MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kenneth A. Arnold,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 27, 2023

Court of Appeals Case No. 22A-CR-2982

Appeal from the Boone Superior Court

The Honorable Bruce E. Petit, Judge

Trial Court Cause No. 06D02-2108-F1-1605

Memorandum Decision by Judge Kenworthy
Judges Bailey and Tavitas concur.

Kenworthy, Judge.

Case Summary

[1] Following a bench trial, Kenneth A. Arnold was convicted of three counts of Level 1 felony child molesting.[1] Arnold appeals, raising four issues which we restate as:

1. Did the trial court err in admitting evidence of Arnold's prior sexual misconduct?

2. Did the testimony of certain witnesses constitute improper vouching?

3. Was there insufficient evidence to convict Arnold of one of the charges?

4. Did the trial court err when sentencing Arnold?

[2] Determining Arnold waived his "vouching" and sentencing arguments and the trial court did not err as to the remaining issues, we affirm.

Facts and Procedural History

[3] E.L. was born in the summer of 2004. She began taking gymnastics classes when she was six or seven years old. She started classes at Interactive Academy when she was nine or ten years old and stopped attending when she was thirteen. Her parents would drop her off and would not stay during practice.

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[1] Ind. Code § 35-42-4-3(a)(1) (2015).

In 2020, E.L. disclosed that one of her coaches at Interactive Academy, Arnold, had sexually abused her.

[4] Arnold was a gymnastics coach at Interactive Academy from July 2011 to January 2016. The gymnasts considered him "a big teddy bear" because "he was very genuine and sweet and seemed to care about [them]." *Tr. Vol. 2* at 47. Classes at Interactive Academy took place on an open gym floor. The level above the open gym floor had a walking track that circled the gym, allowing parents to watch classes from above. On a normal day, more than one hundred students attended classes taught by thirty to forty coaches, and around fifty parents stayed during classes.

[5] A few years after E.L. stopped attending Interactive Academy, she started intensive counseling. E.L. was in intensive counseling because the effects of Arnold's abuse were "bubbling up from [E.L.] not talking." *Id.* at 72. E.L. had not told her parents about the abuse. She first disclosed the abuse in group therapy about two months after starting counseling. The therapist told E.L. to write a "no-send letter" to Arnold. *Id.* at 73. E.L.'s mother walked in while E.L. was writing the letter and "demanded to see it." *Id.*

[6] Once E.L.'s parents learned about the abuse, they took E.L. to a child advocacy center to be interviewed. E.L. was interviewed twice. In the first interview, she said Arnold would touch her under her leotard by putting his finger in her vagina. Then E.L. wrote a journal entry detailing all the abuse from Arnold.

E.L. went to a second interview, where she read the journal entry, stating Arnold raped her three times.

[7] The State charged Arnold with four counts of Level 1 felony child molesting. Count 1 alleged Arnold performed or submitted to sexual intercourse with E.L. Count 2 alleged he had inserted his finger into E.L.'s vagina. Count 3 alleged he put his mouth on E.L.'s vagina. And Count 4 alleged he put his penis into E.L.'s mouth.

[8] The State filed a notice of intent to introduce evidence under Indiana Evidence Rule 404(b), including testimony of four witnesses: a parent of a child attending Interactive Academy during the alleged abuse of E.L.; a former gymnast at Interactive Academy, L.C.; and two other gymnasts, M.H. and M.M. The State argued the testimony would be used for a permissible purpose under Indiana Evidence Rule 404(b). That is, it proved Arnold's motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident.

[9] The parent would watch her daughter's practices at Interactive Academy and said she saw Arnold placing his hand much lower on the girls' front area than is normal for coaching children doing gymnastics. She said Arnold touched the girls over their leotards below the waist with his fingertips almost between their legs. She reported Arnold's conduct to the gym director. L.C. said Arnold touched her "butt" inside her leotard once and outside her leotard twice. *Appellant's App. Vol. 2* at 99. After a hearing on the State's notice of intent, the

court issued an order excluding the testimony of the parent and L.C. The trial court determined that although the testimony of the parent and L.C. was connected to the alleged conduct in time and place, it was "not sufficiently similar in character to establish strong probative value relative to the risk of unfair prejudice." *Id.* at 102.

