



Following a jury trial, Andres Sanchez<sup>1</sup> was convicted of three counts of class A felony Child Molesting<sup>2</sup> and sentenced to an aggregate term of eighty years. Sanchez raises the following three restated issues for review:

1. Did the prosecutor's redirect questions to the victims' mother and comments during closing argument constitute fundamental error?
2. Was the evidence sufficient to support Sanchez's conviction for child molesting in Count III?
3. Is Sanchez's aggregate sentence inappropriate?

We affirm.

The facts most favorable to the convictions follow. In October 2002, Sanchez married Ruth Congdon, who had two daughters, B.S.(1), born March 14, 1998, and B.S.(2), born March 9, 2001. Sanchez was a father figure to the girls, and they referred to him as Dad.

During 2006 to 2007, Sanchez, on at least two separate occasions, took six-year-old B.S.(2) from her bedroom into the living room, where he pulled down her pajama pants and touched her "private" area where she would "[p]ee" with his finger and rubbed it in a circular motion. *Transcript* at 281. Around May 2007, Sanchez also took nine-year-old B.S.(1)—who, in January 2007, had surgery to remove a brain tumor—into the living room and used his hand and fingers in a back and forth motion to touch her "[f]ront butt", or the part of her body where she "pees." *Id.* at 353.

In May 2007, after finding out what Sanchez had done to B.S. (1) and B.S.(2),

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<sup>1</sup> Sanchez was also known as Roberto Garza.

<sup>2</sup> Ind. Code Ann. § 35-42-4-3 (West, Westlaw through 2009 1st Special Sess.).

Congdon took her daughters to the emergency room to be examined. Sanchez then moved out of the apartment, but a few days later, Congdon began talking to and writing letters to Sanchez. Congdon, who had been in the apartment but asleep in her room when Sanchez molested B.S.(1) and B.S.(2) in the living room, tried to convince herself that the girls' allegations were just related to occasions where Sanchez had spanked them. Congdon even told B.S.(1) and B.S.(2) to tell authorities that the alleged incidents were just related to spanking. The girls did not do so.

The State charged Sanchez with three counts of class A felony child molesting. A jury trial was held in July 2008. The jury found Sanchez guilty as charged. The trial court sentenced Sanchez to an aggregate term of eighty years. Specifically, the trial court sentenced Sanchez to forty years on each of the class A felony convictions and ordered the two convictions relating to B.S.(2) to be served concurrently to each other but consecutively to the conviction relating to B.S.(1). Sanchez now appeals. Further facts will be provided as necessary.

1.

Sanchez first argues that the prosecutor engaged in prosecutorial misconduct during redirect examination and during closing argument. Specifically, Sanchez claims the prosecutor committed prosecutorial misconduct in her redirect examination of Congdon and in her closing argument.

Generally, in order to preserve a claim of prosecutorial misconduct for appeal, a defendant must not only raise a contemporaneous objection, he must also request an admonishment and, if the admonishment is not given or is insufficient to cure the error, then

he must request a mistrial. *Cooper v. State*, 854 N.E.2d 831 (Ind. 2006). Where a defendant fails to make an objection to the allegedly improper comments, he fails to preserve any claim of prosecutorial misconduct for appellate review. *Id.*

Sanchez acknowledges that he has waived any such prosecutorial misconduct argument by not objecting to the prosecutor's questions and comments but attempts to avoid waiver by claiming the prosecutor's redirect questions and closing argument comments constituted fundamental error. When reviewing such a claim, we are mindful of our Supreme Court's observation that fundamental error in this context is "an extremely narrow exception". *Cooper v. State*, 854 N.E.2d at 835. In order for prosecutorial misconduct to constitute fundamental error, the misconduct must constitute a clearly blatant violation of basic and elementary principles of due process, present an undeniable and substantial potential for harm, and make a fair trial impossible. *Cooper v. State*, 854 N.E.2d 831. "Fundamental error must be of such magnitude to persuade the reviewing court that the defendant could not possibly have received a fair trial or that the verdict is clearly wrong or of such dubious validity that justice cannot permit it to stand." *Guy v. State*, 755 N.E.2d 248, 258 (Ind. Ct. App. 2001), *trans. denied*.

