MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Juan E. Mendoza,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 16, 2021

Court of Appeals Case No. 19A-CR-2784

Appeal from the Elkhart Superior Court

The Honorable Teresa L. Cataldo, Judge

Trial Court Cause No. 20D03-1809-FA-6

Mathias, Judge.

[1] For nearly two decades, Juan Mendoza molested his four daughters. His conduct was eventually exposed, and a jury ultimately found him guilty of four

counts of Class A felony molesting, one count of Class A felony attempted child molesting, one count of Class C felony child molesting, and one count of Level 4 felony attempted incest. The court entered judgment on the seven convictions and imposed an aggregate 216-year sentence.

[2] On appeal, Mendoza raises several issues for our review, which we restate as the following five:

I. Whether his convictions and sentences on two identically worded counts violate the prohibition against double jeopardy;
II. Whether alleged deficiencies in the charging information violated his right to due process;
III. Whether the State presented sufficient evidence to support his conviction for Class A felony attempted child molesting;
IV. Whether he received ineffective assistance of trial counsel; and
V. Whether his sentence is inappropriate in light of the nature of his offenses and his character.

[3] We affirm.

Facts and Procedural History

[4] In 2003, Mendoza moved to Elkhart, Indiana with his wife, Martha Reynaga, and their four daughters: A.M. (born in 1996); B.M. (born in 1998); M.M. (born in 1999); and C.M. (born in 2002). From 2003 to 2006, the family lived in a home located in downtown Elkhart ("Downtown Home"), after which they moved to a home on Morehouse Avenue ("Morehouse Home"). In both

locations, and for nearly twenty years, Mendoza repeatedly molested his daughters.[1]

[5] From the time A.M. was seven years old until her mid-teens, Mendoza would touch his penis to her vagina and would force A.M. to touch his penis with both her hands and mouth. Mendoza told A.M. that "it was normal because people used to do it back in the day." Tr. Vol. 3, p. 92. He also told her "that he did it because [their mother] wouldn't do it for him," and if he could not fulfill his sexual desire with his daughters, "he was going to cheat." *Id.*

[6] Mendoza first molested B.M. when she was "five, maybe six" at the Downtown Home. Tr. Vol. 4, p. 35. Over the next several years, Mendoza forced B.M. to touch his penis with both her hands and mouth, performed sexual acts with her and A.M. at the same time, and had sexual intercourse with B.M. when she was around eleven years old. Mendoza told B.M., just as he had told A.M., "that it was normal, that back in the day, like in the Bible it says that the family does it—like it's together with the family." *Id.* at 45. Though B.M. learned in elementary school that her father's actions were inappropriate, she did not want to tell anyone because she was "scared that no one was going to believe [her]." *Id.* at 46.

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[1] Mendoza and Reynaga also have two younger sons together. There is no allegation that Mendoza ever molested either of them.

[7] Mendoza molested M.M. until she was "13 or 14," Tr. Vol. 3, p. 172, when she told him, "I don't want to do that no more," *id.* at 175. Prior to that, Mendoza touched his penis to M.M.'s vagina and forced her to perform oral sex on him. Mendoza likewise molested his youngest daughter, C.M., for several years, beginning when she was around four or five years old. She too "thought it happened to every little girl," and Mendoza told her not to "talk about it with anybody." *Id.* at 139.

[8] By 2018, A.M., B.M., and M.M., had each moved out of the Morehouse Home, but C.M. still lived there. That August, B.M., who had "been really depressed," began talking to A.M. about what Mendoza had done. Tr. Vol. 4, p. 47. Though the sisters rarely discussed their father's perverse actions, B.M. knew Mendoza had also molested A.M. because, at times, they "were in the same room." *Id.* B.M. was concerned that Mendoza may still be molesting C.M., and once the other three sisters determined that the molestation "was still going on," they knew that they "had to do something about it." Tr. Vol. 3, p. 168. So, A.M., B.M., M.M., and C.M. met together with their mother and, for the first time, described their father's actions. They also contacted the police.

[9] Detective Ryan Hubbell attended a forensic interview of C.M.—she was under eighteen years old at the time—and conducted interviews of A.M., B.M., and M.M. During those interviews, the four sisters detailed the years of molestation they had endured. Detective Hubbell also spoke to Mendoza who said the "allegations were being made up by his daughters." *Id.* at 203. About a week later, the State charged Mendoza with seven counts: Count I (Class A felony

child molesting) and Count V (Class A felony attempted child molesting) related to A.M.; Counts II and III (both for Class A felony child molesting) related to B.M.; Count IV (Class A felony child molesting) related to M.M.; and Count VI (Class C felony child molesting) and Count VII (Level 4 felony incest) related to C.M.