[10] However, the trial court found testimony of M.H. and M.M. admissible. Arnold had pleaded guilty to and been convicted of molesting M.H. and M.M. M.H. said while she was doing splits to stretch, Arnold placed his hands on her hips, then moved his hand under her shorts and slipped a finger inside her leotard, touching her vagina. M.M. said that while Arnold spotted her during press handstands, he would pull her hips higher and put his finger underneath the lower part of her leotard and touch her vagina.

[11] The trial court permitted the testimony of M.H. and M.M. because it "strongly support[s] a plan implemented by the Defendant to explore how he could at a minimum touch or fondle the young gymnasts during practice, on the gym floor with many other persons around and how far he could take that touching if successful." *Id.* at 103. The court added, "The trier of fact may easily wonder how such activity alleged in the current crimes could occur in a setting with so many persons around and the extrinsic testimony is relevant to show the Defendant's plan and experience in executing that plan." *Id.* But the trial court ordered the State not to present any evidence that Arnold was convicted of the crimes iterated in M.H.'s and M.M.'s testimony.

[12] Arnold waived his right to a jury trial, and the trial court held a bench trial. E.L. testified. She said Arnold sometimes taught E.L.'s class, and she "loved him" until he began abusing her. *Tr. Vol. 2* at 47.

[13] The abuse began when E.L. was ten years old. E.L. would warm up for practice in the open area of the gym by doing the splits to stretch. Coaches would help students maintain proper form in the splits by putting their hands on the students' waists and turning the students' hips forward instead of "open to the side." *Id.* at 50. Arnold would spot E.L. while she was doing the splits. While spotting E.L., Arnold would put his finger under the seam of E.L.'s leotard and touch the outside of her vagina. This act led to Arnold putting his finger into her vagina on a weekly basis for a few months. E.L. said it was uncomfortable and hurt, but she did not say anything because she thought it was how she was supposed to be stretched for practice.

[14] E.L. then described three incidents at other locations at Interactive Academy. First, she described an incident in the staff office bathroom. It was picture day for E.L.'s gymnastics team, and she was wearing her competition leotard. E.L. was in line to get her picture taken when Arnold asked her to help him retrieve some things for the pictures. Arnold took E.L. to the staff office bathroom and "pulled [her] leotard down off [her] shoulders and slid it down." *Id.* at 60. He groped her breast and told her to lie down. "[H]is penis rubbed the outside of [her] vagina. . . [and] entered into [her] vagina." *Id.* at 61. E.L. "wanted to scream" and "felt paralyzed." *Id.* When Arnold's penis left E.L.'s vagina, he told her to "get up and put the leotard on . . . and to grab something so it didn't

look weird that [they] didn't come up with nothing in [their] hands." *Id.* After this incident, Arnold would continue to put his finger in E.L.'s vagina while she was stretching "[o]ccasionally" but "[n]ot as frequently" as before. *Id.* at 66.

[15] Second, E.L. described an event in the storage room or "dungeon." *Id.* at 62. E.L. arrived early for practice. Arnold told E.L. she "needed to try on [her] warm-ups," which E.L. thought was "odd" because she "already had warm-ups." *Id.* at 63. E.L. went with Arnold because she "was scared." *Id.* Arnold and E.L. took the elevator to the "dark and cold" storage room. *Id.* at 64. Arnold told E.L. they "had to do it quickly," and "[h]is penis entered [her] vagina." *Id.* E.L. felt "even more paralyzed and like [she] was being stabbed." *Id.*

[16] Third, E.L. described an event in a public bathroom. E.L. arrived for practice and "happened to look over and meet [Arnold's] eye." *Id.* at 67. She followed Arnold to the women's restroom, which had four stalls. Arnold and E.L. went into the "handicap" stall farthest from the entrance. *Id.* at 68. Someone came in to use the bathroom, so Arnold told E.L. to stand on the toilet so the other person would not see four feet under the stall. E.L. got off the toilet when the person left, and Arnold told her "this time would be different." *Id.* at 69. Arnold put his penis in E.L.'s mouth and controlled E.L.'s head "like [she] was a puppet," causing E.L. to choke. *Id.* at 70. Arnold also put his penis in E.L.'s vagina.

