MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Jennifer L. Koethe
Raleigh, North Carolina

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Indiana Attorney General
Indianapolis, Indiana

Erica S. Sullivan
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Michael Dumdey,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

November 16, 2023

Court of Appeals Case No. 23A-CR-284

Appeal from the La Porte Circuit Court

The Honorable Thomas Alevizos, Judge

Trial Court Cause No. 46C01-2012-F1-1538

Memorandum Decision by Judge May
Chief Judge Altice and Judge Foley concur.

May, Judge.

[1] Michael L. Dumdey appeals his convictions of two counts of Level 1 felony child molesting,[1] three counts of Level 4 felony child molesting,[2] and eight counts of Level 5 felony child pornography.[3] Dumdey argues the evidence was insufficient to support his convictions and his thirty-five-year sentence is inappropriate for his character and his offenses. We affirm.

Facts and Procedural History

[2] Dumdey lived alone in a one-bedroom apartment and would sometimes babysit the two children – J.M. and A.P. – of Dumdey's niece, A.D. J.M. was born in 2008, and A.P. was born in 2012. In 2017, when A.P. was about five years old, Dumdey began babysitting A.P. and J.M. while their parents were at work. Soon thereafter, Dumdey began showing A.P. pornography from his computer and touching her inappropriately. On one occasion, when A.P. was sitting on a chair in front of Dumdey in the computer area of the kitchen, Dumdey put his finger under A.P.'s underwear and rubbed in circles inside the folds of skin of her genitals, and while he did this Dumdey was making "heavy breathing" sounds. (Tr. Vol. 2 at 57-58.) Another time, when A.P. was wearing only a t-shirt, Dumdey picked her up so she was facing him, put her legs over his shoulders, and licked her genital area.

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[1] Ind. Code § 35-42-4-3(a).

[2] Ind. Code § 35-42-4-3(b).

[3] Ind. Code § 35-42-4-4(d) & (e)(1).

[3] When J.M. and A.P. would spend the night at Dumdey's house, A.P. would sometimes sleep in the bed with Dumdey. On one occasion when she was sleeping with Dumdey, he used his hand to rub her genitals over her clothing, and on a second occasion, he put his hand under her underwear to rub her genitals. On still another occasion in Dumdey's bedroom, he asked A.P. to take her pants off and do the splits on the bed so that he could take a picture of her "private part." (*Id*. at 66.) After he took the picture and while A.P. was still naked, Dumdey masturbated, ejaculated onto A.P.'s stomach, and wiped her stomach off with a towel.

[4] Dumdey once forced A.P. to touch his naked erect penis with her hands when they were both in the hallway. On another occasion, Dumdey entered the shower naked when A.P. was showering, and he had her wash his penis with a bar of soap. Dumdey became erect, but he did not ejaculate on this occasion. Dumdey told A.P. not to tell anyone about their touching "because something would happen to him." (*Id*. at 73.)

[5] On one occasion when A.P. and J.M. were spending the night, Dumdey's neighbor allowed her granddaughter, L.B., to spend the night at Dumdey's apartment because L.B. and A.P. had been playing together. L.B. was born in 2010 and is two years older than A.P. That night, when L.B. was alone with Dumdey in the computer table area of the kitchen, Dumdey used his hand to rub the genital area of L.B. over her clothing, which was "frightening" to L.B. (*Id*. at 153.) Dumdey did not say anything to L.B., and his touching stopped when L.B. went to the restroom.

[6] In early December 2020, A.P.'s mother, A.D., received a phone call from a close friend who was also A.P.'s babysitter, who indicated A.D. should talk to A.P. about things that Dumdey had done to A.P. When A.D. asked A.P., A.P. became "emotionally distraught, sad, [and] she cried." (*Id*. at 24.) A.D. did not push A.P. to tell her anything, but she called the sheriff's department, which began an investigation. A.P. underwent a forensic interview and physical examination.

[7] On December 9, 2020, the State executed a search warrant at Dumdey's apartment and found four photographs depicting nude young children or focusing on the genitals of young children. Police also seized "Computers, hard drives, SSD drive, Tablet, routers, SD card, and flash drives." (App. Vol. 2 at 65.) In addition, police seized 21 VHS tapes, 5 mini-digital video cassettes, and 353 CD/DVDs. One of the DVDs was entitled "How to Handle Sexual Addiction" but many of the storage devices had no label to identify the contents. (*Id*.)

