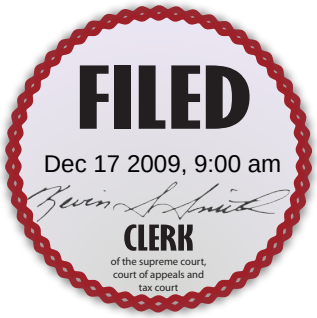

ATTORNEY FOR APPELLANT:

MARCE GONZALEZ, JR.
Dyer, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

STEVEN EDWARD LEWIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0902-CR-69
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0702-FC-20

December 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Steven Lewis appeals his conviction for Class C felony child molesting. The trial court admitted several hearsay statements by the victim pursuant to the Protected Person Statute, Indiana Code section 35-37-4-6. We hold that (1) the trial court erred by not instructing the jury in accordance with the Protected Person Statute, but the trial court's omission did not constitute fundamental error, (2) counsel did not render ineffective assistance by failing to tender a Protected Person Statute instruction, and (3) the victim witness's testimony was not so incredibly dubious as to render the evidence insufficient to support the defendant's conviction. We affirm.

Facts and Procedural History

Steven lived in Cedar Lake with his wife, Jennelle, and their two daughters, O.L. and S.L. O.L. was three years old and S.L. was an infant. Steven also had a ten-year-old step-niece, K.V. K.V. would periodically visit to play with her cousins. On December 26, 2006, K.V. came to the house to play and sleep over. She spent most of the day with Jennelle, O.L., and S.L.

Steven was at work during the day but returned home around 5 p.m. He took a shower, ate dinner, played with the kids, and watched television. At approximately 10 p.m., Steven put K.V. and O.L. to sleep. K.V. slept in O.L.'s room. They shared a twin bed. Steven and Jennelle went to sleep in their own room around 10:30 p.m.

K.V. was a restless sleeper. She kicked in her sleep and woke up O.L. several times. O.L. called for her mother. Around 4 a.m., Jennelle brought O.L. in to sleep with her and Steven.

Steven was snoring, so at about 4:15 a.m. Jennelle woke him up and told him to roll over. Steven decided to go sleep on the living room couch since he would have to go to work soon. He got out of bed and went to retrieve a pillow from O.L.'s room. Jennelle went to the bathroom at the same time. The bathroom was situated between her room and O.L.'s room. Jennelle saw Steven enter O.L.'s room, leave with a pillow, and proceed to the living room couch.

K.V. woke up twice that night. The first time she woke up because her pillow had fallen to the floor. The second time she apparently awoke to Steven touching her in her private area with his hand.

The next morning Jennelle and K.V. were talking at the coffee table. Jennelle asked K.V. how she slept. K.V. told Jennelle that she had woken up because Steven touched her. Jennelle asked her more questions and discovered that Steven had touched K.V.'s private area. K.V.'s mother Jennifer ultimately came to the house to talk with K.V. and Jennelle. K.V. told Jennifer that she had been touched beneath her underwear. Jennifer notified authorities and brought K.V. to the hospital for a physical examination.

Two days later K.V. spoke to Detective Michelle Weaver of the Lake County Sheriff's Department Family and Domestic Service Bureau. K.V. told Detective Weaver that Steven had watched television with her and the others on the night in question. She said that when Steven came into her room in the middle of the night, she could see his shadow. She explained that when he touched her, she was lying on her stomach, and she was touched both on her butt and between the legs.

The State charged Steven with Class C felony child molesting. At trial the State called K.V., Jennelle, Jennifer, and Detective Weaver to testify to the foregoing events.

K.V. testified in court that she could not recall whether Steven had tucked her into bed. She said that the first time she saw Steven that night was when he touched her. She could see the outline of his face. She said she was lying on her back and Steven touched her only in the front. Steven touched her inside her underwear, "[w]here I go pee from." Tr. p. 36. He used his "whole hand," and his hand was "moving." *Id.* at 42. "[I]t wasn't a real short touch, it wasn't quick[.]" *Id.* at 38. K.V. flipped over to make Steven stop. Steven then left the room, and K.V. fell asleep sometime thereafter. The State also played Detective Weaver's videotaped interview for the jury.

