MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kevin Scott Weiss,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 3, 2021

Court of Appeals Case No. 21A-CR-32

Appeal from the Vanderburgh Superior Court

The Honorable Robert J. Pigman, Judge

Trial Court Cause No. 82D03-1911-F1-8223

Mathias, Judge.

[1] Kevin Weiss molested his step-granddaughter, A.W., for several years. A.W. eventually exposed Weiss's conduct, and a jury found him guilty of four counts

of Level 1 felony child molestation, one count of Level 4 felony child molestation, and of being a repeat sexual offender. On appeal, Weiss challenges the evidence supporting one of his Level 1 felony convictions; namely, the one predicated on attempted sexual intercourse with A.W. Finding that evidence establishing that Weiss completed the act of sexual intercourse is sufficient to support his attempt conviction for the same conduct, we affirm.

Facts and Procedural History

[2] In fall 2019, eleven-year-old A.W. lived in her grandparents' home with her mother, younger brother, grandmother, and step-grandfather, Weiss. On Friday, November 22, A.W. attended the final session of a weeklong Truth Talks seminar at her school. Truth Talks is an "abstinence program," presented during the students' health class, aimed at teaching them about "the steps of affection" in relationships and appropriate boundaries. Tr. Vol. II, pp. 90–91. At the conclusion of the final session, which covered sexual abuse, the facilitator instructed the students "if this has happened to them to write their name on [a] piece of paper and tell me exactly what happened or what they need me to know." *Id.* at 92. A.W. stayed after the session and handed a piece of paper to the facilitator, on which she wrote, "Help me please!" and, "I'm

being touched wrongly by my gpa[.]" Ex. Conf. Vol. at 27.[1] By "gpa," A.W. was referring to Weiss.

[3] After reading the note, the facilitator spoke with A.W. to get a better understanding of where and how she had been touched. A.W. reported that Weiss had touched her vagina with both his hand and his penis and that this conduct had occurred "since [she] was five." Tr. Vol. II, p. 93. At that point, the facilitator notified a school counselor and they contacted local authorities as well as A.W.'s mother and grandmother. Detective Brian Turpin arrived at the school first, and A.W.'s mother and grandmother arrived soon after. The detective arranged for A.W. to be transported to Holly's House—a local adult-and-child advocacy center—where she underwent a forensic interview.

[4] During the interview, A.W. disclosed that Weiss, "weekly or a few times a week," fondled her, subjected her to oral sex, paid her to hold his penis, put his penis against her vagina, and inserted his penis into her vagina. Appellant's App. Vol. II, p. 31. After watching the conversation from a different room, Detective Turpin interviewed A.W.'s mother and grandmother, and he secured a search warrant for the family's house. While executing the search warrant that evening, Detective Turpin asked Weiss to come with him to the police

[1] Though the note abruptly ends with "but," the subsequent investigation revealed that A.W. intended to finish the note with, "but he's the only one that provides for the entire family so I don't want anything to happen to him." State's Ex. 13.

station so that he "could talk to [Weiss] about the case." Tr. Vol. II, p. 176. Weiss agreed, and the detective gave him a ride to the station.

[5] After arriving at the station around 8:30 p.m., Detective Turpin led Weiss into an interview room where he advised Weiss of his Miranda rights and then questioned him about A.W.'s allegations. Over the next two-plus hours, Weiss admitted to engaging in sexual conduct with A.W., at one point stating, "I'll just agree to what she says I did." State's Ex. 13. He also disclosed that he had recently "put [his] hand in [A.W.]'s pants and fondled her," Ex. Conf. Vol. at 30, and he wrote in a note to A.W., "I am sorry for your pain + confusion from my bad decisions," *id.* at 32. Weiss was subsequently placed under arrest.

[6] The State initially charged Weiss with twenty counts of felony child molestation but, after amending the dates, reduced them to the following eight:

- Counts I and II alleged that Weiss performed two distinct acts of deviate sexual conduct with A.W. between July 7, 2013, and June 30, 2014;
- Counts III and IV alleged that Weiss performed two distinct acts of other sexual conduct with A.W. between July 1, 2014, and October 17, 2019;
- Count V alleged that Weiss performed sexual intercourse with A.W. between July 1, 2014, and October 17, 2019;
- Count VI alleged that Weiss attempted to perform sexual intercourse with A.W. between July 1, 2014, and October 17, 2019;
- Count VII alleged that Weiss fondled A.W. between July 7, 2013, and June 30, 2014; and
- Count VIII alleged that Weiss fondled A.W. between July 1, 2014, and October 17, 2019.

