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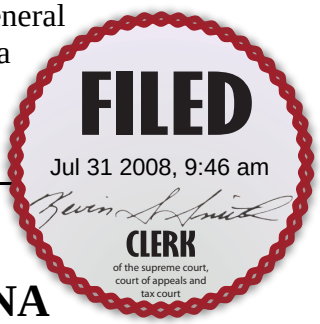

IN THE COURT OF APPEALS OF INDIANA

TIMOTHY WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0803-CR-195
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G06-0707-FA-136393

July 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Timothy Williams appeals his conviction of three counts of Child Molesting,[1] two as class A felonies and the other as a class C felony. Williams presents the following restated issues for review:

1. Was the evidence sufficient to support Williams's convictions?

2. Did entry of conviction for three counts of child molesting violate double jeopardy principles?

We affirm.

The facts favorable to the conviction are that in the first half of 2006, O.H., who was seven or eight years old during this time, and her mother (Mother) lived with Williams, who was Mother's boyfriend at the time. One night, O.H. could not sleep and went into the dining room, where Williams was sitting alone. When O.H. told Williams that she could not sleep, he said, "Come here, this is how I get your mom to sleep." *Transcript* at 43. Williams instructed O.H. to pull down her underwear and she complied. He then "took his finger and started rubbing the inside of where the pee comes out." *Id.* O.H. later characterized the touching as "a soft touch" using a "round and round" motion. *Id*. at 69. Williams rubbed O.H. in that manner for "a couple of minutes" and asked O.H. if it felt good. *Id*. at 44. O.H. did not answer. Williams stopped rubbing O.H. and she pulled up her underwear. Williams then took Vaseline from a nearby jar and instructed O.H. to rub it on his "thing", which O.H. later clarified was his penis. *Id*. at 46. Williams told O.H. to squeeze and rub his penis, which she did for "a couple of minutes." *Id*. at 47. Upon Williams's instruction, O.H. then pulled down her underwear, faced away from him and "kind of [sat] down and [bent her]

[1] Ind. Code Ann. § 35-42-4-3 (West, PREMISE through 2007 1st Regular Sess.).

knees." *Id.* After she complied, Williams, as O.H. described it, "took his thing and rubbed it in [her] butt." *Id.* She explained this meant Williams rubbed his penis "inside [her] butt cheek." *Id.* at 48. When Williams was finished, he told O.H. not to tell her mother or anyone else what had happened.

Approximately one year later, O.H. attended a "good touch-bad touch" program at her school. Afterward, her teacher noticed that O.H. was distracted and unable to do school work. The teacher allowed O.H. to call her mother. During that phone call, O.H., for the first time, informed her about the incident with Williams described above. Mother contacted police two days later. Following an investigation, Williams was charged with three counts of child molesting, two as class A felonies and one as a class C felony. Williams was convicted as charged following a jury trial.

1.

Williams contends the evidence was not sufficient to support his convictions. Under the general heading of sufficiency, Williams brings two kinds of challenges. First, he contends the State did not prove the "penetration" element of class A felony child molesting, as alleged in Counts I and II. Second, and more generally, he contends all three convictions are supported only by the incredibly dubious testimony of O.H., and thus cannot stand.

When considering a challenge to the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). This review "respects 'the [fact-finder]'s exclusive province to weigh conflicting evidence.'" *Id.* at 126 (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). Considering only the probative evidence and reasonable inferences supporting the

verdict, we must affirm "'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *McHenry v. State*, 820 N.E.2d at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

Williams challenges the class A felony convictions under Counts I and II on grounds that the State failed to prove penetration. For purposes of this argument, it appears that the State and Williams are in agreement with respect to the salient facts relative to those matters.[2] Under Count I, Williams contends that even assuming he penetrated O.H.'s external genitalia, "more is required than circumstantial evidence to prove penetration and the penetration of external genitalia is insufficient to meet the evidentiary requirements for a class A felony child molesting conviction." *Appellant's Brief* at 5.

