



Mark Phillips appeals his conviction and sentence for child molesting as a class C felony.<sup>1</sup> Phillips raises two issues, which we revise and restate as:

- I. Whether the evidence is sufficient to sustain his conviction; and
- II. Whether Phillips's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The facts most favorable to the conviction follow. In June 2008, Phillips, who was born on December 24, 1972, and Phillips's partner Quentin Whitfield moved in next door to S.S. and her son, D.S., who was born on August 24, 1998, and her other son, R.S. Phillips and Whitfield went over to S.S.'s house every morning for coffee. S.S. trusted Phillips and considered him to be a friend. D.S. thought of Phillips as a friend, looked up to Phillips, and visited Phillips's house "about every day" and played videogames. Transcript at 427.

In late spring or early summer of 2008, Phillips's sister-in-law and her two children moved in with Phillips and stayed until October 2009. For a period of time, Jeremy Starkey, a family friend of S.S., lived with Phillips and Whitfield. Starkey saw that Phillips had gay pornographic movies in the house and saw gay pornography on the television in Phillips's house. At some point, Phillips said that D.S. was "going to end up being gay." Id. at 587. Phillips also said that D.S. "was a cute looking boy" and that D.S. had "a nice looking butt." Id.

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<sup>1</sup> Ind. Code § 35-42-4-3 (Supp. 2007).

On January 16 or 17, 2009, S.S. allowed R.S. to stay the night at Phillips's house. On January 24, 2009, while S.S. was present, D.S. asked Whitfield if he could spend the night, and Whitfield and S.S. approved the sleepover. During the night of the sleepover, D.S. was watching a movie with Whitfield downstairs and then went upstairs to use the bathroom. Phillips went into the bathroom and told D.S. that D.S. was "going to watch a good movie." Id. at 405. Phillips then played a "bad movie" that had "[b]oys and boys" that were not wearing clothes. Id. at 406.

D.S. stood in front of the television and Phillips stood behind him. Phillips started touching D.S. under his clothes and underwear and touched D.S.'s penis with his hand. Phillips told D.S. not to talk about what had happened. At some point, D.S. left Phillips's room and went downstairs but could not sleep.

Sometime later, D.S. told Starkey about the video that he had watched. Based upon a conversation with Starkey and D.S., S.S. cut off all ties with Phillips. On February 26, 2009, S.S. took D.S. to see Diane Burkhardt, an outpatient therapist at the Otis R. Bowen Center, because he was having some questions regarding his sexuality.

On March 17, 2009, Sergeant Terry Hall gave a presentation discussing body safety and differentiating rude touches from child molestation at D.S.'s school. After the presentation, D.S. indicated that he wanted to speak to someone.

On March 26, 2009, John Lane, a family case manager employed by Huntington County Department of Child Services, interviewed D.S. at McKenzie's Hope Child Advocacy Center. The interview was a child-led process, there was no one present to

coach D.S., and D.S. used age appropriate words. D.S. had a hard time telling Lane what had happened. D.S. told Lane that Phillips's hand had touched his penis. At some point, D.S. began "closing down" and asked to see his mother a couple of times, and Lane decided to take a break. Id. at 394. Lane felt that even before the break that there was additional information D.S. wanted to share.

During the break, Huntington County Investigator Ron Hochstetler, who had been watching the interview via closed circuit television, talked to D.S. because he "wanted to give him a little pep talk and encourage him to tell the truth because [he] just sensed something during the interview that there was more to be told than what was being said." Id. at 523. Investigator Hochstetler told D.S. that he "wasn't the only little boy that this had ever happened to" and asked D.S. if he had told Lane "everything that happened." Id. at 524. At some point, D.S. began talking and Investigator Hochstetler told D.S. to stop talking so that D.S.'s statements could be recorded. Investigator Hochstetler never told D.S. what to say about the abuse that happened to him. During the second part of the interview, D.S. indicated that anal intercourse occurred.

On March 31, 2009, Lane took S.S. and D.S. to the Fort Wayne Sexual Assault Treatment Center. Joyce Moss, a forensic nurse examiner, examined D.S. Moss did not find any injuries, but did not expect to find any because the anus is vascular and heals very quickly.

At some point, the police obtained a search warrant. Before serving the warrant, Investigator Hochstetler told Huntington Police Detective Sergeant Chad Hacker not to

mention why they were investigating Phillips. The police read the search warrant to Phillips, and as a result of the search, the police discovered an “X-box,” two empty DVD cases, and KY personal lubricant. Id. at 496.

