MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

T. Andrew Perkins
Peterson Waggoner & Perkins, LLP
Rochester, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Tina L. Mann
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Bronson E. Cottrell,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 30, 2021

Court of Appeals Case No. 21A-CR-455

Appeal from the Fulton Superior Court

The Honorable Gregory L. Heller, Judge

Trial Court Cause No. 25D01-1903-F1-158

Crone, Judge.

Case Summary

[1] Following a bench trial, the court found Bronson E. Cottrell guilty of level 1 felony child molesting and sentenced him to thirty-five years. On appeal, Cottrell challenges the sufficiency of the evidence supporting his conviction, and he asserts that the trial court committed fundamental error in admitting certain evidence. He also contends that the court abused its discretion in sentencing him. We affirm.

Facts and Procedural History

[2] Corey Brown (Father) and Shanita Michael (Mother) are the biological parents of B.B., who was born in January 2012. In 2017, Father was married to Marissa Hooks (Stepmother) and had primary custody of B.B., who spent one evening per week and every other weekend at Mother's apartment in Rochester. In June 2017, Mother started dating Cottrell, who began living with her full time in October. Toward the end of the year, B.B. became reluctant to visit Mother. She would cry before her visits and tell Father, "I don't want to go; Bronson makes me feel uncomfortable[.]" Tr. Vol. 2 at 121. Ultimately, B.B. told Mother, "I'm not coming back. I'm not coming back until he's gone[.]" *Id*. at 136. On December 27, B.B. told Stepmother that Cottrell had molested her. Stepmother informed Father and Mother, and a report was made to local police and the Department of Child Services (DCS). On December 28, Rochester Police Department Officer Edward Haines and DCS family case manager (FCM) Cynthia Rainey interviewed B.B., Father, Stepmother, and

Mother. Officer Haines also interviewed Cottrell, who denied touching B.B. inappropriately.

[3] In March 2019, the State charged Cottrell with one count of level 1 felony child molesting (relating to his touching of B.B.'s sex organ) and one count of level 4 felony child molesting (relating to B.B.'s touching of his sex organ). A bench trial was held in December 2020. The trial court found Cottrell guilty as charged, vacated the level 4 felony conviction on double jeopardy grounds, and sentenced him to thirty-five years, with five years suspended to probation. Cottrell now appeals his conviction and sentence.

Discussion and Decision

Section 1 – Cottrell's conviction is supported by sufficient evidence.

[4] Cottrell first challenges the sufficiency of the evidence supporting his conviction. "When reviewing a challenge to the sufficiency of the evidence underlying a criminal conviction, we neither reweigh the evidence nor assess the credibility of witnesses." *Bailey v. State*, 979 N.E.2d 133, 135 (Ind. 2012). "The evidence—even if conflicting—and all reasonable inferences drawn from it are viewed in a light most favorable to the conviction." *Id.* If the finder of fact heard evidence of probative value from which it could have inferred the defendant's guilt beyond a reasonable doubt, we must affirm the conviction. *Brown v. State*, 827 N.E.2d 149, 152 (Ind. Ct. App. 2005). The uncorroborated testimony of a child molesting victim is sufficient to prove the offense beyond a

reasonable doubt. *Terpstra v. State*, 138 N.E.3d 278, 289 (Ind. Ct. App. 2019), *trans. denied* (2020).

[5] Here, the State alleged that Cottrell committed level 1 felony child molesting by performing or submitting to "other sexual conduct," which is defined in pertinent part as an act involving the penetration of the sex organ of a person by an object. Ind. Code § 35-31.5-2-221.5(2). At trial, B.B. testified that Cottrell "[r]ubbed" the "[i]nside" of her "bad spot" with his fingers, and she clarified the location of her "bad spot" by using a pen to circle the genitalia on a drawing of a nude female figure. Tr. Vol. 2 at 102, State's Ex. 1. This evidence is sufficient to sustain Cottrell's conviction. *See Seal v. State*, 105 N.E.3d 201, 209 (Ind. Ct. App. 2018) ("Our case law has established that a finger is an object for purposes of the child molesting statute. It is also well established that the female sex organ includes the external genitalia and that the slightest penetration of the female sex organ constitutes child molesting.") (citation omitted), *trans. denied*. Cottrell's argument to the contrary is merely a request to reweigh evidence and reassess witness credibility, which we may not do.

Section 2 – The trial court did not commit fundamental error in admitting certain testimony.

