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ATTORNEY FOR APPELLANT:

JEFFREY D. STONEBRAKER
Clark County Chief Public Defender
Jeffersonville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANDREW R. FALK
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOHN T. HAMILTON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 10A05-1103-CR-205
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Vicki L. Carmichael, Judge
Cause No. 10D01-0903-FA-101

December 28, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

John Hamilton ("Hamilton") was convicted of three counts of Class A felony child molesting and three counts of Class C felony child molesting. He was ordered to serve an aggregate sentence of sixty years. Hamilton appeals raising two issues, which we restate as:

> I. Whether Hamilton's multiple Class A and Class C felony child molesting convictions violate the prohibition against double jeopardy; and,
>
> II. Whether Hamilton's aggregate sixty-year sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

Facts and Procedural History

A.C. and Hamilton met in 1999 at their place of employment. In 2001, when they began dating, A.C. had three children from a prior relationship. The youngest child, As.C., was just two weeks old. The couple eventually married in 2007. In March 2008, the family moved to Sellersburg, Indiana.

In the fall of 2008, A.C. began watching a videotape that she believed contained images of she and Hamilton engaged in sexual intercourse. But it was actually a video of Hamilton touching seven-year-old As.C.'s chest and vaginal area. When A.C. confronted Hamilton about the video, he would not admit to touching As.C. A.C. made Hamilton apologize to As.C. and promise never to touch As.C. again. A.C. did not report the molestation but decided that she and Hamilton should work toward improving their marriage.

But Hamilton continued to molest As.C. and her older sister, eleven-year-old Ar.C. Hamilton would typically molest As.C. when she would come home from school while

A.C. was at work. The molestation included inserting his finger inside her vagina and using his penis to touch her genitals. He would also touch her buttocks with his hands. The molestation occurred almost daily in either Hamilton's bedroom or on the couch in the living room. As.C. was instructed to touch Hamilton's penis by moving her hands up and down. And on one occasion, Hamilton placed his mouth on As.C.'s genitals.

Hamilton also molested eleven-year-old Ar.C. on multiple occasions. He inserted his finger into Ar.C.'s vagina and used his penis to touch her genitals. Ar.C. felt that she had to submit to Hamilton's abuse and that it hurt when his penis was inside her vagina. Hamilton instructed Ar.C. to take a bath and clean up after he was finished molesting her.

In March 2009, the two girls told a neighbor about the molestation. The neighbor contacted the Sellersburg Police Department, and the investigating officer contacted Child Protective Services. The Department of Child Services removed the girls from A.C.'s and Hamilton's household during the investigation. When questioned by a detective, Hamilton admitted to fondling each child at least one time, but denied having sexual contact with the children.

After a three-day jury trial Hamilton was convicted of the following:

> Class A felony child molesting (Count II): "Between February of 2008 and February of 2009 . . . [Hamilton] . . . did with As.C., a child under fourteen (14) years of age, perform or submit to deviate sexual conduct, to-wit: oral sex upon As.C."
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> Class A felony child molesting (Count III): "Between February of 2008 and February of 2009 . . . [Hamilton] . . . did with As.C., a child under fourteen (14) years of age, perform or submit to deviate sexual conduct, to-wit: digital penetration of the genitals."

> Class A felony child molesting (Count V): "Between February of 2008 and February of 2009 . . . [Hamilton] . . . did with Ar.C., a child under fourteen (14) years of age, perform or submit to deviate sexual conduct, to-wit: digital penetration of the genitals of Ar.C.
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> Class C felony child molesting (Count VII): "Between February of 2008 and February of 2009 . . . [Hamilton] . . . did with As.C., a child under fourteen (14) years of age perform or submit to any fondling or touching of As.C. with intent to arouse or to satisfy the sexual desires of either As.C. or [Hamilton]."
>
> Class C felony child molesting (Count VIII): "Between February of 2008 and February of 2009 . . . [Hamilton] . . . did with Ar.C., a child under fourteen (14) years of age perform or submit to any fondling or touching of Ar.C. with intent to arouse or to satisfy the sexual desires of either Ar.C. or [Hamilton]."
>
> Class C felony child exploitation (Count IX): "Between February of 2008 and February 2009 . . . [Hamilton] did knowingly or intentionally manage, produce, sponsor, present, exhibit, photograph, film, videotape, or create a digitized image of any performance or incident that includes sexual conduct by a child under eighteen (18) years of age, to-wit: created pornographic images of As.C.