[8] On December 10, 2020, the State filed seven charges against Dumdey: three counts of Level 1 felony child molesting, three counts of Level 4 felony child molesting, and one count of Level 5 felony possession of child pornography. The three Level 1 felony charges alleged Dumdey: (1) "used one or more of his fingers to penetrate the sex organ of [A.P.,]" (App. Vol. 2 at 32); (2) "placed his mouth on the sex organ of [A.P.,]" (*id*.); and (3) "placed [A.P.] on his lap, positioned his exposed sex organ against [A.P.]'s exposed sex organ and anus, and pushed [A.P.]'s sex organ and anus down and upon Dumdey's sex organ,

while maneuvering [A.P.]'s pelvic region." (*Id*. at 32-33.) The three Level 4 felony charges alleged that, to arouse or satisfy his own sexual desires, Dumdey: (1) "touched or fondled genital area of [A.P.,]" (*id*. at 33); (2) "had [A.P.] touch or fondle Dumdey's sex organ," (*id*.); and (3) "touched or fondled the buttocks and anal area of [A.P.]" (*Id*.)

[9] On January 4, 2021, the State requested permission to search the electronics and electronic storage devices seized from Dumdey's apartment for pictures or images of "child pornography, child exploitation, or evidence tending to show sexual conduct establishing the offense of child molest." (*Id*. at 64.) That same day, the trial court granted the warrant to search Dumdey's electronics and storage devices for evidence of child pornography.

[10] As part of their investigation, police talked to neighbors of Dumdey to determine whether other children had been in Dumdey's apartment. L.B. and her twin brother were taken for forensic interviews, during which L.B. reported being touched by Dumdey. On January 25, 2021, the State moved to add a count of Level 4 felony child molesting for "fondl[ing] or touch[ing] the genital area of Victim 2, [L.B.], with the intent to arouse or satisfy the sexual desires of Dumdey." (*Id*. at 86.) The trial court granted the State's motion the same day.

[11] On February 8, 2021, the State requested a warrant to search inside Dumdey's computers, hard drives, tablets, phone, flash drive, and SD Card. The trial court granted the State's motion the same day. Investigation of Dumdey's electronics uncovered more than 4000 images and videos of child pornography.

(Tr. Vol. 3 at 50.) The State again moved to amend its charging information on September 22, 2022, to amend the original allegation of possession of child pornography to include reference to the specific image at issue in that count and to add seven additional counts of Level 5 felony possession of child pornography based on specific distinguishable images found on electronics in Dumdey's apartment.[4]

[12] Dumdey agreed to waive his right to a jury trial in exchange for a sentencing cap of 35 years. After a bench trial, the court found Dumdey guilty of two counts of Level 1 felony child molesting, three counts of Level 4 felony child molesting, and eight counts of Level 5 felony possession of child pornography. The probation department prepared a presentence investigation report, and then the court held a sentencing hearing.

[13] Regarding aggravators and mitigators, the court's written sentencing order provided:

> The Court finds the following aggravating factors on all counts:
>
> > 1. The Defendant has a prior criminal history. This is important because these were crimes of violence. However, it is not extensive to some degree and the criminal history is quite dated. The Court finds this as a modest aggravating factor.

[4] The charging information includes details of the sexual acts being depicted in each of the images, but we need not include those details to address the issues raised on appeal.

2. The Defendant had the care, custody and control over the victims, especially Victim 1, as he was a familial [sic] family caretaker at the time.

3. The victims are much younger than necessary for this offense.

In regard to Counts [involving child pornography], the Court finds the additional aggravating factor as follows:

1. The elements are far greater to prove the case.

The Court finds no mitigating factors.

The Court therefore finds that the aggravating factors outweigh any mitigating factors concerning these counts.

(Appellant's App. Vol. 3 at 15) (indentation modified). The court imposed concurrent thirty-two-year sentences for the two Level 1 felony convictions. It imposed seven-year sentences for the two convictions of Level 4 felony child molesting of A.P. and ordered those sentences served concurrent to one another and to the Level 1 felony sentences. Finally, the court imposed concurrent three-year sentences for the eight Level 5 felony convictions of possession of child pornography and the single count of Level 4 felony child molesting against L.B., and it ordered those nine concurrent sentences served consecutive to the concurrent thirty-two-year sentences. Thus, the court imposed an aggregate sentence of thirty-five years.

Discussion and Decision

1. Sufficiency of Evidence

[14] 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).

1.1 Child molesting convictions

[15] In support of his assertion the evidence was insufficient to convict him of child molesting, Dumdey argues the testimony of A.P. and L.B. was incredibly dubious. The incredible dubiosity rule "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)). Incredible dubiosity 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) 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 746.

