



Appellant/Defendant Lee Alan Murphy appeals the sentence imposed by the trial court following his guilty plea to Class A felony Child Molesting,<sup>1</sup> two counts of Class B felony Sexual Misconduct with a Minor,<sup>2</sup> Class D felony Dissemination of Matter Harmful to Minors,<sup>3</sup> and Class C felony Child Molesting.<sup>4</sup> We affirm.

### **FACTS AND PROCEDURAL HISTORY**

According to the factual basis entered during the August 26, 2009 plea hearing, Murphy is the adoptive father of K.M., who suffers from a mild mental handicap. Between the dates of June 1, 2007, and March 17, 2008, Murphy performed the “deviate sexual conduct of putting [his] penis in the mouth” of K.M., who was thirteen years of age. Tr. p. 7. Murphy also performed the “deviate sexual conduct of putting [his] penis in the mouth” of K.M. between the dates of March 18, 2008, and March 9, 2009, when K.M. was fourteen years of age. Tr. p. 7. In addition, between the dates of March 18, 2008, and March 9, 2009, Murphy “performed or submitted to deviate sexual conduct to-wit touched [his] penis to the anus” of K.M., who was then fourteen years of age. Tr. p. 8. Between June 1, 2007, and March 8, 2009, Murphy also “knowingly disseminated matter or showed matter to K.M. ... that was harmful to her, that being digital pornographic images on a computer.” Tr. p. 9. Murphy also “performed or submitted to fondling or touching K.M. ... with the intent to arouse or satisfy [his] sexual desires” between the dates of June 1, 2007 and March 17, 2008.

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<sup>1</sup> Ind. Code § 35-42-4-3(a) (2006).

<sup>2</sup> Ind. Code § 35-42-4-9(a) (2007).

<sup>3</sup> Ind. Code § 35-49-3-3 (2006).

<sup>4</sup> Ind. Code § 35-42-4-3.

Tr. p. 9.

On March 13, 2009, the State charged Murphy with two counts of Class A felony child molesting, two counts of Class B felony sexual misconduct with a minor, one count of Class D felony dissemination of matter harmful to minors, one count of Class C felony child molesting, and one count of Class C felony sexual misconduct with a minor. The State subsequently dismissed one count of Class A felony child molesting and the Class C felony sexual misconduct with a minor charge. Murphy pled guilty to the remaining charges on August 26, 2009. The trial court conducted a sentencing hearing on October 1, 2009, at the conclusion of which the court sentenced Murphy to an aggregate executed term of sixty years in the Department of Correction. Murphy now appeals.

## **DISCUSSION AND DECISION**

### **A. Consecutive Sentences**

Murphy challenges his sentence on appeal, contending that the trial court erred in imposing consecutive sentences following his convictions for Class A felony child molestation, two counts of Class B felony sexual misconduct with a minor, Class D felony dissemination of matter harmful to a minor, and Class C felony child molestation. Generally, the decision to impose consecutive sentences lies within the discretion of the trial court. *Williams v. State*, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008). A single aggravating factor may justify the imposition of consecutive sentences. *Gilliam v. State*, 901 N.E.2d 72, 74 (Ind. Ct. App. 2009).

Here, the trial court found the following aggravating factors: (1) Murphy was placed

in the position of having care, custody, or control over K.M.; (2) Murphy was the adoptive father of K.M.; (3) Murphy's criminal actions occurred several times; and (4) K.M. suffers from a mild mental handicap. Murphy does not challenge the trial court's findings relating to these aggravating factors on appeal. Rather, Murphy's challenge to his sentence is that his aggregate sixty-year sentence violates Indiana Code section 35-50-1-2(c) (2006). Specifically, Murphy argues that his aggregate sixty-year executed sentence "exceeds the maximum sentence allowed" because his aggregate sixty-year sentence violates the provision of 35-50-1-2(c) providing that the defendant's aggregate sentence for felony convictions shall not exceed the advisory sentence for a felony which is one class higher than the most serious of the felonies for which the defendant has been convicted. Appellant's Br. p. 7.

With respect to the imposition of consecutive or concurrent terms of imprisonment, Indiana Code section 35-50-1-2(c) provides as follows:

Except as provided in subsection (d) or (e), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the:

- (1) aggravating circumstances in IC 35-38-1-7.1(a); and
- (2) mitigating circumstances in IC 35-38-1-7.1(b);

in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions *arising out of an episode of criminal conduct* shall not exceed the advisory sentence for a felony which is one (1) class higher than the most serious of the felonies for which the person has been convicted.

