

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Justin Newbury,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 24, 2024

Court of Appeals Case No.
23A-CR-1495

Appeal from the Marion Superior
Court

The Honorable Mark D. Stoner,
Judge

Trial Court Cause No.
49D32-2112-F4-037319

Memorandum Decision by Judge May
Judges Bailey and Felix concur.

May, Judge.

[1] Justin Newbury appeals his two convictions of Level 4 felony child molesting.¹ He argues the State presented insufficient evidence to support his convictions because the child’s testimony was “inconsistent with her earlier statements” and because “there existed motives to fabricate the allegations[.]” (Appellant’s Br. at 4.) Because the evidence presented at trial does not meet the standard required for the victim’s testimony to be declared incredibly dubious, we cannot overturn Newbury’s convictions by invading the province of the factfinder, who saw the witnesses live and was in a much better position than we are to assess witness credibility. Accordingly, we affirm.

Facts and Procedural History

[2] In 2021, Newbury and his ex-wife, C.N.,² shared custody of their children – M.N., a boy born in 2009, and E.N., a girl born in 2010. One evening in the fall of 2021, while the children were in Newbury’s custody, M.N. slept over at a friend’s house. E.N. and Newbury watched a movie in the living room and then went upstairs to go to bed. Newbury asked 11-year-old E.N. if she wanted to sleep in his room with him, and E.N. agreed. E.N. awoke later that night to Newbury pulling down her underwear and touching the outside of her vagina under her clothes with his hand.

¹ Ind. Code § 35-42-4-3(b).

² C.N.’s full legal name is E.C.N., but she is commonly known as “C.” To respect her name preference and to avoid confusion between E.C.N. and E.N., we will refer to E.C.N. herein as “C.N.”

- [3] On another occasion around the same time, E.N. again slept in Newbury's bed and, when she woke in the morning, she found her underwear on the floor. E.N. asked Newbury why her underwear was on the floor, and he told her that she must have put it there. At her dad's house was the only place E.N. had ever woken up without her underwear on.
- [4] On a third occasion, when E.N. and M.N. were both at Newbury's house, E.N. slept in her own bed and she woke up "to [Newbury] rubbing his private part on [hers] in bed." (Tr. Vol. 2 at 187.) E.N. had gone to bed in her bra and underwear, but she was wearing only her bra when she woke up. Newbury's underwear was down by his knees and his penis was skin-to-skin with her vagina. E.N. was "shocked" and pretended she was asleep for a few moments. When she stopped pretending, she asked Newbury what he was doing, and "he said he was trying to give me a massage to wake me up to get ready for school." (*Id.* at 189.)
- [5] A couple of weeks later, on October 20, 2021, C.N. noticed that E.N. was "acting weird." (*Id.* at 189.) When C.N. was tucking E.N. into bed, she asked E.N. if something was wrong, and E.N. "broke down" and told C.N. that Newbury had done something to her. (*Id.*) E.N. was trembling and teary eyed as she told C.N. that she had seen a "body safety" program at school, (*id.* at 190), and she was trying to figure out if what Newbury had done to her was wrong. E.N. did not tell C.N. any specifics. C.N. comforted E.N., prayed with her, and then laid in bed with her.

- [6] The next morning, October 21, 2021, M.N. went to school, but C.N. kept E.N. home. C.N. called her stepfather, who is an attorney, to ask advice about what to do. After speaking to him, C.N. called the police, who came to take a report, and she called the Department of Child Services (“DCS”), which scheduled a forensic interview for E.N. the next day. When C.N. was putting M.N. to bed on October 21st, M.N. asked C.N. “if something sexually happened to E.N.” (Tr. Vol. 2 at 90.) M.N. then told C.N. about two incidents that he had seen.
- [7] The first incident happened at Newbury’s house when M.N. was twelve years old. M.N. was playing video games downstairs, and he heard laughter coming from upstairs, so he went up to see what was happening. He walked into Newbury’s bedroom and saw his father on top of E.N. on the bed. Newbury then pulled down E.N.’s pants and was “tickling her butt” on bare skin. (Tr. Vol. 3 at 85.) M.N. asked Newbury why he would do that, and Newbury denied responsibility by saying her pants “must have come down while he was tickling her[.]” (*Id.* at 87.) The interaction between Newbury and E.N. made M.N. uncomfortable.
- [8] On another occasion, M.N. woke in the morning and left his room to look for Newbury. When M.N. peeked into E.N.’s room, he saw Newbury remove E.N.’s underwear so that she was naked from the waist down, and then Newbury pulled a blue blanket up over himself and E.N. E.N. looked like she was asleep. M.N. thought it was weird and did not know what to do, so he “left pretty quickly.” (Tr. Vol. 3 at 93.) M.N. was unsure how much time had

passed between either of these incidents and the date that he told C.N. about them.

