MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dylan S. Lopez,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 19, 2022

Court of Appeals Case No. 22A-CR-671

Appeal from the LaPorte Circuit Court

The Honorable Thomas Alevizos, Judge

Trial Court Cause No. 46C01-1809-F1-1011

Bailey, Judge.

Case Summary

[1] Dylan Lopez appeals his convictions following a jury trial for child molesting, as a Class B felony;[1] attempted child molesting, as a Class B felony;[2] attempted child molesting, as a Level 1 felony;[3] child solicitation, as a Class D felony;[4] and child solicitation, as a Level 5 felony.[5] Lopez raises one issue for our review, namely, whether the State presented sufficient evidence to support his convictions. We affirm in part, reverse in part, and remand.

Facts and Procedural History

[2] Michelle Ellian ("Mother") and Mario Lopez ("Father") have two children together: J.L., born May 22, 2006, and A.L., born November 22, 2007. In addition, Father has one child from a previous relationship, Lopez, who was born on December 12, 1991. In 2011, Mother and Father lived in a home on Small Road in LaPorte with J.L. and A.L. Lopez lived elsewhere, but he would go over to the house to "help out with the kids," and he would sometimes spend the night. Tr. Vol. 2 at 223.

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[1] Ind. Code § 35-42-4-3(a) (2012)

[2] I.C. § 35-41-5-1; I.C. § 35-42-4-3(a)

[3] I.C. § 35-41-5-1; I.C. § 35-42-4-3(a) (2015)

[4] I.C. § 35-42-4-6(b) (2012)

[5] I.C. § 35-42-4-6(b) (2015)

[3] When J.L. was four or five years old, Lopez began "touching" her inappropriately. *Id*. at 201. Lopez would enter J.L.'s room, lock the door, "unzip his pants," and ask J.L. to "touch . . . his area." *Id*. at 202. Sometimes, Lopez would sit on the floor with J.L., "put a blanket over [her] head, and "ask [her] to lick" his penis. *Id*. at 202-03. J.L. "usually wouldn't use" her mouth, but she would "lick [her] fingers and . . . put it on his area." *Id*. at 204. She would then "rub[] her fingers on it . . . [u]p and down." Tr. Vol. 3 at 204-05. Lopez would "realize" that J.L. was not using her mouth, and he would "tell [her] to use [her] mouth instead of [her] fingers." *Id*. at 206. Lopez would "sometimes" place his hands "on [J.L.'s] head" and "push[]" her head down toward "[h]is area." *Id*. at 207. At least once, J.L.'s mouth "touch[ed] his area." *Id*. at 208. The "tip" of Lopez's penis "went in [J.L.'s] mouth . . . a little bit." *Id*. at 209. Other times, Lopez would sit on the edge of J.L.'s bed, "undo his pants," "grab [J.L.'s] hand, and "make [her] touch his area." *Id*. at 210. He would also "push [J.L.'s] head down." *Id*. at 208. When the touching would stop, Lopez would tell J.L. that "it was ok and not to tell anybody." *Id*. at 215.

[4] At some point, Mother and Father ended their relationship, and Father got custody of J.L. and A.L. in June 2013. Mother did not see them for several years. At or shortly after Father got custody of the children, he and the children left the house on Small Road and briefly moved in with Father's new girlfriend. While they lived with Father's girlfriend, Lopez would not babysit the kids. Then, in February 2015, Father and the children moved in with Father's

mother ("Grandmother"). Lopez would again "help[] out" with the children, and he would spend the night "[o]n and off." Tr. Vol. 2 at 228.

