MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

DeJuan L. Clardy,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 26, 2023

Court of Appeals Case No. 23A-CR-336

Appeal from the Marion Superior Court

The Honorable Jeffrey L. Marchal, Judge

Trial Court Cause No. 49D31-1909-F1-35427

Memorandum Decision by Judge Tavitas
Judges Bailey and Kenworthy concur.

Tavitas, Judge.

Case Summary

[1] DeJuan Clardy was convicted of two counts of child molesting, one as a Level 1 felony and one as a Level 4 felony. Clardy appeals and argues: (1) the trial court violated his Fifth Amendment right against self-incrimination by commenting on his decision not to testify; and (2) the State presented insufficient evidence to support his convictions. We find Clardy's arguments without merit and, accordingly, affirm.

Issues

[2] Clardy raises two issues on appeal, which we reorder and restate as:

I. Whether the trial court violated Clardy's Fifth Amendment right against self-incrimination by commenting on Clardy's decision not to testify.

II. Whether the State presented sufficient evidence to support Clardy's convictions.

Facts

[3] J.S. was born in 2006. She has two brothers, M.S. and J.B. When J.S. was approximately seven or eight years old, her mother began dating Clardy, who moved in with the family approximately one year later.

[4] When J.S. was approximately eight or nine years old, the family lived in a house in Indianapolis near the Martin Luther King Community Center. J.S. had her own bedroom. One evening, Clardy came into J.S.'s room and began kissing her and touching her breasts. Clardy briefly left to let the dogs inside the

house. He then returned to J.S.'s room where he "rubb[ed]" and "lick[ed]" J.S.'s vagina. Tr. Vol. II p. 166.

[5] The family eventually moved to a house on Sherman Drive. J.S. had her own room, which was separated from her brothers' room by a bathroom. When J.S. was twelve years old, she was "drifting" into sleep when she felt a "sharp pain" in her vagina and lower abdomen. *Id*. at 169, 172. J.S. had gone to bed wearing "pineapple underwear" and an "orangish-pinkish type of T-shirt"; however, her underwear had been removed. *Id*. at 170. J.S. observed that Clardy was "over" her, had his penis a few inches "past th[e] line" of her vagina, and was moving in a "forward, backward type of motion." *Id*. at 170-172. J.S. knew that it was Clardy by the "engine oil type of smell in his dreads." *Id*. at 170. Clardy told J.S. that "[i]t was [a] secret." *Id*. at 174.

[6] J.S. reported Clardy's inappropriate touching to her mother; however, J.S.'s mother did not believe her. J.S. later reported the inappropriate touching to several of her aunts, who contacted the Department of Child Services ("DCS").

[7] According to J.S., in addition to the inappropriate touching, Clardy "would show [J.S.] porn and ask [her] to take videos" of herself for him. *Id*. at 191. J.S. reported to DCS that these videos would be on Clardy's phone.

[8] On September 6, 2019, the State charged Clardy with two counts of child molesting, one as a Level 1 felony and one as a Level 4 felony. The State also alleged that Clardy was an habitual offender.

[9] Clardy waived his right to a jury trial, and the trial court held a two-day bench trial in December 2022. J.S. testified regarding the incidents at the two houses. Specifically, she testified that the incident that occurred at the Sherman Drive house when she was twelve years old occurred at night when the rest of the family was home and that her door was shut. During cross-examination, J.S. admitted that, during her deposition, she testified that the incident occurred during the middle of the day after she got home from school and that neither her mother nor her brothers were home. J.S. explained that "there h[ave] been times where [Clardy] has touched [her] during the night and there h[ave] been times when [] he's touched [her] during the day" and that she "got[] the different timeframes mixed up . . . ." *Id*. at 190.

[10] J.S.'s brothers and mother testified that, in the Sherman Drive house, J.S.'s bedroom did not have a door "leading into the hallway" but that the bathroom that separated her room from her brothers' room had doors. *Id*. at 229. They further testified that Clardy was never alone with J.S.

[11] The trial court found Clardy guilty of both counts. In so doing, the trial court stated the following:

> Child molest cases are difficult in that it often comes down to the word of the victim. We like to classify it as he said/she said, but when someone asserts their Fifth Amendment privilege and doesn't take the stand, it really comes down to what she said. And you look very critically at credibility on all angles. And I understand the approach that the Defense has taken in this case to try to put J.S.'s credibility into question.

