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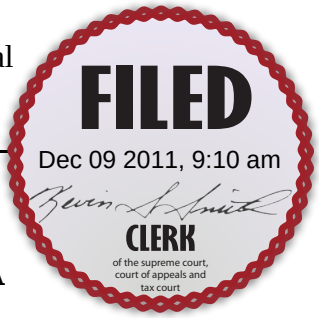

IN THE COURT OF APPEALS OF INDIANA

PAUL B. ROBERSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-1103-CR-334
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Rudolph R. Pyle III, Judge
Cause No. 48C01-0901-FA-55

December 9, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Paul B. Roberson appeals his convictions for six counts of Class A felony Child Molesting,[1] one count of Class A felony Attempted Child Molesting,[2] four counts of Class C felony Child Molesting,[3] and one count of Class D felony Obscene Performance.[4] Roberson raises numerous issues which we restate as follows: (1) whether the trial court erred in denying Roberson's motion for a severance of charges; (2) whether the trial court abused its discretion in denying Roberson's request for a continuance; (3) whether the trial court abused its discretion in not allowing Roberson to impeach a certain witness; (4) whether the evidence was sufficient to support Roberson's convictions; and (5) whether the trial court properly sentenced Roberson. We affirm.

FACTS AND PROCEDURAL HISTORY

A. General Background Facts

At all times between 2001 and 2008, Roberson, who was born on July 29, 1969, lived in Madison County.[5] During this time, Roberson owned multiple video game systems, including an Xbox 360 and a PlayStation 2. Roberson also owned several pets, including dogs, cats, turtles, lizards, frogs, mice, fish, and a bird. Roberson would befriend parents of

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[1] Ind. Code § 35-42-4-3(a) (2001).

[2] Ind. Code §§ 35-42-4-3(a); 35-41-5-1 (2003).

[3] Ind. Code § 35-42-4-3(b).

[4] Ind. Code § 35-49-3-1(2) (2003).

[5] At the beginning of this period, Roberson resided in the Southwood Mobile Home Community. Roberson later moved to an apartment on South E Street. It is undisputed that both residences were located in Madison County.

young boys and their children and invite the children to his residence to play video games and with his pets. Many children, mostly, if not exclusively, young boys, would even spend the night at Roberson's residence. Roberson would give gifts to the young boys and would encourage them to invite their friends over to his residence. Roberson considered it to be his "calling" to be around young boys and felt that he had a duty to mentor them. Tr. p. 426.

B. Facts Relating to R.S.

In 2001, while residing in the Southwood Mobile Home Community, Roberson befriended R.S. R.S., who was born in February of 1993 and was eight years old at the time, would visit Roberson's residence to play video games. R.S. spent the night at Roberson's residence on two separate occasions. On the first occasion that R.S. spent the night at Roberson's residence, R.S. was "laying on [Roberson's] couch-bed thing" when he felt Roberson touch him "inappropriately" by placing his hand on R.S.'s penis. Tr. p. 96. On the second occasion that R.S. spent the night at Roberson's residence, R.S. "was asleep on the couch-bed [when he] felt something wet touch [his] penis." Tr. p. 98. R.S. awoke to find Roberson's mouth on his penis. Roberson's head was moving "up and down." Tr. p. 102. R.S. told Roberson to stop, but Roberson kept R.S.'s penis in his mouth for another five or ten minutes. After Roberson stopped, R.S. "got up and ran home." Tr. p. 99. R.S. reported Roberson's actions to his mother, who later contacted the police. The police investigated R.S.'s claims, but formal charges were not filed at that time.

C. Facts Relating to J.G.H.

Between 2004 and 2007, J.G.H., who was born on February 13, 1996, lived with his

mother at the Southwood Mobile Home Community, where they met Roberson. J.G.H. began visiting Roberson at his apartment on South E Street in 2005 because his mother "needed help babysitting." Tr. p. 129. J.G.H. enjoyed going to Roberson's apartment because Roberson allowed him to play PlayStation 2 and with Roberson's pets. J.G.H. spent "most of [his] time" and, frequently, the night at Roberson's apartment. Tr. p. 140. J.G.H. stated that there were never many adults or girls at Roberson's apartment, "just boys" between the ages of seven and eleven years old. Tr. p. 183. Roberson gave J.G.H. gifts, including a Nintendo DS and a video game.

On one occasion while J.G.H. was at Roberson's apartment, Roberson's hand "touched [J.G.H.'s] penis." Tr. p. 157. Roberson's hand was "inside [J.G.H.'s] shorts, but outside [his] boxers" and was moving in "a rubbing motion." Tr. p. 158. Another time, Roberson touched J.G.H.'s penis with "skin to skin contact." Tr. p. 159. On this occasion, Roberson instructed J.G.H. "not to tell anyone" about the contact. Tr. p. 161. On another occasion, Roberson rubbed J.G.H.'s shoulder, pulled down J.G.H.'s underwear, knelt down, and placed J.G.H.'s penis in his mouth. Roberson's head was moving "[i]n an up and down motion." Tr. p. 164. Another victim, T.K., testified that he saw J.G.H.'s penis in Roberson's mouth on this occasion. On yet another occasion, Roberson instructed J.G.H. to follow him. Roberson stopped, pulled down J.G.H.'s pants, touched J.G.H.'s penis with his hand, and placed J.G.H.'s penis in his mouth. Roberson told J.G.H. "[i]t would probably be best if you didn't tell anyone." Tr. p. 165. J.G.H. estimated that Roberson touched him inappropriately more than twenty times. J.G.H. eventually reported Roberson's actions to his mother, who

subsequently contacted the police.

