

STATEMENT OF THE CASE

Timothy W. Newman appeals his convictions, after a jury trial, of three counts of child molesting as class A felonies and two counts of child molesting as class C felonies, and the sentences thereon.

We affirm.

ISSUES

1. Whether sufficient evidence supports the convictions.
2. Whether the trial court abused its discretion when it allowed the victims' maternal grandmother to testify as a rebuttal witness.
3. Whether Newman received ineffective assistance of trial counsel.
4. Whether Newman's sentence is inappropriate.

FACTS

Amy Goff ("Mother") had two daughters: M.G., born October 30, 1994 ("M."); and T.G., born January 29, 1992 ("T."). In early 1998, Mother began dating Newman, and they married in November of 1998. Newman undertook the major remodeling and reconstruction of a home in Frankfort for the parties. While this remodeling took place over the next several years, Mother, M., and T. stayed in Mother's parents' home during the week and spent the weekends in the Frankfort home with Newman. In August of 2002, Mother and her daughters moved into the Frankfort home and lived with Newman full-time. Mother worked as a nurse, often working twelve-hour night shifts at St. Vincent's Hospital in Indianapolis; at times, she also worked a second job in Frankfort. While Mother worked, or slept, Newman took care of M. and T.

In October of 2003, Mother left Newman – taking M. G. and T. G. with her, moved back to her parents’ home, and filed for divorce. On Christmas day of 2004, Mother, M. and T. played a game called “Life Stories,” in which players revealed personal experiences, such as “worst memories.” (Tr. 82). M. became “visibly upset” and told Mother “she had something very important to tell [her].” (Tr. 82, 83). “She asked . . . if she could write it down . . . grabbed a piece of paper and wrote down what had occurred.” (Tr. 83). M. wrote, “Sorry but me and Tim did the private thing.” (Ex. 1). M. then told Mother about instances of inappropriate acts by Newman. Shortly thereafter, Mother spoke with T., who told Mother that Newman had also acted inappropriately with her. T. wrote an account of the incident for Mother in which Newman

. . . shut the door and locked it. . . . We sat on the bed he pulled down his pants he asked me if I had seen the health movie w/both boy + girl. I said no. Then he told me things that I can’t remember, but I know it was boy stuff. He told me to touch his ball sac [sic]. I told no. [sic] he told me to take off my pants and he touched me where you pee He had me lay [sic] on top of him and he rubbed his penis on my private down low private that is.

(Ex. 2) (emphasis in original).

Mother reported the matter to police. On January 24, 2005, the State charged that between January 29, 2003 and September 27, 2003,¹ Newman had committed three counts of child molesting, as A felonies, and two counts of child molesting, as class C felonies. The A felony charges, with M. as the victim, alleged three acts: that Newman

¹ During this period of time, M. was age 8 and T. was age 11.

placed his penis in M.'s mouth, that he placed his mouth on M.'s vagina, and that he placed his penis in M.'s anus. The C felony charges, with T. as the victim, alleged that Newman had caused T. "to touch his genitals" and that he had placed his hand on T.'s vagina. (App. 18).

A jury trial was held on April 25-26, 2006. At the outset, the trial court granted Newman's motion for separation of witnesses.

M. testified that on one occasion when she was watching a movie with Newman, he began "rubbing [her] stomach, and he said that he went too low" when he touched "below [her] stomach." (Tr. 31). M. further testified that after she, T., and Mother had moved in with Newman, he would "touch [her] private parts and mak[e] [her] touch his." (Tr. 35). Newman touched her private parts with "his hand and sometimes his mouth, . . . his tongue." (Tr. 36). M. touched Newman's penis "mostly" with "[her] hands," but "sometimes" with [her] mouth," and "sometimes" he put his penis "inside [her] mouth." (Tr. 36). This would happen when she and Newman "were watching movies or playing video games," and Newman "would take down his pants and make [her] do that" or "place his tongue on [her] privates." (Tr. 37, 38). These acts happened "probably about fifteen to twenty times," in the living room and "his bedroom," and when only she and Newman were home. (Tr. 38, 47). On one occasion when Mother "was gone," M. "was sleeping" in "[Newman's] bed with him." (Tr. 47, 39, 47). M. was lying on her side, and awoke when Newman "took down [her] pants and underwear and stuck his private part in [her] bottom." (Tr. 39). M. "rolled over on [her] stomach and he pulled it back out"; it hurt her. *Id.*