Neither Investigator Hochstetler nor Detective Hacker mentioned D.S.’s name prior to Phillips mentioning D.S.’s name during a police interview. Phillips denied any child spending the night with him in his house. Phillips said that the lubricant belonged to D.S.’s grandmother. Phillips admitted that there was “gay porn” in the house. Id. at 544.

On March 27, 2009, the State charged Phillips with Count I, child molesting as a class A felony; Count II, child molesting as a class A felony; and Count III, child molesting as a class C felony.<sup>2</sup>

On October 9, 2009, the State filed a Motion to Introduce Child Hearsay and to Set a Child Hearsay Hearing. At the child hearsay hearing, Hani Amhad, D.S.’s child psychiatrist, testified that D.S. has intense flashbacks and suffers from an extreme form of PTSD. D.S. testified that Phillips had touched him and that he had touched Phillips. Specifically, D.S. testified that he touched Phillips with his hand on the inside of Phillips’s clothes. D.S. also indicated that Phillips never touched him with any part of Phillips’s body other than his hand. A short time later, D.S. testified that Phillips touched D.S.’s anus with his penis. D.S. testified that he never put his penis into Phillips’s anus. After the hearing, the trial court granted the State’s motion and ordered that “the

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<sup>2</sup> On May 6, 2009, the State moved to amend the information by adding an habitual offender charge, which the trial court granted. The prosecutor later dismissed this charge.

statements of [D.S.] in the video can be admitted in to evidence.”<sup>3</sup> Appellant’s Appendix at 90.

At trial, Investigator Hochstetler testified that D.S. indicated during the second part of the interview at McKenzie’s Hope Child Advocacy Center that anal intercourse occurred and that D.S. performed anal intercourse on Phillips. Moss, the forensic nurse examiner, testified that D.S. indicated to her that his genitals were fondled, that he fondled someone else’s genitals, that he put someone else’s penis in his mouth, and that his anus was penetrated by a penis. Moss also testified that D.S. indicated that he noticed blood in his underwear following anal penetration and blood with his first bowel movement following penetration.

D.S. testified that after Phillips touched his penis Phillips told him to “get on the bed.” Transcript at 408. D.S. testified that D.S. “got on to the bed,” and Phillips “laid down behind” D.S., put lotion on his penis, and placed it inside of D.S.’s butt, which hurt D.S. Id. D.S. also testified that Phillips also used his mouth to touch D.S.’s penis and stopped after D.S. kicked him in the chest. D.S. testified that he never touched Phillips with his hand, mouth, or penis. D.S. testified that he did not talk about Phillips’s mouth touching his penis at the child hearsay hearing because he forgot.

D.S. testified that he was scared at the child hearsay hearing, that it makes it hard for him to think when Phillips is in the room, that it took awhile to tell the counselors about the touches, and that it has not always been easy for him to talk about what

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<sup>3</sup> The videotaped interview of D.S. was not admitted as an exhibit at trial.

happened. In addition, Burkhardt, D.S.'s therapist, testified that the trial affected D.S., that his stress level increased, and that he became more aggressive. Burkhardt testified that D.S. had a lot of trouble in treatment and therapy being able to verbalize any of the sexual trauma that occurred and that it would be common for a child to not want to talk about the child touching the perpetrator as the child may feel guilt and may not want to remember those parts of the molestation.

After the jury trial, Phillips was found guilty of Count III, child molesting as a class C felony which alleged that Phillips had touched or fondled D.S. The jury found Phillips not guilty of Count II, child molesting as a class A felony which alleged that Phillips performed or submitted to an act involving a sex organ of one person and the mouth of another person. The jury was unable to reach a verdict on Count I, child molesting as a class A felony which alleged that Phillips performed or submitted to an act involving a sex organ of one person and the anus of another person.

The trial court found no mitigators and the following aggravators: Phillips's lengthy criminal history; "position of trust (child staying overnight);" Phillips's probation violations; the fact that Phillips was on parole at the time of the offense; and the fact that D.S. was under the age of twelve years old. Appellant's Appendix at 138. The court sentenced Phillips to eight years in the Department of Correction.

#### I.

The first issue is whether the evidence is sufficient to sustain Phillips's conviction for child molesting as a class C felony. When reviewing claims of insufficiency of the

evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

The offense of child molesting as a class C felony is governed by Ind. Code § 35-42-4-3, which provides that “[a] person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony.” Thus, to convict Phillips of child molesting as a class C felony, the State needed to prove that Phillips touched or fondled D.S., a child under fourteen years of age, with the intent to arouse or to satisfy the sexual desires of either himself or D.S.

