



Mark Phillips appeals his conviction for Child Molesting<sup>1</sup> as a class A felony and the sentence imposed thereon. Phillips presents three issues for our review:

1. Did the trial court abuse its discretion in admitting evidence regarding a witness's recollection of the testimony Phillips gave during his first trial?
2. Did the retrial on the class A felony offense violate Phillips's constitutional right against double jeopardy?
3. Is Phillips's sentence inappropriate?

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

The facts most favorable to the conviction reveal that in 2008, Phillips moved into a home on Washington Street in Huntington, Indiana. Phillips lived with his boyfriend, Quentin, his brother and his brother's girlfriend, and their two children. Jeremy Starkey also lived in Phillips's household from December 2008 until January 2009. D.S., who turned ten years old on August 24 of that year, lived next door with his family, including his mother and his mother's boyfriend, his maternal grandmother and her husband, and two brothers. The families were on friendly terms. D.S. often went to Phillips's home and played video games. D.S. considered Phillips and Quentin to be his friends.

On one occasion in January 2009, D.S. spent the night at Phillips's home. D.S. watched movies with Quentin and at some point went upstairs to use the restroom. When D.S. exited the restroom, he saw Phillips in his bedroom. Phillips asked D.S. to come into the bedroom to watch a movie that D.S. claims was playing on an X-box system. When D.S.

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<sup>1</sup> Ind. Code Ann. § 35-42-4-3(a) (West, Westlaw through 2010 2nd Regular Sess.).

entered the room, he noticed that the movie had people in it without their clothes. As D.S. stood and watched the movie, Phillips, who was standing behind D.S., reached inside D.S.'s pants and underwear with his hand and grabbed D.S.'s penis. The touching lasted a few seconds. Phillips then directed D.S. to get on the bed. Phillips obtained something "like lotion" out of the closet and then joined D.S. on the bed. *Transcript* at 298. Phillips put the "lotion" on his penis. *Id.* D.S.'s pants and underwear were partially down and his buttocks were exposed. Phillips's pants were "[k]ind of off" as well. *Id.* at 299. Phillips touched D.S.'s buttocks with his penis. Phillips then inserted his penis inside D.S.'s "butt," where D.S. "poops." *Id.* at 300. D.S. felt pain. Afterward, when D.S. went to the restroom he noticed bleeding when he went "poop." *Id.* at 302. Phillips told D.S. not to mention the encounter to anyone. D.S. then went downstairs.

On March 17, 2009, Terry Hall put on a program at D.S.'s elementary school about body safety, which included information about inappropriate touching. After the program, students were asked to indicate on a piece of paper if they wished to talk to someone. D.S. indicated that he wished to speak with someone and it was arranged for him to speak with Detective Cory Boxell and Shane Blair, a family case manager with the Huntington County Department of Child Services (HCDCS). After speaking briefly with D.S. at the school, Blair arranged for D.S. to be interviewed at McKenzie's Hope, a center for children.

On March 26, 2009, Huntington County criminal investigator Ron Hochstetler and HCDCS representative John Lane interviewed D.S. at McKenzie's Hope. D.S. related the encounter as set forth above. After the interview, Lane arranged for D.S. to be seen at the Fort Wayne Sexual Assault Treatment Center. On March 31, 2009, forensic nurse examiner

Joyce Moss examined D.S. Moss noted that the exam of D.S. was normal. She further explained that this was not unusual given that the assault had occurred two months prior. Moss did not expect to find DNA evidence or evidence of penetration. Overall, the result of her examination of D.S. was consistent with what Moss expected to find under the circumstances.

After D.S.'s interview at McKenzie's Hope, the police secured a warrant and searched Phillips's home. During the search officers found an X-box system that had a frayed cord and KY personal lubricant in Phillips's bedroom.

On March 27, 2009, the State charged Phillips with three counts of child molesting, two as class A felonies and one as a class C felony. Specifically, the charging information alleged that between January and March of 2009, Phillips, who was over twenty-one years of age, engaged in an act involving the sex organ of one person and the anus of another (Count I), engaged in an act involving the sex organ of one person and the mouth of another (Count II), and touched or fondled a ten-year-old child with the intent to arouse or satisfy his own sexual desires or that of the child (Count III). Counts I and II were charged as class A felonies and Count III was charged as a class C felony. A jury trial was held on October 30 and 31, 2009. At the conclusion of trial, the jury found Phillips guilty of Count III, not guilty of Count II, and failed to reach a verdict on Count I. On December 14, 2009, the trial court sentenced Phillips to 8 years for the class C felony conviction under Count III.

