Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

ELIZABETH A. BELLIN
WILLIAM J. COHEN
Cohen Law Offices
Elkhart, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JAMES E. PORTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SAMUEL L. WAIT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0904-CR-135
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0708-FA-55

October 7, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Samuel L. Wait appeals following his convictions for four counts of Child Molesting,[1] a class A felony, and his admission to being a Habitual Offender.[2] Wait argues that the evidence was insufficient to convict him of one of the counts because the State failed to prove that Wait committed the molestation during the time alleged in the charging information. Additionally, Wait argues that the trial court erred by ordering one of the sentences to run consecutively to the remaining three concurrent terms because the evidence failed to establish that the acts occurred on different dates. Finding that time is not of the essence in child molestation and that the evidence established that the acts of molestation occurred on different dates, we affirm.

FACTS

In March 2006, Heather Statts began a relationship with Wait. At that time, she was living in Ohio with S.S., her seven-year-old daughter. In June 2006, Statts and S.S. relocated to live with Wait in his camper. In late August 2006, they moved to a house in New Paris.

After they moved to New Paris, Wait committed multiple acts of sexual abuse against S.S. He penetrated her vagina with his finger and his penis, penetrated her anus with his penis, and, on a separate day, inserted his penis into her mouth. On another day, Wait forced S.S. to take her clothes off and "hump" his penis. Tr. p. 266-67. S.S. saw a tattoo on Wait's penis of a red and green snake, the existence of which was stipulated to

[1] Ind. Code § 35-42-4-3(a)(1).

[2] Ind. Code § 35-50-2-8.

by the parties. Wait told S.S. that if she ever told anyone "that he touched her in her naughty places that he would hurt her." Id. at 348.

Statts's relationship with Wait deteriorated, and Statts and S.S. moved out of the New Paris home and returned to Ohio at the end of October 2006. But Statts and Wait resumed their relationship the following month, at which time Statts and S.S. returned to Indiana to live with Wait in Goshen. Approximately two months thereafter, S.S. told a friend's mother about the abuse, and the mother reported it to the authorities.

On August 29, 2007, the State charged Wait with four counts of class A felony child molesting, and on December 31, 2009, the State alleged Wait to be a habitual offender and a repeat sexual offender. Wait's jury trial took place on January 13, 2009, during which the State orally moved to amend the charging information with respect to the dates as listed therein. The trial court denied the motion. The jury found Wait guilty as charged and Wait admitted to being a habitual offender and repeat sexual offender.

On February 12, 2009, the trial court found the following aggravators: Wait's criminal history,[3] the offenses occurred over an extended period of time, Wait is an ongoing threat to children in the community, and he violated a position of trust. The trial court found no mitigating circumstances. It imposed forty-year sentences on each of the four convictions, with three to be served concurrently and one to be served consecutively.

[3] Wait's criminal history includes three felony and four misdemeanor convictions. Two of his felony convictions were for attempted criminal sexual conduct, and each of those offenses involved children under thirteen years of age.

The trial court enhanced the sentences by thirty years in light of Wait's status as a habitual offender,[4] for an aggregate sentence of 110 years. Wait now appeals.

DISCUSSION AND DECISION

I. Sufficiency

Wait first argues that the evidence was insufficient to prove that he committed the act of child molesting as described within Count IV of the information, which alleged as follows:

> The undersigned affiant swears that on or about January 2007, at the County of Elkhart, State of Indiana, one SAMUEL L. WAIT, a person at least twenty-one (21) years of age, did with a child under fourteen (14) years of age, to wit: one S.S., knowingly perform or submit to deviate sexual conduct; all of which is contrary to the form of I.C. § 35-42-4-3(a)(1); contrary to the form of the statute in such cases made and provided; and, against the peace and dignity of the State of Indiana.

Appellant's App. p. 59. Specifically, Wait emphasizes that all of the evidence at trial established that the offenses occurred while he, Statts, and S.S. were living in the house in New Paris. It is undisputed, however, that Statts and S.S. moved out of the New Paris house months before January 2007; therefore, Wait contends that the evidence did not prove that he committed the offense as charged.

Upon a challenge to the sufficiency of the evidence supporting a conviction, we will neither reweigh the evidence nor assess witness credibility, considering only the probative evidence and reasonable inferences supporting the verdict. Bald v. State, 766 N.E.2d 1170, 1173 (Ind. 2002). We must affirm if the evidence and inferences could

[4] The trial court found that Wait's status as a repeat sexual offender merged into his status as a habitual criminal offender.

have allowed a reasonable factfinder to find the defendant guilty beyond a reasonable doubt. Tobar v. State, 740 N.E.2d 109, 111-12 (Ind. 2000).