M. testified that subsequently, Newman would “give [her] three choices”: she could “put [her] mouth on his private part,” or he could “put his mouth on [hers], or he’d rub his . . . private parts against [hers], and if [she] didn’t choose . . . , he’d threaten to” put his penis in her anus “again.” *Id.* M. “didn’t like any” of the choices but chose “him rubbing against [hers] . . . because . . . it was like the quickest one so, [she] could just get it over with.” (Tr. 40). M. never told anyone “because [Newman] told [her] that [she]’d have to go through all these sorts of tests, . . . scary, complicated tests.” (Tr. 40). M. did not tell Mother, even after they moved from the house in Frankfort, because she “was scared to.” (Tr. 41).

When asked whether Newman had ever touched T. “in a way that he shouldn’t,” M. testified that Newman frequently “rubb[ed]” the “bare bottoms” of T. and herself, “but that was pretty normal.” (Tr. 46). She testified that it was “normal” because “he did it a lot.” *Id.*

On cross-examination, M. admitted that after Mother, T. and she moved from Newman’s house in October of 2003, Mother had asked whether he had ever touched her inappropriately, and that she told Mother he had not. M. also admitted, during cross-examination, that she had not told Mother until a year later, and that in a deposition she had stated that she was never afraid of Newman when she was living with him.

T. testified that when she watched movies with Newman, “he would rub [her] butt and M[.]’s butt.” (Tr. 57). T. testified that she had seen Newman touch M.’s bottom “inside” her clothing “maybe ten times,” and that he had done this to her “maybe five times.” (Tr. 58). T. also testified that on one occasion, she was playing a video game

with Newman when he “told her that he wanted to talk to [her],” and led her into the bedroom, where “he locked the door behind him and then laid [sic] down on the bed.”

(Tr. 53). Newman

asked [her] if [she] had seen the health movie at school and [she] said no. And so, then he . . . started talking like all – all the male parts and stuff. And, then he – he just had his underwear on . . . And so, then he took down his underwear and was like showing me all the male parts and he said to touch his testicles and [she] said no. And, he’s like it’s okay – it’s okay – it’s okay. [She] was like – so, then [she] finally did it and [she] barely touched them and . . . then he started talking about the female . . . parts. And so, then he told [her] to take down [her] underwear and [she] said no. . . . And, he said it’s okay – it’s okay. . . . And . . . then [she] finally did take down [her] underwear and he was touching and in [her] private area.

(Tr. 53-55). T. specified that Newman was touching her “with his finger.” (Tr. 55). She further testified that Newman then “told [her] to get on top of him,” and she “just laid [sic] on top of him and he started rubbing his private area up and down on [hers].” (Tr. 55, 56). T. testified that Newman stopped when the cell phone rang with an incoming call from Mother.

On cross-examination, T. admitted that she had not told Mother about the above incident when it happened; and that after they had moved and were no longer living with Newman, she had answered in the negative when asked by Mother whether Newman had ever touched her inappropriately. Also, T. admitted that when Newman’s counsel had asked at a deposition about things Newman “did that was wrong,” the initial three incidents she described concerning him were not “about touching [her] private parts.” (Tr. 62).