[10] On October 7, 2019, Mendoza's jury trial began. Over the next three days, the jury listened as A.M., B.M., M.M., and C.M. recounted several examples of their father's sexual acts. During trial, the State, over Mendoza's objection, amended Count VII to Level 4 felony attempted incest. *Id.* at 178; Vol. 4, p. 63. The jury ultimately found Mendoza guilty as charged. About a month later, the court imposed an aggregate 216-year sentence: consecutive sentences of forty years for each of the five Class A felony convictions; six years for the Class C felony conviction; and ten years for the Level 4 felony conviction.

[11] Mendoza now appeals.

Discussion and Decision

[12] Mendoza argues that (1) his convictions and sentences on Counts II and III, which were charged using identical language, violate the prohibition against double jeopardy; (2) the duplicate language of Counts II and III as well as the lengthy time spans alleged in Counts I through VI violated his right to due process; (3) the State failed to present sufficient evidence to support his conviction for Class A felony attempted child molesting; (4) he received

ineffective assistance of trial counsel; and (5) his sentence is inappropriate in light of the nature of his offenses and his character.

[13] We address each of these arguments in turn.

I. There is no double-jeopardy violation as Mendoza was convicted of Counts II and III for two sufficiently distinct criminal acts.

[14] Mendoza first contends that his convictions and sentences on Counts II and III violate the constitutional prohibitions against double jeopardy. This presents a question of law that we review de novo. *Wadle v. State*, 151 N.E.3d 227, 237 (Ind. 2020).

[15] The prohibition against double jeopardy—embedded in both the Fifth Amendment to the United States Constitution and Article 1, Section 14 of the Indiana Constitution—shields a criminal defendant from being twice convicted for the same offense in a single prosecution. *Wadle*, 151 N.E.3d at 239. For alleged substantive double-jeopardy violations, as Mendoza seemingly raises here, our supreme court recently explained that such claims "arise in one of two situations: (1) when a single criminal act or transaction violates multiple statutes with common elements, or (2) when a single criminal act or transaction violates a single statute and results in multiple injuries." *Powell v. State*, 151 N.E.3d 256, 263 (Ind. 2020) (citing *Wadle*, 151 N.E.3d at 247–48). Yet, as we explain in more detail below, neither situation is implicated here because Mendoza's relevant convictions were each predicated on a distinct criminal act.

[16] In Counts II and III, the State charged Mendoza as follows:

> The undersigned affiant swears that on or about or between June, 2003, through the 18th day of June, 2011, at the County of Elkhart, State of Indiana, one JUAN E. MENDOZA, a person at least twenty-one (21) years of age, did knowingly perform or submit to deviate sexual conduct with B.M., a child under fourteen (14) years of age, all of which is contrary to the form of I.C. § 35-42-4-3(a)(1); contrary to the form of the statute in such cases made and provided; and, against the peace and dignity of the State of Indiana.

Appellant's Conf. App. p. 17. Because the State charged each count with identical language, Mendoza claims that he "was punished twice for exactly the same offense." Reply Br. at 8.[2] The State acknowledges the duplicate counts but contends that there was no double-jeopardy violation because Mendoza was convicted based on "separate incidents and, thus, separate violations of the child molesting statute." Appellee's Br. at 24. Mendoza does not disagree that the State *could* have obtained two convictions under the statute. Reply Br. at 9. In his view, however, because the charging information does not specifically

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[2] In light of *Wadle* and *Powell*, which were handed down between submission of the appellant's brief and the reply brief, Mendoza seemingly abandons his initial argument that Counts II and III "were multiplicitous." Appellant's Br. at 19. *See* Reply Br. at 7–10. To the extent that claim remains, it fails for similar reasons provided in this section. As laid out in *Powell*, resolving a claim of multiplicity—the charging of a single offense in multiple counts—is potentially a two-step process. 151 N.E.3d at 263–64. The first step requires a review of the relevant statute's text: "If the statute, whether expressly or by judicial construction, indicates a unit of prosecution, then we follow the legislature's guidance and our analysis is complete." *Id.* at 264. But if the statute does not indicate a unit of prosecution, we move to the second step in which we "determine whether the facts—as presented in the charging instrument and as adduced at trial—indicate a single offense or whether they indicate distinguishable offenses." *Id.* When "the defendant's criminal acts are **sufficiently distinct**, then multiple convictions may stand." *Id.* (emphasis added). Here, even if we assume that the relevant statute, Indiana Code section 35-42-4-3(a)(1), does not "expressly or by judicial construction" indicate a unit of prosecution, the facts—as presented in the probable-cause affidavit supporting the information and as adduced at trial—establish that Mendoza was convicted of Counts II and III for sufficiently distinct criminal acts of deviate sexual conduct with B.M.

identify two separate incidents, Mendoza maintains that the State violated constitutional "double jeopardy principles." *Id.* He is mistaken. While we agree with Mendoza that the State could have used more precise language in charging Counts II and III, he was not convicted based on the charging information alone. And the record establishes that, for each count, Mendoza was convicted based on separate criminal acts.

