MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Megan Shipley
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

J.G.,

Appellant-Respondent,

v.

State of Indiana,

Appellee-Petitioner.

February 1, 2024

Court of Appeals Case No. 23A-JV-113

Appeal from the Marion Superior Court

The Honorable Geoffrey Gaither, Judge

Trial Court Cause No. 49D09-2208-JD-6173

Memorandum Decision by Judge Kenworthy
Judges Bailey and Tavitas concur.

Kenworthy, Judge.

Case Summary

[1] The State filed a delinquency petition alleging J.G. committed acts that, if he were charged as an adult, would be the following: Counts 1 and 2, Level 4 felony child molesting;[1] Count 3, Level 5 felony criminal confinement;[2] and Count 4, Level 6 felony dissemination of matter harmful to minors.[3] After a fact-finding hearing, the trial court made true findings on all four counts and adjudicated J.G. delinquent. The trial court issued a "Dispositional Order" on December 20, 2022, a "Corrected Disposition Order" on January 3, 2023, and a "Wardship Order" on January 5, 2023. The January 3 order incorrectly indicated Count 3 was for child molesting instead of criminal confinement.

[2] J.G. now appeals, raising three issues:

> 1. Did the trial court err when it admitted evidence about body diagrams used during the forensic interviews of two children?
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> 2. Is there sufficient evidence to sustain the true finding for dissemination of matter harmful to minors?
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> 3. Should this Court remand to correct the portion of the dispositional order stating J.G. was adjudicated for Count 3, child molesting?

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[1] Ind. Code § 35-42-4-3(b) (2021).

[2] I.C. §§ 35-42-3-3(a) & 35-42-3-3(b)(1)(A) (2019).

[3] I.C. § 35-49-3-3(a)(1) (2014).

[3] Determining the trial court's error in admitting the evidence about body diagrams was harmless, there was insufficient evidence to support the adjudication for dissemination of matter harmful to minors, and the trial court should correct the scrivener's error in the dispositional order, we affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[4] During the time they were J.G.'s foster parents, Thomas and Tamica Skaggs were married but lived separately. Tamica lived with her teenaged daughter and two foster children when J.G. was placed with Thomas. Tamica's nieces, C.D. (ten years old) and K.S. (six years old), sometimes visited Tamica's and Thomas' homes.

[5] One night, J.G., Thomas, Tamica, Tamica's daughter, Tamica's foster son, and C.D. watched a movie together in Thomas' home. Thomas' home consisted of a living room, kitchen, two bedrooms, and a bathroom. After the movie, everyone went to bed: Thomas and Tamica were in the living room, Tamica's daughter and C.D. were in one bedroom, and J.G. was in the other room. Tamica's foster son at first slept in the bedroom with Tamica's daughter and C.D., but Tamica later moved him to the living room because he was crying.

[6] As C.D. started to fall asleep, she saw J.G. go into the kitchen. When he came back, J.G. "shined his flashlight in the room and he went back to his room." *Tr. Vol. 2* at 11. Then J.G. came back to C.D. and Tamica's daughter's room and "touched [C.D] in the front and was . . . rubbing [her] front area." *Id.* at

13. C.D. rolled over because she "didn't know what it was and then [J.G.] start[ed] squeezing [C.D.'s] butt[.]" *Id.* at 13. C.D. got up to tell Tamica and saw J.G. lying on the floor. When C.D. went to the living room to tell Tamica what happened, J.G. went back to his room.

[7] C.D. told Tamica what happened, and Tamica woke Thomas. Tamica "got the kids together"—including C.D., Tamica's daughter, and Tamica's foster son—and went to Tamica's home. *Id.* at 47. Thomas went to J.G.'s room to confront him, but J.G. "stayed like he was sleeping," even though Thomas "was loud" when confronting him. *Id.* at 57. The next morning, J.G. left Thomas' home while Thomas was away.

[8] After that incident, K.S. disclosed that J.G. had previously touched her. K.S. and J.G. were on J.G.'s bed watching a movie on TV. Thomas and Tamica were in the living room. While they were watching the movie, J.G. touched K.S. "[o]n [her] private area." *Id.* at 22. J.G. touched K.S. with his hand under her underwear. He also touched her "butt" over her underwear. *Id.* at 23–24.

