MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Peydon L. Bennett,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 14, 2023

Court of Appeals Case No. 22A-CR-1947

Appeal from the Wabash Circuit Court

The Honorable Robert R. McCallen, III, Judge

Trial Court Cause No. 85C01-2007-F1-773

Memorandum Decision by Judge Robb

Judges Mathias and Foley concur.

Robb, Judge.

Case Summary and Issues

[1] Following a jury trial, Peydon Bennett was convicted of three counts of child molesting and ordered to serve an aggregate sentence of forty years in the Indiana Department of Correction with five years suspended to probation. Bennett appeals, raising two issues for our review: 1) whether the evidence is sufficient to support his convictions, and 2) whether his sentence is inappropriate. Concluding the evidence was sufficient and the sentence is not inappropriate, we affirm.

Facts and Procedural History

[2] In 2016, K.M. lived with her mother; her two daughters, Victim 1 and Victim 2; and her son. In November 2016, K.M. became acquainted with Bennett over Facebook, in early December, they met in person, and by the end of December, Bennett had moved in with K.M. and her family. Victim 1 was nine years old, and Victim 2 had just turned five. When Bennett first moved in, Victim 1 and Victim 2 shared a room with their grandmother. Eventually, the family fixed up a spare room for the girls to share.

[3] K.M. and Bennett typically worked different schedules so someone could always be with the kids. While Bennett lived with the family, Victim 1 had oral surgery to remove an extra tooth, got braces, and had numerous dentist and orthodontist appointments. Because K.M. did not have a driver's license or

vehicle at that time, Bennett took Victim 1 to her appointments. K.M. occasionally went along, but Bennett took her by himself five or six times. Bennett also assisted K.M. by bathing Victim 2 and her son a few times.

[4] Initially, Bennett and all the kids "would play all the time and just joke around with each other." Transcript of Evidence, Volume 2 at 191. But about two years into the relationship, K.M. noticed that Victim 1 "became really distant and she would avoid [Bennett]. She wouldn't hug him, she wouldn't say good night, I love you, nothing. She just quit." *Id.* at 204. Victim 1 said her feelings about Bennett were on again-off again because "he would always change my mom's mind, or answer for her, or just act like he was like my . . . real dad . . . and he could tell me what to do, when I could do it." Tr., Vol. 3 at 24. Victim 2 also began to keep a little bit of distance from Bennett. *See* Tr., Vol. 2 at 204. In December 2019, K.M. and Bennett got engaged.

[5] Victim 1 had a friend who had disclosed that her mother's boyfriend was molesting her. That made Victim 1 feel "more comfortable" disclosing to that friend that Bennett was molesting her. Tr., Vol. 3 at 33. In March 2020, approximately one month after Victim 1 shared that she was being molested, Victim 1's friend received inappropriate Facebook messages from Bennett. The friend showed the messages to Victim 1 and later, to K.M. Victim 1 then told K.M. about inappropriate things Bennett had done to her. K.M. immediately asked Victim 2 if anybody had ever touched her and Victim 2 said yes. Victim 1 and Victim 2 had not shared Bennett's actions with each other.

[6] K.M. called Bennett at work, told him that the girls had made some accusations against him, and asked him to come home. When he got home, K.M. confronted him. Bennett was "really shaky" but denied the allegations. Tr., Vol. 2 at 208. The girls also confronted him. Victim 1 said Bennett "looked worried. He was crying. He was barely saying anything besides the fact that he didn't do it, why would he do it, how could he have done it." Tr., Vol. 3 at 17. She was "upset and disappointed" that he would not take responsibility. *Id.* at 27. Bennett's denials made Victim 2 feel sad.

[7] A few days later, K.M. made a police report. Victim 1 and Victim 2 were subsequently interviewed at the Child Advocacy Center. Based on the report and the interview, the State charged Bennett with two counts of child molesting as Level 1 felonies, one as to each child, for performing or submitting to other sexual conduct with a child under fourteen years of age; and two counts of child molesting as Level 4 felonies, one as to each child, for performing or submitting to fondling or touching with a child under fourteen years of age.

