MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Joshua D. Williams,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 22, 2023

Court of Appeals Case No. 22A-CR-2339

Appeal from the Wells Circuit Court

The Honorable Kenton W. Kiracofe, Judge

Trial Court Cause No. 90C01-2009-F1-1

Memorandum Decision by Judge Tavitas
Judges Vaidik and Foley concur.

Tavitas, Judge.

Case Summary

[1] Joshua Williams was convicted of two counts of child molestation, one as a Level 1 felony and the other as a Level 4 felony. Williams appeals and argues that: (1) the trial court abused its discretion by admitting the victim's hearsay statements; (2) the State presented insufficient evidence to support Williams's convictions; and (3) Williams's convictions violate the prohibition against double jeopardy. We find Williams's arguments to be without merit and, accordingly, affirm.

Issues

[2] Williams raises three issues on appeal, which we restate as:

I. Whether the trial court abused its discretion by admitting the victim's hearsay statements.

II. Whether the evidence is sufficient to support Williams's convictions.

III. Whether Williams's convictions violate the prohibition against double jeopardy.

Facts

[3] K.F. was born on April 25, 2016, to Kasondra Horton. In the summer of 2020, K.F. and Horton were living with Sherry Oda, Kenneth Oda, and Williams in Bluffton, Indiana, while Horton looked for housing.

[4] On August 28, 2020, Horton and Sherry left the house to look for an apartment while Williams watched four-year-old K.F. When Horton returned, K.F. reported that Williams "took her panties off" and that "something bad happened." Tr. Vol. III pp. 181-82. K.F. led Horton to Williams's bedroom, where Horton found a pair of K.F.'s unicorn underwear on the bed. Horton later confirmed that, although she had dressed K.F. that morning, K.F. was no longer wearing the underwear in which Horton had dressed her. Horton reported the abuse to K.F.'s father and paternal grandfather, and K.F.'s paternal grandfather reported the abuse to law enforcement.

[5] On September 1, 2020, Angela Vachon, a forensic interviewer with the Department of Child Services, conducted a recorded interview with K.F. K.F. reported that Williams "stuck his wiener in her 'hoo-hoo'" four times,[1] that "it hurt," and that she cried. Tr. Vol. II pp. 70, 74. Later in the interview, K.F. "got down on her hands and her feet," "rock[ed] back and forth," and stated that Williams was behind her when the inappropriate touching occurred. *Id*. at 70. K.F. further reported that Williams "peed in [her] 'hoo-hoo.'" *Id*.

[6] After her forensic interview, K.F. was taken for a sexual assault forensic examination. K.F. reported to Joyce Moss, the sexual assault nurse examiner, the following: Williams took off her underwear and "[t]ouched" her "hoo-hoo"; Williams "stuck his wiener in [her] 'hoo-hoo' four times"; "pee came out of

[1] Vachon testified that she was not sure whether K.F. meant that Williams touched her four times during the same incident or over separate incidents.

[Williams's] 'willie' and went on her 'hoo-hoo'"; Williams told K.F., "Don't tell"; Williams "was being mean to [K.F.] and her mommy"; and "it hurt when [K.F.] was going pee" afterwards. Tr. Vol. III p. 240; Tr. Vol. IV p. 28. That same day, law enforcement executed a search of the Oda residence and located a pair of K.F.'s unicorn underwear in a backpack, which they located in a room that Williams used as his own.[2]

[7] On September 9, 2020, the State charged Williams with two counts: Count I, child molestation, a Level 1 felony; and Count II, child molestation, a Level 4 felony.

[8] On March 2, 2021, the State filed a notice of its intent to introduce K.F.'s hearsay statements to Horton, Vachon, and Moss at trial pursuant to Indiana's protected persons statute,[3] Indiana Code Section 45-37-4-6.[4] The State argued that K.F. was a protected person and that K.F. would be unavailable at trial because "testifying in the physical presence of [Williams] will cause [K.F.] to suffer serious emotional distress such that [K.F.] cannot reasonably communicate[.]" Appellant's App. Vol. II p. 89. The State also moved for a hearing on the matter.

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[2] It is unclear if the underwear that the police located was the same pair of underwear that Horton found on Williams's bed.

[3] The statute is also commonly referred to as the "child hearsay" statute. *See L.H. v. State*, 878 N.E.2d 425, 428 (Ind. Ct. App. 2007).

