## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Franklin K. Gramelspacher,
*Appellant-Defendant*

v.

State of Indiana,
*Appellee-Plaintiff.*

February 9, 2022

Court of Appeals Case No. 21A-CR-1599

Appeal from the Dubois Circuit Court

The Honorable Nathan A. Verkamp, Judge

Trial Court Cause No. 19C01-1909-F1-937

**Pyle, Judge.**

## Statement of the Case

[1] Franklin Gramelspacher ("Gramelspacher") appeals, following a jury trial, his convictions for six counts of Level 1 felony child molesting,[1] two counts of Level 4 felony child molesting,[2] and two counts of Level 6 felony dissemination of matters harmful to minors.[3] Gramelspacher argues that there was insufficient evidence to support his convictions. Concluding that the evidence was sufficient to support Gramelspacher's convictions, we affirm the trial court's judgment.

[2] We affirm.

## Issue

Whether there is sufficient evidence to support Gramelspacher's convictions.

## Facts[4]

[3] K.A. was born in March 2010. In 2015, when K.A. was five years old, Gramelspacher married K.A.'s mother, Amanda ("K.A.'s Mother"). This

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[1] IND. CODE § 35-42-4-3.

[2] I.C. § 35-42-4-3.

[3] I.C. § 35-49-3-3.

[4] We note that Gramelspacher's Statement of Facts section was lacking in content and somewhat hampered our appellate review. Gramelspacher did not set forth a narrative of the facts in the Statement of Facts section, reasoning that K.A.'s testimony "comprises over 80-pages of the Transcript[.]" (Gramelspacher's Br. 7). Instead, Gramelspacher set forth what he "believe[d]" were the "material portions" of the facts, in his Argument section when he quoted multiple chunks of the transcript containing K.A.'s trial testimony and listed some facts in a numerical list. We direct Gramelspacher's attention to Indiana Appellate Rule 46(A)(6), which provides that an appellant's Statement of Facts "shall describe the facts relevant to the issues

marriage was Gramelspacher's third marriage. At the beginning of their relationship, Gramelspacher told K.A.'s Mother that he had human papilloma virus ("HPV"), which is a sexually transmitted disease. When the couple got married, K.A.'s Mother had four children, including K.A. During the couple's marriage, Gramelspacher and K.A.'s Mother had two additional children, a son ("K.A.'s brother") born in 2016 and a daughter born in February 2019. Gramelspacher and the family lived in a white house on Second Avenue in Jasper ("the white house") from 2015 until April 2019. When they lived in the white house, K.A. was between five and nine years old. From April 2019 until September 2019, when K.A. was nine years old and in third and fourth grade, they lived in a house on Leopold Street ("the Leopold house").

[4] Gramelspacher began to do "inappropriate stuff" to K.A. when she was seven years old and lived in the white house. (Tr. Vol. 2 at 158, 159). Specifically, Gramelspacher touched and "[r]ubb[ed]" K.A.'s "female part" or "vagina" with his "finger." (Tr. Vol. 2 at 145, 146, 147). Gramelspacher touched K.A. in that manner "more than one time." (Tr. Vol. 2 at 165).

[5] When K.A. was eight years old and still living in the white house, Gramelspacher put his "finger. . .in [K.A.'s] hole," which K.A. explained was the place in the vagina where babies come out when they are born. (Tr. Vol. 2

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presented for review[,]" "shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed[,]" and "shall be in narrative form[.]"

at 158). When Gramelspacher put his finger in K.A.'s vagina, "[i]t hurt" K.A. (Tr. Vol. 2 at 177).

[6] After the family moved to the Leopold house, Gramelspacher put his "male part" or "[p]enis" into K.A.' mouth. (Tr. Vol. 2 at 160). Gramelspacher had nine-year-old K.A. perform this fellatio in the basement of the Leopold house. "[S]ometimes he made [her] wiggle his male part when it was in [her mouth.]" (Tr. Vol. 2 at 179). Whenever Gramelspacher made K.A. put his penis in her mouth, there was a "stinky smell." (Tr. Vol. 2 at 180).

[7] Also, when nine-year-old K.A. lived in the Leopold house, Gramelspacher started "the pounding[.]" (Tr. Vol. 2 at 160). Specifically, Gramelspacher's penis was "pounding" K.A.'s vagina. (Tr. Vol. 2 at 160). The pounding happened in the Leopold house in Gramelspacher's bedroom and the basement. It happened during the summer before K.A. went into fourth grade, and it happened after that summer when she was in fourth grade. The pounding felt "slimy" because Gramelspacher had taken "Vaseline or something clear" and "put it on his male part[.]" (Tr. Vol. 2 at 178). He also put this lubricant on K.A.'s "female part" to "relax" her. (Tr. Vol. 2 at 178). The last time that Gramelspacher did the pounding to K.A. was around his birthday, which is September 9.

