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ATTORNEY FOR APPELLANT:

RANDY M. FISHER
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

JAMES A. MUDD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-1105-CR-192
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-1007-FA-38

December 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

James Mudd appeals his convictions for Class A and Class C felony child molesting. Upon review of Mudd's claims, we hold that (I) there is sufficient evidence to sustain Mudd's convictions and (II) the jury verdicts in Mudd's case were unanimous. We affirm.

Facts and Procedural History

In March 2010, nine-year-old L.M. went to her aunt's house to visit her father, Mudd. Mudd and L.M.'s mother, Nicole Trice, were divorced, and L.M.'s visits with her father were irregular. On this particular visit, L.M. spent the night at her aunt's house. L.M. had no room or bed of her own at her aunt's house, so she asked to sleep in Mudd's bed. While L.M. was in bed with Mudd, Mudd forced L.M. to masturbate him until he ejaculated. Mudd later pulled down L.M.'s pajama bottoms and placed his penis on her buttocks. Mudd also licked L.M.'s vagina. The next day, Mudd took L.M. back to her mother's house. Mudd told L.M. not to tell anyone what had happened because it was a secret. L.M. did not tell anyone about the molestation.

Approximately one month later, L.M.'s great-grandmother, Mary Wallace-Litzlbauer, came to town for a family reunion. L.M. and Litzlbauer had a close relationship, and L.M. frequently stayed overnight with Litzlbauer. At one point in the evening, L.M. asked Litzlbauer if she could talk to her in private. Later, as L.M. sat in the bathtub, she described the incident with Mudd. *Id.* at 168. Litzlbauer informed Trice about what L.M. had told her. Trice confronted Mudd, who said he had done nothing to L.M.

The authorities were notified. Trice gave authorities the pajama bottoms L.M. had worn on the night she spent with Mudd. Because the pajama bottoms had since been washed, no seminal fluid or blood was found on them. Authorities also obtained sheets from Mudd's bed and a pair of Mudd's shorts. Forensic analysis detected seminal fluid on one of Mudd's bed sheets. No test for blood was performed on Mudd's sheets. L.M. was interviewed by a detective and was examined by a sexual assault nurse at a nearby sexual assault treatment center.

The State charged Mudd with two counts of Class A felony child molesting (deviate sexual conduct involving Mudd's penetration of L.M.'s anus with his penis and deviate sexual conduct involving Mudd's mouth and L.M.'s vagina) and two counts of Class C felony child molesting (fondling by having L.M. touch his penis and fondling by touching L.M.'s buttocks with his penis).

At trial, L.M. testified that Mudd forced her to touch his penis and masturbate him until he ejaculated. *See* Tr. p. 129-32. L.M. demonstrated an "up and down" motion when asked how Mudd made her touch his penis. *Id.* at 131. L.M. stated that semen was on her legs, back, bottom, and hands. *Id.* at 134. She also testified that her father pulled her pajama pants down and put his penis on her buttocks, which hurt her, but that his penis did not penetrate her anus. *Id.* at 133. L.M. also testified that Mudd "was trying to lick me with [sic] on nasty part." *Id.* at 134. The State elicited further explanation that L.M. referred to her vagina as her "nasty part," and when asked if Mudd "was licking [her] there," L.M. responded in the affirmative. *Id.* at 135. L.M. recalled that she was crying and "tried to scream," but her father covered her mouth. *Id.* L.M. testified that

she took a bath the next morning and saw blood in her bath water. *Id.* at 136. L.M. stated that the next morning she felt "uncertain of what happened" and "thought she was dreaming." *Id.* at 155-56.

When L.M.'s aunt was questioned about L.M.'s claims, she stated that her house was small and that she did not hear L.M. scream on the night in question. *Id.* at 195. She also testified that she did not know if L.M. took a bath the next morning, but that she would "probably [have] heard it" because the faucet was loud. *Id.* at 188, 196.

The sexual assault nurse who examined L.M testified that L.M. reported that her father had molested her. She further testified that she found no injuries to L.M's genitals. *Id.* at 248. She explained, however, that this was not inconsistent with L.M.'s report as injuries to the genital area typically heal within two days, and a month had passed since the molestation took place. The nurse also opined that L.M.'s report of seeing blood in her bath water would indicate some trauma to L.M.'s vagina or anus. *Id.* at 243.