[4] The State filed a similar motion on March 15, 2021.

[9] On October 13, 2021, the State had K.F. examined by Dr. David Lombard regarding her ability to testify in Williams's presence. Dr. Lombard concluded that K.F. would be able to testify in Williams's presence. The State then, on May 6, 2022, had K.F. examined by Dr. Amanda Mayle, who diagnosed K.F. with PTSD and concluded that testifying in Williams's presence would "set [K.F.] back" and that K.F. "likely . . . would not be able to answer questions." *Id*. at 143.

[10] On June 1, 2022, the State moved to permit K.F. to testify via closed circuit television at the protected person hearing. The trial court held the protected person hearing on June 2 and 29, 2022. Dr. Mayle testified for the State that K.F. would not be able to testify in Williams's presence, and Dr. Lombard testified for Williams that K.F. would be able to testify.

[11] The trial court initially concluded that K.F. would be able to testify in Williams's presence. Williams then called K.F. to testify, and the prosecutor went to bring K.F. to the courtroom; however, K.F. refused. The victim advocate testified that, when K.F. was informed that she would need to testify in Williams's presence, K.F. "immediately broke down crying," was "inconsolable," and that K.F.'s "body was shaking." Tr. Vol. III pp. 11-12. The trial court, accordingly, ordered that the State and Williams take K.F.'s testimony from the prosecutor's office and broadcast the examination to the trial court over Zoom, which they did. The trial court concluded that K.F. would, in fact, be unable to testify in Williams's presence and that K.F.'s hearsay statements would be admissible at trial.

[12] The trial court held a jury trial in August 2022. Horton, Vachon, and Moss testified regarding K.F.'s allegations of inappropriate touching, to which Williams did not object on hearsay grounds. Williams testified in his own defense and denied any inappropriate touching. K.F.'s testimony from the protected person hearing was never introduced at trial.

[13] The jury found Williams guilty of both counts, and the trial court entered judgments of conviction on the same. The trial court sentenced Williams to concurrent sentences of thirty years on Count I and six years on Count II. Williams now appeals.

Discussion and Decision

I. Abuse of Discretion—Admission of Hearsay Statements

[14] Williams argues that the trial court abused its discretion by admitting K.F.'s hearsay statements to Horton, Vachon, and Moss at the trial. We disagree.

[15] "As a general rule, we defer to a trial court's evidentiary ruling and review it only for an abuse of discretion." *Rosenbaum v. State*, 193 N.E.3d 417, 421 (Ind. Ct. App. 2022) (citing *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003)), *trans. denied*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the trial court or the trial court misinterprets the law. *Id*. Additionally, our Supreme Court has explained that "the protected person statute impinges upon the ordinary evidentiary regime such that we believe a trial court's responsibilities thereunder

carry with them . . . 'a special level of judicial responsibility.'" *Carpenter*, 786 N.E.2d at 703 (quoting *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999)).

[16] Here, the trial court concluded that K.F.'s hearsay statements would be admissible at trial pursuant to Indiana's protected person statute, Indiana Code Section 35-37-4-6. As relevant to the instant case, at the time of the protected person hearing, the protected person statute provided:[5]

> (c) As used in this section, "protected person" means:
>
> > (1) a child who is less than fourteen (14) years of age at the time of the offense but less than eighteen (18) years of age at the time of trial;
> >
> > *****
>
> (d) A statement or videotape that:
>
> > (1) is made by a person who at the time of trial is a protected person, as defined in subsection (c);
> >
> > (2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person;[6] and

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[5] The protected person statute was amended in 2023; however, the amendments do not affect our analysis in the instant case.

[6] Subsections (a) and (b) provide:

> (a) This section applies to a criminal action involving the following offenses where the victim is a protected person under subsection (c)(1) or (c)(2):
>
> (1) Sex crimes (IC 35-42-4).
>
> * * * * *

(3) is not otherwise admissible in evidence;

is admissible in evidence in a criminal action for an offense listed in subsection (a) or (b) if the requirements of subsection (e) are met.