[8] Gramelspacher also showed K.A. pornographic videos "two times." (Tr. Vol. 2 at 174). The first time, Gramelspacher showed K.A. a video of "a girl and a boy" who were doing "[t]he pounding stuff." (Tr. Vol. 2 at 174). The video

was entitled "Fuck [I]t." (Tr. Vol. 2 at 175). He showed it to her on a computer that was in his bedroom at the white house. The second time, he showed her a video on his phone while they were in the basement of the Leopold house.

[9] One day while at the Leopold house, Gramelspacher sat on a porch swing with K.A. and told her that "[she] was like a fourth wife to him[.]" (Tr. Vol. 2 at 185). K.A. was "scared" to tell anyone what Gramelspacher was doing to her, and Gramelspacher told K.A. not to tell anyone or else she would "get a consequence[.]" (Tr. Vol. 2 at 182).

[10] On September 10, 2019, K.A. attended a "red flags program" at school. (Tr. Vol. 2 at 181). After school that day, K.A. had a counseling session, and she disclosed to her counselor and her mother what Gramelspacher had done to her. K.A.'s counselor reported the offenses to the Jasper Police Department. K.A.'s mother confronted Gramelspacher about his actions, and he responded, "If I did do it, I don't remember." (Tr. Vol. 2 at 224).

[11] On September 12, 2019, K.A.'s mother, who knew that Gramelspacher had HPV, took K.A. to a nurse practitioner so that K.A. could be tested for HPV. K.A. tested positive for HPV. K.A. also had a forensic interview with a forensic interviewer.

[12] The State initially charged Gramelspacher with two counts of Level 1 felony child molesting and then amended the charging information multiple times, with the final amendment occurring during the jury trial. Thus, for purposes of

submitting charges to the jury, the State charged Gramelspacher with the following fourteen counts: Count 1, Level 1 felony child molesting (sexual intercourse on or about September 9, 2019); Count 2, Level 1 felony child molesting (penis in mouth on or about September 9, 2019 and at the same time as the incident in Count 1); Count 3, Level 1 felony child molesting (finger in vagina on or about September 9, 2019 and at the same time as the incident in Count 1); Count 4, Level 6 felony performing sexual conduct in the presence of a minor (engaging in other sexual conduct in the presence of K.A.'s three-year-old brother between April and September 2019); Count 5, Level 6 felony dissemination of matters harmful to a minor (showing a pornographic image on his cell phone between August and September 2019); Count 6, Level 1 felony child molesting (penis in mouth between August and September 2019); Count 7, Level 1 felony child molesting (sexual intercourse between August and September 2019); Count 8, Level 1 felony child molesting (penis in mouth between April and August 2019); Count 9, Level 1 felony child molesting (sexual intercourse between April and August 2019); Count 10, Level 1 felony child molesting (finger in vagina between March 2018 and March 2019); Count 11, Level 4 felony child molesting (finger in vagina between March 2018 and March 2019); Count 12, Level 4 felony child molesting (fondling or touching with intent to arouse sexual desire between March 2017 and March 2018); Count 13, Level 4 felony child molesting (fondling or touching with intent to arouse sexual desire between March 2017 and March 2018); Count 14, Level 6 felony dissemination of matters harmful to minors (showing a pornographic image on his computer between March 2017 and March 2018).

[13] The trial court held a three-day jury trial in March 2021. During the trial, K.A., who was then ten years old, testified to the facts as set forth above. The State also presented testimony from K.A.'s Mother, the forensic interviewer, K.A.'s nurse practitioner, and a police officer from the Jasper Police Department.

[14] At the beginning of K.A.'s testimony, she stated that she was "nervous" because she was "in a giant room with lots of people." (Tr. Vol. 2 at 143). During K.A.'s testimony, she kept using the phrase "pretty sure" in her responses.[5] For example, when the prosecutor asked K.A. to point out Gramelspacher, K.A. responded, "He's sitting over there and he's wearing blue, I'm pretty sure." (Tr. Vol. 2 at 138). When the prosecutor pointed out to K.A. that she was saying "pretty sure," K.A. had not realized that she was saying that phrase. Thereafter, the prosecutor had K.A. clarify her response when she used the phrase "pretty sure." Additionally, K.A. began to notice her use of the phrase and would clarify any response where needed.

[15] K.A. testified about Gramelspacher's offenses against her that had occurred in the basement of the Leopold house. She testified that the family's shower was in the basement and that, when she took a shower, Gramelspacher would "be waiting for [her] after [she] got out" of the shower. (Tr. Vol. 2 at 212).