[17] Dr. Tara Holloran, a pediatrician specializing in treatment of abuse victims, testified it is very rare to see evidence of a penetrative sexual abuse injury, especially if the child is not examined within a few days of the incident. She also said she did not examine E.L. and was aware E.L. had not undergone an examination. Kassie Frazier, executive director and forensic interviewer at a child advocacy center, testified about the varied ways children disclose abuse. She described how children tentatively or accidentally disclose abuse. Frazier explained a child might require more than one interview if the child is traumatized and emotionally drained, and sometimes the child recalls other details of the abuse during the second interview. Arnold did not object to the testimony of Dr. Holloran or Frazier. M.H. and M.M. testified as anticipated about Arnold's abuse toward them, and Arnold timely objected.

[18] After the State concluded its presentation of evidence, Arnold moved for an involuntary dismissal of Count 3, the allegation Arnold put his mouth on E.L.'s vagina. The State conceded it had not submitted evidence to support Count 3 and the court entered a finding of not guilty. The trial court ultimately found Arnold guilty of Counts 1, 2, and 4.

[19] At the sentencing hearing, the trial court noted Arnold's lack of criminal record prior to his child molestation convictions but gave this factor minimal mitigating weight. Arnold submitted character letters from friends and coworkers and maintained he was innocent of his alleged conduct toward E.L. For each count, the trial court sentenced Arnold to fifty years with ten years

suspended. Arnold was to serve his sentences concurrently. The trial court determined Arnold is a credit-restricted felon and a sexually violent predator.

1. The Trial Court Did Not Err by Admitting M.H.'s and M.M.'s Testimony

[20] Trial courts have broad discretion to admit or exclude evidence. *Matter of K.R.*, 154 N.E.3d 818, 820 (Ind. 2020). We review trial courts' decisions to admit or exclude evidence for an abuse of discretion. *Id.* "An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights." *Beasley v. State*, 46 N.E.3d 1232, 1235 (Ind. 2016) (quotation omitted). And we will uphold the trial court's ruling on the admission of evidence during trial if it is sustainable on any theory supported by the evidence, *State v. Keck*, 4 N.E.3d 1180, 1186 (Ind. 2014), even if the trial court did not use that theory, *Tinker v. State*, 129 N.E.3d 251, 255 (Ind. Ct. App. 2019), *trans. denied*.

[21] "Evidence of a crime, wrong, or other act is not admissible to prove a person's character[,]" but such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Ind. Evidence Rule 404(b). "Indiana Evidence Rule 404(b)'s purpose is to prevent the jury from indulging in the 'forbidden inference'—that a defendant must be guilty of the charged crime because, on other occasions, he acted badly." *Fairbanks v. State*, 119 N.E.3d 564, 564 (Ind. 2019).

> In assessing the admissibility of 404(b) evidence, the trial court must "(1) determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403."

[22] *Turner v. State*, 953 N.E.2d 1039, 1057 (Ind. 2011) (quoting *Wilson v. State*, 765 N.E.2d 1265, 1270 (Ind. 2002) (internal quotation marks and citation omitted)).

[23] Arnold claims the trial court erred by admitting evidence from M.H. and M.M. regarding Arnold's prior sexual misconduct. Arnold argues this testimony does not show he had a "plan" under Indiana Evidence Rule 404(b). Arnold claims allowing the admission of M. H.'s and M. M.'s testimony was "extremely prejudicial" and that "it would have been difficult to give very little weight to their testimony, especially given the trial court judge was also privy to evidence that was excluded, including a prior conviction." *Appellant's Br.* at 28.[2]

[24] Arnold objected to M.M.'s and M.H.'s testimony at trial, arguing it was not relevant to most of the current allegations and would impinge upon Arnold's right to confront and cross-examine witnesses under the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution. On appeal, Arnold argues a "plan" does not encompass the events alleged by M.H. and M.M. and the events alleged by E.L. because they

