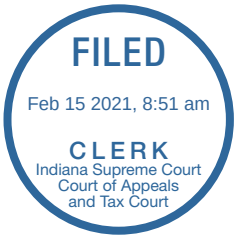
MEMORANDUM DECISION



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IN THE
COURT OF APPEALS OF INDIANA

Christopher M. Sutton,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

February 15, 2021

Court of Appeals Case No. 20A-PC-576

Appeal from the Adams Circuit Court

The Honorable Chad E. Kukelhan, Judge

Trial Court Cause No. 01C01-1201-PC-1

Baker, Senior Judge.

Statement of the Case

[1] Christopher M. Sutton appeals the denial of his petition for post-conviction relief. We affirm.

Issues

[2] Sutton raises five issues, which we consolidate and restate as:

I. Whether the post-conviction court erred in rejecting his claim of ineffective assistance of trial counsel.

II. Whether the post-conviction court erred in rejecting his claim of ineffective assistance of appellate counsel.

Facts and Procedural History

[3] The facts of Sutton's case are as follows:

> Seven-year-old Z.H. lived with her mother S.C[.], her three-year old brother, and thirty-two-year-old Sutton. S.C. and Sutton had lived together for "about 2, 2 years," and Z.H. called Sutton "daddy." On July 8, 2008, Z.H. and her brother were in bed with S.C. and Sutton. Z.H. had an issue with wetting herself at night and wore a pull-up diaper. S.C[.], who is a sound sleeper, did not hear Sutton leave the next morning.
>
> S.C. woke up around 7:00 a.m., and Z.H. was already awake. Z.H. went into the bathroom and her mother told her to take off her clothes so that she could take a bath. Z.H. told S.C. that her vagina hurt. S.C. told Z.H. that she "probably peed [her] pants, um go ahead and take your clothes off you'll be fine," and Z.H. stated "no mom my vagina hurts because . . . daddy stuck his penis in my vagina."

Without talking to Z.H. about what had happened, S.C. called her mother. S.C.'s mother and sister arrived, and her sister called the police. Later that day, Danielle Goewert of the Fort Wayne Child Advocacy Center interviewed Z.H. and the interview was recorded. Z.H. informed Goewert that Sutton put his penis in her vagina the previous night. Z.H. stated that Sutton was asleep because his eyes were closed. Z.H. stated that Sutton's penis touched her pull-up diaper and that her pull-up diaper went into her vagina. Z.H. also stated that her brother once smacked her in her vagina.

After her interview, Z.H. was examined at the Fort Wayne Sexual Assault Treatment Center by Sharon [Robison], the chief administrative officer and a sexual assault nurse examiner. [Robison] asked Z.H. what had happened to her, and Z.H. stated that her "daddy put his penis inside [her] vagina and that he pushed [her] pull up inside with his penis . . . ." [Robison] observed Z.H.'s "internal female sex organ" and "her labia minera," which she described as "beefy regnant" or "beefy like in red meat, so it's really dark red . . . ." [Robison] also observed petechiae, which is "pin point bruising," on Z.H.'s labia minera and above her urethra.

When Sutton arrived home, Berne Police Detective James Newbold identified himself to Sutton and asked him if he would come to the police department with him. Sutton said that he would and asked if he was going to jail. During the interview, Detective Newbold told Sutton that the interview related to the fact that Z.H. had told her mother that her vagina hurt. Sutton stated that Z.H. had complained about her vagina hurting for probably the last year. Detective Newbold asked Sutton if there was a particular reason why Z.H.'s vagina would be hurting, and Sutton stated that over the weekend Z.H. complained that she had been hurt on the "swings or something," but Z.H.'s aunt checked her and determined that she was only scratched. Sutton denied placing his penis in Z.H.'s vagina. When asked why Z.H. would say that he had placed his penis in her vagina, Sutton stated that he is erect in the mornings and that he must roll over

> Z.H. to exit the bed but that his penis did not touch her. Sutton also indicated that he attempts to be sure that he is "clear" of the children and is "careful" because he knows the children are usually in the bed.
>
> At one point during the interview, Detective Newbold asked Sutton if there was any reason why a pubic hair would be found inside of Z.H.'s vagina, and Sutton stated that he was bald because he shaves his pubic area. Detective Newbold indicated that he was not sure whether pubic hairs were found or not, and Sutton indicated that it would not matter because he shaves. At some point during the interview, Sutton pulled his pants down to show Detective Newbold his pubic area, and Detective Newbold observed that Sutton had pubic hair of "maybe a half inch to three quarters" in length.

