MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Steven E. Ripstra
Jasper, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Daylon L. Welliver
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Joshua Tindall,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 24, 2023

Court of Appeals Case No. 23A-CR-749

Appeal from the Pike Circuit Court

The Honorable Jeffrey L. Biesterveld, Judge

Trial Court Cause No. 63C01-2112-F4-321

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Joshua Tindall appeals his convictions for two counts of Level 4 felony child molesting following a jury trial. Tindall presents three issues for our review:

> 1. Whether the trial court abused its discretion when it admitted certain testimony at trial.
>
> 2. Whether the State presented sufficient evidence to support his convictions.
>
> 3. Whether the trial court committed fundamental error when it instructed the jury.

[2] We affirm.

Facts and Procedural History

[3] A.M. was born in March 2010. A few years later, A.M.'s mother, J.C., began a romantic relationship with Tindall, and she and A.M. moved in with him. J.C. became pregnant and had a son, K.T. When A.M. was seven years old, J.C. and Tindall broke up, and J.C., A.M., and K.T. moved out of Tindall's home. Because Tindall was like a father to A.M., however, she continued to visit Tindall with K.T., including frequent overnight visits.

[4] During an overnight visit in 2018, A.M. woke up to find Tindall sitting on her bed. He took her hand in his and forced her to touch his penis. A.M. then pulled her hand away and rolled away from Tindall, and he left her room. A.M. later told a friend, M.R., that Tindall had "touched her inappropriately." Tr. p. 149. A.M. did not tell M.R. anything specific, but M.R. believed that A.M. "didn't want anyone to know about it." *Id.*

[5] A few years later, on November 20, 2021, A.M. and K.T. went to Tindall's house in anticipation of going to a dirt bike racing banquet ("the banquet") together. A.M. was sitting on the couch in Tindall's living room when Tindall sat down next to her, reached under her shirt, and unclasped her bra. A.M. got up, went to the bathroom, took her shirt off, and reclasped her bra. A.M. was putting her shirt back on when Tindall entered the bathroom. Tindall then struggled with A.M. to get her shirt off, and he touched her breasts. A.M. pushed Tindall twice as he tried to embrace her. Tindall then said, "some things we don't tell people" and left the bathroom. *Id.* at 75.

[6] Later, at the banquet, Makenzie Newton observed that Tindall was making A.M. "extremely embarrassed" when he asked Newton's stepson whether he thought that A.M. was "a ten[.]" *Id.* at 130. When the banquet was over, Newton overheard A.M. telling Tindall that she did not want to leave with him, and Tindall made a "scene." *Id.* at 133. Newton told A.M. that she did not have to leave with Tindall, and she helped A.M. call her mother, who came to pick her up. Dana Coultas was outside the banquet when she saw that Tindall was "mad" because A.M. would not leave with him, and he "sped out of the parking lot[.]" *Id.* at 141. Coultas called the police to report Tindall's driving.

[7] On December 7, after A.M. had reported the molestations,[1] she gave a forensic interview with Jade Merriman at the Southwest Indiana Child Advocacy

[1] The record is unclear whether A.M. told her mother or another adult about the molestations prior to the forensic interview.

Center. A.M. told Merriman that Tindall had touched her inappropriately five times in the last three years. During that interview, A.M. also told Merriman that Tindall had touched her inappropriately "maybe thirty times" during a certain time period. *Id.* at 115. On December 10, A.M. met with Pike County Prosecutor Darrin McDonald, and she told him that Tindall had touched her inappropriately "every time" that she went to his house. *Id.* And A.M. told McDonald that, after Tindall and her mom broke up, Tindall touched her inappropriately maybe "ten times." *Id.* at 118.

[8] The State charged Tindall with three counts of Level 4 felony child molesting. Count 1 alleged that, between August 2016 and December 2017, Tindall fondled A.M.'s breasts, buttocks, and vagina "numerous times[.]" Appellant's App. Vol. 2, p. 19. Count 2 alleged that Tindall had forced A.M. to touch his penis in 2018. And Count 3 alleged that Tindall had fondled A.M.'s breasts in November 2021. During the ensuing jury trial, on direct examination A.M. testified that Tindall had molested her on two occasions, namely, the 2018 incident and the November 2021 incident. When the State rested its case, Tindall moved for directed verdicts on all three counts. The trial court entered a directed verdict on the first count but it denied his motion on Counts 2 and 3. The jury found Tindall guilty of those two counts. The trial court entered judgment of conviction accordingly and sentenced Tindall to consecutive ten-year sentences for an aggregate term of twenty years executed. This appeal ensued.

