MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ian Alexander Gray,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 21, 2023

Court of Appeals Case No. 23A-CR-446

Appeal from the Hamilton Superior Court

The Honorable Jonathan M. Brown, Judge

Trial Court Cause No. 29D02-2104-F1-4318

Memorandum Decision by Judge Vaidik
Judges Mathias and Pyle concur.

Vaidik, Judge.

Case Summary

[1] Ian Alexander Gray appeals his conviction for Level 4 felony child molesting, arguing the evidence is insufficient to support the conviction and that he received ineffective assistance of counsel. We disagree and affirm.

Facts and Procedural History

[2] In 2018, G.K., then twelve years old and in the sixth grade, attended Fall Creek Intermediate School in Fishers. Gray was her math teacher and also coached track, which G.K. participated in. Around three years later, in May 2021, G.K. disclosed to her therapist that Gray inappropriately touched her in 2018. The therapist contacted the Fishers Police Department, and a detective interviewed G.K. During the interview, G.K. disclosed that Gray would place his hand down her pants and up her shirt and "feel [] around." Appellant's App. Vol. II p. 23. She stated that while doing this he would touch her vagina and her "bare" breasts underneath her clothing. *Id.*

[3] The State charged Gray with Level 4 felony child molesting.[1] A bench trial was held in January 2023. G.K. testified that, approximately ten times between

[1] The State also charged Gray with Level 1 felony child molesting, but on the State's motion the court dismissed this count before trial.

February and May 2018, Gray sent her to a small room connected to his classroom, called the "small-group room," either for disciplinary reasons or to work on schoolwork. She stated that these encounters occurred during the school day, that she and Gray were alone in the room, and that although the small-group room had multiple windows, the blinds were always down and closed so no one could see in. She further stated that while in the room, Gray would "put his hand down [her] pants" and touch her "between [her] legs" both over and under her underwear. Tr. Vol. II pp. 87, 88. She testified that he would "rest [] his hand" there and not move it. *Id.* at 90. She also stated he sometimes would "touch up [her] shirt over [her] bra." *Id.*

[4] Gray's defense focused on the impracticality of the molestations happening in a room connected to a classroom full of students during the school day. Thus, trial counsel called several witnesses, including Gray and two other teachers, to testify about the layout and visibility of the rooms. Each testified that the small-group room adjoined two classrooms, was unlocked and open to both students and teachers at all times, and had windows with blinds that were generally up and open. During closing, defense counsel further emphasized the accessibility of the room and argued G.K.'s testimony that the blinds were down was untrue based on the other witnesses' testimony.

[5] The trial court found Gray guilty as charged and sentenced him to eight years, with five years executed and three suspended to probation.

[6] Gray now appeals.

Discussion and Decision

I. Sufficiency of Evidence

[7] Gray first contends the evidence is insufficient to support his conviction. When reviewing sufficiency-of-the-evidence claims, we neither reweigh the evidence nor judge the credibility of witnesses. *Willis v. State*, 27 N.E.3d 1065, 1066 (Ind. 2015). We will only consider the evidence supporting the judgment and any reasonable inferences that can be drawn from the evidence. *Id.* A conviction will be affirmed if there is substantial evidence of probative value to support each element of the offense such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

[8] To convict Gray of Level 4 felony child molesting as charged, the State was required to prove that he touched or fondled G.K., a child under fourteen, with intent to arouse or satisfy his or G.K.'s sexual desires. Ind. Code § 35-42-4-3(b); Appellant's App. Vol. II p. 19. Gray argues the State failed to prove that the alleged fondling or touching was done with the intent to arouse or satisfy sexual desires. Mere touching alone is not sufficient to constitute the crime of 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.* The intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points. *Id.*

[9] Gray argues the State did not present any evidence, outside the touching, to show his intent and cites *Clark v. State*, 695 N.E.2d 999, 1002 (Ind. Ct. App. 1998), *trans. denied*, and *DeBruhl v. State*, 544 N.E.2d 542, 546 (Ind. Ct. App. 1989). In *Clark*, the defendant tickled the child, clothed only in a shirt, under the arms. We held this touching alone was insufficient to show the intent element of child molesting. In *DeBruhl*, the defendant kissed the child on the neck and removed some of her clothing. Again, we held these actions alone insufficient to show the intent element of child molesting.

