



## STATEMENT OF THE CASE

Mark Dunning appeals from his conviction for Child Molesting, as a Class C felony. Dunning raises two issues for our review:

1. Whether the trial court abused its discretion when it refused his proffered jury instructions.
2. Whether the State presented sufficient evidence to support Dunning's conviction.

We affirm.

## FACTS AND PROCEDURAL HISTORY

In February of 2008, Dunning “basically lived” in an apartment leased by D.R., the mother of twelve-year-old J.H. Transcript at 111. Dunning had known D.R. and J.H. for approximately five years before then. On February 13, 2008, J.H. stayed home from school because she was ill. While J.H. sat at the family computer and without her mother nearby, Dunning wrapped his arms around J.H. and fondled her breasts over her clothing. Dunning did so for about five minutes and then said “I hope you feel better.” *Id.* at 134. J.H. locked herself in her bedroom and called her father.

Later that day, after Dunning had left the apartment for work, J.H. told her mother what had happened. D.R. confronted Dunning over the phone, moved his contents out of the apartment, and called the police. Dunning then returned to the apartment with four Valentine's Day baskets. But Dunning had left again by the time police arrived shortly afterwards.

On May 22, the State charged Dunning with child molesting, as a Class C felony. Sometime between that date and the commencement of trial on November 12, Dunning called J.H. and offered to buy her a laptop computer.

During his trial, Dunning testified that the act in question was him giving J.H. a “bear hug[.]” Id. at 190. And, after the trial, Dunning proffered the following two jury instructions:

Mere touching alone is not sufficient to constitute the crime of child molesting.

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Mere touching alone is not sufficient to constitute the crime of child molesting. The State must also prove beyond a reasonable doubt that the act of touching was accompanied by the specific intent to arouse or satisfy sexual desires. The intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor’s conduct and natural and usual sequence to which such conduct usually point.

Appellant’s App. at 63-64. The trial court refused Dunning’s proffered instructions on the grounds that their contents were “fully covered by the Court’s instructions on the elements of the offense and the issue of intent.” Transcript at 211. The court’s instructions to the jury stated that the State had to prove beyond a reasonable doubt that Dunning “knowingly performed or submitted to fondling or touching with J.H. with the intent to arouse or satisfy the sexual desires of J.H. or [Dunning].” Appellant’s App. at 73. The court also instructed the jury as follows:

The law does not require a direct statement of intent by a defendant in order to prove the intent to commit a particular crime.

You may infer from all the surrounding circumstances what the intent of a person was at the time.

Intent must be proven beyond a reasonable doubt.

Id. at 74. The jury convicted Dunning as charged and the court sentenced him accordingly. This appeal ensued.

## **DISCUSSION AND DECISION**

### **Issue One: Refused Instructions**

Dunning first challenges the trial court's refusal to accept his proffered jury instructions. The instruction of the jury is within the discretion of the trial court and it is reviewed only for an abuse of discretion. VanPelt v. State, 760 N.E.2d 218, 224 (Ind. Ct. App. 2003), trans. denied. The test applied to review a trial court's decision to give an instruction is 1) whether the instruction correctly states the law; 2) whether there is evidence in the record to support giving the instruction; and 3) whether the substance of the instruction is covered by other instructions which are given. Id. Jury instructions are to be considered as a whole and in reference to each other. Hancock v. State, 737 N.E.2d 791, 794 (Ind. Ct. App. 2000). Error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. Id. Before a defendant is entitled to a reversal, he must affirmatively show the instructional error prejudiced his substantial rights. Id. "This well-settled standard by which we review challenges to jury instructions affords great deference to the trial court." Randolph v. State, 802 N.E.2d 1008, 1011 (Ind. Ct. App. 2004), trans. denied.

Here, the trial court concluded that its instructions would cover the substance of Dunning's proffered instructions, and it therefore rejected his instructions. We agree. The instructions actually given to the jury by the trial court made it clear that the State

was required to demonstrate that Dunning touched J.H. with the intent to arouse either his or J.H.'s sexual desires, and that, therefore, "mere touching" was insufficient to prove the crime alleged. The instructions also made clear that Dunning's intent was a distinct element to be proven by the State. Dunning's proffered instructions were superfluous to the instructions given by the trial court; therefore the trial court did not abuse its discretion in rejecting them.

Dunning also asserts that the trial court's actual instructions were ambiguous and misleading. Specifically, Dunning argues that the following language required the jury to presume that he was guilty: "You may infer from all the surrounding circumstances what the intent of a person was at the time." Appellant's App. at 74 (emphasis added). Dunning states that the "at the time" language means "at the time of the crime," which, in turn, "presupposes that a crime was committed, and [presupposes] . . . the intent to satisfy sexual desires." Appellant's Brief at 9-10 (emphasis removed). We cannot agree. The "at the time" language unambiguously refers only to the time of the alleged criminal activity without presupposition. Dunning cannot demonstrate that the trial court abused its discretion when it instructed the jury.

### **Issue Two: Sufficient Evidence**

Dunning also contends that the State failed to present sufficient evidence that he intended to arouse his or J.H.'s sexual desires when he fondled her. See Ind. Code § 35-42-4-3(b). When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the

reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

The evidence here established that Dunning rubbed J.H.'s breasts for about five minutes and then told her that he hoped she felt better. After the police were informed, he bought her flowers and offered to buy her a laptop. Dunning's intent to arouse either his own or J.H.'s sexual desires are readily inferred from those facts. Indeed, Dunning's argument to the contrary on appeal is merely a request for this court to discredit J.H.'s testimony and read the facts in the light most favorable to him. But we do not reweigh the evidence on appeal, and we look only to the probative evidence supporting the verdict. Jones, 783 N.E.2d at 1189. Accordingly, Dunning's appeal of this issue is without merit.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.