Sutton v. State, No. 01A05-100-CR-75, *1-2 (Ind. Ct. App. Dec. 21, 2010) (record citations omitted), *trans. denied*.

[4] The State charged Sutton with child molesting, a Class A felony. Z.H. did not testify at trial. Instead, the trial court admitted into evidence: (1) a video recording of her interview with Goewert; and (2) a recording of her testimony from a pre-trial protected person hearing. In addition, S.C. and Nurse Robison relayed to the jury what Z.H. had told them. Sutton testified on his own behalf, denying that he had molested Z.H. The jury determined Sutton was guilty as charged. Sutton appealed, claiming the trial court erred in accepting certain exhibits as evidence. A panel of this Court affirmed the trial court's judgment. *Id.* at *12.

[5] Next, Sutton filed a petition for post-conviction relief. He served non-party requests for production of documents on the State, seeking access to records

from Z.H.'s medical care providers. The State objected to Sutton's discovery requests, and the post-conviction court sustained the objection. Sutton sought interlocutory review. A panel of the Court accepted the appeal and affirmed the post-conviction court's judgment. *Sutton v. State*, No. 01A05-1507-PC-882 (Ind. Ct. App. March 14, 2016), *trans. denied*.

[6] On remand, Sutton filed an amended petition. The post-conviction court held an evidentiary hearing, during which Sutton's appellate counsel testified.[1] The post-conviction court denied Sutton's amended petition, and this appeal followed.

Discussion and Decision

Standard of Review

[7] "Post-conviction proceedings do not provide criminal defendants with a 'super-appeal.'" *Garrett v. State*, 992 N.E.2d 710, 718 (Ind. 2013). Rather, they provide a narrow remedy to raise issues that were not known at the time of the original trial or were unavailable on direct appeal. *Id.* Issues available but not raised on direct appeal are waived, while issues litigated adversely to the

[1] Sutton's trial counsel died prior to the evidentiary hearing.

defendant on direct appeal are res judicata.[2] *Pruitt v. State*, 903 N.E.2d 899, 905 (Ind. 2009).

[8] A petitioner who has been denied post-conviction relief appeals from a negative judgment. *Saunders v. State*, 794 N.E.2d 523, 526 (Ind. Ct. App. 2003). A post-conviction court's denial of relief will be affirmed unless the petitioner shows that the evidence leads unerringly and unmistakably to a decision opposite to that reached by the post-conviction court. *Id.* We review the post-conviction court's factual findings for clear error but do not defer to its conclusions of law. *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). We will not reweigh the evidence or judge the credibility of the witnesses. *Hinesley v. State*, 999 N.E.2d 975, 981 (Ind. Ct. App. 2013), *trans. denied*.

Assistance of Trial Counsel

[9] Sutton argues the post-conviction court erred in rejecting his claims of ineffective assistance of trial counsel. He further argues his trial counsel erred in failing to object to certain evidence, in failing to object to alleged prosecutorial misconduct, and in failing to argue that the case should have been dismissed for lack of valid evidence. In considering claims of ineffective assistance, we have stated:

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[2] Sutton argues, among other claims, that the trial court abused its discretion when it permitted the prosecutor to present allegedly improper evidence. This claim of freestanding error is waived. *See Taylor v. State*, 882 N.E.2d 777, 781 (Ind. Ct. App. 2008) (claim of jury instruction error waived for failure to raise it prior to post-conviction proceedings).

> We evaluate claims of ineffective assistance under the two-part test originally set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A petitioner must demonstrate that his or her counsel performed deficiently, resulting in prejudice. Counsel renders deficient performance when his or her representation fails to meet an objective standard of reasonableness. Prejudice exists when a petitioner demonstrates that, if not for counsel's deficient performance, there is a reasonable probability that the result would have been different. A petitioner must prove both parts of the test, and failure to do so will cause the claim to fail.
>
> We strongly presume counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. Counsel's conduct is assessed based on facts known at the time and not through hindsight. Where, as here, a claim of ineffective assistance is based on counsel's failure to object, the petitioner must demonstrate that if an objection had been made, the trial court would have had no choice but to sustain it.

