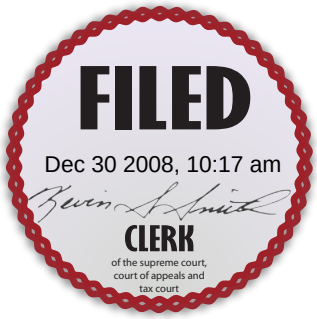

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IN THE
COURT OF APPEALS OF INDIANA

VINCENT E. SIMON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 69A01-0807-CR-321
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable W. Michael Wilke, Special Judge
Cause No. 69C01-0611-FC-24

December 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Vincent E. Simon appeals his convictions and sentence for three counts of incest as class C felonies.[1] Simon raises two issues, which we revise and restate as:

I. Whether the evidence is sufficient to sustain his convictions for incest;

II. Whether the trial court abused its discretion in sentencing him; and

III. Whether the sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. Simon and E.S.'s mother were married in March 1989, and E.S. was born in April 1989. Simon was identified on E.S.'s birth certificate as her father. When Simon and E.S.'s mother divorced in May 1990, Simon agreed that one child, E.S., had been born to the marriage. As a result of the dissolution proceedings, Simon was ordered to pay child support, and Simon did in fact pay child support for E.S.

In 2005 and 2006, Simon regularly inserted his fingers in E.S.'s vagina. In the fall of 2006, Simon had sexual intercourse with E.S. on two occasions. Later DNA testing confirmed that Simon was E.S.'s biological father.

The State charged Simon with three counts of incest as class C felonies. After a bench trial, the trial court found Simon guilty as charged. At the sentencing hearing, the trial court found one mitigator, Simon's minimal prior criminal history, and one aggravator, the violation of his position of trust. For each of the three convictions, the trial court sentenced Simon to the advisory sentence of four years with two years

[1] Ind. Code § 35-46-1-3 (2004).

suspended to probation. The trial court also ordered the sentences to be served consecutively based upon "the repetition or ongoing nature of the offenses." Transcript at 555. Thus, Simon received an aggregate sentence of twelve years with six years executed in the Indiana Department of Correction and six years suspended to probation.

I.

The first issue is whether the evidence is sufficient to sustain Simon's convictions for incest. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

The offense of incest is governed by Ind. Code § 35-46-1-3(a), which provides:

> A person eighteen (18) years of age or older who engages in sexual intercourse or deviate sexual conduct with another person, when the person knows that the other person is related to the person biologically as a parent, child, grandparent, grandchild, sibling, aunt, uncle, niece, or nephew, commits incest, a Class C felony. However, the offense is a Class B felony if the other person is less than sixteen (16) years of age.

Thus, to convict Simon of incest, the State was required to prove that Simon engaged in sexual intercourse or deviate sexual conduct with E.S. when he knew that E.S. was related to him biologically as a child. Simon argues that he was not sure, at the time of the incidents in question, that E.S. was his biological daughter.

Simon points to testimony by E.S.'s mother that "there was always some uncertainty about E.S.'s paternity" and that Simon was aware that another man could have been E.S.'s father. Appellant's Brief at 2. "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2(b). "Because knowledge is the mental state of the actor, the trier of fact must resort to reasonable inferences of its existence." Eichelberger v. State, 773 N.E.2d 264, 265 (Ind. 2002).

We conclude that, from the evidence, the trial court could have inferred that Simon had knowledge that E.S. was his daughter. Simon was identified on E.S.'s birth certificate as her father. When Simon and E.S.'s mother divorced in May 1990, Simon agreed that one child, E.S., had been born to the marriage. As a result of the dissolution proceedings, Simon was ordered to pay child support, and Simon did in fact pay child support for E.S. We conclude that the evidence is sufficient to sustain Simon's conviction. See, e.g., Jackson v. State, 682 N.E.2d 564, 566 (Ind. Ct. App. 1997) (holding that the evidence was sufficient to sustain the defendant's conviction for incest where the State presented evidence that the victim's mother was divorced from the defendant, the victim had the defendant's last name, the defendant paid child support for

the victim, the victim routinely visited the defendant, and the victim had lived with the defendant), trans. denied.

II.

The next issue is whether the trial court abused its discretion in sentencing Simon. The Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances before the court." Id. A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

Simon seems to argue that the trial court abused its discretion by considering his breach of position of trust as an aggravator. Simon argues that the position of trust was a material element of the offense. "A fact which comprises a material element of a crime may not also constitute an aggravating circumstance to support an enhanced sentence." Stewart v. State, 531 N.E.2d 1146, 1150 (Ind. 1988). The offense of incest requires a biological connection, but the biological connection does not necessarily establish a position of trust. Although some incest offenses may also involve a position of trust, a position of trust is not a material element of the offense. See, e.g., McCoy v. State, 856 N.E.2d 1259, 1262 (Ind. Ct. App. 2006) (holding that position of trust was not a material element of the offense of child molesting).

Simon also argues that the trial court abused its discretion by imposing consecutive sentences. Simon contends that "the trial court failed to set forth any specific facts justifying the consecutive nature of the sentence." Appellant's Brief at 9. However, the trial court ordered the sentences to be served consecutively based upon "the repetition or ongoing nature of the offenses." Transcript at 555. "It is a well established principle that the fact of multiple crimes or victims constitutes a valid aggravating circumstance that a trial court may consider in imposing consecutive or enhanced sentences." O'Connell v. State, 742 N.E.2d 943, 952 (Ind. 2001). We conclude that the trial court did not abuse its discretion by imposing consecutive sentences based upon the multiple offenses against E.S.

III.

The final issue is whether Simon's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. 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." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that, in 2005 and 2006, Simon abused his position of trust with his daughter by regularly inserting his fingers in her vagina. In the fall of 2006, Simon had sexual intercourse with his daughter on two occasions. Our review of the character of the offender reveals that Simon has a minimal criminal history, which the trial court considered as a mitigator. At the sentencing hearing, letters were presented describing Simon's work history and commitment to his family.

For each of the three convictions, the trial court sentenced Simon to the advisory sentence of four years with two years suspended to probation and ordered that the sentences be served consecutively. Thus, Simon received an aggregate sentence of twelve years with six years executed in the Indiana Department of Correction and six years suspended to probation. After due consideration of the trial court's decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the

nature of the offense and the character of the offender.[2] See, e.g., Sargent v. State, 875 N.E.2d 762, 770 (Ind. Ct. App. 2007) (holding that the defendant's sentence of twelve years for two counts of incest was not inappropriate in light of the nature of the offense and the character of the offender).

For the foregoing reasons, we affirm Simon's convictions and sentences for three counts of incest as class C felonies.

Affirmed.

ROBB, J. and CRONE, J. concur

[2] We acknowledge the Indiana Supreme Court's recent decision of Harris v. State, __ N.E.2d __, 2008 WL 5233396 (Ind. 2008), in which the Court found the defendant's consecutive fifty-year sentences for two counts of child molesting as class A felonies inappropriate. However, in Harris, the defendant received maximum, consecutive sentences for the class A felonies. Here, Simon received advisory, consecutive sentences for his three class C felonies with half of the sentences suspended to probation.