D. Facts Relating to T.K.

T.K., who was born on June 14, 1994, was introduced to Roberson by his friend J.G.H. when T.K. was about ten years old. T.K. would visit Roberson's apartment with J.G.H. nearly every weekend because Roberson had a lot of video games and animals, and T.K. was "obsessed with animals." Tr. p. 228. T.K. would often spend the night at Roberson's apartment. T.K., who had no father in his life, considered Roberson to be a father figure and eventually started calling Roberson "dad." Tr. p. 242.

On one occasion, T.K. decided to take a bath at Roberson's apartment. When T.K. exited the bathroom wearing only boxers, Roberson "rubb[ed] [T.K.'s] stomach." Tr. p. 230. On another occasion, Roberson placed T.K.'s penis in his mouth and moved his tongue around. Another time, T.K. awoke and found his penis wet and Roberson "pok[ing] his head out from underneath the covers." Tr. p. 233. T.K. testified that whenever Roberson placed T.K.'s penis in his mouth, he would also "put his finger in [T.K.'s] butt." Tr. p. 243. On yet another occasion, Roberson placed his erect penis inside T.K.'s anus. This lasted for approximately five minutes. When Roberson finished, T.K.'s buttocks felt "wet." Tr. p. 237. Roberson informed T.K. that if he told anyone, "you know what's gonna happen." Tr. p. 238. T.K. understood these words to be a threat against his mother.

E. Facts Relating to N.P.

In 2006 or 2007, N.P., who was born on December 5, 1995, was playing at his friend K.B.'s house when Roberson approached the boys, spoke to K.B.'s parents, and invited them

to come to his apartment. Roberson subsequently spoke to both N.P.'s and K.B.'s parents and invited the boys to spend the night at his apartment. N.P. spent the night at Roberson's apartment approximately eight or nine times. Roberson gave N.P. a Nintendo DS game, Pokémon cards, stuffed animals, shoes, and clothes as gifts.

On one occasion when N.P. spent the night at Roberson's apartment, N.P. awoke to find Roberson touching his penis. On another occasion, Roberson requested that N.P. stay behind for a moment when he and K.B. were leaving. Roberson pulled down N.P.'s pants, crouched, and kissed N.P.'s penis. On yet another occasion, Roberson and N.P. were sitting behind some other boys who were playing video games. Roberson pulled down N.P.'s pants and "licked" N.P.'s penis. Tr. p. 294. N.P. testified that Roberson touched his penis at least one other time. Eventually, N.P.'s step-father began to suspect inappropriate behavior after he noticed a change in N.P.'s behavior. N.P.'s step-father spoke to N.P. who told him about Roberson's actions. N.P.'s step-father then contacted N.P.'s mother, who notified the police.

F. Facts Relating to J.M.

J.M., who was born on December 20, 1995, was introduced to Roberson by his friend J.G.H. when J.M. was between eight and ten years old. J.M. spent the night at Roberson's apartment numerous times. While at Roberson's apartment, J.M. played with Roberson's pets. Roberson gave J.M. a pocketknife as a gift.

On one occasion, as a requirement for playing video games, Roberson made J.M. "lift up [his] shirt and let [Roberson] kiss [him] on the belly." Tr. p. 331. In all, J.M. approximated that Roberson kissed his belly over 100 times. On another occasion, J.M. and

his friends were discussing whose testicles were bigger. Roberson told the boys that he would be the judge and instructed them to "let [him] see." Tr. p. 335. Roberson declared J.M. to be the winner. This made J.M. uncomfortable, so he left and quit going over to Roberson's apartment.

G. Procedural History

In light of Roberson's actions with R.S., J.G.H., T.K., N.P., and J.M., on March 2, 2009, the State filed an amended information charging Roberson with six counts of Class A felony child molesting, one count of Class A felony attempted child molesting, five counts of Class C felony child molesting, one count of Class C felony contributing to the delinquency of a minor, and Class D felony distribution or exhibition of obscene matter. On July 24, 2009, Roberson filed a motion requesting separate trials. The trial court conducted a hearing on Roberson's motion for separate trials on October 28, 2009, and denied Roberson's motion on January 4, 2010.

On December 6, 2010, Roberson requested authorization to hire an expert witness at public expense. The trial court granted this request on December 7, 2010. On December 16, 2010, Roberson filed a motion for a continuance of the previously scheduled trial dates because his preferred expert witness was not available on those dates. On December 21, 2010, Roberson's motion for a continuance was denied. On January 12, 2011, Roberson filed a renewed motion for severance and continuance, which was denied.

A three-day trial commenced on January 12, 2011, and, on January 14, 2011, the jury found Roberson guilty of six counts of Class A felony child molesting, one count of Class A

felony attempted child molesting, four counts of Class C felony child molesting, and one count of Class D felony distribution or exhibition of obscene matter.[6] On February 23, 2011, the trial court sentenced Roberson to a term of forty years for each of the Class A felony convictions, eight years for each of the Class C felony convictions, and three years for the Class D felony conviction. The trial court ordered that the sentences run concurrently to one another as they related to a single victim, but that the term of years relating to each individual victim run consecutive to the terms imposed for the charges relating to the other victims, for an aggregate term of 168 years. This appeal follows.

DISCUSSION AND DECISION

I. Motion for Severance

Roberson contends that the trial court erred by denying his request to sever the charges relating to each victim for separate trials. Indiana Code section 35-34-1-9(a) provides that:

> Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:
> (1) are of the same or similar character, even if not part of a single scheme or plan; or
> (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Either the State or the defendant, however, may request that joined charges be severed for separate trials. *See* Ind. Code § 35-34-1-11(a). With respect to severance, Indiana Code section 35-34-1-11(a) provides that:

> Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the

[6] The State dismissed the remaining charges during trial.

> offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
> (1) the number of offenses charged;
> (2) the complexity of the evidence to be offered; and
> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

"Thus, the first part of Indiana Code section 35-34-1-11(a) provides that 'where charges are joined solely on the ground that they are of the same or similar character, the accused has an absolute right to a severance of the offenses.'" *Booker v. State*, 790 N.E.2d 491, 494 (Ind. Ct. App. 2003) (quoting *Valentin v. State*, 567 N.E.2d 792, 794 (Ind. 1991)), *trans. denied*. Because the trial court has no discretion when severing charges that were joined solely on the ground that they were of the same or similar character, we will review the trial court's decision employing a de novo standard. *Id*. (citing *Pardo v. State*, 585 N.E.2d 692, 693 (Ind. Ct. App. 1992)). The second part of Indiana Code section 35-34-1-11(a) provides, however, that "when charges are *not* joined solely on the ground that they are of the same or similar character, the trial court *may* still sever the charges subject to a review for an abuse of discretion." *Id*. (emphases in original).

A. Severance as a Matter of Right

Roberson argues that the trial court denied his right to severance under the first part of Indiana Code section 35-34-1-11(a), and as such, the trial court's decision on severance should be reviewed under a de novo standard. The State, on the other hand, argues that the charges were not joined solely because they were of a similar character, but because they

were similarly linked together by a common modus operandi, a distinctive nature, and the same motive. Thus, the State argues that the trial court's decision on severance should be reviewed under an abuse of discretion standard.

It is well established that "[c]harges may be sufficiently connected as a 'single scheme or plan' to justify joinder if the State can establish they are connected by a distinctive nature, a common modus operandi linked the crimes, and the same motive induced the criminal behavior." *Heinzman v. State*, 895 N.E.2d 716, 720 (Ind. Ct. App. 2008) (citing *Wilkerson v. State*, 728 N.E.2d 239, 246 (Ind. Ct. App. 2000)); *see also Craig v. State*, 730 N.E.2d 1262, 1265 (Ind. 2000). Modus operandi means method of working, and refers to a pattern of criminal behavior so distinctive that separate crimes may be recognized as the work of the same wrongdoer. *Heinzman*, 895 N.E.2d at 720 (quotations omitted). Mere repetition of similar crimes does not by itself warrant admission of the evidence of those crimes under the modus operandi rule; the inquiry must be whether the crimes are "so strikingly similar that one can say with reasonable certainty that one and the same person committed them." *Id.* (quoting *Wilkerson*, 728 N.E.2d at 246). Not only must the methodology of the two crimes be strikingly similar, but the method must be unique in ways that attribute the crimes to one person. *Id.*

In *Craig*, the Indiana Supreme Court held that the molestations of the victims had the same modus operandi. 730 N.E.2d at 1265. The evidence demonstrated that each victim was a member of the Brownie troop led by the defendant and his wife and was spending the night at the defendant's home. *Id.* The incidents occurred within the same week. *Id.* The

defendant asked each of the girls to take the "taste test" and covered each of their eyes with tape. *Id*. He then put an object in their mouths and instructed them to suck on it. *Id*. In holding that the defendant was not entitled to a severance as a matter of right, the Supreme Court concluded that "[t]hese similarities were sufficient to establish that the molestation of each victim was the handiwork of the same person[,]" and that the "motive of both offenses was the same-to satisfy [the defendant's] sexual desires." *Id*.

In *Booker*, this court concluded that the molestations of the victims had the same modus operandi. 790 N.E.2d at 494-95. The evidence demonstrated that both victims were placed in the defendant's care, the molestation had occurred in the children's bedroom while they were in bed, both victims testified that the defendant had used his hand to touch them, and the only persons to test positive for gonorrhea were the defendant and the two victims. *Id*. at 495. In concluding that the defendant was not entitled to a severance as a matter of right, the court indicated that "[a]s in *Craig*, the State established that the charges were correctly joined because the episodes of molestation were the 'handiwork of the same person' and not solely because they were of the same or similar character." *Id*.

In *Piercefield v. State*, 877 N.E.2d 1213, 1217-18 (Ind. Ct. App. 2007), this court concluded that the molestations of the victims had the same modus operandi. The evidence demonstrated that both of the alleged victims were the defendant's stepchildren and he lived with them. *Id*. at 1217. In two of the three charged incidents, the defendant allegedly isolated the children in the shower at a point when they were undressed and vulnerable. *Id*. The children were in the defendant's care at the time, and he had previously showered with

them. *Id*. In addition, both children had been required to give the defendant massages. *Id*. In concluding that the defendant was not entitled to a severance as a matter of right, the court acknowledged that the facts did not have the striking distinctiveness of the situations in *Craig*, but concluded that the facts still created a unique set of circumstances. *Id*. at 1218.

In *Heinzman*, this court concluded that the molestations of the victims were not joined "solely because they [were] of the same or similar character" but because they had the same modus operandi. 895 N.E.2d at 721. The evidence demonstrated that the defendant "abused his position as a caseworker to perpetuate his child molesting scheme." *Id*. (quotation omitted). The defendant met both victims through his employment with Child Protective Services, sent letters or cards to both victims while they were in residential facilities, and bought trinkets for both. *Id*. The defendant molested both by fondling them while taking them on drives. The defendant took both victims to a specific store and bought them movies or video games. *Id*. In concluding that the defendant was not entitled to severance as a matter of right, the court determined that "a common modus operandi linked the crimes and that the same motive induced the criminal behavior." *Id*.

Upon review, we conclude that here, like the above-discussed cases, the charged incidents have more in common than mere repetition of crimes of the same character. The evidence demonstrates that Roberson bought video game systems and games, multiple pets, and toys that he used to entice young boys to his home. Roberson would befriend the boys' parents or guardians so that they would allow the boys to spend time at his home. Roberson would earn the boys' trust by allowing them to play video games and buying them gifts.