[8] Bennett's case was tried to a jury. Victim 1 testified at trial that she was born in October 2007. On one occasion between December 2016 and March 2020 when Bennett was driving her home from a dental appointment, he reached over to where she was sitting in the passenger seat, put his hand down her pants, and rubbed her genitals under her underwear. She was scared and nervous but did not say anything to her mom, testifying, "I was terrified that – because I knew how much my mom liked him[.]" *Id.* at 9. That happened two more times on trips home from dental appointments.

[9] Victim 1 also testified that on one occasion when she and Bennett were home by themselves, they were on the couch watching TV. "[M]e being little and like a little child still, there was sometimes where I'd sit like in between his legs to like watch movies . . . . And this time, I was laying in between his legs, and he reached into my pants and underwear, and put his fingers inside of me." *Id.* at 12. Bennett continued until Victim 1 made an excuse to go to the bathroom.

[10] Victim 2, born in December 2011, testified that Bennett gave her several "bad touches[.]" *Id.* at 53. On one occasion, Victim 2 was doing homework in the living room and Bennett put his hand down her pants and touched her "private spot[,]" putting his finger in her vagina. *Id.* at 54-55. She felt uncomfortable, unsafe, and it hurt. When she went to the bathroom afterwards, she felt a burning sensation. On another occasion in the living room while Bennett was helping Victim 2 with her homework, he put his hands under her shirt and touched her breasts. Once, when Bennett was drying Victim 2 off after helping her bathe in the downstairs bathroom, he again placed his finger inside her vagina. Victim 2 also testified to a time when she and Bennett were in K.M.'s room on the bed watching videos, and she felt Bennett's penis on her leg. Bennett told her not to look, but she could tell he was "holding it, like sliding it up and down and side to side." *Id.* at 63. Sometimes when Bennett touched Victim 2, other people were in the house but not in the same room. But one night, Bennett came into the bedroom Victim 2 shared with her grandma and Victim 1 and touched her while she was in bed. Neither her grandma nor

Victim 1 woke up. The "bad touches" stopped when Bennett and K.M. got engaged. *See id.* at 65.

[11] The jury found Bennett not guilty of Count I (a Level 1 felony alleging other sexual conduct as to Victim 1) but guilty of the remaining counts. The trial court ordered him to serve a sentence of six years each on Count II and Count IV, concurrent with each other and with a sentence of forty years for Count III. The trial court ordered five years of the sentence suspended to formal probation and designated Bennett a credit restricted felon. Bennett now appeals his convictions and sentence.

Discussion and Decision

I. Sufficiency of the Evidence

[12] Bennett claims the evidence is insufficient to support his convictions because the victims' testimony was incredibly dubious. Count III, alleging acts against Victim 2, required the State to prove that Bennett, being at least twenty-one years of age, knowingly or intentionally performed "other sexual conduct" with a child under fourteen years of age. *See* Appellant's Appendix, Volume II at 61; *see also* Ind. Code § 35-42-4-3(a)(1) (defining Level 1 felony child molesting). "Other sexual conduct" is defined in part as an act involving "the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-31.5-2-221.5(2). Count II, alleging acts against Victim 1, and Count IV, alleging acts against Victim 2, required the State to prove that Bennett performed any fondling or touching of a child under fourteen years of age with the intent to arouse or

satisfy the sexual desires of either the child or himself. *See* Appellant's App., Vol. II at 60-61; *see also* Ind. Code § 35-42-4-3(b) (defining Level 4 felony child molesting).