In order for a jury to properly find Williams guilty of class A child molesting as alleged under Count I, the State was required to prove that Williams, a person at least twenty-one years of age, performed or submitted to deviate sexual conduct with O.H., a child under fourteen years of age. *See* I.C. § 35-42-4-3(a). Deviate sexual conduct is defined as, "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 Ann. § 35-41-1-9 (West, PREMISE through 2007 1st Regular Sess.). The State specifically alleged under Count I that Williams engaged in sexual deviate conduct "by inserting … [his] finger into the sex organ of O.H.[.]" *Appellant's Appendix* at 22. "A conviction for child molesting will be

[2] We recognize, of course, that in a different argument in this appeal, Williams asks us to reject O.H.'s entire testimony as inherently incredible. Williams concedes the facts regarding the element of penetration only for

sustained when it is apparent from the circumstances and the victim's limited vocabulary that the victim described an act which involved penetration of the sex organ." *Short v. State*, 564 N.E.2d 553, 558 (Ind. Ct. App. 1991). Proof of the slightest penetration is sufficient to sustain convictions for child molesting. *Spurlock v. State*, 675 N.E.2d 312 (Ind. 1996).

At trial, O.H. testified as follows with respect to the events upon which this count was based:

> Q. And what happened after you pulled your underwear down?
>
> A. He took his finger and he started rubbing the inside of where the pee comes out.
>
> Q. Okay. Do you have a name for that?
>
> A. Yes.
>
> Q. What is that?
>
> A. My va-ja-ja.

Transcript at 43. Later, during cross-examination, O.H. was questioned more closely about where Williams touched her with respect to the actions forming the basis of Count I:

> Q. You went (inaudible), [O.H.], that you talked to someone from the police station or somewhere (inaudible) Jessica [Irish, a forensic child interviewer at the Child Advocacy Center in Indianapolis]?
>
> A. Yes.
>
> Q. Do you recall Jessica asking you if Tim had touched you…put his finger inside your vagina or the outside? What did you tell her?

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the sake of this argument (i.e., that the facts as they exist if O.H.'s testimony is believed do not establish penetration).

A. I told her … I don't remember.

Q. Do you remember telling her that she asked you if Tim touched the inside or the outside, you told her the outside. Do you remember that?

A. Yes.

Q. So you told Jessica he touched the outside, correct?

A. Yes.

Q. Not the inside, correct?

A. Yes.

Q. You also told your mom that he touched the outside, not the inside, that is correct, isn't it?

A. No.

Q. So you told … What did you tell your mother?

A. I told her he touched the inside.

Id. at 54. Later, upon redirect, O.H. was asked:

Q. When Tim's finger was in your va-ja-ja, was it … was he ramming it up your va-ja-ja or was it a soft touch?

A. It was a soft touch.

Q. And what kind of motion did he make?

A. Round and round.

Id. at 69. During her testimony, Mother confirmed that O.H. told her what Williams had done. Mother asked O.H. to show her exactly where and how Williams had touched her. Mother testified that O.H. showed her where on her (O.H.'s) body Williams had touched her.

Like O.H. did at times, Mother testified that Williams rubbed "the outside" of O.H.'s

vagina. *See, e.g.*, *id*. at 80. Mother was then asked specifically what that meant:

> Q. Okay. When you say the outside, and I have to get graphic.
>
> A. Uh-huh.
>
> Q. The outside would it have been the lips of her vagina or the inside?
>
> A. Not her internal where you would have intercourse, where more or less where the pee comes out, where her clitoris would be.
>
> Q. And so is that where she described to you as the outside?
>
> A. Yes.
>
> Q. And what did you say that part was again?
>
> A. Where the pee comes out. That is what she told me.
>
> Q. What did she show you?
>
> A. She showed me that with one finger and he was doing this to her clitoral area or her private part.

Id. at 80-81.

The State and Williams both cite the foregoing testimony in support of their respective arguments that the evidence did and did not demonstrate penetration. We think the competing interpretations stem from O.H.'s use of the term "outside" in describing where Williams touched her with respect to her genitals. Williams notes that O.H. said at various times, and initially reported to Irish, that Williams had touched "the outside" of her vagina. In fact, O.H. claimed that Williams touched "inside" her vagina only in the sense she claimed at trial she told that to her mother. This confusion, and the resultant controversy, might reflect differing definitions of "the outside" in this context. Indeed, adding to this confusion is the fact that "sex organ" is not defined by statute. We have, however, addressed this issue

in several cases. Most notably, we are mindful of the meaning that was given to "sex organ" by this court in *Short v. State*, 564 N.E.2d 559. In that case, this court held that in determining whether an individual had engaged in sexual intercourse for the purpose of establishing the crimes of child molesting and incest, it was not necessary to prove that the vagina was penetrated. Citing favorably in part case law from other jurisdictions, we determined that penetration of the external genitalia was sufficient to sustain a conviction. Specifically, in *Short*, we noted the case *Walker v. State*, 273 S.W.2d 707 (Tenn. 1954), where "the court held that sexual intercourse was established by the slightest penetration of the female sexual organ by the male sexual organ, and it is not necessary that the vagina be entered or that the hymen be ruptured, but the entering of the vulva or labia was sufficient." *Short v. State*, 564 N.E.2d at 559. Therefore, penetration occurs within the meaning of the child molesting statute when the external genitalia of the child is penetrated.