[10] But Gray's case is distinguishable from these. Unlike those victims, G.K. testified that Gray touched her genitals both over and under her underwear. While mere touching does not satisfy the intent element of child molesting, the touching of genitals does. *See Spann v. State*, 850 N.E.2d 411, 414 (Ind. Ct. App. 2006) (explaining that the intent to arouse or satisfy sexual desires required to support a child-molesting conviction may be inferred from evidence that the accused intentionally touched a child's genitals); *Nuerge v. State*, 677 N.E.2d 1043, 1049 (Ind. Ct. App. 1997) (touching child's genitals may "be the source of sexual gratification" to show intent element of child molesting), *trans. denied*.

[11] As such, the evidence is sufficient to support the trial court's finding that Gray fondled or touched G.K. with the specific intent to arouse or satisfy sexual desires.

II. Ineffective Assistance of Counsel

[12] Gray also argues he received ineffective assistance of counsel. A petition for post-conviction relief is the preferred mechanism for raising such a claim, but when the claim can be evaluated on the trial record alone, direct appeal is an appropriate alternative. *Lewis v. State*, 929 N.E.2d 261, 263 (Ind. Ct. App. 2010). When evaluating a defendant's ineffective-assistance-of-counsel claim, we apply the well-established, two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984). *Bobadilla v. State*, 117 N.E.3d 1272, 1280 (Ind. 2019). The defendant must prove (1) counsel rendered deficient performance, meaning counsel's representation fell below an objective standard of reasonableness as gauged by prevailing professional norms, and (2) counsel's deficient performance prejudiced the defendant, i.e., but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different. *Id.* "We afford great deference to counsel's discretion to choose strategy and tactics, and strongly presume that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions." *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002).

[13] Gray alleges trial counsel should have impeached G.K.'s testimony with prior inconsistent statements. Specifically, Gray notes that G.K.'s "description of the touching events in the [probable-cause affidavit] are very different from her testimony at trial." Appellant's Br. p. 14. We agree that G.K.'s description of the touching in the probable-cause affidavit differed slightly from her trial testimony. In her initial disclosure to police, G.K. stated that when Gray placed

his hand in her pants he would "feel around," while at trial she stated his hand did not move. She also initially stated that he touched her "bare breast," but at trial she stated that he touched her over her bra. As Gray points out, these differences, though relatively minor, could have been used to undermine G.K.'s credibility.

[14] But we also note that G.K.'s description of Gray's touching in the probable-cause affidavit was worse than what she ultimately testified to. Therefore, trial counsel faced a choice between undermining G.K.'s credibility and allowing in more prejudicial testimony. While reasonable minds may differ as to the best approach here, we will not second-guess trial counsel's strategic decisions, especially when, due to Gray's choice to bring this claim on direct appeal, we have no extrinsic evidence on trial counsel's reasoning. *See Pontius v. State*, 930 N.E.2d 1212, 1219 (Ind. Ct. App. 2010) ("When the only record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight.") (citation omitted).

[15] Next, Gray alleges trial counsel should have "impeach[ed]" G.K. on issues where her testimony differed from other witnesses. Appellant's Br. p. 15. First, he notes she testified that the small-group room's blinds were generally closed, while others testified that they were open. But Gray does not tell us what more trial counsel should have done to highlight this discrepancy. Trial counsel cross-examined G.K. about the blinds, and she stated that the blinds were down and closed. Trial counsel then elicited testimony from several other witnesses, all of

whom said the blinds were generally up and open. Trial counsel emphasized during closing that G.K.'s testimony differed from these witnesses' as a way to undermine her credibility. It is unclear from this record what more trial counsel could have done. As such, we find no deficiency.

[16] Additionally, Gray emphasizes that G.K. testified that she could not remember if Gray was her track coach, while her mother testified that he was, and that this difference could have been used to undermine G.K.'s credibility. But again, trial counsel elicited these facts at trial, and Gray does not tell us what more counsel should have done. Nor does he tell us how additional questioning would have helped him. As such, we cannot say trial counsel's failure to do so was objectively unreasonable.

[17] Gray has not established ineffective assistance of counsel.

[18] Affirmed.

Mathias, J., and Pyle, J., concur.