Discussion and Decision

Issue One: M.R.'s Testimony

[9] Tindall first contends that the trial court abused its discretion when it admitted M.R.'s testimony that, when she was in second grade, A.M. told her that Tindall had touched her inappropriately. A trial court has broad discretion in the admission of evidence, and we will review its decisions only for abuse of that discretion. *See, e.g.*, *Hall v. State*, 177 N.E.3d 1183, 1193 (Ind. 2021). We will reverse the trial court's judgment only if its ruling was clearly against the logic and effect of the facts and circumstances before it and any error affected a party's substantial rights. *Id.*

[10] During Tindall's trial, the State presented testimony by M.R. In anticipation of that testimony, Tindall objected on grounds of hearsay and "indirect vouching" testimony. Tr. p. 147. The trial court allowed the testimony but instructed the State not to ask "the vouching question," namely, whether M.R. believed A.M. *Id.* at 148. M.R. then testified as follows:

> Q. . . . Do you recall an occasion, in elementary school, when A.M. told you that [Tindall] had touched her inappropriately?
>
> A. Yes.
>
> Q. Okay. And could you tell me - I want you to go back when she first said that. Could you tell me - do you know what grade you were in?
>
> A. Um, I think first or second. I'm pretty sure it was second though.

> Q. You think it was second grade. What makes you think it was second grade?
>
> A. Because I remember being by the bookshelf. And we were like - had um, Ms. Lemond and I'm pretty sure she's a second grade teacher.
>
> Q. Okay. So you - you have a specific memory of when that happened. Did she get specific when she said [he had] touched [her] inappropriately?
>
> A. Not really.
>
> Q. Okay. And did she indicate at all whether she wanted you to keep it secret?
>
> A. Um, not really. But whenever like someone tried to tell, like a teacher, she didn't - like she didn't want anyone to know about it.
>
> Q. Okay.

Tr. pp. 148-49.

[11] On appeal, Tindall contends that M.R.'s testimony was "[i]ndirect [v]ouching" testimony because "[i]ts only purpose was to bolster A.M.'s credibility." Appellant's Br. at 14. In support, Tindall states that, "where a witness offers an opinion about whether the child victim was coached—offering an ultimate opinion about coaching, that opinion, even when given by an Expert witness, invades the province of the jury and constitutes improper vouching." *Id.* at 17 (citing *Sampson v. State*, 38 N.E.3d 985, 989-90 (Ind. 2015); *Kindred v. State*, 973 N.E.2d 1245, 1258 (Ind. Ct. App. 2012)). But Tindall does not explain how M.R.'s brief and straightforward testimony expressed any opinion whether

A.M. had been *coached* or otherwise constituted vouching testimony. Tindall concedes that M.R. "was not asked if she believed A.M." *Id.* at 19. Tindall's contention on this issue is simply without merit.

[12] Tindall also contends that M.R.'s testimony was "clearly hearsay, but may fall into one of the various exceptions." *Id.* at 17. The State argues that Tindall has waived this issue for failure to make cogent argument, and we must agree.[2] Waiver notwithstanding, the State maintains that the testimony was not hearsay and was, therefore, admissible under Indiana Evidence Rule 801(d)(1)(B), which provides:

> (d) Statements That Are Not Hearsay. Notwithstanding Rule 801(c), a statement is not hearsay if:
>
> > (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> >
> > * * *
> >
> > > (B) is consistent with the declarant's testimony, and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying[.]

[2] Tindall labels a section of his brief "Hearsay," but the analysis in that section focuses on vouching testimony rather than setting out case law and argument relevant to hearsay.

The State argues that M.R.'s testimony was (1) consistent with A.M.'s testimony and (2) offered to rebut Tindall's suggestion that A.M.'s mother had persuaded A.M. to fabricate the charges against him.

[13] During his opening statement to the jury, Tindall stated that his relationship with A.M.'s mother had grown more and more contentious after their breakup. And during his cross-examination of A.M., Tindall asked A.M. whether J.C.'s relationship with Tindall was contentious and whether J.C. had talked about Tindall with her. When Tindall objected to M.R.'s testimony, the State argued that it was admissible to rebut Tindall's suggestion that A.M. had a "motive" to lie based on the "bad relationship" between J.C. and Tindall. Tr. p. 147. Notably, during the sidebar conference regarding his objection, Tindall did not dispute the State's characterization of his defense theory. We agree with the State that M.R.'s testimony was not hearsay under Evidence Rule 801(d)(1)(B).

Issue Two: Sufficiency of the Evidence

[14] Tindall next contends that the State presented insufficient evidence to support his convictions. In particular, he argues that A.M.'s testimony was incredibly dubious and there was no circumstantial evidence to support his guilt. We cannot agree.

[15] As the Indiana Supreme Court has explained,

> a court will impinge on the jury's responsibility to judge the credibility of the witnesses only when it has confronted "inherently improbable" testimony or coerced, equivocal, wholly uncorroborated testimony of "incredible dubiosity." . . . A court

> will only impinge upon the jury's duty to judge witness credibility where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the appellant's guilt.

Moore v. State, 27 N.E.3d 749, 755 (Ind. 2015) (cleaned up).

