MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Oscar Sanchez Hernandez,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 16, 2021

Court of Appeals Case No. 21A-CR-19

Appeal from the Marion Superior Court

The Honorable Lisa F. Borges, Judge

Trial Court Cause No. 49G04-1907-F1-28159

Brown, Judge.

[1] Oscar Sanchez Hernandez appeals his convictions and sentence for child molesting as level 1 felonies. He claims the evidence is insufficient to support his convictions and his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] Hernandez and M.S. were in a relationship and lived together beginning in 2010. M.S. is the mother of L.A.[1] According to L.A., she "used to call [Hernandez] [her] father," and "[h]e was like a father to [her]." Transcript Volume II at 12, 14. Hernandez began a relationship with D.B. around May 2016, his relationship with M.S. ended, and Hernandez and D.B. moved to an apartment in Indianapolis.[2] L.A. and her siblings continued to spend time with Hernandez and regularly visited the Indianapolis apartment. According to L.A., Hernandez "sexually abused" her, he did so "[m]ore than once," she was "ten to eleven" years old when it happened, and it happened to her "[i]n the apartment and at a workplace." *Id*. at 18-19.

[3] On one occasion when L.A. and her siblings were at Hernandez and D.B.'s apartment and were planning to go swimming, Hernandez called L.A. into his room and told her to shut the door but she "didn't shut it totally." *Id*. at 27. L.A.'s brother was in the living room watching YouTube or television, her sister was in another room playing on an exercise ball, and D.B. was in the

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[1] At the October 14, 2020 trial, L.A. testified that she was fourteen years old and had known Hernandez since she was about five years old.

[2] The apartment had a living room, a dining room, a kitchen, one bathroom, and two bedrooms.

bathroom. According to L.A., Hernandez "slightly like bends me over" and "then he puts it in the bottom half."[3] *Id*. at 29. She testified that "[h]e pulled down his pants slightly" and "[h]e pulled mine down, like to my knee." *Id*. at 29-30. She indicated that she was bent onto the bed. When asked "[s]o, when he put it into your bottom part, what did it do," L.A. replied "[i]t went in like halfway." *Id*. at 30. When asked "when you say, 'it was there,' are you referring to the penis," she responded affirmatively. *Id*. When asked "[d]id it actually go inside of your bottom part," she said "[y]es," and when asked "[w]as it outside or something else," she testified "[i]t was half inside and half outside." *Id*. L.A.'s sister called for her, and L.A. pulled up her pants and left the room.

[4] On another occasion, L.A. went with Hernandez to a workplace building where he used to clean for work. Hernandez called L.A. into a room, placed her on a table, pulled down his pants halfway, and pulled down L.A.'s pants to lower than her knees. According to L.A.: "After he tries – he puts it in the front. He doesn't go too far, and then I was going to leave, but then he turns me around. He like slightly like moved me, because then I turned around." *Id*. When asked the next thing that happened, she testified: "And then he puts it in from the back, the bottom." *Id*. When asked "when you say 'it' . . . [a]re you she

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[3] L.A. was asked to reference a diagram of the male body and circle the part to which she referred as "it" and to "write 'it' right next to that" and was asked to reference a diagram of the female body and circle the part to which she referred as "'the bottom' part" and to "write that on there," and the transcript states "(Witness complies)." Transcript Volume II at 29. The diagrams were admitted at trial.

was referring to his penis," L.A. replied "[y]es," and when asked "when you say 'front,' are you referring to your vagina," she replied "[y]es." *Id*. When asked "when you say 'back,' do you mean – what part of the body are you talking about," she replied "[t]he bottom part," and when asked "[t]he one that's on the drawing as 'bottom part,'" she replied "[y]es." *Id*. at 36-37. When asked "did he put that inside, inside your bottom part," L.A. answered "[y]es," and when asked "you said he put it in, not on or around. He actually put it in. Is that correct," she answered "[y]es." *Id*. at 37. When asked if there was anybody else "in the place where you were," she testified "[t]here was this one guy, but he was on the opposite side of us" and that he never came into the room. *Id*. L.A. eventually told her mother and a friend about what had occurred.

