MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dominique Hawkins,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 22, 2021

Court of Appeals Case No. 20A-CR-1885

Appeal from the Marion Superior Court

The Honorable Angela D. Davis, Judge

Trial Court Cause No. 49G16-2005-F6-16106

Mathias, Judge.

[1] Dominique Hawkins was convicted in Marion Superior Court of Level 6 felony domestic battery in the presence of a child. Hawkins appeals, challenging the

sufficiency of the evidence supporting his conviction. On the unique facts of this case, we conclude the evidence presented at trial does not permit an inference beyond a reasonable doubt that Hawkins was at least eighteen years old at the time of the offense, a required element of the charged crime.

[2] We thus reverse and remand.

Facts and Procedural History

[3] Hawkins and K.H. began dating in summer 2017 and were married two years later. In May 2020, the couple lived together in a two-bedroom apartment with their two children: a two-year-old daughter and a three-month-old son. On Saturday, May 13, Hawkins returned home from work at 11:15 p.m. Hawkins and K.H. were not speaking to each other because they had argued earlier that day. After the couple ate together in the living room, they "started to discuss the issue" that prompted the earlier argument. Tr. p. 32. Their son was "asleep . . . in his swing" nearby, and their daughter was awake in her bedroom "just doing her own thing on her tablet." *Id.* at 8–9.

[4] The discussion soon turned physical, and Hawkins and K.H. moved the argument into their bedroom. The quarrel continued to escalate: the two shoved each other; K.H. bit Hawkins; and Hawkins hit K.H. "around five" times in her right ear. *Id.* at 10. They soon realized K.H. was bleeding, which scared them both, and the fight stopped. K.H. called 911, and Hawkins cleaned blood off of the bedroom wall while they waited for police to arrive.

[5] Officer Charles Kingery arrived first and came into contact with K.H., who was holding the couple's three-month-old son while standing outside the apartment's front door. She was scared and crying, had blood all over her shirt, and was bleeding from her right ear. Officer Kingery saw Hawkins inside the apartment, but it was the second responding officer who spoke predominantly with Hawkins. The officers placed him under arrest.

[6] The State charged Hawkins with two counts of domestic battery, one as a Level 6 felony and one as a Class A misdemeanor. The former alleged that "Hawkins, being at least eighteen (18) years of age, did knowingly touch [K.H.] . . . in a rude, insolent or angry manner and [] Hawkins committed said offense in the presence of a child less than 16 years of age, knowing that the child was present and might be able to see or hear the offense." Appellant's Conf. App. p. 16. And the latter alleged that "Hawkins did knowingly touch [K.H.], a family or household member, in a rude, insolent or angry manner." *Id.*

[7] The trial court conducted a bench trial over two days in fall 2020. At the conclusion of the trial, the court found Hawkins guilty of the Level 6 felony and vacated the misdemeanor charge because "it's the same offense." Tr. pp. 39–40. The court then imposed a sentence of 545 days, with all but time served suspended to probation. Hawkins now appeals.

Discussion and Decision

[8] Hawkins argues that the evidence is insufficient to support his conviction for Level 6 felony domestic battery in the presence of a minor. To convict Hawkins

of the offense, the State was required to establish the following elements: (1) Hawkins; (2) touched; (3) a family or household member; (4) in a rude, insolent, or angry manner; (5) the touching was in the physical presence of a child less than sixteen years old; (6) Hawkins knew a child was present and might be able to see or hear the offense; and (7) Hawkins was at least eighteen years old at the time of the offense. Ind Code § 35-42-2-1.3(b)(2).[1] Though Hawkins challenges the sufficiency of the evidence on multiple grounds, we find his argument on the last element dispositive: whether the State failed to establish that Hawkins was at least eighteen years old at the time of the offense.

[9] It is a fundamental principle of criminal law that the State has an obligation to prove beyond a reasonable doubt every fact necessary to constitute the charged crime. *See In re Winship*, 397 U.S. 358, 377–78 (1970); *Staton v. State*, 853 N.E.2d 470, 473–74 (Ind. 2006); *see also* I.C. § 35-41-4-1(a). So, when the General Assembly includes the defendant's age as an element of a crime, as is the case here, the State must prove that element beyond a reasonable doubt. *Staton*, 853 N.E.2d at 473–74 (collecting cases). A standard our supreme court has described as a "substantial burden of proof" that impresses upon the fact-finder "the need to reach a subjective state of near certitude" of the defendant's guilt. *Dobbins v. State*, 721 N.E.2d 867, 875 (Ind. 1999) (cleaned up).