Appellant's App. Vol. II, pp. 26–28, 58–59, 107–08. The State also charged Weiss with a repeat sexual offender enhancement based on a prior conviction for Class C felony child molestation. *Id.* at 31.

[7] On September 8, 2020, Weiss's three-day jury trial began. A.W., now twelve years old, indicated on diagrams where the inappropriate touching occurred and recounted several examples of Weiss's sexual acts. *See* Tr. Vol. II, pp. 142–47; Ex. Conf. Vol. at 5, 9. Those acts included Weiss fondling A.W. above and below her waist, compelling A.W. to touch his penis with her hand and mouth, twice inserting his penis into A.W.'s vagina, and performing oral sex on her. A.W. indicated that the molestation began in 2013, when she was around five years old, and that "[m]ost of the time it was daily" including "the night before the Truth Talk." Tr. Vol. II, pp. 144–45, 148. If no one was home, Weiss would touch A.W. in the living room, and she also recounted a time "[a]t a cabin." *Id.* at 148, 165. Most of the inappropriate conduct, however, happened at night in A.W.'s grandparents' bed where she occasionally slept.

[8] A.W.'s grandmother was unaware of Weiss's actions and allowed the child to sleep in their bed because she "thought [A.W.] was safe." *Id.* at 111. On nights A.W. did not want to sleep in her grandparents' bed, A.W. and her mother each noted that Weiss "would get angry." *Id.* at 167; *see also id.* at 123. A.W.'s mother said that on those occasions Weiss "would just tell [A.W.] that he wouldn't take her to breakfast and wouldn't go buy her anything . . . or he wouldn't take her to school." *Id.* at 123. A.W. further revealed that, after

touching her inappropriately, Weiss would often "give [her] money" or "take [her] to a store to get a toy or something like that." *Id.* at 147.

[9] The jury ultimately found Weiss guilty of the five molestation counts for conduct that occurred after July 1, 2014: Count III (other sexual conduct); Count IV (other sexual conduct); Count V (sexual intercourse); Count VI (attempted sexual intercourse); and Count VIII (fondling). The jury also found him guilty of the repeat sexual offender enhancement. The court subsequently sentenced Weiss to an aggregate term of seventy-nine years. He now appeals.

Standard of Review

[10] Weiss challenges the sufficiency of the evidence supporting his conviction for attempted child molestation. In reviewing a sufficiency claim, we consider only the evidence and the reasonable inferences favorable to the conviction, and we neither reweigh the evidence nor judge witness credibility. *Rodriguez v. State*, 868 N.E.2d 551, 553 (Ind. Ct. App. 2007). As long as the conviction is supported by substantial evidence of probative value, we will affirm. *Id.*

Discussion and Decision

[11] Weiss was convicted of two counts of Level 1 felony child molestation predicated on sexual intercourse with A.W.: Count V was based on a *completed* act; and Count VI was based on an *attempted* act. Weiss argues that the evidence is insufficient to support his conviction for the attempt. We disagree.

[12] To convict Weiss of attempted child molestation as charged here, the State had to prove that he knowingly or intentionally engaged in conduct constituting a substantial step toward penetrating A.W.'s vagina with his penis. *See* I.C. §§ 35-42-4-3(a)(1), 35-41-5-1(a), 35-31.5-2-302. At trial, A.W. confirmed that Weiss had "put his penis inside of [her]." Tr. Vol. II, p. 146. And when asked how many times that happened, A.W. responded, "I believe it was twice but I'm not sure." *Id.* From this testimony, the jury could reasonably infer that Weiss had sexual intercourse with A.W. on two occasions. Weiss concedes as much, *see* Appellant's Br. at 10–11, but nevertheless maintains that the State failed to establish "that he attempted to have sexual intercourse with A.W. . . . but was not successful in doing so," *id.* at 9. In Weiss's view, because A.W.'s testimony indicates the charged attempt was completed, there is insufficient evidence to support an attempt conviction. He is incorrect for two interrelated reasons.