[5] While at Grandmother's house, Lopez would sit on the couch with J.L. and show her "adult videos" on his phone. Tr. Vol. 3 at 216. A.L. would be in the same room, but Lopez and J.L. would "hide it" from A.L. *Id.* at 218. After Lopez finished showing J.L. the videos, he "would take [J.L.] into the bathroom" and lock the door. *Id.* Lopez would then "unzip his pants and his area would be out" and he would "repeatedly ask [J.L.] to touch it and stuff like that." *Id.* Lopez did not "try to force [J.L.'s] head down," but "he would keep [her] in the bathroom for long periods of time." *Id.* at 219. Lopez would repeat "touch it" or say, "just do it, it will be fine, and stuff like that." *Id.* at 219. That happened "[m]ore than one time" while at Grandmother's house. *Id.* at 220

[6] When J.L. was nine years old, she watched a "good-touch bad-touch" program at her school. Tr. Vol. 2 at 231. After that program, J.L. told Father about Lopez's actions. Father took J.L. to see a counselor. Based on J.L.'s allegations against Lopez, the counselor filed a report with the Indiana Department of Child Services ("DCS"). DCS supervisor Molly McIntyre received the report and contacted Father. McIntyre recommended that J.L. undergo a forensic interview. Father "didn't believe" J.L., so he did not take her for the interview. *Id.* at 233.

[7] Beginning in 2016, Mother began contacting the children. At the end of that school year, the children moved to Ohio to live with Mother. After the next

school year started, J.L. disclosed to a friend what Lopez had done. The school counselor then contacted J.L., and J.L. told the counselor that Lopez had "touch[ed]" her "when [she] was living with" Father. Tr. Vol. 3 at 228. The counselor then contacted Mother, who took J.L. for a forensic interview. Mother also spoke with police officers.

[8] The State filed an amended information against Lopez and charged him with child molesting, as a Class B felony (Count 1); child molesting, as a Class B felony (Count 2); attempted child molesting, as a Class B felony (Count 3); attempted child molesting, as a Level 1 felony (Count 4); child solicitation, as a Class D felony (Count 5); and child solicitation, as a Level 5 felony (Count 6). The court held a three-day jury trial beginning on November 20, 2021. After the State had rested, Lopez moved for a directed verdict on all counts. The State moved to dismiss Count 2, which motion the court granted. The court then denied Lopez's motion as to Counts 1 and 3 but took the matter under advisement as to Counts 4, 5, and 6. The jury found Lopez guilty as charged.

[9] Following the trial, the court held a hearing on Lopez's pending motion for a directed verdict and allowed the parties to submit briefs. Thereafter, at the sentencing hearing on February 23, 2022, the court denied Lopez's motion and entered judgment of conviction against him on all remaining counts. The court then sentenced Lopez as follows: eleven years on Counts 1 and 3; thirty years, with five years suspended on Count 4; eighteen months on Count 5; and three years on Count 6. The court ordered all of the sentences to be served

concurrently, for an aggregate sentence of thirty years, with five years suspended. This appeal ensued.

Discussion and Decision

[10] Lopez contends that the State failed to present sufficient evidence to support his convictions. Our standard of review on a claim of insufficient evidence is well settled:

> For a sufficiency of the evidence claim, we look only at the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh the evidence. *Id*. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*.

Love v. State, 73 N.E.3d 693, 696 (Ind. 2017).

[11] We first address Lopez's argument that the evidence is insufficient to support any of his convictions because "J.L.'s testimony was not logical or credible and was inconsistent." Appellant's Br. at 32 (bold removed). Specifically, Lopez contends that "J.L.'s testimony was inconsistent with other testimony" and that her "testimony regarding the allegations was also inconsistent." *Id*. at 32, 33. In addition, Lopez contends that, at the time J.L. disclosed the allegations against Lopez, she was receiving counseling to "address lying issues[.]" *Id*. at 32. However, Lopez's argument is contrary to our standard of review. It was

for the jury, not this Court, to assess J.L.'s credibility. And it is clear that the jury found her credible. We therefore reject Lopez's argument.