(e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:

(1) The court finds, in a hearing:

(A) conducted outside the presence of the jury; and

(B) attended by the protected person in person or by using closed circuit television testimony as described in section 8(f) and 8(g) of this chapter;

that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:

(A) testifies at the trial; or

(B) is found by the court to be unavailable as a witness for one (1) of the following reasons:

(i) From the testimony of a psychiatrist, physician, or psychologist, and other

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(b) This section applies to a criminal action involving the following offenses where the victim is a protected person under subsection (c)(3):

* * * * *

(2) A sex crime (IC 35-42-4).

* * * * *

> evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate.
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> * * * * *
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> (f) If a protected person is unavailable to testify at the trial for a reason listed in subsection (e)(2)(B), a statement or videotape may be admitted in evidence under this section only if the protected person was available for cross-examination:
>
> (1) at the hearing described in subsection (e)(1); or
>
> (2) when the statement or videotape was made.

[17] We first note that Williams has waived this argument on appeal by failing to timely object to the hearsay testimony at trial. *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) (holding that failure to lodge a contemporaneous objection at the time evidence is introduced at trial results in waiver on appeal). The failure to timely object to the introduction of evidence at trial ordinarily waives appellate review of the issue, even if the defendant previously objected to the admissibility of the evidence before the trial. *See, e.g.*, *Allen v. State*, 686 N.E.2d 760, 770 n.5 (Ind. 1997) (recognizing that "preliminary rulings . . . require a contemporaneous objection and final ruling at trial"), *reh'g denied*. Though the trial court ruled, in the protected person hearing, that K.F.'s hearsay statements would be admissible at trial, the protected person hearing was merely a preliminary proceeding. *Cf. L.H. v. State*, 878 N.E.2d 425, 430 (Ind. Ct. App. 2007) (recognizing that protected person hearings are preliminary proceedings).

Thus, to exclude the hearsay statements from trial, Williams was required to contemporaneously object to those statements at the time they were introduced into evidence at the jury trial.

[18] Waiver notwithstanding, Williams's argument also fails on the merits. Williams argues that K.F.'s hearsay statements should not have been admitted because the State engaged in "doctor shopping" before the protected person hearing by securing Dr. Mayle's opinion only after Dr. Lombard concluded that K.F. would be able to testify in Williams's presence. Appellant's Br. p. 14. Williams contends that Dr. Mayle "may have been improperly influenced by" Dr. Lombard's opinion, that Dr. Mayle may have "formulated her opinion potentially for favor with the State . . . ," and that the State "improperly exposed K.F. to needless double interviews and the stress associated therewith." *Id*. at 20-21. Williams also argues that the State "caused K.F. to breakdown [sic] and thus contribute[d] to [K.F.] being 'unavailable'" because the State informed K.F. that she would need to testify in Williams's presence. Appellant's Br. p. 21. Williams contends that, as a result of the State's conduct, we must reverse his convictions.

[19] Williams's argument is difficult to comprehend. He does not challenge the trial court's findings that K.F. was a protected person, that the hearsay statements were reliable, or that K.F. was, ultimately, unavailable to testify at trial. Williams essentially argues, without any evidence, that the State engaged in gamesmanship and that led to K.F.'s unavailability finding. Our review of the record, however, reveals nothing problematic about the State's conduct.

Moreover, as Williams concedes, no legal authority supports his requested relief. We, therefore, cannot say that the trial court abused its discretion by determining that K.F.'s hearsay statements would be admissible at trial.

II. Sufficiency of the Evidence

[20] Williams next argues that the State presented insufficient evidence to support his convictions. We disagree.

[21] Sufficiency of evidence claims "warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility." *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020) (citing *Perry v. State*, 638 N.E.2d 1236, 1242 (Ind. 1994)). "When there are conflicts in the evidence, the jury must resolve them." *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022). We consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Powell*, 151 N.E.3d at 262 (citing *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). "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." *Id.* at 263. We affirm the conviction "unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Sutton v. State*, 167 N.E.3d 800, 801 (Ind. Ct. App. 2021) (quoting *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007)).

[22] Here, the State charged Williams with child molestation under Indiana Code Sections 35-42-4-3(a)(1) and (b), which provide:

> (a) A person who, with a child under fourteen (14) years of age, knowingly or intentionally performs or submits to sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) commits child molesting, a Level 3 felony. However, the offense is a Level 1 felony if:
>
> > (1) it is committed by a person at least twenty-one (21) years of age[.]
>
> * * * * *
>
> (b) A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Level 4 felony.