Roberson would then convince the boys to attend overnight sleepovers at his home, specifically, in his living room. While in his home, and often while the boys were sleeping, Roberson would engage in sexual activity with the boys. Roberson would also use his victims to meet other boys by encouraging them to bring friends to his home. This similar modus operandi shows that the abuse was the work of the same person. *See Craig*, 730 N.E.2d at 1264-65; *Booker*, 790 N.E.2d at 494; *Piercefield*, 877 N.E.2d at 1217-18; *Heinzman*, 895 N.E.2d at 721.

Further, to the extent that Roberson relies on this court's conclusion in *Clark v. State*, 695 N.E.2d 999, 1003 (Ind. Ct. App. 1998), *trans. denied*, in support of his claim that he was entitled to a severance as a matter of right, we conclude that the court's conclusions in *Clark* do not apply to the instant matter. In *Clark*, the State conceded at trial that the two offenses were "of a similar character" and evidence was presented detailing "two completely separate allegations of sexual misconduct against children." *Id*. We are also unconvinced by Roberson's claim that the evidence does not demonstrate a distinctive nature merely because his alleged actions involved multiple victims at multiple addresses over a period of nearly seven years. Roberson's pre-sexual encounter actions were the same with each of the victims throughout the period in question, regardless of which address Roberson lived at, at the time. With respect to each victim, Roberson used video games, pets, and toys to entice his victims to his home. Roberson would then attempt to earn the boys' trust before engaging them in sexual activity. In light of the distinct circumstances and similar modus operandi employed by Roberson, we conclude that Roberson was not entitled to right of severance, and we will

review the trial court's decision under the abuse of discretion standard. *See Piercefield*, 877 N.E.2d at 1218.

B. Abuse of Discretion

Roberson alternatively argues that even if he was not entitled to a severance of the charges by right, the trial court abused its discretion in denying his request for a severance because "it would be difficult for the jury to keep the allegations [levied by] the multiple victims straight." Appellant's Br. p. 11. Again, under the abuse of discretion standard, the trial court must determine whether the severance is appropriate to promote a fair determination of defendant's guilt or innocence of each offense. *Piercefield*, 877 N.E.2d at 1218; *Booker*, 790 N.E.2d at 494. In making such a determination, the severance statute mandates that the trial court consider: (1) the number of offenses charged; (2) the complexity of the evidence to be offered; and (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. Ind. Code § 35-34-1-11(a).

In *Heinzman*, this court concluded that the trial court did not abuse its discretion in denying the defendant's motion for severance despite the sheer volume of the charges. 895 N.E.2d 721-22. In coming to this conclusion, this court noted that while the fact that the defendant was charged with twenty-nine counts would seem to suggest that the trial should have been severed, the evidence was not complex and the jury appeared to be able to distinguish the evidence and apply the law intelligently to each offense. *Id*. Likewise, in *Craig* and *Piercefield*, the Indiana Supreme Court and this court, respectively, concluded that the trial court did not abuse its discretion in denying the defendants' motions for severance

because the evidence was not complex and consisted primarily of the child-victims' testimony, and the jury appeared able to distinguish the evidence and apply the law to each count separately. 730 N.E.2d at 1265; 877 N.E.2d at 1218.

Here, while the charging information included fourteen charges involving multiple victims, the evidence was not complex. The evidence consisted primarily of the testimony of the child victims, and in some cases, a parent or the investigating law enforcement officer. Each witness underwent direct and cross-examination. In addition, the only exhibits that were admitted at trial were pictures of the victims, as well as pictures of Roberson's then-home. Roberson has presented no reason to believe that the jury would not be able to distinguish the evidence and apply the law intelligently to each count. As such, we conclude that the trial court did not abuse its discretion in denying Roberson's motion for severance.

II. Motion for Continuance

Roberson contends that the trial court abused its discretion in denying his motion for a continuance because his preferred expert witness was unavailable on the scheduled trial date. Continuances are governed by Indiana Trial Rule 53.5, which provides in relevant part:

> Upon motion, trial may be postponed or continued in the discretion of the court, and shall be allowed upon a showing of good cause established by affidavit or other evidence.… A motion to postpone the trial on account of the absence of evidence can be made only upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it; and where the evidence may be; and if it is for an absent witness, the affidavit must show the name and residence of the witness, if known, and the probability of procuring the testimony within a reasonable time, and that his absence has not been procured by the act or connivance of the party, nor by others at his request, nor with his knowledge and consent, and what facts he believes to be true, and that he is unable to prove such facts by any other witness whose testimony can be as readily procured.

Likewise, with respect to continuances, Indiana Code section 35-36-7-1 provides in relevant part:

> (a) A motion by a defendant to postpone a trial because of the absence of evidence may be made only on affidavit showing:
>
> (1) that the evidence is material;
>
> (2) that due diligence has been used to obtain the evidence; and
>
> (3) the location of the evidence.
>
> (b) If a defendant's motion to postpone is because of the absence of a witness, the affidavit required under subsection (a) must:
>
> (1) show the name and address of the witness, if known;
>
> (2) indicate the probability of procuring the witness's testimony within a reasonable time;
>
> (3) show that the absence of the witness has not been procured by the act of the defendant;
>
> (4) state the facts to which the defendant believes the witness will testify, and include a statement that the defendant believes these facts to be true; and
>
> (5) state that the defendant is unable to prove the facts specified in accordance with subdivision (4) through the use of any other witness whose testimony can be as readily procured.

