



## STATEMENT OF THE CASE

Stephen A. Wright appeals from his conviction, following a jury trial, for two counts of child molesting as a class A felony and a class C felony.

We affirm.

### ISSUES

1. Whether sufficient evidence supports his convictions.
2. Whether the trial court invaded the province of the jury and committed fundamental error in the giving of its instruction on reasonable doubt.

### FACTS

On an unspecified evening in March of 2009, seven-year old K.M. fell asleep on the floor of her aunt's bedroom, while her mother, J.L., slept in the bed. Wright, who was dating J.L., entered the room, "crouched down and . . . started rubbing [K.M.'s] belly. And then he started going down and down and then under." (Tr. 343). K.M. later testified that "[a]t first he was on top, then he started going under my clothes." (Tr. 343-44). She testified further that Wright "rubbed and push[ed]" his index finger "in circles" under her panties and "between [her] private." (Tr. 344). K.M. indicated that her "private" is her vagina, where she "pee[s]." (Tr. 346).

On June 26, 2009, Wright was charged with two counts of child molesting, as a class A felony and a class C felony. He was tried to a jury on February 22 and 23, 2010. After *voir dire*, the trial court gave the following preliminary instruction on reasonable doubt:

The State of Indiana has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you should find him[ ] guilty. If, on the other hand, you think there is a real possibility that he[ ] is not guilty, you should give him[ ] the benefit of the doubt and find him[ ] not guilty.

(App. 36, 63).

During the State's case-in-chief, K.M. testified to the foregoing facts. In addition, she testified as follows:

Q: Okay. And when [Wright] started [touching you], what did you do?

A: I – I woke up giving him a mad face, and then I got on the bed.

Q: Now, when you say you woke up, were you already awake when you were feeling it, or did you just have your eyes closed, or help us understand?

A: I was – I was awake and then he – I was awake –

Q: Okay.

A: -- I was awake and I just like – I like thought in my head, and he just like put his hands behind his back.

Q: Okay. So you were awake?

A: Yeah.

Q: Did you have your eyes open or closed?

A: Closed.

Q: Okay. So was there a time when you were awake when your eyes were closed; was there a time when you were awake and opened your eyes?

A: When I opened my eyes, I saw him just like swoop his hands behind his back.

Q: Okay. So you're actually – the motion you're showing . . . you used the word swooping your hand back behind your back, is that what you saw him do?

A: Yeah.

Q: Okay. Who did you see making that motion?

A: Steven [Wright].

(Tr. 345-37). Thereafter, the following exchange occurred:

Q: Okay. And when his hands went behind his back, what did you do?

A: I gave him a mad face, and just like took his spot on the bed.

Q: Okay. Why did you give him a bad face?

A: Because he was doing something bad to me.

(Tr. 349). K.M. testified further, “Like he was trying to open my – spread my legs apart; I kept like closing them,” and “kept like . . . – not letting them go apart; I kept keeping them closed.” (Tr. 350). K.M. testified that she tried to wake up her mom, but “she said . . . I can tell her when she wakes up.” (Tr. 351). She also testified that the following morning, her mother saw that her panties were “like inside out.” (Tr. 351).

Subsequently, under cross-examination, K.M. testified as follows:

Q: Now, do you remember was Steven [Wright] in the room when you fell asleep?

A: No.

Q: Does that mean that you didn’t see him come into the room?

A: I didn’t see him come into the room.

Q: You didn’t see him come into the room because you were asleep?

A: Yeah

Q: And you didn’t see him touch you because you were asleep?

A: Yeah.

(Tr. 362). Subsequently, on re-direct, the following exchange ensued:

Q: K.M., you said that when you’re sleeping your eyes are not open; did I understand?

A: Yeah.

Q: Can you show me sleeping right now?  
(indication)

Q: Okay, K.M., keep showing me [that you're] sleeping. Sweetheart, I'm walking right up to you, okay, 'cause I don't want you to be scared. Can you hear me come up?

A: Yeah.