[9] K.S. got off the bed, but J.G. "picked [K.S.] up and put [her] back on, he wasn't letting [her] go." *Id.* at 24. J.G. "made [K.S.] put [her] hand [on] his private part . . . under his clothes[.]" *Id.* J.G. then showed K.S. a picture on his phone. The picture was of "[a] girl naked." *Id.* at 25. K.S. tried to move J.G.'s hands off her, and J.G. let her go.

[10] A forensic child interviewer at Marion County Child Advocacy Center conducted interviews of C.D. and K.S. A few weeks later, the State filed a

petition alleging J.G. was a delinquent child. A fact-finding hearing was held about two months later.

[11] At the fact-finding hearing, C.D. testified J.G. touched her "private parts." *Id.* at 12. When the State asked her if her private part is where she uses the bathroom, C.D. answered, "Yeah." *Id.* When asked if she knew another word for her private part, C.D. answered, "No." *Id.*

[12] K.S. testified her private area was "[o]n [her] front," where she puts on "panties" when getting dressed. *Id.* at 23. K.S. said J.G.'s "private part" is the area where he wears underwear. *Id.* at 25. When describing the picture J.G. showed her on his phone, K.S. said the girl "didn't have nothing on." *Id.* K.S. told the child interviewer that after J.G. touched her, she "screamed and everyone ran in the room." *Id.* at 28. At the hearing, K.S. said no adults came into the room when she was in the room with J.G. K.S. told the child interviewer that she told Tamica what happened, but at the hearing, K.S. said she told Tamica's daughter what happened.

[13] Tamica testified about the incident involving C.D. She said shortly after she moved her foster son to the living room, she saw J.G. walk through the house. She asked J.G. what he was doing, and he did not respond. Tamica assumed J.G. went back to his room. Of her experience with J.G. generally, Tamica said she never left J.G. alone with the children, and when K.S. and C.D. were visiting, she and Thomas supervised them.

[14] The forensic child interviewer testified that when children disclose sexual abuse, interviewers have the child use body diagrams to circle the parts that were affected. The State did not provide the body diagrams used during the interviews with C.D. and K.S.—the original diagrams had been lost. The State asked the forensic child interviewer if C.D. and K.S. circled body parts on the diagrams, and J.G. objected, arguing the testimony was hearsay. The trial court overruled the objection. The State asked the forensic child interviewer what specific body parts C.D. circled on the diagram, and J.G. objected again. J.G. asked some preliminary questions, and the forensic child interviewer explained C.D. circled a body part on the diagram "to communicate to [the forensic child interviewer] a body part." *Id.* at 35. J.G.'s counsel responded, "Judge, this is hearsay." *Id.*

[15] Over J.G.'s objection, the trial court admitted portions of the video in which C.D. and K.S. circled body parts on the diagram. C.D. circled the vagina and buttocks on the female diagram. K.S. circled the vagina and buttocks on the female diagram and the penis on the male diagram. The State provided three screenshots from the video portions of the video depicting the diagrams, and the screenshots were admitted.

[16] The trial court entered a true finding on all counts and adjudicated J.G. delinquent. J.G. was committed to the Department of Correction for a recommended term of twelve months. The trial court ordered J.G. to complete a sexual offender counseling program and a vocational or GED program.

[17] The trial court issued its dispositional order on December 20, 2022. The court then issued another order on January 3, 2023. The January 3 order was entered into the Chronological Case Summary ("CCS") as "Corrected Disposition Order" and is entitled "Corrected Dispositional Decree on Delinquency . . . (Original Date December 15, 2022)." That order lists Count 3 as Level 5 felony child molesting rather than as Level 5 felony criminal confinement. *See Appellant's App. Vol. 2* at 8, 16. The trial court entered another order on January 5, 2023, which was entered into the CCS as a "Wardship Order" and entitled "Dispositional Order Wardship Awarded to Department of Correction." *Id.* at 8, 152. In the January 5 order, the trial court "recommends that the Department of Correction . . . [s]ee disposition order." *Id.* at 153.

Error in Admitting Hearsay Statements Was Harmless

[18] A trial court has broad discretion to admit or exclude evidence, including hearsay. *Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014). We will not reverse the trial court's decision to admit or exclude evidence "unless it is clearly contrary to the logic and effect of the facts and circumstances of the case or misinterprets the law." *VanPatten v. State*, 986 N.E.2d 255, 260 (Ind. 2013).

