MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Eric A. Fulk,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 26, 2023

Court of Appeals Case No. 22A-CR-1606

Appeal from the Whitley Circuit Court

The Honorable Matthew J. Rentschler, Judge

Trial Court Cause No. 92C01-2009-F1-817

Memorandum Decision by Judge Mathias
Judges May and Bradford concur.

Mathias, Judge.

[1] Eric A. Fulk appeals his conviction for Level 1 felony child molesting following a jury trial. Fulk raises the following two issues for our review:

> 1. Whether the trial court abused its discretion when it admitted into evidence sexual behaviors exhibited by his five-year-old victim approximately four months after Fulk's molestation of her.
>
> 2. Whether the State presented sufficient evidence to support Fulk's conviction.

[2] We affirm.

Facts and Procedural History

[3] In March 2020, five-year-old C.F. lived with her maternal grandmother, S.I. ("Grandmother"), in Huntington County. On occasion, C.F. would visit her mother, R.F. ("Mother"), who lived with Fulk (her fiancé) and Fulk's mother in Whitley County.

[4] A few days before March 26, Mother called Grandmother. Mother was crying and said C.F. was crying and wanted to go back to Grandmother's house. Mother did not know why C.F. was crying, and, when Grandmother spoke to C.F., C.F. just said that she wanted to come home. Grandmother asked C.F. if C.F. could take a nap for an hour and have Grandmother check back in. C.F. agreed and took a nap. When Grandmother checked back in, C.F. "was playing" and "doing much better." Tr. Vol. 3, p. 60.

[5] The next day, Grandmother picked up C.F. and returned home. Later, on March 26, Grandmother gave C.F. a bath. As Grandmother was washing C.F. "in her personal area," C.F. said "ouch" and that "she was sore." *Id.* at 59. Grandmother then observed that C.F. had a "sore" or "red mark" and, remembering the prior phone call, was "concerned." *Id.* Grandmother then called the police.

[6] Thereafter, Lorrie Frieburger, at the request of either law enforcement or the Department of Child Services, conducted a forensic interview with C.F. in April. During that interview, C.F. disclosed "immediately" and "without being asked" that "her privacy hurt" because Fulk had "touched it." *Id.* at 156. When asked to say what she remembered, C.F. provided "a lot of sensory details, . . . [f]rom how it felt, how it smelled, to what [Fulk] did with his fingers after he put them in her privacy," namely, that he "put them into his mouth." *Id.* Frieburger noted that those sensory details were "important" because they indicated "details that a child" of C.F.'s age was not likely to be able to "provide unless it actually happened." *Id.* at 157.

[7] In July, C.F. began attending daycare with her brother, D.R., who was about one year younger than C.F. The two were in the same classroom, for four- and five-year olds, under the care of Courtney Krider. Krider observed that C.F. and D.R. were "very touchy and doing adult behavior stuff to each other." *Id.* at 99. In particular, Krider observed that C.F. and D.R. would, "touch with their tongues as kissing, and they would lay on top of each other and hump," which is to say that they "would lay on top of each other and go up and down with

each other." *Id.* Krider observed this behavior "a few times" in August. *Id.* at 100, 106-07. When Krider intervened and asked C.F. what was going on, C.F. stated that Fulk had touched her.

[8] In September, the State charged Fulk with Level 1 felony child molesting. After a first trial ended in a mistrial, the court held Fulk's second trial in May 2022. During that trial, Grandmother, Frieburger, and Krider all testified. Krider testified over Fulk's objection that her testimony was irrelevant on the ground the behavior she observed had occurred "well p[a]st the alleged incident." *Id.* at 99. After Krider's testimony, the State also presented the testimony of Siquilla Liebetrau, a clinical psychologist. Liebetrau testified that children who have experienced sexual trauma can "act out" by "display[ing]" sexual behaviors later. *Id.* at 196. The jury found Fulk guilty, and, after a sentencing hearing, the court sentenced Fulk to twenty years executed. This appeal ensued.

