



Michael Gregory appeals his convictions and sentence for three counts of child molesting as class A felonies,<sup>1</sup> three counts of child molesting as class C felonies,<sup>2</sup> and the sanctions imposed for findings of contempt. Gregory raises four issues, which we revise and restate as:

- I. Whether his convictions for three counts of child molesting as class A felonies violate double jeopardy principles;
- II. Whether the evidence is sufficient to sustain his convictions for child molesting for touching S.J. as a class C felony and child molesting for touching D.C. as a class C felony;
- III. Whether the prosecutor committed prosecutorial misconduct that resulted in fundamental error; and
- IV. Whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm in part, reverse in part, and remand.

The relevant facts follow. S.J., who was born on August 10, 1998, and F.T., who was born on October 4, 1997, are the children of Sh.J. (“Mother”). D.C., who was born on February 14, 1997, is a cousin of S.J. and F.T. Mother married Gregory in April of 2006. In October of 2006, Mother became incarcerated and left S.J. and F.T. in Gregory’s care. D.C. frequently stayed overnight at the residence of Gregory, S.J., and F.T.

Sometime between October 2006 and March 2007, D.C., S.J., and F.T. were in S.J. and F.T.’s room watching a movie, and Gregory touched D.C.’s leg above the knee

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<sup>1</sup> Ind. Code § 35-42-4-3(a) (Supp. 2007).

<sup>2</sup> Ind. Code § 35-42-4-3(b) (Supp. 2007).

and moved his hand up her leg toward D.C.'s "private part." Transcript at 594. D.C. told Gregory to stop, and Gregory told D.C. that he was "just check[ing] if [she] peed." Id. at 595. D.C. replied to Gregory: "I don't pee on myself." Id. at 596.

Sometime after March 2007, Gregory entered F.T.'s bedroom where D.C. was watching a movie and S.J. and F.T. were sleeping. Gregory placed his hand under S.J.'s shirt and touched S.J.'s chest under her clothing while she was sleeping. Gregory then moved his hand down into S.J.'s shorts and touched S.J.'s "private part where she pees from" under her clothing. Id. at 607. D.C. asked Gregory what he was doing, and he replied that he was just checking to see if S.J. had "peed." Id. at 608. Gregory also put his hand under F.T.'s shorts and touched F.T.'s bare penis. Gregory used his hand to make an "up and down" motion on F.T.'s penis. Id. at 645. F.T. woke up because Gregory was "feeling on [him]." Id. at 644. F.T. asked Gregory what he was doing, and Gregory did not respond and walked out of the room.

On another occasion sometime after March 2007, S.J. was in the shower in the bathroom, and Gregory sat down on the toilet. S.J. put on a towel and stepped out of the shower, and Gregory, who was still sitting on the toilet, grabbed S.J. and placed her on his lap. Gregory pulled S.J. back against his erect penis, which touched S.J. "in the middle" of her butt "where [she] poop[ed]" and it "[k]ind of hurt." Id. at 443-444. S.J. "tried to move away" and was able to leave the bathroom. Id. at 444.

On another day, S.J. had a doctor's appointment and was at home. Gregory pulled down S.J.'s clothes and underwear to her ankles, put her on a bed, and touched S.J.'s

vagina with his fingers and index finger. Gregory touched S.J.'s "[p]ee hole" and made "[c]ircular motions." Id. at 450. Gregory stopped when S.J. almost started to scream.

On another day, Gregory told S.J. to come into his room. Gregory pulled down S.J.'s pants and underwear and touched S.J.'s "pee hole" with his tongue and made "[c]ircular motions" with his tongue. Id. at 454-455.

The State initially filed an information on September 21, 2007, charging Gregory with nine counts, and the State filed an amended information on December 3, 2009, charging Gregory with the following eight counts: Count I, child molesting for touching S.J. as a class C felony; Count II, child molesting for deviate sexual conduct with S.J. as a class A felony; Count III, child molesting for deviate sexual conduct with S.J. as a class A felony; Count IV, child molesting for sexual intercourse or deviate sexual conduct with S.J. as a class A felony; Count V, child exploitation as a class C felony; Count VI, child molesting for touching F.T. as a class C felony; Count VII, child molesting for touching D.C. as a class C felony; and Count VIII, child exploitation as a class C felony. On July 11, 2008, the State alleged that Gregory was an habitual offender.

