MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE

COURT OF APPEALS OF INDIANA

Nael Zuniga,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 14, 2022

Court of Appeals Case No. 21A-CR-2022

Appeal from the Marion Superior Court

The Honorable Mark D. Stoner, Judge

Trial Court Cause No. 49D32-2011-F5-34259

Weissmann, Judge.

[1] Nael Zuniga appeals his conviction for sexual misconduct with a minor, arguing that the State failed to prove Marion County was the proper venue for his prosecution and that the trial court erred by admitting alleged vouching testimony of the victim's pastor. Finding no error, we affirm.

Facts

[2] The State charged 36-year-old Zuniga with Level 5 felony sexual misconduct with a minor based on allegations that he touched his 14-year-old niece, I.T., with intent to arouse or to satisfy sexual desires. At Zuniga's jury trial, I.T. testified that Zuniga kissed her at least four times while she was visiting his home. I.T. felt Zuniga's tongue inside her mouth during each kiss, and during the last one, she felt his "private part get, like hard." Tr. Vol. II, p. 189.

[3] I.T. told her mother about the kisses, and the family sought advice from their pastor, Rafael Caranza, before calling the police.[1] At trial, over Zuniga's objection, Carranza offered the following testimony on direct examination:

> Q I want to direct your attention to a date in October of 2020. Was there a time where [I.T.'s] family came to talk with you about something that happened?
>
> A Yes.

[1] According to I.T.'s mother, the family sought Carranza's advice before calling the police because Zuniga's mother was on her deathbed.

Q And without telling me specifically what they said, did they make -- were you made aware of a situation that was alleged to have occurred between [I.T.] and Nael Zuniga?

A Yes.

***

Q Based on what they told you, did you give them any advice?

A Yes.

Q And what advice did you give them?

A So after Sunday's reunion or meeting, after Sunday's meeting, they came up to me and asked if they could speak with me and asked for advice. So after they told me about the situation with their daughter, [I.T.], and what was happening, then I gave them advice. They found themselves in a difficult situation because of what was going on with [Zuniga's] mother. Their -- she was dying of cancer and they couldn't figure out what to do then because they found themselves, I would say, between a rock and a hard place.

Q Was there advice, specific advice, that you gave them –

A Yes.

Q -- on what to do?

A Yes.

Q And what was the advice that you gave them?

A My advice to them was for them to speak with the person who had caused the problem to see if they could come to an agreement, that that person could ask for forgiveness, show some humility, recognize that they had committed an error, and that if they could fix something on that day. And if on that day, the person wouldn't admit their error or became aggressive, then

they should call the authorities, the police, who would take over the situation.

Q And was that the end of the meeting that you had with [I.T.'s] family?

A Yes.

Tr. Vol. II, pp. 96-97.

[4] The jury found Zuniga guilty as charged, and the trial court sentenced him to 5 years' imprisonment with 2 ½ suspended to probation. Zuniga appeals.

Discussion and Decision

I. Venue

[5] Zuniga first argues that the State failed to prove Marion County was the proper venue for his prosecution. A criminal defendant has a constitutional and statutory right to be tried in the county where an offense was committed. See Ind. Const. art. I, § 13 ("In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed . . . ."); Ind. Code § 35-32-2-1(a) ("Criminal actions shall be tried in the county where the offense was committed, except as otherwise provided by law."). The State is required to prove venue, but it is not an element of an offense. *Baugh v. State*, 801 N.E.2d 629, 631 (Ind. 2004). As a result, the State may prove venue by a preponderance of the evidence rather than by proof beyond a reasonable doubt. *Id.*

[6] Zuniga waived his venue argument by not objecting to his prosecution in Marion County at trial. *See Peacock v. State*, 126 N.E.3d 892, 896 (Ind. Ct. App. 2019) ("A defendant waives error relating to venue when he fails to make an objection at the appropriate time in the trial court."). Waiver notwithstanding, we review sufficiency challenges to venue in the same manner as other claims of insufficient evidence. *Eberle v. State*, 942 N.E.2d 848, 855 (Ind. Ct. App. 2011). We neither weigh the evidence nor resolve questions of credibility but, instead, look to the evidence and reasonable inferences that support the conclusion that venue was proper. *Id.* Circumstantial evidence may be sufficient to establish proper venue. *Evans v. State*, 571 N.E.2d 1231, 1233 (Ind. 1991).

[7] At trial, I.T. testified that Zuniga kissed her while she was visiting his home in October 2020. Zuniga's wife, Yanira Turcios, testified that she and Zuniga lived in a home on West Michigan Street in Marion County and had lived there "since 2018, '19." Tr. Vol. II, p. 131. Turcios also indicated that she and Zuniga "lived there" in October 2020. *Id.* at 132. From this testimony, the jury could reasonably infer that I.T. was visiting Zuniga's West Michigan Street home when he kissed her. Venue in Marion County therefore was proper.

II. Vouching

[8] Zuniga next argues that the trial court erred by admitting Carranza's alleged vouching testimony. "The admission and exclusion of evidence falls within the sound discretion of the trial court, and we will review the admission of evidence solely for an abuse of discretion." *Carter v. State*, 31 N.E.3d 17, 28 (Ind. Ct.

App. 2015). "An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances before the court." *Id.*

[9] Zuniga claims Carranza impermissibly vouched for the truthfulness of I.T.'s testimony. Indiana Evidence Rule 704(b) provides that "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." This includes both direct and indirect testimony that a witness is telling the truth. *Hoglund v. State*, 962 N.E.2d 1230, 1234 (Ind. 2012) (holding testimony that child witness "is not prone to exaggerate or fantasize about sexual matters" inadmissible under Evidence Rule 704). "Such vouching testimony is an invasion of the province of the jurors in determining the weight they should place upon a witness's testimony." *Carter*, 31 N.E.3d at 29.

[10] Carranza's testimony was not vouching. As Zuniga acknowledges: "Carranza never stated he believed I.T.," and "he never testified to her character for truthfulness or whether she embellished things or was prone to fantasy." Appellant's Br. pp. 11-12. Carranza merely recounted the advice he gave I.T.'s family about a "situation" involving I.T. and Zuniga. Tr. Vol. II, p. 96. From this advice, Zuniga urges us to infer Carranza's belief in I.T.'s truthfulness, but "our jurisprudence requires more." *Halliburton v. State*, 1 N.E.3d 670, 681 (Ind. 2013) (rejecting inferential vouching argument where mother testified that she begged her daughter to tell police the truth about murder her daughter witnessed).

[11] The trial court did not abuse its discretion in admitting Carranza’s testimony. The judgment is therefore affirmed.

Robb, J., and Pyle, J., concur.