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[1] Notably, the State was not required to establish the latter three elements to support a conviction for domestic battery as a Class A misdemeanor. Hawkins does not claim the evidence was insufficient to support a conviction for that offense. *See* Appellant's Br. at 8, 15, 18, 21.

[10] In deciding whether the State has met its burden on each element, the fact-finder must consider only the evidence properly admitted during trial. *See, e.g., Maddix v. State*, 250 Ind. 261, 267, 235 N.E.2d 475, 478 (1968). And when the trier of fact concludes the State has met its burden, we will affirm if each element of the crime is supported by substantial probative evidence from which a reasonable fact-finder could find the defendant guilty beyond a reasonable doubt. *See, e.g., Wright v. State,* 828 N.E.2d 904, 906 (Ind. 2018). When making this determination, we do not reweigh evidence or assess witness credibility; rather, we consider only the evidence most favorable to the judgment and the reasonable inferences to be drawn from that evidence. *Staton*, 853 N.E.2d at 474. At the same time, it is "our duty to examine the evidence closely." *Woods v. State*, 274 Ind. 624, 629, 413 N.E.2d 572, 575 (1980). Thus, if the inference drawn by the fact-finder rests "upon speculation or conjecture, it cannot be drawn beyond a reasonable doubt, and we are required to set it aside." *T.H. v. State,* 92 N.E.3d 624, 626 (Ind. 2018) (quoting *Shutt v. State*, 267 Ind. 110, 114, 367 N.E.2d 1376, 1378 (1977)) (per curiam).

[11] At trial, the State did not produce any direct evidence of Hawkins's age. However, the State argues that Hawkins's "appearance and surrounding circumstances" established that he was at least eighteen years old at the time of the offense. Appellee's Br. at 7. On these unique facts and circumstances, we disagree. To explain why, we briefly survey Indiana caselaw addressing the State's burden to establish age when it is an element of a charged offense.

A. A defendant's age can be established through testimonial evidence or decisive age-related circumstantial evidence.

[12] More than sixty years ago, our supreme court aptly observed that "[a]ge can be proved without difficulty." *Watson v. State*, 236 Ind. 329, 336, 140 N.E.2d 109, 112 (1957). Indeed, the State can confirm a defendant's age through documentary evidence, conclusive testimony, or public records. Yet, in the absence of such direct evidence, circumstantial evidence may also be sufficient.

[13] For example, age can be established through a testifying witness's opinion if that opinion is based on personal observation. *See, e.g.*, *Staton*, 853 N.E.2d at 473–74; *Chrisp v. State*, 267 Ind. 673, 674, 372 N.E.2d 1180, 1191 (1978). In *Staton*, our supreme court found that a witness's equivocal testimony was sufficient evidence from which the jury could find Staton was at least eighteen years old. 853 N.E.2d at 474–76. The victim in that case, who was fifteen at the time of the crime, said she "imagined" and "understood" that Staton was at least eighteen or four years older than her, and noted that he had graduated from high school at least one year before her eighteen-year-old sister. *Id.* at 474.

[14] Yet even in cases where opinion testimony is lacking—as in this case—a defendant's age may be established through evidence of definitive age-related details. For example, in *Owen v. State*, 396 N.E.2d 376, 382, 272 Ind. 122, 131 (1979), our supreme court held that the jury's observation of Owen, coupled with evidence that he had been released from prison after serving a six-year sentence, was sufficient to establish that he was over sixteen. The court reached

the same conclusion in *Altmeyer v. State*, 519 N.E.2d 138, 141 (Ind. 1988), based on Altmeyer's testimony that he was married and had an eleven-year-old son.

[15] Our court addressed this issue in both *Marshall v. State*, 643 N.E.2d 957, 963 (Ind. Ct. App. 1994), and *Brown v. State*, 149 N.E.3d 322, 323 (Ind. Ct. App. 2020). In *Marshall,* evidence that Marshall "was a deputy marshal[] for the town of Fairmount, was married, had two children over the age of six, and had attended high school several years earlier" was sufficient to support the jury's conclusion that he was over sixteen. 643 N.E.2d at 963. More recently, in *Brown*, we determined the jury's conclusion that Brown was at least twenty-one years old was adequately supported by (1) a testifying witness's description of Brown "as being bald on top with a white beard," and (2) evidence that, several years prior to the offense, Brown "was employed, had multiple cars and a house, and would watch numerous children at a time." 149 N.E.3d at 323.

