



## **Case Summary**

Jose Mendez appeals his convictions and sentence for Class A felony child molesting and Class B felony child molesting. We affirm in part, reverse in part, and remand.

## **Issues**

Mendez raises four issues, which we restate as:

- I. whether the trial court improperly joined his trial with another defendant's trial;
- II. whether the trial court properly permitted one interpreter to interpret for both defendants;
- III. whether there was sufficient evidence to sustain his convictions; and
- IV. whether he was properly sentenced.

## **Facts**

Sometime in July and August 2007, Mendez touched twelve-year-old S.C.'s vagina and breasts with his hand.<sup>1</sup> At one point, Mendez put his penis in S.C.'s mouth and ejaculated.

On August 22, 2007, the State charged Mendez with Class C felony child molesting based on the fondling. On December 28, 2007, the State moved to amend the information to include a charge of Class A felony child molesting based on Mendez

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<sup>1</sup> S.C. turned twelve during the period of time in which the offenses were committed.

fondling S.C. and a charge of Class B felony child molesting based on Mendez putting his penis in S.C.'s mouth.<sup>2</sup>

A bench trial was held on February 26, 2008. Mendez' trial was consolidated with Sergio Utrera-Viveros' trial. Utrera-Viveros was alleged to have committed two counts of child molesting after apparently paying S.C.'s mother to have sex with S.C.<sup>3</sup> Immediately prior to trial, Mendez presented a written "Waiver of Jury Trial and Agreement to Consolidate" to the trial court. Trial Tr. p. 2. The trial court then questioned Mendez regarding his right to a jury trial. At the trial, the two defendants were represented by their own attorneys; however, one interpreter was assigned to interpret for both men who apparently primarily speak Spanish. The trial court found both men guilty as charged.

The trial court sentenced Mendez to thirty-five years on the Class A felony charge and twelve years on the Class B felony charge. The trial court ordered the sentences to be served concurrently for a total sentence of thirty-five years executed. Mendez now appeals.

## **Analysis**

### ***I. Consolidated Trials***

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<sup>2</sup> The Class A felony child molesting charge alleged only that Mendez was at least twenty-one years old and that he fondled S.C., who was under fourteen. The charge did not include the allegations necessary to elevate the offense to a Class A felony. See Ind. Code § 35-42-4-3(b). However, Mendez did not file a motion to dismiss or otherwise challenge the charge prior to trial.

<sup>3</sup> The charging information pertaining to Utrera-Viveros was not included in the appendix. It is not clear what level felony with which he was charged.

Mendez first argues that the trial court improperly joined his trial with Utrera-Viveros' trial. Although Mendez analyzes the joinder under Indiana Code Section 35-34-1-9(b), governing the joinder of two or more defendants in the same indictment or information, the State did not seek to join the defendants in one information. Instead, Mendez expressly agreed to the joint trial. The written agreement to consolidate provided in part, "I also agree to have this case consolidated for trial to the Court with case of State v. SERBIO NMN UTRERA-VIVEROS, 36C01-0709-FA-21." Supp. App. p. 8. Accordingly, as the State points out, any error resulting from the combined trial was invited by Mendez. "The doctrine of invited error is grounded in estoppel." Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005) (citation omitted). Under this doctrine, a party may not take advantage of an error that he or she commits, invites, or which is the natural consequence of his or her own neglect or misconduct. Id. Because Mendez created this situation by expressly agreeing to the joinder, he cannot take advantage of any alleged error on appeal.<sup>4</sup> See id.

Mendez also claims that because his trial attorney acknowledged a "communication barrier" at the sentencing hearing, he was "likely to not have understood the prejudice to be placed against him by the joinder of these two cases, nor to have had a full understanding what rights the justice system afforded to him." Appellant's Br. p. 11. This assertion is not supported by evidence and is nothing more than pure speculation.

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<sup>4</sup> Although he contends that the proceedings were confusing, Mendez does not specifically argue that the joinder resulted in fundamental error.

Without more, Mendez has not established that he should not be bound by his own agreement to consolidate the trials.