[12] To the extent Lopez's argument can be construed as an argument that the jury's reliance on J.L.'s testimony violated the incredible dubiosity rule, we again reject it. Our Supreme Court has made clear that, under the incredible dubiosity rule, a Court "will only impinge upon the jury's duty to judge witness credibility 'where a *sole witness* presents inherently contradictory testimony which is equivocal or the result of coercion and there is a *complete lack of circumstantial evidence* of the appellant's guilt.'" *Moore v. State*, 27 N.E.3d 749, 755 (Ind. 2015) (quoting *Tillman v. State*, 642 N.E.2d 221, 223 (Ind. 1994) (emphasis original to *Moore*). The incredible dubiosity rule is not applicable where, as here, the State presented numerous witnesses, several of whom corroborated at least some key portions of J.L.'s testimony. We therefore decline to vacate Lopez's convictions under that rule. And, as that is the only argument Lopez makes in regard to Counts 1 and 3, we affirm those convictions.[6]

[13] We next turn to Lopez's argument that the State failed to present sufficient evidence to support his convictions on Counts 4, 5, and 6, which, according to

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[6] While Lopez does not separately challenge the sufficiency of the evidence to support Counts 1 and 3 outside of challenging J.L.'s credibility, we note that there is ample evidence to support both of those charges. In its opening argument, the State clarified that Counts 1 and 3 "are based upon what happened at Small Road[.]" Tr. Vol. 2 at 261. And J.L. testified that, at the house on Small Road, Lopez attempted to submit to oral sex on multiple occasions and that he did submit to oral sex on at least one occasion.

the State, were "based upon instances while living at the grandmother's house." Tr. Vol. 2 at 216. We address each conviction in turn.

Count 4

[14] To prove that Lopez committed Level 1 felony attempted child molesting, as charged in Count 4, the State was required to show that Lopez, who was at least twenty-one years of age, did knowingly or intentionally take a substantial step toward performing or submitting to sexual intercourse or other sexual conduct with J.L. when she was under fourteen years of age. Ind. Code. § 45-42-4-3(a) (2015); I.C. § 35-41-5-1(a). Other sexual conduct is defined in relevant part as an act involving "a sex organ of one (1) person and the mouth or anus of another person." I.C. § 35-31-2-221.5(1).

[15] On appeal, Lopez contends that the State failed to present sufficient evidence to support his conviction on Count 4 because J.L. "never describe[ed]" any request by Lopez that she place her mouth on his penis while at Grandmother's house. Appellant's Br. at 27. We must agree.

[16] The evidence demonstrates that, while at Grandmother's house, Lopez would sit on the couch with J.L., show her "adult videos" on his phone, and take her to the bathroom. Tr. Vol. 2 at 216. Lopez would then lock the door, expose his penis, and "ask [J.L.] to touch it and stuff like that" while keeping her in the bathroom "for long periods of time." *Id.* at 218-19. In other words, the only evidence regarding Lopez's actions at Grandmother's house is simply that Lopez exposed himself and asked J.L. to touch his penis. There is no evidence

that Lopez asked her to "lick it" or otherwise took any action to force or request oral sex. Again, to prove that Lopez attempted to commit child molesting, as a Level 1 felony, the State was required to prove that Lopez took a substantial step toward other sexual conduct, which, as relevant here, would be an act involving Lopez's penis and J.L.'s mouth. But the State did not present any evidence that Lopez took a substantial step toward any act involving J.L.'s mouth while at Grandmother's house.

[17] The State, however, did present evidence that, while at the house on Small Road, Lopez submitted to oral sex with J.L. on at least once occasion and attempted to submit to oral sex with her on other occasions—which actions resulted in Lopez's convictions on Counts 1 and 3. Based on those prior acts of oral sex or attempted oral sex, the State contends that a jury "could reasonably infer that J.L.'s statement that Lopez wanted her to 'touch it and stuff like that' meant that Lopez wanted J.L. to put her mouth on his penis" while in the bathroom at Grandmother's house. Appellee's Br. at 13-14. We cannot agree.

