

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



---

### ATTORNEY FOR APPELLANT

William T. Myers  
Marion, Indiana

### ATTORNEYS FOR APPELLEE

Theodore E. Rokita  
Attorney General of Indiana  
  
Steven J. Hosler  
Deputy Attorney General  
Ashley Ormsby  
Certified Legal Intern  
Indianapolis, Indiana

---

## IN THE COURT OF APPEALS OF INDIANA

---

Zachery Ryan Roe,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

August 31, 2021

Court of Appeals Case No.  
21A-CR-662

Appeal from the  
Huntington Circuit Court

The Honorable  
Davin G. Smith, Judge

Trial Court Cause No.  
35C01-2007-F4-253

**Kirsch, Judge.**

[1] Zachery Ryan Roe (“Roe”) was convicted after a jury trial of attempted child molesting<sup>1</sup> as a Level 4 felony and was sentenced to twelve years with one year suspended to probation. Roe appeals his conviction and raises the following issue for our review: whether the State presented sufficient evidence to support his conviction for attempted child molesting.

[2] We affirm.

### **Facts and Procedural History**

[3] In March 2020, T.B. was living with her four children, including her ten-year-old daughter (“Child”), who was in the fifth grade. *Tr. Vol. III* at 226-28. At that time, Roe, who is the cousin of Child’s father, was twenty-four years old. *Id.* at 241. For a short time in March 2020, Roe stayed with T.B. and her family and provided childcare while T.B. went to work. *Id.* at 238-41. On March 13, 2020, Child told both T.B. and her school counselor that Roe had done things to make her feel uncomfortable. *Id.* at 236, 249-50. Based on what Child told her, T.B. called the police, and Child was interviewed at McKenzie’s Hope, a child advocacy center. *Id.* at 237.

[4] One morning before school, between March 9, 2020 and March 13, 2020, Roe told Child that he wanted to show her something and then showed Child a pornographic video on his phone of a man and a woman engaging in anal sex.

---

<sup>1</sup> See Ind. Code §§ 35-42-4-3(b), 35-41-5-1.

*Tr. Vol. IV* at 5-7. After briefly watching the video, Child left the room to go upstairs to her bedroom and took her little sister with her because Child “always kept her with me.” *Id.* at 7. Roe did not say anything to Child while showing her the video or when she left the room to go upstairs. *Id.* at 7-8. While Child was upstairs and after she had changed her clothes, Roe followed her upstairs and knocked on her door. *Id.* at 8. Child opened the door, and Roes was standing outside. *Id.* at 8-9. Roe pulled down his pants and showed her “[h]is private” and said, “come on.” *Id.* at 9. Child told Roe “no” and immediately walked out of her room. *Id.* at 10. Roe moved out of her way when she exited her room, and Child went to her brother’s room. *Id.*

[5] On another occasion between March 9, 2020 and March 13, 2020, Roe showed Child another pornographic video, which showed a man and a woman engaging in oral sex. *Id.* at 10-12. Roe stated to Child, “we don’t have to do it the other way, we can do it like this.” *Id.* at 11. Child responded “no” and told Roe that “I don’t feel comfortable.” *Id.* Roe asked Child three times to “do the things he showed her in the video,” but she refused. *Id.* at 11-12.

[6] On July 22, 2020, the State charged Roe with Level 4 felony attempted child molesting, Level 5 felony child solicitation, and Level 6 felony dissemination of material harmful to a minor. *Appellant’s App. Vol. 2* at 17-19. On March 24, 2020, a jury trial was held, and Roe admitted to the jury that he had pornographic videos on his phone but denied showing them to Child. *Tr. Vol. IV* at 63-64. He also denied showing his genitals to Child. *Id.* at 64. At the conclusion of the trial, the jury found Roe guilty on all charges. *Id.* at 89.

[7] At sentencing, the trial court vacated Roe’s convictions for Level 5 felony child solicitation and Level 6 felony dissemination of material harmful to a minor charge because they were used as overt act elements to prove the attempted child molesting conviction. *Id.* at 95-96. The trial court found Roe to be “a sexually violent predator” and found his criminal history, the fact that he was on probation at the time he committed the present offense, and that he was in a position of trust with Child as aggravating factors. *Id.* at 96. Finding no mitigating factors, the trial court sentenced Roe to twelve years with one year suspended to probation, resulting in eleven years executed. *Id.* at 95-96. Roe now appeals.

## **Discussion and Decision**

[8] Roe argues that the evidence presented at trial was insufficient to support his conviction. When we review the sufficiency of the evidence to support a conviction, we do not reweigh the evidence or assess the credibility of the witnesses. *Peppers v. State*, 152 N.E.3d 678, 682 (Ind. Ct. App. 2020). We consider only the evidence most favorable to the trial court’s ruling and the reasonable inferences that can be drawn from that evidence. *Lock v. State*, 971 N.E.2d 71, 74 (Ind. 2012). We also consider conflicting evidence in the light most favorable to the trial court’s ruling. *Oster v. State*, 992 N.E.2d 871, 875 (Ind. Ct. App. 2013), *trans. denied*. A conviction will be affirmed if there is substantial evidence of probative value that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Wolf v. State*, 76 N.E.3d 911, 915 (Ind. Ct. App. 2017).