> As it pertains to impeachment, I would say that the impeachment by the Defense is mild. All the Defense has been able to show is that in a deposition, [J.S.] indicated this took place during the day after school when no one was home versus her trial testimony when she discussed that this took place at night when everybody was home. But in all other respects, she was incredibly detailed on what happened to her.
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> In delayed disclosure cases, sometimes I get testimony that is very general and vague in nature, and it is very difficult for a Court to find guilt beyond a reasonable doubt when the victim can't give specifics as to what happened. [J.S.] was very specific about what happened to her on each of these occasions. And I found her credible, and I found her believable.

Tr. Vol. III pp. 12-13.

[12] The trial court later found Clardy to be an habitual offender. The trial court sentenced Clardy to thirty years on Count I, with a ten-year habitual offender enhancement, and a concurrent sentence of six years on Count II for an aggregate sentence of forty years in the Department of Correction. Clardy now appeals.

Discussion and Decision

I. Fifth Amendment—Privilege not to Testify

[13] Clardy first argues that the trial court violated his Fifth Amendment right against self-incrimination by commenting on Clardy's decision not to testify at trial.[1] We are not persuaded.

[14] The Fifth Amendment to the United States Constitution prohibits a person from being "compelled in any criminal case to be a witness against himself." Accordingly, a criminal defendant has the privilege not to testify at trial. *See, e.g.*, *Bleeke v. Lemmon*, 6 N.E.3d 907, 925 (Ind. 2014). Trial courts are prohibited from "commenting at trial on the defendant's refusal to testify." *Smith v. State*, 160 N.E.3d 1152, 1155 (Ind. Ct. App. 2021) (citing *Ziebell v. State*, 788 N.E.2d 902, 913 (Ind. Ct. App. 2003)); *see also Griffin v. State*, 380 U.S. 609, 615 (1965) (holding that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt").

[15] "'[A]bsolute silence'" regarding the defendant's decision not to testify, however, is not required. *See Moore v. State*, 669 N.E.3d 733, 737 (Ind. 1996) (quoting *Long v. State*, 56 Ind. 182, 186 (1877)). Rather, a trial court's comment on the defendant's silence "violates a defendant's privilege against compulsory self-

[1] Clardy makes no argument under Article 1, Section 14 of the Indiana Constitution, which provides, in relevant part: "No person, in any criminal prosecution, shall be compelled to testify against himself."

incrimination if the statement is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence.'" *Smith*, 160 N.E.3d at 1155 (quoting *Ziebell*, 788 N.E.2d at 913). On the other hand, when the comment "in its totality is addressed to other evidence rather than the defendant's failure to testify, it is not grounds for reversal." *Owens v. State*, 937 N.E.2d 880, 893 (Ind. Ct. App. 2010) (citing *Boatright v. State*, 759 N.E.2d 1038, 1043 (Ind. 2001)), *trans. denied*. "The defendant bears the burden of showing that a comment improperly penalized the exercise of the right to remain silent." *Id*. (citing *Moore,* 669 N.E.2d at 739).

[16] Here, we are dealing with a bench trial. Under the judicial temperance presumption, "[w]e generally presume that in a proceeding tried to the bench a court renders its decisions solely on the basis of relevant and probative evidence." *Konopasek v. State*, 946 N.E.2d 23, 28 (Ind. 2011). "The presumption exists because '[t]he risk of prejudice is quelled when the evidence is solely before the trial court.'" *Terpstra v. State*, 138 N.E.3d 278, 287 (Ind. Ct. App. 2019) (quoting *Conley v. State*, 972 N.E.2d 864, 873 (Ind. 2012)), *trans. denied*.

[17] We are not persuaded that the trial court impermissibly considered Clardy's decision not to testify in this case. Read in context, the trial court merely recognized the obvious—that J.S.'s testimony was the only direct evidence of Clardy's offenses. The trial court explained that it looked "very carefully" at J.S.'s credibility and ultimately found her "credible" and "believable." Tr. Vol. II p. 13. In no way did the trial court suggest that it held Clardy's decision not

to testify against him. Accordingly, the trial court's comment did not violate Clardy's Fifth Amendment rights. [2]

II. Sufficiency of the Evidence—Incredible Dubiosity Rule

[18] Clardy next argues that the State presented insufficient evidence to support his convictions. We are not persuaded.

[19] 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

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[2] We do not decide whether the trial court's explicit recognition of Clardy's decision not to testify would have been appropriate in a jury trial. *See Moore*, 669 N.E.2d at 737 (suggesting that "direct references" to the defendant's decision not to testify are more likely to mandate reversal than "indirect references"). The best practice, however, is for trial judges to refrain from comments regarding the defendant's exercise of his or her Fifth Amendment privilege in bench trials as well as jury trials.