Sanchez first contends the prosecutor committed prosecutorial misconduct that amounted to fundamental error during her redirect examination of Congdon. Specifically, Sanchez argues the prosecutor engaged in misconduct in asking Congdon about her marital problems with Sanchez, which culminated in Congdon testifying about Sanchez's alcohol and cocaine use. Sanchez argues the prosecutor engaged in further misconduct in asking Congdon if she believed that the molestations had occurred. We address each in turn.

When Sanchez's attorney conducted his cross-examination of Congdon, the attorney asked Congdon about the state of her relationship with Sanchez in May 2007, which was when B.S.(2) and B.S.(1) revealed what Sanchez had done to them. Congdon indicated that they "were having a lot of problems", and Sanchez's attorney asked Congdon to specify the problems. *Transcript* at 247. After Congdon replied generally, "[e]verything", Sanchez's attorney tried to have Congdon more specifically identify the problem by asking Congdon if their problems were related to the allegations of molestation. *Id.* Congdon replied that it was not, and Sanchez's attorney further delved into the subject by asking Congdon if their problems were related to Congdon's fear that Sanchez was having an affair. Congdon denied having thoughts that Sanchez was having an affair and agreed that their marital problems were related to "other things." *Id.* Sanchez's attorney also elicited testimony from Congdon that the girls saw Congdon and Sanchez argue a lot.

On redirect examination, the prosecutor followed up on Congdon's testimony regarding her marital problems with Sanchez, and Congdon testified that the problems were related to "[f]inancial and drinking." *Id.* at 252. The prosecutor asked if Sanchez used "some other substance", and Congdon replied, "Cocaine". *Id.* Without objection from Sanchez, the prosecutor asked further questions about Sanchez's alcohol and drug use, and Congdon testified that Sanchez could drink a "[t]wenty-four pack" of beer in eight or nine hours and that she had only "caught" him using cocaine "a couple of times." *Id.* at 253.

On appeal, Sanchez argues that the prosecutor's questions were improper under Indiana Evidence Rule 404(b)<sup>3</sup> because the "testimony was offered under the theory that a drunkard and a drug user would be more likely to commit deviate sexual conduct than [sic] someone practicing sobriety". *Appellant's Brief* at 9. The State, on the other hand, contends that the prosecutor's questions were not intended to establish a link between substance abuse and child molestation but were asked in response to Sanchez's multiple cross-examination questions that opened the door to the source of Congdon's marital difficulties with Sanchez. The State contends that Sanchez may not take advantage of any alleged error in the prosecutor's questions because he invited any such error in his cross-examination about the marital problems and further argues that the questions did not constitute fundamental error.

"Under the doctrine of invited error, a party may not take advantage of an error [he] commits, invites, or which is the natural consequence of [his] own neglect or misconduct." *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005). "A party may not invite error, then later argue that the error supports reversal, because error invited by the complaining party is not reversible error." *Kingery v. State*, 659 N.E.2d 490, 494 (Ind. 1995).

While Sanchez's cross-examination questions about the source of Sanchez and Congdon's marital problems invited the prosecutor's questions about the same, his questions, of course, did not the prosecutor carte blanche to delve into otherwise inadmissible or irrelevant evidence. Nevertheless, the prosecutor's questions did not violate Evidence Rule

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<sup>3</sup> Indiana Evidence Rule 404(b) provides in part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other