Timothy Newman, Jr., Newman's son, testified that he had lived in the house during the same time that Mother, M. and T. were living there² and that he could not recall any occasion when Newman had taken T. into the bedroom and closed and locked the door. Brent Newman, Newman's other son, testified that he had spent every other weekend at the house during the time that Mother, M. and T. were living there,³ and that he also could recall no occasion on which Newman took T. into the bedroom and closed and locked the door. Brent testified that on the day that Newman and Mother permanently separated, he had been with M. and T. at "Jan's house" – Mother's parents' house. (Tr. 135). Brent testified that when Newman arrived to "pick[] [him] up," M. and T. "said that they didn't want him to go. [M.] was trying to get out the door and Jan was holding her." *Id.* According to Brent, both M. and T. were "upset" that they weren't going with Newman. (Tr. 136).

Newman testified that he had never touched either girl inappropriately, and that he had had a loving, father-like relationship with them. Newman also testified that on one occasion, suppositories had been prescribed for M., and that both he and Mother had inserted the suppositories in M.'s anus. Mother testified that although the suppositories were prescribed, neither she nor Newman administered any to M. after their arrival home because "she didn't require them" after her symptoms abated. (Tr. 104).

² Timothy testified that he was age 22 at the time of trial. Thus, he would have been approximately 19 at the time of the offenses charged.

³ Brent testified that he was age 15 at the time of trial. Thus, he would have been approximately 12 at the time of the offenses charged.

During cross-examination, Mother admitted that she had observed no changes in her daughters' behavior while they lived with Newman, and that they never seemed afraid of him. Mother also admitted that after they moved, she had asked her daughters if Newman "had ever touched them or anything inappropriate," and that they "both told [her] no." (Tr. 94). Finally, Mother confirmed that pursuant to the 2004 divorce decree, Newman was ordered to pay her \$11,000.00, and that he had not "paid a dime" of that to her. (Tr. 99).

After the defense rested, juror Christie Cottrell informed the trial court that she knew "Jan" (M. and T.'s grandmother), having worked "with her for about six years." (Tr. 164). The trial court inquired about the relationship and felt that Cottrell could nonetheless "make a decision based on the evidence." (Tr. 165). Defense made no objection to her remaining as a juror.

The State then informed the trial court that it wanted to call "Jan Robbins, . . . the maternal grandmother of the two victims" as a rebuttal witness to Brent's testimony about the reactions of M. and T. when Newman picked him up at Robbins' house. (Tr. 166). Newman's counsel objected, arguing that Robbins "was . . . present during all of the testimony," and there had been a separation of witnesses order. (Tr. 166-67). The trial court ruled that it would allow Robbins "to testify in rebuttal to those facts" concerning Brent's testimony. (Tr. 167).

The trial court then stated that because Robbins would be testifying, it would remove Cottrell as a regular juror and make her the alternate juror with specific instruction regarding deliberation. Newman and his counsel agreed to this. When trial

resumed, the trial court informed the jury that because Robbins would be testifying as a rebuttal witness, the alternate juror would be made “a member of the regular jury,” and Cottrell would be made the alternate juror. (Tr. 171). It instructed Cottrell that as an alternate juror, she could not “say anything.” *Id.*

Robbins testified that on the day when Newman and Mother separated, M., T. and Brent were at her home. She testified that when Newman came to pick up Brent, there was no attempt by M. or T. “to try to go with [Newman] and his son,” and no “emotional exchange” or “shouting or crying or anything like that.” (Tr. 175). Her testimony was limited only to rebut the testimony that Brent had earlier given.

Thereafter, the trial court gave its final instructions to the jury. The trial court expressly instructed the jury that Cottrell was “not to vote or take part in the deliberations,” that she could

not enter into [the jury’s] deliberations in any way, no matter how helpful you . . . feel it might be. For instance, it may be that you will remember a particular important piece of evidence which all of the other jurors have forgotten. Even in such a case, the law strictly forbids you to say anything at all to them about it. It is important that you remember this instruction and follow it at all times.

(Tr. 220). The jury returned verdicts finding Newman guilty on all five counts. After the verdicts were read, Newman caused a disturbance. After being admonished by the trial court, Newman responded by cursing at the court.