Cole v. State, 61 N.E.3d 384, 387 (Ind. Ct. App. 2016) (citations omitted), *trans. denied*.

A. Admission of Evidence

[10] Sutton claims his trial counsel should have objected to the admission of several witnesses' testimony, and that if counsel had done so, the evidence would have been excluded, undermining the State's case. Specifically, he argues that the testimony that counsel should have challenged was unfairly prejudicial, impermissible hearsay, or improperly vouched for Z.H.'s truthfulness.

[11] Starting with the question of unfair prejudice, Indiana Evidence Rule 403 provides: "The court may exclude relevant evidence if its probative value is

substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." All evidence that is relevant to a criminal prosecution is inherently prejudicial. *Fuentes v. State*, 10 N.E.3d 68, 73 (Ind. Ct. App. 2014), *trans. denied*. The balancing of probative value against the danger of unfair prejudice must be determined with reference to the issue to be proved by the evidence. *Bryant v. State*, 984 N.E.2d 240, 249 (Ind. Ct. App. 2013), *trans. denied*. When determining whether evidence had an unfairly prejudicial impact, courts look for "the dangers that the jury will substantially overestimate the value of the evidence or that the evidence will arouse or inflame the passions or sympathies of the jury." *Fuentes*, 10 N.E.3d at 73.

[12] Sutton claims S.C. and Nurse Robison's testimony was unfairly prejudicial. S.C. relayed to the jury that Z.H. had said her vagina hurt, and that Sutton had put his penis in her vagina. Nurse Robison testified that Z.H. stated during her examination that Sutton put his penis in her vagina, pushing her pull-up diaper into her vagina in the process.

[13] At trial, one of Sutton's defenses was that Z.H. had fabricated the assault or confused it with a dream. Another of Sutton's defenses was that Z.H.'s injury to her vagina was caused by her brother hitting her on her genitals, not by a sexual assault. S.C. and Nurse Robison's testimony was relevant to disprove Sutton's alternate explanations for Z.H.'s injury. In addition, their testimony was not presented in an inflammatory way intended to provoke the jury's passions. Although their testimony was prejudicial, it was not so unfairly

prejudicial as to outweigh probative value. *See Love v. State*, 761 N.E.2d 806, 811 (Ind. 2002) (evidence that Love, a defendant in child molest case, could have gotten medicine to treat a sexually transmitted disease while in jail was not unfairly prejudicial; evidence was relevant to disprove Love's defense that he could not have molested the child because she had a sexually transmitted disease and he did not). If Sutton's counsel had objected to the testimony on grounds of unfair prejudice, the trial court would not have granted the objection.

[14] We next turn to Sutton's claim that his trial counsel should have objected to certain testimony as hearsay. Hearsay is an out-of-court statement that "is offered to prove the truth of the matter asserted." Ind. Evid. Rule 801(c). "Hearsay is not admissible unless [the Indiana Rules of Evidence] or other law provides otherwise." Ind. Evid. R. 802.

[15] Sutton asserts that S.C., Nurse Robison, and Goewert improperly shared with the jury Z.H.'s out-of-court statements. Starting with Nurse Robison's testimony, Indiana Evidence Rule 803(4) provides that a statement "made for medical diagnosis or treatment," which is then told to the jury, is not subject to Rule 802's ban on hearsay. The two-step analysis for determining whether a statement was made for medical diagnosis or treatment is: (1) whether the declarant is motivated to provide truthful information in order to promote diagnosis and treatment; and (2) whether the content of the statement is such that an expert in the field would reasonably rely upon it in rendering diagnosis

and treatment. *Ramsey v. State*, 122 N.E.3d 1023, 1031 (Ind. Ct. App. 2019) (quotation omitted), *trans. denied*.