[16] On the other hand, in *Stewart v. State*, 866 N.E.2d 858, 863 (Ind. Ct. App. 2007), the evidence was insufficient to support the trial court's conclusion that Stewart was under eighteen years old. There, evidence of Stewart's age came from a witness's testimony. *Id.* The witness, who was seventeen at the time of the offense, said she had a class with Stewart in high school. *Id.* She did not, however, say what grade she thought Stewart was in or how old he might be. *Id.* In finding this evidence insufficient to establish Stewart's age, our court observed "that many high school students, seniors in particular, may be eighteen years old and that different grade level students may still take certain classes together." *Id.*

[17] Read together, these decisions demonstrate that while circumstantial evidence alone can be sufficient to establish a defendant's age, the State fails to carry its burden when: (1) there is no opinion testimony of age based on personal observation; and (2) other age-indicative evidence is wholly inconclusive. This is because, when both are lacking, the fact-finder must pile inference upon inference to reach a conclusion as to the defendant's age. And a conclusion reached in this manner, which ultimately rests on conjecture or speculation, fails to satisfy the substantial burden of proof borne by the State.

[18] Turning to this case, none of the witnesses testified as to Hawkins's age during the trial. Thus, we must determine whether the age-indicative evidence presented at trial permits an inference beyond a reasonable doubt that Hawkins was at least eighteen years old at the time of the offense.

B. The age-indicative evidence does not permit an inference beyond a reasonable doubt that Hawkins was at least eighteen years old.

[19] The State asserts that it established Hawkins's age through the following circumstances: (1) he married K.H. the previous summer; (2) he had a two-year-old daughter and a three-month-old son; (3) he got off work at 11:00 p.m. the night of the offense; and (4) the court observed him.[2] Based on the caselaw discussed above applied to these facts, we find this evidence insufficient.

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[2] The State also notes that Hawkins "was repeatedly identified by the State's witness." Appellee's Br. at 9. Our supreme court, however, explained decades ago that "[t]he mere pointing out by the defendant for identification is no proof of his age in itself." *Watson,* 236 Ind. at 336, 140 N.E.2d at 112. Just as in *Watson*, the witnesses here only identified Hawkins—no one offered any opinion as to his age. *See id.* Thus, the fact

[20] Unlike in *Owen*, *Altmeyer*, *Marshall*, and *Brown*, none of the age-indicative evidence here, viewed individually or collectively, permits a definitive inference that Hawkins was at least eighteen years old in May 2020. Though he married K.H. months earlier, in July 2019, Hawkins could have been as young as fifteen at that time. *See* I.C. §§ 31-11-1-5, -11-1-6, -11-2-1 to -3 (2019); *cf. Owen*, 272 Ind. at 131, 396 N.E.2d at 382 (finding support for jury's conclusion that Owen was over sixteen years old based in part on his testimony that he had recently been released from prison after serving a nearly six-year sentence). And the fact that Hawkins has two children provides little support for the court's conclusion that he was at least eighteen years old, as the kids were only two years old and three months old. *Cf. Altmeyer*, 519 N.E.2d at 141 (highlighting Altmeyer's testimony that he had an eleven-year-old son); *Marshall*, 519 N.E.2d at 141 (same but Marshall had two children over the age of six). As to Hawkins getting off work at 11:00 p.m. on the night of the offense—a Saturday—no evidence revealed any details of his employment. *Cf. Marshall*, 519 N.E.2d at 141 (observing that Marshall worked in law enforcement for the town). And it is not uncommon for people who are under eighteen to work until 11:00 p.m., particularly on a weekend.[3]

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that Hawkins was "repeatedly identified" during trial does not affect our analysis. We also reject the State's reliance on the fact that Hawkins lived in an apartment with K.H. At trial, K.H. referred to "my apartment." Tr. p. 7. We see no reason—and the State does not point to any—why living at K.H.'s apartment in May 2020 supports a conclusion that Hawkins was at least eighteen years old at the time.

