MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

David M. Payne
Marion, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Myriam Serrano-Colon
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

John Walter Downam, Sr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 30, 2022

Court of Appeals Case No. 22A-CR-856

Appeal from the Grant Superior Court

The Honorable Jeffrey D. Todd, Judge

Trial Court Cause No. 27D01-1909-F1-8

Bailey, Judge.

Case Summary

[1] John Walter Downam, Sr. ("Downam") appeals his convictions for Child Molesting, as a Level 1 felony,[1] and Battery, as a Level 6 felony.[2] He also challenges his sentence and his designation as a credit restricted felon. We affirm in part, reverse in part, and remand with instructions.

Issues

[2] Downam presents three issues for review:

I. Whether his convictions are supported by sufficient evidence;

II. Whether the trial court's determination that Downam is a credit restricted felon is erroneous; and

III. Whether Downam's sentence is inappropriate.

Facts and Procedural History

[3] Siblings E.M. and M.M. were abandoned by their mother when they were aged twelve and eleven, respectively. At that time, their father was in prison. The Indiana Department of Child Services ("DCS") placed the siblings with their maternal grandmother and her husband, Downam. Within months, E.M.

---

[1] Ind. Code § 35-42-4-3(1).

[2] I.C. § 35-42-2-1(e).

reported to her DCS caseworker that Downam was physically abusive, and E.M. requested a different placement. Initially, DCS instructed Downam to refrain from using corporal punishment. Eventually, however, DCS removed E.M. and M.M. and placed them in foster care.

[4] Several months after her placement in foster care, E.M. revealed to her foster mother that she had been a victim of sexual abuse. In a subsequent forensic interview, E.M. wrote a message indicating that Downam had raped her. E.M. repeated her allegations in a second forensic interview. M.M. was also interviewed and made allegations that Downam had physically abused each of the siblings. On September 10, 2019, the State charged Downam with Child Molesting and two counts of Battery, one related to E.M. and one related to M.M.[3]

[5] Downam's jury trial commenced on March 7, 2022, and concluded on March 9, 2022. The jury found Downam guilty of molesting E.M. and battering M.M., and not guilty of battering E.M. On April 14, 2022, the trial court sentenced Downam to forty years imprisonment, with five years suspended, for his Child Molestation conviction. The trial court imposed upon Downam a consecutive two-year sentence for Battery and declared Downam a credit-restricted felon. Downam now appeals.

---

[3] The State also charged Downam with two counts of Neglect of a Dependent. I.C. § 35-46-1-4. These charges were dismissed prior to trial.

Discussion and Decision

Sufficiency of the Evidence

[6] Downam contends that there is insufficient evidence to support his convictions for Child Molesting and Battery. Our standard of review is well established:

> In reviewing a claim of insufficient evidence, we will affirm the conviction unless, considering only the evidence and reasonable inferences favorable to the judgment, and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000).

[7] To convict Downam of Child Molesting, as a Level 1 felony, as charged, the State was required to prove beyond a reasonable doubt that Downam, a person at least twenty-one years of age, performed or submitted to sexual intercourse or other sexual conduct with E.M., a person under fourteen years of age. I.C. § 35-42-4-3; App. Vol. II, pg. 24. Indiana Code Section 35-31.5-2-221.5 defines "other sexual conduct" as "an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." Downam claims that there is insufficient proof of penetration.

[8] E.M. testified that she had reported to a forensic interviewer, first in writing and later verbally, that Downam had raped her. E.M. acknowledged having explained to the interviewer that E.M.'s understanding of "rape" was being

forcibly held down and forced to "have sex without consent." (Tr. Vol. II, pg. 175.) When asked to provide more detail in her in-court testimony, E.M. testified that Downam touched her vagina with his fingers, he "tried to have sex" with her, and "it didn't go in like all the way." (*Id.* at 151.) E.M. had "felt [Downam]'s penis on her vagina." (*Id.* at 152.)

> We have held that the slightest penetration of the female sex organ, including external genitalia, constitutes child molesting. *Seal v. State*, 105 N.E.3d 201, 211 (Ind. Ct. App. 2018), *trans. denied*; *see also Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002) (stating that "our statute defining sexual intercourse does not require that the vagina be penetrated, only that the female sex organ, including the external genitalia, be penetrated"), *trans. denied*. Thus, full penetration resulting in genital trauma is not required to prove child molesting.