(Tr. 367). Counsel for the State then asked K.M. a series of questions -- such as her name, age, and the name of her school -- which K.M. answered with her eyes closed. Counsel also flicked K.M.'s arm, and pushed down on K.M.'s head with her index finger and her palm. K.M. was able to identify and distinguish between each touch. Subsequently, counsel asked K.M., "[I]s that how you were sleeping when Steven was touching you?" (Tr. 371). K.M. responded, "Yeah." (Tr. 371). Counsel then asked, "That night when you were sleeping and you were feeling all those touches with your eyes closed, when you opened your eyes who did you see?" (Tr. 372). K.M. responded, "Steven [Wright]." (Tr. 372).

Next, K.M.'s mother, J.L. testified for the State. She testified that on the evening of the incident, she had gone out with Wright and consumed large quantities of alcohol, as well as methamphetamine and marijuana. She testified that she could not recall much that happened after she got into bed that night. J.L. testified that the following morning, K.M. told her, "Mommy, my underwear are inside out," (tr. 404); however, J.L. dismissed it as "[K.M.] not paying attention and put[ting] them on inside out." (Tr. 405). J.L. also testified that on or about April 11, 2009, while she and Wright were watching television, K.M. entered the room and told Wright, "Do you know how you did

something wrong to me? Well, I'm going to do it to you." (Tr. 409). J.L. testified that K.M. pointed to her vagina and accused Wright of touching her inappropriately.

The jury found Wright guilty as charged. On March 25, 2010, the trial court imposed the following sentences, to be served concurrently: Count I, thirty-five years; and Count II, five years. Wright now appeals.

### DECISION

Wright argues that the evidence is insufficient to support his convictions; and, that the trial court erred in giving its instruction on reasonable doubt to the jury.

#### 1. Sufficiency of Evidence

Wright argues that K.M.'s testimony was incredibly dubious and, therefore, insufficient to support his conviction. Specifically, he alleges "significant and inherent contradictions" from K.M.'s testimony that she was "awake and asleep when the alleged touching occurred, that she did see the defendant, but that she didn't see the defendant, that the touching was over[,] then under her clothes[,] but that her clothes were either pulled up or down and away from her privates" when the alleged touching occurred. Wright's Br. at 7. We are not persuaded.

When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could

conclude the defendant was guilty beyond a reasonable doubt. *Id.* If there is substantial evidence of probative value to support the conviction, it will not be set aside. *Id.*

Under the incredible dubiousity rule, “a court will impinge on the [fact-finder’s] responsibility to judge the credibility of the witness only when it is confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity.” *Stephenson v. State*, 742 N.E.2d 463, 497 (Ind. 2001).

The incredible dubiousity doctrine is not applicable here because K.M.’s testimony was not wholly uncorroborated. *See Thompson v. State*, 765 N.E.2d 1273, 1275 (Ind. 2002). J.L. testified that K.M.’s panties were inside-out on the day after the alleged molestation. Further, J.L. testified that K.M. had confronted Wright several weeks later regarding the alleged molestation. Thus, J.L. directly corroborated K.M.’s testimony that Wright touched her inappropriately on the evening in question. (Tr. 409). Accordingly, Wright’s reliance on the incredible dubiousity doctrine is misplaced.

Moreover, K.M. testified unequivocally that Wright molested her. Asked whether “anybody ever touched a part of [he]r body that shouldn’t be touched,” (tr. 338), K.M. identified Wright and described in detail the manner in which Wright had first touched her over her clothes, then lifted her dress, moved her panties, and touched her vagina with his index finger. The record also reveals that at trial, K.M. demonstrated her ability to distinguish between truth and lies; characterized lying as “[b]ad” and truth-telling as “[g]ood”; and communicated that she understood the significance of a sworn oath to tell the truth. (Tr. 333).

Based upon the foregoing, we conclude that the State presented sufficient evidence to support Wright's convictions. Thus, we reject Wright's claim of "contradictions" in K.M.'s testimony and allegation that her testimony was incredibly dubious as no more than an invitation that we should reweigh her credibility, (Wright's Br. at 7); this we cannot do. *See Jones*, 783 N.E.2d at 1139.

