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.

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IN THE COURT OF APPEALS OF INDIANA

Marcos G. Ramirez,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 23, 2022

Court of Appeals Case No. 22A-CR-967

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause No. 02D05-1908-F4-80

Bailey, Judge.

Case Summary

[1] Marcos Ramirez ("Ramirez") appeals his conviction for child molesting, as a Level 4 felony.[1] He presents the sole issue of whether sufficient evidence supports his conviction. We affirm.

Facts and Procedural History

[2] During the summer of 2019, twelve-year-old R.H. often spent the night with her best friend, K.G., who is Ramirez's daughter. On one occasion, R.H., K.G., three other children, Ramirez, and Ramirez's girlfriend swam in a backyard pool until after 1 a.m. R.H. and Ramirez were the last to come into the house to sleep. Finding no room to sleep in the living room, R.H. went into a bedroom near the kitchen and laid down next to one of the other children.

[3] Ramirez entered the bedroom and laid down next to R.H. Acting in a "playful" manner, Ramirez began to rub R.H.'s stomach. (Tr. Vol. II, pg. 119.) R.H. pushed Ramirez's hand away, telling him that it was cold. Ramirez denied that his hands were cold and continued touching R.H. until he slipped his fingertip underneath her bra. Eventually, Ramirez placed his hand under R.H.'s shorts and over her underwear. He then rubbed R.H.'s vagina.

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[1] Ind. Code § 35-42-4-3(b).

[4] After she returned home, R.H. told her mother about the encounter. On August 26, 2019, the State charged Ramirez with child molesting, as a Level 4 felony. Ramirez's jury trial commenced on March 1, 2022, and concluded on March 3. Ramirez was convicted as charged. On April 18, 2022, the trial court sentenced Ramirez to seven years imprisonment. Ramirez now appeals.

Discussion and Decision

[5] "When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict." *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). Reviewing courts should not assess witness credibility or weigh the evidence to determine whether it is sufficient to support a conviction, and convictions should be affirmed unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* at 146.

[6] To convict Ramirez of Level 4 felony child molesting as charged, the State was required to prove beyond a reasonable doubt that he: (1) being at least eighteen years of age (2) performed or submitted to any fondling or touching (3) of either R.H. (a child under fourteen years of age) or himself (4) with the intent to arouse or to satisfy the sexual desires of R.H. or himself. *See* Ind. Code § 35-42-4-3(b). R.H. testified that, when she was twelve years old, Ramirez touched her breast and rubbed her vagina. Ramirez does not argue that the State failed to establish any element of the charge against him; rather, he argues that the rule of incredible dubiosity renders the evidence insufficient as a whole.

[7] In general, the uncorroborated testimony of the victim is sufficient to sustain a conviction. *Bailey v. State*, 979 N.E.2d 133, 135 (Ind. 2012). However, the rule of incredible dubiosity permits a reviewing court to "impinge on the jury's responsibility to judge the credibility of the witness" in limited circumstances. *Moore v. State*, 27 N.E.3d 749, 755 (Ind. 2015).

> [T]he appropriate scope of the incredible dubiosity rule as utilized in Indiana and other jurisdictions requires that there be: 1) a sole testifying witness; 2) testimony that is inherently contradictory, equivocal, or the result of coercion; and 3) a complete absence of circumstantial evidence.

Id. at 756.

[8] As to the first factor, although there were multiple witnesses called by the State to testify, Ramirez argues that there was "only R.H.'s testimony to prove or establish the elements of the crime." Appellant's Brief at 14. In *Smith v. State*, 163 N.E.3d 925, 929 (Ind. Ct. App. 2021), a panel of this Court considering application of the incredible dubiosity rule found that the first factor had been established where, although there were multiple witnesses, only the victim's testimony had sufficient "specificity to establish the necessary factual basis of the crime." In so doing, the *Smith* Court observed that, in *Moore*, our Supreme Court had found that the sole testifying witness factor was not met because "there were multiple testifying witnesses that the jury could have relied upon in reaching its verdict." *Id.* (quoting *Moore*, 27 N.E.3d at 757-58). Specifically, the *Smith* Court considered the victim's testimony to be "critical" and observed that

the other witnesses (the victim's mother and a detective) were not eyewitnesses, leaving only the victim testimony to establish the elements of the crime. *Id.*

[9] The circumstances here are akin to those in *Smith*. Although R.H. was not the sole witness examined before the jury, she was the sole witness available to establish the elements of the charged crime. R.H.'s mother, grandmother, and the investigating officer possessed no first-hand knowledge of the incident. Accordingly, we consider the first factor of the incredible dubiosity rule satisfied and our analysis continues.

[10] As for the second factor, Ramirez does not argue that R.H. provided testimony that was inherently contradictory, equivocal, or the result of coercion. Instead, Ramirez claims that R.H.'s testimony is "inherently improbable" because K.G. didn't awaken, R.H. didn't awaken others by calling out, R.H. didn't ask to use K.G.'s cell phone, R.H. did not immediately report to her father that she had been molested, and R.H. remained with the Ramirez family an additional day for a planned visit to a water park. Appellant's Brief at 14. During her testimony, R.H. did not equivocate; she remained consistent that Ramirez had touched her breast underneath her clothing and rubbed her vagina with his hand on top of her underwear and underneath her shorts. Ramirez's contentions are simply an invitation to reweigh the credibility of R.H.'s testimony. We decline to do so. *Drane*, 867 N.E.2d at 146.

[11] Finally, Ramirez argues that "there was a complete absence of circumstantial evidence," more specifically, "there was no physical evidence to support the

allegations." Appellant's Brief at 15. But physical evidence is not required to establish the offense of child molesting and the lack of physical evidence does not render the incredible dubiosity rule applicable. *See Smith*, 13 N.E.3d at 930 (recognizing that the lack of corroborating medical or physical evidence does not unilaterally render uncorroborated testimony of a victim insufficient and observing that "the type of criminal conduct that [the defendant] was accused of committing seldom leaves outward physical scars that can be corroborated by medical testimony and is seldom committed in the presence of eye-witnesses.") And we cannot say in this case that there is a complete lack of circumstantial evidence, in that witnesses testified to R.H.'s demeanor when she reported the incident.

[12] We will apply the incredible dubiosity rule only if Ramirez established that a sole witness gave inherently contradictory, equivocal, or coerced testimony, completely unsupported by circumstantial evidence. He did not do so.

Conclusion

[13] Sufficient evidence supports Ramirez's conviction for child molesting. Here, the incredible dubiosity rule does not permit our infringement upon the jury's responsibility to judge the credibility of a witness.

[14] Affirmed.

Riley, J., and Vaidik, J., concur.