[16] Nurse Robison was wearing scrubs when she examined Z.H. She introduced herself to Z.H., identified herself as a nurse, and explained that she was there to make sure Z.H. was "ok." Trial Tr. Vol. 2, p. 342. She further stated she would examine Z.H. "from head to toe." *Id.* After showing Z.H. the medical equipment, Nurse Robison had Z.H. change into a hospital gown and asked her questions about bleeding and pain as she examined her, at which point Z.H. disclosed Sutton's abuse. Under these facts, a reasonable person could conclude that Z.H.'s forensic examination closely resembled the treatment a child would receive from medical personnel after disclosing an injury, and Z.H. would have been motivated to give truthful statements to Nurse Robison for medical diagnosis and treatment. Further, Z.H.'s statement, which was a report of pain and what caused the pain, is the kind of statement a medical professional would reasonably rely on in rendering a diagnosis. Nurse Robison's testimony was admissible. *See Shoda v. State*, 132 N.E.3d 454, 468 (Ind. Ct. App. 2019) (child's statement to nurse providing child forensic exam fell under hearsay exception for statements related to medical diagnosis and treatment). If Sutton's counsel had objected, the trial court would not have sustained the objection.

[17] Turning to Goewert, Sutton's hearsay claim fails because Goewert did not repeat to the jury any of Z.H.'s statements to her. Instead, she described her education and training, discussed her organization's protocols for forensic

interviews, and authenticated the video recording of her interview with Z.H., which was played for the jury.

[18] As for S.C.'s testimony, in which she relayed to the jury that Z.H. told her that her vagina hurt and that Sutton had put his penis in her vagina, the State argues the testimony was not hearsay because Z.H.'s statement was an excited utterance. We disagree. Indiana Evidence Rule 803(2) provides that a statement is not barred by the rule against hearsay if it: "relat[es] to a startling event or condition, made while the declarant was under the stress of the excitement that it caused." The record is absolutely silent on Z.H.'s emotional state when she disclosed the abuse to S.C. In the absence of any evidence that Z.H. was still under the stress of the attack, her statements to S.C. do not qualify as an excited utterance. *Cf. Burdine v. State*, 751 N.E.2d 260, 264 (Ind. Ct. App. 2001) (child's statement to caseworker was an excited utterance; the child, who was normally boisterous, was uncharacteristically quiet when she gave the statement and was still under the stress of the event), *trans. denied*.

[19] Our analysis does not end there. Even if counsel should have objected to S.C.'s testimony as hearsay, we must consider whether, in light of all the evidence presented at trial, Sutton was prejudiced by any deficient performance on this point. Among other evidence, a recording of Z.H.'s interview with Goewert was admitted at trial. During the interview, Z.H. told Goewert that Sutton had pressed her pull-up diaper into her vagina with his penis. In addition, Nurse Robison told the jury that Z.H. had said to her that Sutton had put his penis in her vagina, pushing her pull-up diaper inside. Nurse Robison testified that she

saw signs of bruising inside of Z.H.'s sex organs, and the bruising was consistent with Z.H.'s version of events rather than Sutton's allegation that Z.H.'s brother may have caused the injury by hitting her.

[20] Considering all the evidence presented at trial, S.C.'s testimony about Z.H.'s statement had a minimally persuasive effect on the jury's decision, and Sutton was not prejudiced by his trial counsel's failure to object. *See Bouye v. State*, 699 N.E.2d 620, 624 (Ind. Ct. App. 1998) (trial counsel's failure to object to witness's testimony that Bouye had once been in a juvenile correctional facility was not prejudicial in light of all the evidence presented).

[21] For his third and final claim of ineffective assistance of trial counsel arising from evidentiary issues, Sutton argues that S.C., Nurse Robison, and Goewert impermissibly vouched for Z.H.'s truthfulness, which improperly influenced the jury. Indiana Evidence Rule 704(b) provides: "Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." Vouching testimony is considered an invasion of the province of the jurors in determining what weight they should place on a witness's testimony. *Alvarez-Madrigal v State*, 71 N.E.3d 887, 892 (Ind. Ct. App. 2017), *trans. denied*. "[T]here is a fine line between impermissible vouching testimony and admissible corroboration testimony . . . ." *Kress v. State*, 133 N.E.3d 742, 748 (Ind. Ct. App. 2019), *trans. denied*.

[22] Sutton argues S.C. vouched for Z.H. when she told the jury that Z.H. had said her vagina hurt and that Sutton had put his penis in her vagina. Appellant's Br. p. 15. This argument lacks merit. S.C. merely repeated what Z.H. had told her, without expressing any belief or disbelief in Z.H.'s truthfulness. Such testimony does not qualify as vouching. *See State v. Velasquez*, 944 N.E.2d 34, 46-47 (Ind. Ct. App. 2011) (in child molest case, trial court erred in excluding testimony from victim's grandmother; grandmother did not offer any opinion on the child's truthfulness but instead described the child's demeanor), *trans. denied*.