Williams was convicted of child molestation as a Level 1 felony and as a Level 4 felony.

[23] Williams first argues that his convictions cannot stand because K.F.'s testimony was incredibly dubious. We have summarized the incredible dubiosity rule as follows:

> 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." *Moore v. State*, 27 N.E.3d 749, 751 (Ind. 2015). The rule is applied in limited circumstances, namely 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." *Id*. at 756. Application of the incredible dubiosity 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 v. State*, 761 N.E.2d 806, 810 (Ind. 2002). "[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 (quoting *Edwards v. State*, 753 N.E.2d 618, 622 (Ind. 2001)).

Smith v. State, 163 N.E.3d 925, 929 (Ind. Ct. App. 2021).

[24] The incredible dubiosity rule is clearly not applicable here. First, K.F. did not testify at trial, nor was her testimony from the protected person hearing ever presented to the jury. *See Reyburn v. State*, 737 N.E.2d 1169, 1171 (Ind. Ct. App. 2000) ("[T]he rule of incredible dubiosity concerns testimony, not statements made outside of trial or the courtroom."). Moreover, the State presented circumstantial evidence of Williams's guilt. Horton testified that, after K.F. reported to her that Williams removed her underwear, Horton found a pair of K.F.'s unicorn underwear on Williams's bed. Horton also testified that she dressed K.F. that morning but that K.F. was no longer wearing the underwear in which Horton dressed her. In addition, several police officers testified that they located a pair of K.F.'s unicorn underwear in a backpack located in a room Williams used as his own. Accordingly, Williams's reliance on the incredible dubiosity rule is misplaced. *See White v. State*, 706 N.E.2d 1078, 1080 (Ind. 1999) (holding circumstantial evidence that defendant's

clothing was found at the crime scene invalidated incredible dubiosity argument). Williams makes no other argument regarding Count I, child molestation, a Level 1 felony, and we, thus, turn to his sufficiency argument regarding Count II, child molestation, a Level 4 felony.

[25] Williams argues that the State presented insufficient evidence to support his conviction for Count II because, even if the State presented sufficient evidence of sexual intercourse, the State presented no separate evidence that Williams fondled or touched K.F. with the intent to arouse himself or K.F. We have held that the requisite intent for this offense "may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points." *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000)).

[26] Here, K.F. reported that Williams removed her underwear and that Williams "touched" her "hoo-hoo," which was K.F.'s age-appropriate term for vagina. Tr. Vol. III p. 240. This evidence was sufficient for a reasonable juror to conclude that Williams touched K.F. Additionally, the jury could infer from the fact that Williams forced sexual intercourse on K.F. that Williams touched K.F. with the intent to arouse himself. *Bowles*, 737 N.E.2d at 1152 (holding that jury could infer defendant's intent to arouse himself from defendant's "intentional sexual acts" on the victims). Accordingly, the State presented sufficient evidence to support Williams's convictions.

III. Double Jeopardy

[27] Lastly, Williams argues that his dual convictions for child molestation, one as a Level 1 felony and the other as a Level 4 felony, violate the prohibition against double jeopardy. Because the two convictions are for separate offenses, we disagree.

[28] In *Wadle v. State*, the Indiana Supreme Court set forth a framework for analyzing whether a defendant's convictions violate principles of "substantive" double jeopardy.[7] 151 N.E.3d 227 (Ind. 2020). *Wadle* applies "when a single criminal act or transaction violates multiple statutes with common elements and harms one or more victims." *Id.* at 247. We agree with Williams and the State that *Wadle* applies here. *See Carranza v. State*, 184 N.E.3d 712, 715 (Ind. Ct. App. 2022) (analyzing convictions for Level 1 and Level 4 felony child molestation under *Wadle*).