1.1.1 Crimes against A.P.

[16] Dumdey was convicted of four crimes against A.P. – two Level 1 felonies and two Level 4 felonies. Dumdey asserts "A.P.'s testimony was equivocal, contradictory and not credible." (Appellant's Br. at 23.) In support, Dumdey first notes that A.P. did not testify to two incidents that A.P. had reported earlier – one incident reported to the police and a second incident reported to the medical examiner. However, the incredible dubiosity "rule applies only when a witness contradicts herself or himself in a single statement or while testifying, and does not apply to conflicts between multiple statements." *Reynolds v. State*, 142 N.E.3d 928, 943 (Ind. Ct. App. 2020), *trans. denied*.

[17] Nor does J.M.'s testimony render A.P.'s testimony incredibly dubious, as Dumdey asserts. (*See* Appellant's Br. at 23.) J.M. indicated he did not see or hear anything inappropriate, but he confirmed that sometimes A.P. would sleep with Dumdey and that sometimes the bedroom door was closed. J.M. indicated A.P. usually came outside with him, but L.B.'s brother, B.B., who played outside with J.M., indicated A.P. was not always outside when B.B. and

J.M. played outside. In addition, J.M. testified that he would sometimes wear headphones while he was playing video games on the television, which would mean he "couldn't hear a whole lot" of what else was happening. (Tr. Vol. 2 at 113.) That J.M. did not see or hear anything inappropriate does not render A.P.'s testimony contradictory, equivocal, incredible, or unbelievable.

[18] Finally, the other facts regarding pornography – that A.P. accidentally saw pornography on her mother's cellphone and that police could not locate the picture of A.P.'s genitals on Dumdey's phone – do not render A.P.'s testimony incredibly dubious. *See Reynolds*, 142 N.E.3d at 943 ("the incredible dubiosity analysis focuses on contradictions within a witness's testimony, not in the context of other evidence"). A.P. may also have seen pornography on her mother's phone once, but her report of being shown pornography by Dumdey is supported by the 4,000 images or videos of child pornography found in Dumdey's possession.

[19] A.P.'s testimony was not equivocal, contradictory or incredible, and thus we will not invade the province of the fact-finder to assess the credibility of the witnesses and weigh the evidence. *See*, *e.g.*, *McCallister v. State*, 91 N.E.3d 554, 559 (Ind. 2018) (incredible dubiosity rule did not apply where testimony was not improbable or unimaginable). Accordingly, A.P.'s testimony was sufficient to support Dumdey's convictions of molesting A.P. *See Young v. State*, 973 N.E.2d 1225, 1227 (Ind. Ct. App. 2012) (testimony of child victim sufficient to support conviction of child molesting), *reh'g denied*, *trans. denied*.

1.1.2 Crimes against L.B.

[20] Dumdey was convicted of one count of Level 4 felony child molesting against L.B., and Dumdey asserts her testimony "was also equivocal, contradictory and not credible." (Appellant's Br. at 24.) However, Dumdey again supports his argument with evidence from other witnesses, which is not relevant to whether L.B.'s testimony was so internally inconsistent to be declared incredibly dubious. *See Reynolds*, 142 N.E.3d at 943 ("the incredible dubiosity analysis focuses on contradictions within a witness's testimony, not in the context of other evidence"). Further, while L.B. may not have remembered the names of the children who had been in Dumdey's apartment the night that she stayed, she testified in detail about where those children were when the molesting occurred, what Dumdey was wearing, and how she felt as it occurred. Her testimony was not equivocal, contradictory, or incredible, and thus the incredible dubiosity rule is inapplicable and L.B.'s testimony was sufficient to support Dumdey's conviction. *See Young*, 973 N.E.2d at 1227 (testimony of child victim, which was not incredibly dubious, was sufficient to support conviction of child molesting).

1.2 Possession of child pornography convictions

[21] Regarding his possession of child pornography, Dumdey notes a police detective testified that the only way to prove who downloaded the pornography onto Dumdey's electronic devices was to have been present in the room when the images or videos were downloaded. Because no one saw Dumdey download the illegal materials, and because the resume of A.P.'s mother, A.D.,

was also found on one device, Dumdey asserts A.D. or someone else may have downloaded the child pornography files onto his electronic devices. Regardless of who downloaded the files, it was well within the trial court's province as finder-of-fact to determine that Dumdey knowingly possessed the 4,000 images and videos of child pornography stored on his electronic devices that he kept in the apartment where he lived alone, especially when police also found printed photographs of child pornography in his apartment. *See*, *e.g.*, *Albrecht v. State*, 185 N.E.3d 412, 423 (Ind. Ct. App. 2022) (trier-of-fact could infer Albrecht, who lived in the apartment and whose name was a shortcut on the computer drive, knowingly or intentionally possessed the child pornography on a hard drive), *trans. denied*.