Both Trial Rule 53.5 and Indiana Code section 35-36-7-1 explicitly require that a motion for a continuance filed by a defendant be made by affidavit. In the instant matter, Roberson concedes that his motion for a continuance did not contain an affidavit, but argues that "the signing of the pleading under Ind. Trial Rule 11(A) serves the same purpose as a verification for an affidavit." Appellant's Br. p. 14. Roberson does not provide any authority in support of his claim that signing a pleading under Indiana Trial Rule 11(A) serves the same purpose as a verification for an affidavit, and we find none.

Indiana Trial Rule 11(A) provides that "[e]xcept when specifically required by rule, pleadings or motions need not be verified or accompanied by affidavit." Trial Rule 11(B)

further provides that when, "it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind, be verified … it shall be sufficient if the subscriber simply affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language: 'I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.'" Roberson's motion for a continuance did not contain the above-stated affirmation language, but merely stated "Respectfully submitted, [Roberson's counsel's signature]." Thus, we must conclude that Roberson has failed to satisfy the requirements of Trial Rule 53.5 and Indiana Code section 35-36-7-1, which again, explicitly require that a motion for a continuance be made by affidavit. As such, the trial court did not abuse its discretion in denying Roberson's request for a continuance.

Furthermore, even if Roberson's counsel's signature did serve the same purpose as a verification for an affidavit, Roberson has failed to prove that the trial court abused its discretion in denying his request for a continuance. "The standard for review for a trial court's denial of a motion for continuance is well established." *Elmore v. State*, 657 N.E.2d 1216, 1218 (Ind. 1995). When a defendant's motion for continuance is made due to the absence of material evidence, absence of a material witness, or illness of the defendant, and the specially enumerated statutory criteria are satisfied, then the defendant is entitled to the continuance as a matter of right. *Id*. (citing *Vaughn v. State*, 590 N.E.2d 134, 135 (Ind. 1992)); *see also* Ind. Code § 35-36-7-1. When a motion for continuance does not meet the specially enumerated requirements, the trial court's decision is given substantial deference and is reviewable only for abuse of discretion. *Elmore*, 657 N.E.2d at 1218. "It is important

to emphasize, however, that there is always a strong presumption that the trial court properly exercised its discretion." *Id*.

Roberson does not argue that he was entitled to a continuance as a matter of right, but rather that the trial court abused its discretion in denying his motion for a continuance until a time when his preferred expert witness would be available to testify.[7] Roberson's motion did not state the facts to which his preferred expert witness would testify, a statement that Roberson believed these facts to be true, or state that Roberson would be unable to prove these facts through the use of any other witness whose testimony could be readily procured as is required by Indiana Code section 35-36-7-1(b). In addition, Roberson did not indicate that he would be able to procure his preferred expert witness's testimony within a reasonable time, but merely suggested that his preferred expert may be available in mid- to late-March, or during April or May. (Appellant's App. 80)

Moreover, at trial, Roberson argued that his request for a continuance should have been granted because he learned on December 14, 2010, that his preferred expert witness was not available to testify at the scheduled trial and that "because of the holiday period" Roberson's counsel "didn't think that there was sufficient time to try to find another expert and that [the preferred expert] was [his] first choice and [he] was comfortable with him." Tr. p. 266. Roberson's counsel did not argue that he actually tried to find a different expert and

[7] To the extent that Roberson relies on this court's opinion in *Booker* in support of his claim that the trial court abused its discretion by denying his motion for a continuance, we note that *Booker* is distinguishable from the instant matter because in *Booker*, the defendant appealed the trial court's order denying his request to provide funds for an expert witness. 790, N.E.2d at 495. Here, the trial court granted Roberson's request to provide funds for an expert witness. The trial court merely denied Roberson's request for a continuance until a time that his preferred witness would be available to testify at trial.

was unable to do so, but rather that he did not think that he would be able to find anyone. These statements fall far short of the requirements set forth in Indiana Code section 35-36-7-1(b). As such, we conclude that the trial court did not abuse its discretion in denying Roberson's request for a continuance.[8]

III. Impeachment of T.K.

Roberson contends that the trial court abused its discretion by refusing to allow him to impeach T.K. during cross-examination regarding T.K.'s alleged theft from Roberson's mother. The purpose of cross-examination is to expose possible biases, prejudices, or ulterior motives related to the case. *Morrison v. State*, 613 N.E.2d 865, 867 (Ind. Ct. App. 1993). However, the trial court may impose reasonable limits upon cross-examination and only a clear abuse of discretion warrants reversal. *Id*. (citing *Braswell v. State*, 550 N.E.2d 1280, 1282 (Ind. 1990); *Ingram v. State*, 547 N.E.2d 823, 827 (Ind. 1989)). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Whiteside v. State*, 853 N.E.2d 1021, 1025 (Ind. Ct. App. 2006) (citing *State v. Lloyd*, 800 N.E.2d 196, 198 (Ind. Ct. App. 2003)).

The parties argued the admissibility of Roberson's desired line of questioning regarding T.K.'s alleged theft from Roberson's mother under Indiana Evidence Rule 609, which governs impeachment by evidence of conviction of a crime. In relevant part, Evidence

[8] Additionally, the instant matter is easily distinguishable from the Indiana Supreme Court's holding in *Flowers v. State*, 654 N.E.2d 1124, 1125 (Ind. 1995), where the Supreme Court held that the trial court abused its discretion in denying a one-day continuance so that the defendant could call a DNA expert witness. Here, Roberson did not provide a specific date wherein his preferred witness would definitely be available, but rather requested a continuance until a few possible dates in mid-March, April, or May. Such a continuance would have resulted in a delay of at least two months, likely more.

