MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Christopher C. Rosenow,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

August 12, 2024

Court of Appeals Case No.
23A-CR-2851

Appeal from the Gibson Circuit Court

The Honorable Jeffrey F. Meade, Judge

Trial Court Cause No.
26C01-2308-F1-747

Memorandum Decision by Judge May
Judges Vaidik and Kenworthy.

May, Judge.

[1] Christopher C. Rosenow appeals his conviction of Level 1 felony child molesting.[1] He argues "the evidence [was] insufficient to prove [he] knew the victim was under the age of fourteen[.]" (Br. of Appellant at 4.) However, the State did not have a burden to prove Rosenow knew the victim was under the age of fourteen. Instead, Rosenow had a burden to prove by a preponderance of the evidence that he reasonably believed she was over fourteen. The jury saw and heard all the relevant evidence, and it rejected Rosenow's defense. We cannot second-guess its decision and accordingly affirm.

Facts and Procedural History

[2] In May 2023, thirteen-year-old A.E. was struggling emotionally following the death of her father. She was engaging in self-harm, threatening her mother and brother, and running away from home frequently "to find drugs" to help her cope with her father's death. (Tr. Vol. 2 at 202.) When A.E. ran away on May 20th, police found her and took her to Youth Village in Vincennes, Indiana, where she stayed overnight. A.E.'s mother picked her up the next day, and A.E. ran away again as soon as they arrived back home. Police again located A.E. and took her home.

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[1] Ind. Code § 35-42-4-3(a)(1). Rosenow was also convicted of Level 6 felony possession of child pornography, Ind. Code § 35-42-4-4(d)(1), but he does not challenge that conviction on appeal.

[3] Around 3:00 p.m. on May 22nd, A.E.'s mother took A.E. to stay at the home of A.E.'s great-aunt, hoping that the aunt could help A.E., but A.E. ran away at 11:00 p.m. that night. A.E. found a ride with a stranger, who took her to her uncle's house in Princeton, Indiana. No one answered the door at her uncle's house, so A.E. began walking around town until she saw a bonfire outside a house. There were two men at the bonfire and one of them had a puppy. The man with the puppy was Rosenow, and he smelled like marijuana, so A.E. asked if he had any marijuana.

[4] Rosenow took A.E. to his apartment, where he lived with his girlfriend and her son, to retrieve his marijuana. A.E. and Rosenow smoked marijuana together, and then Rosenow taught A.E. how to smoke methamphetamine and he gave her tequila to drink. A.E. told Rosenow that she had run away from her great aunt's house, and she asked him not to tell anyone. A.E. changed into pajamas that she had in her backpack and asked Rosenow to turn on sexually provocative music. Rosenow touched A.E.'s breasts, he put his fingers inside her vagina, she performed oral sex on him, and he took a video recording of A.E. masturbating at 2:15 a.m. on May 23rd. Soon thereafter, Rosenow's girlfriend returned home, and she was upset by A.E.'s presence, so A.E. left.

[5] The State charged Rosenow with Level 1 felony child molesting and Level 6 felony possession of child pornography. A jury found Rosenow guilty of both charges. The trial court imposed concurrent sentences of thirty-nine years for

child molesting and twenty-six months for possession of child pornography, and the court determined Rosenow is a sexually violent predator.[2]

Discussion and Decision

[6] Rosenow challenges the evidence supporting his conviction of Level 1 felony child molesting. When faced with challenges to the sufficiency of evidence, we apply a "well settled" standard of review that leaves determinations of the weight of the evidence and credibility of the witnesses to the fact-finder. *Teising v. State*, 226 N.E.3d 780, 783 (Ind. 2024). "We consider only the evidence most favorable to the trial court's ruling and will affirm a defendant's conviction unless 'no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.'" *Id*. (quoting *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000)).

[7] To convict Rosenow of Level 1 felony child molesting, the State had to prove Rosenow, who was over twenty-one years old, knowingly or intentionally performed or submitted to sexual intercourse or other sexual conduct with A.E., who was under fourteen years old. *See* Ind. Code § 35-42-4-3(a). "Other sexual conduct" was defined by our legislature, in relevant part, as "an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person . . . ." Ind. Code § 35-31.5-2-221.5.

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[2] Ind. Code § 35-38-1-7.5.