404(b). “In assessing the admissibility of 404(b) evidence, we determine whether the evidence is relevant to a matter at issue other than the defendant’s propensity to commit the charged act, and we balance the probative value of the evidence against its prejudicial effect.” *Smith v. State*, 891 N.E.2d 163, 171 (Ind. Ct. App. 2008), *trans. denied*. It is clear from the record before us that the questions regarding Sanchez’s drug and alcohol use were not asked to elicit testimony to prove that Sanchez committed child molestation but instead were relevant to specifying the source of marital problems. Although the prosecutor’s questions regarding the specific details of the type of alcohol consumed or the amount of alcohol and drug usage may not have been essentially relevant to establishing the source of marital difficulties, Sanchez has not shown that he was prejudiced or that it constituted fundamental error. Indeed, Sanchez’s own attorney also asked Congdon about Sanchez’s drug and alcohol use. On recross-examination, Sanchez’s attorney elicited further testimony from Congdon about her belief that Sanchez had a “drinking problem” and a “[c]ocaine problem” and tried to use it to his advantage by showing that Congdon felt safe in leaving her daughters in Sanchez’s care despite such problems. *Transcript* at 261. Accordingly, we cannot say the prosecutor’s questions constituted fundamental error.

Sanchez also argues that the prosecutor further engaged in misconduct that amounted to fundamental error when the prosecutor asked Congdon if she believed that the molestations had occurred.

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purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

Sanchez's attorney conducted a thorough cross-examination of Congdon regarding how she had never seen Sanchez touch B.S.(1) and B.S.(2) in an inappropriate manner, how there were no signs of problems prior to the allegations raised by the girls, and how the girls had not been not afraid to be around Sanchez. Sanchez's attorney also questioned Congdon in detail about her doubts regarding the girls' allegations against Sanchez and her continued contact with Sanchez even after the child molest allegations had been revealed. Congdon testified that she continued to talk to Sanchez and wrote letters to him everyday for a couple of months. When asked why she continued to communicate with Sanchez even after her daughters alleged he had molested them, Congdon testified that she had a brother who had been falsely accused of child molesting and that she tried to convince herself that the girls were mistaken and that their allegations against Sanchez were just really instances where he had spanked them. Sanchez's attorney also questioned Congdon about the fact that she had even told the investigating detective of her doubts about whether the alleged molestations were really just related to spanking.

On redirect examination, Congdon also testified that she encouraged B.S.(1) and B.S.(2) to tell authorities that Sanchez had just spanked them and told them that she could get in trouble if they talked about things other than spanking. Additionally, she revealed that she allowed the girls to be around Sanchez a couple of months after the allegations had occurred, which then resulted in Child Protective Services taking physical custody of the girls.

On recross-examination, Sanchez's attorney again focused on Congdon's doubts about the molestations. Sanchez's attorney established that Congdon—despite her concerns about his alcohol and drug use—did not believe that B.S.(1) and B.S.(2) were in danger when in

Sanchez's care. She also testified that she let the girls spend time with Sanchez after the allegations because she "thought everything was a misunderstanding." *Transcript* at 262.

On re-redirect examination, the prosecutor attempted to have Congdon distinguish between her doubts about the molestation allegations versus the girls' reports of the molestations. Congdon testified that despite her hope that the allegations were a misunderstanding, the girls never backed down on their allegations. Congdon testified that at the time the allegations against Sanchez came out, she had hoped they had not really occurred and she had attempted to find reasons to say the molestations had not occurred. The prosecutor then asked, "Do you believe it occurred, ma'am?", and Congdon replied, "Yes, I do." *Transcript* at 263. The trial court called counsel to the side, informed the prosecutor that her question was "inappropriate" because it was asking Congdon to "render an opinion as to the Defendant's guilt or innocence", and admonished the jury to disregard the prosecutor's question and Congdon's answer and not to consider them in deliberations. *Id.* at 264. Sanchez made no objection otherwise and did not move for a mistrial.

Sanchez contends the prosecutor's question regarding whether Congdon believed the molestations had occurred was an evidentiary harpoon that led to improper vouching by Congdon.