Rule 609 provides as follows:

> **(a) General Rule**. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.
>
> ****
>
> **(d) Juvenile Adjudications**. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(emphases in original). The Indiana Supreme Court has held that Evidence Rule 609 "draws a bright line at conviction before a prior crime may be used to impeach a witness." *Outback Steakhouse of Fl., Inc. v. Markley*, 856 N.E.2d 65, 84-85 (Ind. 2006). "A high probability of guilt is not enough." *Id*. at. 85. Accordingly, "[a] witness may not be impeached by specific acts of misconduct that have not resulted in criminal convictions." *Palmer v. State*, 654 N.E.2d 844, 848 (Ind. Ct. App. 1995).

In the instant matter, it is undisputed that T.K. has not been convicted of or adjudicated to be a juvenile delinquent for committing the alleged theft. Pursuant to the plain language of Evidence Rule 609, Roberson was not entitled to impeach T.K. on cross-examination regarding the alleged theft. *See id*. As such, we must conclude that the trial court did not abuse its discretion in this regard.

Alternatively, Roberson argues that despite the restrictions for impeachment set forth in Evidence Rule 609, he nonetheless should have been able to impeach T.K. on cross-

examination about the alleged theft because T.K. admitted to the investigating officers that he had used Roberson's mother's credit card to make purchases from Amazon.com,[9] T.K. did not make allegations of misconduct by Roberson before being questioned by police regarding the alleged theft, and T.K. had "a motive to stay on the good side of the prosecutor so that he would not be charged with his crime." Appellant's Br. p. 18. In support, Roberson relies on the Indiana Supreme Court's decision in *Smith v. State*, 721 N.E.2d 213 (Ind. 1999). In *Smith*, the trial court refused to allow the defendant to question or cross-examine two witnesses concerning pending criminal charges against them to see whether they had a motive to testify against the defendant in exchange for favorable treatment. 721 N.E.2d at 218. The Supreme Court held that the trial court committed reversible error by not granting the defendant the opportunity to inquire into perceptions relating to the witnesses treatment in their individual pending criminal matters. *Id.* at 219-20.

Here, unlike in *Smith*, the trial court conducted a hearing outside of the presence of the jury where both the State and Roberson were permitted to investigate whether the State promised to refrain from filing criminal charges against T.K. in the theft case in exchange for T.K. raising allegations and testifying against Roberson in the instant matter by questioning T.K. and the investigating officers. T.K. and the investigating officers denied that any such offer had been made or that the cases had even been discussed in conjunction with one

[9] The record indicates that T.K. lived with Roberson's mother at the time he committed the alleged theft.

another.[10] Thus, we conclude that the Supreme Court's holding in *Smith* is distinguishable from the instant matter.

Moreover, even if the trial court did abuse its discretion in denying Roberson the opportunity to impeach T.K. on cross-examination regarding the alleged theft, we conclude that such an abuse of discretion would amount to harmless error. "Harmless error is an error that does not affect the substantial rights of a party." *Littler v. State*, 871 N.E.2d 276, 278 (Ind. 2007) (quotations omitted). "Harmlessness is ultimately a question of the likely impact of the evidence on the jury." *Id*. (quotation omitted).

In the instant matter, we cannot say that the desired testimony would have likely impacted the jury. If such testimony were admitted, the State would have likely presented testimony from the investigating officers that T.K. had not been offered leniency in exchange for raising his allegations or testifying against Roberson. The State would have likely presented evidence that T.K. only reluctantly levied the allegations against Roberson in response to questioning by one of the investigating officers who became suspicious of T.K.'s practice of calling Roberson, to whom he was unrelated, "dad."[11] Tr. p. 215. We therefore

[10] At one point T.K. seemed to suggest that he was told that he would not have to go to juvenile court if he testified in the instant matter, but later clarified that no such statement was ever made by the prosecutor or any of the investigating officers.

[11] During the impeachment questioning conducted outside the presence of the jury, an investigating officer testified that T.K. referred to Roberson as "dad" while being questioned about the alleged theft. Tr. p. 215. After determining that Roberson was not related to T.K., the officer became suspicious and requested permission from T.K.'s mother to speak to T.K. alone. While speaking privately to T.K., the officer asked T.K. whether there had been any inappropriate activity between himself and Roberson. T.K. immediately began to cry. T.K. continued to cry as he told the investigating officer about the instances when Roberson performed oral sex on him.

conclude that it is unlikely that the testimony regarding the alleged theft would have impacted the jury. *See Littler*, 871 N.E.2d at 278.

IV. Sufficiency of the Evidence

Roberson contends that the evidence is insufficient to support his convictions.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction.… The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (citations, emphasis, and quotations omitted). "[I]t is for the trier of fact to reject a defendant's version of what happened, to determine all inferences arising from the evidence, and to decide which witnesses to believe." *Holeton v. State*, 853 N.E.2d 539, 541 (Ind. Ct. App. 2006). Upon review, appellate courts do not reweigh the evidence or assess the credibility of the witnesses. *Stewart v. State*, 768 N.E.2d 433, 435 (Ind. 2002).

Here, Roberson was convicted of six counts of Class A felony child molesting, one count of Class A felony attempted child molesting, four counts of Class C felony child molesting, and one count of Class D felony distribution or exhibition of obscene matter.[12] Roberson claims that the evidence is insufficient to support his convictions because the "convictions in this case are based on testimony that falls under the often raised, but seldom applied, incredible dubiosity rule." Appellant's Br. p. 19. Specifically, Roberson claims that

[12] Roberson does not specify which of these convictions his sufficiency argument relates to.

"[n]o reasonable person could believe that the dozens if not hundreds of acts of misconduct the boys testified about could have occurred without the other boys who were present hearing or seeing something." Appellant's Br. p. 19.