[2] Although Arnold argues the testimony of M.H. and M.M. "was extremely prejudicial," he does not argue the prejudicial effect outweighs the probative value. *See* Ind. Evid. R. 403.

occurred "too far apart in time." *Id.* at 26. M.H. and M.M. said their abuse occurred between 2011 and 2013. E.L. alleged her abuse occurred between July 2014 and December 2016. And E.L.'s allegations "greatly exceeded those of M.H. and M.M." because although E.L. similarly alleged Arnold touched her vagina under her leotard while spotting her doing the splits, she alleged the abuse eventually escalated to three instances of rape. *Id.*

[25] The State argues the testimony of M.H. and M.M. shows Arnold had the opportunity to inappropriately touch E.L. The State discusses *Dickens v. State*, 754 N.E.2d 1, 4 (Ind. 2001), claiming "the opportunity exception contemplates admitting evidence which tends to show that the defendant had the ability to commit the charged offense and applies to situations where it would otherwise be less likely that a fact finder may have believed that the defendant could have committed the crime." *Appellee's Br.* at 20–21. The State notes "the trial court did not explicitly state that it was relying on 'opportunity'" but claims the testimony was relevant "to rebut [Arnold's] assertions concerning the likelihood that the crime could have been committed in public and not viewed by anyone." *Id.* at 21.

[26] The trial court permitted the State to present M.H.'s and M.M.'s testimony of Arnold's prior sexual misconduct to show Arnold had a plan for his conduct toward E.L. To prove the defendant had a plan, the State must show the character, time, and place of the offense was so related to the prior offenses that the plan embraces both the prior acts and the charged criminal activity. *Greenboam v. State*, 766 N.E.2d. 1247, 1253 (Ind. Ct. App. 2002), *trans. denied.*

The trial court found Arnold's alleged conduct in the incidents involving M.H. and M.M. was "almost identical to the allegations in the current charges." *Appellant's App. Vol. 2* at 103. The trial court continued:

> All acts occurred at the Interactive Academy during the same time frame on the gym floor during practice while the Defendant was spotting the gymnast[s] as their coach. All involved the Defendant assisting the gymnasts during stretching splits or handstands and resulted in the Defendant placing his finger under the lower leotard and touching the girl's vagina under her clothing. . . . These circumstances strongly support a plan implemented by the Defendant to explore how he could at a minimum touch or fondle the young gymnasts during practice, on the gym floor with many other persons around and how far he could take that touching if successful. The trier of fact may easily wonder how such activity alleged in the current crimes could occur in a setting with so many persons around and the extrinsic testimony is relevant to show the Defendant's plan and experience in executing that plan.

Id.

[27] Regardless of whether the testimony shows a plan, the trial court properly admitted the evidence under Rule 404(b) to rebut Arnold's assertions about the likelihood he committed the crime in a public place where no one saw him. "Rule 404(b)'s list of permissible purposes is illustrative but not exhaustive." *Davis v. State*, 186 N.E.3d 1203, 1210 (Ind. Ct. App. 2022), *trans. denied*. And the trial court must exclude evidence under Rule 404(b) "only when it is introduced to prove the forbidden inference of demonstrating the defendant's propensity to commit the charged crime." *Laird v. State*, 103 N.E.3d 1171, 1177

(Ind. Ct. App. 2018), *trans. denied*. The trial court may admit testimony that "is relevant to a matter at issue other than the defendant's propensity to commit the charged act." *Fairbanks*, 119 N.E.3d at 568 (quoting *Hicks v. State*, 690 N.E.2d 215, 219 (Ind. 1997)).

[28] Arnold argued at trial E.L.'s testimony was not credible partly because no witnesses saw him inappropriately touch E.L. "[i]n a crowded gym . . . with a hundred (100) kids and lord knows how many hovering mommies watching every move." *Tr. Vol. 2* at 137. He also claimed the conduct occurred "in a very public place, almost impossibly public place." *Id.* at 138. In its order allowing the admission of M.M.'s and M.H.'s testimony, the trial court noted: "The trier of fact may easily wonder how such activity alleged in the current crimes could occur in a setting with so many persons around[.]" *Appellant's App. Vol. 2* at 103. M.M.'s and M.H.'s testimony provides evidence contrary to the apparent unlikelihood of the alleged events in such a public place without someone seeing.

