MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

J.I.,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff.

May 26, 2021

Court of Appeals Case No. 20A-JV-2225

Appeal from the Delaware Circuit Court

The Honorable Kimberly Dowling, Judge

The Honorable Amanda Yonally, Magistrate

Trial Court Cause No. 18C02-2005-JD-54

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Respondent, J.I. (J.I.), appeals his adjudication as a juvenile delinquent based on the juvenile court's finding that he committed acts that would be Level 4 felony attempted child molesting, Ind. Code §§ 35-42-4-3(b); 35-41-5-1; and Level 4 felony child molesting, I.C. § 35-42-4-3(b), if committed by an adult.

[2] We affirm.

ISSUE

[3] J.I. presents two issues on appeal, one of which we find dispositive and restate as follows: Whether the State presented sufficient evidence beyond a reasonable doubt to sustain his adjudication as a delinquent.

FACTS AND PROCEDURAL HISTORY

[4] A.R. lived with her mother, father, sister, little brother, and her foster brother J.I. in Carthage, Indiana. One night, A.R. was lying in bed when she awoke to someone on her bed "trying to touch [her] privates." (Transcript Vol. II, pp. 14-15). When she turned over to see who was touching her, she saw that it was J.I. A.R. pushed J.I. off her bed, told him to go away, and J.I. left the room. Although A.R. could not recall the date when J.I. inappropriately touched her, she stated that the incident occurred when she was eleven years old and it was before her 12th birthday in August 2020.

[5] In February of 2020, M.B. was A.R.'s friend and their families were close. The day before the Super Bowl, M.B. went to A.R.'s house to spend the night. A.R.'s mother, her mother's fiancé, A.R.'s little brother, and J.I. were in the house that night. M.B. slept on a couch in the living room. Late in the night, J.I. came out of his room, entered the living room, and said something to M.B., which M.B. could not recall. J.I. then went back to his room. Later, J.I. again came out of his room and said he wanted to sleep in the living room because his brother, with whom he shared a room, was snoring. M.B. said that was not a problem. Instead of sleeping on a separate couch, J.I. got onto the same couch where M.B. sleeping. M.B. found it "awkward and unusual" because there were two couches but accepted it as long as J.I. stayed on his side of the couch. (Tr. Vol. II, p. 22). A short while later, J.I. moved to M.B.'s side of the couch and started touching M.B.'s "private areas." (Tr. Vol. II, p. 22). J.I. began to take off M.B.'s pants, and she told him "no." (Tr. Vol. II, p. 22). M.B. then "froze up" and stopped moving or speaking. (Tr. Vol. II, p. 27). J.I. took off his clothes and started rubbing his penis on M.B.'s vagina. At first J.I. rubbed his penis against M.B.'s vagina over her clothes, but when he removed M.B.'s clothes, he rubbed his penis on her vagina. J.I. also used his hand to rub M.B.'s vagina. Eventually J.I. stopped and asked M.B. if she wanted him to keep going. M.B. said no, and J.I. went to the bathroom and then returned to his room. M.B. went to the bathroom, cried, and went to sleep. The next day, A.R.'s and M.B.'s families watched the Super Bowl together. M.B. later told her sister what had happened, and they both told their mother, who then contacted the police.

[6] On May 26, 2020, the State filed a Petition Alleging Delinquency, claiming that J.I. had committed one Count of Level 4 felony attempted child molesting, if committed by an adult; four Counts of Level 4 felony child molesting, if committed by an adult; and one Count of Class B misdemeanor battery, if committed by an adult. On September 18, 2020, the juvenile court held a fact-finding hearing and later issued an order adjudicating J.I. delinquent only for the Level 4 felony attempted child molesting and one Count of the Level 4 felony child molesting. On October 30, 2020, the juvenile court issued a dispositional order awarding wardship of J.I. to Logansport Juvenile Intake Diagnostic Facility for an indeterminate amount of time.

[7] J.I. now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

[8] When the State seeks to have a juvenile adjudicated a delinquent for committing an act that would be a crime if committed by an adult, the State must prove every element of the offense beyond a reasonable doubt. *C.L. v. State*, 2 N.E.3d 798, 800 (Ind. Ct. App. 2014). When reviewing on appeal the sufficiency of the evidence supporting a juvenile adjudication, we neither reweigh the evidence nor judge the credibility of the witnesses. *Z.A. v. State*, 13 N.E.3d 438, 439 (Ind. Ct. App. 2014). We consider only the evidence most favorable to the judgment and the reasonable inferences therefrom, and we will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *C.L.*, 2 N.E.3d at 800.

[9] "A person who, with a child under fourteen (14) 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 child molesting, a Level 4 felony." I.C. § 35-42-4-3(b). Mere touching alone is not sufficient to constitute child molesting. *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000). The State must also prove beyond a reasonable doubt that the act of touching was accompanied by the specific intent to arouse or satisfy sexual desires. *Id*. Intent may be established by circumstantial evidence and may be inferred from the actor's conduct. *Id*. As for the attempted Level 4 felony child molesting charge, the State had to prove beyond a reasonable doubt that J.I. acted with the same culpability required to prove he committed child molesting and that he engaged in conduct that constituted a substantial step towards the commission of the crime. I.C. §§ 35-42-4-3(b); -41-5-1.