[3] There are few restrictions on how late a person between sixteen and eighteen years of age can work on a Saturday night. *See* I.C. §§ 22-2-18-31, -40.5.

[21] Finally, although Hawkins testified at trial, the only description of his physical characteristics was K.H.'s testimony that he stands around six-feet tall and weighs over 180 pounds. *See* Tr. p. 13. We fail to see how this height and weight supports a conclusion that Hawkins was at least eighteen years old. *Compare Watson*, 236 Ind. at 336, 140 N.E.2d at 112 (finding insufficient evidence of age, in part, because "[n]o physical characteristics from which a jury can draw any inferences of age were presented"), *with Brown*, 149 N.E.3d at 323 (finding sufficient evidence of age, in part, because a witness "described Brown's appearance at trial as being bald on top with a white beard"). Simply put, the trial record is devoid of evidence from which the court could infer beyond a reasonable doubt that the State proved the age element of the offense. *See Clark v. State*, 978 N.E.2d 1191, 1198 (Ind. Ct. App. 2012); *cf. Brown*, 149 N.E.3d at 323 (recognizing that Brown owned multiple cars and a house); *Marshall*, 643 N.E.2d at 963 (noting that Marshall had graduated from high school several years prior to the crime).

[22] The evidence suggestive of Hawkins's age is similar to the testimonial evidence in *Stewart*. While we acknowledge there is slightly more to draw from here, just as in *Stewart*, a fact-finder would need to pile inference upon inference to reach an ultimate conclusion on age based on the evidence presented at trial. *See* 866 N.E.2d at 864. Also, like in *Stewart*, no one during trial even ventured a guess as to Hawkins's age. *Id.* So, while we agree with the State that the age-related evidence does "support an inference that" Hawkins was at least eighteen years old, Appellee's Br. at 10, the evidence in a criminal case must warrant an

inference beyond a reasonable doubt. *See Gray v. State*, 903 N.E.2d 940, 944 (Ind. 2009). And the evidence here does not warrant such an inference, as any conclusion as to Hawkins's age would require speculation and conjecture arising from wholly inconclusive circumstances. *See T.H.*, 92 N.E.3d at 626.

[23] In reaching this conclusion, we are cognizant that our standard of review requires us to review the evidence most favorable to the conviction and affirm unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. But we are also mindful of our supreme court's guidance some years ago that, when reviewing a sufficiency challenge, we must not be so deferential to the fact-finder as to create a rule

> that any evidence no matter how infinitesimal or inferences drawn therefrom, whether based on speculation or conjecture, would be sufficient to establish guilt beyond a reasonable doubt. . . . [F]or to assume such a judicial posture, neglecting our appellate responsibility, would reduce the appellate process to an exercise in impotent and meaningless futility.

Liston v. State, 252 Ind. 502, 511–12, 250 N.E.2d 739, 743–44 (1969).

[24] It is not enough for us to find some record evidence, however slight, to support each essential element; we must find that there was enough evidence to satisfy a rational fact-finder that the State proved each element beyond a reasonable doubt. Moreover, the fact that it is not difficult to establish age when it is an element of a charged offense suggests that we should not affirm convictions when the State fails to satisfy this burden. And the State failed to do so here.

[25] We acknowledge that Hawkins, at sentencing, confirmed that he was twenty-nine years old when responding to a question form the court. *See* Tr. p. 48. Thus, but for the State's failure during trial, Hawkins felony conviction would stand. Yet, to affirm that conviction on this record would violate the legal presumption that Hawkins is innocent until proven guilty; and it would render our sufficiency standard of review futile by relieving the State of its substantial burden to prove "beyond reasonable doubt . . . every fact necessary to constitute the crime . . . charged," *Winship*, 397 U.S. at 364. This we will not do.

Conclusion

[26] To convict Hawkins of Level 6 felony domestic battery in the presence of a child, the State was required to prove that he was at least eighteen years old at the time of the offense. The State did not produce any direct evidence of Hawkins's age. And the circumstantial age-related evidence does not permit an inference beyond a reasonable doubt that Hawkins was at least eighteen. Thus, his felony conviction must be reversed. We remand for the trial court to vacate that conviction, enter conviction for Class A misdemeanor domestic battery, and resentence Hawkins accordingly.

[27] Reversed and remanded.

Altice, J., and Weissmann, J., concur.