Before the sentencing hearing, trial counsel withdrew and new counsel appeared for Newman. On May 18, 2006, the pre-sentence investigation report (“PSI”) was filed

with the trial court.⁴ The sentencing hearing was held on June 26, 2006. Newman’s counsel affirmed that the PSI was correct. Mother testified about the devastating effects that Newman’s criminal acts had inflicted on M. and T. Newman confirmed that he had no criminal history whatsoever, as reported in the PSI. He further testified that he had never been involved with any substance abuse, and that his elderly, disabled parents now needed and relied upon him for around-the-clock care.

As aggravating factors, the trial court found that Newman “violated his position of trust as step-father to the victims” and committed the offenses when he “had care, custody and control of the victims on a regular basis.” (App. 11). It also found that Newman “made [M.] choose which sex act” would be “performed” by Newman. *Id.* The trial court further found that Newman committed the offenses over an extended nine month period of time.

The trial court sentenced Newman to serve thirty years on each of the three counts of child molesting as class A felonies, and that he serve “four years each” on the two counts of child molesting as class C felonies. (Tr. 290). It then ordered that Newman serve “all these sentences consecutively,” for an aggregate sentence of ninety-eight years. *Id.*

DECISION

1. Sufficiency of the Evidence

⁴ The Appendix purports to include the PSI. App. at 120. However, page three of the PSI indicates that eleven exhibits are attached to the PSI, and none of those exhibits are included with the PSI provided by Newman in his Appendix. One of the listed exhibits, the victim impact statement letter submitted by Mother, is cited in the PSI as providing facts to support various PSI conclusions concerning the damages and long-term effects suffered by M. and T.

When addressing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). Moreover, we “must consider only the probative evidence and reasonable inferences supporting the verdict.” *Id.* Thus, we “must affirm” if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.*

The three counts of child molesting as class A felonies alleged, and required the State to prove beyond a reasonable doubt, that Newman was a person at least twenty-one years of age; that M. was a child under fourteen years of age; and that Newman (1) placed his penis in M.’s mouth, (2) placed his mouth on M.’s vagina, and (3) placed his penis in M.’s anus. *See* Ind. Code §§ 35-42-4-3(a)(1), 35-41-1-9. Mother testified that Newman’s date of birth was April 11, 1965, *i.e.*, age thirty-eight at the time of the offenses charged. M. testified that her date of birth was October 20, 1994, *i.e.*, M. was eight years of age at the time of the offenses charged. M. testified that Newman placed his penis in her mouth. M. also testified that Newman placed his mouth on her vagina. M. further testified that Newman inserted his penis in her anus.

The two counts of class C felonies alleged, and required the State to prove beyond a reasonable doubt, that T. was a child under the age of fourteen and that Newman (1) caused T. to touch his genitals, and (2) placed his hand on T.’s vagina. *See* Ind. Code § 35-42-4-3(b). T. testified that she was born on January 29, 1992, *i.e.*, that she was eleven years of age at the time of the offenses charged. T. also testified that Newman caused her to touch his testicles, and that he touched her vagina with his finger and his penis.

Nevertheless, Newman asserts that the “only evidence actually presented at trial that implicated Mr. Newman on the counts of child molesting was the testimony given by” M. and T. Newman’s Br. at 8. Newman then argues that their testimony should be discounted pursuant to the “incredible dubiousity rule.” *Id.*

Our Supreme Court has described the application of the rule as follows:

Within the narrow limits of the “incredible dubiousity” rule, a court may impinge upon a jury’s function to judge the credibility of a witness. If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant’s conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of credible dubiousity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Love v. State, 761 N.E.2d 806, 810 (Ind. 2002) (internal citations omitted).

Newman argues that unlike M.’s testimony at trial describing the alleged sexual acts performed by Newman, her deposition testimony thereon was “very unclear” and lacking in detail. Newman’s Br. at 9. However, he cites no authority for the proposition that mere inconsistency in a deposition, as opposed to testimony given in open court, would alone give rise to application of the incredible dubiousity rule.