[17] As noted above, in Counts II and III, the State alleged that Mendoza "did knowingly perform or submit to sexual deviate conduct with B.M., a child under fourteen (14) years of age, all of which is contrary to the form of I.C. § 35-42-4-3(a)(1)." Appellant's Conf. App. p. 17. The legislature defined "deviate sexual conduct" as "an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." I.C. § 35-41-1-9 (2003). Here, the probable-cause affidavit and evidence from trial establishes that Mendoza was charged with, and ultimately convicted of twice violating a single statute, I.C. § 35-42-4-3(a)(1) (2003), by engaging in two distinct acts of sexual deviate conduct with B.M.

[18] In the supporting probable-cause affidavit, the detective included B.M.'s description of two incidents: (1) when, at the Downtown Home, Mendoza forced B.M. to kiss his penis; and (2) when, "before [B.M.] started her period," Mendoza began to have sexual intercourse with her. Appellant's Conf. App. p. 19. Then, at trial, B.M. provided further details on both events, and the

prosecutor explicitly delineated the relationship between each incident and Counts II and III respectively.

[19] To the first incident, B.M. testified that, when she was five or six years old, Mendoza called her into the bathroom of the Downtown Home where he "pulled out his penis and said to give it a kiss." Tr. Vol. 4, p. 38. She didn't know what to do, so she "kissed the air" but he responded, "no, kiss it good." *Id.* at 39. She "gave it a little peck" and left. *Id.* Shortly after her testimony concluded, the prosecutor remarked during closing argument, "[B.M.'s] father got his penis out and told her to kiss it. That is deviate sexual conduct. . . . So ladies and gentleman, that is Count II." *Id.* at 82.

[20] To the second incident, B.M. testified that, when she was around eleven years old, Mendoza took her into his Morehouse-Home bedroom because "[h]e just wanted to have sex." *Id.* at 43. He proceeded to have sexual intercourse with B.M. "[i]n between the bed and the wall." *Id.* at 44. The prosecutor similarly recounted this occurrence in closing, explained why it was "deviate sexual conduct," and then argued that "the [S]tate has proven Count III beyond a reasonable doubt." *Id.* at 83–84.

[21] In short, despite the duplicate language in Counts II and III, the record reveals that Mendoza was not convicted twice for the same offense. Instead, the probable-cause affidavit, B.M.'s trial testimony, and the prosecutor's closing argument all establish that Counts II and III were predicated on two distinct acts of deviate sexual conduct by Mendoza. Thus, the convictions and

sentences on these counts do not violate the prohibition against double jeopardy.

[22] We now turn to Mendoza's arguments relating to the charging information and his right to due process.

II. The charging information did not deprive Mendoza of due process.

[23] Mendoza next claims that alleged deficiencies with the charging information deprived him of his constitutional right to due process; this presents a question of law that we review de novo. *Hilligoss v. State*, 45 N.E.3d 1228, 1230 (Ind. Ct. App. 2015). But Mendoza has waived any challenge to the sufficiency of the charging information by failing to timely raise the issue below. *See Hayden v. State*, 19 N.E.3d 831, 840 (Ind. Ct. App. 2014), *trans. denied*. Nevertheless, we will review Mendoza's claims for fundamental error, [3] an "extremely narrow" exception to the general rule that a party's failure to properly preserve an issue below results in waiver of that issue on appeal. *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018). An error is fundamental if it "made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm." *Id.* (quoting *Knapp v. State*, 9 N.E.3d 1274, 1281 (Ind. 2014)).

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[3] We recognize that, for alleged due-process violations regarding Counts II and III, Mendoza did not raise the issue of fundamental error until his reply brief. Though this is impermissible, *see* Ind. App. R. 46, we choose to address each of Mendoza's due-process arguments on their merits.