A jury trial commenced on December 7, 2009. At one point during a sidebar conference regarding an objection at trial, the court warned Gregory, who proceeded *pro se* throughout most of his trial,<sup>3</sup> not to interrupt the court and that if he did he would be held in contempt. Gregory then stated: "Hey, you people . . . you racist. The all white people is racist. You racist and everybody is racist. I can't win in here. You're racist,

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<sup>3</sup> Gregory was represented by counsel at trial after the presentation of evidence and at sentencing.

racist, KKK Klan . . . .” Transcript at 457. The court had Gregory removed from the courtroom. After Gregory was returned to the courtroom, the court held Gregory in direct contempt and sanctioned him to six months in the Elkhart County Jail without good time.

The State presented testimony of S.J. that Gregory showed her a video which allegedly depicted sexual conduct by persons under eighteen years of age. The court indicated that it was inclined to grant Gregory a directed verdict on Count VIII and stated that “[a]n essential element of this crime is that the actors in this video were younger than 18 years of age” and that “[t]he evidence that I’ve heard from S.J. did not establish that . . . .” Transcript at 543. After some discussion in which Gregory expressed his desire that the jury be told of the reason for the proposed judgment on the evidence ruling and the State expressed its desire that the jury not be told of the reason for the proposed judgment on the evidence ruling, the State indicated that it was “considering at this point just simply moving to dismiss Count VIII.” *Id.* at 546. A short time later the State moved to dismiss Count VIII, which the court granted. During closing argument, the prosecutor stated to the jury: “[Y]ou’re going to see that the [S]tate is going to give, always, the defendant the benefit of the doubt, and we have dismissed Count VIII. That is what the [S]tate does.” *Id.* at 812-813.

The jury found Gregory not guilty of Count V and guilty of Counts I, II, III, IV, VI, and VII. Gregory stipulated to his status as an habitual offender.

A sentencing hearing was held on February 4, 2010. At one point during the hearing, Gregory stated: “As to my allocution, your Honor, I first would like to say . . . that I am an innocent man. Throughout this whole process, from the initial investigation through every court appearance, including trial, justice has been thwarted. This trial court, instead of insuring that . . . my rights . . . under the law, including my right to a fair and equal trial were protected, participated in a deliberate and wholly intentional high-tech lynching. This court has held sway over its own little fiefdom for so long that everyone from the judge down to the bailiff, including the prosecuting attorney--[.]” Id. at 885. The court interrupted and warned Gregory that if he continued to use such language he would be held in contempt. Gregory then stated: “This court has held sway over its little fiefdom for so long that everyone from the judge, down to the bailiff, including the prosecuting attorney, the court reporter, and jury, who are Caucasian, participate in deliberate malfeasance, official misconduct . . . .” Id. at 886. The court then held Gregory in direct contempt and sanctioned him to 180 days in the Elkhart County Jail, to be served without good time and following his release from custody.

The court permitted Gregory to proceed, and Gregory read aloud the order of the court related to the contempt finding at trial and stated that “[a]lthough [he] did, in fact, accuse [the judge], the jury, and the prosecuting attorneys of being racist, and the court as being a ‘Klan court,’ primed for a high-tech lynching, the [contempt] order was riddled with half-truths and outright lies.” Id. at 887. The court stated that “[a]ccusing [the court] of lying is contempt of court,” found Gregory in contempt, and sanctioned him to

an additional 180 days in the Elkhart County Jail to be served consecutive to the sanctions for the two contempt citations previously imposed.

The court sentenced Gregory to eight years for Count I, fifty years for Count II, fifty years for Count III, fifty years for Count IV, eight years for Count VI, and eight years for Count VII. The court ordered the sentences for Counts I, II, III, and IV to be served concurrently with each other and the sentences for Counts VI and VII to be served consecutive to each other and Counts I-IV. The court also enhanced Gregory's sentence by thirty years for being an habitual offender. Thus, Gregory received an aggregate sentence of ninety-six years.<sup>4</sup>

## I.

The first issue is whether Gregory's convictions under Count II, III, and IV violate the prohibition against double jeopardy. Gregory argues: "Counts II, III and IV are charged exactly the same. Same offense, same child, same place, same time period." Appellant's Brief at 8 (internal citation omitted). Gregory claims that the three convictions violate double jeopardy under both the Federal and Indiana Constitutions.