[23] Next, Sutton asserts Nurse Robison vouched for Z.H. by telling the jury what Z.H. had said during the examination. We disagree. Nurse Robison repeated what Z.H. told her. She further described Z.H.'s vaginal injury and stated it was consistent with Z.H.'s version of events rather than Sutton's claim that Z.H.'s brother had hit her, but she did not express an opinion on Z.H.'s truthfulness. *See Baumholser v. State*, 62 N.E.3d 411, 416 (Ind. Ct. App. 2016) (forensic interviewer did not impermissibly vouch for child witness during trial; interviewer generally discussed how victims of child molestation sometimes behave but did not comment on child's truthfulness), *trans. denied*.

[24] Finally, Sutton argues Goewert vouched for Z.H. by: (1) repeating Z.H.'s accusations; (2) describing Z.H.'s case as "acute;" and (3) explaining that it was common for children to identify someone they know well as their abuser. Appellant's Br. pp. 21-22. Sutton's argument is incorrect. On the witness stand, Goewert did not repeat any of Z.H.'s statements or express an opinion as

to Z.H.'s truthfulness. To the contrary, she told the jury it was not her job to "prove or disprove the allegations." Trial Tr. Vol. 2, p. 254. In addition, Goewert's description of Z.H.'s case as acute was in reference to her agency's policy of prioritizing cases for forensic interviews. That policy defines an acute case as one in which sexual abuse is alleged to have occurred recently. Finally, Goewert's explanation that children frequently identify someone they know as an abuser was a general statement about child molestation, not an opinion on Z.H.'s credibility. *See Hobbs v. State*, 2020 WL 7019663, *8 (Ind. Ct. App. 2020) (pediatrician did not vouch for child witness's testimony by stating child victims generally delay disclosure of molestation; the statement did not relate to child witness's truthfulness). Once again, if Sutton's counsel had objected to witness testimony on grounds of vouching, the trial court would not have sustained the objections.

B. Prosecutorial Misconduct

[25] Sutton argues his trial counsel should have objected during the prosecutor's opening statement and closing arguments, claiming the prosecutor unfairly vouched for Z.H.'s truthfulness and attempted to inflame the jury against him.

[26] To prevail on an ineffective assistance of counsel claim alleging prosecutorial misconduct, a petitioner for post-conviction relief must first establish that prosecutorial misconduct occurred. *Laux v. State*, 985 N.E.2d 739, 750 (Ind. 2013), *trans. denied*. In reviewing a properly preserved claim of prosecutorial misconduct, we must first determine whether the prosecutor's conduct was improper. *Stephens v. State*, 10 N.E.3d 599, 605 (Ind. Ct. App. 2014). If we

determine the conduct was improper, we must then determine whether, under all the circumstances, the prosecutor's misconduct placed the defendant in a position of grave peril. *Id.* Whether a defendant has been placed in a position of grave peril is measured by the probable persuasive effect of the misconduct on the jury's decision. *Samaniego v. State*, 679 N.E.2d 944, 949 (Ind. Ct. App. 1997), *trans. denied*.

[27] Whether a prosecutor's statements to the jury constitute misconduct is determined "by reference to case law and the disciplinary rules of the Code of Professional Responsibility." *Mahla v. State*, 496 N.E.2d 568, 572 (Ind. 1986). It is proper for the prosecutor to argue both law and fact during closing argument and propound conclusions based on an analysis of the evidence. *Hand v. State*, 863 N.E.2d 386, 394 (Ind. Ct. App. 2007). In judging the propriety of a prosecutor's remarks, we consider the challenged statements in the context of the argument as a whole. *Id.* "A prosecutor may comment on the credibility of the witnesses only if the assertions are based on reasons which arise from the evidence." *Gaby v. State*, 949 N.E.2d 870, 881 (Ind. Ct. App. 2011).