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)).

[20] Clardy argues that J.S.'s testimony was incredibly dubious. Although our review for sufficiency of evidence is deferential, we afford less deference when a witness presents incredibly dubious testimony. We have summarized the incredible dubiosity rule as follows:

> Application of the incredibly dubiosity 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). "[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.'" *Id.* (quoting *Edwards v. State*, 753 N.E.2d 618, 622 (Ind. 2001)). "'The testimony must be so convoluted and/or contrary to human experience that no reasonable person could believe it.'" *Id.* (quoting *Edward*s, 753 N.E.2d at 622).

Wilburn v. State, 177 N.E.3d 805, 815-16 (Ind. Ct. App. 2021).

[21] Here, Clardy was convicted of two counts of child molesting, one as a Level 1 felony and one as a Level 4 felony. The offense of child molesting is governed by Indiana Code Section 35-42-4-3, which provides, in relevant part:

> (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. . . .

[22] J.S. testified that, when she was twelve years old, Clardy came into her bedroom and had sexual intercourse with her. She further testified that when she was eight or nine years old, Clardy came into her bedroom and touched her breasts and "rubb[ed]" and "lick[ed]" her vagina. Tr. Vol. II p. 166.

[23] Clardy argues that J.S.'s testimony was incredibly dubious because J.S. testified at trial that the incident that occurred when she was twelve years old happened at night when everyone was home and that her bedroom door was shut; however, J.S. testified during her deposition that the incident occurred during the middle of the day when her mother and brothers were not home,[3] and J.S.'s brothers and mother testified at trial that J.S.'s room had no door. Clardy

[3] Clardy does not direct us to any inconsistencies between J.S.'s deposition and trial testimony regarding the incident where Clardy inappropriately touched her when she was approximately eight or nine years old.

further argues that J.S. was "impeached" by her brothers and mother, who testified that Clardy was never alone with J.S. Appellant's Br. p. 12.

[24] First, any inconsistencies between J.S.'s deposition and trial testimony do not trigger the incredible dubiosity rule because "witness testimony that contradicts [a] witness's earlier statements does not make such testimony 'incredibly dubious.'" *Smith v. State*, 163 N.E.3d 925, 930 (Ind. Ct. App. 2021) (quoting *Stephenson v. State*, 742 N.E.2d 463, 498 (Ind. 2001)) (holding that inconsistencies between trial and deposition testimony did not trigger incredible dubiosity rule).

[25] Moreover, J.S. was consistent regarding the facts necessary to prove that Clardy had sexual intercourse with her when she was twelve years old and inappropriately touched her when she was eight or nine years old. *See id*. (declining to apply incredible dubiosity rule when victim's testimony on the "important facts" regarding molestation "remained consistent"). J.S. also recalled details regarding the clothes she was wearing and how Clardy smelled at the time Clardy had sexual intercourse with her. J.S.'s confusion regarding the time of day and who was home when this offense occurred does not render her testimony incredibly dubious. *See Williams v. State*, 170 N.E.3d 237, 244 (Ind. Ct. App. 2021) (declining to find victim's testimony incredibly dubious based on victim's "confusion about when precisely the[] crimes occurred"), *trans. denied*.

[26] As for the testimony regarding whether J.S.'s bedroom door was shut during the incident and whether Clardy was ever alone with J.S., conflicts between the testimony of witnesses do not trigger the incredible dubiosity rule but are rather matters of witness credibility, which this court will not second-guess. *See Levya v. State*, 971 N.E.2d 699, 702 (Ind. Ct. App. 2012), *trans. denied*.

[27] Clardy also argues that J.S.'s testimony is incredibly dubious because she testified that she reported that Clardy had inappropriate videos of her on his phone, but the State introduced no such videos at trial. Clardy, however, was not charged with possession of inappropriate videos of J.S., and Clardy cites no authority to suggest that the lack of physical evidence regarding uncharged conduct renders a victim's testimony incredibly dubious. Accordingly, we find that the State presented sufficient evidence to support Clardy's convictions.

Conclusion

[28] The trial court's comment on Clardy's decision not to testify did not violate Clardy's Fifth Amendment right against self-incrimination, and the State presented sufficient evidence to support Clardy's convictions. Accordingly, we affirm.

[29] Affirmed.

Bailey, J., and Kenworthy, J., concur.