MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.

ATTORNEY FOR APPELLANT

Ryan M. Gardner
Deputy Public Defender
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Sierra A. Murray
Deputy Attorney General

Garrett McNamee
Certified Legal Intern
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Jeremy A. Falk,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 16, 2023

Court of Appeals Case No. 22A-CR-1872

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D06-2109-F4-96

Memorandum Decision by Judge Weissmann
Judges Bailey and Brown concur.

Weissmann, Judge.

[1] Jeremy Falk was convicted of molesting his daughter, H.F., based solely on H.F.'s testimony that Falk repeatedly touched her inappropriately when she was 10 to 13 years old. Falk appeals his conviction, arguing that H.F.'s testimony was incredibly dubious and, therefore, insufficient to prove any molesting occurred. Falk also challenges his maximum 12-year sentence as inappropriate in light of the nature of the offense and his character. Finding the incredible dubiosity rule does not apply to H.F.'s testimony and that Falk's sentence is not inappropriate, we affirm.

Facts

[2] Falk and H.F.'s mother (Mother) divorced in 2010, when H.F. was 3 years old. Mother was awarded full custody of H.F., and Falk played a minimal part in H.F.'s life for the next eight years. From 2018 to 2021, however, Falk exercised court-ordered visitation with H.F. during which the two would go out to eat; engage in various activities, like going to the zoo; or simply spend time at Falk's house.

[3] In March 2021, H.F.'s maternal grandmother (Maternal Grandmother) began noticing changes in H.F.'s behavior—she was withdrawn, quieter than normal, and wearing baggy clothing. When Maternal Grandmother asked H.F. about the changes, H.F. disclosed that Falk had sexually abused her. Maternal Grandmother relayed this information to Mother, who reported it to law enforcement.

[4] The Fort Wayne Police Department conducted a forensic interview of H.F. during which she again said that Falk had sexually abused her. After the interview, the State charged Falk with Level 4 felony child molesting. At Falk's jury trial, H.F. testified that Falk started making inappropriate comments to her about her buttocks and breasts when she was around 10 years old. At some point, however, these comments devolved into inappropriate touching.

[5] According to H.F., Falk would put his arm around her and rest his hand on her breast. He would also smack her buttocks and place his hand on her thigh. Once, while Falk and H.F. were sitting on a bench, Falk moved his hand down to H.F.'s inner thigh. On another occasion, while Falk and H.F. were sitting in a booth at a restaurant, Falk put his hand inside H.F.'s pants and rubbed her vagina over her underwear before a waiter interrupted him. On yet another occasion, while H.F. was riding with Falk in his snowplow truck, Falk put his hand inside H.F.'s underwear and rubbed her vagina directly. When H.F. asked Falk to stop, he told her to just "take it." Tr. Vol. I, p. 109.

[6] H.F. also testified that Falk twice tried to make her perform oral sex on him by pushing her head toward his penis while he had an erection. Additionally, in late February 2021, while H.F. was at Falk's house for dinner, Falk unbuckled his pants, pulled down H.F.'s pants, and partially pulled down her underwear before a phone call from Mother interrupted him. H.F. immediately asked Mother to come pick her up, and on the way home, H.F. was "real upset" and "withdrawn." *Id.* at 130.

[7] A jury found Falk guilty as charged, and the trial court sentenced him to the maximum of 12 years in prison.

Discussion and Decision

[8] On appeal, Falk claims the State presented insufficient evidence to convict him of Level 4 felony child molesting. He also claims his 12-year sentence is inappropriate under Indiana Appellate Rule 7(B). Neither claim prevails.

I. Sufficiency of the Evidence

[9] When reviewing the sufficiency of the evidence to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence. *Id.* We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

[10] To convict Falk of Level 4 felony child molesting, the State was required to prove, among other things, that Falk performed or submitted to fondling or touching with H.F. Ind. Code § 35-42-4-3(b). At trial, the State relied solely on H.F.'s testimony to prove this element of the crime. Falk claims H.F.'s testimony that he touched her inappropriately was incredibly dubious and, therefore, insufficient to convict him.

[11] Generally, the uncorroborated testimony of a victim is sufficient to sustain a criminal conviction. *Bailey v. State*, 979 N.E.2d 133, 135 (Ind. 2012). We may make an exception, however, when that testimony is incredibly dubious. *Moore v. State*, 27 N.E.3d 749, 751 (Ind. 2015). "The incredible dubiosity rule allows the reviewing court to impinge upon the factfinder's responsibility to judge the credibility of witnesses when confronted with evidence that is 'so unbelievable, incredible, or improbable that no reasonable person could ever reach a guilty verdict based upon that evidence alone.'" *Smith v. State*, 163 N.E.3d 925, 929 (Ind. Ct. App. 2021) (quoting *Moore*, 27 N.E.3d at 751).