Phillips argues in part that the evidence was insufficient because “the Xbox was broken between Thanksgiving and Christmas of 2008 and was never used after that time.” Appellant’s Brief at 6-7. We observe that D.S. testified that Phillips played a movie on the X-box and Starkey testified that he never knew a time that the X-box was broken. Phillips merely requests that we reweigh the evidence or judge the credibility of the witnesses, which we cannot do. Jordan, 656 N.E.2d at 817.



Phillips also argues that the “State’s case was based entirely on D.S.’s testimony at trial” and that the incredible dubiosity rule applies.<sup>4</sup> Appellant’s Brief at 6-7. Appellate courts may apply the “incredible dubiosity” rule to impinge upon a jury’s function to judge the credibility of a witness. Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007). Under the incredible dubiosity rule, “[i]f a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant’s conviction may be reversed.” Id. “This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity.” 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.

Phillips argues that D.S. gave several inconsistent versions of what happened. Specifically, Phillips argues that: (1) when D.S. was initially interviewed at McKenzie’s Hope Child Advocacy Center “D.S. indicated at first that he was fondled by Phillips and that he fondled Phillips in return. D.S. then indicated that was all that happened;” (2) “the questioning continued until D.S. alleged that oral sex had also been performed on him by Phillips;” (3) after the break in the interview “D.S. disclosed for the first time that

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<sup>4</sup> Phillips also argues that the verdicts of the jury were fatally inconsistent because the verdicts were based on the testimony of D.S. To the extent that Phillips raises a new issue or suggests that this relates to his challenge to the sufficiency of the evidence, we note that the Indiana Supreme Court has held that “[t]he evaluation of whether a conviction is supported by sufficient evidence is independent from and irrelevant to the assessment of whether two verdicts are contradictory and irreconcilable,” and “[j]ury verdicts in criminal cases are not subject to appellate review on grounds that they are inconsistent, contradictory, or irreconcilable.” Beattie v. State, 924 N.E.2d 643, 648 (Ind. 2010).

Phillips performed and submitted to anal intercourse with D.S.;" (4) when D.S. was examined by the forensic nurse examiner, "D.S. indicated that he fondled Phillips and Phillips fondled him, that he and Phillips performed oral sex with each other, and that Phillips performed anal sex with D.S.;" (5) at the child hearsay hearing D.S. "testified that he was fondled by Phillips and that Phillips performed anal intercourse with him" and "indicated that no oral sex occurred, and that he never touched Phillips;" and (6) at trial D.S. "testified that Phillips fondled him, performed oral sex on him, and performed anal sex with him."<sup>5</sup> Appellant's Brief at 7.

We observe that Phillips's arguments based upon the interview at McKenzie's Hope Child Advocacy Center were based upon Investigator Hochstetler's recollection of the interview and not the interview itself or D.S.'s testimony.<sup>6</sup> We also observe that Phillips cites to the testimony of the forensic nurse examiner and not D.S.'s testimony for his argument that D.S.'s statements to the forensic nurse examiner were inconsistent.

To the extent that Phillips argues that there are inconsistencies between D.S.'s statements at the child hearsay hearing and his testimony at trial, we acknowledge that a discrepancy exists. At the hearing, D.S. indicated that he touched Phillips and that no

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<sup>5</sup> To the extent that Phillips argues that there are inconsistencies in D.S.'s statements at the child hearsay hearing and his testimony at trial, we observe that Phillips does not cite to the record. We remind Phillips that Ind. Appellate Rule 46(A)(8) provides that "[e]ach contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22."

<sup>6</sup> At trial, when asked whether he reviewed the interview prior to the child hearsay hearing, Investigator Hochstetler testified: "It was prior to that, yes but, but again, it's been a long, it was actually time prior to that hearing because I, I wasn't prepared to have to testify on what was said during the interview." Transcript at 552.

other part of Phillips's body other than his hand and penis touched D.S. At the trial, D.S. testified that Phillips used his mouth to touch D.S.<sup>7</sup> During direct examination of D.S., the following exchange occurred:

Q: Do you remember you had to come in the courtroom last week and talk?

A: Yes.

Q: Okay. When you did that um, did you talk about [Phillips's] mouth touching your penis?

A: Yes.

Q: Okay. Did you, did you say last week, did you talk about it?

A: No.

Q: Okay and why did you not talk about it last week?