[29] Under *Wadle*, we first determine "whether 'either statute clearly permits multiple punishment, whether expressly or by unmistakable implication.'" *Demby v. State*, 203 N.E.3d 1035, 1042 (Ind. Ct. App. 2021) (quoting *Wadle*, 151 N.E.3d at 253), *trans. denied*. If the answer to that question is negative or unclear, we proceed to the second step, which "requires that we 'apply our included-offense statutes to determine whether the charged offenses are the

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[7] Substantive double jeopardy refers to "claims concerning multiple convictions in a single prosecution, as opposed to procedural, also known as constitutional, double jeopardy claims, "which concern convictions for the same offense in successive prosecutions[.]" *Carranza v. State*, 184 N.E.3d 712, 715 (Ind. Ct. App. 2022) (quoting *Wadle*, 151 N.E.3d at 248-49; *Powell v. State*, 151 N.E.3d 256, 263 (Ind. 2020)).

same.'" *Id*. at 1043 (quoting *Wadle*, 151 N.E.3d at 253). "'We determine whether either offense is included in the other—'either inherently or as charged'—under the included-offense statutes. " *Id*. (quoting *Wadle*, 151 N.E.3d at 253). An offense is inherently included if it meets the definition of "included offense" under Indiana Code Section 35-31.5-2-168, *Wadle*, 151 N.E.3d at 248, and an offense is included as charged if "'the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense,'" *id*. at 251 n.30 (quoting *Young v. State*, 30 N.E.3d 719, 724 (Ind. 2015)). Only if the offenses are included do we proceed to the third step, which asks whether the facts underlying those offenses were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Id*. We review double jeopardy claims de novo. *Id*. at 237.

[30] In *Carranza*, we held that the defendant's convictions for Level 1 and Level 4 felony child molestation under Indiana Code Sections 31-42-4-3(a) and (b) did not constitute double jeopardy under *Wadle*. We first determined that "[n]either subsection (a) nor subsection (b) of the Child Molesting Statute clearly permits multiple punishments for multiple acts of molestation." 184 N.E.3d at 716; *see also Koziski v. State*, 172 N.E.3d 338, 342 (Ind. Ct. App. 2021) ("[N]either the child-molesting statute nor the statute defining 'other sexual conduct' … clearly permits (or prohibits) multiple punishment for multiple acts of molestation against the same victim in a single encounter."), *trans. denied*.

[31] We next determined, in *Carranza*, that the offenses were not inherently included. *Carranza*, 184 N.E.3d at 716. We observed that Indiana Code Section 35-31.5-2-168 defines "included offense" as an offense that:

> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;
>
> (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
>
> (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

[32] We concluded that:

> Our included-offense statute is not implicated here because child molesting under subsection (a) of the Child Molesting Statute is not established by proof of child molesting under subsection (b) and vi[ce] versa. Unlike subsection (a), subsection (b) does not require proof of "other sexual conduct" (here, Carranza inserting his fingers in MNP's vagina). And unlike subsection (b), subsection (a) does not require proof of fondling or touching (here, Carranza rubbing his penis on MNP's vagina). Carranza also was not convicted of an attempt crime, and subsections (a) and (b) of the Child Molesting Statute differ in respects other than degree of harm or culpability.

Id.

[33] Williams makes no attempt to distinguish *Carranza*. Instead, Williams argues that "the only elemental difference [between his convictions] is the level of

harm to the victim . . . .” Appellant’s Br. p. 31. That is not the case. As we explained in *Carranza*, Indiana Code Sections 31-42-4-3(a) and (b) proscribe separate conduct. We find, therefore, that Williams was not convicted of inherently included offenses.

[34] Neither was Williams convicted of offenses that are included as charged. Count I alleged that Williams “did perform sexual intercourse with [K.F.]” and Count II alleged that Williams “did perform or submit to fondling with [K.F.] . . . with the intent to arouse or satisfy the sexual desires of the child or defendant.” Appellant’s App. Vol. II p. 70. The charging information, thus, alleges separate facts for each offense. Williams, accordingly, was not convicted of included offenses.

[35] Williams next argues that his offenses “constitute a single transaction under *Wadle*,” Appellant’s Br. pp. 31-32, which essentially directs us to *Wadle* step three. Because Williams’s convictions are not included offenses under *Wadle* step two, *Wadle* instructs that our analysis ends at step two, and Williams’s argument is, therefore, unavailable. Accordingly, Williams’s convictions do not violate the prohibition against double jeopardy.

Conclusion

[36] The trial court did not abuse its discretion by admitting K.F.’s hearsay statements at trial; the State presented sufficient evidence to support Williams’s convictions; and Williams’s convictions do not violate the prohibition against double jeopardy. Accordingly, we affirm.

[37] Affirmed.

Vaidik, J., and Foley, J., concur.