[29] Once the trial court decides the 404(b) evidence is relevant for a permissible purpose, it must determine whether the probative value of the evidence outweighs its prejudicial effect. Ind. Evid. R. 403. Arnold argues it would have been difficult for the trial court judge to give little weight to the 404(b) testimony because the judge was privy to the evidence that was excluded, including Arnold's prior convictions. But a trial court judge is presumed to follow the law. *Smith v. State*, 770 N.E.2d 818, 823 (Ind. 2002). And Arnold waived his right to a jury trial.

[30] The trial court was "very confident that any testimony presented by M.H. and M.M. would not lead [it] to believe that the Defendant committed the acts currently alleged because there is evidence that he may have performed similar acts in the past." *Appellant's App. Vol. 2* at 103. At the bench trial, the court stated:

> [W]e did have 404(B) evidence that was presented. I give that very little consideration to be quite honest with you. And it's not because the young girls were not credible, had nothing to do with their testimony. I just believe this case revolves around one (1) thing. [E.L.]. Either she is credible and telling the truth, or she's not and . . . for some reason she's manipulated all these facts and her testimony to pin something on [Arnold] that didn't happen. . . . All the other evidence probably would've played better to a jury than to the Court.

Tr. Vol. 2 at 145–46. And the trial court "absolutely believe[d] [E.L.] was a credible witness." *Id.* at 148. The trial court determined "[t]his evidence's probative value outweighs any prejudicial effect," per Rule 403. *Appellant's App. Vol. 2* at 103. Given this ample insight into the trial court's reasoning, we cannot say the trial court abused its discretion in admitting the testimony of M.H. and M.M.

2. Arnold Waived His "Vouching" Argument

[31] Arnold argues the testimony of Dr. Holloran and Kassie Frazier was "drumbeat testimony effectively vouching for E.L.'s testimony and excusing her delay of reporting." *Appellant's Br.* at 28. "Drumbeat" or "vouching" testimony includes "opinions concerning intent, guilt, or innocence in a criminal case; the

truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." Ind. Evid. R. 704(b).

[32] Arnold acknowledges Indiana caselaw allows testimony about the commonness of late disclosure of abuse if the testimony does not relate to the victim's truthfulness. *See Appellant's Br.* at 29–30; *see also Baumholser v. State*, 62 N.E.3d 411, 416 (Ind. Ct. App. 2016), *trans. denied*. Arnold does not argue the testimony of Dr. Holloran and Kassie Frazier relates to E.L. or her truthfulness. Rather, he claims the trial court's "use of Rule 703 evidence[3] . . . invades the province of the factfinder by suggesting that the lack of physical evidence and delay in reporting of sexual abuse is of no consequence." *Appellant's Br.* at 30. Arnold further argues that even if the testimony of Dr. Holloran and Kassie Frazier is not vouching testimony, it should be excluded because it is irrelevant.

[33] Arnold concedes he failed to object to the testimony at trial but claims he did not waive the issue because admission of the testimony is fundamental error. A party's failure to object to an alleged trial error results in waiver of that claim on appeal. *Batchelor v. State*, 119 N.E.3d 550, 556 (Ind. 2019). But a party can raise an otherwise waived issue through a showing of fundamental error. *See Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). "The 'fundamental error' exception is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is

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[3] Under Indiana Evidence Rule 703, expert witnesses may testify to opinions based on inadmissible evidence.

substantial, and the resulting error denies the defendant fundamental due process." *Id.* In arguing fundamental error, the defendant "faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to 'make a fair trial impossible.'" *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014) (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)). And as mentioned above, the trial court has broad discretion to admit or exclude evidence.

[34] Arnold has not shown the trial court made errors so prejudicial to his rights that it made a fair trial impossible. The evidence falls within the boundaries of Indiana Rules of Evidence 703 and 704(b). And this Court has found no fundamental error on nearly identical facts. *See Baumholser*, 62 N.E.3d at 416. Arnold waived his vouching argument by not objecting at trial and has not established fundamental error.

