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IN THE COURT OF APPEALS OF INDIANA

Ladis Orlando Saavedra,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 23, 2022

Court of Appeals Case No. 21A-CR-1761

Appeal from the Cass Circuit Court

The Hon. Stephen R. Kitts, Judge

Trial Court Cause No. 09C01-1907-F3-18

Bradford, Chief Judge.

Case Summary

[1] Around May of 2018, Ladis Saavedra, who lived in Logansport, began asking his granddaughter H.J.S.V., who lived in Guatemala and was then fifteen years old, to send him "sexy videos" in exchange for money sent to her family. Later, H.J.S.V. began sending Saavedra explicit photographs of herself and the requested videos. In April of 2019, Saavedra paid to have H.J.S.V. brought to the United States, and she eventually came to live with him. Saavedra frequently asked H.J.S.V. to have sexual intercourse with him, requests she refused. One evening, H.J.S.V. heard a noise and a cry for help from Saavedra's bedroom. When H.J.S.V. entered the bedroom, the naked Saavedra emerged from behind the door, grabbed her from behind, grasped her breast, kissed her, and attempted to put her on the bed. H.J.S.V. managed to escape and later told her aunt what had happened.

[2] The State charged Saavedra with Level 3 felony attempted rape, Level 5 felony child exploitation, Level 5 felony vicarious sexual gratification, and Level 6 felony sexual battery, and a jury convicted him as charged. The trial court merged Saavedra's sexual battery guilty verdict into his guilty verdict for attempted rape and sentenced him to twelve years of incarceration for attempted rape, four years for child exploitation, and four years for vicarious sexual gratification, with the last two sentences to be served concurrently. Saavedra contends that the State failed to produce sufficient evidence to sustain his convictions, that the trial court's merger of sexual battery into attempted rape violated prohibitions against double jeopardy, and that remand is

appropriate to clarify his sentence. Because we disagree with Saavedra's first contention, agree that vacation of his sexual battery is the proper remedy for the double jeopardy violation, and agree that his sentence needs clarification, we affirm and remand with instructions.

Facts and Procedural History

[3] H.J.S.V., born on August 12, 2002, is Saavedra's granddaughter and lived with her mother in Guatemala in 2017. H.J.S.V. had frequent contact with Saavedra via video calls, and, around the time she turned fifteen years old in August of 2017, the character of the calls changed, with Saavedra telling her to "show him things about [her] body" and commenting that she "already had a better body." Tr. Vol. II. pp. 138, 139. Around May of 2018, Saavedra's wife died, and, when H.J.S.V. was still fifteen years old, Saavedra started asking her to send him "sexy videos" in exchange for money sent to H.J.S.V.'s family. Tr. Vol. II. p. 139. Saavedra asked H.J.S.V. to "[d]ance, take [her] clothes off, [and] show him parts of [her] body" in the videos. Tr. Vol. II. p. 140. Later, H.J.S.V. began sending Saavedra explicit photographs of herself and the "sexy" videos she had made at his request.

[4] H.J.S.V. was aware that conditions in Guatemala were dangerous, which she described as "[r]ape, killing women, and rape them, rape them." Tr. Vol. II. p. 150. H.J.S.V.'s cousin had become a victim, and Saavedra suggested at some point that H.J.S.V. come to the United States to distance herself from the threats. Saavedra also told H.J.S.V. that he wanted her to be his wife when she arrived. Saavedra paid someone to bring H.J.S.V. from Guatemala to the

United States, and she left in April of 2019. While H.J.S.V. was in a migrant-detention facility in the United States, Saavedra spoke with her and asked if she would sleep with him. H.J.S.V. recalled she "would only just give excuses to him." Tr. Vol. II. p. 154.