[13] Generally, in reviewing witness testimony on a sufficiency challenge, we do not judge the credibility of the witness, *Purvis v. State*, 87 N.E.3d 1119, 1124 (Ind. Ct. App. 2017), and a victim's uncorroborated testimony is sufficient for a conviction, *Smith v. State*, 163 N.E.3d 925, 929 (Ind. Ct. App. 2021). Within the narrow limits of the "incredible dubiosity" rule, however, a court may impinge upon a jury's function to judge the credibility of a witness. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). The rule is applied only where there is "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." *Moore v. State*, 27 N.E.3d 749, 756 (Ind. 2015). If any one factor is lacking, application of the incredible dubiosity rule is precluded. *Id*. at 758. Application of this rule is rare and "the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it." *Love*, 761 N.E.2d at 810. "[W]hile incredible dubiosity provides a standard that is not impossible to meet, it is a difficult standard to meet, [and] one that requires great ambiguity and inconsistency in the evidence." *Moore*, 27 N.E.3d at 756 (internal quotations omitted).

[14] Bennett contends that the only evidence that he touched or fondled either of the victims came from their own testimony and "[i]t is this exact testimony that

Bennett now alleges to be incredibly dubious." Appellant's Brief at 15. Specifically, he points to the following testimony as incredibly dubious:

- With respect to Victim 1, Bennett argues her testimony about being molested in the car is improbable because "[p]resumably, due to her age, she would have been riding in the back seat of the vehicle" and it is "hard to imagine" that Bennett could have reached back while driving to fondle her; that her testimony that she did not always get along with Bennett reveals a motive to make false allegations; and that "it is reasonable to presume" from her testimony about her friend disclosing she was molested that she "would also want to be like [her friend] and garner sympathy or favor." *Id.* at 17, 18.
- With respect to Victim 2, Bennett challenges her testimony that other people were sometimes in the house when Bennett molested her and that on one occasion her grandmother and sister were asleep in the same room but nobody noticed as improbable.
- With respect to both victims, Bennett argues the fact that they did not tell anyone about the molestations as they happened "despite having ample opportunities to do so" "runs afoul of what would be perceived as the normal response a person would take in such a situation[.]" *Id.* at 17, 18.

[15] In applying the *Moore* factors, we conclude the incredible dubiosity rule is inapplicable to the present case. Bennett is correct that because Victim 1 and Victim 2 were the only eyewitnesses who could establish the elements of the alleged crimes perpetrated against them, the first factor is satisfied even though

more than one witness testified. *Cf. Smith v. State*, 34 N.E.3d 1211, 1221-22 (Ind. 2015) (noting that although three witnesses testified, without the allegedly incredibly dubious testimony of one witness, the remaining witnesses' testimony would have been an insufficient basis for the jury to find the defendant guilty; therefore, the first factor was satisfied).

[16] But Bennett fails to satisfy the second and third elements. The second factor is satisfied when the sole witness offers testimony that is inherently contradictory, equivocal, or the result of coercion. Neither Victim 1 nor Victim 2's testimony was contradictory, equivocal, or shown to be the result of coercion. Nor was their testimony "so convoluted and/or contrary to human experience that no reasonable person could believe it." *Edwards v. State*, 753 N.E.2d 618, 622 (Ind. 2001). Bennett misstates Victim 1's testimony about the molestations in the car; Victim 1 specifically described riding in the front passenger seat, which is within easy reach of the driver in most vehicles. Further, the fact that Victim 2 did not cry out for help when Bennett molested her when other people were in the house or that neither victim told anyone about the molestations for some time after they occurred is also not counter to human experience. Bennett cites no support for his assertion that it is; and in fact, the opposite seems to be true: it is not unusual for a child victim of molestation to wait months, if not years, before disclosing the crime. *See Ennik v. State*, 40 N.E.3d 868, 879 (Ind. Ct. App. 2015) (quoting with approval trial court's finding that "[c]ommon sense and experience have shown that rarely do children disclose abuse or molestation

immediately after it occurs"), *trans. denied*. Both victims' trial testimony was clear, consistent, and without contradiction as to Bennett touching them.