In this case, O.H. testified that Williams rubbed her in a place that, based upon her description, must have been either her urethra or her clitoris, or both. We note in this regard that when O.H. showed Mother where Williams touched her, Mother described it as "[n]ot her internal where you would have intercourse, where more or less where the pee comes out, where her clitoris would be." *Transcript* at 80. These features are located within O.H.'s external genitalia and can be accessed only by penetrating the external genitalia, or labia majora. In short, we conclude that the evidence was sufficient to prove that Williams penetrated O.H.'s external genitalia with his finger, thus satisfying the penetration element of the crime charged in Count I.

Williams also challenges the sufficiency of the evidence proving penetration as it relates to Count II, which alleged he "did perform or submit to deviate sexual conduct, an act involving a sex organ, that is: penis of Timothy Williams and the anus of [O.H.][.]" *Appellant's Appendix* at 22-23. In order to sustain a conviction under this count, the State was not required to introduce evidence of penetration of O.H.'s anus with Williams's penis to establish deviate sexual conduct. Rather, the State need only establish that Williams committed a sex act with his penis involving O.H.'s anus. *See Wisneskey v. State*, 736 N.E.2d 763 (Ind. Ct. App. 2000).

O.H. described the act that gave rise to Count II as follows:

> A. Then he told me to turn around and … and … kind of like … because he was sitting down. So I had like squat, not squat, but I had to kind of sit down and bend my knees. And then he took his thing and rubbed it in my butt.
>
> Q. What did that feel like?
>
> A. It felt like it was … uh, slimy cause it had the petroleum jelly on there.
>
> Q. When he rubbed his penis in your butt, was it on the outside of your butt cheek or the inside of your butt cheek?
>
> A. The inside.
>
> Q. Were … Was [sic] your underwear up or were they down?
>
> A. Down.

Transcript at 47-48. O.H. went on to describe Williams's penis as "moving … [u]p and down" during this episode. *Id*. at 48-49. Considering O.H.'s age and limited vocabulary, *see Short v. State*, 564 N.E.2d 553, and in light of the anatomical location of the anus relative to

the "butt cheek", *Transcript* at 48, we conclude that O.H.'s testimony above was sufficient to prove that Williams committed an act involving his penis and O.H.'s anus.

We turn briefly to Williams's argument that O.H.'s testimony is generally insufficient, i.e., not worthy of belief, under the incredible dubiosity rule. "For testimony to be so inherently incredible that it is to be disregarded on this basis, 'the witness must present testimony that is inherently contradictory, wholly equivocal or the result of coercion, and there must also be a complete lack of circumstantial evidence of the defendant's guilt.'" *Gleaves v. State*, 859 N.E.2d 766, 769-770 (Ind. Ct. App. 2007) (quoting *Clay v. State*, 755 N.E.2d 187, 189 (Ind. 2001)).

Williams's claim of incredible dubiosity is based upon the facts that (1) O.H. waited almost a year to tell anyone about the molestation, (2) there was no physical evidence of molestation, and (3) O.H.'s account of what happened varied in certain respects at different times; also, (4) Williams claims that Mother coached O.H. None of these is a valid basis for deeming O.H.'s testimony incredible. It is not uncommon for victims of child abuse to delay reporting the molestation, occasionally for periods much longer than a year. We note in this regard that the statute of limitation for prosecuting the offense of child molesting, which in all cases will be at least eighteen years (i.e., a thirty-one-year-old victim reporting abuse occurring when he or she was thirteen years old), is defined by the victim's age,. *See*, Ind. Code Ann. § 35-41-4-2(e)(1) (West, PREMISE through 2007 1st Regular Sess.) (a child molesting charge may be filed until the victim is thirty-one years old) and I.C. § 35-42-4-3 (child molesting defined as involving a child under the age of fourteen). This extended period of limitation is no doubt attributable to the fact that victims of child molesting often

delay reporting the abuse for a long period of time. The delay is certainly not a reason to declare the report unworthy of belief.