### A. Federal Double Jeopardy

The Federal Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. This constitutional provision includes protection from multiple punishments for the same

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<sup>4</sup> The court also ordered that the sanctions imposed by the court in connection with its contempt findings be served consecutive to the aggregate sentence.

offense. Pontius v. State, 930 N.E.2d 1212, 1215-1216 (Ind. Ct. App. 2010). In support of his claim that his convictions under Counts II, III, and IV violate the Federal Constitution, Gregory cites to Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932), and argues that “the offenses charged are Class A felony child molestings based on deviate conduct and contain identical elements” and that “the defendant cannot be convicted and sentenced for two of the three counts . . . .” Appellant’s Brief at 8. The State argues that “[e]ssentially, Gregory argues on appeal that he cannot be convicted of three counts of the same offense” and that “[t]his is simply untrue.” Appellee’s Brief at 15. The State argues that “[t]he Indiana Courts have repeatedly held that when separate and distinct offenses occur, even when they are similar acts done many times to the same victim, they are chargeable individually as separate and distinct criminal conduct.” Id.

Gregory essentially claims that his convictions pursuant to Ind. Code § 35-42-4-3(a) under Counts II, III, and IV constitute impermissible multiple convictions in violation of double jeopardy principles as stated in Blockburger. “The classic test for multiplicity is whether the legislature intended to punish individual acts separately or to punish the course of action which they make up.” Pontius, 930 N.E.2d at 1218 (citing Brown v. State, 912 N.E.2d 881, 893-894 (Ind. Ct. App. 2009) (citing Blockburger, 284 U.S. at 302, 52 S. Ct. at 181), trans. denied). See also Brown, 912 N.E.2d at 893-894 (“In analyzing double jeopardy claims based on multiple punishments, we utilize a method of statutory interpretation in which the court is asked to determine whether the

legislature intended to impose separate sanctions for multiple offenses arising in the course of a single act or transaction”) (citation omitted).

We need not undertake an extensive inquiry into whether the legislature intended to punish individual acts of child molesting separately. This court has already noted with respect to multiple class A convictions for child molesting that “[w]here . . . a double jeopardy challenge is premised upon convictions of multiple counts of the same offense, the statutory elements test of Richardson [v. State], 717 N.E.2d 32, 49 (Ind. 1999),] is inapplicable.” Thomas v. State, 840 N.E.2d 893, 900 (Ind. Ct. App. 2006) (citing Minton v. State, 802 N.E.2d 929, 937 (Ind. Ct. App. 2004), trans. denied), trans. denied. We observe that the “statutory elements test” referenced in Richardson is the same test enunciated in Blockburger. See Pontius, 930 N.E.2d at 1218. The child molesting offenses for which Gregory was convicted under Counts II, III, and IV occurred on different days and included different deviate sexual conduct and constituted separate acts of child molesting. Federal double jeopardy principles as enunciated in Blockburger do not prohibit Gregory’s multiple convictions for child molesting as class A felonies for each separate instance of deviate sexual conduct. See Thomas, 840 N.E.2d at 900 (holding that the statutory elements test is inapplicable where the defendant was convicted of multiple counts of child molesting).

B. Indiana Double Jeopardy

The Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” IND. CONST. art. 1, § 14. In Richardson v. State, the Indiana

Supreme Court developed a two-part test for Indiana double jeopardy claims, holding that “two or more offenses are the ‘same offense’ in violation of Article I, Section 14 of the Indiana Constitution, 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.” 717 N.E.2d 32, 49 (Ind. 1999).

In support of his claim, Gregory argues that “the prosecutor attempted to add some sense of order to these apparently redundant charges in final argument, and that the Judge crafted jury verdict forms that attempted to eliminate double jeopardy.” Appellant’s Brief at 8. Gregory argues: “Can it be said with any degree of certainty that the jury was able to match the facts with the proper count, or is there a reasonable possibility that the evidentiary facts used to establish one set of facts may have overlapped or been used to establish a second offense? There would certainly seem to be more than enough of a question to find the existence of a reasonable possibility.” *Id.* at 9.

