MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael Martin,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 14, 2022

Court of Appeals Case No. 21A-CR-827

Appeal from the Marion Superior Court

The Honorable James K. Snyder, Magistrate

Trial Court Cause No. 49D28-1909-F5-37412

Brown, Judge.

[1] Michael Martin appeals his convictions for attempted sexual misconduct with a minor as a level 5 felony and battery as a class B misdemeanor. He asserts the evidence is insufficient to sustain his felony conviction, the battery charge was barred by the statute of limitations, the trial court abused its discretion in sentencing him, and his conviction for attempted sexual misconduct with a minor does not require him to register as a sex offender. We affirm in part, reverse in part, and remand.

Facts and Procedural History

[2] J.H. was born on February 12, 2003. On April 14, 2017, he was fourteen years old when he moved to Indianapolis with his mother, father, and brother. Martin, who was born in April 1985 and was J.H.'s cousin, helped the family move. On the day of the move, J.H. went to his room on the top floor and fell asleep. He awoke when Martin "brushed up against" him. Transcript Volume II at 26. J.H. "was laying down on [his] left side and [Martin] tried to . . . brush up against . . . with his penis," and "tried to maybe touch, like brush up against . . . [J.H.'s] butt," and J.H. felt Martin's "chin on . . . the back of [his] neck." *Id.* at 27. J.H. told Martin "move," "[g]et off of me," and "[j]ust get away," Martin "tried to touch [J.H.'s] penis" and "just kept putting his hand in [J.H.'s] area," and J.H. "told [Martin] stop . . . just get away from me please." *Id.* Martin looked in J.H.'s eyes and said, "[J.H.], I like you," and J.H. responded, "[y]ou're sick" and "get out of my room." *Id.* Martin left the room, but when J.H. awoke the next morning, Martin was in the room on the floor. J.H. told his parents about the incident in 2019.

[3] On September 24, 2019, the State charged Martin with Count I, attempted sexual misconduct with a minor as a level 5 felony, and Count II, battery as a class B misdemeanor. On March 2, 2021, the court held a bench trial. J.H. testified to the foregoing. When asked if Martin actually touched his penis, J.H. testified that Martin "just tried to" and "his hand might have touched, but like [J.H.] just moved it." *Id.* at 28. The court found Martin guilty of both counts. The presentence investigation report included the following written statement from Martin:

> I am most definitely innocent . . . . I believe my little cousin is struggling with his sexuality and is unsure how to express himself to his mother . . . . In this situation, it would be easier for him to lie and take the spotlight off himself . . . . I have been molested has [sic] a child by one of my family members and nothing happened to my cousin. I understand my aunt wants to protect her child and I would do the same. But this situation did not occur, and she is using it to shield the fact that her son may be homosexual.

Appellant's Appendix Volume II at 127.

[4] On April 13, 2021, the court held a sentencing hearing. The court found Martin's military service, that he was a victim of sexual abuse, his employment and/or enrollment in college classes in which he was excelling, and his performance while on Marion County Community Corrections to be mitigating circumstances. It found that Martin's "position of trust, that care, custody, control or trust" to be a substantial aggravator and his prior juvenile and criminal history to be "somewhat of an aggravator." Transcript Volume II at

177-178. It also found the trauma to J.H. to be an aggravating circumstance.[1] The court found the aggravating and mitigating factors were in balance and stated:

> [Y]ou are able to certainly maintain your innocence, but what I see here goes above that and you are blaming [J.H.'s mother]. You are blaming [J.H.'s Mother]. That concerns me. It not only concerns me for that, but your potential to be rehabilitated after that. So, as a direct result of finding this position of trust significant and the denials that I see and the blaming that I see, I believe that a three year sentence as to Count I, a three year sentence is appropriate with three years executed at the Indiana Department of Correction. As to Count II, I find a 180 day sentence, 180 days executed, Marion County Jail, that will run concurrent, concurrent or together with Count I.

Id. at 179. The court also ordered Martin to register for ten years after finding him to be a sex or violent offender.

Discussion

I.

[5] Martin contends the evidence is insufficient to sustain his conviction for attempted sexual misconduct with a minor as a level 5 felony. When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the

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[1] J.H.'s mother testified at the sentencing hearing that J.H. "became very dark and withdrawn after [Martin] violated him," and the "experience has been so horrible that [J.H.] spoke about not wanting to be here on Earth any longer . . . ." Transcript Volume II at 159-160. The court found the effect on J.H. went "above what is necessary as far as the elements of the offense and certainly goes above any sort of typical trauma, as a result of [J.H.'s] suicidal ideations and having to be admitted for those." *Id.* at 178.

verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* When confronted with conflicting evidence, we must consider it most favorably to the trial court's ruling. *Id.* We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.* at 147. The uncorroborated testimony of one witness is sufficient to sustain a conviction even if the witness is the victim. *Ferrell v. State*, 565 N.E.2d 1070, 1072-1073 (Ind. 1991).