Cutshall v. State, 166 N.E.3d 373, 377 (Ind. Ct. App. 2021). A victim's testimony, even if it is uncorroborated, is ordinarily sufficient to sustain a conviction for Child Molesting. *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000). Here, the State introduced sufficient evidence of penetration and Downam's conviction for Child Molesting, as a Level 1 felony, is supported by sufficient evidence.

[9] To convict Downam of Battery, as a Level 6 felony, as charged, the State was required to establish beyond a reasonable doubt that Downam knowingly or intentionally touched M.M. in a rude, insolent, or angry manner by hitting, slapping, striking, punching, or smacking M.M. I.C. § 35-42-2-1; App. Vol. II, pg. 24. M.M. testified that "any time one of us did something we were abused

either physically or mentally." (Tr. Vol. II, pg. 118.) According to M.M., the physical abuse "mostly" involved open handed back-hand slaps and M.M. being "picked up by [his] cheeks." (*Id.*) M.M. described one occasion where his grandparents had received a report that M.M. was insubordinate at school. Downam "burst through the door," and knocked M.M. off his feet and onto a bed. (*Id.* at 119.) On another occasion, M.M. attempted to sneak a drink of water despite strict rationing of drinks in the household. His grandmother caught him trying to fill a toy teacup with tap water and reported it to Downam. Downam was holding a water bottle mostly filled with ice and threw the bottle at M.M., striking his head. M.M.'s head bled for several minutes. M.M. was also forced to kneel against a wall for thirty to sixty minutes with his head injury untreated. Although M.M. focused upon two incidents, he testified that there were "countless" other such incidents. (*Id.* at 119.)

[10] Downam concedes that he touched M.M. but contends that his conduct toward M.M. fell within the realm of permissible corporal punishment administered by one acting as a parent. We review an allegation that the State failed to refute a claim of parental privilege in a battery of a child prosecution under the same standard of review applicable to any sufficiency of the evidence claim. *Hanks v. State*, 119 N.E.3d 1067, 1069 (Ind. Ct. App. 2019) (citing *Willis v. State*, 888 N.E.2d 177, 182-83 (Ind. 2008)), *trans. denied*. Under Indiana Code Section 35-41-3-1, "[a] person is justified in engaging in conduct otherwise prohibited if he has legal authority to do so." One such potential justification is what is sometimes called the "parental discipline privilege," under which a parent has

legal authority to "apply such reasonable force" upon his or her child as the parent "reasonably believes to be necessary for ... proper control, training, or education." *Hanks*, 119 N.E.3d at 1069 (quotation marks omitted) (quoting *Willis*, 888 N.E.2d at 182).

[11] When a defendant asserts the parental discipline privilege as a defense to a battery charge,

> the State must disprove at least one element of the defense beyond a reasonable doubt." [*Willis*, 888 N.E.2d at 182.] Thus, "the State must prove that either: (1) the force the parent used was unreasonable or (2) the parent's belief that such force was necessary to control [the] child and prevent misconduct was unreasonable." *Id*. The State may refute the defense "by direct rebuttal or by relying upon the sufficiency of the evidence in its case-in-chief." *Id*. Ultimately, "[t]he decision of whether a claim of parental privilege has been disproved is entrusted to the fact-finder." *Id*.

Id. at 1070.

[12] In determining whether the particular force used constitutes "reasonable" parental discipline, the fact-finder should balance several factors, including:

> (a) whether the actor is a parent; (b) the age, sex, and physical and mental condition of the child; (c) the nature of his offense and his apparent motive; (d) the influence of his example upon other children of the same family or group; (e) whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command; (f) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.

Id. (citations omitted). This list of factors is non-exhaustive, and "obviously, not all of the listed factors may be relevant or applicable in every case." *Willis*, 888 N.E.2d at 182.

[13] We first observe that Downam was not M.M.'s parent. Although Downam had custody of M.M. pursuant to the DCS family placement, DCS specifically instructed Downam to refrain from using corporal punishment as a condition of placement. Moreover, the degree of force involved was extreme. The State presented evidence that Downam picked up M.M. by his cheeks, knocked M.M. off his feet, and, most egregiously, struck M.M. in the head with a projectile bottle of ice and liquid. The ensuing laceration caused bleeding for ten minutes but, rather than offer medical assistance, Downam continued the punishment by making M.M. kneel on the floor for up to one hour. The evidence is sufficient to refute a claim of parental privilege to use reasonable force pursuant to Indiana Code Section 35-41-3-1. Sufficient evidence supports Downam's conviction for Battery.