A retrial of Count I was scheduled for March 9-11, 2010. The day before the second trial was to commence, Phillips filed a motion to dismiss Count I, claiming a violation of double jeopardy. The trial court denied the motion and the jury trial was held as scheduled.

At the conclusion of the evidence, the jury found Phillips guilty of child molesting as a class A felony (Count I). On April 19, 2010, the trial court sentenced Phillips to the maximum term of fifty years for the class A felony conviction, with the sentence to run concurrently with the eight-year sentence previously imposed on Count III. Phillips now appeals.

1.

During his first trial, Phillips exercised his constitutional right to be heard in his own defense. During his second trial, Phillips exercised his constitutional right against compulsory self-incrimination by choosing not to testify. During the course of the second trial, the State asked its investigator, Ron Hochstetler, to testify as to a portion of Phillips's testimony during the first trial. The trial court allowed the testimony over Phillips's objection. On appeal, Phillips argues that the trial court abused its discretion when it allowed Hochstetler to testify as to his recollection of what Phillips's testimony was during his first trial.

We begin by noting our standard of review. The admission or exclusion of evidence lies within the sound discretion of the trial court and is afforded great deference on appeal. *Whiteside v. State*, 853 N.E.2d 1021 (Ind. Ct. App. 2006). We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion. *Id.* A claim of error in the admission or exclusion of evidence will not prevail, however, "unless a substantial right of the party is affected." Ind. Evidence Rule 103(a). Whether an appellant's substantial rights are affected is determined by examining the "probable impact of that evidence upon the jury." *Pruitt v. State*, 834 N.E.2d 90, 117 (Ind. 2005).

Here, D.S. testified that he and Phillips watched a movie on an X-box system in Phillips's bedroom when the molestation occurred in January 2009. It is undisputed that when police collected the X-box system during the search of Phillips's home in March of 2009, the cord to the system was frayed. The time at which the X-box system became unusable was a fact hotly disputed during the second trial.

State's witness Jeremy Starkey, who lived with Phillips from December 2008 through January 2009, testified that there was an X-box in Phillips's bedroom and that the system was in working order the entire time he lived in Phillips's home. Defense witness Millicent Waters testified that the cord to the X-box system broke in November and that she asked Phillips at that time to unplug it from the downstairs television because it was no longer usable. A second defense witness testified that he had been to Phillips's home in mid-January 2009 and that the X-box system could not be played at that time because it was broken. Phillips's brother testified that he knew the X-box system to have been broken since December of 2008.

Phillips then called Hochstetler as part of the defense's case-in-chief and elicited testimony from him that an investigation of the X-box system revealed that the last time a game was saved on the X-box screen was on December 26, 2008. During the State's cross-examination, the State asked Hochstetler whether Phillips had testified during his first trial about when the X-box system broke. Hochstetler indicated that Phillips had so testified. Over Phillips's objection, the court allowed the State to elicit additional testimony from Hochstetler about his recollection of Phillips's testimony during the first trial as it related to the X-box system. Specifically, Hochstetler testified that Phillips had previously testified

during his first trial that the X-box cord had broken around Thanksgiving of 2008, that he was present when it happened, and that he moved the X-box system to his bedroom two days later.

Assuming without deciding that the trial court abused its discretion in allowing Hochstetler to testify as to his recollection of Phillips's prior testimony, we conclude that Phillips's substantial rights were not affected, and therefore, any error was harmless. It is undisputed that the X-box system was broken. The conflicting evidence on the question of when the system ceased to function bears only upon the credibility of the witnesses and only marginally at that. It is clear that the jury did not attach much significance to the timing of the X-box's demise. Rather, it obviously focused upon D.S.'s clear and unequivocal testimony that Phillips inserted his penis into D.S.'s anus. On this record, the admission of Hochstetler's testimony regarding his recollection of Phillips's prior testimony about the X-box system likely had no impact on the jury's finding of guilty. The admission of such evidence, even if erroneous, was harmless.

2.

Phillips argues that the trial court erred in denying his motion to dismiss Count I prior to his retrial based on double jeopardy grounds. Phillips maintains that the same evidentiary facts establish both the class A felony child molesting offense and the class C felony child molesting offense. Phillips thus argues that his conviction for class C felony child molesting as a lesser-included offense of the class A felony child molesting offense serves as an implied acquittal of the greater offense.