[5] After finally making it to Logansport in May of 2019, H.J.S.V. stayed with Saavedra and her uncle. H.J.S.V. observed that Saavedra seemed to be hiding her and did not like her to see her aunt, who lived nearby. Saavedra would grab H.J.S.V. and try to kiss her. Saavedra spoke to H.J.S.V. about his desire for her other relatives to go away so that it could be just the two of them. H.J.S.V. recalled that she told Saavedra "[t]hat it was fine, but I didn't want to go." Tr. Vol. II. p. 156. Saavedra made H.J.S.V. wear "very short, short shorts" and dance for him, "sexy dances, so that I could move well," and told her not to be ashamed of their "game[.]" Tr. Vol. II. p. 157. When H.J.S.V.'s uncle was at work, Saavedra "always asked" her to have sex with him, and even offered her $500 if she agreed to sleep with him. Tr. Vol. II. p. 158.

[6] One evening in early July of 2019, H.J.S.V.'s uncle had gone out of town on vacation, and she was alone with Saavedra in his apartment. H.J.S.V. heard a loud noise and Saavedra shouting for help from his bedroom, and when she entered and turned on the light, Saavedra appeared from behind the bedroom door, completely naked. Saavedra grabbed H.J.S.V. from behind, grasped her breast, and tried to put her on his bed while kissing her on her body and neck. H.J.S.V. managed to escape, run to her own bedroom, and lock the door. Some days later, H.J.S.V.'s aunt came to the apartment when Saavedra was

gone; H.J.S.V. disclosed to her aunt what Saavedra had done, and her aunt reported the incident to authorities.

[7] The State charged Saavedra with Level 3 felony attempted rape, Level 5 felony child exploitation, Level 5 felony vicarious sexual gratification, and Level 6 felony sexual battery. A jury found Saavedra guilty as charged, and the trial court sentenced him to twelve years of incarceration for attempted rape, four years for child exploitation, and four years for vicarious sexual gratification, with at least the last two sentences to be served concurrently. The trial court "merged" the sexual battery conviction with the attempted rape conviction and did not impose a sentence for sexual battery.

Discussion and Decision

I. Sufficiency of the Evidence

[8] When evaluating a challenge to the sufficiency of the evidence to support a conviction, we do not "reweigh the evidence or judge the credibility of the witnesses," nor do we intrude within the factfinder's "exclusive province to weigh conflicting evidence." *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001). Rather, a conviction will be affirmed unless "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). The evidence need not exclude every reasonable hypothesis of innocence, but instead, "the evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Pickens v. State*, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001). When we are confronted with

conflicting evidence, we must consider it "most favorably to the [factfinder's] ruling." *Wright v. State*, 828 N.E.2d 904, 906 (Ind. 2005).

A. Child Exploitation

[9] In order to prove that Saavedra committed Level 5 felony child exploitation, the State was required to establish that he,

> with the intent to satisfy or arouse the sexual desires of any person[,] knowingly or intentionally […] create[d] a digitized image of [] any performance or incident that include[d] the uncovered genitals of a child less that eighteen (18) years of age or the exhibition of the female breast with less than a fully opaque covering of any part of the nipple by a child less than eighteen (18) years of age[.]

Ind. Code § 35-42-4-4(b)(4).

1. Creation of the Photographs

[10] Saavedra contends that the State failed to establish that he "created" any of the images at issue. To address this claim, we must interpret the statute by ascertaining the legislature's intent. *D.A. v. State*, 58 N.E.3d 169, 171–72 (Ind. 2016). "The best evidence of legislative intent is the statute's language." *Id.* Analysis of a statute's language begins with the words used by the legislature, giving "common and ordinary meaning to the words employed." *Young v. Hood's Gardens, Inc.*, 24 N.E.3d 421, 426 (Ind. 2015). "Create" may be defined as "to bring into existence" or "to bring about by a course of action or behavior[.]" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 532 (Phillip Babcock Gove et al. eds., G.&C. Merriam Company 1964). In this case, bringing into existence the images of H.J.S.V. found on Saavedra's

telephone involved more than taking them; Saavedra told H.J.S.V. to use her telephone to capture the explicit images, explained what he wanted to see, and paid her to capture them. Saavedra's course of action clearly brought the photographs into being, even if he was not the one actually taking them. We therefore conclude that the State produced sufficient evidence to establish that Saavedra created the images at issue for purposes of Indiana Code section 35-42-4-4(b)(4).