"An evidentiary harpoon involves the deliberate use of improper evidence to prejudice the defendant in the eyes of the jury." *Williams v. State*, 512 N.E.2d 1087, 1090 (Ind. 1987). Additionally, Indiana Evidence Rule 704(b) provides that "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." Still,

“[r]eversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant’s rights and remove any error created by the objectionable statement.” *Agilera v. State*, 862 N.E.2d 298, 307 (Ind. Ct. App. 2007), *trans. denied*.

Assuming without deciding that the prosecutor’s question was a deliberate use of an evidentiary harpoon that led to improper vouching, we presume any error was cured by the trial court’s immediate admonishment to the jury. *See Ramsey v. State*, 853 N.E.2d 491 (Ind. Ct. App. 2006) (finding no prosecutorial misconduct because a trial court’s admonishment is presumed to correct any error), *trans. denied*; *Guy v. State*, 755 N.E.2d 248 (admonishment was held to cure any prejudice from prosecutor’s improper comment). Accordingly, we cannot say the prosecutor’s statement constituted fundamental error.

Lastly, we address Sanchez’s contention that the prosecutor engaged in misconduct during closing argument. As the prosecutor began her oral argument, she stated:

Ladies and Gentlemen, pretty soon you’re going to be heading back into that room. And as a prosecutor handling these cases, you always want to be sure that you have not dropped the ball or you haven’t done everything that you need to do to go forward with this case. So I am going to ask you, please, to have a little bit more patience with me as I go through the evidence. I am doing that probably out of an abundance of caution; but, also, I feel like I need to do everything I can before I turn this child over to you, well both of these children.

*Transcript* at 374. The prosecutor then discussed the evidence presented during trial and how the testimony from B.S.(1) and B.S.(2), while uncorroborated, would provide them with the evidence necessary to convict Sanchez.

During Sanchez's closing argument, his attorney focused on Congdon's testimony that she never saw Sanchez touch B.S.(1) or B.S.(2) in an inappropriate manner and never had any reason to suspect such a thing. Sanchez's attorney also focused on the lack of corroborating evidence and discounted the girls' testimony that Sanchez had touched them on more than one occasion: "[I]f Mr. Sanchez is doing these things repeatedly, on more than one occasion, to these girls, in this apartment, one would think that someone would see something, someone would hear something. And that didn't happen." *Id.* at 387.

During the prosecutor's surrebuttal argument, she responded:

And when we talk about there is some sort of need for a video camera, perhaps, or for a person other than a child to give you some sort of personal knowledge, then what will happen is you will have silenced the voice of every child that comes forward and says, this is what physically happened to me. Because in cases like this, it doesn't occur on a fifty yard line during half-time where a lot of people can jump up and say, "I saw it."

*Id.* at 388-89. The prosecutor then concluded her argument by stating, "Ladies and gentlemen, do not silence the voice of children, even if it is just one." *Id.* at 390.

Sanchez argues the prosecutor engaged in misconduct because she was trying to inflame the passions of the jury and asking the jury to find him guilty for reasons other than the evidence adduced at trial. We disagree.

"Prosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." *Cooper v. State*, 854 N.E.2d at 836. A review of the record reveals that the prosecutor's closing argument comments were not a request for the jury to find Sanchez guilty because the jury needed to protect the girls. Instead, the comments were intended to respond to Sanchez's defense set

forth in his cross-examinations and closing argument that he should not be found guilty because no one else saw the molestations occur. It “strains credulity” to believe that the jury found Sanchez guilty for any reason other than the evidence introduced at trial. *See Cooper v. State*, 854 N.E.2d at 838. Additionally, the trial court instructed the jury that it was required to base its conviction upon the evidence presented, that comments of counsel were not evidence, and that any sympathy or prejudice for the victim or defendant should not influence the verdict. Thus, even if the deputy prosecutor’s closing remarks were improper, it was not probable that the remarks had a persuasive effect on the jury’s decision. *See e.g., Surber v. State*, 884 N.E.2d 856 (Ind. Ct. App. 2008) (holding that even if the prosecutor’s closing argument comments constituted misconduct, there was no fundamental error given the evidence presented and the trial court’s instructions to the jury), *trans. denied*.