[6] The offense of sexual misconduct with a minor is governed by Ind. Code § 35-42-4-9(b)(1), which provided at the time of the offense that "[a] person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits sexual misconduct with a minor" and "the offense is . . . a Level 5 felony if it is committed by a person at least twenty-one (21) years of age . . . ."[2] Ind. Code § 35-41-5-1(a) provides that "[a] person attempts to commit a crime when, acting

[2] Subsequently amended by Pub. L. No. 144-2018, § 28 (eff. July 1, 2018); Pub. L. No. 40-2019, § 13 (eff. July 1, 2019).

with the culpability required for commission of the crime, the person engages in conduct that constitutes a substantial step toward commission of the crime."

[7] The charging information alleged:

> On or about April 17, 2017, [Martin], being at least 21 years of age, did attempt to commit the crime of Sexual Misconduct With A Minor, that is, to perform fondling or touching with J.H., a child at least fourteen (14) years of age but less than sixteen (16) years of age, to-wit, fourteen (14) years old, with the intent to arouse or satisfy the sexual desires of [Martin] or J.H., by engaging in conduct that constitutes a substantial step toward the commission of said crime of Sexual Misconduct With A Minor, that is, [Martin] reached toward J.H.'s penis . . . .

Appellant's Appendix Volume II at 30.

[8] J.H. testified that, while he was in his room, Martin "tried to . . . brush up against . . . with his penis" and he "tried to maybe touch . . . brush up against . . . my butt." Transcript Volume II at 27. J.H. testified: "I just told him . . . move. Get off of me. Just get away from me." *Id.* When asked if he felt Martin touch any other part of his body, J.H. testified "no, but he tried to touch my penis." *Id.* When asked to say more about that, J.H. testified "[h]e kept putting his hand in my area. I told him stop . . . just get away from me please." *Id.* He testified "[h]e looked at me dead in my eyes and said, '[J.H.], I like you.'" *Id.* When asked if he felt Martin "anywhere on your body, other than your butt area," J.H. replied "[h]is chin on my neck, the back of my neck." *Id.*

[9] Based on the record and J.H.'s testimony, we conclude that the State presented evidence of a probative nature from which a reasonable trier of fact could have

found that Martin committed attempted sexual misconduct with a minor as a level 5 felony.

II.

[10] Martin argues that his conviction for battery as a class B misdemeanor was barred by the applicable two-year statute of limitations. The State agrees. Ind. Code § 35-41-4-2(a)(2) provides that a prosecution is barred for an offense unless it is commenced "within two (2) years after the commission of the offense, in the case of a misdemeanor." Statute of limitations claims "may be presented in a criminal appeal without being raised at trial . . . ." *Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008). Here, the battery offense occurred on April 14, 2017, and the State filed the charging information against Martin over two years later on September 24, 2019. Based on the record, we reverse Martin's conviction for battery as a class B misdemeanor.

III.

[11] The next issue is whether the trial court abused its discretion in sentencing Martin. We review the sentence for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.* A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence – including

a finding of aggravating and mitigating factors if any – but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." *Id.* at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id.* at 491. The relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. *Id.*

[12] Martin argues the court abused its discretion in finding as a significant aggravator that he allegedly tried to blame J.H.'s mother for his conviction as it was "part and parcel of his maintaining of his innocence." Appellant's Brief at 12-13.

[13] The Indiana Supreme Court has observed that it is improper to rely on a defendant's maintaining his innocence as an aggravator. *Angleton v. State*, 686 N.E.2d 803, 816 (Ind. 1997), *reh'g denied*. Here, the trial court stated:

> *[Y]ou are able to certainly maintain your innocence, but what I see here goes above that* and you are blaming [J.H.'s mother]. You are blaming [J.H.'s mother]. That concerns me. It not only concerns me for that, but your potential to be rehabilitated after that.

Transcript Volume II at 179 (emphasis added). Based upon the record, we cannot say that the trial court improperly relied upon Martin's maintaining his

innocence as an aggravating circumstance or abused its discretion in sentencing him.

IV.