[13] First, Weiss's argument imputes an element for attempt—"failure to complete"—that does not exist. Indeed, it is well settled under Indiana law that a criminal-attempt conviction does not require proof that the defendant failed to complete the crime. *See Crump v. State*, 259 Ind. 358, 287 N.E.2d 342, 345 (1972) (rejecting the argument that "proof of an ineffective act is necessary to establish the 'attempt'"). Rather, the State must prove the defendant (1) acted with the culpability required for the substantive crime, and (2) engaged in conduct constituting a substantial step toward commission of the crime. I.C. §

35-41-5-1(a).[2] And when that showing is made, the defendant is subject to the same punishment as if the crime had been committed. *Id.*

[14] Second, Weiss's argument incorrectly suggests that evidence of a completed act cannot constitute a substantial step toward commission of the offense. In a general sense, every completed crime is inevitably preceded by a substantial step to commit that crime.[3] *See* I.C. § 35-31.5-2-168(2) (defining "included offense" as an attempt to commit the crime charged); *Ocelotl-Toxqui v. State*, 793 N.E.2d 271, 274 n.5 (Ind. Ct. App. 2003), *trans. denied*; *McFarland v. State*, 179 Ind. App. 143, 384 N.E.2d 1104, 1109 n.7, 1110 n.10 (1979). Here, the fact that the evidence supports a conclusion that Weiss had sexual intercourse with A.W. on two occasions is sufficient to show that, on each occasion, he first took a substantial step toward committing the offense. Further, accepting Weiss's position would result in us vacating his attempt conviction "not because he was innocent, but for the very strange reason, that he was too guilty." *United States v. Fleming*, 215 A.2d 839, 840–41 (D.C. Cir. 1966) (quotation omitted); *see also Perry v. State*, 177 Ind. App. 334, 379 N.E.2d 531, 534 n.6 (1978) ("We know of

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[2] Some states have statutes that include failure to complete the substantive crime as an element of criminal attempt. *E.g.,* Kan. Stat. Ann. § 21-5301(a); Nev. Rev. Stat. § 193.330(1).

[3] Several states have statutes that expressly permit a conviction for a charged criminal attempt when the evidence establishes a completed crime. Ala. Code § 13A-4-5(a); Alaska Stat. §11.31.140(a); Ariz. Rev. Stat. Ann. § 13-110; Cal. Penal Code § 663; Colo. Rev. Stat. § 18-2-101(1); Ga. Code. Ann. § 16-4-2; Idaho Code § 18-305; La. Stat. Ann. § 14:27(C); Mont. Code Ann. § 45-4-103(5); Nev. Rev. Stat. § 193.330(2); Or. Rev. Stat. § 161.485(1); Tenn. Code Ann. § 39-12-101(c); Tex. Penal Code Ann. §15.01(c); Utah Code Ann. §76-4-101(3)(a); Wis. Stat. § 940.46. On the other hand, two states explicitly forbid a conviction for criminal attempt if the crime was committed. Miss Code Ann. § 97-1-9; Okla. Stat. tit. 21 § 41. Notably, Indiana's analogous statute, I.C. § 35-41-5-3, does not include a provision either way.

no prejudice accruing to a defendant who is convicted of attempt when evidence proves his attempt was successful."). And such a result, in these circumstances, would be illogical.

[15] In short, proof sufficient to support a defendant's conviction for child molestation predicated on sexual intercourse is, logically and legally, sufficient to support that defendant's conviction for criminal attempt to commit the same offense. The evidence here, as conceded by Weiss, is sufficient to show that he twice had sexual intercourse with A.W. One of those completed acts therefore supports Weiss's criminal attempt conviction.[4]

Conclusion

[16] Evidence that Weiss had sexual intercourse with A.W. is sufficient to support his conviction for Level 1 felony attempted child molestation. We affirm.

Riley, J., and Crone, J., concur.

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[4] Weiss also points to (1) the State's failure to explicitly charge Counts V and VI on "separate and distinct acts," and (2) the prosecutor's comments during closing argument that "seemed to suggest" Count VI "was an alternative to" Count V. Appellant's Br. at 11. To the first point, while we agree it would have been better if the State had indicated the two counts were based on "separate and distinct acts"—as the State did with the other counts—Weiss concedes that the evidence reveals he had sexual intercourse with A.W. on two separate occasions. *See id.* at 10–11. To the second point, even if we agreed with Weiss's characterization of the prosecutor's argument, the jury was twice instructed that statements by counsel are not evidence. Appellant's App. Vol. II, pp. 117, 140.