3. Sufficient Evidence Supports Arnold's Convictions

[35] Arnold argues his conviction on Count 4 for putting his penis in E.L.'s mouth should be vacated because E.L.'s testimony was incredibly dubious, and the evidence is therefore insufficient to convict him. He claims "where only one witness testified, disclosure [of this incident] came much later, even later [than] the initial disclosure that application of the incredibly dubious rule should be applied[.]" *Appellant's Br.* at 32.

[36] "It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to

support a conviction." *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). Thus, "[w]hen reviewing the sufficiency of the evidence to support a conviction, 'appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict.'" *Id.* (quoting *McHenry v. State*, 820 N.E.2d 124, 126 (Ind.2005)). We will affirm the conviction "if probative evidence supports each element of the crime beyond a reasonable doubt." *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*.

[37] To convict Arnold of Count 4, the State was required to prove beyond a reasonable doubt that Arnold (1) being at least twenty-one years of age (2) knowingly or intentionally (3) performed or submitted to other sexual conduct as defined in Indiana Code Section 35-31.5-2-221.5 (4) with E.L. (a child under fourteen years of age). *See Appellant's App. Vol. 2* at 95–96; I.C. § 35-42-4-3(a). "'Other sexual conduct'" means an act involving: (1) a sex organ of one (1) 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. § 35-31.5-2-221.5.

[38] "In general, the uncorroborated testimony of the victim is sufficient to sustain a conviction." *Smith v. State*, 163 N.E.3d 925, 929 (Ind. Ct. App. 2021). But we make an exception when that testimony is incredibly dubious. *Id.* We may "impinge upon the factfinder's responsibility to judge the credibility of witnesses when confronted with evidence that is 'so unbelievable, incredible, or improbable that no reasonable person could ever reach a guilty verdict based upon that evidence alone.'" *Id.* (quoting *Moore v. State*, 27 N.E.3d 749, 751 (Ind. 2015)). We apply the rule where there is: "1) a sole testifying witness; 2)

testimony that is inherently contradictory, equivocal, or the result of coercion; and 3) a complete absence of circumstantial evidence." *Moore*, 27 N.E.3d at 756. Although incredible dubiosity "provides a standard that is 'not impossible' to meet, it is a 'difficult standard to meet, [and] one that requires great ambiguity and inconsistency in the evidence.'" *Id.* (quoting *Edwards v. State*, 753 N.E.2d 618, 622 (Ind. 2001)).

[39] We agree E.L. was the sole testifying eyewitness as required for the application of the incredible dubiosity rule. But "even if the first factor is satisfied when multiple witnesses testify but only one is an eyewitness, [Arnold] must still show the remaining [incredible dubiosity] factors are met or satisfied." *Smith*, 163 N.E.3d at 929. That is, Arnold must also demonstrate E.L.'s testimony is "inherently contradictory, equivocal, or the result of coercion" and there is "a complete lack of circumstantial evidence." *Moore*, 27 N.E.3d at 756.

[40] Arnold summarizes E.L.'s testimony as to Count 4: On a given day at Interactive Academy there were one hundred students, fifty parents, and forty to fifty coaches; E.L. and Arnold entered the public restroom and went to the "handicap" stall; Arnold engaged in sexual intercourse with E.L. and told E.L. to put her mouth on Arnold's penis; and when someone came into the bathroom, Arnold instructed E.L to stand on the toilet until the person left. Arnold notes his counsel argued the circumstances of the rape were incredible:

> [H]is client, a six-foot five (6' 5") two hundred and fifty (250) pound man is in a restroom with a young girl when someone enters and nobody notices because she stands on the toilet but his

> client is in the stall and no one sees his size 13 shoes under the stall door.

Appellant's Br. at 32 (citing *Tr. Vol. 2* at 139). But nothing in E.L.'s testimony about these events is inherently contradictory, equivocal, or the result of coercion. Although Arnold's counsel argued the events were unlikely, this argument does not come close to meeting the incredible dubiosity standard.