[12] Incredible dubiosity is a "difficult," but "not impossible," standard to meet. *Moore*, 27 N.E.3d at 756. The rule applies only where: (1) a sole testifying witness; (2) offers testimony that is inherently contradictory, equivocal, or the result of coercion; and (3) there is a complete absence of circumstantial evidence. *Id.* Falk's incredible dubiosity claim fails at step two.

[13] According to Falk, H.F.'s testimony that Falk touched her inappropriately must have been coerced because H.F. did not disclose the touching for 3 or 4 years after it first occurred. But at trial, the State presented evidence that "the vast majority" of child sex abuse cases involve "a delayed disclosure." Tr. Vol. I, p. 149. In fact, H.F.'s forensic interviewer testified that only 20 to 40% of child sex abuse victims disclose within the first 5 years, while another 30 to 60% of victims do not disclose until adulthood. *Id.* at 171.

[14] Falk also contends H.F.'s testimony was improbable because H.F.'s paternal grandmother (Paternal Grandmother), testified that H.F. and [Falk] were rarely, if not never, alone with one another." Appellant's Br., p. 10. The record, however, shows that Paternal Grandmother testified as follows:

> [Prosecutor]: . . . To your knowledge you are saying that between 2018 and 2021 the Defendant was never alone with his daughter, yes or no?
>
> [Paternal Grandmother]: I don't know.

Tr. Vol. I, p. 208. Moreover, H.F. testified that one touching occurred in Falk's snowplow truck, in which—Falk admitted—he and H.F. were alone for about 3½ hours. *Id.* at 222, 224. Another touching occurred at a restaurant, where H.F. and Falk were not alone.

[15] As Falk has failed to show that H.F.'s testimony was coerced, improbable, or otherwise incredibly dubious, her testimony was sufficient to support his conviction for Level 4 felony child molesting.

II. Appropriateness of Sentence

[16] Indiana Appellate Rule 7(B) provides: "The Court may revise a sentence authorized by statute 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." In reviewing the appropriateness of a sentence, our "principal role . . . is to attempt to leaven the outliers . . . not to achieve a perceived correct sentence." *Knapp v. State*, 9 N.E.3d 1274, 1292 (Ind.

2014) (internal citations and quotations omitted). Accordingly, we give "substantial deference" and "due consideration" to the trial court's sentencing decision. *Id.*

[17] "[T]he advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Falk was convicted of child molesting as a Level 4 felony. The sentencing range for a Level 4 felony is 2 to 12 years imprisonment, with an advisory sentence of 6 years. Ind. Code § 35-50-2-5.5. The trial court imposed the maximum sentence of 12 years.

[18] As to both the nature of the offense and his character, Falk argues that a maximum sentence is inappropriate because neither he nor his crime is the worst of the worst. Falk correctly asserts that maximum sentences are ordinarily reserved for the "very worst offenses and offenders." *Buchanan v. State*, 699 N.E.2d 655, 657 (Ind. 1998). But this "refer[s] generally to the class of offenses and offenders," which "encompasses a considerable variety [of both]." *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002). "Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario." *Id.*

[19] The record reveals that Falk violated a position of trust by repeatedly molesting his daughter during court-ordered visitation over a period of several years. Falk's inappropriate touchings ran the gamut from resting his hand on H.F.'s breast and smacking H.F.'s buttocks to twice inserting his hand in H.F.'s pants

and rubbing her vagina. When H.F. asked Falk to stop, he told her to just "take it." Tr. Vol. I, p. 109. Falk also twice tried to make H.F. perform oral sex on him pushing her head toward his erect penis. And on one occasion, Falk unbuckled his pants and pulled down H.F.'s pants and underwear before being interrupted.

[20] Falk's criminal history includes 14 misdemeanors and 5 felony convictions, most of which are drug and alcohol related. But at the time of his sentencing, Falk had a pending Class A misdemeanor charge for contributing to the delinquency of a minor. This charge stemmed from a police investigation into Falk's relationship with another child, 15-year-old H.G. At Falk's sentencing hearing, the State presented, without objection, a recording of a June 2022 jailhouse phone call between Falk and H.G. during which Falk referred to H.G. as his "boo" and said he "can't wait to . . . [t]aste her." Tr. Vol. II, p. 22.

[21] Based on the foregoing, we cannot say that Falk's maximum sentence is inappropriate in light of the nature of the offense and his character. *See generally Newsome v. State*, 797 N.E.2d 293, 300 (Ind. Ct. App. 2003) ("Repeated molestations occurring over a period of time can be an aggravating factor supporting the maximum enhancement."); *McCoy v. State*, 856 N.E.2d 1259, 1262 (Ind. Ct. App. 2006) ("'[P]osition of trust' by itself constitutes a valid aggravating factor, which supports the maximum enhancement of a sentence for child molesting."); *Tunstill v. State*, 568 N.E.2d 539, 545 (Ind. 1991) ("Pending charges . . . are relevant and may be considered by a sentencing court as being reflective of the defendant's character . . . .").

[22] We affirm the trial court's judgment.

Bailey, J., and Brown, J., concur.