The State argues that “[a]n examination of the record reveals that there was no possibility that the jury relied upon the same facts to convict Gregory of the three charges.” Appellee’s Brief at 16. The State argues that “the prosecutor developed the evidence at trial as to each count before moving on to the next,” that the “prosecutor also explained during both opening and closing arguments that the charges were based upon separate incidents during the charged periods of time,” and that “the jury was provided with verdict forms that informed them that, in order to return a verdict of guilty on

Counts II through IV, they must find that the counts were supported by separate and distinct acts.” Id. at 16-17.

Gregory essentially argues that his three convictions under Counts II, III, and IV violate Indiana’s “actual evidence test.” Under the actual evidence test, the evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Lee v. State, 892 N.E.2d 1231, 1234 (Ind. 2008). 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. The Indiana Supreme Court has determined the possibility to be remote and speculative and therefore not reasonable when finding no sufficiently substantial likelihood that the jury used the same evidentiary facts to establish the essential elements of two offenses. Hopkins v. State, 759 N.E.2d 633, 640 (Ind. 2001) (citations omitted). In determining the facts used by the fact-finder to establish the elements of each offense, it is appropriate to consider the charging information, jury instructions, and arguments of counsel. Lee, 892 N.E.2d at 1234; Spivey v. State, 761 N.E.2d 831, 832 (Ind. 2002).

Our review of the record reveals that Counts II and III, as amended, alleged that “on or about the 9<sup>th</sup> day of March 2007 through the 13<sup>th</sup> day of May, 2007, at the County of Elkhart, State of Indiana,” Gregory “did then and there knowingly perform deviate sexual conduct with a child under fourteen (14) years of age, to wit: S.J. . . .”

Appellant's Appendix at 73. Count IV, as amended, alleged that "on or about the 9<sup>th</sup> day of March 2007 through the 13<sup>th</sup> day of May, 2007, at the County of Elkhart, State of Indiana," Gregory "did then and there knowingly perform sexual intercourse<sup>[5]</sup> or deviate sexual conduct with a child under fourteen (14) years of age, to wit: S.J. . . . ." Id.

During opening statements, the prosecutor stated to the jury the evidence would show that Gregory caused S.J. "to submit to various acts of criminal deviate conduct" and that "these acts were on different dates." Transcript at 356.

The record reveals that the State presented evidence related to three incidents with S.J. First, S.J. testified that Gregory grabbed her when she stepped out of the shower and pulled her back against his erect penis, which touched S.J. "in the middle" of her butt "where [she] poop[ed]" and it "[k]ind of hurt." Id. at 443-444. Second, S.J. testified that Gregory pulled down her clothes and underwear to her ankles, put her on a bed, and touched her vagina with his fingers and index finger, making "[c]ircular motions." Id. at 450. Third, S.J. testified that Gregory told S.J. to come into his room, pulled down her pants and underwear, and touched S.J.'s "pee hole" with his tongue and made "[c]ircular motions" with his tongue. Id. at 454-455. In addition, S.J. specifically testified that each of the three incidents she described occurred on different days.

During closing arguments, the State argued that it would "present to [the jury] what facts [it] believe[s] are established under each count" and that it was "asking [the jury] to limit [its] deliberations to the fact scenario that [the State] give[s] [the jury] under

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<sup>5</sup> In the amended information submitted to the jury as attached to the final instructions, the words "sexual intercourse or" under Count IV were blacked out. See Appellant's Appendix at 107.

each one of those counts.” Id. at 789-799. The State argued to the jury that Count II was supported by testimony that Gregory grabbed S.J. as she stepped out of the shower and pulled her back against his erect penis, which touched her anus and hurt. The State argued that Count III was supported by testimony that Gregory put S.J. on a bed and touched her vagina with his fingers and index finger and made circular motions. Finally, the State argued that Count IV was supported by testimony that Gregory had S.J. come into his room and touched S.J.’s “pee hole” with his tongue and made circular motions. Id. at 455.

Further, the verdict forms provided to the jury with respect to Counts II through IV each included language that to convict Gregory the jury had to find him guilty “as a result of his commission of acts occurring on a date separate and distinct from those described” in the other counts in the amended charging information. See Appellant’s Appendix at 144-146.