[19] A statement is hearsay if it "(1) is not made by the declarant while testifying at the trial or hearing; and (2) is offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). The statement may be an "oral assertion, written assertion, or nonverbal conduct if the person intended it as an

assertion." Evid. R. 801(a). Hearsay is not admissible unless it falls under an exception in the Indiana Rules of Evidence. Evid. R. 802.

[20] "The erroneous admission of hearsay testimony does not require reversal unless it prejudices the defendant's substantial rights." *Blount*, 22 N.E.3d at 564. To determine whether the error was prejudicial, we assess the probable impact the evidence had upon the fact-finder "in light of all of the other evidence that was properly presented." *Id.* When a defendant challenges the admissibility of evidence at a bench trial and the evidence was inadmissible, "the judicial-temperance doctrine comes into play." *Konopasek v. State*, 946 N.E.2d 23, 30 (Ind. 2011). That is, we generally presume in proceedings tried to the bench, a court renders its decisions based only on relevant and probative evidence. *Id.* at 28. "Admission of hearsay evidence is not grounds for reversal where it is merely cumulative of other evidence admitted." *McClain v. State*, 675 N.E.2d 329, 331–32 (Ind. 1996).

[21] J.G. argues the trial court erred when it admitted (1) the forensic child interviewer's testimony about C.D. and K.S. circling body parts on diagrams during their interviews and (2) screenshots from the videotaped forensic interviews showing the body diagrams with circled parts. J.G. asserts both pieces of evidence were inadmissible hearsay. Further, J.G. claims the error in admitting the hearsay evidence was not harmless because C.D. and K.S. were the only eyewitnesses and the evidence impacted their credibility. He claims C.D. and K.S. are not credible because of inconsistencies in K.S.' testimony and because it was unlikely for J.G. to shine a flashlight around Thomas' small

home without waking anyone. The State contends it avoided presenting hearsay testimony "by only asking what actions the interviewer observed and not asking for any context that would provide meaning to the markings." *Appellee's Br.* at 10. The State argues J.G. invited the testimony about the reason the children made the markings by seeking an explanation of the circumstances of the marking.

[22] At the fact-finding hearing, the court determined C.D.'s and K.S.'s acts of circling areas on the body diagrams to communicate with the forensic child interviewer where they were touched/forced to touch was nonverbal conduct intended as an assertion and was therefore hearsay. The State claimed the purpose of admitting the evidence was "for clarity on what [C.D. and K.S.'] understanding of body parts were that they spoke about in their previous testimony." *Tr. Vol. 2* at 37. The court admitted the screenshots of the body diagrams over J.G.'s objections.

[23] We agree the testimony and screenshots were inadmissible hearsay, and the trial court erred by admitting them. *See* Evid. R. 801(a); *see also Hall v. State*, 284 N.E.2d 758, 762 (Ind. 1972) (determining testimony about the declarant "point[ing] out" the defendant to an officer was inadmissible hearsay); *Hackner v. State*, 161 N.E.3d 1287, 1290 (Ind. Ct. App. 2021) (determining a victim's nonverbal nod in response to officer's question about whether it was the defendant who shot the victim was admissible under the dying declaration exception to the hearsay rule). But given the other available evidence, the error was harmless. Both C.D. and K.S. testified about where J.G. touched them,

and K.S. described where J.G. made her touch him. C.D. and K.S. provided substantive details about J.G.'s actions and the circumstances surrounding those actions. Tamica and Thomas corroborated C.D.'s testimony about the circumstances of J.G.'s actions, C.D.'s disclosure of the touching, and J.G.'s response. And J.G. fled once Thomas left the house, which can be evidence of guilt. *See Dill v. State*, 741 N.E.2d 1230, 1232 (Ind. 2001).

[24] K.S. acknowledged but was not asked to explain the inconsistencies in her testimony. Yet none of the inconsistencies related to the touching itself. And "[i]t is not surprising that a young child in an adversary courtroom setting may demonstrate a degree of confusion and inconsistency." *Hill v. State*, 646 N.E.2d 374, 378 (Ind. Ct. App. 1995). Finally, the fact-finding hearing was before the bench, which quells the risk of prejudice. *See Conley v. State*, 972 N.E.2d 864, 873 (Ind. 2012).