[5] The State charged Hernandez with two counts of child molesting as level 1 felonies.[4] The court held a bench trial at which it heard testimony from L.A., M.S., D.B., and Hernandez. On cross-examination, L.A. indicated that she had told the forensic interviewer that, during the workplace incident, Hernandez "put it in [her] butt" and she "really didn't know how it felt." *Id*. at 52. When asked "I believe you told at the deposition that he put his penis in your vagina," she said "[y]es," and when asked "[b]ut you told the forensic

[4] The charging information alleged Hernandez "did perform or submit to other sexual conduct as defined in [Ind. Code §] 35-31.5-2-221.5 with [L.A.], a child under the age of fourteen years (14)." Appellant's Appendix Volume II at 32. One of the counts, as amended, alleged the offense occurred between January 31, 2016, and January 30, 2018, and the other count alleged the offense occurred between January 31, 2017, and January 30, 2018.

interviewer that he put it in your butt," she replied "[h]e put it in both." *Id*. at 54-55. When asked "[i]s there some reason you didn't tell the attorney that it was both at that time," she testified "[a]t that time, I didn't remember so much," when asked "[s]o, you remember more now than you did in November of 2019," she replied affirmatively, and when asked "[i]s that because you've talked about it a lot of times with people," she said "[y]es." *Id*. at 55. She indicated Hernandez did not "put anything on his penis" or use any kind of lubrication. *Id*. at 55-56. When asked whether, during the apartment incident, she left the door partially open, she replied affirmatively. L.A. indicated that she recalled that the forensic interviewer asked her "how it made your thing feel" and that she had said that she "really didn't remember." *Id*. at 58. When asked "[a]nd the attorney at the deposition asked you, he said, 'was it painful?' I'm asking today on a scale of one to ten . . . what would you choose for the pain? . . . The physical pain of this," L.A. replied "[l]ike a seven." *Id*. at 58. When asked "[b]ut until that attorney asked you about the pain, physical pain, you never described that pain to the interviewer," she answered "[y]es." *Id*. When asked "[w]hat part of your body hurt," she answered "[t]he front." *Id*. The court found Hernandez guilty as charged and sentenced him to concurrent terms of thirty-five years with five years suspended to probation.

Discussion

I.

[6] Hernandez contends the allegations contained in L.A.'s testimony are inherently improbable and equivocal, there was no circumstantial evidence, and

there were no witnesses other than L.A. He argues L.A. "claimed [he] put his penis in her 'butt' while in the bedroom with the door open while her two younger siblings were running around the living room of the two-bedroom apartment and [D.B.] was in the bathroom" and "[i]t is inherently improbable that this could occur while so many others were around, moving freely through the apartment." Appellant's Brief at 15. He also asserts "[i]t would be inherently improbable that the genital area on the front of her body would hurt due to alleged anal penetration and that she suffered no pain in her anus." *Id*. at 16 (footnote omitted). He argues that L.A. stated at her deposition that, during the workplace incident, he placed his penis in her vagina, that she testified she remembered "more" at the time of trial because she "talked about it a lot of times with people," and that, "[p]resumably, that includes conversations about the contradictions in her testimony." *Id*. He also argues "[t]here is no evidence that proves beyond a reasonable doubt that [he] penetrated the anus of [L.A.] or committed any other act with her anus and his penis." *Id*. at 21-22.

[7] When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id*. When confronted with conflicting evidence, we must consider it most favorably to the trial court's ruling. *Id.* We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a

reasonable doubt. *Id*. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id*. at 147. The uncorroborated testimony of one witness is sufficient to sustain a conviction even if the witness is the victim. *Ferrell v. State*, 565 N.E.2d 1070, 1072-1073 (Ind. 1991).