During closing argument, the State informed the jurors that their verdicts on the Class A felony counts were dependant upon proof of two alleged instances of criminal deviate conduct, one involving anal intercourse and the other involving Mudd's mouth and L.M.'s vagina. *See id.* at 330-31. The State similarly informed the jurors that their verdicts on the Class C felony counts depended upon two alleged acts—Mudd's forcing L.M. to fondle his penis and his touching of L.M.'s buttocks with his penis. In his closing argument, Mudd questioned L.M.'s credibility, drawing attention to the fact that despite allegations of anal intercourse and L.M.'s testimony that she saw blood in her bath water, no blood evidence was found. *Id.* at 344-45.

When the jury informed the trial court that they had reached a verdict, the court examined the written verdicts.[1] The court then informed the jurors that they should return to the jury room and identify, by writing on the appropriate verdict form, which specific act they relied upon in reaching a verdict as to count II. *Id.* at 360, 362. Mudd did not object to this procedure. The court explained the directive: "The information's [sic] are the same . . . I know that the State argued in closing . . . there had been deviate sexual conduct with anal sex as well as deviate sexual conduct with oral sex. Just so it's clear for the record what the jury found Mr. Mudd guilty of I've asked them to identify on that particular verdict form." *Id.* at 362.

When the jury returned the verdict forms to the trial court, one form stated that the jury had found Mudd not guilty as to Count I and a second verdict form indicated that the jury had found Mudd guilty as to Count II. On the second verdict form, a notation read, "deviate sexual conduct (oral)." Appellant's App. p. 78. The jury found Mudd guilty of both Counts III and IV. The trial court sentenced Mudd to thirty years on Count II and concurrent terms of four years on each Count III and Count IV. Mudd now appeals.

Discussion and Decision

Mudd raises two issues on appeal: (I) whether there is sufficient evidence to sustain his child molesting convictions and (II) whether his convictions for child molestation lack jury unanimity.

I. Sufficiency of the Evidence

[1] The jury had previously sent two questions to the trial court, asking if L.M. had "vomit[ed] after the alleged assault" and if attempting deviate sexual conduct could constitute Class A felony child molesting. Tr. p. 359. The trial court responded that the jurors should rely on their recollection and any notes and informed them that attempt could not constitute deviate sexual conduct. *Id.*

Mudd argues that the State's evidence is insufficient to sustain his convictions. 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. *Lainhart v. State*, 916 N.E.2d 924, 939 (Ind. Ct. App. 2009). 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.*

Mudd was convicted of one count of Class A and two counts of Class C felony child molesting. Indiana Code section 35-42-4-3 provides in pertinent part:

> (a) A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if:
>
> (1) it is committed by a person at least twenty-one (21) years of age;
>
> * * * * *
>
> (b) 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.

"'Deviate sexual conduct' means an act involving: (1) a sex organ of one 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." Ind. Code § 35-41-1-9.

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.*

Mudd was convicted of deviate sexual conduct involving Mudd's mouth and L.M.'s vagina and fondling by forcing L.M. to touch his penis and by touching L.M.'s buttocks with his penis. We find sufficient evidence to sustain these convictions.

With regard to the Class A felony, the evidence most favorable to the verdict reveals that Mudd licked L.M.'s vagina.[2] Tr. p. 135. L.M.'s testimony is sufficient to sustain Mudd's conviction for Class A felony child molestation. *See Stewart v. State*, 768 N.E.2d 433, 435 (Ind. 2002) (holding that the uncorroborated testimony of a child victim of molestation is sufficient to support a conviction). With respect to the Class C felonies, the evidence reveals that Mudd put his penis on L.M.'s buttocks and forced L.M. to masturbate him until he ejaculated. From this evidence, the jury could reasonably infer that, through these actions, Mudd intended to arouse or satisfy his sexual desires.

Mudd nonetheless invokes the "incredible dubiosity" rule and argues that L.M.'s testimony was too unreliable and untrustworthy to sustain his conviction. The incredible

[2] Mudd claims that L.M.'s testimony that Mudd "was trying to lick me with [sic] on nasty part" indicated that he attempted to, but was unsuccessful in, licking L.M.'s vagina. *See* Appellant's Br. p. 12. Mudd incorrectly claims that the State did not clarify this testimony. In fact, the State proceeded to clarify what L.M. meant by her "nasty part," and when asked if Mudd "was licking you there," L.M. responded affirmatively. Tr. p. 135.

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 instances 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).