[9] C.N. called DCS to report what M.N. had told her. DCS decided M.N. should also have a forensic interview. Both children were interviewed on October 22, 2021. On December 9, 2021, the State charged Newbury with two counts of Level 4 felony child molesting. Each of those counts alleged Newbury “did perform fondling or touching with E.N., a child under the age of fourteen years, with the intent to arouse or satisfy the sexual desires” of Newbury or E.N. (Appellant’s App. Vol. 2 at 27.) The trial court held a bench trial and then found Newbury guilty of both counts on May 4, 2023.

[10] The trial court held a sentencing hearing on June 14, 2023. The court recognized Newbury’s lack of criminal history as a “significant mitigator.” (Tr. Vol. 3 at 47.) It also found Newbury’s employment history and community support to be “substantial mitigators.” (*Id.* at 48.) The court imposed a four-and-a-half-year sentence for each count and ordered those sentences served consecutively. The court ordered Newbury to serve 60 actual days of an executed sentence, which Newbury would serve over 19 weekends, and the court suspended the remainder of the sentence to probation. The first four of the nearly nine years of probation were to be served on home detention as a condition of probation. The court’s express motivation for the sentence was to keep Newbury employed so that Newbury could provide financial support for M.N. and E.N., and the court ordered Newbury to place \$10,000 in an escrow account to pay for counseling for his children. The court indicated it would

consider modifying the sentence if Newbury completed psychosexual counseling, which would require Newbury to accept responsibility for his crimes.

Discussion and Decision

[11] Newbury challenges the sufficiency of the evidence to support his convictions. We apply a well-settled standard of review when evaluating claims of insufficient evidence:

Sufficiency-of-the-evidence claims . . . warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility. Rather, we consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt.

Powell v. State, 151 N.E.3d 256, 262-63 (Ind. 2020) (internal citations omitted).

“The State must prove every element of the crime charged beyond a reasonable doubt.” *Willis v. State*, 983 N.E.2d 670, 672 (Ind. Ct. App. 2013). Newbury was found guilty of Level 4 felony child molesting, which required the State to prove Newbury fondled or touched E.N., who was under fourteen years of age, “with intent to arouse or to satisfy the sexual desires of either” E.N. or Newbury. *See* Ind. Code § 35-42-4-3(b) (definition of crime); *and see* (Appellant’s App. Vol. 2 at 27) (charging information).

[12] Newbury asks us to reassess the credibility of E.N. and M.N. based on their “motives to fabricate the allegations” and based on inconsistencies between statements given at different times. (Appellant’s Br. at 27.) Indiana law “allows an appellate court to impinge upon the fact-finder’s assessment of witness credibility when the testimony at trial was so ‘unbelievable, incredible, or improbable that no reasonable person could ever reach a guilty verdict based upon that evidence alone.’” *Carter v. State*, 44 N.E.3d 47, 52 (Ind. Ct. App. 2015) (quoting *Moore v. State*, 27 N.E.3d 749, 751 (Ind. 2015)). This standard, called incredible dubiousity, is a difficult standard to meet, and we will not interfere with the fact-finder’s role unless the testimony runs counter to human experience. *Edwards v. State*, 753 N.E.2d 618, 622 (Ind. 2001). Three requirements must be met for the rule to apply: (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*, 27 N.E.3d at 756.

[13] Newbury first asserts his “children were wildly inconsistent about the fondling incidents.” (Appellant’s Br. at 24.) In support thereof, Newbury contrasts: (1) E.N.’s trial testimony with her statements in a forensic interview and deposition; and (2) specific details provided by E.N. and M.N. about Newbury’s clothing and about the dates of the events. As to the differences in E.N.’s statements over time, “[t]he fact that a witness gives trial testimony that contradicts earlier pre-trial statements does not necessarily render the trial testimony incredibly dubious.” *Murray v. State*, 761 N.E.2d 406, 409 (Ind.