In summary, Sanchez has not demonstrated that the harm or potential harm done by the prosecutor’s questions or comments was substantial. Both B.S.(1) and B.S.(2) testified that Sanchez used his finger to touch and rub them in their private area where they pee. Given the evidence supporting Sanchez’s convictions, the trial court’s quick admonishment to the jury, and the trial court’s instructions, we cannot say the prosecutor’s questions and comments, separately or cumulatively, fell within the extremely narrow exception of fundamental error.

2.

Next, we turn to Sanchez’s argument that the evidence is insufficient to support his conviction for child molesting against B.S.(1) as contained in Count III.<sup>4</sup>

When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder’s exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the conviction, and “must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” *Id.* at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)). Additionally, a “molested child’s uncorroborated testimony is sufficient to sustain a conviction.” *Carter v. State*, 754 N.E.2d 877, 880 (Ind. 2001), *cert. denied*.

A defendant commits child molesting as a class A felony when the defendant, being at least twenty-one years of age, with a child under fourteen years of age, performs or submits to sexual intercourse or deviate sexual conduct. I.C. § 35-42-4-3(a)(1). “Deviate sexual conduct” means an act involving “the penetration of the sex organ or anus of a person by an object.” Ind. Code Ann. § 35-41-1-9 (West, Westlaw through 2009 1st Special Sess.). The definition of the term “object” includes a finger. *D’Paffo v. State*, 778 N.E.2d 798 (Ind. 2002).

At trial, B.S.(1) —who, in January 2007, had surgery to remove a brain tumor— testified that Sanchez used his hand to touch her “[f]ront butt”, which was the part of her body where she “pees.” *Transcript* at 353. B.S.(1) testified that she had on her nightgown

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<sup>4</sup> Sanchez does not challenge his other two child molesting convictions.

and underwear when Sanchez touched her and that he pushed through her panties to the point where she could feel it where she went pee. During her testimony, B.S.(1) touched the prosecutor's hand with her fingers and rubbed in a back and forth motion to demonstrate the type of motion Sanchez used when he touched her with his fingers. The prosecutor also had B.S.(1) use a Kleenex box to further demonstrate how Sanchez touched her. When B.S.(1) rubbed the top of the Kleenex box, her finger went inside the slit of the box. Upon questioning by the prosecutor, B.S.(1) confirmed that Sanchez rubbed his finger in a back and forth motion and "went inside". *Id.* at 359. During redirect examination, the prosecutor asked B.S.(1) if Sanchez went "[i]nside in between?", and B.S.(1) responded, "Yes." *Id.* at 369.

Sanchez argues that there was insufficient evidence of penetration because the Kleenex box was "never analogized to the physiology of the female sex organ except by inference" and the "impediment of the clothing further erodes any suggestion of penetration." *Appellant's Brief* at 15.

Proof of even the slightest penetration is sufficient to sustain convictions for child molesting. *Spurlock v. State*, 675 N.E.2d 312 (Ind. 1996), *aff'd in relevant part on reh'g* (1997). There is no requirement that the vagina be penetrated, only that the female sex organ, including the external genitalia, be penetrated. *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002), *trans. denied*. Additionally, "a complete state of undress is not required for a child to be a victim of deviate sexual conduct[.]" *Stewart v. State*, 768 N.E.2d 433, 436 (Ind. 2002), *cert. denied*.