[16] The incredible-dubiosity rule is not applicable here, where the State presented witnesses who corroborated key facts set out in A.M.'s testimony. *See id.* In particular, Newton and Coultas testified regarding Tindall's behavior at the November 20, 2021 banquet and A.M.'s obvious distress that night. Moreover, while A.M.'s trial testimony was inconsistent with her pretrial interviews regarding the number of times Tindall had touched her inappropriately, it was not inherently improbable or wholly uncorroborated. *See id.* Tindall's contention on this issue is without merit. The State presented ample evidence to support his convictions.

Issue Three: Fundamental Error

[17] Finally, Tindall contends that "the Jury's extensive exposure to the dismissed Count 1 deprived him of a fundamentally fair trial." Appellant's Br. at 30. And he asserts that the trial court committed fundamental error when it instructed the jury to consider the preliminary instructions, which included an instruction setting out the elements of Count 1. We do not agree.

[18] As our Supreme Court has explained:

> A claim that has been waived by a defendant's failure to raise a contemporaneous objection can be reviewed on appeal if the

> reviewing court determines that a fundamental error occurred. The fundamental error exception is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process. This exception is available only in egregious circumstances.

Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010) (quotation marks and citations omitted). "To prove fundamental error," Tindall must show "that the trial court should have raised the issue sua sponte . . . ." *Taylor v. State*, 86 N.E.3d 157, 162 (Ind. 2017). Further, "fundamental error in the evidentiary decisions of our trial courts is especially rare." *Merritt v. State*, 99 N.E.3d 706, 709-10 (Ind. Ct. App. 2018), *trans. denied*.

[19] First, to the extent Tindall contends that the jury's exposure to "information regarding the dismissed Count [1]" constituted fundamental error, we reject that contention. Appellant's Br. at 29. After the State rested, Tindall moved for directed verdicts on all three counts, and the trial court granted that motion with respect to Count 1. At that point, Tindall could have asked that the trial court admonish the jury to disregard any evidence it may have heard regarding Count 1, but he did not.

[20] And we cannot say that the trial court should have sua sponte made such an admonishment. As this Court has observed,

> admonishments are double-edged swords. On the one hand, they can help focus the jury on the proper considerations for admitted evidence. [Ind. Evid. Rule 105.] However, on the other hand, they can draw unnecessary attention to unfavorable aspects of the evidence. *See, e.g.*, *McCollum v. State*, 582 N.E.2d 804, 811 (Ind. 1991) (stating that requesting an admonishment "could have drawn unnecessary attention" to undesired commentary). The risk calculus inherent in a request for an admonishment is an assessment that is nearly always best made by the parties and their attorneys and not sua sponte by our trial courts.

Merritt v. State, 99 N.E.3d 706, 710 (Ind. Ct. App. 2018), *trans. denied*.

[21] Here, as the State points out, Tindall focused his cross-examination of A.M. on her prior, out-of-court statements in an effort to undermine her credibility. On direct examination, A.M. testified that Tindall had molested her on only two occasions. But on cross-examination, Tindall questioned A.M. about her interviews with Merriman and McDonald, which included contradictory statements that Tindall had touched her inappropriately five times, ten times, thirty times, and "every time" that she went to his house. Tr. p. 115. Had the trial court sua sponte admonished the jury to disregard that testimony, which supported Count 1,[3] Tindall would not have benefited from the intended impact on A.M.'s credibility. Tindall has not shown that the trial court committed

[3] The State had alleged in Count 1 that, between August 2016 and December 2017, Tindall fondled A.M.'s breasts, buttocks, and vagina "numerous times[.]" Appellant's App. Vol. 2, p. 19. Because her trial testimony did not support that count, the State agreed with Tindall on his motion for a directed verdict on Count 1.

fundamental error when it did not sua sponte admonish the jury to disregard the evidence that supported Count 1.

[22] Second, to the extent Tindall complains that the trial court did not instruct the jury to disregard the evidence it had heard regarding Count 1 and instructed the jury to consider the preliminary instruction setting out the elements of Count 1, again, he has not shown fundamental error. Tindall expressly stated that he had "no objection" to the trial court's final instructions, which included an instruction that the jury was to "consider all the instructions together (both preliminary and final)." Tr. p. 201. And, taken as a whole, the jury instructions properly instructed the jury that: the filing of a charge is not evidence of guilt, and attorneys' statements are not evidence. *See Evans v. State*, 81 N.E.3d 634, 637 (Ind. Ct. App. 2017) (stating that we will not reverse based on an alleged jury instruction error unless the jury instructions, taken as a whole, misstate the law or mislead the jury). Further, the jury was only given verdict forms for Counts 2 and 3. Tindall has not shown that this alleged error made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process. *Brown*, 929 N.E.2d at 207.

[23] For all these reasons, we affirm Tindall's convictions.

[24] Affirmed.

Vaidik, J., and Pyle, J., concur.