Steven testified in his own defense and denied ever touching K.V. He explained that he went into O.L.'s bedroom, grabbed a pillow off the bed, and "went right in the living room and laid on the couch." *Id.* at 202.

The court instructed the jury that "[y]ou are the exclusive judges of the evidence, which may be either witness testimony or exhibits. In considering the evidence, it is your duty to decide the value you give to the exhibits you receive and the testimony you hear." Appellant's App. p. 78. The court also instructed that "[i]n determining the value to give to a witness's testimony, some factors you may consider are" "the witness's ability and opportunity to observe"; "the behavior of the witness while testifying"; "any interest, bias or prejudice the witness may have"; "any relationship with people involved in the case"; "the reasonableness of the testimony considering the other evidence"; and "your knowledge, common sense, and life experiences." *Id.*

During deliberations, the jury asked to see K.V.'s taped interview again. The trial court permitted the jury to view it.

The jury found Steven guilty as charged. He now appeals.

Discussion and Decision

Steven raises three issues which we restate as follows: (1) whether the trial court erred by not instructing the jury pursuant to the Protected Person Statute, Indiana Code section 35-37-4-6(h), (2) whether trial counsel rendered ineffective assistance by not tendering a Protected Person Statute instruction, and (3) whether the victim's testimony was so incredibly dubious as to render the evidence insufficient to sustain Steven's conviction.

I. Protected Person Statute Instruction

Steven first argues that the trial court erred by not instructing the jury in accordance with the Protected Person Statute, Indiana Code section 35-37-4-6(h). Steven concedes that he did not tender the instruction or object to the court's omission at trial. Failure to tender an instruction ordinarily results in waiver of the issue for review. *Ortiz v. State*, 766 N.E.2d 370, 375 (Ind. 2002). Steven therefore argues that the court's failure to provide a Protected Person Statute instruction constituted fundamental error. Fundamental error is a "substantial, blatant violation of due process." *Hopkins v. State*, 759 N.E.2d 633, 638 (Ind. 2001). In order for error to be deemed fundamental and warrant reversal, the error must be so prejudicial to the rights of a defendant so as to make a fair trial impossible. *Id.*

The Indiana legislature has created special procedures for introducing evidence that is "not otherwise admissible" in cases involving crimes against children and the mentally disabled. *Pierce v. State*, 677 N.E.2d 39, 43 (Ind. 1997). The Protected Person Statute (PPS), Indiana Code section 35-37-4-6, allows for the admission of otherwise inadmissible hearsay evidence relating to specified crimes whose victims are deemed "protected persons." *Tyler v. State*, 903 N.E.2d 463, 465 (Ind. 2009). The statute provides as follows:

> (d) A statement or videotape that:
>
> (1) is made by a person who at the time of trial is a protected person;
>
> (2) concerns an act that is a material element of an [enumerated offense such as child molesting] that was allegedly committed against the person; and
>
> (3) is not otherwise admissible in evidence;
>
> is admissible in evidence in a criminal action for an [enumerated offense such as child molesting] if the requirements of subsection (e) are met.
>
> (e) A statement or videotape described in subsection (d) is admissible in evidence in [an enumerated criminal action] if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:
>
> (1) The court finds, in a hearing:
>
> (A) conducted outside the presence of the jury; and
>
> (B) attended by the protected person;
>
> that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.
>
> (2) The protected person:
>
> (A) testifies at the trial; or
>
> (B) is found by the court to be unavailable as a witness for [an enumerated reason.]
>
> (f) If a protected person is unavailable to testify at the trial for a reason listed in subsection (e)(2)(B), a statement or videotape may be admitted in evidence under this section only if the protected person was available for cross-examination:
>
> (1) at the hearing described in subsection (e)(1); or
>
> (2) when the statement or videotape was made.

Ind. Code § 35-37-4-6. Our Supreme Court recently explained that the purpose of the PPS is

> to spare children the trauma of testifying in open court against an alleged sexual predator. Balanced against these considerations are concerns for the defendant's right to a fair trial, specifically, the Sixth Amendment right "to be confronted with the witnesses against him," and the right under article I, section 13 of the Indiana Constitution to meet witnesses "face to face." And, of course, the policies underlying the hearsay rule come into play. Aside from these issues, some have expressed specific concerns regarding children's suggestibility and have also questioned their capacity for accurate perception and memory.
>
> The PPS addresses these concerns in two ways. First, the trial court must find any video taped statements to be reliable before they may be admitted. Second, the protected person must be made available for cross-examination.