Mudd's claim of incredible dubiosity is based upon the facts that (1) L.M. waited "over an entire month" to tell anyone about the molestation, (2) there was no physical evidence of molestation, (3) L.M.'s testimony conflicted with that of her aunt's, (4) L.M. testified that she was screaming during the incident, (5) L.M. testified that semen was on her legs, back, bottom, and hands despite the fact that she was clothed, and (6) with regard to the molestation, L.M. testified that she thought she was dreaming and was unsure what had occurred. Appellant's Br. p. 15. These are not valid bases for deeming L.M.'s testimony incredible. It is not uncommon for victims of child abuse to delay reporting the molestation, and such delay may result in a lack of physical evidence. We also note that L.M.'s aunt simply testified that she did not hear any screaming on the night in question nor did she hear L.M. running a bath the next morning. As to the issue

of L.M.'s screaming, L.M. in fact testified that she tried to scream, but that Mudd put his hand over her mouth. L.M. also testified that Mudd pulled down her pajama bottoms before ejaculating. Finally, L.M.'s testimony regarding dreaming and her uncertainty regarding what had occurred were accompanied by clear and descriptive testimony regarding her experience of being molested by her father. We conclude that L.M.'s testimony was not so equivocal or inherently contradictory that no rational jury could believe it.

II. Jury Unanimity

Mudd argues that his convictions for child molesting lack jury unanimity and therefore he was denied a fair trial.

In making this argument, Mudd relies on *Baker v. State*. 948 N.E.2d 1169, 1177 (Ind. 2011).[3] In *Baker*, the Indiana Supreme Court held that "the State may in its discretion designate a specific act (or acts) on which it relies to prove a particular charge." *Id.* If the State does not so designate, jurors should be instructed that in order to convict, they must "either unanimously agree that the defendant committed the same act

[3] The State argues that *Baker* does not apply to this case because the Supreme Court's "decision to limit the application of *Baker* to such cases shows that *Baker* is an exercise of the Court's supervisory powers." Appellee's Br. p. 15. Citing *Tyler v. State*, 903 N.E.2d 463, 467 (Ind. 2009), the State argues that rules implemented by the use of supervisory powers are not applicable to proceedings conducted before publication. *Id.* *Baker* is unlike *Tyler* and other cases before and after it, in which the Court explicitly referenced or announced the exercise of supervisory powers. *See Johnson v. State*, 948 N.E.2d 331, 339 (Ind. 2011), *reh'g denied*; *Hopper v. State*, 934 N.E.2d 1086, 1088 (Ind. 2010), *reh'g granted on other grounds*; *Tyler*, 903 N.E.2d at 465; *Carpenter v. State*, 786 N.E.2d 696, 705 n.3 (Ind. 2003); *Williams v. State*, 690 N.E.2d 162, 169 (Ind. 1997). We therefore decline, absent more persuasive argument, to adopt the State's reasoning that *Baker* constitutes an exercise of the Court's supervisory powers and therefore does not apply here. We also note that the State makes no argument regarding retroactivity.

or acts or that the defendant committed all of the acts described by the victim and included within the time period charged." *Id*.

The State did not designate the specific acts of molestation it would rely upon in the four-count charging information. *See* Appellant's App. p. 10-13. However, the State explained in closing argument that the jury's verdicts on Counts I and II were dependent upon proof of two alleged instances of criminal deviate conduct, one involving anal intercourse and the other involving Mudd's mouth and L.M.'s vagina. The State similarly informed the jury that their verdicts on Counts III and IV depended upon two other alleged actions, Mudd's forcing L.M. to fondle his penis and his touching of L.M.'s buttocks with his penis.

More importantly, the trial court instructed the jury to inform the court, by writing on the appropriate verdict form, which specific act they relied upon in reaching a verdict as to Count II. The court explained the instruction as an effort to identify what "conduct they have found [Mudd] guilty of." Tr. p. 360. The jury returned the verdict forms as directed, and the second verdict form indicated that Mudd was guilty of "deviate sexual conduct (oral)." Appellant's App. p. 78. We conclude that the trial court's instructions to the jury ensured jury unanimity in accordance with *Baker*, and therefore Mudd was not denied a fair trial.[4]

Affirmed.

ROBB, C.J., and NAJAM, J., concur.

[4] Because we resolve the jury unanimity issue as we do, we need not reach the State's claim of waiver or either party's arguments regarding fundamental error. *See* Appellee's Br. p. 15-17; Appellant's Br. p. 16-19.