[8] Ind. Code § 35-42-4-3(a) provides in part that "[a] person who, with a child under fourteen (14) years of age, knowingly or intentionally performs or submits to . . . other sexual conduct (as defined in IC 35-31.5-2-221.5) commits child molesting" and the offense is a level 1 felony if it is committed by a person at least twenty-one years of age. Ind. Code § 35-31.5-2-221.5 provides "other sexual conduct" means "an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object."[5]

[9] "Although evidence of the penetration of a child's anus with a defendant's penis will establish deviate sexual conduct [now other sexual conduct], the State is not required to introduce evidence of penetration." *Wisneskey v. State*, 736 N.E.2d 763, 764 (Ind. Ct. App. 2000). "Instead, the State need only establish that the defendant committed a sex act with his penis involving the child's

[5] Prior to July 1, 2014, Ind. Code § 35-42-4-3 referred to "deviate sexual conduct" rather than "other sexual conduct," *see* Pub. Law No. 168-2014, § 68 (eff. July 1, 2014), and "deviate sexual conduct" meant "an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." *See* Ind. Code § 35-31.5-2-94 (2013) (repealed by Pub. Law No. 158-2013, § 366 (eff. July 1, 2014)).

anus." *Id*. "[F]or an act to 'involve' the anus there must be contact with the anus." *Riehle v. State*, 823 N.E.2d 287, 293 (Ind. Ct. App. 2005), *trans. denied*.

[10] We also note the incredible dubiosity rule applies only in very narrow circumstances. *See Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). The rule is expressed as follows:

> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this 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.

Id. (citations omitted).

[11] The record reveals that L.A. testified that, when she and Hernandez were together in his room, he pulled her pants down to her knees, pulled his pants down slightly, bent her onto the bed, and "puts it in the bottom half." Transcript Volume II at 29. L.A. clarified that "it" referred to Hernandez's penis, *id*. at 30, and the transcript reveals that she was asked to circle and label the area to which she referred as her "bottom part" on a diagram of a female body. *See id*. at 29-30. Further, she testified that his penis "went in like halfway," that it "actually [went] inside of [her] bottom part," and "[i]t was half inside and half outside." *Id*. at 30. L.A. also testified that, at his workplace, Hernandez pulled his pants halfway down, pulled her pants down, and "[a]fter

he tries – he puts it [his penis] in the front," or her vagina, he "puts it in from the back, the bottom," which she had identified on the drawing. *Id*. at 36. She clarified that he placed his penis "inside [her] bottom part" and he "actually put it in," "not on or around." *Id*. at 37. The evidence is sufficient to show that Hernandez performed or submitted to other sexual conduct with L.A.[6] *See Riehle*, 823 N.E.2d at 293 (holding there was evidence the defendant's penis contacted the child's anus where the child testified he "put his peter in her butt" and his "'peter' touched her 'butt'" and explained the term "butt" is "the part of your body where you go poop out of").

[12] Further, Hernandez fails to demonstrate that L.A.'s testimony was inherently contradictory or so inherently improbable that no reasonable person could believe it. To the extent there was any conflict between L.A.'s trial testimony and her prior deposition testimony, the trier of fact was able to assess L.A.'s recollections and credibility, and we do not assess witness credibility or reweigh the evidence. *See Drane*, 867 N.E.2d at 146. L.A. was thoroughly examined and cross-examined, and Hernandez's counsel questioned her regarding her recollection of the details of Hernandez's actions and her surroundings, her prior statements, the extent she experienced physical pain, and the presence and

[6] Hernandez cites *Downey v. State*, in which the evidence revealed the defendant rubbed his penis against or between the victim's buttocks but did not show there was any contact with the victim's anus. 726 N.E.2d 794, 798 (Ind. Ct. App. 2000), *reh'g denied*, *trans. denied.* Here, L.A.'s testimony was sufficient to establish there was contact between Hernandez's penis and her anus. *Downey* is distinguishable.

relative location of others at the apartment and workplace. L.A.'s testimony is not incredibly dubious.