(emphasis added). As the State points out, the portion of subsection (c) stating that a defendant's aggregate sentence for felony convictions "shall not exceed the advisory

sentence for a felony which is one class higher than the most serious of the felonies for which the person has been convicted” applies only when the defendant’s felony convictions arise out of an episode of criminal conduct. *See* Ind. Code § 35-50-1-2(c). An episode of criminal conduct means “offenses or a connected series of offenses that are closely related in time, place, and circumstance.” I.C. § 35-50-1-2(b).

This court has previously concluded that convictions stemming from multiple acts of child molestation, sexual misconduct with a minor, or other sexually deviate acts do not constitute an episode of criminal conduct because each act of molestation or misconduct constitutes a separate and distinct act. *See Powell v. State*, 895 N.E.2d 1259, 1263 (Ind. Ct. App. 2008) (providing that the trial court’s order imposing consecutive sentences did not violate Indiana Code section 35-50-1-2 because defendant’s multiple acts of child molestation were not a single episode of criminal conduct, but rather were separate and distinct acts), *trans. denied*. Upon review of the instant matter, we too conclude that multiple acts of sexual molestation, sexual misconduct, or sexual deviate behavior do not constitute an ongoing episode of criminal conduct but rather are separate and distinct acts for the purposes of sentencing under Indiana Code section 35-50-1-2(c).

Murphy was convicted of Class A felony child molestation, two counts of Class B felony sexual misconduct with a minor, Class D felony dissemination of matter harmful to a minor, and Class C felony child molestation. The acts which led to each of Murphy’s convictions occurred on different dates over a period of nearly two years and involved different forms of criminally deviate touching and conduct. For example, some of Murphy’s

actions included putting his penis in K.M.'s mouth, others included attempting to put his penis in K.M.'s anus, forcing K.M. to view digital pornographic images, or fondling K.M. with the intent to arouse or satisfy his own sexual desire. Because Murphy's various criminally deviate acts occurred on different dates, we conclude that Murphy's criminally deviate acts were separate and distinct acts and did not arise from an ongoing episode of criminal conduct. *See id.* Therefore, the trial court's order that the sentences imposed for each these crimes be run consecutively did not violate Indiana Code section 35-50-1-2(c). In light of the multiple aggravating factors found by the trial court and our conclusion that Murphy's convictions for multiple acts of sexual molestation and sexual misconduct arose from separate and distinct acts, not an ongoing episode of criminal conduct, we further conclude that the trial court did not abuse its discretion in sentencing Murphy.

### **B. Appropriateness**

Murphy also contends that his sixty-year executed sentence is inappropriate in light of the nature of his offenses and his character. 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, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

Our review of the nature of Murphy's offenses reveals that over a period of nearly two years, Murphy committed multiple acts of sexual misconduct against his mentally disabled daughter. In committing these acts, Murphy forced his daughter to perform oral sex on him,

attempted to engage in anal intercourse with her, forced her to view digital pornographic images, and fondled her for the purpose of his own sexual arousal. We find Murphy's acts to be particularly heinous because Murphy repeatedly violated the ever-important trust that exists between a father and his child.

Moreover, our review of Murphy's character reveals that, although Murphy did not have a criminal history prior to the instant convictions, his instant convictions constituted repeated sexual misconduct against his own disabled daughter. We are unconvinced by Murphy's claim that, despite his acts of sexual misconduct against K.M., the fact that he has allegedly never committed sexual misconduct against any of his three sons reflects well on his character. We are also unconvinced that the lack of an allegation that Murphy used physical violence or weapons during the commission of his acts reflects well on his character because Murphy abused his position of trust in committing his offenses.

In addition, we are not persuaded that Murphy's guilty plea reflects particularly well on his character because Murphy pled guilty on the first morning of trial after the jury had been selected and after K.M. had prepared to recount Murphy's sexual misconduct in her testimony before the court. We believe that Murphy's guilty plea, which came while both the jury and the victim were outside the courtroom waiting for the trial to begin, can be considered a pragmatic move rather than true showing of remorse for his actions. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) (providing that a guilty plea is not necessarily a showing of remorse and does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence

against his is such that the decision to plead guilty is merely a pragmatic one), *trans. denied*.

Based on our review of the evidence, we see nothing in Murphy's character or in the nature of his offenses that would suggest that his sentence is inappropriate.

The judgment of the trial court is affirmed.

RILEY, J., and MATHIAS, J., concur.