[24] Mendoza's due-process claims are based on the wording of the charging information. The overarching purpose of that document "is to advise the defendant of the particular offense charged so that he can prepare a defense and be protected from being twice placed in jeopardy for the same offense" *Grimes v. State*, 84 N.E.3d 635, 639 (Ind. Ct. App. 2017), *trans. denied*. Whether this purpose is met includes an evaluation of the charging information itself as well the supporting probable-cause affidavit. *Id.* Due process is satisfied when these documents, together with the evidence adduced at trial, enable the accused, the trial court, and the jury to determine the crime for which conviction is sought. *See Lampitok v. State*, 817 N.E.2d 630, 636 (Ind. Ct. App. 2004), *trans. denied*.

[25] Mendoza asserts that two deficiencies in the charging information violated his right to due process. First, he maintains that the "carbon-copy charges" of Counts II and III denied him adequate notice and protection against double jeopardy and also made it impossible to know if he was convicted based on distinct criminal acts. Appellant's Br. at 26. Second, he contends that the "long time spans" alleged in Counts I through VI denied him fair notice of the charges he faced. *Id.* at 29. We address each argument in turn.

A. The duplicate wording of Counts II and III did not deprive Mendoza of due process.

[26] Mendoza, in arguing that the way in which the State charged Counts II and III violated his right to due process, relies on three federal-court decisions: *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005); *Isaac v. Grider*, No. 98-6376, 2000 WL 571959 (6th Cir. May 4, 2000); and *Lawwill v. Pineda*, No. 1:08 CV

2840, 2011 WL 1882456 (N.D. Ohio May 17, 2011).[4] Though these decisions are not binding, they also do not support Mendoza's position.

[27] The circumstances here fall far short of implicating the due-process concerns in either *Valentine* or *Isaac*. And *Lawwill* supports the State's argument that the "charges for Counts II and III were enough to give Mendoza adequate notice to prepare a defense and to protect himself from exposure to double jeopardy" Appellee's Br. at 28.

[28] In *Valentine*, the defendant was charged with, and ultimately convicted of, two sets of twenty identically worded counts. 395 F.3d at 628. There, however, the prosecution, "[i]n its charges and in the evidence before the jury," never attempted "to lay out the factual bases of forty separate incidents." *Id.* at 632. In fact, "no factual distinctions were made among any of the forty counts." *Id.* at 633. And, at trial, the victim did not identify forty separate incidents, but generally estimated the number of times the offenses occurred. *Id.* Thus, the Court of Appeals for the Sixth Circuit found the defendant's right to due process was violated in two ways: (1) he "was given no notice of the multiple incidents for which he was tried and convicted"; and (2) because "the charges were not linked to differentiated incidents," there was "resulting uncertainty as

[4] Mendoza cites to *Lawwill v. Pineda*, No. 1:08-cv-02840, 2010 WL 6649888 (N.D. Ohio Dec. 9, 2010), but that decision is a Magistrate's report and recommendation that was ultimately rejected, in relevant part, by the District Court in *Lawwill v. Pineda*, No. 1:08 CV 2840, 2011 WL 1882456 (N.D. Ohio May 17, 2011). We thus refer to the latter decision and direct Mendoza's counsel to be more mindful of the cases he cites in the future.

to what the trial jury actually found." *Id.* at 634, 636. This latter concern—a danger of double jeopardy—was the basis for the due-process violation in *Isaac*.

[29] There, the defendant was convicted, in part, of several identically worded charges of sexual misconduct with a young boy. *Isaac*, 2000 WL 571959, at *5. Before submitting the case to the jury, the trial court acquitted the defendant on four of the duplicate charges and "the six remaining duplicate charges" were presented to the jury. *Id.* But the jury was never advised of the trial court's directed verdict, and the court's instructions did not limit the jury's consideration of the evidence to the particular victim. *Id.* Further, the jury heard evidence of thirteen to fourteen acts of alleged criminal conduct, which could not be reconciled with the court's instructions on only six counts. *Id.* Thus, "given the unique facts," the Court of Appeals for the Sixth Circuit found it "possible that the jury verdict on the duplicate charges involving [the victim] constituted double jeopardy." *Id.*

[30] Conversely, in *Lawwill*, the district court found no due-process violation where a defendant was convicted of eight identical counts because "the indictment and the evidence at trial provided enough differentiation" to allow the jury to determine whether each count "was sufficiently and independently proven." 2011 WL 1882456, at *4. The court also aptly recognized that the wording of the charging information alone is not dispositive when determining whether a defendant was provided sufficient notice of the charges. *Id.* Instead, the evidence presented at trial must also be considered; a principal that the court

observed is particularly important in cases involving crimes against children. *Id.* n.7.