Tyler, 903 N.E.2d at 466 (citations omitted).[1] Furthermore, subsection (h) of the PPS provides for the trial court to mandatorily instruct the jury as follows:

> If a statement or videotape is admitted in evidence under this section, the court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement or videotape and that, in making that determination, the jury shall consider the following:
>
> (1) The mental and physical age of the person making the statement or videotape.
>
> (2) The nature of the statement or videotape.
>
> (3) The circumstances under which the statement or videotape was made.
>
> (4) Other relevant factors.

---

[1] In *Tyler*, our Supreme Court exercised its supervisory powers and held that if

> statements are consistent and both are otherwise admissible, testimony of a protected person may be presented in open court or by prerecorded statement through the PPS, but not both except as authorized under the Rules of Evidence. If the person is able to testify live without serious emotional distress such that the protected person cannot reasonably communicate, that is clearly preferable.

903 N.E.2d at 467. The Court further explained that "[r]ules implemented by use of supervisory powers are not applicable to proceedings conducted prior to publication." *Id.* Steven's trial took place before the publication of *Tyler*, so he would not have received the benefit of its prospective rule. We therefore note, *sua sponte*, that the trial court did not err by admitting both K.V.'s live testimony and her videotaped interview.

We agree with Steven that the trial court erred as a matter of law by failing to instruct the jury in accordance with Section 35-37-4-6(h). The statute unambiguously requires the court to instruct the jury as to the factors relevant in evaluating the credibility of a protected person's out-of-court statements. *Cf. Bell v. State*, 820 N.E.2d 1279, 1284 (Ind. Ct. App. 2005) (noting that the instruction is "mandated by statute"), *trans. denied*.

However, we do not believe the trial court's omission rises to the level of fundamental error. The court did instruct the jury that "[y]ou are the exclusive judges of the evidence, which may be either witness testimony or exhibits. In considering the evidence, it is your duty to decide the value you give to the exhibits you receive and the testimony you hear." The court further instructed that "[i]n determining the value to give to a witness's testimony, some factors you may consider are" "the witness's ability and opportunity to observe"; "the behavior of the witness while testifying"; "any interest, bias or prejudice the witness may have"; "any relationship with people involved in the case"; "the reasonableness of the testimony considering the other evidence"; and "your knowledge, common sense, and life experiences." The substance of the PPS admonition was covered in large part by the foregoing instructions, and Steven has not shown that he was prejudiced such that a fair trial was made impossible. We therefore hold that the trial court's failure to submit the PPS instruction did not constitute fundamental error.

II. Ineffective Assistance of Counsel

Steven next argues that trial counsel rendered ineffective assistance by failing to tender a PPS instruction. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel performed deficiently and the deficiency

resulted in prejudice. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). If we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Id.*; *see also Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."). In order to prove prejudice stemming from ineffective assistance, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of his criminal proceeding would have been different. *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009) (citing *Strickland*, 466 U.S. at 694).

Steven contends that because the trial court would have been required to instruct the jury pursuant to the PPS, trial counsel's failure to tender such an instruction constituted deficient performance. The State responds that defense counsel's decision could be justified as sound trial strategy. *Cf. Bell*, 820 N.E.2d at 1283 (in which counsel tried to prevent submission of a PPS instruction to avoid undue emphasis on the protected person's testimony).

Even if we assume without deciding that counsel's performance was deficient, Steven has failed to meet his burden of showing the deficiency resulted in prejudice. As noted above, the trial court submitted several instructions to the jury which covered the substance of the omitted PPS instruction. Steven has not shown a reasonable probability that, had counsel successfully requested the specific PPS instruction, the outcome of his

trial would have been different. We conclude that Steven was not prejudiced by counsel's omission. *See Curtis v. State*, 905 N.E.2d 410, 417 (Ind. Ct. App. 2009) ("[T]he record indicates that the jury received numerous instructions on the issue of assessing witness credibility. Thus, even if a specific instruction pursuant to the child hearsay statute had been appropriate, its absence was not prejudicial."), *trans. denied*.