[28] Sutton argues the prosecutor improperly vouched for Nurse Robison and Z.H.'s testimony and baselessly attacked his credibility. During the prosecutor's opening statement, he described sexual assault nurse examiners such as Nurse Robison as "the experts." Trial Tr. Vol. 1, p. 234. During closing arguments, the prosecutor noted Nurse Robison's expert testimony was uncontradicted and stated, "that's the evidence you need to rely on." Trial Tr. Vol. 2, p. 379. At

trial, Nurse Robison described her educational history and the ongoing training she participated in to maintain her certification as a sexual assault nurse examiner. Although the prosecutor did not formally ask the court to recognize her as an expert witness, the record establishes Nurse Robison's expertise in sexual assault examination. Further, at trial Sutton argued that the injury to Z.H.'s vagina could have been caused by her brother hitting her, and Nurse Robison testified that the injury was inconsistent with Sutton's argument. We conclude the prosecutor's statements were a fair comment on the evidence rather than impermissible vouching. *See Robey v. State*, 7 N.E.3d 371, 382 (Ind. Ct. App. 2014) (prosecutor's comment on doctor's testimony was a fair description of the evidence rather than impermissible vouching), *trans. denied*.

[29] As for Z.H., during opening statements the prosecutor told the jury the following about her testimony: "we know people lie (inaudible) but remember they lie to get out of trouble, not to get others in trouble." Trial Tr. Vol. 1, p. 235. Sutton's trial counsel objected to the prosecutor's remark as argumentative, after which an off-the-record discussion between the trial court and counsel was held and opening statements resumed. In the absence of a record of what was said during the discussion and knowledge of the trial court's ruling, we cannot review counsel's performance following the objection.

[30] Next, Sutton claims his attorney should have challenged the prosecutor's statement during closing arguments that Z.H. looked scared in the recording of the protected persons hearing. The prosecutor's statement was a fair comment

on the evidence, and the jury, having viewed the recording, was free to make its own observation of Z.H.'s demeanor.

[31] Sutton further claims the prosecutor improperly vouched for Z.H. by telling the jury: "[t]here's no evidence here at all that this child was ever coached." Trial Tr. Vol. 2, p. 386. Sutton argues that his attorney never raised the question of coaching during trial, and it was inappropriate for the prosecutor to sua sponte raise the issue in closing arguments. Sutton cites *Sampson v. State*, 38 N.E.3d 985 (Ind. 2015), which established the rule that a prosecutor may not present evidence as to whether a child was coached unless the defendant first opens the door to that issue. The Supreme Court issued its decision in *Sampson* over five years after Sutton's trial. "An attorney is not required to anticipate changes in the law and object accordingly in order to be effective." *Smylie v. State*, 823 N.E.2d 679, 690 (Ind. 2005) (internal quotation omitted).

[32] The prosecutor further stated during closing arguments: "Kids don't lie to be [sic] someone else in trouble they lie to get themselves out of trouble." Trial Tr. Vol. 2, p. 384. This statement appears to imply an understanding of child psychology, and there is no evidence in the record to support it. Similarly, the prosecutor told the jury Z.H. "did the right thing" by disclosing Sutton's abuse. *Id.* at 391. Both remarks amount to improper vouching for Z.H.'s truthfulness. *See Brummett v. State*, 10 N.E.3d 78, 86-87 (Ind. Ct. App. 2014) (prosecutor improperly vouched for witnesses by telling the jury kids "do not lie" and that one witness "did the right thing" by encouraging another person to report abuse), *summarily aff'd*, *Brummett v. State*, 24 N.E.3d 965 (Ind. 2015).

[33] We must determine whether, under the circumstances of the case, the prosecutor's remarks placed Sutton in a position of grave peril. Z.H.'s testimony was important because she was the victim of Sutton's offense. Even so, the prosecutor's two remarks must be considered in the context of the entire closing argument, which was lengthy. In addition, during closing argument the prosecutor emphasized to the jury that they were the judges of the evidence, not him:

> Ultimately, what you think is important in this case is your decision. This is argument. The Judge [sic] is going to instruct you questions [sic] that we asked the word [sic] we used, that's not evidence. The arguments we made, the open statements we made is [sic] not evidence, what we thought it would be. Closing statements is [sic] not evidence it's [sic] our take on it. You decide what evidence you believe was presented to you in this case.