Based upon the record, including the evidence and the prosecutor’s arguments presented to the jury, we conclude that the State distinguished and set forth independent evidence of Counts II, III, and IV. Thus, we cannot say that Gregory’s convictions for Counts II, III, and IV violate Indiana’s Double Jeopardy Clause. See Pontius, 930 N.E.2d at 1219 (holding that while the charging informations for two counts were identical, the evidence used to prove each count was clearly distinct and noting that there was no suggestion by either counsel that the evidence relating to the two counts was common or interchangeable); Micheau v. State, 893 N.E.2d 1053, 1066 (Ind. Ct. App. 2008) (holding

based on the evidence presented at trial and the prosecutor's closing argument that the State distinguished and set forth independent evidence of two counts and thus the defendant's convictions for those did not violate Indiana's Double Jeopardy Clause), trans. denied; Storey v. State, 875 N.E.2d 243, 250 (Ind. Ct. App. 2007) (holding that the State "carefully parsed the evidence" and "[i]n doing so, the State set forth independent evidence that the defendant committed each of the charged offenses and the defendant's convictions did not violate double jeopardy), trans. denied; Thomas, 840 N.E.2d at 900-901 (holding in part that the incidents alleged in several counts for child molesting were established by separate and distinct facts in that the incidents occurred in different rooms and at different times and that therefore the defendant's convictions under those counts did not violate the Indiana Constitution where several of the counts in the amended charging information were similar or identical), trans. denied.

## II.

The next issue is whether the evidence is sufficient to sustain Gregory's convictions under Counts I and VII. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

The offense of child molesting as a class C felony is governed by Ind. Code § 35-42-4-3(b), which 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.” In order to convict Gregory of child molesting as a class C felony under Counts I and VII, the State needed to prove that Gregory performed or submitted to any touching of either Gregory or S.J. and D.C., respectively, each a child under fourteen years of age, with the intent to arouse either Gregory or S.J. and D.C., respectively.

Gregory argues that “[t]he sparse and ambiguous testimony introduced . . . was not sufficient to sustain the convictions on Counts I and VII.” Appellant’s Brief at 11. We address Gregory’s arguments with respect to Counts I and VII separately.

A. Count I – Touching of S.J.

Gregory argues with respect to Count I that “[t]here is not evidence that [the] extremely brief touching was done for sexual arousal or that sexual arousal or satisfaction occurred, and no such intent can be safely inferred.” Id. at 10. In support of his argument, Gregory points to D.C.’s testimony that Gregory “placed his hand under S.J.’s shirt touching her chest” but that “[t]his lasted only a couple of seconds.” Id. Gregory also argues that D.C. testified that Gregory’s hand was “touching skin” but that “it is a surmise on D.C.’s part as to what Gregory’s hand was doing since she couldn’t see it.” Id.

The State argues that “there is no minimum time requirement in the child molesting statute, and the fact that Gregory touched S.J. on both her chest and vagina indicates that the touching had to be something more [than] ‘extremely brief.’” Appellee’s Brief at 19. The State also points to testimony that when D.C. asked Gregory what he was doing, Gregory stated that he was “checking S.J. to ensure that she had not urinated on herself” and that “[g]iven that children do not urinate from their chests and that S.J. had been potty trained for some time, this explanation was dubious at best and was further evidence of Gregory’s guilty intent.” *Id.* Gregory merely requests that we reweigh the evidence or judge the credibility of the witnesses, which we cannot do. Jordan, 656 N.E.2d at 817.

Mere touching alone is not sufficient to constitute the crime of child molesting. Nuerge v. State, 677 N.E.2d 1043, 1048 (Ind. Ct. App. 1997), trans. denied. The element of intent of child molesting may be established by circumstantial evidence and inferred from the actor’s conduct and the natural and usual sequence to which such conduct usually points. Cruz Angeles v. State, 751 N.E.2d 790, 797 (Ind. Ct. App. 2001) (citing Nuerge, 677 N.E.2d at 1048), trans. denied. This court has found sufficient evidence to support a finding of touching with intent to satisfy sexual desires where a defendant entered a child’s bedroom at night and touched the child’s breasts over her t-shirt between eight and twelve times. See Cruz Angeles, 751 N.E.2d at 798. We have also found sufficient evidence to support a finding of touching with intent to satisfy sexual desires where a defendant put his arm around the shoulder of a child and let his hand

hang, touching her breast, and where he placed his hand on the shoulder of another child and then on her breast. See Pedrick v. State, 593 N.E.2d 1213, 1220 (Ind. Ct. App. 1992), reh'g denied.