[25] We disagree with the State that J.G. invited error by asking the forensic child interviewer preliminary questions to establish C.D. and K.S. circled body parts on the diagrams "to communicate" with the forensic child interviewer (and thereby establish the testimony was hearsay). *Tr. Vol. 2* at 35. J.G. properly objected to the admission of both pieces of hearsay evidence, but the erroneous admission of the evidence was harmless.

The Evidence Was Insufficient to Support the Trial Court's True Finding for Dissemination of Matter Harmful to Minors

[26] "For sufficiency of the evidence challenges, we 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). It is the role of the fact-finder, not appellate courts, "to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). "[W]e affirm if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." *Wright v. State*, 828 N.E.2d 904, 906 (Ind. 2005) (quoting *Davis v. State*, 813 N.E.2d 1176, 1178 (Ind. 2004)) (internal quotation marks omitted).

[27] To prove J.G. disseminated matter harmful to minors under Indiana Code Section 35-49-3-3(a)(1) ("the Dissemination Statute"), the State was required to show J.G. knowingly or intentionally disseminated matter to K.S., a minor, and the matter was harmful to minors. Matter is considered harmful to minors if:

> (1) it describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse;
>
> (2) considered as a whole, it appeals to the prurient interest in sex of minors;

> (3) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and
>
> (4) considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.

I.C. § 35-49-2-2. The Indiana Supreme Court has determined the plain text of the Dissemination Statute and Indiana Code Section 35-49-2-2 is not ambiguous. *State v. S.T.*, 82 N.E.3d 257, 260 (Ind. 2017). The State was required to prove each element of both these statutes beyond a reasonable doubt. *See Wright*, 828 N.E.2d at 906.

[28] J.G. admits the evidence "satisfies the first prong" of Indiana Code Section 35-49-2-2 because "it establishes the picture showed nudity," but J.G. claims the evidence does not satisfy any of the other three prongs. *Appellant's Br.* at 17–18. The State contends the issue of whether the matter was harmful to minors was properly left to the fact-finder. The State argues:

> The circumstances in the case show the image was displayed for its prurient interest in sex and was not suitable to show to six-year-old K.S. Specifically, [J.G.] showed K.S. the image of a nude girl in the context of rubbing her genitals and forcing the young child to touch his genitals.

Appellee's Br. at 16.

[29] The plain text of the Dissemination Statute requires the matter itself to be harmful, not that the dissemination of the matter occurred in a harmful manner. Indeed, Indiana Code Section 35-49-2-2 contains the criteria for matter that is harmful to minors, not an explanation of the circumstances and contexts under which the dissemination of the matter might be considered harmful. The State bears the burden of proving each prong under the definition as it applies to the matter itself. Here, where the only evidence about the picture is that it showed "a girl naked" who "didn't have nothing on," *Tr. Vol. 2* at 25, the State did not meet its burden under three of the four prongs. We reverse the trial court's true finding for Count 4.[4]

The Scrivener's Error in the Disposition Order Should Be Corrected

[30] We agree with J.G. that the trial court should correct the scrivener's error in the disposition order. Although the State claims the scrivener's error was corrected by the document filed on January 5, the January 5 order was entered into the CCS as a "Wardship Order," not a disposition order. And the January 5 order instructs the Department of Correction to "[s]ee disposition order," presumably the "Corrected Disposition Order" filed January 3—the very order containing the incorrect statement that listed Count 3 as Level 5 felony child molesting

[4] The State also argues "showing 'sexually-tinged content' to children can be evidence of grooming child sex victims." *Appellee's Br.* at 16 (citing *Guffey v. State*, 42 N.E.3d 152, 161 (Ind. Ct. App. 2015)). This argument again pertains to the circumstances surrounding the dissemination of the matter and not the nature of the matter itself.

rather than as Level 5 felony criminal confinement. We remand with instructions to correct the scrivener's error.

Conclusion

[31] We conclude the admission of hearsay testimony was harmless, insufficient evidence supports the trial court's true finding for the dissemination of matter harmful to minors, and the scrivener's error should be corrected. Therefore, we affirm in part, reverse in part, and remand with instructions to correct the scrivener's error.

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

Bailey, J., and Tavitas, J., concur.