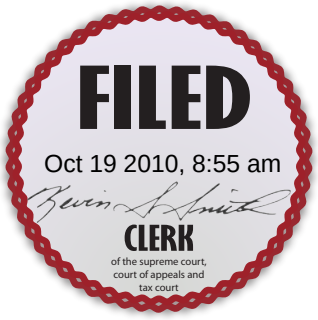

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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM D. OSBORN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A04-0911-CR-670
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Randall L. Johnson, Judge
Cause No. 27D02-0812-FA-193

October 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

William D. Osborn appeals his conviction, after a jury trial, of three counts of child molesting, as class C felonies.

We affirm.

ISSUE

Whether sufficient evidence supports the convictions.

FACTS

From the time that K.H.[1] was a baby, she lived with her mother S. ("Mother"), her brother C.H. (who was three years older than K.H.), and Osborn. In 1998, Mother and Osborn had a daughter, N.O., and they subsequently married.

When K.H. was nine years old, Osborn began molesting her. While Mother was at work, Osborn would have K.H. join him on his bed for "naps." Tr. 173. There were "lots" of these naps, "dozens of them." *Id.*

When K.H. was "ten," or "maybe nine," he "put lotion all over [her] body" when she "was completely naked." *Id.* at 155. On another occasion, Osborn had both K.H. and N.O. in his bed "taking a nap." *Id.* at 152. While N.O. was asleep, Osborn's hands "move[d]" over K.H.'s back and "front side," where he "rub[bed] over" her breasts. *Id.*

On a later occasion, K.H. and Osborn were in his bed with K.H. "in front of him" and "pressed up against" him. *Id.* at 151. K.H. "had a bra and underwear on," but Osborn "didn't have anything on." *Id.* Osborn "moved [her] hand" to place it "on him," such that she was "touching" his erect penis, while he was "breathing heavy." *Id.*

[1] K.H. was born October 12, 1996.

On a subsequent occasion, while Mother was on her "three to eleven" shift at work, K.H. was "tak[ing] a nap," "like usual," with Osborn "massag[ing] [her] body, rub[bing] all over it." *Id.* at 150, 149. This time, "when he was rubbing [her] legs," he "rubbed over [her] vagina," "put[ting] pressure" and "push[ing]" there but not penetrating her with his finger, and "breathing heavy." *Id.* at 149, 150.

Finally, in 2008, "when [she] was 12," Osborn and K.H. were lying in his bed "to take a nap like always" while Mother was at work. *Id.* at 147, 143. Osborn "was . . . massaging [her] back and rubbing [her] body," and both were naked. *Id.* He "pulled" her "on top of him," with her "legs . . . on the side of him," and moved her "up and down on top . . . of him . . . pressed up against him." *Id.* at 174, 143. Osborn was breathing hard, and his penis was erect, rubbing against her vaginal area. Wet "stuff . . . came out of" his penis. *Id.* at 143. C.H. "knocked on the door," and Osborn "told [K.H.] to get up and get dressed and go clean [her]self off." *Id.*

At some point during 2008, K.H. told Mother that Osborn had massaged her for relief from her menstrual cramps. *Id.* at 153. Mother "talked to him" and told him "not to do that 'cause [K.H.] felt uncomfortable." *Id.* After that, Osborn "didn't massage [K.H.] for a while," but "then that last thing happened" wherein she "was on top of him." *Id.*

Osborn never told K.H. not to tell Mother about what he did to her, but did "say[] that, 'If your mom knew about this, she would flip.'" *Id.* at 161. K.H. "felt that if [she] told," Mother's "life would be ruined because that's the man that she loved," and it would destroy K.H.'s "family." *Id.* at 142. Nevertheless, during the "short three day

week" before Thanksgiving in 2008, K.H. told her friend C.B. that Osborn was "doing things to [her] that he shouldn't have been." *Id.* at 138. C.B. advised her "to tell [her] mom." *Id.* The day after Thanksgiving, K.H. told Mother but did "not tell" her "every detail" because K.H. "was scared and . . . was just worried that she would think it was [her] fault." *Id.* at 179. Mother ordered Osborn to move out of the home immediately.

On December 31, 2008, the State charged Osborn with four counts of child molesting.[2] On September 28 – October 1, 2009, Osborn appeared for trial by jury. K.H. testified to the above. In addition, the jury viewed the recorded December 23, 2008 interview of K.H. by a Child Protective Services counselor. Therein, K.H. reported the same facts elicited at trial. The jury returned verdicts finding Osborn guilty of three counts of child molesting, as class C felonies.

DECISION

Osborn asserts that there was insufficient evidence to sustain his convictions. He asks that we "examine this case under the incredible dubiosity rule," and that we "reweigh the credibility of K.H." Osborn's Br. at 17.

The offense of child molesting, as a class C felony, is defined as follows:

> 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 the intent to arouse or to satisfy the sexual desire of either the child or the older person, commits child molesting, a class C felony.

Ind. Code § 35-42-4-3(b).

[2] Osborn was initially charged with one count of class A child molesting, and three counts of class C child molesting. However, the charging information was amended such that Osborn was tried with four counts of child C child molesting.

As our Supreme Court has stated,

> In addressing a claim of insufficient evidence, an appellate court must consider only the probative evidence and reasonable inferences supporting the judgment, without weighing evidence or assessing witness credibility, and determine therefrom whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Appellate courts may, however, 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) (internal citations omitted). It then noted that the

> rule is expressed as follows:
> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. 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.

Osborn presents what he characterizes as thirteen "problem areas" of K.H.'s testimony. Osborn's Br. at 17. He concedes that "[n]one" of these, "standing alone require a reversal" but argues that combined, they "show[] that K.H.'s testimony is incredibly dubious," such that her "testimony will not sustain a conviction." *Id.* at 24. We are not persuaded.

Each of the purported "problem areas" of K.H.'s testimony was argued to the jury in his counsel's closing argument. Despite these express challenges to K.H.'s credibility, the jury did not find her testimony to be "so incredibly dubious or inherently improbable" that they could not "believe it." 859 N.E.2d at 1208. Having reviewed not only the trial

transcript, but having also viewed K.H.'s statements and demeanor in her recorded interview eight months before the trial, we also find that her testimony "was not so incredibly improbable that no reasonable person could believe it." *Id.* at 1209.

There was clear, unequivocal testimony by K.H. "that established the charged offense[s]." *Fajardo*, 859 N.E.2d at 1209. Hence, we decline to invoke the incredible dubiosity rule to impinge on the jury's evaluation of the evidence in this case and conclude from the evidence that a reasonable trier of fact could have found Osborn guilty beyond a reasonable doubt. *Id.*

Affirmed.

BROWN, J., and BRADFORD, J., concur.