[13] Based upon our review of the evidence as set forth above and in the record, we conclude the State presented evidence of a probative nature from which the trier of fact could find beyond a reasonable doubt that Hernandez committed two counts of child molesting as level 1 felonies.

II.

[14] The next issue is whether Hernandez's sentence is inappropriate in light of the nature of the offenses and his character. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[15] Hernandez asserts that he never had any gang affiliation, was employed at the time of his arrest, has no past due debts, and never used illegal drugs, his assessments indicate he has a low risk to reoffend, and these offenses are his first felony convictions. He also argues there was no evidence that he held L.A. against her will or threatened to harm her.

[16] Ind. Code § 35-50-2-4(b) provides that, except as provided in subsection (c), a person who commits a level 1 felony shall be imprisoned for a fixed term of

between twenty and forty years with the advisory sentence being thirty years. Ind. Code § 35-50-2-4(c) provides a person who commits a level 1 felony child molesting offense described in Ind. Code § 35-31.5-2-72(1) or (2) shall be imprisoned for a fixed term of between twenty and fifty years with the advisory sentence being thirty years. Ind. Code § 35-31.5-2-72(1) refers to child molesting involving other sexual conduct if the offense is committed by a person at least twenty-one years old and the victim is less than twelve years old.

[17] Our review of the nature of the offenses reveals that Hernandez, on one occasion at his apartment and on another at his workplace, called L.A. into a room, pulled down his and her pants, and performed an act involving his penis and her anus. L.A. indicated that she was ten to eleven years old when the offenses occurred, and Hernandez, who was born in June 1988, was at least twenty-one years old. Hernandez had previously lived with M.S. and L.A., had been in a relationship with M.S., and was "like a father" to L.A., and L.A. called him "[d]ad." Transcript Volume II at 14, 83. L.A.'s testimony also indicated that Hernandez "sexually abused" her on other occasions. *See id.* at 18 (when asked "did it happen in Indianapolis? Outside of Indianapolis? Or both," L.A. testified "[b]oth"); *id*. at 31 (when asked "[d]o you remember thinking anything else or feeling any kind of sensation at all," L.A. testified "I was just thinking that this is happening again and just to get it over with because I was used to it because it [sic] used to do it a lot in Franklin"); *id*. at 62 (when asked "[w]ere there other times before that either in Marion County or

out of Marion County where he put his penis in your butt," L.A. answered "[y]es").

[18] Our review of Hernandez's character reveals that, according to the presentence investigation report ("PSI"), he was convicted of operating a vehicle while intoxicated as a class A misdemeanor in 2007 and was arrested for operating a motor vehicle without ever receiving a license in 2013, which the PSI states was "Dismissed (Diversion)." Appellant's Appendix Volume II at 112. The PSI indicates a probation violation was filed in 2008, there was an "ICE arrest" on December 2, 2013, and that on December 20, 2013, his probation was revoked and he was sentenced to forty days. *Id*. Hernandez reported that he was born in Mexico, completed the ninth grade, moved to the United States in 2004 to work and help his family financially, and did not have a gang affiliation. He reported that he was employed doing landscaping work at the time of his arrest, had no past due debts, and was a new member to the Jehovah's Witnesses religion. He reported he last drank alcohol in 2017 and never used illegal drugs. The PSI provides that his risk assessment score using the Indiana Risk Assessment System places him in the low risk to reoffend category. It also indicates he was assessed using the STATIC-99R risk assessment, an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders, and he scored low on the assessment instrument.

[19] After due consideration, we conclude that Hernandez has not sustained his burden of establishing that his concurrent sentences are inappropriate in light of the nature of the offenses and his character.

[20] For the foregoing reasons, we affirm Hernandez's convictions and sentences.

[21] Affirmed.

Bradford, C.J., and Vaidik, J., concur.