

STATEMENT OF THE CASE

Appellant-Defendant, Joshua W. Weston (Weston), appeals his conviction for Counts I and II, child molesting, Class A felonies, Ind. Code § 35-42-4-3(a)(1).

We affirm.

ISSUES

Weston raises two issues for our review, which we restate as:

- (1) Whether there was sufficient evidence to convict him of both Counts of child molesting; and
- (2) Whether fundamental error occurred when the trial court admitted J.B.'s testimony that his behavior improved after telling his therapist that he was molested.

FACTS AND PROCEDURAL HISTORY

Twin brothers D.B. and J.B. lived with, S.O., who was their aunt and legal guardian, S.O.'s son, and two daughters. D.B. and J.B. considered S.O. to be their mother. D.B. and J.B. became acquainted with Weston because S.O. had dated Weston's cousin, and had lived at S.O.'s house for a period of time before getting his own apartment.

After a while, S.O. began to notice that Weston's relationship with D.B. and J.B. was not "normal behavior at his age to, [] act[] like the boys were his best friends" (Transcript p. 115). On July 25, 2007, S.O. asked D.B. if anything was going on between him and Weston. (Tr. p. 118). D.B. told her that Weston had been "touching him and doing other things," specifically "put[ing] [Weston's] wiener in [his] mouth." (Tr. pp. 118; 56).

On July 30, 2007, S.O. took D.B. to the police station where he was interviewed by New Castle Police Detective Andrew Hood (Detective Hood). Detective Hood drew a sketch of a penis and asked D.B. if he could recall any tattoos, bumps, or bruises on Weston's penis and if so, where it was located. D.B. stated that Weston had a mole below his right testicle and then drew it on the sketch. Detective Hood also interviewed J.B., who had been placed in different behavioral placements for nearly a year.

On October 2, 2007, the State filed an Information, charging Weston with Counts I and II, child molesting, Class A felonies, I.C. § 35-42-4-3(a)(1). Count I was for molesting D.B., and Count II was for molesting J.B. On February 23, 2009, a jury trial was held. The next day, the jury found Weston guilty of both Counts. On March 23, 2009, the trial court sentenced Weston to a total of 60 years to be served in the Department of Correction; 30 years on each Count, to run consecutive to each other.

Weston now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Weston contends there was insufficient evidence to support his convictions for both Counts of child molesting. Our standard of review for reviewing sufficiency of the evidence claims is well settled. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the

evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

Child molesting as a Class A felony is defined by I.C. § 35-42-4-3 as:

(a) A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if:

(1) it is committed by a person at least twenty-one (21) years of age;

Deviate sexual conduct is defined as, “an act involving: (1) a sexual organ of one 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.” I.C. § 35-41-1-9.

Both D.B. and J.B. testified that Weston had molested them on different occasions. D.B. testified that on one occasion while Weston had been living with them, Weston “put [D.B.’s] wiener on his mouth . . . and then he, his sperm came out and then he put it on the towel.” (Tr. p. 56). D.B. stated that while this was happening, Weston put a pillow against the wall with his legs spread as he performed oral sex.

J.B. testified that Weston molested him and his brother while they were all sharing a bed at Weston’s apartment. During J.B.’s cross-examination, he answered in the affirmative that on one occasion, he “[was] sucking [Weston’s] wiener and [D.B.] had to suck [Weston’s] balls.” (Tr. p. 100). D.B. corroborated the testimony when he stated that on that same night, “I was sucking—he, he put me on his nuts and put my head on his nuts and [J.B.] was sucking his wiener. (Tr. p. 74). Because we will not reweigh the evidence or judge their

credibility, their testimony is sufficient to uphold Weston's conviction. *Perez*, 872 N.E.2d at 212-13.

Weston also argues that "no rational jury could convict [Weston] given D.B.'s answer in the affirmative that the sexual abuse happened too many times to count." (Appellant's Br. p. 7). Weston is asking us to reweigh the evidence, which we may not do. Furthermore, we are mindful that the trier of fact is entitled to determine which version of the incident to credit. *Reyburn v. State*, 737 N.E.2d 1169, 1171 (Ind. Ct. App. 2000).

In conjunction with his first argument, Weston argues that D.B.'s testimony was contradictory and we should apply the "incredible dubiousity" doctrine, as D.B. testified that Weston had a mole on the right side of his genitals; however, "photographs published to the jury of Weston's penis and genital area reveal[ed] no such mole." (Appellant's Br. p. 7).

"Within the narrow limits of the 'incredible dubiousity' rule, a court may impinge upon a jury's function to judge the credibility of a witness." *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). We may reverse a conviction if a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence. *Id.* This is appropriate only in the event of inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. *Id.* "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.*

We conclude that the incredible dubiousity rule does not apply here. The rule applies only when a witness contradicts himself in a single statement or while testifying, not to

conflicts between multiple statements. *Glenn v. State*, 884 N.E.2d 347, 356 (Ind. Ct. App. 2008); *see also Newsome v. State*, 686 N.E.2d 868, 875 (Ind. Ct. App. 1997) (observing that the incredible dubiousity rule applies only to internal inconsistencies within the witness's trial testimony and does not apply to inconsistencies between the trial testimony and pre-trial or extra-trial statements made by the witness).

In this case, D.B.'s testimony was not contradictory. During the trial, D.B. testified that when Detective Hood interviewed him, he was asked to describe identifying features on Weston's penis. D.B. told Detective Hood that Weston had a mole "[u]nder his thigh, [], by his nut." (Tr. p. 66). Detective Hood asked D.B. to draw a dot to show where the mole was located on a hand sketched drawing of a penis. The drawing did not show testicles. During the trial, the State introduced this sketch into evidence as State's Exhibit 1. When describing the mole, D.B. stated, "It's right here, but his nuts cover it. It's right below his nuts." (Tr. p. 67).