A: Cause I forgot.

Transcript at 417. D.S. testified that he was "very scared" at the child hearsay hearing, that it makes it hard for him to think when Phillips is in the room, and that it took awhile to tell the counselors about the touches and that it has not always been easy for him to talk about what had happened. Id. at 418. We also observe that D.S. was consistent in his statements at the hearing and at the trial that Phillips touched his penis.

Having reviewed the record, we find that the testimony of ten-year-old D.S. was not so incredibly dubious or inherently improbable that no reasonable person could

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<sup>7</sup> As previously noted, Phillips does not cite to the record for the proposition that D.S. indicated that no oral sex occurred at the child hearsay hearing. Our review of the record reveals that D.S. indicated that Phillips did not touch D.S. with any part of his body other than Phillips's hand and penis, but was never explicitly asked whether Phillips used his mouth.

believe it. While there are inconsistencies between some of D.S.'s statements, the inconsistencies "are appropriate to the circumstances presented, the age of the witness, and the passage of time between the incident and the time of [his] statements and testimony." Fajardo, 859 N.E.2d at 1209. Based upon the facts set forth above, we conclude that the State presented evidence of probative value from which a reasonable jury could have found Phillips guilty of child molesting as a class C felony. See, e.g., id. (holding that the incredible dubiousity rule was inapplicable and affirming the defendant's conviction for child molesting); Surber v. State, 884 N.E.2d 856, 869 (Ind. Ct. App. 2008) (holding that the testimony of the six-year-old victim was not so incredibly dubious or inherently improbable that no reasonable person could believe it), trans. denied.

## II.

The next issue is whether Phillips's sentence is inappropriate in light of the nature of the offense and the character of the offender. 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). Phillips argues that the nature of the offense and his character do not warrant a maximum sentence and that we should reduce his sentence to the advisory sentence of four years.

Initially, we note that Phillips received the maximum sentence. See Ind. Code § 35-50-2-6 (Supp. 2005). In general, the maximum possible sentences are generally most appropriate for the worst offenders. Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002). This is not, however, a guideline to determine whether a worse offender could be imagined. Id. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Id. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment. Id. But such class encompasses a considerable variety of offenses and offenders. Id.

Our review of the nature of the offense reveals that S.S. trusted Phillips and considered him to be a friend and that ten-year-old D.S. also considered Phillips to be a friend and looked up to Phillips. During a sleepover, Phillips showed D.S. a pornographic video, touched D.S. under his clothes and underwear, and touched D.S.'s penis with his hand. Phillips told D.S. not to talk about what had happened. As a result of the offense, D.S. experienced difficulty in school and sought counseling.

Our review of the character of the offender reveals that Phillips served in the Army National Guard from February 1997 until June 1999 and received a general honorable discharge. As a juvenile, Phillips was adjudicated a delinquent for three counts of theft. As an adult, Phillips was convicted of false informing and at least four counts of check deception in 1992. In 1993, Phillips was found in contempt of court. In 1994, Phillips was charged with three counts of driving while suspended. The

presentence investigation report (“PSI”) reveals that the disposition of two of the counts were unknown and one of the charges resulted in judgment being withheld on the condition of paying fines and court costs. In 1996, Phillips was charged with criminal recklessness, operating without financial responsibility, driving left of center, and false registration. Phillips was sentenced to sixty days with all time suspended and one year of informal probation. In 1997, Phillips was convicted of at least five counts of check deception. In 1998, Phillips was convicted of driving while suspended and two counts of check deception. That same year, Phillips was charged with failure to appear but the PSI indicates that the disposition was unknown. In 1999, Phillips was convicted of escape as a felony. In 2000, Phillips was charged with disorderly conduct and trespass and was sentenced to three days in jail. In 2001, Phillips was convicted of disorderly conduct. That same year, Phillips was charged with battery and damage to property, but the charges were dismissed. In 2002, Phillips was charged with possession of marijuana, but the PSI indicates that the disposition was unknown. In 2005, Phillips was convicted of non-support of a dependent child as a felony. The PSI also reveals that Phillips has violated his probation on multiple occasions.

Under the circumstances and after due consideration of the trial court’s decision, we cannot say that the eight-year sentence is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Garland v. State, 855 N.E.2d 703, 711 (Ind. Ct. App. 2006) (holding that the maximum sentence for child molesting was not inappropriate in light of the nature of the offenses and his character), trans. denied.

For the foregoing reasons, we affirm Phillips's sentence for child molesting as a class C felony.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.