[14] The next issue is whether the trial court erred in ordering Martin to register as a sex offender. Martin argues that Ind. Code § 11-8-8-5(a) contains a comprehensive list of sex or violent offenders including people convicted of sexual misconduct with a minor but asserts that the statute does not include convictions for attempted crimes.

[15] At the time of his offense in April 2017, Ind. Code § 11-8-8-19(a)(1) provided that "a sex or violent offender is required to register under this chapter until the expiration of ten (10) years after the date the sex or violent offender . . . is released from a penal facility (as defined in IC 35-31.5-2-232) . . . for the sex or violent offense requiring registration, whichever occurs last."[3] At the time of his offense, Ind. Code § 11-8-8-5(a) provided that "'sex or violent offender' means a person convicted of any of the following offenses . . . (8) Sexual misconduct with a minor (IC 35-42-4-9) as a . . . Level 5 felony (for a crime committed after June 30, 2014) . . . (22) An attempt or conspiracy to commit a crime listed in this subsection."[4]

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[3] Subsequently amended by Pub. L. No. 40-2019, § 1 (eff. July 1, 2019).

[4] Subsequently amended by Pub. L. No. 144-2018, § 4 (eff. July 1, 2018); Pub. L. No. 142-2020, § 13 (eff. July 1, 2020).

[16] In 2020, the legislature adopted Pub. L. No. 142-2020, which became effective July 1, 2020. Pub. L. No. 142-2020, § 2, added Ind. Code § 1-1-2-4, which is found at the beginning of the Indiana Code under the broadly applicable Ind. Code Chapter 1-1-2, which is titled "Laws Governing the State." Ind. Code § 1-1-2-4 provides:

> (a) As used in this section, "reference to a conviction for an Indiana criminal offense" means both a specific reference to a conviction for a criminal offense in Indiana (with or without an Indiana Code citation reference) and a general reference to a conviction for a class or type of criminal offense, such as:
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> (1) a felony;
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> (2) a misdemeanor;
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> (3) a sex offense;
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> (4) a violent crime;
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> (5) a crime of domestic violence;
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> (6) a crime of dishonesty;
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> (7) fraud;
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> (8) a crime resulting in a specified injury or committed against a specified victim; or
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> (9) a crime under IC 35-42 or IC 9-30-5 or under any other statute describing one (1) or more criminal offenses.
>
> (b) Except as provided in subsection (c), *a reference to a conviction for an Indiana criminal offense appearing within the Indiana Code also includes a conviction for any of the following*:
>
> (1) *An attempt to commit the offense*, unless the offense is murder (IC 35-42-1-1).

> (2) A conspiracy to commit the offense.
>
> (3) A substantially similar offense committed in another jurisdiction, including an attempt or conspiracy to commit the offense, even if the reference to the conviction for the Indiana criminal offense specifically refers to an "Indiana conviction" or a conviction "in Indiana" or under "Indiana law" or "laws of this state".
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> (c) A reference to a conviction for an Indiana criminal offense appearing within the Indiana Code does not include an offense described in subsection (b)(1) through (b)(3) if:
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> (1) the reference expressly excludes an offense described in subsection (b)(1) through (b)(3); or
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> (2) with respect to an offense described in subsection (b)(3), the reference imposes an additional qualifier on the offense committed in another jurisdiction.
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> (d) If there is a conflict between a provision in this section and another provision of the Indiana Code, this section controls.

(Emphases added).

[17] Pub. L. No. 142-2020, § 13, amended Ind. Code § 11-8-8-5 to delete the reference to "[a]n attempt or conspiracy to commit a crime listed in this subsection" from the statute, but the statute still provides that "'sex or violent offender' means a person convicted of any of the following offenses . . . (8) Sexual misconduct with a minor (IC 35-42-4-9) as a . . . Level 5 felony (for a crime committed after June 30, 2014) . . . ."

[18] In light of Ind. Code § 1-1-2-4, which provides that "a reference to a conviction for an Indiana criminal offense appearing within the Indiana Code also includes

a conviction for . . . [a]n attempt to commit the offense," and Ind. Code 11-8-8-5, which provides that "'sex or violent offender' means a person convicted of any of the following offenses . . . (8) Sexual misconduct with a minor (IC 35-42-4-9) as a . . . Level 5 felony (for a crime committed after June 30, 2014)," we conclude that the trial court did not err in ordering him to register as a sex offender.

[19] For the foregoing reasons, we affirm Martin's conviction and sentence for Count I and the court's order that he register as a sex offender, reverse his conviction for Count II, and remand to vacate the judgment of conviction under Count II.

[20] Affirmed in part, reversed in part, and remanded.

May, J., and Pyle, J., concur.