As noted above, B.S.(1) demonstrated and testified that Sanchez touched her on the inside of her “[f]ront butt”, or the part of her body where she “pees”, with his finger in a back and forth rubbing motion. *Transcript* at 353. She testified that although she was wearing her panties, she could feel his finger push through her panties to the point where she could feel his finger where she went pee. Sanchez’s argument to the contrary is nothing more than a request to reweigh the evidence, which we will not do. *See McHenry v. State*, 820 N.E.2d 124. There is sufficient evidence from which the jury could infer that Sanchez’s finger at least slightly penetrated B.S.(1)’s external genitalia. *See, e.g., Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002) (explaining that a conviction for child molesting will be sustained when it is apparent from the circumstances and the victim’s limited vocabulary that the victim described an act which involved penetration of the sex organ). Accordingly, we affirm Sanchez’s conviction for class A felony child molesting as charged in Count III.

3.

Finally, we address the appropriateness of Sanchez’s sentence. The trial court sentenced Sanchez to forty years on each of the class A felony convictions and ordered the two convictions relating to B.S.(2) to be served concurrently to each other but consecutively to the conviction relating to B.S.(1). Sanchez’s argues that this eighty-year aggregate sentence was inappropriate.

We have the constitutional authority to revise a sentence if, after consideration of the trial court’s decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. *See* Indiana Appellate Rule 7(B); *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218. Although we are not

required under App. R. 7(B) to be extremely deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State*, 866 N.E.2d 867 (Ind. Ct. App. 2007). On appeal, Sanchez bears the burden 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 offenses, Sanchez molested his two stepdaughters who considered him to be their father. Sanchez's commission of child molesting against multiple victims justifies the imposition of consecutive sentences. *See McCann v. State*, 749 N.E.2d 1116 (Ind. 2001). As the trial court noted, Sanchez violated a position of trust with six-year-old B.S.(2) and nine-year-old B.S.(1) when he took them into the living room of the apartment while their mother was sleeping in a nearby bedroom and rubbed their private areas with his finger. The trial court noted that B.S.(2) was unable to resist because of her "tender years" and B.S.(1) was unable to do so given her "series of illnesses," which included recent surgery to remove a brain tumor. *Transcript* at 426. Additionally, both girls testified that he molested them on more than one occasion and that he warned them not to tell anyone what he had done. The nature of the offenses is not deserving of a lesser sentence.

With regard to the character of the offender, Sanchez lied to the trial court regarding his vital statistics during a pre-trial appearance before the trial court. Sanchez has used an alias and is apparently in the United State illegally. Sanchez also has a criminal history, which includes convictions for operating while intoxicated and speeding and pending charges for operating while intoxicated and false informing. While Sanchez's alcohol-related crimes may not be directly related to the instant crimes, we note that the evidence shows that

Sanchez continued to abuse substances, including alcohol and cocaine. Additionally, the fact that Sanchez took advantage of the two girls—one a six-year-old girl and a nine-year-old girl who had recently had brain surgery—who looked to Sanchez as their own father and called him “Dad” speaks volumes about his character.

In light of Sanchez’s character and the nature of the offenses, we cannot say that an aggregate eighty-year sentence for three counts of class A felony child molesting against two victims is inappropriate.

Judgment affirmed.

ROBB, J., concurs.

KIRSCH, J., concurs in part and dissents in part, with opinion.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ANDRES SANCHEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A04-0912-CR-720
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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**KIRSCH, Judge, *concurring in part and dissenting in part***

I fully concur in the decision of my colleagues affirming the convictions, but from their decision to affirm the eighty-year sentence, I respectfully dissent.

Although our deferential standard of review leads me to conclude that evidence was sufficient to support Sanchez’s child molestation convictions as A felonies, I note that on the facts before them the jury could have easily concluded that Sanchez committed child molestation as C felonies (fondling with the intent to arouse or satisfy sexual desire), not A felonies. Because of this fact, I believe that the nature of Sanchez’s offenses, while heinous, constitutes the least serious, not the most serious of offenses of this type and grade. Similarly, Sanchez does not fall into the category of the worst offender.

I believe the eighty year sentence imposed by the trial court is inappropriate. I would vacate the sentence and remand with instructions to enter concurrent advisory sentences of thirty years.