[8] Rosenow does not deny that he was over age twenty-one, that A.E. was only thirteen years old, or that other sexual conduct occurred between himself and A.E. He argues, however, that the State failed to "prove he knew the alleged victim was under the age of fourteen." (Br. of Appellant at 7.) The State argues that the statutory definition of child molesting does not require the State to prove Rosenow knew A.E was under fourteen and that instead his knowledge or lack thereof was an affirmative defense that Rosenow had to prove.

[9] The child molesting statute provides:

> It is a defense to a prosecution under this section that the accused person reasonably believed that the child was sixteen (16)[3] years of age or older at the time of the conduct[.]

Ind. Code § 35-42-4-3(d) (footnote added). The statute defining sexual misconduct with a minor contains an identical defense, *see* Ind. Code § 35-42-4-9(c) ("It is a defense that the accused person reasonably believed that the child was at least sixteen (16) years of age at the time of the conduct."), and regarding that defense we held: "The defendant's knowledge of the victim's age is not an element of the crime." *Moon v. State*, 823 N.E.2d 710, 715 (Ind. Ct. App. 2005),

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[3] We previously have held the reference to the child being "sixteen" years old is a scrivener's error based on "a category of offense – sexual activity involving children aged 12 to 16 – which no longer exists" in the statute's definition of the crimes. *T.M. v. State*, 804 N.E.2d 773, 775 (Ind. Ct. App. 2004) (quoting *Lechner v. State*, 715 N.E.2d 1285, 1287 (Ind. Ct. App. 1999), *trans. denied*), *trans. denied*. Thus, "the defense is available to any defendant who reasonably believes the victim to be of such an age that the activity engaged in was not criminally prohibited." *Lechner*, 715 N.E.2d at 1288 (holding statutory reasonable-belief-about-age defense was available to seventeen-year-old defendant charged with child molesting for having sexual intercourse with thirteen-year-old girl).

trans. denied. Accordingly, the statutory defense is not negating an element of the crime, *see id*., and therefore the State has no burden to disprove Rosenow's statutory defense beyond a reasonable doubt. *See id.* at 715-16. Instead, Rosenow had "the burden to prove his reasonable belief by a preponderance of the evidence." *See id*. at 716; *see also Wilson v. State*, 997 N.E.2d 38, 44-45 (Ind. Ct. App. 2013) (holding, based on *Moon*, that trial court properly instructed jury that defendant had the burden to prove the statutory defense of reasonable-belief-about-age by a preponderance of the evidence), *aff'd on reh'g*, 4 N.E.3d 670, 677 (Ind. Ct. App. 2014), *trans. denied*.

[10] "For the [statutory] defense to prevail it is clear that the statute requires both the subjective element of actual belief by the accused and the objective element that such belief be reasonable under the circumstances." *Fenix v. State*, 438 N.E.2d 1005, 1006 (Ind. Ct. App. 1982). The State is not required to "introduce evidence to specifically negate the defense." *Id*. The jury was able to see A.E. when she appeared to testify at trial approximately six months after the molesting occurred, and the State admitted into evidence pictures of A.E. that were taken in the year before the molesting occurred. The jury was able to view this evidence, along with the pornographic video that Rosenow took of A.E. on the night in question, and to hear the testimony from Rosenow and his girlfriend. The jury was not required to believe Rosenow's assertion that he subjectively believed that A.E. was at least fourteen, *see Fenix*, 438 N.E.2d at 1006 ("despite Fenix'[s] asserted evidence that the girl might have reasonably appeared to be sixteen and his in-trial assertion that he thought she was about

his own age, the jury could reasonably have determined that his subjective belief was that the girl was under sixteen"), and we cannot reweigh evidence or reassess witness credibility to overturn the jury's decision. *Teising*, 226 N.E.3d at 783 (appellate court cannot reweigh evidence or judge the credibility of witnesses).

[11] The State's evidence demonstrated beyond a reasonable doubt that Rosenow, who was over twenty-one years of age, knowingly engaged in other sexual conduct with A.E., a child under the age of fourteen. We accordingly affirm his conviction of Level 1 felony child molesting. *See Fenix*, 438 N.E.2d at 1007 (affirming conviction of child molesting because State proved elements of crime and jury rejected defendant's special defense of reasonable belief of victim's age).

Conclusion

[12] Because the State demonstrated the required elements of the offense and the jury reasonably concluded that Rosenow did not prove his defense by a preponderance of the evidence, we affirm his conviction of Level 1 felony child molesting.

[13] Affirmed.

Vaidik, J., and Kenworthy, J., concur.

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