Generally, the uncorroborated testimony of one witness is sufficient to sustain a conviction on appeal. *Gregory v. State*, 885 N.E.2d 697, 704-05 (Ind. Ct. App. 2008), *trans. denied*. However, appellate courts may apply the 'incredible dubiosity' rule to impinge on the jury's function to judge the credibility of a witness. *Id*. The "incredible dubiosity" test is a difficult standard to meet, one that requires great ambiguity and inconsistency in the evidence. *Edwards v. State*, 753 N.E.2d 618, 622 (Ind. 2001). "For testimony to be so inherently incredible that it is disregarded based on a finding of 'incredible dubiosity,' the witness must present testimony that is inherently contradictory, wholly equivocal or the result of coercion, and there must also be a complete lack of circumstantial evidence of the defendant's guilt." *Clay v. State*, 755 N.E.2d 187, 189 (Ind. 2001). Thus, before a court can interfere with the jury's authority to judge witness credibility and evaluate evidence, the court must be presented with testimony which "'runs counter to the human experience,'" and is "so convoluted and/or contrary to human experience that no reasonable person could believe it." *Edwards*, 753 N.E.2d at 622 (quoting *Campbell v. State*, 732 N.E.2d 197, 207 (Ind. Ct. App. 2000)).

In support of his argument, Roberson focuses this court's attention on the fact that the victims testified that the alleged sexual abuse took place while other boys were present, but those other boys "heard and saw nothing." Appellant's Br. p. 19. Roberson claims that

"[c]hild molesting is the type of offense which is normally not committed with witnesses present" and "[n]o reasonable person could believe that the multitude of actions could have been committed with multiple witnesses present and no one was aware of what was happening." Appellant's Br. pp. 19-20.

This court, however, has previously rejected this argument in *Altes v. State*, 822 N.E.2d 1116 (Ind. Ct. App. 2005), *trans. denied*. In *Altes*, the defendant argued that the victim's testimony at trial was incredibly dubious because it concentrated on two instances of child molestation that occurred during the daytime when there were many other children visiting the defendant's residence. *Id*. at 1122-23. In affirming the defendant's conviction, the *Altes* court concluded that "Nowhere does [the defendant] explain where [the victim's] testimony is inherently contradictory. By now claiming that he should not be convicted based solely on the testimony of [the victim], without any corroborating testimony by other child witnesses and a lack of circumstantial evidence, [the defendant] is actually asking us to reweigh the evidence." *Id*. at 1123.

In the instant matter, Roberson does not point to any specific testimony that he claims is incredibly dubious. Rather, Roberson claims that it is unreasonable to believe that the alleged acts, especially those involving N.P. which occurred in very close proximity to others, could have occurred without others witnessing the alleged acts. This argument, however, effectively amounts to an invitation to reweigh the evidence or reassess the credibility of witness, which again, we will not do. *See Gregory*, 885 N.E.2d at 704.

V. Sentencing Issues

Roberson contends that the trial court abused its discretion in sentencing him and that his sentence is inappropriate in light of the nature of his offenses and his character.

A. Abuse of Discretion

Roberson claims that the trial court abused its discretion in sentencing him following his convictions for six counts of Class A felony child molesting, one count of Class A felony attempted child molesting, four counts of Class C felony child molesting, and one count of Class D felony distribution or exhibition of obscene matter. In raising this claim, Roberson challenges two of the aggravating factors relied on by the trial court at sentencing.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *modified on other grounds on reh'g*, 875 N.E.2d 218 (Ind. 2007). "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id*. (quotation omitted). When imposing a sentence in a felony case, the trial court must provide a reasonably detailed sentencing statement explaining its reason for imposing the sentence. *Id*.

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering 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, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy 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 490-91.

In sentencing Roberson, the trial court found the following aggravating factors: (1) Roberson's criminal history; (2) Roberson violated a position of trust; (3) some of the victims were under the age of twelve at the time of the offenses; and (4) the length of time over which the offenses occurred and the continuing pattern of victimization. (Appellant's App. 12) The trial court found no mitigating factors. After considering each of these factors, the trial court imposed an aggregate 168-year term.

On appeal, Roberson does not challenge the trial court's finding his violation of a position of trust to be an aggravating factor at sentencing. Roberson argues, however, that the trial court improperly considered his criminal history, the fact that some of the victims were under the age of twelve at the time of the offenses, and the length of time over which the offenses occurred and the continuing pattern of victimization to be aggravating factors.

1. Criminal History

Roberson argues that the trial court abused its discretion in considering his criminal history to be an aggravating factor at sentencing. Specifically, Roberson argues that his criminal history, which consisted of one conviction for Class C felony forgery, one conviction for Class D felony theft, and two convictions for Class A misdemeanor driving while suspended, does not seem to be of particular significance when compared with his instant convictions. Generally, a person's criminal history is a valid aggravating factor. *See Newsome v. State*, 797 N.E.2d 293, 300 (Ind. Ct. App. 2003), *trans. denied*. In addition, this

court has held that "[e]ven a limited criminal history can be considered an aggravating factor." *Atwood v. State*, 905 N.E.2d 479, 488 (Ind. Ct. App. 2009), *trans. denied*.

Here, in finding Roberson's criminal history to be an aggravating factor, the trial court noted that Roberson's criminal history is "not the worst we've seen, but it is criminal history nonetheless." Tr. p. 514. While we have seen more extensive criminal histories, we do not believe that the standards of a decent society have been diminished to the point where two felony convictions in addition to two misdemeanor convictions are considered insignificant. We therefore conclude that the trial court did not abuse its discretion in finding it to be an aggravating factor at sentencing.

