MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Jennifer L. Koethe
Raleigh, North Carolina

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Daylon L. Welliver
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

David Powers, II,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 18, 2023

Court of Appeals Case No. 22A-CR-1991

Appeal from the LaPorte Circuit Court

The Honorable Thomas Alevizos, Judge

Trial Court Cause No. 46C01-2002-F1-209

Memorandum Decision by Judge Vaidik
Judges Mathias and Pyle concur.

Vaidik, Judge.

Case Summary

[1] David Powers, II, appeals his convictions for child molesting, arguing insufficiency of the evidence and double jeopardy. We affirm.

Facts and Procedural History

[2] The evidence most favorable to the verdicts is as follows. In February 2019, Amanda Costello met Powers on a dating website. Costello had an eleven-year-old daughter, R.D. At the time, R.D. lived with her grandparents, Tina and Jay Wright (Costello's mother and stepfather). Costello allowed Powers to meet R.D. for the first time in May.

[3] In October, Costello bought a house, and R.D., then twelve, moved in with her. Powers also moved in. Although the relationship between Powers and R.D. started with Powers being "standoffish," Tr. Vol. II p. 246, he soon became more interested and involved with R.D. Powers and R.D. used Snapchat and TikTok together, and Powers took R.D. shopping, out to eat, and to the movies. Powers also bought R.D. gifts, including a hoverboard, a flat-screen television, a Play Station, a gold necklace, stuffed animals, a glass rose, and a swimsuit. Powers, however, never bought Costello any gifts.

[4] As Powers' relationship with R.D. became "affectionate" and "very touchy," Tr. Vol. III p. 114, his relationship with Costello became more like "an old

married couple" with "no intimacy," Tr. Vol. II p. 246. Powers slept downstairs in a chair while Costello slept upstairs in a bedroom.

[5] R.D. soon became uncomfortable with Powers' affection. Powers left R.D. notes telling her that he loved her, that his love for her was "true, pure, honest, intense, unconditional and never ending," and that she meant "everything" to him. *See* Ex. 9A. Powers also told R.D. that she was "a beautiful young woman" and complimented her "lips" and "butt." Tr. Vol. III p. 55. R.D. told her mother, who confronted Powers about it. Powers said R.D. took it wrong and that he loved her "like a father." Tr. Vol. II p. 249. When Powers still didn't change his behavior, a family meeting took place with Costello, Powers, Jay, and Tina. Powers said he didn't know how to talk to children and wanted to learn how to do so. Powers' behavior changed, but it didn't last long. After another family meeting in early January 2020, R.D. went to stay with her grandparents for a couple of weeks. But because R.D. wanted to be with her mother, she went back to living with her and Powers.

[6] On the morning of February 6, Powers went into R.D.'s bedroom to wake her up. Powers shook R.D.'s shoulder, but she did not wake up. Powers began to massage R.D.'s back and lower back. Powers then pulled down R.D.'s pants just past her hips and began massaging her "butt." Tr. Vol. III p. 66. Powers moved his hand and touched R.D.'s "vaginal area" with his "fingers." *Id.* at 67. He then "put his fingers inside of" R.D.'s "vagina" and moved them "[i]n and out." *Id.* at 68, 75. This hurt R.D. and made her "vaginal area" feel "[h]ot." *Id.* at 68. R.D. rolled over, pulled up her pants, and told Powers that she had to get

ready for school. That day, R.D. didn't tell anyone what happened because she was scared and convinced herself that he didn't mean to do it.

[7] The next morning around the same time, Powers returned to R.D.'s bedroom to wake her up. Powers shook R.D.'s shoulder, but she did not wake up. Powers then pulled down R.D.'s pants and put his "fingers" in her "vagina" and moved them "[i]n and out." *Id.* at 75. This, too, hurt R.D. Powers also climbed on top of R.D. and "put his leg in between [R.D.'s legs] and his arms on either side of [her] head." *Id.* at 73. R.D. rolled out from underneath Powers and told him that she needed to shower. R.D. grabbed her cell phone, went into the bathroom, locked the door, and turned on the shower. She then took off her clothes and got in the shower. From the shower, R.D. texted her grandmother that Powers had "fingered" her and to come get her "now" because she was "scared." *Id.* at 128; Ex. 11 (text messages). Tina contacted Jay and law enforcement. Jay arrived at the house first and took R.D. outside. R.D. was "[s]haken" and "white as a ghost." Tr. Vol. III pp. 130, 159. They called Costello on the phone, and when R.D. heard her mother's voice, she "began ba[w]ling." *Id.* at 130. Jay and Tina then took R.D. to the hospital for a sexual-assault examination.