1. The trial court did not abuse its discretion in permitting Krider's testimony.

[9] On appeal, Fulk first asserts that the trial court abused its discretion when it permitted Krider to testify to the "sexual tendencies" Krider observed from C.F. in August 2020. Appellant's Br. at 16. A trial court has broad discretion in the admission of evidence, and we will review its decisions only for abuse of that discretion. *Johnson v. State*, 157 N.E.3d 1199, 1203 (Ind. 2020). We will reverse only if the trial court's ruling was clearly against the logic and effect of the facts and circumstances before it and the error affect a party's substantial rights. *Hall v. State*, 177 N.E.3d 1183, 1194 (Ind. 2021).

[10] Fulk asserts that Krider's testimony "did not tend to prove or disprove a material fact or shed any light on whether Fulk digitally penetrated C.F. four months earlier." Appellant's Br. at 18. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and that fact is of consequence in determining the action. Ind. Evidence Rule 401. Irrelevant evidence is inadmissible. Evid. R. 402.

[11] Fulk objected in the trial court to Krider's testimony only on the basis that it was not relevant due to the passage of time. But, as Liebetrau's testimony made clear, children who are the victims of sexual trauma may later act out by displaying sexual behaviors. Therefore, Krider's testimony as to her August 2020 observations of C.F. acting out by displaying sexual behaviors was relevant evidence, and the trial court did not abuse its discretion when it overruled Fulk's objection.

[12] Still, Fulk argues on appeal that Krider's testimony should have been excluded under Indiana Evidence Rule 403 or Rule 404(b)(1).[1] Rule 403 provides in relevant part that a court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice. And Rule 404(b)(1) prohibits the use of evidence of a crime or wrong to prove a person's character

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[1] Fulk also cites Evidence Rule 412 in his brief, but he provides no argument supported by cogent reasoning under that Rule, and we therefore do not consider it. *See* Ind. Appellate Rule 46(A)(8)(a).

in order to show that on a particular occasion the person acted in accordance with that character.

[13] But Fulk did not object during his trial to Krider's testimony under Rule 403 or Rule 404. He objected only on the ground that the evidence was not relevant. He therefore has not preserved for appellate review any possible arguments under Rule 403 or Rule 404. *See, e.g.*, *Durden v. State*, 99 N.E.3d 645, 651 (Ind. 2018). Neither does he argue fundamental error on appeal.[2] We therefore cannot say the trial court abused its discretion in the admission of Krider's testimony.

2. The State presented sufficient evidence to support Fulk's conviction.

[14] Fulk also argues that the State did not present sufficient evidence to support his conviction. As our Supreme Court has stated:

> On a fundamental level, sufficiency-of-the-evidence arguments implicate a "deferential standard of review," in which this Court will "neither reweigh the evidence nor judge witness credibility," but lodge such matters in the special "province" and domain of the jury, which is best positioned to make fact-centric determinations. *See* *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018). In reviewing the record, we examine "all the evidence and reasonable inferences supporting the verdict," and thus "will

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[2] Although fundamental error may require a trial court to act *sua sponte* to avoid the error, *see, e.g., Brewington v. State*, 7 N.E.3d 946, 974 (Ind. 2014), our Supreme Court has stated that *review* for fundamental error is waived on appeal when the appellant fails to argue it in his principal appellate brief, *Curtis v. State*, 948 N.E.2d 1143, 1148 (Ind. 2011).

> affirm the conviction if probative evidence supports each element of the crime beyond a reasonable doubt." *Id.*

Carmack v. State, 200 N.E.3d 452, 459 (Ind. 2023).

[15] Fulk's argument on this issue is that "the rule of incredible dubiosity," as applied to C.F.'s testimony, "renders the evidence insufficient . . . ." Appellant's Br. at 20. But our Supreme Court has emphasized that the incredible-dubiosity rule requires the trial evidence to be based on a "sole witness" with a "complete lack of circumstantial evidence." *Moore v. State*, 27 N.E.3d 749, 755 (Ind. 2015) (emphases removed). That did not happen here, where the State presented the testimony of multiple corroborating witnesses along with C.F.'s testimony. Accordingly, Fulk's argument on this issue simply seeks to have this Court reweigh the evidence, which we will not do. The State presented sufficient evidence to support Fulk's conviction for Level 1 felony child molesting, and we affirm his conviction.

[16] Affirmed.

May, J., and Bradford, J., concur.