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[5] During closing argument, the prosecutor described K.A.'s habit of saying "pretty sure" during her testimony as a type of "verbal tick for K.A." (Tr. Vol. 3 at 63).

[16] K.A.'s Mother testified that K.A. "hated going down in the basement" and that K.A. "didn't want to go downstairs by herself." (Tr. Vol. 2 at 230). K.A.'s Mother confirmed that they had ointments like Vaseline in the house because K.A.'s brother had eczema. K.A.'s Mother also confirmed that Gramelspacher had pornography on his computer and that he kept his computer in the bedroom of the white house.

[17] Forty-six-year-old Gramelspacher testified on his own behalf. He denied molesting K.A. or engaging in any sort of inappropriate activity with her. The jury found Gramelspacher not guilty of Counts 2 through 4 and guilty of the remaining eleven counts.

[18] During the sentencing hearing, the trial court dismissed Count 11 as being a lesser-included offense of Count 10. Thereafter, the trial court imposed a forty (40) year sentence on each of Gramelspacher's Level 1 felony convictions, a twelve (12) year sentence on each of his Level 4 felony convictions, and a two and one-half (2½) year sentence on each of his two Level 6 felony convictions. The trial court ordered all of Gramelspacher's sentences to be served concurrent to one another, thereby imposing an aggregate sentence of forty (40) years. Gramelspacher now appeals.

## Decision

[19] Gramelspacher argues that the evidence was insufficient to support his convictions. Our standard of review for sufficiency of the evidence claims is well settled. We "consider only the probative evidence and reasonable

inferences *supporting* the verdict." *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007) (emphasis in original). We do not reweigh the evidence or judge witness credibility. *Id.* We will affirm the conviction unless no reasonable fact finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* at 146-47. The evidence is sufficient if an inference may be reasonably drawn from it to support the verdict. *Id.* at 147. Additionally, a conviction of child molesting may rest on the uncorroborated testimony of the victim. *Young v. State*, 973 N.E.2d 1225, 1227 (Ind. Ct. App. 2012), *reh'g denied*, *trans. denied*.

[20] Gramelspacher does not challenge any specific element of his ten convictions and acknowledges that K.A.'s testimony provided evidence of the elements of his convictions. Instead, Gramelspacher invokes the incredible dubiosity rule, contending that K.A.'s testimony was "equivocal and contradictory" and that there was a "complete absence of circumstantial evidence" to support his convictions. (Gramelspacher's Br. 7). We disagree.

[21] Application of the incredible dubiosity rule is "rare" and requires a reviewing court to determine "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). The rule is applied in limited circumstances and 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 [the] incredible dubiosity [rule] 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)).

[22] Here, the incredible dubiosity rule is not applicable. First, K.A. was not the sole testifying witness. Second, her testimony was not inherently contradictory or equivocal. K.A. did not waiver in her testimony that Gramelspacher had rubbed her vagina, put his finger in her vagina, put his penis in her mouth, put his penis in her vagina, and showed her pornographic videos. Finally, there was not an absence of circumstantial evidence in this case. K.A. tested positive for HPV, which is the sexually transmitted disease that Gramelspacher had.

[23] Gramelspacher's challenge to the evidence supporting his conviction is nothing more than an invitation to reweigh the evidence and judge the credibility of the witnesses, which we will not do. *See Drane*, 867 N.E.2d at 146. Because there was probative evidence from which the jury, as finder of fact, could have found that Gramelspacher committed six counts of Level 1 felony child molesting, two counts of Level 4 felony child molesting, and two counts of Level 6 felony dissemination of matters harmful to minors, we affirm Gramelspacher's convictions.[6]

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[6] We also reject Gramelspacher's argument that his convictions should be reversed because K.A.'s testimony did not establish that his crimes were committed during the specific time period charged for each offense. His argument is without merit because time is not of the essence in child molesting cases. *See Love*, 761 N.E.2d at 809. "In child molestation cases, the exact date is only important in limited circumstances, such as where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies." *Id.* "Where time is not of the essence of the offense, . . . it is well established that the State is not confined to proving the commission on the date alleged in the affidavit or indictment[] but may prove the commission at any time within the statutory period of limitations." *Id.* (cleaned up). Here, K.A.'s age of seven to nine years

[24] Affirmed.

May, J., and Brown, J., concur.

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old at the time of the offenses was well below the age of fourteen that would provide the dividing line between classes of felonies, and there is no issue regarding the statutory period of limitations for the offenses.

Additionally, we decline to review Gramelspacher's suggestion, made in a footnote, that he may have been subjected to double jeopardy for his convictions on Counts 12 and 13. He made no cogent argument and has waived any such argument. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring an appellate argument be supported by cogent reasoning and citation to authority); *Cooper v. State*, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (explaining that a defendant waives an appellate argument not supported by cogent argument).