Credit Time Restriction

[14] Indiana Code Section 35-38-1-7.8(a) provides: "At the time of sentencing, a court shall determine whether a person is a credit restricted felon (as defined in IC 35-31.5-2-72)." The trial court must base its determination upon: "(1) evidence admitted at trial that is relevant to the credit restricted status; (2) evidence introduced at the sentencing hearing; or (3) a factual basis provided as part of a guilty plea." I.C. § 35-38-1-7.8(b).

[15] Downam contends that the trial court's determination that he is a credit restricted felon is based upon trial court error as to the age of the victim. Our General Assembly has defined "credit restricted felon" to include "a person who has been convicted of … child molesting involving sexual intercourse … or other sexual conduct … if: (A) the offense is committed by a person at least twenty-one (21) years of age; and (B) the victim is less than twelve (12) years of age." I.C. § 35-31.5-2-72.[4] Here, however, the State alleged that E.M. was twelve years old when Downam molested her. E.M. testified that she was twelve or thirteen at the time of the molestation. The trial court's determination that Downam is a credit restricted felon lacks evidentiary support and must be reversed.

Sentence

[16] Finally, Downam contends that his sentence is inappropriate. Upon conviction of a Level 1 felony, Downam was subject to a sentence of twenty to forty years, with an advisory sentence of thirty years. I.C. § 35-50-2-4(b). Upon conviction of a Level 6 felony, Downam was subject to a sentence of six months to two and one-half years, with an advisory sentence of one year. I.C. § 35-50-2-7(b). The trial court imposed upon Downam an aggregate sentence of forty-two years, with five years suspended.

[4] Other bases for credit restriction, including molestation causing serious bodily injury or death, and murder in some circumstances related to sexual conduct, are not applicable here.

[17] In selecting that sentence, the trial court found two aggravating circumstances: Downam's criminal history, consisting of a battery conviction, and his violation of a position of trust. In mitigation, the trial court recognized that Downam had led a law-abiding life for a significant period of time after the battery conviction. The trial court stated that the criminal history was "negated" by its remoteness and indicated that consideration was given "primarily [to] the fact that he was a custodian of these children who were in his care." (Tr. Vol. III, pg. 11.)

[18] Pursuant to Appellate Rule 7(B), we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision," we find "that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Because sentencing is principally a discretionary function, we reserve our authority for "exceptional cases." *Livingston v. State*, 113 N.E.3d 611, 613 (Ind. 2018). As our Supreme Court has explained, deference to the trial court "should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). Ultimately, the defendant bears the burden of persuading us that the sentence is inappropriate. *Harris v. State*, 165 N.E.3d 91, 99 (Ind. 2021).

[19] The nature of Downam's offenses was that he was entrusted with the care and custody of children who had suffered severe trauma in the past; Downam added

to their trauma on multiple levels. At the sentencing hearing, M.M. read a statement on behalf of himself and his sister. He described their treatment at Downam's hands as being treated like animals, and he referenced deprivation of water, mental abuse, physical violence, and sexual abuse. Downam does not address the nature of his offenses. As such, he points to no "compelling evidence portraying in a positive light the nature of the offense." *Stephenson*, 29 N.E.3d at 122.

[20] As for the character of the offender, Downam insists that he is unlikely to re-offend and he asks that we consider his history of employment and his lack of a criminal conviction after 1994. We acknowledge that Downam did not have a lengthy history of crimes and he was regularly employed. As such, Downam has met minimal societal expectations. This does not militate toward a lesser sentence than that selected by the trial court. Downam has not demonstrated, in light of the nature of the offenses and his character, that his sentence is inappropriate.

Conclusion

[21] Sufficient evidence supports Downam's convictions for Child Molesting and Battery. His designation as a credit restricted felon is in error. Downam has not persuaded us that his sentence is inappropriate. We affirm the convictions and sentence and remand with instructions to the trial court to remove the credit restricted felon designation.

Riley, J., and Vaidik, J., concur.