[11] Saavedra relies on our decision in *Salter v. State*, 906 N.E.2d 212, 221 (Ind. Ct. App. 2009), *overruled on other grounds by State v. Thakar*, 82 N.E.3d 257, 260 (Ind. 2017), in which we overturned Salter's convictions for child exploitation on the basis that he had not created the images at issue. *Id*. *Salter*, however, is easily distinguished, as Salter merely downloaded the images and copied them to a compact disc. *See id*. ("By downloading the images of M.B. and the other children and burning them onto CDs, Salter only saved copies of them, *i.e.*, he possessed them. We therefore reverse Salter's convictions for child exploitation."). In contrast, Saavedra played a very active role in causing the images at issue in this case to come into being, directing H.J.S.V. to take the photographs, telling her what he wanted to see in them, and paying her to take them. Saavedra's reliance on *Salter* is unavailing.[1]

[1] Similarly, if a commercially-produced film were at issue in this case, the "creation" of the film would not be limited to the camera operator but would include the director, producer, and financier of the video.

2. Mens Rea

[12] Saavedra also contends that he cannot be convicted of child exploitation because the State did not prove that he had subjective, personal knowledge of H.J.S.V.'s age. Indiana Code section 35-42-4-4, however, only requires proof of "knowing" conduct, and a person acts "'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2(b). Moreover, intent "is a mental function; hence, absent a confession, it often must be proven by circumstantial evidence" and the inferences arising from it. *Hightower v. State*, 866 N.E.2d 356, 368 (Ind. Ct. App. 2007), *trans. denied*. Therefore, the evidence admitted at trial must have permitted a conclusion that Saavedra was aware of a reasonable probability that H.J.S.V. was under the age of eighteen. Ind. Code §§ 35-42-4-4(d), 35-41-2-2(b).

[13] The evidence admitted at trial is sufficient to support such a reasonable inference. That evidence indicates that Saavedra was H.J.S.V.'s grandfather, which alone leads to a reasonable inference that he knew how old she was at any given time. H.J.S.V. also testified that during her regular video calls with Saavedra, she spoke with him about "things that were going on, like, events and birthdays[,]" Tr. Vol. II p. 138, also supporting an inference that he was aware of her age. Given their close familial relationship and frequent communication, there was sufficient evidence from which a reasonable jury could conclude that Saavedra (at the very least) was aware of a high degree of probability that H.J.S.V. was under eighteen years of age. *Drane v. State*, 867 N.E.2d 144, 147 n.4 (Ind. 2007).

[14] Saavedra draws our attention to H.J.S.V.'s appearance in the videos, noting that she had developed breasts and pubic hair and also claims that many grandparents do not know how old their grandchildren are. It was for the jury, drawing upon their experience and common sense, to determine if H.J.S.V.'s appearance was consistent with that of a girl under the age of eighteen and how likely it was that Saavedra knew her age. *See Clemons v. State*, 83 N.E.3d 104, 108 (Ind. Ct. App. 2017) ("When determining whether an element of an offense has been proven, the jury may rely on its collective common sense and knowledge acquired through everyday experiences—indeed, that is precisely what is expected of a jury."), *trans. denied*. Saavedra's argument is nothing more than an invitation to reweigh the evidence, which we will not do. *See Alkhalidi*, 753 N.E.2d at 627.

3. Whether the Child Exploitation Statute Criminalizes the Private Possession of Consensually-Obtained Nude Images

[15] Saavedra argues that the child-exploitation statute should not apply to the "consensual" sharing of images by a sixteen-year-old girl. Essentially, Saavedra argues "that the facts stated do not constitute an offense" because it would be absurd to criminalize the creation of pornographic images of a person younger than eighteen when persons over the age of sixteen may validly consent to sexual activity. Saavedra, however, raises this claim for the first time on appeal, and it is waived because it was not first brought by a motion to dismiss pursuant to Indiana Code section 35-34-1-4(a)(5). *See, e.g.*, *Leggs v. State*, 966

N.E.2d 204, 207 (Ind. Ct. App. 2012); *Truax v. State*, 856 N.E.2d 116, 123 (Ind. Ct. App. 2006).