[17] The other facts Bennett highlights – such as a possible motive to fabricate the allegations – do not make that testimony inherently improbable. Incredible dubiosity involves testimony about the act charged. *See Rose v. State*, 36 N.E.3d 1055, 1061-62 (Ind. Ct. App. 2015) (noting cases in which we have found testimony to be incredibly dubious have involved situations where the facts of the crime as alleged are inconsistent with the laws of nature or human experience or so equivocal that the testimony is riddled with doubt about its trustworthiness). Everything else is a matter bearing on the victims' credibility for the jury to weigh.

[18] And as to the third factor requiring that there be a complete lack of circumstantial evidence, K.M. confirmed that Bennett took Victim 1 to dental appointments by himself on more than one occasion. She further confirmed that Bennett sometimes gave Victim 2 a bath. And she testified that she noticed both victims became more distant from Bennett as time wore on. Circumstantial evidence for this purpose is not required to independently establish guilt. *Smith*, 34 N.E.3d at 1221. Moreover, the fact that there was no physical evidence or corroborating witness testimony is not unusual for this type of criminal conduct. There is enough circumstantial evidence that the third factor is not satisfied, but even if there were none, the incredible dubiosity rule does not apply because we have already determined that the girls' testimony was not inherently contradictory or equivocal.

[19] Because the second and third prongs of the incredible dubiosity test are not met in this case, Bennett has failed to establish that the limited exception of the incredible dubiosity rule applies and therefore we will not judge the victims' credibility for ourselves. The jury heard and believed the victims' testimony, which was sufficient to support the verdict, and therefore we conclude there was sufficient evidence to sustain Bennett's convictions.

II. Inappropriate Sentence

[20] Indiana Appellate Rule 7(B) permits us to independently review and revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The defendant carries the burden of persuading us the sentence imposed by the trial court is inappropriate, *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006), and we may consider any factors appearing in the record in making such a determination, *Reis v. State*, 88 N.E.3d 1099, 1102 (Ind. Ct. App. 2017). Whether a defendant's sentence is inappropriate turns on our "sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). "The principal role of appellate review should be to attempt to leaven the outliers, . . . not to achieve a perceived 'correct' result in each case." *Id*. at 1225.

A. Bennett's Sentence

[21] In exercising our discretion to review sentences, "our concern is whether the totality of the penal consequences imposed by the trial court was appropriate." *Sharp v. State*, 970 N.E.2d 647, 650 (Ind. 2012). The advisory sentence is the starting point selected by the legislature as an appropriate sentence for the crime committed. *Clara v. State*, 899 N.E.2d 733, 736 (Ind. Ct. App. 2009). Bennett was convicted of a Level 1 felony and two Level 4 felonies. The punishment for a Level 1 felony is a fixed term of imprisonment between twenty and forty years with an advisory sentence of thirty years. Ind. Code § 35-50-2-4(b). The punishment for a Level 4 felony is a fixed term of imprisonment between two and twelve years with an advisory sentence of six years. Ind. Code § 35-50-2-5.5.

[22] The trial court sentenced Bennett to the maximum term of forty years with five years suspended to supervised probation for his Level 1 felony conviction and to the advisory term of six years for each of his Level 4 convictions. All sentences were ordered to be served concurrently, even though the convictions reflected crimes committed against two victims. The trial court also found Bennett to be a credit restricted felon, which means he initially would earn one day of credit for every six days he was imprisoned. *See* Ind. Code § 35-31.5-2-72 (defining a credit restricted felon to include a person convicted of child molesting involving other sexual conduct if the person is at least twenty-one years of age and the victim is less than twelve years of age); § 35-50-6-4(c) (providing a person who is a credit restricted felon is initially assigned to credit

time class C); § 35-50-6-3.1(d) (providing a person assigned to Class C earns one day of good time credit for every six days the person is imprisoned).