2. Inappropriateness of Sentence

[22] Dumdey contends his thirty-five-year sentence is inappropriate. Our standard of review regarding such claims is well-settled:

> Indiana Appellate Rule 7(B) gives us the authority to revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Our review is deferential to the trial court's decision, and our goal is to determine whether the appellant's sentence is inappropriate, not whether some other sentence would be more appropriate. We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. The appellant bears the burden of demonstrating his sentence [is] inappropriate.

George v. State, 141 N.E.3d 68, 73-74 (Ind. Ct. App. 2020) (internal citations omitted).

[23] "Our analysis of the nature of the offense requires us to look at the nature, extent, heinousness, and brutality of the offense." *Pritcher v. State*, 208 N.E.3d 656, 668 (Ind. Ct. App. 2023). As our Indiana Supreme Court has explained, "compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality)" may lead to a downward revision of the defendant's sentence. *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). "When considering the nature of the offense, we first look to the advisory sentence for the crime." *McHenry v. State*, 152 N.E.3d 41, 46 (Ind. Ct. App. 2020). When a sentence 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." *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021).

[24] The sentencing range for a Level 1 felony is twenty to forty years, with the advisory term being thirty years. Ind. Code § 35-50-2-4. The trial court imposed thirty-two years for each of Dumdey's two Level 1 felony convictions and ordered those sentences served concurrently. The sentencing range for a Level 4 felony is between two and twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5.5. The trial court imposed seven-year sentences for each of Dumdey's two convictions of Level 4 felony child molesting against A.P. and a three-year sentence for his Level 4 felony crime against L.B. The court ordered the sentences for the four crimes against A.P. served concurrently, and it ordered the sentence for the crime against L.B.

served consecutive to those but concurrent with the Level 5 felony sentences. Finally, the sentencing range for a Level 5 felony is one to six years, "with the advisory sentence being three (3) years." Ind. Code § 35-50-2-6. The court imposed a three-year sentence for each of Dumdey's eight Level 5 felonies and ordered those sentences served concurrent to one another but consecutive to the Level 1 felony sentences. As a result, Dumdey's cumulative sentence is thirty-five years.

[25] Dumdey notes he received the maximum sentence permitted by his plea agreement and argues we "should find that the trial court's maximum sentence under the sentencing cap is inappropriate." (Appellant's Br. at 29.) In the process, he fails to acknowledge that his cumulative sentence for thirteen felonies is only five years above the advisory sentence for a single conviction of Level 1 felony child molesting – and he had two convictions of Level 1 felony molesting. Given that Dumdey's crimes against A.P. and L.B. occurred on separate occasions, had there not been a sentencing cap by agreement of the parties, we would be more likely to declare his sentence inappropriately short for his crimes than to declare it inappropriately long. Dumdey's sentence is not too short for his crimes.

[26] Nor do we find his sentence inappropriate for his character. "When considering the character of the offender, one relevant fact is the defendant's criminal history." *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). An offender's continued criminal behavior after judicial intervention reveals a disregard for the law that reflects poorly on his character. *Kayser v. State*, 131

N.E.3d 717, 724 (Ind. Ct. App. 2019). Dumdey was convicted in Alabama in 1999 of third-degree assault, first degree criminal trespassing, and resisting law enforcement. In Illinois in 2008, Dumdey was convicted of Class A misdemeanor battery causing bodily harm. The trial court identified this criminal history as only a "modest" aggravator. (App. Vol. 3 at 15.) Despite that history, Dumdey asks that we reduce his cumulative sentence based on the testimony of his character witnesses. We decline. While Dumdey's willingness to visit and help elderly relatives and church members, especially with computer issues, demonstrates kindness, it is not adequate to render inappropriate a thirty-five-year sentence for thirteen felonies. *See*, *e.g.*, *McCain v. State*, 88 N.E.3d 1066, 1067 (Ind. 2018) (finding forty-year sentence not inappropriate for mother with no criminal history who placed her mouth on the penis of her one-year-old son).

Conclusion

[27] Dumdey's convictions were supported by sufficient evidence, and his thirty-five-year sentence is not inappropriate in light of his character and his thirteen offenses. Accordingly, we affirm the judgment of the trial court.

[28] Affirmed.

Altice, C.J., and Foley, J., concur.