Newman argues that M.’s testimony was equivocal in that she testified both that Newman pulled his penis from her anus and that his penis stayed inside her. The relevant testimony is as follows:

M. I was sleeping and laying [sic] on my stomach and not my stomach, my side and uhm, he took down my pants and underwear and stuck his private part in my bottom.

Q. Then what?

M. I fell on my stomach – I rolled over on my stomach and he pulled it back out.

Q. Was his private still inside of you?

A. Yes.

(Tr. 39). We understand M. to have testified that she was lying on her side when Newman first inserted his penis in her anus; that as she started to roll to her stomach with Newman's penis still inside her anus, that he pulled his penis out. Thus, we do not find the testimony equivocal so as to render M.'s testimony that Newman inserted his penis in her anus to be incredible dubious.

Newman also directs out attention to the fact that although M. generally referred to Newman as "T.N." in her testimony, she once referred to him as "T.C." Newman posits that M. was referring to Mother's current husband. However, Mother identified herself at trial as "Amy Goff-Kaylor." (Tr. 71). Thus, her husband would have the last initial "K." We do not find that the single reference to "T.C." renders M.'s testimony that Newman inserted his penis in her anus, placed his penis in her mouth, and placed his mouth on her vagina to be so equivocal as to invoke the incredible dubiousity rule.

Newman also argues that T.'s testimony was "contradictory and equivocal." Newman's Br. at 11. Newman directs our attention to testimony that when asked in her deposition about whether Newman had done anything wrong to her, T. had initially responded with three initial allegations of wrongdoing by him that did not involve any

inappropriate touching. The jury heard this testimony, and it is “within the jury’s province to evaluate the witness’s credibility.” *Love*, 761 N.E.2d at 810.

Newman also asserts that it “is likely that the testimony of [M.] and [T.] was coerced by” Mother. Newman’s Br. at 13. Mother was cross-examined in this regard. Moreover, as indicated above, the jury heard that she had observed no changes in her daughters’ behavior when they lived with Newman. Further, the jury heard repeated testimony that not only had M. and T. reported no inappropriate touching by Newman to Mother until more than a year after they moved away from him, but that they had actually denied any such inappropriate touching when asked at the time of the move more than a year earlier. Newman’s argument that Mother directed M. and T. to manufacture their accounts of molestation was presented to the jury. It was “within the jury’s province to evaluate” the witnesses’ credibility, “and the jury chose to believe” the victims. *Love*, 761 N.E.2d at 810.

The testimony of M. and T. is not so incredibly dubious or inherently improbable that no reasonable person would believe it. Therefore, the incredible dubiousity rule does not apply. *Love*, 761 N.E.2d at 810.

Finally, Newman directs our attention to testimony by his son, Brent, that Newman had never taken either girl into the bedroom and shut and locked the door. Newman’s discussion of this evidence is simply a request that we reweigh the evidence and assess witness credibility, which we do not do. *See McHenry*, 820 N.E.2d at 126; *see also Love*, 761 N.E.2d at 810. There was probative evidence from which a reasonable

jury could have found Newman guilty beyond a reasonable doubt of the five counts of child molesting. *See id.*

2. Admission of Evidence

Newman argues that “the trial court abused its discretion” and his “convictions should be overturned” because, despite there having been an order for separation of witnesses and the fact that Robbins had been present in the courtroom throughout trial, she was allowed to testify. Newman’s Br. at 16, 15. We cannot agree.

The trial court has inherent discretionary power on the admission of evidence. *McManus v. State*, 814 N.E.2d 253, 264 (Ind. 2004), *cert. denied*. Further, the determination of the remedy for any violation of a separation order is wholly within the discretion of the trial court. *Jordan v. State*, 646 N.E.2d 816, 818 (Ind. 1995). As we noted in *Roser v. McPeak*, 698 N.E.2d 860, 865 (Ind. Ct. App. 1998), “In the absence of connivance or collusion by the party calling the witness, the trial court may permit the testimony of a witness in violation of a separation order.” Moreover, even when it is confronted with a clear violation, the trial court may choose to allow the violating witness to testify at trial. *Jordan*, 656 N.E.2d at 818. We will not disturb a trial court’s decision on such matters absent a showing of a clear abuse of discretion. *Id.*

There was no evidence that the State had colluded in Robbins’ presence in the courtroom throughout the trial despite intending to call her as a witness. Further, the State requested that Robbins only be allowed to testify on the limited subject of the girls’ behavior when Newman came to her home to pick up Brent, to rebut Brent’s “totally new” testimony in that regard. (Tr. 167). Based upon the circumstances, we find no

clear abuse of discretion in the trial court's decision to allow Robbins' limited testimony in rebuttal.