B. Vicarious Sexual Gratification

The offense of vicarious sexual gratification, a Level 5 felony, occurs when a person "knowingly […] directs, aids, induces, or causes a child under the age of sixteen (16) to touch or fondle […] herself with intent to arouse or satisfy the sexual desires of a child or the older person." Ind. Code § 35-42-4-5. Saavedra focuses on evidence regarding when the videos were created, but this focus is somewhat misplaced. Because the statute is written in the disjunctive, it was only necessary to prove that Saavedra *either* directed, aided, induced, *or* caused H.J.S.V. to touch or fondle herself when she was fifteen years old, not that all four of those things occurred. Put another way, the crime was complete if Saavedra *directed* H.J.S.V. to touch or fondle herself when she was fifteen years old, even if there is no proof that she actually did so until she had turned sixteen—or ever, for that matter.

1. Age of the Victim

[16] Saavedra argues first that the State failed to produce sufficient evidence to establish that H.J.S.V. was age sixteen or under when Saavedra requested the "sexy" videos from her. As an initial matter, Saavedra's argument is based on his incorrect assertion that the latest birth date for H.J.S.V. for which there is

evidence in the record is March 12, 2002, when the actual latest date supported by the record is August 12, 2002.[2]

[17] With this in mind, we conclude that the State produced sufficient evidence to establish that H.J.S.V. was under the age of sixteen when Saavedra first solicited the videos from her. H.J.S.V. testified as follows regarding the timing of Saavedra's requests for "sexy" videos from her:

> Q. And you indicated he started asking for them right after your grandma died, is that right?
>
> A Yes.
>
> Q And you were 15 in May, is that right?
>
> A Yes.

Tr. Vol. II. p. 149. H.J.S.V. testified that she was fifteen years old when Saavedra asked her to start making "sexy" videos for him, testimony the jury was entitled to believe. Saavedra's argument in this regard is nothing more than an invitation to reweigh the evidence, which we will not do. *See Alkhalidi*, 753 N.E.2d at 627.

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[2] During direct examination, H.J.S.V. testified that her "[d]ate of birth" was August 12, 2002. Tr. Vol. II. p. 145. During cross-examination, however, H.J.S.V. testified that her actual date of birth was March 12, 2001, but that it had not been recognized by the government until August 12, 2002. (Tr. Vol. II. p. 164). While Saavedra does not actually argue that no reasonable jury could have found that H.J.S.V. was born in August of 2002, he does bring this contradictory evidence to our attention. Even though the contradictory evidence regarding H.J.S.V.'s birth date came from the same source, the jury was free to credit H.J.S.V.'s testimony that she was born on August 12, 2002, and reject her contradictory testimony as it saw fit. Our standard of review for such matters is clear and includes no exceptions for witnesses who contradict themselves.

2. Mens Rea

[18] Saavedra again contends that he cannot be convicted of vicarious sexual gratification because the State did not prove that he had subjective, personal knowledge of H.J.S.V.'s age. As with Indiana Code section 35-42-4-4, section 35-42-4-5(a) requires proof of "knowing" conduct Ind. Code § 35-41-2-2(b). The observations we made in section I(A)(2) of this opinion are just as relevant in this section, so we will not repeat them. Suffice it to say that Saavedra's argument is nothing more than an invitation to reweigh the evidence, which we will not do. *See Alkhalidi*, 753 N.E.2d at 627. The State produced sufficient evidence to sustain Saavedra's convictions for child exploitation and vicarious gratification.

C. Attempted Rape

[19] Saavedra also challenges his conviction for attempted rape. A person commits a crime if he, "acting with the culpability required for commission of the crime, engages in conduct that constitutes a substantial step toward commission of the crime." Ind. Code § 35-41-5-1. The State, then, was required to establish that Saavedra took a substantial step toward knowingly or intentionally having sexual intercourse with H.J.S.V. or knowingly or intentionally causing her to perform or submit to other sexual conduct when she is compelled by force or imminent threat of force. *See* Ind. Code § 35-42-4-1(a)(1).