2002). At issue is whether the trial testimony itself was inherently contradictory or equivocal. *See, e.g., Smith v. State*, 163 N.E.3d 925, 931 (Ind. Ct. App. 2021) (affirming conviction of child molesting because testimony of sole witness was not incredibly dubious based on inconsistencies between pre-trial statements and trial testimony, given that child testified unequivocally at trial). Newbury points to only one example of E.N. contradicting herself while on the witness stand testifying – she testified both that Newbury’s hand rubbed her genitalia, (Tr. Vol. 2 at 199), and that she did not know exactly what Newbury’s hand was doing. (*Id.* at 200.) Contrary to Newbury’s assertions, these statements are not inherently contradictory – instead it seems wholly plausible that an eleven-year-old girl might know that someone was touching the outside of her genital area without really understanding what that person was doing. Defense counsel questioned E.N. about the inconsistencies between her pre-trial statements and her trial testimony, the trial court was able to consider her responses as it determined whether to find her credible, and we will not declare her testimony incredibly dubious based thereon. *See, e.g., Edwards*, 753 N.E.2d at 623 (“As witness’s proposed alteration of his testimony was put squarely before the jury, the jury had the ability to perform its role as a trier of fact and determine the extent to which it affected the integrity of his testimony.”).

[14] Nor do any discrepancies between E.N. and M.N. render E.N.’s testimony incredibly dubious. “It is for the trier of fact to resolve conflicts in the evidence and to decide which witnesses to believe or disbelieve.” *Moore*, 27 N.E.3d at 755-56 (quoting *Murray*, 761 N.E.2d at 409). While there may have been

discrepancies between E.N. and M.N. about the clothing Newbury was wearing as he entered E.N.'s bedroom and climbed into her bed, those discrepancies do not negate M.N.'s corroboration of the fact that Newbury went into E.N.'s bedroom and climbed into her bed. *See, e.g., Edwards*, 753 N.E.2d at 623 (discrepancy between witnesses about the color of a car did not prohibit the jury from accepting a witness's testimony about the "essential elements" of the crime). As for discrepancies between E.N. and M.N. about the order of the molesting incidents or exactly when they happened in the fall of 2021, the charging information alleged the crimes occurred "on or about or between August 1, 2021, and October 21, 2021," (Appellant's App. Vol. 2 at 27), and the order of events is not an element of the crimes that the State was required to prove. *See Baker v. State*, 948 N.E.2d 1169, 1174 (Ind. 2011) ("the precise time and date of the commission of a child molestation offense is not regarded as a material element of the crime"). We will not overturn Newbury's convictions on this basis.

[15] Finally, Newbury also asserts there was no evidence of his intent to arouse or satisfy sexual desires, especially as to "the first incident in particular[.]" (Appellant's Br. at 25.) However, an adult's sexual intent for fondling a child can be inferred from the circumstances surrounding the touching. *Carter v. State*, 31 N.E.3d 17, 30 (Ind. Ct. App. 2015) ("The intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual consequence to which such conduct usually points."), *reh'g denied, trans. denied*. The evidence indicated that

Newbury was fondling his daughter's genitals in the middle of the night. While Newbury suggests he may have been asleep, and thus had no conscious sexual intent, the trial court was not required to believe Newbury's suggestion that he was asleep. Nor was the trial court required to ignore the testimony it heard about the other instances of touching when deciding whether to infer Newbury had intent to arouse sexual desires during this fondling incident. The evidence was sufficient to permit the trial court to determine Newbury had the intent to arouse sexual desires when he touched his daughter's genitals. *See, e.g., Amphonephong v. State*, 32 N.E.3d 825, 833 (Ind. Ct. App. 2015) (jury could find defendant knowingly touched child with intent to satisfy sexual desires, despite defendant's claim he was asleep, based on evidence of defendant repeatedly touching child's genitals).

Conclusion

[16] Because Newbury has not demonstrated the testimony of E.N. was incredibly dubious, we cannot reassess her credibility or reweigh the evidence. Newbury's other challenges to the credibility of the witnesses and the weight of the evidence are determinations that we entrust to the finder of fact. Accordingly, we hold the evidence was sufficient to support Newbury's convictions of Level 4 felony child molesting, and we affirm the trial court's judgment.

[17] Affirmed.

Bailey, J., and Felix, J., concur.