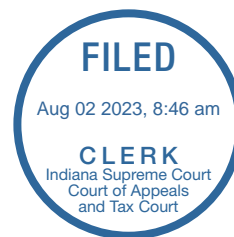


MEMORANDUM DECISION

Pursuant to [Ind. Appellate Rule 65\(D\)](#), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Joshua B. Volkert,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 2, 2023

Court of Appeals Case No.
22A-CR-2927

Appeal from the Marshall Superior
Court

The Honorable Robert O. Bowen,
Judge

Trial Court Cause No.
50D01-2009-F1-6

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Joshua B. Volkert appeals his habitual offender adjudication after a jury trial. Volkert raises a single issue for our review, namely, whether the State presented sufficient evidence to support his habitual offender adjudication. In response, the State agrees that it did not present sufficient evidence and that Volkert's habitual offender adjudication must be vacated. We agree with the parties. We therefore reverse Volkert's adjudication as a habitual offender and remand for resentencing.

Facts and Procedural History

[2] In October 2022, the State filed an amended information against Volkert in which the State alleged that Volkert had committed the following offenses: Class A felony and Class C felony child molesting against M.T. for acts that occurred between 2011 and 2013; and Level 1 felony and Level 4 felony child molesting against M.T. for acts that occurred between 2016 and 2017. The State also alleged Volkert to be a habitual offender. In support of its habitual-offender allegation, the State relied on a 2016 conviction and three 2018 convictions. *See* Appellant's App. Vol. 2, p. 44.

[3] Following a trial, the jury found Volkert guilty on each of the four child-molesting counts. The jury then also found Volkert to be a habitual offender based on his 2016 and 2018 convictions. After a hearing, the court sentenced Volkert to an aggregate term of seventy-six years, which included six years for his adjudication as a habitual offender. This appeal ensued.

Discussion and Decision

[4] Volkert argues that the State failed to present sufficient evidence to support his habitual offender adjudication. As our Supreme Court has stated:

On a fundamental level, sufficiency-of-the-evidence arguments implicate a “deferential standard of review,” in which this Court will “neither reweigh the evidence nor judge witness credibility,” but lodge such matters in the special “province” and domain of the jury, which is best positioned to make fact-centric determinations. *See Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018). In reviewing the record, we examine “all the evidence and reasonable inferences supporting the verdict,” and thus “will affirm the conviction if probative evidence supports each element of the crime beyond a reasonable doubt.” *Id.*

Carmack v. State, 200 N.E.3d 452, 459 (Ind. 2023).

[5] There is no dispute that, at all relevant times, [Indiana Code section 35-50-2-8](#), our habitual offender statute, permitted the State to allege Volkert to be a habitual offender based on his convictions for “prior” unrelated felonies. There is also no dispute that that statute has at all relevant times required the following sequencing:

(1) the second prior unrelated felony conviction was committed after commission of and sentencing for the first prior unrelated felony conviction;

(2) *the offense for which the state seeks to have the person sentenced as a habitual offender was committed after commission of and sentencing for the second prior unrelated felony conviction; and*

(3) for a conviction requiring proof of three (3) prior unrelated felonies, the third prior unrelated felony conviction was committed after commission of and sentencing for the second prior unrelated felony conviction.

I.C. § 35-50-2-8(f) (emphasis added).

[6] Thus, in order to show that Volkert was a habitual offender, the State was required to show that the instant offenses were “committed after commission of and sentence for” the prior offenses. That did not happen here, where the State alleged that Volkert committed the instant offenses between 2011 and 2017, *before* Volkert was sentenced on three of the four “prior” offenses in the habitual-offender allegation. Accordingly, the State did not present sufficient evidence to support Volkert’s adjudication as a habitual offender. We therefore order the trial court to vacate his adjudication as a habitual offender.

[7] Reversed and remanded.

Vaidik, J., and Pyle, J., concur.