III. Sufficiency of the Evidence

Steven finally argues that the State's evidence is insufficient to sustain his conviction. Our standard of review with regard to sufficiency 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. *Fought v. State*, 898 N.E.2d 447, 450 (Ind. Ct. App. 2008). We will consider only the evidence most favorable to the judgment 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.* A conviction may be based upon circumstantial evidence alone. *Id.* Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

Steven was convicted of Class C felony child molesting. Indiana Code section 35-42-4-3(b) 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.

Mere touching alone is not sufficient to constitute the crime of child molesting. *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000). The State must also prove beyond a

reasonable doubt that the act of touching was accompanied by the specific intent to arouse or satisfy sexual desires. *Id.* The intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points. *Id.*

K.V. testified that Steven touched her inside her underwear, "[w]here I go pee from." Tr. p. 36. He used his "whole hand," and his hand was "moving." *Id.* at 42. "[I]t wasn't a real short touch, it wasn't quick[.]" *Id.* at 38. We find sufficient evidence of probative value from which the jury could conclude that Steven touched K.V. with the intent to arouse his or her sexual desires. *See, e.g.*, *Stanage v. State*, 674 N.E.2d 214, 216 (Ind. Ct. App. 1996) (finding evidence sufficient to sustain child molesting conviction, where victim testified that the defendant "touched her in her 'private parts'").

Steven nonetheless invokes the "incredible dubiosity" rule and argues that K.V.'s testimony was too unreliable and untrustworthy to sustain his conviction. The incredible dubiosity rule provides that a court may "impinge on the jury's responsibility to judge the credibility of witnesses only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity." *Murray v. State*, 761 N.E.2d 406, 408 (Ind. 2002). The application of this rule is limited to where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt. *James v. State*, 755 N.E.2d 226, 231 (Ind. Ct. App. 2001), *trans. denied*. "[A]pplication 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." *Stephenson v. State*, 742 N.E.2d 463, 498 (Ind. 2001) (quotation omitted).

The State first responds that the incredible dubiosity rule is inapplicable because the State offered testimony from multiple corroborating witnesses. Steven argues that although the State called more than one witness, only K.V. provided substantive evidence of the offense charged. Jennelle, Jennifer, and Detective Weaver either relayed K.V.'s statements describing what happened or added undisputed, collateral details. We agree with Steven that for all intents and purposes, this case involves a "sole" witness within the purview of the incredible dubiosity rule. *See West v. State*, 907 N.E.2d 176, 177-78 (Ind. Ct. App. 2009) (observing that "the rule of incredible dubiosity is not necessarily rendered inapplicable merely because more than one witness testifies for the State"); *Fajardo v. State*, 859 N.E.2d 1201, 1208-09 (Ind. 2007) (entertaining incredible dubiosity argument in child molesting case, where the State offered testimony of the child, the child's mother, a Child Protective Services caseworker, and the forensic pediatrician/child abuse consultant who examined the child).

That being said, we do not find K.V.'s testimony so equivocal or inherently contradictory such that no rational jury could believe it. We acknowledge inconsistencies between K.V.'s out-of-court statements and her trial testimony. K.V. told Detective Weaver that Steven had watched television with her that night, that she had been lying on her stomach when Steven touched her, that she could see his shadow, and that Steven touched her on the butt and between the legs. At trial K.V. testified that the first time she saw Steven that night was when he touched her, that she had been lying on her back, that

she could see the outline of his face, and that Steven touched her only in the front. But in the words of our Supreme Court,

> [w]hile equivocations, uncertainties, and inconsistencies appear, they are appropriate to the circumstances presented, the age of the witness, and the passage of time between the incident and the time of her statements and testimony. And there is clear, unequivocal testimony from the child that establishes the necessary elements of the charged offense.

Fajardo, 859 N.E.2d at 1209.

For the reasons stated, we find sufficient evidence to sustain Steven's conviction, and we do not find the victim witness's testimony so incredibly dubious as to impinge on the jury's evaluation of the evidence in this case.

Affirmed.

RILEY, J., and CRONE, J., concur.