Trial Tr. Vol. 2, p. 377. The prosecutor later stated: "Again, our openings our closing are not evidence, ok, instructions says so. Our openings are our road map of what we think the evidence is going to be." *Id.* at 381. Next, the evidence against Sutton was strong, particularly Z.H.'s recorded testimony and Nurse Robison's testimony about her examination of Z.H. Under these circumstances, we conclude the prosecutor's isolated vouching remarks did not place Sutton in a position of great peril. If Sutton's trial counsel had objected to the prosecutor's remarks, the objection would not have been granted because the remarks did not rise to the level of misconduct.

[34] On a related topic, Sutton argues the prosecutor improperly commented on Sutton's credibility during closing arguments, stating, "You know that Chris Sutton will lie." Trial Tr. Vol., 2, p. 382. We disagree that the prosecutor's comment was improper, in the context of the evidence presented. Sutton testified at trial, and his credibility was a key issue in the case. The prosecutor discussed Sutton's credibility in the context of considering, based on the evidence in the case, who had stronger incentive to lie. For example, the prosecutor referred to Sutton's statement to the police that he shaved his pubic hair, which was disproved when he demonstrated to the officers that he was not shaved. The prosecutor's statement about Sutton's honesty was a fair comment on the evidence.

[35] Sutton next claims his trial counsel should have objected to remarks by the prosecutor that he claims unduly prejudiced the jury against him. It is misconduct for a prosecutor to request a jury to convict a defendant for any reason other than his guilt or to phrase closing argument in a manner calculated to inflame the passions or prejudice of a jury. *Jerden v. State*, 37 N.E.3d 494, 499 (Ind. Ct. App. 2019). "The line between acceptable and improper advocacy is not easily drawn; the question is whether the defendant was deprived of a fair trial." *Gasaway v. State*, 547 N.E.2d 898, 902 (Ind. Ct. App. 1989), *trans. denied*.

[36] During opening statements and closing arguments, the prosecutor described Z.H.'s injury, and the sexual assault in general, as "acute." Trial Tr. Vol. 1, p. 234; Trial Tr. Vol. 2, p. 396. Sutton argues the prosecutor's word choice was

unnecessarily inflammatory. We disagree because the prosecutor's word choice was supported by the evidence. Goewert used the word "acute" to describe a category of reports of child molest cases that her employer prioritized for forensic interviews.

[37] Next, Sutton argues the prosecutor committed misconduct by once referring to Z.H. as "this victim" during opening statements, claiming the prosecutor was unfairly implying that the defendant is guilty. Trial Tr. Vol. 1, p. 234. The prosecutor used the word victim in the context of discussing how Nurse Robison examines children such as Z.H., as well as discussing Z.H.'s disclosure of abuse during her examination. The prosecutor's use of the word "victim" was a fair comment on the evidence presented. In any event, even if the prosecutor should not have used that word in describing Z.H., we conclude Sutton was not placed in grave peril because the prosecutor used the word to describe Z.H. only once in his opening and closing remarks.

[38] Finally, during opening statements the prosecutor told the jury, "you do what's right and convict Mr. Sutton of child molesting." *Id.* at 236. Similarly, during closing arguments the prosecutor asked the jury "to do the right thing" and find Sutton guilty. Trial Tr. Vol. 2, p. 390. Considering the context of the entirety of the prosecutor's opening statement and closing argument, in which the prosecutor discussed the evidence at length, we conclude the prosecutor was merely asking the jury to find Sutton guilty because the evidence showed he was guilty, not due to any inflammatory motive other than Sutton's guilt. *Cf. Ryan v. State*, 9 N.E.3d 663, 672 (Ind. 2014) (prosecutor engaged in improper

conduct during closing argument by urging the jury to "send the message" that child molesting would not be tolerated in the community).

[39] To summarize, if Sutton's trial counsel had objected to some or all of the prosecutor's statements, the trial court would not have sustained the objections because none of the statements amounted to prosecutorial misconduct. Sutton's claim of ineffective assistance must fail.

C. Motion for Directed Verdict

[40] After the State rested its case, Sutton's trial counsel moved for judgment on the evidence, arguing the State "failed to prove beyond a reasonable doubt that the defendant is guilty." Trial Tr. Vol. 2, p. 367. The trial court denied Sutton's motion. Sutton claims his trial counsel should have instead argued that Z.H.'s recorded statements were incredibly dubious, and without those statements, there was insufficient evidence to sustain the State's case.