3. Alternate's Presence During Deliberations

Newman also argues that his "convictions should be overturned and the case remanded for a new trial" because despite having admitted her acquaintance with Robbins, juror Cottrell was permitted to be present "in the jury room as an alternate during deliberations." Newman's Br. at 17, 16. We disagree.

In the case of *Smith v. State*, 477 N.E.2d 311, 313 (Ind. Ct. App. 1985), we held that "our basis for review of a trial court's ruling on a defendant's challenge for cause is abuse of discretion." *Id.* First, we note that Newman did not challenge Cottrell's service as an alternate juror. Furthermore, an alternate juror may retire with the jury for deliberations so long as the trial court properly instructs the alternate juror "not to participate in the deliberative process." *Miller v. State*, 702 N.E.2d 1053, 1073 (Ind. 1998). The trial court expressly instructed Cottrell (and the jury as a whole) that Cottrell was not allowed to participate in any way in the deliberations. We presume the jury follows the instructions that it is given. *Tormoehlen v. State*, 848 N.E.2d 326, 332 (Ind. Ct. App. 2006). Therefore, we find no error in Cottrell's presence during jury deliberations.

3. Effective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel requires the defendant to show that (1) counsel's performance fell below an objective standard of reasonableness based upon prevailing professional norms, and (2) the deficient performance resulted in

prejudice, *i.e.*, there is a reasonable probability that the result of the trial would have been different but for counsel's unprofessional errors. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)). The claim of ineffective assistance must overcome the strongest presumption of adequate assistance. *Thomas v. State*, 797 N.E.2d 752, 754 (Ind. 2003) (citing *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997), *cert. denied* 525 U.S. 1021)).

Newman first argues that his trial counsel was ineffective in its cross-examination of M. and T. Specifically, he challenges trial counsel's failure to "mention all of the inconsistencies" between their trial testimony and depositions when questioning M. and T. on cross-examination. Newman's Br. at 18. As the State notes, arguably M. and T. provided consistent accounts of their molestation by Newman in their depositions and testimony. Further, at the time of trial, M. was not yet twelve-years-old and T. was fourteen; their level of discomfort and anxiety in having to answer questions posed to them before the jury on the subject of inappropriate touching of a highly and potentially embarrassing sexual nature cannot possibly be discerned from the review of a printed record. Therefore, we view the decision of whether to pursue aggressive questioning of M. and T. concerning possible inconsistencies between their deposition answers and their trial testimony in open court as a strategic one. Because we presume that counsel provides adequate assistance, *see Thomas*, 797 N.E.2d at 754, we find that this decision was a reasonable strategy under the circumstances. Reasonable strategic decisions of trial counsel cannot form the basis of an ineffective assistance of counsel claim. *Azania v. State*, 738 N.E.2d 248, 251 (Ind. 2000).

Newman further argues that trial counsel was ineffective for failing to object to juror Cottrell's presence as an alternate juror during deliberations. As discussed above, the trial court's express instructions directed Cottrell not to participate in the jury's deliberations, and we presume that the jury followed the instructions given. *Tormoehlen*, 848 N.E.2d at 332. Therefore, we find no reasonable probability that the result of the trial would have been different if trial counsel had objected to Cottrell being present as an alternate juror during deliberations. *Grinstead*, 845 N.E.2d at 1031.