## *II. One Interpreter*

Mendez next argues that by only having one interpreter at the trial, “his ability to confer with counsel, who is non-Spanish speaking, was effectively eliminated, severely limiting his capacity to understand the activities of the court, let alone assist in his own defense.” Appellant’s Br. p. 12. Mendez acknowledges that he did not object to this arrangement at trial and attempts to avoid waiver by arguing that it amounted to fundamental error. To qualify as fundamental error, an error must be so prejudicial to the defendant’s rights so as to make a fair trial impossible. Brown v. State, 799 N.E.2d 1064, 1067 (Ind. 2003). “To constitute fundamental error, ‘the error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.’” Id. (citation omitted in original).

In support of his argument, Mendez again relies on a comment made at the sentencing hearing by defense counsel that “Communication with Mr. Mendez is even in best description is difficult.” Sentencing Tr. p. 3. We note, however, that defense counsel was not a witness and that his argument was not evidence. See, e.g., Kilpatrick v. State, 746 N.E.2d 52, 59 (Ind. 2001) (holding that no Sixth Amendment violation occurred where a defendant was not permitted to confront statements made by his co-defendant’s counsel who was not a witness and whose arguments were not evidence).

Regarding evidence of Mendez' ability to communicate in English, S.C. testified at trial that Mendez spoke English and Spanish and that he spoke enough English to be able to talk to her. See Trial Tr. p. 52. Contrary to Mendez' characterization, S.C. did not state that "he had little knowledge of the English language and that his attempts to communicate with her were rudimentary."<sup>5</sup> Appellant's Br. p. 13. Further, Mendez' brief "yes" and "no" answers at trial are not conclusive of his comprehension. These answers were given in response to questions presented by defense counsel. There is no indication that Mendez did not understand the questions being presented to him. See Trial Tr. pp. 167-68.

Most importantly, however, our review of the record shows that the trial proceeded in an orderly manner, with Mendez cross-examining the witnesses first and Utrera-Viveros cross-examining them second. There were a few instances in which the interpreter asked the witnesses to repeat themselves. See Trial Tr. pp. 32, 82. These issues were resolved immediately and the questioning resumed. There simply is no evidence to support Mendez' claim that he had difficulty comprehending the proceedings and may have been prevented from receiving a fair trial. Mendez has not established fundamental error. See Rondon v. State, 534 N.E.2d 719, 729 (Ind. 1989) ("Because we have no evidence that appellant had any difficulty in comprehending the translator's interpretations, we cannot find that fundamental error occurred which prohibited appellant from receiving a fair trial.").

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<sup>5</sup> For this proposition, Mendez cites page 52 of his appendix; however, nothing on this page supports his assertion.

### *III. Sufficiency of the Evidence*

Mendez argues there is insufficient evidence to support his conviction for Class A felony child molesting because the fondling was not committed by using or threatening to use deadly force, while armed with a deadly weapon, or by furnishing the victim with a drug or controlled substance. See Ind. Code § 35-42-4-3(b). The State agrees and suggests that in the absence of this aggravating evidence the conviction should be entered as a Class C felony. In his reply brief, Mendez agrees that this relief is appropriate.

Mendez also urges us to consider whether a victim's uncorroborated testimony is sufficient to support a conviction "where physical evidence was readily available to corroborate or disprove an allegation of molestation . . . ." Appellant's Br. p. 9. He claims that the State should have offered photographs of S.C.'s alleged bruising or scratching, an examination by a physician to prove penetration, or DNA evidence. Mendez asserts, "With the scientific and investigative techniques readily available to the modern police force, foregoing these opportunities to prove guilt or innocence in favor of one individual's uncorroborated testimony appears irresponsible and reckless and inconsistent with the presumption of the reasonable doubt burden of proof." Appellant's Reply Br. p. 9.