[41] A motion for directed verdict, also sometimes known as a motion for judgment on the evidence, is granted only where there is a total lack of evidence on some essential element and where the State has failed to establish a prima facie case. *Canaan v. State*, 541 N.E.2d 894, 905 (Ind. 1989). In general, Indiana's appellate courts do not reweigh witness testimony. *Reyburn v. State*, 737 N.E.2d 1169, 1171 (Ind. Ct. App. 2000). A court may impinge on the jury's responsibility to judge witness credibility "only when confronted with inherently improbable testimony or coerced, equivocal wholly uncorroborated

testimony of incredible dubiosity." *Carter v. State*, 31 N.E.3d 17, 30-31 (Ind. Ct. App. 2015), *trans. denied*. Application of this rule is rare. *Id.* at 31.

[42] Sutton asks us to conclude that Z.H.'s statements, as presented to the jury in two recordings, should have been disregarded because they were contradictory and equivocal. We disagree. The doctrine of incredible dubiosity is inapplicable to this case because Z.H.'s recorded statements are supported by corroborating evidence. Specifically, Nurse Robison testified that the interior of Z.H.'s vagina had bruises that were consistent with Z.H.'s description of events and inconsistent with Sutton's theory that Z.H. was hit by her brother. As a result, Sutton's incredible dubiosity claim must fail. *See Baxter v. State*, 132 N.E.3d 1, 5 (Ind. Ct. App. 2019) (rejecting claim that child victim's testimony was incredibly dubious; testimony was supported by other circumstantial evidence).

[43] "[T]rial counsel cannot be found deficient for failing to make an objection that would not have been sustained at trial." *Thompson v. State*, 671 N.E.2d 1165, 1171 (Ind. 1996). Similarly, counsel could not have been found deficient for failing to make a motion that would have been denied.

D. Cumulative Impact

[44] Sutton argues that his trial counsel's errors, taken together, establish ineffective assistance of counsel and require that his conviction be vacated. "Errors by counsel that are not individually sufficient to prove ineffective representation may add up to ineffective assistance when viewed cumulatively." *Pennycuff v.*

State, 745 N.E.2d 804, 816-817 (Ind. 2001). We have determined that trial counsel may have performed deficiently only in one instance (failure to object to S.C.'s hearsay testimony), but even in that instance, there is no evidence that Sutton was unfairly prejudiced. Taken together, counsel's handling of Sutton's case does not amount to ineffective assistance. *See id.* at 817 (counsel did not provide ineffective assistance; counsel's decisions, considered cumulatively, fell within the range of reasonable trial performance).

Assistance of Appellate Counsel

[45] Sutton claims the post-conviction court erred in rejecting his claim of ineffective assistance of appellate counsel. We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Walker v. State*, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006), *trans. denied*.

[46] Sutton asserts his appellate counsel should have presented a claim of ineffective assistance of trial counsel, raising the evidentiary issues discussed above. A claim that appellate counsel was ineffective for failing to fully and properly raise and support a claim of ineffective assistance of trial counsel will be successful only when the petitioner shows that both trial counsel and appellate counsel were ineffective under the *Strickland* standard. *Allen v. State*, 749 N.E.2d 1158, 1169 (Ind. 2001) (quotation omitted). We have already considered the evidentiary issues Sutton believes his trial counsel should have raised, and he was not entitled to prevail on any of them. If appellate counsel had raised those

issues in the context of a claim of ineffective assistance of trial counsel, the appellate court would not have found in his favor.

[47] Next, Sutton argues his appellate counsel should have challenged the sufficiency of the evidence supporting his conviction. Specifically, Sutton believes his appellate counsel should have argued that Z.H.'s recorded statements were incredibly dubious. We have already determined that Z.H.'s testimony was not incredibly dubious. If appellate counsel had challenged the sufficiency of the evidence, the Court would not have found in his favor. Appellate counsel did not perform deficiently, and the post-conviction court did not err in rejecting his claim of ineffective assistance of appellate counsel.

Conclusion

[48] For the reasons stated above, we affirm the judgment of the post-conviction court.

[49] Affirmed.

May, J., and Brown, J., concur.