Williams also makes much of the fact that O.H.'s claims about certain details of the incident varied somewhat over time. For instance, she claimed variously that Williams touched inside her "va-ja-ja" and that he touched outside her "va-ja-ja;" at one point she claimed she was not wearing underwear, while at another point she claimed he made her pull her underwear down; and O.H. stated that she was standing when Williams touched her butt with his penis, while at another times she stated that he made her "kind of sit down and bend [her] knees." *Transcript* at 47. The mere fact that O.H. made inconsistent statements does not render her trial testimony inherently improbable or incredibly dubious. *See Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002), *trans. denied*. It was the function of the jury to judge O.H.'s credibility based in part on those inconsistent statements and we decline to hold that O.H.'s testimony was insufficiently credible to support a conviction. *See id.* Moreover, we summarily hold that Williams has not demonstrated that O.H.'s testimony was the result of coercion.

In summary, the incredible dubiosity rule does not apply here and the evidence was sufficient to support the convictions.

2.

Williams contends the entry of conviction for three counts of child molesting violates double jeopardy principles. He contends: "The trial court convicted and sentenced Mr. Williams on Count III, C felony child molestation which contains the same facts and events as Count I, A felony child molestation. The trial court's action violates the principles of

double jeopardy." *Appellant's Brief* at 8. In reviewing the standard of review cited by Williams on this issue, it is apparent that he brings this challenge under the Indiana Constitution.

The double jeopardy clause of the Indiana Constitution prevents the State from proceeding against a person twice for the same criminal transgression. *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). Two offenses are the same offense, with respect to Indiana's double jeopardy clause, "if, with respect to *either* the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Id*. at 49 (emphasis in original). Clearly, Williams's challenge in this regard arises under the actual evidence test. Under the actual evidence test,

> the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Id. at 53. To prevail, a defendant must show "more than a remote or speculative possibility that the same facts were used." *Goldsberry v. State*, 821 N.E.2d 447, 459 (Ind. Ct. App. 2005). To determine what facts were used, "we consider the evidence, charging information, final jury instructions, and arguments of counsel." *Id*.

Counts I and III did *not* allege the same facts. As indicated above, Count I alleged Williams "did perform or submit to deviate sexual conduct by inserting an object, that is: finger, into the sex organ of [O.H.]." *Appellant's Appendix* at 22. In contrast, Count III

alleged Williams "did perform or submit to any fondling or touching with O.H., … with intent to arouse or satisfy the sexual desires of … Williams." *Id*. at 23. Count I was based upon the act of Williams rubbing O.H.'s clitoris or vagina, whereas Count III was based upon the separate and distinct act of Williams forcing O.H. to rub his penis. It might be argued that Count III could be interpreted as referring to the act charged in Count I. Any chance of confusion in that regard was dispelled by, among other things, the prosecutor during closing argument, who explained that Count I was based upon the following: "[O.H.] testified that he put his finger in her vagina and he moved it around and around. He put it inside her sex organ, moved around and around." *Transcript* at 241. Count III, on the other hand, was explained as follows:

> Count Three, child molest, as a Class C felony. Timothy Williams did knowingly, perform or submit to any fondling or touching with O.H., … with the intent to arouse or satisfy his sexual desires, when she was under the age of fourteen, being seven or eight. He is guilty of Count Three, ladies and gentlemen, and here's why. [O.H.] testified that he told her to put Vaseline on his penis. He showed her how to rub it. In the video that you saw, Jessica Irish, [O.H.] was showing her with her hands how he told her to rub the Vaseline on his penis. She said it was hard and stretched out when she was in here testifying yesterday. She said it had veins in it. Something she made up? Something she imagined? The State submits, no. Her disclosure. She told Jessica Irish how he rubbed it, how he made her rub this Vaseline on his penis. On page 13 of the transcribed statement of that video you will see the reference and how consistent she was with her testimony here yesterday. Also she told … she told Irish that the Defendant wanted her to squeeze his penis when she was rubbing the Vaseline on it but she couldn't, it was too hard. She couldn't get her hands around it. The State has met its burden with regard to Count Three. He's guilty.

I*d.* at 243-44.

Having examined the charging informations and the argument of the prosecuting attorney, we conclude there is not a reasonable possibility that the evidentiary facts used by

the jury to establish the essential elements of Count I may also have been used to establish the essential elements of Count III.

Judgment affirmed.

KIRSCH, J., and BAILEY, J., concur