[9] Roe asserts that the State failed to present sufficient evidence to support his conviction for Level 4 felony attempted child molesting. He specifically contends that the evidence presented was not sufficient to prove that his actions constituted a substantial step toward performing or submitting to any sexual contact with Child, and instead, only proved that he solicited Child. Roe argues that the solicitation did not take the form of urging, and neither his words nor his actions exhibited any effort to coerce Child, to touch Child, or to prevent her from walking away. He maintains that the words spoken and the idea they conveyed were only an invitation and did not constitute the crime of attempted child molesting. Therefore, because the evidence at trial was insufficient to show that he engaged in conduct that constituted a substantial step toward performing or submitting to any sexual contact between himself and Child, he urges that his conviction should be reversed.

[10] The crime of Level 4 child molesting is proven by showing that “A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person.” Ind. Code § 35-42-4-3(b). “A person attempts to commit a crime when, acting with the culpability required for commission of the crime, the person engages in conduct that constitutes a substantial step toward commission of the crime.” Ind Code § 35-41-5-1(a). As for the culpability requirement, “[o]ur Indiana Supreme Court has explained that the culpability requirement of the child molesting statute is ‘knowingly or intentionally.’” *Amphonephong v. State*, 32

N.E.3d 825, 832-33 (Ind. Ct. App. 2015) (citing *Louallen v. State*, 778 N.E.2d 794, 798 (Ind. 2002)). Here, Roe was charged with attempted child molesting through his “knowing” conduct. *Appellant’s App. Vol. 2* at 17. A person engages in “knowing” child molesting when he is aware of a high probability that he is doing so. Ind. Code § 35-41-2-2(b). Therefore, in order to convict Roe of attempted child molesting, the State was required to show that he knowingly engaged in conduct that constituted a substantial step toward the commission of child molesting.

[11] Roe contends his actions only constituted solicitation and did not rise to the level of an attempt. In *Ward v. State*, 528 N.E.2d 52 (Ind. 1988), our Supreme Court held that certain acts of child solicitation may constitute attempted child molesting. In determining whether acts of solicitation rise to the level of attempt, we start with the established definition of criminal attempt. *Id.* at 54. Thus, Roe “must have been acting with specific intent to commit the substantive crime, and he must have engaged in an overt act which constitutes a substantial step toward commission of the crime.” *Id.* Applying this definition to the facts of the present case requires application of two separate tests to determine when solicitation may be a substantial step. *Id.* The first is a mechanical test, and the second assesses the nature of the offense that the legislature seeks to prohibit. *Id.*

[12] The *Ward* court first applied a three-prong test for determining when solicitation can be found to constitute a substantial step toward the commission of the crime. A solicitation may be a substantial step only when: (1) the solicitation

takes the form of urging; (2) the solicitation urges the commission of the crime at some immediate time and not in the future; and (3) the cooperation or submission of the person being solicited is an essential feature of the substantive crime. *Id.* Second, we must consider the specific crime and the wrongful human conduct that the legislature sought to sanction. *Id.*

[13] In *Ward*, the defendant initiated contact with the victim by following him and then approaching him and asking the victim three times if he would perform oral sex on the defendant. *Id.* at 53. The defendant appealed his conviction for attempted child molesting arguing that evidence of solicitation was insufficient to sustain a conviction of attempted child molesting, especially because there was an applicable child solicitation statute. *Id.* The Supreme Court found that the defendant's solicitations were an overt act and amounted to urging and not mere invitation. *Id.* at 54-55. The Court concluded that the pursuit, the approach, the multiple requests, and the defendant's initial statements to the victim, which were provocative and authoritative, all indicated that the defendant's solicitation was a substantial step toward committing child molesting. *Id.* at 55. Further, the Court found that the crime of child molesting is a two-party offense, which requires the cooperation or submission of the child being solicited. *Id.* Because the solicitation of the victim was substantially in the nature of persuasion, aimed at immediate commission of a crime, and aimed at committing an offense dependent on cooperation of the one being solicited and based on the relatively serious nature of child molesting as a

crime, the Court held that the defendant's actions could be characterized as an attempt and upheld his conviction. *Id.*

[14] Here, Roe approached Child and showed her pornographic videos, followed her to her bedroom after she refused his advances, exposed his genitals to her, and requested sexual contact multiple times on two occasions. *Tr. Vol. IV* at 6-8, 10-12. After showing Child a video depicting a man and a woman engaging in oral sex, he stated to her, "we don't have to do it the other way, we can do it like this." *Id.* at 10-11. Roe asked Child three times to "do the things he showed her in the video." *Id.* at 11-12. Furthermore, Roe was in a position of trust and authority over Child as her babysitter and adult family member, which gave his provocations more powerful weight. His repeated attempts, like the defendant in *Ward*, constituted urging and were more than mere invitation. Roe's solicitations also urged the commission of the crime at an immediate time and not in the future as he followed Child to her bedroom and made multiple requests that she engage in the behavior depicted in the videos. Further, as in *Ward*, the crime of child molesting is a two-party offense, which requires the cooperation or submission of the child being solicited.

[15] Under the second test, we must assess the nature of Roe's offense. "[T]he court must consider the specific crime, and the wrongful human conduct that the legislature sought to sanction." *Ward*, 528 N.E.2d at 54. Like *Ward*, the present case too involves child molesting, which is a "sufficiently serious crime to justify drawing a fairly early line to identify and sanction behavior as an attempt." *Id.*



[16] Because, as in *Ward*, the solicitation of Child by Roe was substantially in the nature of persuasion and aimed at immediate commission of a crime and at the commission of an offense dependent on cooperation of the one being solicited and based on the serious nature of child molesting as a crime, we conclude that Roe's actions constitute an attempt. Roe's authoritative urging surpassed solicitation and was an attempt. We, therefore, find that sufficient evidence was presented to support his conviction for attempted child molesting.

[17] Affirmed.

May, J., and Vaidik, J., concur.