Moreover, to the extent that Roberson relies on the Indiana Supreme Court's opinion in *Wooley v. State*, 716 N.E.2d 919, 929 n.4 (Ind. 1999), we note that *Wooley* can be distinguished from the instant matter because one single conviction comprised the defendant's criminal history. Here, Roberson's criminal history included two prior felony convictions and two felony misdemeanor convictions. It is not unreasonable for a trial court to take into account multiple instances of criminal activity. *See generally, Vasquez v. State*, 762 N.E.2d 92, 97 (Ind. 2001) (providing that it is not unreasonable for a trial court to take into account the frequency of a defendant's criminal behavior when the defendant's criminal history consisted of three misdemeanor convictions).

2. Age of Victims

Roberson also argues that the trial court abused its discretion in considering the fact that some of the victims were under the age of twelve at the time of the offenses to be an

aggravating factor. Although Roberson correctly states that a trial court cannot use a material element of an offense as an aggravating factor, *see Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000), the Indiana Supreme Court has held that particularized circumstances of a criminal act may constitute separate aggravating circumstances. *See Vasquez*, 762 N.E.2d at 98.

The statutes under which Roberson was convicted of both Class A felony and Class C felony child molesting, required the State to prove that Roberson performed or submitted to certain sexual contact with a person under the age of fourteen. Here, Roberson's victims were pre-pubescent boys between the ages of eight to twelve years old when he molested them. This court has held that a court may consider extreme youth as an aggravating factor even where the age of the victim is an element of the offense. *Brown v. State*, 760 N.E.2d 243, 246 (Ind. Ct. App. 2002) (citing *Kile v. State*, 729 N.E.2d 211, 214 (Ind. Ct. App. 2000) (concluding that "trial court did not unreasonably consider that neglect of a very young child is worse that [sic] the same behavior toward an older, more capable dependent")). Although the child molesting statute requires the victims to be under fourteen years of age, it does not require the victims to be of an age as young as the victims were in this case. As such, we conclude that the trial court acted within its discretion in considering the age of the pre-pubescent victims in the instant matter to be an aggravating factor at sentencing. *See Brown*, 760 N.E.2d at 246 (providing that the trial court acted within its discretion in considering the young age of the seven-year-old child molestation victim to be an aggravating factor at sentencing).

3. Continuing Pattern of Victimization

Roberson also argues that the trial court abused its discretion in considering the length of time over which the offenses occurred and the continuing pattern of victimization to be an aggravating factor at sentencing. Specifically, Roberson claims that the "fact that there were multiple victims over a period of time are elements of the multiple charges filed." Appellant's Br. p. 21. Again, "[a]lthough elements of a crime cannot be used to enhance a sentence, particularized circumstances of a criminal act may constitute separate aggravating circumstances." *Vasquez*, 762 N.E.2d at 98. This court has previously concluded that "[r]epeated molestations occurring over a period of time can be an aggravating factor." *Newsome*, 797 N.E.2d at 300 (providing that trial court acted within its discretion in finding repeated molestation of multiple victims over a number of years to be an aggravating factor at sentencing). Upon review, we conclude that Roberson's molestation of multiple victims over a number of years creates a continuing pattern of victimization. In light of this court's opinion in *Newsome*, we conclude that the trial court acted within its discretion in finding this continuing pattern of victimization to be an aggravating factor at sentencing.

Having concluded that the trial court did not abuse its discretion in finding Roberson's criminal history, the fact that his victims were pre-pubescent boys between the ages of eight and twelve years old when the offenses occurred, or the length of time over which the offenses occurred and the continuing pattern of victimization to be aggravating factors, we further conclude that the trial court did not abuse its discretion in sentencing Roberson.

B. Appropriateness of Sentence

In addition, Roberson challenges his sentence by claiming that it is inappropriate in light of the nature of his offenses and his character. Initially, we note that Roberson's appropriateness argument is based upon the premise that he received a 314-year sentence. The record demonstrates that Roberson was sentenced to a 168-year term. Thus, on appeal, we will review the appropriateness of the imposed 168-year sentence, rather than the 314-year term argued by Roberson.

Indiana Appellate Rule 7(B) provides that "The 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." 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).

With respect to the nature of his offenses, Roberson claims that his sentence was inappropriate because "[t]here was no gratuitous brutality during the actions" and "[t]here was no evidence of any emotional trauma to the boys beyond what would be present in any crime of this nature." Appellant's Br. p. 22. We disagree. The record demonstrates that over a seven-year span, Roberson repeatedly molested five different young boys, all of whom were between the ages of eight and twelve years old. Roberson's repeated acts of molestation included fondling, oral sex, anal sex, and digital anal penetration. In addition, Roberson often waited until the boys were sleeping and therefore particularly defenseless before molesting them.

With respect to his character, the record reveals that Roberson maintained a home that

was baited with video games, toys, and animals, specifically to entice pre-adolescent boys. Roberson considered it his "calling" to be around young boys. Tr. p. 426. Roberson befriended and gained the trust of young boys, provided them with gifts, allowed them to come to his home and play with his video games, toys, and animals, and invited them to spend the night at his house. In addition, Roberson sought to widen the net for his victims by encouraging the boys to invite their friends over to his home. In light of the sordid nature of Roberson's particularly premeditated offenses and Roberson's character, we cannot say that his aggregate 168-year sentence is inappropriate.

CONCLUSION

In sum, the trial court did not abuse its discretion in denying Roberson's motion for severance, in denying Roberson's request for a continuance, or in denying Roberson the opportunity to impeach T.K. on cross-examination regarding the alleged theft. In addition, the evidence was sufficient to support Roberson's convictions, the trial court acted within its discretion in sentencing Roberson, and Roberson's sentence is wholly appropriate.

The judgment of the trial court is affirmed.

ROBB, C.J., and BARNES, J., concur.