[6] Cottrell also argues that the trial court erred in admitting certain testimony. He failed to object to the testimony at trial, which waives the issue for review unless fundamental error occurred. *Hoglund v. State*, 962 N.E.2d 1230, 1239 (Ind. 2012). "The fundamental error doctrine provides a vehicle for the review of error not properly preserved for appeal. In order to be fundamental, the error

must represent a blatant violation of basic principles rendering the trial unfair to the defendant and thereby depriving the defendant of fundamental due process." *Id*. "Harm is not shown by the fact that the defendant was ultimately convicted; rather harm is found when error is so prejudicial as to make a fair trial impossible." *Id*. "[I]n criminal bench trials, we presume that the court disregard[s] inadmissible testimony and render[s] its decision solely on the basis of relevant and probative evidence." *Tibbs v. State*, 996 N.E.2d 1288, 1290 (Ind. Ct. App. 2013) (quoting *Griffin v. State*, 698 N.E.2d 1261, 1267 (Ind. Ct. App. 1998), *trans. denied*), *trans. denied* (2014). "Further, generally valid issues with regard to fundamental error such as 'unfair prejudice, confusion of the issues, or potential to mislead the jury' are relevant only in jury trials." *Id*. (quoting *Ruiz v. State*, 926 N.E.2d 532, 535 (Ind. Ct. App. 2010), *trans. denied*).

[7] Cottrell first takes issue with Father's and Mother's testimony about B.B.'s expressions of reluctance and refusal to visit Mother, claiming that B.B.'s statements are inadmissible hearsay. Hearsay is a statement that is not made by the declarant while testifying at trial and is offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is not admissible unless the evidence rules or other law provides otherwise. Ind. Evidence Rule 802. The State argues, and we agree, that B.B.'s statements are not hearsay because they were not offered in evidence to prove the truth of the matter asserted. And even if they were, we presume that the trial court disregarded them. *Tibbs*, 996 N.E.2d at 1290.

[8] Cottrell also takes issue with FCM Rainey's statement that she "substantiated" B.B.'s account of the molestations, Tr. Vol. 2 at 56, claiming that this violated Evidence Rule 704(b). *See* Ind. Evidence Rule 704(b) ("Witnesses may not testify to opinions concerning … the truth or falsity of allegations ….''). In *Hinesley v. State*, we explained that "the concern with improper vouching testimony is that the jury may be influenced in a manner inconsistent with the defendant's right to a fair trial[,]" but that "[t]his particular concern is not present" in "a bench trial." 999 N.E.2d 975, 985 (Ind. Ct. App. 2013), *trans. denied* (2014). Consequently, we find no fundamental error, and we affirm Cottrell's conviction.

Section 3 – The trial court did not abuse its discretion in sentencing Cottrell.

[9] Finally, Cottrell asserts that, during sentencing, the trial court relied on an improper aggravating circumstance regarding B.B.'s age. Sentencing decisions rest within the trial court's sound discretion. *Howell v. State*, 97 N.E.3d 253, 270 (Ind. Ct. App. 2018), *trans. denied*. "So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion." *Id*. The statutory sentencing range for level 1 felony child molesting committed by a person at least twenty-one years of age against a victim less than twelve years of age is between twenty and fifty years, with the advisory sentence being thirty years. Ind. Code § 35-50-2-4(c). "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the

court or the reasonable, probable, and actual deductions to be drawn therefrom." *Howell*, 97 N.E.3d at 270.

> A trial court abuses its discretion during sentencing by: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law.

Id.

[10] Indiana Code Section 35-38-1-7.1(a) provides that in determining what sentence to impose for a crime, the court may consider various aggravating circumstances, including that "[t]he victim of the offense was less then twelve (12) years of age … at the time the person committed the offense." But when a victim's age is a material element of the crime, the trial court cannot treat it as an aggravating factor "unless it sets forth 'particularized circumstances' justifying such treatment[.]" *McCoy v. State*, 96 N.E.3d 95, 99 (Ind. Ct. App. 2018) (quoting *McCarthy v. State*, 749 N.E.2d 528, 539 (Ind. 2001)). For level 1 felony child molesting, the victim must be under fourteen years of age, and the offender must be at least twenty-one years of age. Ind. Code § 35-42-4-3(a). Here, B.B. was five when she was molested, and Cottrell was approximately thirty-three. *See* Appellant's App. Vol. 2 at 100 (presentence investigation report (PSI) listing Cottrell's birth date as September 1984).

[11] The probation officer who compiled the PSI proposed several aggravating circumstances, including that "[t]he victim of the offense was less than twelve (12) years of age …." *Id*. at 108. At the sentencing hearing, Cottrell's counsel stated, "So, Judge, I look at this and I think well, the age of the child is already an element of the crime. And to me, that's punishing him twice." Tr. Vol. 2 at 245. The trial court replied,

> [I]t's an interesting argument you make about the -- whether that's an aggravating circumstance, the victim being less than 12 years of age at the time the -- Mr. Cottrell committed this offense. However, I mean that is an aggravating offense under the statute. And I still find that to be an aggravating circumstance, really, in consideration of Mr. Cottrell's age. He's 36 now. At the time of the offense, approximately -- still probably in his early 30s, late 20s. So I still find that that is an aggravating circumstance.

Id. at 248. We take this to mean that the trial court found the relatively large disparity in age between B.B. and Cottrell to be an aggravating circumstance, and we cannot say that the trial court abused its discretion in doing so. Therefore, we affirm Cottrell's sentence.

[12] Affirmed.

Bailey, J., and Pyle, J., concur.