B. Nature of the Offense

[23] The nature of the offense is found in the details and circumstances of the offenses and the defendant's participation therein. *Lindhorst v. State*, 90 N.E.3d 695, 703 (Ind. Ct. App. 2017). When considering a sentence that deviates from the advisory sentence, we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence. *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017), *trans. denied*. Count III was proved in this case by evidence that Bennett knowingly or intentionally penetrated Victim 2's sex organ with his finger. According to Victim 2's testimony, Bennett committed such an act at least twice. And both victims testified to multiple instances of Bennett touching or fondling them, as alleged by Counts II and IV. Bennett characterizes his actions as "de minimis" in relation to acts that would typically constitute Level 1 and Level 4 felony child molesting convictions. Appellant's Br. at 21. We disagree. The relationship between Bennett and the victims and the multiple acts of molestation make this crime more egregious than the typical child molesting offense, warranting an aggravated sentence. *See Sharp*, 970 N.E.2d at 651 (finding that forty-year sentence for then-Class A felony child molesting and a concurrent six-year sentence for then-Class C felony child molesting was not inappropriate even considering the defendant's credit time status as a credit

restricted felon because despite only being charged with one count of molesting by criminal deviate conduct and one count of molesting by fondling, the evidence showed the defendant had committed the same offenses against the victim on multiple occasions over a period of years, which "warrants serious penal consequences").

C. Character of the Offender

[24] The "character of the offender" portion of the Rule 7(B) standard refers to general sentencing considerations and relevant aggravating and mitigating factors. *Williams v. State*, 782 N.E.2d 1039, 1051 (Ind. Ct. App. 2003), *trans. denied*. We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. *Stephenson v. State*, 53 N.E.3d 557, 561 (Ind. Ct. App. 2016). Here, the trial court found as an aggravator that Bennett was in a position of trust with the victims as an adult caretaker living in their home and described this as a "crime of opportunity." Tr., Vol. 3 at 133. The trial court found no mitigators.

[25] A typical factor to be considered in examining a defendant's character is his or her criminal history. *McFarland v. State*, 153 N.E.3d 369, 374 (Ind. Ct. App. 2020), *trans. denied*. Bennett had two cases prior to this one: one for criminal mischief, a misdemeanor; and one for possession of a narcotic drug, a Level 6 felony, and possession of marijuana and conversion, both misdemeanors. Bennett pleaded guilty to the possession and conversion counts and his sentence

was fully suspended to probation. However, Bennett had positive drug screens on several occasions and his probation was revoked. The significance of a criminal history varies based on the gravity, nature, and number of prior offenses in relation to the current offense. *Murray v. State*, 182 N.E.3d 270, 278-79 (Ind. Ct. App. 2022). Bennett's criminal history is minimal, and the gravity and nature of his prior convictions are significantly different than his current offenses. However, "[e]ven a minor criminal record reflects poorly on a defendant's character." *Reis*, 88 N.E.3d at 1105.

[26] Bennett alleges his character is demonstrated by his "very minimal criminal history," and the facts that he graduated from "Youth Explosion Ministries"[1] and has attended some college level courses. Appellant's Br. at 21. All of these things are to his credit, but the fact that Bennett preyed on the children of his live-in girlfriend over a period of months when she had entrusted them to his care does not reflect well upon his character.

[27] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. "Such deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, or lack

[1] There is no explanation in the record about this program. It is mentioned in the pre-sentence investigation report but was not offered as a mitigator at the sentencing hearing. *See* Appellant's App., Vol. II at 128; Tr., Vol. 3 at 130-31.

of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). Bennett has not offered such evidence. Therefore, Bennett has failed to persuade us that the nature of his offense or his character renders his sentence inappropriate.

Conclusion

[28] The testimony in this case does not warrant application of the incredible dubiosity rule and the presented evidence is sufficient to support Bennett's convictions. Further, Bennett's sentence is not inappropriate. Accordingly, we affirm Bennett's convictions and sentence.

[29] Affirmed.

Mathias, J., and Foley, J., concur.