It is well established that time is not of the essence in child molesting cases. E.g., Love v. State, 761 N.E.2d 806, 809 (Ind. 2002). Our Supreme Court has explained that "[i]t is difficult for children to remember specific dates, particularly when the incident is not immediately reported as is often the situation in child molesting cases." Barger v. State, 587 N.E.2d 1304, 1307 (Ind. 1991). Therefore, the precise date of the offense becomes important "only in limited circumstances, such as where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies." Id.; see also Coomer v. State, 575 N.E.2d 683, 686 (Ind. Ct. App. 1991) (holding that in child molesting cases, "the offense may be proved as having occurred at any date within the statute of limitations preceding the filing of the affidavit or indictment").

Here, the State was required to prove that the acts occurred when S.S. was under the age of fourteen. I.C. § 35-42-4-3(a)(1). It is undisputed that she was only seven years old at the time of Wait's offenses; therefore, the precise date of the offense is not important. Whereas the charging information states that Wait committed these acts on or about January 2007, the acts must have actually occurred sometime between August and October 2006. We find that this discrepancy of a matter of months was inconsequential and caused no prejudice to Wait. Given that time is not of the essence in child molesting cases save for limited circumstances that do not apply here, we do not find the evidence to be insufficient for this reason.

To the extent that Wait also impliedly argues that the State failed to prove that four separate acts of molestation occurred, we note that S.S. testified that Wait (1) penetrated her vagina with his penis, tr. p. 253-55; (2) penetrated her vagina with his finger, id. at 257-58; (3) penetrated her anus with his penis, id. at 264-65; (4) forced her to perform fellatio, id. at 260-63; and (5) forced her to remove her clothes and "hump" his penis, id. at 266-67. We find this evidence to be sufficient to support Wait's convictions for four counts of class A felony child molestation. See Carter v. State, 754 N.E.2d 877, 880 (Ind. 2001) (holding that "[a] molested child's uncorroborated testimony is sufficient to sustain a conviction").

II. Sentencing

Next, Wait argues that the trial court erroneously ordered one of the four sentences to be served consecutively to the other three concurrent terms. The decision to order consecutive sentences is within the trial court's discretion, and we will only reverse if the trial court abused that discretion. Townsend v. State, 860 N.E.2d 1268, 1272 (Ind. Ct. App. 2007), trans. denied.

The trial court elected to run Count I consecutive to the remaining counts because "the acts which gave rise to the filing of the charge set forth in Count I clearly occurred on . . . a date different than those which give rise to the charges under Counts II, III, and IV." Appellant's App. p. 20.[5] See Powell v. State, 895 N.E.2d 1259, 1263 (Ind. Ct. App.

[5] The trial court also could have imposed consecutive sentences based upon the aggravating circumstances. Ind. Code § 35-50-1-2(c). Here, the trial court found the following aggravators: Wait's criminal history, the offenses occurred over an extended period of time, Wait is an ongoing threat to children in the community, and Wait violated a position of trust. It would have been proper for the trial court to have imposed consecutive sentences on this basis as well.

2008) (explaining that "[t]he basis for the gross impact that consecutive sentences may have is the moral principle that each separate and distinct criminal act deserves a separately experienced punishment"), trans denied. Wait argues that there is no evidence establishing that, in fact, those acts occurred on different dates. We cannot agree.

Count I alleges that Wait performed or submitted to sexual deviate conduct with S.S. on or about August 2006. Deviate sexual conduct is "an act involving (1) a sex organ of one person and the mouth or anus of another person; or (2) The penetration of the sex organ or anus of a person by an object." I.C. § 35-41-1-9. S.S. testified that Wait forced her to perform sexual acts on at least three separate occasions:

> Q And could you tell me what happened when he put his wiener in your mouth? . . .
>
> A He moved it around. . . .
>
> Q And was this a different time than when he had you lay on the floor, and he put his wiener in your crotch?
>
> A Yes.

Tr. p. 262-63.

> Q Okay. What happened in Mommy's room? . . .
>
> A He made me hump him. . . .
>
> Q Okay. What did he make you hump?
>
> A His wiener.
>
> Q His wiener. And were your clothes on or off?
>
> A Off. . . .
>
> Q Now was that on a different date than these other dates we were talking about? A different time?
>
> A I think so. . . .
>
> Q So we're talking about different days, okay? Now, having said different days, was that on a different day?

A Yes.

Id. at 265-67. We find this evidence sufficient to support the trial court's conclusion that the offense alleged in Count I was a separate and distinct criminal act from the molesting offenses alleged in the remaining counts. Therefore, the trial court did not abuse its discretion by imposing consecutive sentences on this basis.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and RILEY, J., concur.