The double jeopardy clause in the Indiana Constitution is embodied in article 1,

section 14, and provides, “No person shall be put in jeopardy twice for the same offense.” Our Supreme Court has concluded this provision was intended to prohibit, among other things, multiple punishments for the same actions. *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). Our analysis under this provision involves dual inquiries under what have come to be known as the “statutory elements test” and the “actual evidence test.” *Davis v. State*, 770 N.E.2d 319, 323 (Ind. 2002).

Under the actual evidence test, multiple convictions are prohibited if there is “a reasonable possibility that the evidentiary facts used by the fact-finder to establish the elements of one offense may also have been used to establish the essential elements of a second challenged offense.” *Id.* (quoting *Richardson v. State*, 717 N.E.2d at 53). In determining whether the trier of fact used the same evidence to establish the essential elements of each offense, it is appropriate to consider the charging information and arguments of counsel. *See Lee v. State*, 892 N.E.2d 1231 (Ind. 2008) (citing *Richardson v. State*, 717 N.E.2d 32).

In arguing that the jury relied upon the same evidence in convicting him of Count I that was relied upon in the first trial in finding him guilty of Count III, Phillips cites to testimony from his first trial as “Tr. First Trial p. [. . .].” *Appellant’s Brief* at 13. The transcript of the first trial, however, is not part of the record before us. We will therefore disregard any references to the transcript of the first trial and arguments based thereon. Without the transcript of the first trial, we have no way to review whether the same evidence was relied upon to establish both offenses.

Lack of transcript of the first trial aside, we note that in Count I, Phillips was charged as follows:

Sometime between January and March 2009, in Huntington County, Indiana, Mark W. Phillips, who was at least twenty-one (21) years of age, performed or submitted to deviate sexual conduct with a ten year-old male, to wit: an act involving a sex organ of one person and anus of another person.

*Appellant's Appendix* at 9. In Count III, Phillips was charged as follows:

Sometime between January and March 2009, in Huntington County, Indiana, Mark W. Phillips touched or fondled a child with the intent to arouse or satisfy his own sexual desires or the sexual desires of the child, when the child was under fourteen (14) years of age, to wit: a ten year-old male child.

*Id.* at 11. In its opening and closing statements during the retrial on Count I, the State asked the jury to consider D.S.'s testimony that Phillips had anal intercourse with him.

It is clear from the charging information that the offenses are very different from one another. During the retrial on Count I, D.S. testified that Phillips reached inside D.S.'s pants and underwear and grabbed D.S.'s penis. This evidence would have supported the offense charged in Count III,<sup>2</sup> but would not have supported the jury's verdict that Phillips performed

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<sup>2</sup> Even though we were not provided with a transcript of the first trial, we think it is highly likely that that jury relied upon this evidence to convict Phillips of Count III.

deviate sexual conduct with D.S. as charged in Count I. D.S.'s testimony that Phillips inserted his penis in D.S.'s "butt" where he "poops" and that afterward D.S. observed bleeding after he went to "poop" supports the jury's verdict as to Count I. *Transcript* at 300, 302. It is highly unlikely that the jury in the first trial used this evidence to find D.S. guilty of Count III, child molesting as a class C felony based upon fondling or touching.

Phillips's argument that his conviction on Count III was an implied acquittal of Count I is also unavailing because the premise of his argument is faulty. *See Hoover v. State*, 918 N.E.2d 724, 735 (Ind. Ct. App. 2009) (noting that where a defendant is tried alternatively for both a lesser-included and greater offense, and the jury convicts on the lesser-included offense while saying nothing with respect to the greater offense, the defendant is said to be "impliedly" acquitted of the greater offense and therefore may not face retrial), *trans. denied*. Here, Phillips has not established that the offense charged in Count III, of which Phillips was convicted at the conclusion of his first jury trial, is a lesser-included offense of the class A felony offense charged in Count I. Child molesting by deviate sexual conduct and child molesting by fondling or touching are separate and distinct offenses and are not inherently included in one another. *See Downey v. State*, 726 N.E.2d 794 (Ind. Ct. App. 2000) (citing *Buck v. State*, 453 N.E.2d 993 (Ind. 1983)). Further, Phillips has not established that the two offenses were supported by the same evidence such that the class C felony offense was factually included in the greater offense. We therefore conclude that Phillips's conviction of class C felony child molesting during the first trial was not an implied acquittal of the class A felony child molesting offense charged in Count I.

