, C. J. and Pyle, J. concur