> Our statute clearly sets out the two elements necessary for an attempt to commit a crime as (1) acting with the required culpability, and (2) engaging in conduct that constitutes a substantial step toward commission of the crime. The emphasis

> in this statute is on what the defendant has already done toward committing the crime and not on what remains to be done. What constitutes a substantial step must be determined from all the circumstances of each case, and the conduct must be strongly corroborative of the firmness of the defendant's criminal intent.

Zickefoose v. State, 270 Ind. 618, 622–23, 388 N.E.2d 507, 510 (1979). "The question of whether [a defendant's actions] constituted a substantial step is a question of fact for the jury." *Cowans v. State*, 274 Ind. 327, 329, 412 N.E.2d 54, 55 (1980).

[20] We have little trouble concluding that the record supports a finding that Saavedra took a substantial step toward raping H.J.S.V. Saavedra's desire to have sexual relations with H.J.S.V. had been made abundantly clear to her in the months leading up to July of 2019, with him making frequent advances and offering her $500 to have intercourse with him. As for the substantial step (or steps) taken toward raping H.J.S.V., Saavedra, apparently tired of being rebuffed, undressed completely and lured her to his room by feigning some sort of trouble, where he grabbed her from behind, took hold of her breast, began kissing her, and attempted to put her onto his bed. Especially when considered in the context of Saavedra's actions leading up the events of early July of 2019, the jury was free to find any or all of these actions to constitute a substantial step toward the commission of rape. *See Salahuddin v. State*, 492 N.E.2d 292, 296 (Ind. 1986) (concluding that evidence including forcing the victim onto a bed and undressing sufficient to prove attempted rape); *Dillon v. State*, 448 N.E.2d 21, 23 (Ind. 1983) (concluding that evidence sufficient to prove attempted rape included proof that the defendant threw the victim down on a

cot and undid his own pants). Saavedra's argument is another invitation to reweigh the evidence, which we will not do. *See Alkhalidi*, 753 N.E.2d at 627.

II. Double Jeopardy

[21] Saavedra contends that the trial court's merging of his sexual battery conviction with his attempted rape conviction is not the proper remedy for a double jeopardy violation. Saavedra argues that the proper remedy is to vacate the sexual battery conviction instead of simply merging it. Saavedra's position is consistent with Indiana Supreme Court precedent, which holds that "a merged offense for which a defendant is found guilty, but on which there is *neither a judgment nor a sentence*, is 'unproblematic' as far as double jeopardy is concerned." *Green v. State*, 856 N.E.2d 703, 704 (Ind. 2006) (emphasis added). Here, although Saavedra was not sentenced for sexual battery, the record is inconclusive regarding whether judgment of conviction was entered on that charge.[3] In light of the fact that the proper remedy in this case requires that no judgment of conviction be entered on the sexual battery verdict, we remand for clarification of the record on that point.

III. Sentence

[22] There is no dispute that the trial court ordered that Saavedra serve twelve years of incarceration for attempted rape, four years for child exploitation, and four years for vicarious sexual gratification, the last two to be served concurrently.

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[3] For instance, the presentence investigation report lists sexual battery as a "Present Offense[,]" Appellant's App. Vol. II p. 190, and the trial court's judgment of conviction lists sexual battery among the crimes for which Saavedra has been adjudged guilty. (Appellant's App. Vol. II p. 187).

Although the trial court's sentencing statement clearly indicates that these two sentences were to be served consecutive to the attempted rape sentence, (Tr. Vol. II. p. 223), the written record is inconsistent. A hearing journal entry from July 15, 2021, indicated that Saavedra was "sentenced to 16 years DOC[,]" Appellant's App. Vol. II p. 207, while neither the sentencing order of the same date nor the abstract of judgment indicates that any sentence would be served consecutive to any others. (Appellant's App. Vol. II p. 208–09, 211). Saavedra requests, and the State concurs, that we remand for clarification.

[23] The judgment of the trial court is affirmed, and we remand for clarification that no judgment of conviction for sexual battery was entered and regarding Saavedra's sentence.

Crone, J., and Tavitas, J., concur.