[18] At the house on Small Road, Lopez would specifically ask J.L. to "lick" his penis, and he would push her head toward his penis. Tr. Vol. 3 at 204. However, J.L. testified that, at Grandmother's house, Lopez asked her to touch his penis. And, when asked what else Lopez had said while at Grandmother's house, J.L clarified that Lopez "really didn't say anything else except for touch it." *Id.* at 219. Further, J.L. testified unequivocally that, while at Grandmother's house, Lopez did not "try to force [her] head down," and that Lopez never referenced "anything back to what [had] happened . . . on Small

Road[.]" Tr. Vol. 3 at 219-20. Lopez's request for J.L. to touch his penis while at Grandmother's house does not equate to a request that she place her mouth on his penis.

[19] The United States Supreme Court has held that the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). "While we seldom reverse for insufficient evidence, we have an affirmative duty to make certain that the proof at trial is sufficient to support the verdict beyond a reasonable doubt." *Webb v. State, 147 N.E.3d 378, 386 (Ind. Ct. App. 2020), trans. denied.* Here, the State failed to prove every fact necessary to constitute attempted child molesting, as a Level 1 felony. We therefore reverse Lopez's conviction on Count 4.

Counts 5 and 6

[20] To convict Lopez of Class D felony child solicitation, as charged in Count 5, the State was required to prove that, while at Grandmother's house, Lopez requested that J.L. engage in deviate sexual conduct by asking her to lick his penis. *See* I.C. § 35-42-4-6(b) (2012), *see also* Appellant's App. Vol. 2 at 166. And to prove that Lopez committed Level 5 felony child solicitation, as charged in Count 6, the State was required to prove that, while at Grandmother's house, Lopez knowingly or intentionally solicited J.L. to engage in other sexual conduct by asking J.L. to lick his penis. *See* I.C. § 35-42-4-6(b) (2015); *see also* Appellant's App. Vol. 2 at 166.

[21] Lopez again asserts, and we again agree, that the State failed to present sufficient evidence to support these charges. As discussed above, J.L. testified that, at Grandmother's house, Lopez only asked her to "touch" his penis after he had exposed it to her. Tr. Vol. 3 at 218. Indeed, J.L. clarified that Lopez "didn't say anything else except for touch it." *Id*. at 219. There was no evidence that he asked her to "lick it" or otherwise asked her to place her mouth on his penis, and J.L. explicitly stated that Lopez never attempted to force her head down while at Grandmother's. And we again cannot agree with the State that Lopez's act of asking J.L. to touch his exposed penis equates to a request that she place her mouth on his penis.

[22] We note that the crime of child solicitation was, at all relevant times, defined to include the knowing or intentional solicitation of a child to engage in "any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person[.]" I.C. § 35-42-4-6(b)(3) (2012); I.C. § 35-42-4-6(b) (2015). However, the State did not charge Lopez with child solicitation based on his request that J.L. touch his penis, nor did the State argue that factual scenario before the jury. Rather, in its charging information, the State specifically alleged that Lopez had solicited J.L. to engage in deviate sexual conduct (Count 5) or other sexual conduct (Count 6) by requesting that she "lick the sex organ of" Lopez. Appellant's App. Vol. 2 at 166. In addition, the State asserted in its closing argument that it was Lopez's "intent to have oral sex" when he asked J.L. to touch him. Tr. Vol. 4 at 46. And the final

instruction specifically directed that the jury must find that Lopez committed deviate or other sexual conduct in order to convict him of Counts 5 and 6.

[23] However, as discussed above, the State failed to present any evidence that Lopez solicited J.L. to lick his penis while at Grandmother's. As such, the State failed to present sufficient evidence to demonstrate that Lopez committed child solicitation, as charged in Counts 5 and 6. We therefore vacate those convictions.

Conclusion

[24] The State presented sufficient evidence to support Lopez's convictions on Counts 1 and 3, and we affirm those convictions. However, the State failed to present sufficient evidence to demonstrate that Lopez attempted to engage in other sexual conduct with J.L. or that he solicited oral sex from J.L. while at Grandmother's house, and, as a result, the State failed to present sufficient evidence to support his convictions on Counts 4, 5, or 6. We therefore vacate those convictions and remand for the trial court to resentence Lopez on the remaining convictions.

[25] Affirmed in part, reversed in part, and remanded.

Riley, J., and Vaidik, J., concur.