Here, the facts most favorable to the judgment show that D.C. observed Gregory reach under S.J.'s shirt and touch her bare chest while S.J. was sleeping. Gregory then reached his hand into S.J.'s shorts and touched S.J. on her "private part where she pees from." Transcript at 607. D.C. asked Gregory what he was doing, and he replied that he was just checking to see if S.J. had "peed." Id. at 608. Mother testified that S.J. "was probably potty trained at around two years old," that she "was not having accidents," and that she did not need to check S.J. during the night by touching S.J.'s body to see if she had wet herself. Id. at 699.

Based upon the record, we conclude that the State presented evidence of probative value from which a reasonable jury could have inferred that Gregory touched S.J. with the intent to arouse either S.J. or Gregory and found Gregory guilty of child molesting for touching S.J. as a class C felony. See Cruz Angeles, 751 N.E.2d at 797-798 (holding the evidence was sufficient to sustain the defendant's conviction for child molesting as a class C felony where the defendant touched the victim's breasts over her t-shirt eight to twelve times).

B. Count VII – Touching of D.C.

Gregory argues with respect to Count VII that "[t]here is no evidence that [his] hand on [D.C.'s] leg is anything more than a brief touch," that "[i]t was done on the top

of her clothing,” and that “[t]here is not evidence that it was done for sexual arousal or satisfaction occurred, and no such intent can be safely inferred.” Appellant’s Brief at 10. In support of his argument, Gregory points to D.C.’s testimony that Gregory “touched her on the leg” and that his hand was “[j]ust almost going up, but it didn’t.” Id.

The State argues “[t]he only reason [Gregory] did not reach [D.C.’s] crotch was that D.C. told him to stop” and that “Gregory’s explanation of his behavior to eleven-year-old D.C. was that he was simply checking her to see if she had wet her pants.” Appellee’s Brief at 19. The State argues that “[t]he plain language of the child molesting statute does not require that the touching involve a sexual organ.” Id. at 20. The State argues that the “touch, coupled with Gregory’s ludicrous explanation that he was checking to see if D.C. had wet herself, supports a reasonable conclusion that Gregory touched D.C. with intent to arouse himself.” Id.

As previously stated, the element of intent of child molesting may be established by circumstantial evidence and inferred from the actor’s conduct and the natural and usual sequence to which such conduct usually points. Cruz Angeles, 751 N.E.2d at 797. This court has also stated that “[b]ecause the inner thigh is in close proximity to the genitals, an erogenous zone, it may itself be the source of sexual gratification.” Nuerge, 677 N.E.2d at 1049.

Here, the facts most favorable to the judgment show that Gregory touched D.C.’s leg above the knee and moved his hand up her leg toward D.C.’s “private part.” Transcript at 594. D.C. told Gregory to stop, and Gregory told D.C. that he was “just

check[ing] if [she] peed.” Id. at 595. D.C. replied to Gregory: “I don’t pee on myself.” Id. at 596. D.C. testified that she was potty trained when she was two years old and indicated that she had not had an accident and peed on herself or on her bed during the night or day.

Based upon the record, we conclude that the State presented evidence of probative value from which a reasonable jury could have found Gregory guilty of child molesting for touching D.C. as a class C felony. See Nuerge, 677 N.E.2d 1043, 1049 (holding that the evidence was sufficient to sustain the defendant’s conviction for child molesting and that it could also have been inferred that the defendant intended to arouse the child’s sexual desires by putting put his hand on the child’s leg and kissing the inside of her upper thigh).

### III.

The next issue is whether the prosecutor committed prosecutorial misconduct that resulted in fundamental error. During closing arguments, the prosecutor stated: “[Y]ou’re going to see that the [S]tate is going to give, always, the defendant the benefit of the doubt, and we have dismissed Count VIII. That is what the [S]tate does.” Transcript at 812-813.