## 2. Jury Instruction

Wright argues that the trial court committed fundamental error in giving Preliminary Instruction Number 9<sup>1</sup> regarding reasonable doubt. Specifically, he challenges the following sentences of the instruction as fundamentally flawed:

If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you should find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you should give him/her the benefit of the doubt and find him/her not guilty.

(App. 63) (emphasis added). We disagree.

We initially note that Wright concedes that he did not object to the jury instructions during trial; thus, he argues that the purportedly erroneous instruction amounts to fundamental error. Generally, a failure to object during the trial court proceeding results in waiver of that issue for appeal unless the unpreserved error constitutes fundamental error. *See Kimbrough v. State*, 911 N.E.2d 621, 634 (Ind. Ct. App. 2009). To be deemed fundamental, the error must be a substantial blatant violation of basic principles that renders a trial unfair to a defendant. *Geiger v. State*, 721 N.E.2d

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<sup>1</sup> Final Instruction No. 14 given by the trial court was identical to Preliminary Instruction No. 9.

891, 895 (Ind. Ct. App. 1999). Fundamental error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. *Id.*

Jury instructions are within the discretion of the trial court and will not be reversed unless the instructions, when taken as a whole, misstate the law or mislead the jury. *Champlain v. State*, 717 N.E.2d 567, 569 (Ind. 1999).

Wright contends that the trial court invaded the province of the jury by instructing that the jurors “should” find the defendant not guilty if they felt there was a real possibility that he was not guilty. Wright’s Br. at 8. We considered this very issue in *Burgett v. State*, 758 N.E.2d 571, 578 (Ind. Ct. App. 2001), *trans. denied*. In *Burgett*, the defendant challenged the trial court’s use of the term “should” in an identical preliminary instruction on reasonable doubt. In rejecting Burgett’s claim, we opined that

if the jury had not been informed that it had the right to decide both the law and the facts and that it must consider the instructions as a whole, [the challenged preliminary instruction] would have improperly invaded the province of the jury in violation of Ind. Const. Art. 1, § 19. However, the jury was informed of such, as well as all of the essential elements of [the charged offenses]. Therefore, based on the foregoing, we cannot find that the use of the term “should” in the last two sentences of [the challenged preliminary instruction] amounts to fundamental error. The use of the term “should” instructed the jury on what the law contemplates is the proper course for the jury. When considering the preliminary instructions as a whole, we find that [the challenged preliminary instruction] did not absolutely require the jury to do anything. Therefore, the jury still had the right to “determine the law and the facts.” Thus, Burgett has not demonstrated that the trial court committed an error that equates to a substantial blatant violation of basic principles, rendering his trial unfair.

*Id.* (internal citations omitted).

The record here reveals that the trial court instructed the jury of the following: the essential elements of the charged offenses, (Preliminary Instructions Nos. 3 – 6; Final Instructions Nos. 2 – 5); that the jurors “[we]re the exclusive and sole judges of what facts have been proven and . . . may also determine the law for [them]selves,” (Preliminary Instruction No. 11; Final Instruction 17); that each juror “must determine the facts,” (Preliminary Instruction No. 12; Final Instruction No. 18); and that the jury must “consider all the instructions as a whole.” (Preliminary Instruction No. 18; Final Instruction No. 29).

In light of our holding in *Burgett*, we cannot say that the trial court’s instruction on reasonable doubt invaded the province of the jury by requiring a certain course of action. To the contrary, the trial court’s instructions -- considered in whole -- apprised the jury of its right under Article 1, Section 19 to “determine the law and the facts.” Thus, we conclude that Wright has not carried his burden of demonstrating that the trial court committed an error that was a substantial blatant violation of basic principles which rendered his trial unfair. *See Geiger*, 721 N.E.2d at 895. Accordingly, we find no fundamental error in the trial court’s giving of Preliminary Instruction Number 9.

Affirmed.<sup>2</sup>

NAJAM, J., and BAILEY, J., concur.

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<sup>2</sup> We urge the trial court, in the future, to consider using the word “may” instead of “should,” in instructing juries regarding reasonable doubt.