The trial court sentenced Phillips to fifty years for the class A felony conviction and ordered the sentence served concurrent with the eight-year sentence previously imposed on Count III. The sentence is the maximum for that class of offense. *See* Ind. Code ann. § 35-50-2-4 (West, Westlaw through 2010 2nd Regular Sess.) (“[a] person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years”). Phillips argues that his sentence is inappropriate and requests that we reduce his sentence to the advisory sentence of thirty years.

Article 7, section 4 of the Indiana Constitution grants our Supreme Court the power to review and revise criminal sentences. Pursuant to Ind. Appellate Rule 7, the Supreme Court authorized this court to perform the same task. *Cardwell v. State*, 895 N.E.2d 1219 (Ind. 2008). Per App. R. 7(B), we may revise a sentence “if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” *Wilkes v. State*, 917 N.E.2d 675, 693 (Ind. 2009), *cert. denied*, 2010 WL 2469998 (2010). “[S]entencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Cardwell v. State*, 895 N.E.2d at 1223. Phillips bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

With regard to the nature of the offense, we observe that Phillips molested ten-year-old D.S. on one occasion when D.S. spent the night at Phillips’s home. Phillips first invited D.S. to come into his room and watch a pornographic movie. Phillips had D.S. lie on the bed with his pants pulled down and his buttocks exposed and then he inserted his penis into D.S.’s

anus. These actions, despicable as they are, do not stand out as especially egregious in the universe of child molesting offenses – they are certainly not among the worst of the worst.

With regard to the character of the offender, we note, as did the trial court, that Phillips has a lengthy criminal history. The weight to be afforded to an individual's criminal history, however, is measured by the number of prior convictions and their seriousness, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability. *Morgan v. State*, 829 N.E.2d 12 (Ind. 2005). Although lengthy, Phillips's criminal history is not particularly significant when viewed in relation to the instant offense. Nearly eighteen years ago, Phillips accumulated five counts of misdemeanor check deception within a two-month period. Phillips accumulated twelve additional counts of misdemeanor check deception over a five month span from October 1997 through February 1998. Phillips has also accumulated convictions for misdemeanor false informing in 1992, misdemeanor criminal recklessness in 1996, driving while suspended in 1998, escape in 1999, disorderly conduct and trespass in 2000, disorderly conduct in 2001. Phillips's only felony offense is for nonsupport of a dependent child, a class C felony, in 2005. The majority of Phillips's criminal history is lumped into two relatively short periods of time and occurred over ten years prior to the instant offense. Further, Phillips's criminal history is not violent in nature and he has no prior offenses against children.

Although deserving of a sentence greater than the advisory, given the nature of the offense and the character of the offender, we find that the maximum sentence is inappropriate. We therefore revise Phillips's sentence for his class A felony child molesting

conviction to forty years, to be served concurrently with the eight-year sentence previously imposed on Count III.

Judgment affirmed in part, reversed in part, and remanded.

BAILEY, J., concurs.

MAY, J., concurs in part and dissents in part with separate opinion.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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MARK W. PHILLIPS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A05-1005-CR-343
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	
	)	

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**MAY, Judge, concurring and dissenting**

While I agree with the majority’s resolution of the two procedural issues, I cannot concur with the reduction of Phillips’ sentence because I do not find it “inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). Accordingly I dissent in part.

Thirty-seven-year-old Phillips inserted his penis into the anus of a ten-year-old boy, causing pain and bleeding. At the time of the offense, Phillips held a position of trust both with the boy, who visited frequently from his house next door and considered Phillips to be his friend, and with the boy’s family, who allowed the boy to spend the night at Phillips’

house. Phillips instructed the boy not to talk about what had happened, and the boy began to experience difficulty in school after the incident. I believe those facts place Phillips' offense within the class of offenses that could warrant the maximum punishment. *See Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002) (noting maximum sentences are appropriate for a class containing a considerable variety of offenses and offenders).

And although, as the majority notes, Phillips' convictions appear to include only non-violent crimes against adults, I cannot say his character justifies reduction of his sentence. Our assessment of a defendant's character is not limited to prior convictions but may also include a defendant's record of arrests. *See Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005) (A record of arrest is not criminal history, but may indicate a person has not been deterred by interactions with "the police authority of the State," which "may be relevant to the trial court's assessment of the defendant's character.").