During D.B.'s cross-examination, Weston used State's Exhibit 1 and asked D.B. to identify where the mole was located. D.B. testified, "It's right at the end, right – there's a – here comes his nut and there's a nut and it's right under the nut." (Tr. p. 72). He went on to state that "It's [the mole] covered." (Tr. p. 72). To discredit D.B., Weston introduced into evidence actual photos of his genital area. While the photos did not show the mole that D.B. described, none of the photos showed the area "below [Weston's] nut" where D.B. repeatedly testified the mole was located. Therefore, Weston is not asking us to examine a sole witness's testimony for incredible dubiousity; instead, he is asking us to reweigh D.B.'s

testimony against evidence presented on his behalf, which we will not do. In addition, it was for the jury to decide how to weigh D.B.'s credibility in light of all the circumstances, and in the absence of "incredibly dubious" testimony we will not impinge on the jury's responsibility to judge witness credibility. *See Kilpatrick v. State*, 746 N.E.2d 52, 60-61 (Ind. 2001).

II. *J.B.'s Testimony*

Weston contends the trial court's admission of J.B.'s testimony regarding his subsequent behavioral improvement constituted fundamental error. Specifically, he argues that the State "relied upon prejudicial evidence by eliciting from J.B. that his behavior when he arrived at Columbus [Behavioral Health] was 'pretty bad' and after he told his therapist . . . his behavior improved." (Appellant's Br. p. 8).

A trial court has broad discretion in ruling on the admissibility of evidence and we will only reverse a trial court's ruling on admissibility of evidence when the trial court has abused its discretion. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequences to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401. The standard of admissibility under this rule is a liberal one. *Kimbrough v. State*, 911 N.E.2d 621, 633 (Ind. Ct. App. 2009).

However, failure to object to the admission of evidence results in waiver of the issue of admissibility on appeal. *Kubsch v. State*, 784 N.E.2d 905, 923 (Ind. 2003). Here, Weston did not object to the State's line of questioning during J.B.'s direct examination. Thus,

Weston has waived his right to present the issue on appeal. *Kubsch*, 784 N.E.2d at 923. To avoid waiver, Weston argues that we should perform a fundamental error analysis. The fundamental error exception to the waiver rule is an extremely narrow one. *Glotsbach v. State*, 783 N.E.2d 1221, 1225-26 (Ind. Ct. App. 2003). To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. *Id.* at 1226. Specifically, the error “must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.” *Id.* (citing *Wilson v. State*, 514 N.E.2d 282, 284 (Ind. 1987)).

Weston cites to *Steward v. Indiana*, 652 N.E.2d 490 (Ind. 1995), *reh’g denied*, where our supreme court discussed whether expert evidence of child sex abuse syndrome, profile or pattern is admissible in a child molestation case to prove that molestation occurred. Weston directs us a portion of the opinion, where our supreme court stated,

Where a jury is confronted with evidence of an alleged victim’s behaviors, paired with expert testimony concerning similar syndrome behaviors, the invited inference – that the child was sexually abused because he or she fits the syndrome profile – will be as potentially misleading and equally as unreliable as expert testimony applying the syndrome to the facts of the case and stating outright the conclusion that a given child was abused.

Steward, 652 N.E.2d at 499. Weston concedes that here, the State did not present expert witnesses but “relied upon prejudicial evidence” from J.B. that his behavior improved after he told his therapist about the molestation and then improperly used this information during closing argument. (Appellant’s Br. p. 8). In the closing argument, the State argued,

[J.B.] went to Community North and then to Columbus Behavioral and didn’t

tell anybody for a long time, and the question is, is why? Well, it's not uncommon for people, whether adults or kids, not to tell anybody what happened. They keep it in them and they don't let it known.

(Tr. pp. 204-05). Weston argues that these comments “[were] bare assertions made by the prosecutor [that J.B. was molested] without the benefit of expert testimony.” (Appellant’s Br. p. 9). We find *Steward* to be inapplicable to the present case.

In this case, the jury heard and the State relied on J.B.’s own testimony in which he described how his behavior improved once he attended therapy at Columbus Behavioral. He stated,

[J.B.]: When I first got there it was pretty bad.

[STATE]: And what was the reason you kept exploding?

[J.B.]: ‘Cause I had to hold on, hold on, hold in all these things and not talk about them because at the time, I didn’t know what to do?

[STATE]: You finally told somebody?

[J.B.]: Yes

(Tr. p. 95). Because all relevant evidence is admissible, J.B.’s testimony about his own personal knowledge before and after therapy was relevant to whether Weston molested him. Ind. Evidence Rule 402. In addition, the jury heard direct testimony from J.B. that between December 26, 2006 and January 2, 2007, Weston had molested him while he was staying at Weston’s apartment. J.B. testified that he had put his mouth on Weston’s penis and that Weston “stuck his private parts in [his] butt.” (Tr. p. 89). Taken together, no error, let alone

fundamental error occurred, as J.B.'s testimony was relevant to whether Weston molested him.

CONCLUSION

Based on the foregoing, we find that: (1) the State presented sufficient evidence to uphold Weston's conviction beyond a reasonable doubt; and (2) no error, let alone fundamental error, occurred when J.B. testified about how his behavior improved after talking to a therapist.

Affirmed.

VAIDIK, J., and CRONE, J., concur.