[10] The delinquency petition alleged that J.I. committed what would be Level 4 felony attempted child molesting if committed by an adult, by engaging in conduct that constituted a "substantial step towards the commission of the crime of child molesting." (Appellant's App. Vol. II, p. 16).

[11] On appeal, J.I. claims that the State specifically alleged that he committed the attempted child molesting offense on December 25, 2019, and he argues that the State failed to establish that the events occurred on that date because A.R. could not recall the date when the incident occurred. J.I. further argues that the

attempted child molesting charge did not specify the name or initials of the alleged victim.

[12] As for J.I.'s claim that the State failed to prove that the events relating to the attempted child molesting charge occurred on December 25, 2019, Indiana Code section 35-34-1-2(a)(6) requires the charging information to state, "the time of the offense as definitely as can be done if time is of the essence of the offense." It is well-established that, where time is not of the essence of the offense, "the State is not confined to proving the commission on the date alleged in the affidavit or indictment but may prove the commission at any time within the statutory period of limitations." *Love v. State*, 761 N.E.2d 806, 809 (Ind. 2002). Time is not of the essence in child molesting cases. *Id.* In such cases, "the exact date is only important in limited circumstances, such as where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies." *Id.*

[13] Here, the specific date on which J.I. committed attempted child molesting was not an element of the offense because it does not bear on whether the victim, A.R., was over the age of fourteen. At the fact-finding hearing, A.R. testified that one night before she turned twelve years old, J.I. entered her room, got onto her bed, and attempted to touch her "privates" through her clothes. (Tr. Vol. II, p. 15). A.R. described her privates as the part of her body she uses to go to the restroom. Because A.R.'s age did not fall at or near the fourteen-year-old dividing line for the child molesting offense, time was not of the essence in this case. *See* I.C. § 35-42-4-3. Because time is not of the essence, the State needed

only to prove that the offense occurred during the statutory period of limitations. *See Love*, 761 N.E.2d at 809. The statutory period of limitations for a Level 4 felony is five years. *See* I.C. § 35-41-4-2(a)(1). At the fact-finding hearing, A.R. stated J.I. molested her when she was eleven years old but before her twelfth birthday in August 2020. From A.R.'s testimony, it appears that J.I. molested her sometime between 2019 and 2020, and the State filed the delinquency petition in May 2020. The State is correct that A.R.'s testimony was sufficient to establish that the crime occurred during the statute of limitations and that this is sufficient evidence to support the true finding for attempted child molesting.

[14] As for J.I.'s claim that the attempted child molesting charge did not refer to the victim, Indiana Code section 35-34-1-2(d) provides that an Information "shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged." The purpose of a charging information is "'to provide a defendant with notice of the crime of which he is charged so that he is able to prepare a defense.'" *Gilliland v. State*, 979 N.E.2d 1049, 1060 (Ind. Ct. App. 2012) (quoting *State v. Laker*, 939 N.E.2d 1111, 1113 (Ind. Ct. App. 2010), *trans. denied*). The State is not required to include detailed factual allegations; rather, a charging information satisfies due process if the information "enables an accused, the court, and the jury to determine the crime for which conviction is sought." *Id*. at 1061 (quoting *Dickenson v. State*, 835 N.E.2d 542, 550 (Ind. Ct. App. 2005)).

[15] At his fact-finding hearing, J.I. did not file a motion to dismiss the delinquency petition on the grounds that the attempted child molesting charge was insufficient based on the fact that the victim was not referenced in the charge, thus, we find that he waives this claim. *See Wilhoite v. State*, 7 N.E.3d 350, 352 (Ind. Ct. App. 2014). Nevertheless, we review his claim for fundamental error. Fundamental error is error so prejudicial to the rights of a defendant that a fair trial is rendered impossible. *Thomas v. State*, 61 N.E.3d 1198, 1201 (Ind. Ct. App. 2016), *trans. denied*. J.I. does not argue that the delinquency petition was so lacking that it constitutes fundamental error nor does he argue that .

[16] Even assuming that the delinquency petition was lacking for not referencing the specific victim, any claim of error does not rise to the level of fundamental error. At the fact-finding hearing, the State proved through A.R.'s testimony that J.I. engaged in a substantial step towards molesting A.R. when, one night before A.R. turned twelve years old, J.I. entered her room, got onto her bed, and attempted to touch A.R.'s "privates" through her clothes. (Tr. Vol. II, p. 15). J.I. also makes no claim that his defense at his fact-finding hearing was prejudiced by the insufficient information on the delinquency petition, and in fact, J.I. provided a vigorous defense to the charge at his hearing, thus, we hold that his claim on this issue fails, and we conclude that the State presented sufficient evidence beyond a reasonable doubt to support J.I.'s adjudication.

CONCLUSION

[17] Based on the foregoing, we conclude that the State presented sufficient evidence beyond a reasonable doubt to support J.I.'s adjudication.

[18] Affirmed.

[19] Mathias, J. and Crone, J. concur