Assuming such evidence existed and would have proven Mendez' guilt definitely, there is no indication that such evidence is required to sustain a conviction for child molesting. As has repeatedly been stated by our supreme court, "A conviction for child molesting may rest exclusively upon the uncorroborated testimony of the victim." Garner v. State, 777 N.E.2d 721, 725 (Ind. 2002). Supreme court precedent is binding

until it is changed either by that court or by legislative enactment. Dragon v. State, 774 N.E.2d 103, 107 (Ind. Ct. App. 2002). Mendez' argument on this point is unavailing.

Mendez also challenges the conviction in light of S.C.'s credibility. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). "It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." Id. We construe conflicting evidence most favorably to the trial court's ruling and affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

S.C. provided evidence satisfying the elements of Class B felony child molesting and Class C felony child molesting. S.C.'s credibility was challenged on cross-examination and was an issue for the fact finder. It is not our role to assess witness credibility or weigh the evidence. This argument fails.

#### ***IV. Sentence***

Mendez also challenges his sentence. As an initial matter, we agree with the State that because there is insufficient evidence to support the Class A felony child molesting conviction, the case should be remanded for the trial court to determine the sentence for Class C felony child molesting. Regarding the Class B felony child molesting conviction, Mendez argues, among other things, that the trial court confused Mendez' crimes with Utrera-Viveros' crimes at the sentencing hearing.

We engage in a four-step process when evaluating a sentence. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes “reasonably detailed reasons or circumstances for imposing a particular sentence.” Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

An abuse of discretion in identifying or not identifying aggravators and mitigators occurs if it 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.” Anglemyer, 868 N.E.2d at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing a sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Id. at 490-91.

Even in the absence of a pre-sentence investigation report,<sup>6</sup> we believe that Mendez has established that the trial court may have abused its discretion in sentencing him. In issuing its sentence the trial court stated in part:<sup>7</sup>

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<sup>6</sup> The State points out that Mendez did not include a pre-sentence investigation report in his appendix on appeal and asserts that his challenge to the sentence should be waived. See Nasser v. State, 727 N.E.2d 1105, 1110 (Ind. Ct. App. 2000) (“We initially observe that Nasser has waived this issue because he failed to include the presentence report in the record that the trial court had referred to at sentencing.”), trans. denied. We believe the failure to include a pre-sentence investigation report in the appendix on

I have considered the nature of this offense. . . . This is a case of [sic] man thirty-five (35) years old having sex with a child, and buying sex with a child. I am not going to repeat the comments that I made at the sentencing a short while ago of the victim's mother in a related case to this because those comments were really about her.

Sentencing Tr. p. 9. It was Utrera-Viveros, not Mendez, who was alleged to have paid S.C.'s mother to have sex with S.C., and there is no indication that S.C.'s mother was involved in the commission of Mendez' offenses. Although other portions of the sentencing statement did apply specifically to Mendez, it appears that the trial court was referencing Utrera-Viveros' offenses when it sentenced Mendez.<sup>8</sup> Accordingly, we remand for the trial court to clarify the reasons for sentencing Mendez to twelve years executed on the Class B felony child molesting conviction or, if necessary, to modify Mendez' sentence in light of the aggravating and mitigating circumstances applicable to him.

### **Conclusion**

Mendez agreed to the consolidated trials and may not challenge such on appeal. Mendez has not established that a single interpreter for both defendants amounted to fundamental error. Because there is insufficient evidence to support the Class A felony conviction, that conviction should be vacated and a Class C felony conviction should be

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appeal is better framed as whether the defendant can meet his or her burden of establishing that the sentence is inappropriate. See Ind. Appellate Rule 49(B) ("Any party's failure to include any item in an Appendix shall not waive any issue or argument.").

<sup>7</sup> Although the trial court issued a written sentencing order, it did not include its reasons for imposing the sentence in the written order. Accordingly, we rely on the trial court's statements at the sentencing hearing in reviewing the sentence.

<sup>8</sup> It does not appear that Mendez and Utrera-Viveros were sentenced at the same sentencing hearing.

imposed. Otherwise, there is sufficient evidence to sustain the Class B felony conviction and a Class C felony conviction. We remand for sentencing on the Class C felony conviction and for re-sentencing on the Class B felony conviction. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

BAILEY, J., and MATHIAS, J., concur.