[41] To the extent Arnold argues E.L.'s testimony is incredibly dubious because E.L. waited to disclose the rapes, the State presented evidence explaining the late disclosure. And the trial court found the explanation credible:

> With regard to her late disclosure. That's not uncommon. It's not. . . . When she finally during . . . the intensive counseling in November of '19 . . . she hadn't told her parents, hadn't told anyone, and she testified here in Court, I couldn't hold it back. . . . I had to get it out. And so she told in group therapy. I find it important that this disclosure that made it public was an involuntary disclosure. She was not there saying okay, some girls have already said something, now look at me. That's not the impression I got at all. She was writing this because it was tearing her up. And she wrote that non-send letter. And as any good parent would do, mom was a snoop and got a hold of it. And that's what started the wheels rolling. It was not [E.L.] standing from the mountaintops screaming look what [Arnold] did. It wasn't.

Tr. Vol. 2 at 147. Again, nothing about the testimony on the late disclosure is inherently contradictory, equivocal, or the result of coercion. Arnold has not shown the incredible dubiosity rule applies; and the trial court "absolutely believe[d] [E.L.] was a credible witness," calling her testimony "[u]nequivocal."

Id. at 147–48. The evidence is therefore sufficient to support Arnold's conviction.

4. Arnold's Sentencing Arguments are Not Cogent

[42] Arnold claims the trial court found no mitigators despite Arnold having no criminal record and the court receiving letters of support from several of Arnold's friends. Arnold argues a lack of criminal record is "a factor which deserves 'substantial mitigating weight.'" *Appellant's Br.* at 34 (quoting *Loveless v. State*, 642 N.E.2d 974, 976 (Ind. 1994)). He also argues the sentence he received is "manifestly unreasonable" because his is not among "the very worst offenses and offenders." *Appellant's Br.* at 34 (quoting *Buchanan v. State*, 699 N.E.2d 655, 657 (Ind. 1998).

[43] Arnold's arguments on this issue fail for several reasons. First, Arnold provides no standard of review or current law to support his argument. Second, the trial court expressly considered the factors Arnold claims it overlooked.[4] Third, "the

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[4] At the sentencing hearing, the trial court stated, "I really don't find any mitigators, other than I agree with [Arnold's counsel] that up 'til this point of this behavior you . . . lived a law abiding life. And . . . there's something to be said for that." *Tr. Vol. 2* at 176–77. And in the sentencing order, the trial court included as mitigating circumstances "until the pattern of behavior resulting in [Arnold's] convictions, he had no history of juvenile delinquencies or criminal convictions[,]" and "[Arnold's] incarceration will result in a possible hardship to his mother[.]" *Appellant's App. Vol. 2* at 183. The court gave both these mitigators "minimal weight." *Id.*

The trial court also considered the letters of support at the sentencing hearing:

> When I read the letters from your co-workers and family and friends, what struck me is that's the exact same person all these girls knew until you did what you did. The big teddy bear, right [E.L.]? That was the person. You were to . . . the girl[s], they said you were their favorite coach. So kind, so nice. So it didn't surprise me when I saw family and friends and co-workers say that's who you are. Because that's who they knew until it happened.

trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence," so "*a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors*." *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (emphasis added).[5] And finally, when Indiana Appellate Rule 7(B) was revised in 2002 (effective January 1, 2003), the "manifestly unreasonable" standard for reviewing sentences was replaced with the "inappropriate" standard. Arnold has waived this issue.

Conclusion

[44] Determining Arnold waived his "vouching" and sentencing issues and the trial court did not err as to the remaining issues, we affirm.

[45] Affirmed.

Bailey, J., and Tavitas, J., concur.

Tr. Vol. 2 at 175–76.

[5] Arnold also says the court "cited the fact that there were other children present when the crimes occurred; however, it was uncontested that there were [not] any other children who witnessed the crimes occurring." *Appellant's Br.* at 33. The court may consider the presence of other children regardless of whether the children saw Arnold committing the crimes. *See* I.C. § 35-38-1-7.1(a)(4)(B).