[8] Meanwhile, law enforcement arrived at the house and stayed with Powers until a search warrant could be obtained. Law enforcement did not let Powers go to the bathroom, where he could wash his hands and remove any DNA evidence. After a warrant was obtained, law enforcement swabbed Powers' hands and

fingers, focusing on the area underneath his fingernails. Law enforcement also took a buccal swab of Powers so that they had his DNA profile.

[9] The sexual-assault examination did not reveal the presence of any "trauma" to R.D., which due to the elasticity of the vaginal area was not unusual and was consistent with R.D.'s report that Powers had inserted his fingers in her vagina. *Id.* at 192. Swabs were taken of R.D.'s vaginal area. The swabs were examined by a DNA analyst, who determined that male DNA was present but that there wasn't enough to develop a profile. The swabs of Powers' fingers from both hands showed that the DNA present was "at least one trillion times more likely to have originated from David Powers and [R.D.] than if it had originated from David Powers and an unknown unrelated individual." Tr. Vol. IV pp. 83-84. This provided "very strong support" that R.D.'s DNA was on Powers' fingers. *Id.* In addition, the swabs of Powers' fingers from his right hand had a separate component consistent with R.D. such that the DNA analyst could "exclude anyone with the exception of an identical twin." *Id.* at 87.

[10] The State charged Powers with four counts: Count I: Level 1 felony child molesting (penetration of sex organ by object on February 6); Count II: Level 1 felony child molesting (penetration of sex organ by object on February 7); Count III: Level 4 felony child molesting (touching or fondling on February 6); and Count IV: Level 4 felony child molesting (touching or fondling on February 7). A jury trial was held, and the jury found Powers guilty on all counts. At sentencing, the parties agreed that Counts III and IV "should merge" with Counts I and II. *Id.* at 188. The trial court sentenced Powers to thirty-six years

"on each count, to be served concurrently." *Id.* at 189. In its "Judgment of Conviction & Sentencing Order," the court entered judgment of conviction on Counts I and II only, "merged" Counts III and IV, and sentenced Powers to thirty-six years on Counts I and II, to be served concurrently. Appellant's App. Vol. III p. 12.

[11] Powers now appeals.

Discussion and Decision

I. Incredible-Dubiosity Doctrine

[12] Powers contends the evidence is insufficient to support his convictions. Specifically, he argues that R.D.'s testimony should be disregarded under the doctrine of incredible dubiosity. Under this doctrine, we can impinge upon a fact-finder's responsibility to judge the credibility of the witnesses when "the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it." *Hampton v. State*, 921 N.E.2d 27, 29 (Ind. Ct. App. 2010), *reh'g denied*, *trans. denied.* The doctrine "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." *Moore v. State*, 27 N.E.3d 749, 756 (Ind. 2015). Application of this rule is rare. *Leyva v. State*, 971 N.E.2d 699, 702 (Ind. Ct. App. 2012), *trans. denied.*

[13] This is not a rare case meriting application of the incredible-dubiosity doctrine because there is not a "complete absence" of circumstantial evidence. Unlike

other child-molesting cases, R.D. sought help immediately after the molestation. She went to the hospital, and her vaginal area was swabbed. Male DNA was found, but there wasn't enough to develop a profile. In addition, law enforcement arrived at the house and didn't let Powers wash his hands. Powers' fingers were swabbed, and R.D.'s DNA was found on them. This is circumstantial evidence that Powers molested R.D. by inserting his fingers in her vagina. Although Powers claims that R.D.'s DNA could have gotten on his fingers from touching another surface that contained her DNA, such as a doorknob, this argument was presented to the jury and rejected. "In a case where there is circumstantial evidence of an individual's guilt, reliance on the incredible dubiosity rule is misplaced." *Moore*, 27 N.E.3d at 759 (quotation omitted). The incredible-dubiosity doctrine does not apply here.

II. Double Jeopardy

[14] Powers next contends the trial court erred by "fail[ing] to vacate [his] convictions for Count III and IV in violation of the Double Jeopardy [C]lause because Counts III and IV were based upon the same conduct as Counts I and II." Appellant's Br. p. 35. But the court did not enter judgment of conviction on Counts III and IV; it only entered judgment of conviction on Counts I and II. At the parties' request, the court "merged" Counts III and IV into Counts I and II. As our appellate courts have explained, "A trial court need only vacate a conviction under a specific count to remedy a double-jeopardy concern if a judgment of conviction has been entered on the jury's verdict on that count." *Stubbers v. State*, 190 N.E.3d 424, 431 (Ind. Ct. App. 2022), *trans. denied*; *see also*

Green v. State, 856 N.E.2d 703, 704 (Ind. 2006) ("[A] merged offense for which a defendant is found guilty, but on which there is neither a judgment nor a sentence, is 'unproblematic' as far as double jeopardy is concerned."). There is no double-jeopardy problem here.

[15] Affirmed.

Mathias, J., and Pyle, J., concur.