Finally, Newman argues that trial counsel was ineffective for “never mention[ing] the fact that there was no physical evidence in this case.” Newman's Br. at 18. He specifically notes the lack of evidence based on physical examinations of M. and T. The charged offenses were alleged to have occurred between January 29 and September 29 of 2003. It was not until Christmas of 2004 when M. and T. reported that Newman had inappropriately touched them. As the trial court instructed, the jurors were to “use [their] own knowledge, experience and common sense gained from day to day living.” (Tr. 213). Such general knowledge, experience and common sense would apply to whether physical examinations more than a year later would produce dispositive evidence of molestation. We find that there is no reasonable probability that the result of Newman's trial would have been different if trial counsel had argued to the jury the lack of physical evidence. *Grinstead*, 845 N.E.2d at 1031.

4. Sentence

Newman's final argument is that his "sentence is manifestly unreasonable because all sentences on all convictions were ordered to be run consecutively." Newman's Br. at 19. Newman cites to "Ind. Appellate Rule 17(B)(1)"⁵ and cases applying that rule. *Id.*

Indiana Appellate Rule 17(B) has not been in effect since January 1, 2001. The current rule, Indiana 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." Ind. App. R. 7(B) (effective January 1, 2003). In assessing the appropriateness of sentences under this rule, we review the aggravating and mitigating circumstances identified, or not so identified, by the trial court. *McMahon v. State*, 856 N.E.2d 743, 748 (Ind. Ct. App. 2006). The trial court's finding of aggravating circumstances, or refusal to find mitigating circumstances, and its weighing and balancing of those circumstances is a matter of trial court discretion. *Id.*

As aggravating factors, the trial court found that Newman had violated his position of trust when he molested his stepdaughters while they were in his care. This has long since been recognized as a valid aggravating circumstance. *See Plummer v. State*, 851 N.E.2d 387, 390 (Ind. Ct. App. 2006). It further found that Newman had "made [M.] choose" the sex act that would ensue with him. (App. 11). This finding relates to the nature and circumstances of Newman's class A felony offenses against M., also a valid aggravating circumstance. *Plummer*, 851 N.E.2d at 391. In addition, the trial court

⁵ Appellate Rule 17(B) provided that "[t]he reviewing court shall not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." Ind. App. R. 17(B) ("effective until 1-1-2001") (West 2000).

found that Newman had committed the offenses against M. and T. over an extended nine-month period of time. Evidence supports the inference that Newman's care and custody of M. and T. placed them at constant risk of being molested by their step-father over this lengthy period of time. Therefore, we conclude that this finding is also a valid aggravating circumstance as it relates to the nature and circumstances of the five offenses. *See id.* (findings that encompass more than elements of offenses charged are valid aggravators as to nature and circumstances of crimes). In total, the trial court's finding that Newman violated his position of trust with respect to the victims, and that the nature and circumstances of the crimes he committed were valid aggravating circumstances, we do not find an abuse of discretion in the trial court's sentence. *Plummer*, 851 N.E.2d at 390, 391. As a result, we find that the same valid aggravating circumstances of violation of a position of trust and the nature and circumstances of the crimes also support imposition of consecutive sentences. *Id.*

In summary, we find that the evidence regarding the nature of the offenses established that Newman committed three class A felony child molesting offenses upon an eight-year-old child entrusted to his care, a child who called him "Dad" and who had no contact with her own biological father. (Tr. 34). Further, Newman made M. choose the sex act that he would perform upon her, a fact which exacerbated her feelings of guilt and could potentially impair her ability to heal from the damage she suffered. With T., an eleven-year-old child, Newman cast his approach as one of "teaching" her, when in fact he proceeded to commit two acts of child molestation upon her.

Newman was in complete control and could have stopped himself from inappropriately touching either child. Rather than curtail his criminal behavior, he chose to increase such activity over an extended period of time which speaks volumes as to his character.

The maximum possible sentence for the five offenses was 158 years; however, the trial court imposed an aggregate sentence of 98 years. We do not find Newman's sentence inappropriate in light of the nature of the offenses and the character of the offender.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.