Gregory argues that the prosecutor’s statement “conveys to the jury that the State is unwilling to proceed if in its own independent evaluation, it has not established the case beyond a reasonable doubt” and “[i]t has the effect of assuring the jury that if the State is proceeding on these other counts, the counts have been proven.” Appellant’s

Brief at 12. Gregory argues that “[t]he back story to the State’s dismissal of Count VIII is that the Judge had advised both parties that he was entering judgment on the evidence with regards to Count VIII.” Id. Gregory argues that “[t]he State opposed the Judge’s proposed action in no uncertain terms” and that “after learning that the Judge could not be dissuaded from this position, and after hearing how the Judge intended to instruct the jury, then and only then, did the State arrive at the decision that it should dismiss Count VIII.” Id. at 12-13. Gregory further argues that the “prosecutor’s comment during closing was directed at a jury in which one member had already shown an uncomfortable alignment with the other prosecutor”<sup>6</sup> and that the “[t]he comment delivered during closing argument sought to further develop the bond between the jury and the prosecutors and add further distance between these two entities and the defendant, Mr. Gregory, who was proceeding *pro se.*” Id. at 13.

The State argues that Gregory has waived his prosecutorial misconduct argument on appeal because Gregory failed to object to the prosecutor’s remark or request an admonishment or mistrial during the closing arguments and fails to cite to legal authority or a standard of review on appeal. The State argues that “assuming, without conceding, that there was something improper about the prosecutor’s remark, Gregory has failed to meet his burden on appeal to show that he was placed in great peril thereby.” Appellee’s Brief at 21. The State argues that “given that the jury acquitted [Gregory] of the other

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<sup>6</sup> Gregory argues that “when one of the jurors tells a prosecutor during break that he looks like movie star, Keanu Reeves, it cannot help but raise questions of impartiality at the very least in the mind of the defendant.” Appellant’s Brief at 13.

child exploitation charge based upon the alleged showing of the same movie, it would appear that the prosecutor's remarks had the unintended effect of urging them to give Gregory the benefit of the doubt on that charge as well." Id. at 21-22. The State also argues that "the victims' direct testimony regarding the offenses, some of which was corroborated by D.C., likely had more persuasive effect on the jury than the prosecutor's truthful and isolated comment during closing argument that it had dismissed the other child exploitation count." Id. at 22.

In reviewing a properly preserved claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct. Id. The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. Id.

When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. Id. If the party is not satisfied with the admonishment, then he or she should move for mistrial. Id. Failure to request an admonishment or to move for mistrial results in waiver. Id. Here, Gregory did not object to the prosecutor's closing argument and did not request an admonishment or a mistrial. Thus, Gregory has waived the issue.

Where, as here, a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. Id. More specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Id. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. Id. It is error that makes “a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm.” Id. Gregory does argue fundamental error in his appellate brief.

Even assuming misconduct, we are not persuaded that the comments during the prosecutor’s closing argument created “an undeniable and substantial potential for harm.” Id. We note that the jury was instructed that “[t]o overcome the presumption of innocence, the State must prove the defendant guilty of each essential element of the crime charged beyond a reasonable doubt.” Appellant’s Appendix at 125. The jury was also instructed: “When the evidence is completed, the parties will make final statements. These final statements are not evidence, but are given to assist you in evaluating the evidence. The parties are also permitted to argue, characterize the evidence, and to attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit.” Id. at 100. Given the evidence presented at the trial and the jury instructions, we conclude that any prejudicial impact caused by the prosecutor’s statements was minimal and that the prosecutor’s statements do not constitute

fundamental error. See Surber v. State, 884 N.E.2d 856, 866 (Ind. Ct. App. 2008) (holding that even assuming the prosecutor’s comments constituted misconduct they did not constitute fundamental error), trans. denied. Gregory’s prosecutorial misconduct claim fails.

#### IV.

The next issue is whether Gregory’s sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Gregory first points to the court’s sanctions that he serve six months in jail in connection with the finding of direct contempt during trial on December 8, 2009 and 180 days in jail on each of the two findings for direct contempt during the sentencing hearing on February 4, 2010. Gregory argues that he “is someone who does not have complete control of his emotions and may not be able to rein himself in when his frustration reaches a certain level” and that “Gregory’s outburst on December 8th was in front of the same jury who would decide his fate.” Appellant’s Brief at 16. Gregory “requests this Court to review these contempt sanctions as part of the overall sentence, find them excessive and inappropriate, and reduce or eliminate the sanctions entirely.” Id.