Appellant's App. pp. 85-88.

The sentencing hearing was held on February 22, 2011. Hamilton was ordered to serve the advisory, thirty-year sentence for each Class A felony conviction. The two Class A felony counts wherein Hamilton was charged with molesting As.C. were ordered to be served concurrently, but consecutive to the thirty-year sentence for molesting Ar.C. Hamilton was also sentenced to concurrent terms of the advisory four-year sentence for the Class C felony convictions. Therefore, Hamilton's aggregate sentence is sixty years. Hamilton now appeals.

I. Double Jeopardy

Hamilton argues that his multiple convictions for Class A felony and Class C felony child molesting violate his right to be free from double jeopardy because the same

evidence used to convict him of the Class A felony counts was used to convict him of the Class C felony counts. The Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Ind. Const. art. 1, § 14. Our Supreme Court has developed a two-part test for Indiana double jeopardy claims, holding that two or more offenses are the "same offense" in violation of Article 1, Section 14, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999).

The "statutory elements test" referenced in Richardson is the same test enunciated in Blockburger v. United States, 284 U.S. 299 (1932). Brown v. State, 912 N.E.2d 881, 896 (Ind. Ct. App. 2009), trans. denied. Multiple convictions will not be precluded if each statutory offense requires proof of an additional fact that the other does not. Robinson v. State, 835 N.E.2d 518, 522 (Ind. Ct. App. 2005). We look only to the statutory elements of the offenses. Id.

Hamilton concedes that his convictions do not violate the statutory elements test. Class A felony child molesting requires deviate sexual conduct while Class C felony child molesting requires fondling or touching with intent to arouse sexual desires. See Ind.Code § 35–42–4–3(a)(1) & (b). Because each offense requires proof of an additional fact which the other does not, there is no violation of the statutory elements test. See Sloan v. State, 947 N.E.2d 917, 924 (Ind. 2011) ("Sloan concedes that the statutory

elements of Class A felony child molesting and Class C felony child molesting are different. His argument rests on the actual-evidence test[.]").

Under the actual evidence test, the evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Lee v. State, 892 N.E.2d 1231, 1234 (Ind. 2008). To show that two challenged offenses constitute the "same offense," a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the factfinder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. Id. Application of this test requires the court to identify the essential elements of each of the challenged crimes and to evaluate the evidence from the factfinder's perspective. Id.

The evidence at trial established (as was alleged in the charging information) that Hamilton inserted his finger into both As.C.'s vagina and Ar.C.'s vagina on multiple occasions, and that he placed his mouth on As.C.'s vagina at least once. From this evidence, the State proved that Hamilton committed three counts of Class A felony child molesting.

In support of the two Class C felony child molesting convictions, evidence was presented that Hamilton fondled As.C.'s vagina and buttocks independently of inserting his finger into her vagina. And the evidence established that Hamilton forced As.C. to touch his penis. With regard to Ar.C., Hamilton admitted that he fondled Ar.C. underneath her pajamas on at least one occasion. Tr. pp. 177-78. And Ar.C. testified that Hamilton touched her genitals.

Although the charged acts often occurred together, there was independent and distinct evidence of both penetration and fondling to support the Class A felony and Class C felony child molesting convictions. See Sloan v. State, 947 N.E.2d 917, 924 (Ind. 2011) (rejecting the defendant's double jeopardy argument because the defendant penetrated the victim's vagina numerous times and on multiple occasions fondled and touched her breasts). Moreover, the fact that Hamilton committed numerous acts of child molesting with both victims "greatly weighs against" Hamilton's argument. See id. We conclude that there is no reasonable possibility that the jury used the same evidentiary facts to establish both the essential elements of the Class A felony child molesting charges and the essential elements of the Class C felony child molesting charges. Consequently, there is no double jeopardy violation.

II. Inappropriate Sentence

Hamilton argues that his aggregate sixty-year sentence is inappropriate in light of the nature of the offense and the character of the offender. Specifically, he argues that his sentence is inappropriate because his stepdaughters were not physically harmed or threatened during the commission of his multiple offenses, and because he has no prior criminal history.

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute 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." Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007)). The defendant has the burden of persuading us that his sentence is inappropriate. Id. (citing Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). Finally, although we have the power to review and revise sentences, "[t]he principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008).