Phillips' interactions with our legal system began when he was a juvenile. Phillips was adjudicated a delinquent in 1986, 1987, and 1989 for committing acts that would be theft if committed by an adult. Phillips paid restitution in 1989 for an act that apparently would have been criminal mischief if committed by an adult, although there was no formal adjudication. His presentence report indicates he was expelled from school twice, he twice was reported as a runaway, and was twice referred for services for "Incorrigibility." (App. of Appellant, Vol. III at 402.)

Phillips' behavior did not improve when he became an adult. In 1992, Phillips was convicted of false informing and five counts of check deception. Some of those sentences were suspended to probation, which was subsequently revoked. Phillips was offered the

opportunity to perform community service in lieu of paying court costs, but he refused to participate in community service and the court ordered him to serve time in jail. In 1993, Phillips was found in contempt of court.<sup>3</sup>

In 1994, Phillips was charged with three counts of driving while suspended; the disposition of two of those counts is unknown, but Phillips paid fines and court costs on the third count on the condition the court withhold judgment. In 1996, Phillips was charged with criminal recklessness, operating without financial responsibility, driving left of center, and false registration. He apparently was convicted of at least one of those, as he was sentenced to sixty days, with all time suspended and one year of informal probation. Phillips again refused to pay fines and court costs and was ordered to serve time in jail. In 1997, Phillips was convicted of ten counts of check deception. In 1998, Phillips was convicted of driving while suspended. The trial court suspended his sentence and ordered probation, but Phillips violated probation, and the court ordered him to spend the balance of the sentence executed. Also in 1998, Phillips was convicted of two counts of check deception. The State also charged Phillips with failure to appear, but the record does not reflect the disposition of that charge. In 1999, Phillips was convicted of felony escape.

Between July of 2000 and May of 2002, Phillips accumulated seven charges in Florida: trespass, failure to appear, “battery (domestic violence),” damage to property,

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<sup>3</sup> Although not entirely clear from the record, this contempt finding for “failure to complete” appears related to Phillips’ refusal to participate in court-ordered community service. (App. of Appellant, Vol. III at 404.)

possession of marijuana, and two counts of disorderly conduct. (*Id.* at 406.) The battery and damage to property charges were dismissed, disposition of the failure to appear and possession of marijuana are unknown, and for two counts of disorderly conduct and one count of trespass, Phillips spent five days in jail.<sup>4</sup>

Phillips returned to Indiana, and in 2005 was convicted of felony non-support of a dependent child.<sup>5</sup> He violated his probation by failing to pay child support or submit to a drug test, so in 2006 the court ordered him to serve his sentence on electronic monitoring. Phillips did not comply with the terms of monitoring, and the court ordered in 2007 that Phillips would serve the remainder of his sentence incarcerated. Phillips committed the instant crime less than two years later, while he was still on parole for that felony conviction.

Thus, to summarize, between 1986 when Phillips was thirteen years old and 2010 when he was sentenced for the instant crime, there are only four years for which Phillips' presentence report does not indicate some involvement with the legal system. While some of those charges were dismissed or their disposition is unknown, the fact remains that after nearly two dozen adult convictions, three juvenile true findings, and dozens of additional arrests, Phillips has not modified his behavior. *See Cotto*, 829 N.E.2d at 526 (Ind. 2005) (A lengthy record of arrests is relevant to a court's assessment of a defendant's character). Phillips repeated violations of probation, his refusal to engage in court-ordered community service, and his contempt of court all display disrespect for authority in general, and the legal

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<sup>4</sup> It is not entirely clear from the presentence report whether Phillips was convicted of these charges or spent those days in jail before being released following his arrest.

<sup>5</sup> Phillips fathered two children with a former wife. He does not have custody of the children, who were fifteen and nine years old when a presentence report was prepared in December of 2009.

system in particular and also reflect negatively on his character.

Neither Phillips' character nor the nature of his offense leads me to believe his fifty-year sentence is inappropriate. *See Garland v. State*, 855 N.E.2d 703, 711 (Ind. Ct. App. 2006) (holding maximum sentence for child molesting was not inappropriate in light of offense and character), *trans. denied*. Accordingly, in light of our "limited opportunity to fully perceive and appreciate the totality of the circumstances personally perceived by the trial judge at trial and sentencing," *Sanchez v. State*, 2010 WL 5178071 at \*3 (Ind., Dec. 22, 2010) (Dickson, J., dissenting), I would not "intru[de] into the trial court's sentencing decision." *Id.* I therefore dissent in part.