Gregory further argues that he “displays a strong tendency to engage in what can only be described as self-defeating behavior.” Id. Gregory argues that “[t]his is demonstrated by his election to proceed as his own counsel, his decision not to testify even though he was representing himself, and by the highly counterproductive remarks directed to the court and jury” and that “[i]t is urged that mitigation of the sentence is warranted to offset some of this self-inflicted damage.” Id. at 17. Gregory argues that “his mother and father did not marry and never resided together as a family unit,” that “[i]t is highly significant that all of [his] brothers and sisters currently reside in the Indiana Department of Correction,” and that “[t]his factor should be considered by the Court as bearing on his character.” Id. Gregory argues that “[i]t should also be noted that [he] was conscientious about providing care for F.T. and S.J., especially after their mother was sent to prison” and that “[a]s the sole provider, it is also noted that Gregory maintained gainful employment with the Elkhart City street department, a job that required manual labor.” Id. Gregory argues that “[t]he aggregate sentence of ninety-six (96) years is inappropriate in this case.” Id.

The State argues that the trial court’s contempt sanctions should be upheld and that “[d]espite the trial court’s repeated warnings, Gregory used his allocution to malign the racial neutrality and impartiality of the trial court, even accusing the trial court of participating in a ‘high-tech lynching.’” Appellee’s Brief at 24-25. The State argues that Gregory’s aggregate sentence “is entirely appropriate given the nature of his offenses and his character.” Id. at 25. In support of its argument, the State argues that “Gregory’s

sentencing exposure was 204 years, but the trial court sentenced him to only ninety-six years.” Id. The State also argues that Gregory has an extensive criminal history and that Gregory has beaten F.T. with a belt and choked F.T.

Initially, we note that Gregory received the maximum sentence for each of his child molesting convictions. See Ind. Code §§ 35-50-2-4 (class A felonies); 35-50-2-6 (class C felonies).

A review of the nature of the offenses reveals that, between October 2006 and August 2007, Gregory, who was the step-father of F.T. and S.J., molested D.C. by touching her leg above the knee, F.T. by touching his penis, and S.J. four times, including by touching her chest, by pulling her back onto his penis when she stepped out of the shower, by touching her vagina with his fingers, and by touching her vagina with his tongue, all as set forth above. While these offenses are egregious, they do not entail the most heinous acts and circumstances sometimes present in child molesting cases.

A review of the character of the offender reveals that Gregory has a juvenile and adult criminal history, which includes felony convictions for theft in 1985, possession of cocaine in 1987, and robbery in 1988, and misdemeanor convictions for trespass and resisting arrest in 1985 and check deception in 2009, and Gregory was on probation at the time of the offenses. While his criminal history is serious, we note that he does not have any prior convictions for sex-related crimes.

After due consideration of the trial court’s decision, we cannot say that Gregory’s maximum sentences for Counts I, II, III, IV, VI, and VII are appropriate in light of the

nature of the offenses and the character of the offender. We conclude that Gregory's sentences for the class A felony convictions under Counts II, III, and IV should be reduced to the advisory term of thirty years each and that his sentences for the class C felony convictions under Counts I, VI, and VII should be reduced to the advisory term of four years each. Gregory's sentences under Counts I-IV should be served concurrently with each other, and his sentences under Counts VI and VII should run consecutive to each other and to the sentences under Counts I-IV. Gregory's sentence should be enhanced by thirty years for being a habitual offender. Thus, Gregory should receive an aggregate sentence of sixty-eight years in the Indiana Department of Correction. See Serino v. State, 798 N.E.2d 852, 858 (Ind. 2003) (reducing the defendant's 385-year sentence for twenty-six counts of child molesting and sexual misconduct involving a minor to "three consecutive standard terms or 90 years total" in light of the nature of the offense and the character of the offender). In addition, based upon our review of the trial and sentencing transcripts and after due consideration, we cannot say that the sanctions imposed at trial and at sentencing for direct contempt are inappropriate under the circumstances.

For the foregoing reasons, we affirm Gregory's convictions for child molesting, reverse his aggregate sentence, and remand this case to the trial court with instructions to issue an amended sentencing order and to issue any other documents or chronological case summary entries necessary to impose an aggregate sentence of sixty-eight years.

Affirmed in part, reversed in part, and remanded with instructions.

ROBB, C.J., and RILEY, J., concur.