In this case, Hamilton was ordered to serve a thirty-year advisory sentence for each Class A felony conviction[1] and the advisory four-year sentence for each Class C felony conviction.[2] The advisory sentence is a helpful guidepost for ensuring fairness, proportionality, and transparency in sentencing. Hamilton v. State, 955 N.E.2d 723, 726 (Ind. 2011) (citing Ind. Code § 35–50–2–1.3(a) (2008) (defining advisory sentence as "a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence")). And because the "advisory sentence is the starting point our General Assembly has selected as an appropriate sentence for the crime committed, the defendant bears a particularly heavy burden in persuading us that his sentence is inappropriate when the trial court imposes the advisory sentence."

[1] A person who commits a Class A felony faces a prison sentence of between twenty and fifty years. Ind. Code § 35–50–2–4 (2008).

[2] A person who commits a Class C felony faces a prison sentence of between two and eight years. Ind. Code § 35–50–2–6 (2008).

Fernbach v. State, 954 N.E.2d 1080, 1089 (Ind. Ct. App. 2011) (citing Golden v. State, 862 N.E.2d 1212, 1216 (Ind. Ct. App. 2007), trans. denied).

Hamilton was also ordered to serve consecutive sentences because he molested multiple victims. The presence of multiple victims generally "justif[ies] the imposition of enhanced and consecutive sentences." Sanchez v. State, 938 N.E.2d 720, 723 (Ind. 2010).

Our courts have occasionally revised sentences for child molestation even where there were multiple victims when other evidence in the record supported revision. See Sanchez, 938 N.E.2d at 723 (revising defendant's consecutive, enhanced sentences to be served concurrently where defendant molested two young victims, but molestations were isolated incidents and defendant had limited criminal history unrelated to the molestations and did not physically harm victims); Granger v. State, 946 N.E.2d 1209, 1221 (Ind. Ct. App. 2011) (reducing defendant's executed sixty-year sentence for molesting two victims to fifty years executed with ten years suspended in light of defendant's "lack of prior criminal record, generally good conduct in the community separate from the offenses for which she was convicted, and lack of substantial physical harm to her victims"). But based on our review of the record, we are unconvinced that revision is warranted here.

Concerning the nature of the offense, Hamilton repeatedly molested his two stepdaughters ages seven and eleven over a period of several months. The molestation included fondling, penetration, and oral sex. Both girls testified that they suffered physical pain from the molestation.

We also observe that Hamilton committed two of his three Class A felony offenses against his seven-year-old stepdaughter. Our supreme court has observed that "the victim's age also suggests a sliding scale in sentencing, as younger ages of victims tend to support harsher sentences. . . . The younger the victim, the more culpable the defendant's conduct." Hamilton, 955 N.E.2d at 727.

And there is no question in this case that Hamilton violated his position of trust with his stepdaughters when he subjected them to repeated acts of molestation. Hamilton was the victims' only father figure, and As.C. was only two weeks old when Hamilton and A.C. began dating in 2001. See id. ("A harsher sentence is also more appropriate when the defendant has violated a position of trust that arises from a particularly close relationship between the defendant and the victim, such as a parent-child or stepparent-child relationship.").

Hamilton repeatedly molested both children, and the heinous offenses against As.C. occurred on nearly a daily basis. A harsher sentence may be more appropriate in cases involving a long-term pattern of sexual abuse when compared to a sentence imposed for a single act of sexual misconduct. Id. at 728; see also Sanchez, 938 N.E.2d at 722 (finding the defendant's sentence inappropriate in part because his "offenses were isolated incidents, rather than systematic or repeated behavior").

Concerning the character of the offender, Hamilton has no prior criminal history. Hamilton also cooperated in part with the police, graduated from high school, and was gainfully employed. Although Hamilton may have been a productive member of society, the nature of the offenses in this case support the trial court's decision to impose advisory

sentences, and to order two of the three Class A felonies to run consecutively because Hamilton molested his two stepdaughters. Hamilton has not met his substantial burden of persuading us that his two consecutive, but advisory, thirty-year sentences are inappropriate in light of the nature of the offense and the character of the offender.

Conclusion

Hamilton's convictions for multiple counts of Class A felony child molesting and Class C felony child molesting do not violate the prohibition against double jeopardy. And Hamilton's aggregate sixty-year sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

FRIEDLANDER, J., and RILEY, J., concurt.