[31] Here, unlike the circumstances in *Valentine* or *Isaac* but similar to those in *Lawwill*, despite the two identically worded counts, Mendoza was fairly informed of the charges he faced and had sufficient information to admit or deny the allegations and adequately prepare a defense. More specifically, the information put Mendoza on notice that the State alleged two acts of sexual deviate conduct with B.M., and the supporting probable-cause affidavit included B.M.'s account of the incidents for which Mendoza was ultimately convicted. As we explained in Section I, the affidavit included B.M.'s account of "[t]he first incident"—Count II—when Mendoza "took her into a bathroom exposed his penis to her and told her to kiss it which she did." Appellant's Conf. App. p. 19. The affidavit also included B.M.'s recollection of the second incident—Count III—when Mendoza had sexual intercourse with her. *Id.* Based on these details, Mendoza was able to understand the charges that he faced and was able to identify any defenses he may have had to rebut those charges.[5] And, also for reasons explained in Section I, both B.M.'s trial testimony and the prosecutor's argument in closing further confirm that Mendoza's convictions on these two counts were for two sufficiently distinct criminal acts.

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[5] Because Mendoza has always denied any inappropriate conduct with his daughters, nothing more than the nature of the alleged conduct with B.M. and her identity was needed to fashion a defense.

[32] Under these facts and circumstances, we cannot conclude that the State's use of identical language in charging Counts II and III deprived Mendoza of fair notice, placed him in danger of double jeopardy, or made it impossible to know whether he was convicted for two separate criminal acts. Thus, Mendoza was not deprived of his right to due process. Yet, even if we found error, Mendoza has failed to show the duplicate charges prejudiced him to such an extent that he was unable to receive a fair trial. Mendoza has accordingly failed to demonstrate fundamental error on this point. We now address the lengthy time spans alleged in Counts I through IV.

B. The time spans alleged in Counts I through VI did not deprive Mendoza of due process.

[33] The timeframes alleged in Counts I through VI counts were nine years (Counts I), eight years (Counts II, III, and VI), seven years (Count IV), and one year (Count V). Mendoza contends that these "excessive periods of time . . . denied him the ability to prepare an adequate defense." Appellant's Br. at 33. Though we acknowledge the time spans are significant, on the facts of this case, we find no error, let alone fundamental error.

[34] It is well settled that, under most circumstances, time is not of the essence in child-molesting cases. *See, e.g.*, *Love v. State*, 761 N.E.2d 806, 809 (Ind. 2002). Indeed, "the exact date is only important in limited circumstances, such as where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies." *Id.*; *see also, e.g., Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992). Those limited circumstances are not present here.

[35] The crimes alleged in Counts I through VI were each based on Mendoza's conduct with his daughters when they were "under fourteen (14) years of age." Appellant's Conf. App. pp. 17–18. And the date ranges used in the information correspond to the time period from when each daughter alleged Mendoza began molesting them to that daughter's fourteenth birthday. *See* Tr. Vol. 4, pp. 72–73. In this way, the information satisfies the statutory requirement of "stating the date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense." Ind. Code § 35-34-1-2(a)(5).

[36] Mendoza nevertheless argues that the "time spans of each count were so enormous as to make it practically impossible" for him to know "before trial what specific criminal acts with which he was charged and to be able to defend against those specific acts." Appellant's Br. at 31.[6] This argument is unavailing for two reasons. First, Mendoza's defense was a complete denial of any inappropriate conduct with his daughters—a defense that was available regardless of the lengthy timeframes. Second, the charging information in tandem with the probable-cause affidavit provided Mendoza with sufficient

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[6] In support of his argument, Mendoza relies on *People v. Keindl*, 502 N.E.2d 577, 581 (N.Y. 1986). Appellant's Br. at 32–33; Reply Br. at 16. In that case, the New York Court of Appeals—the highest court in the state—found that counts of sexual misconduct charged over "periods of time for 10, 12 and 16 months" were "so excessive on their face that they are unreasonable." *Keindl*, 502 N.E.2d at 581. In *People v. Pabon*, 65 N.E.3d 688 (N.Y. 2016), however, the same court recognized that *Keindl* had been superseded by statute, observing "the reality that child victims are less capable of providing specific detail as to the dates and times of each sexual assault committed over an extended period of time." *Pabon*, 65 N.E.3d at 692. We **again** direct Mendoza's counsel to be more mindful of the cases he cites in the future.

notice of the charges he faced thereby allowing him to prepare an adequate defense. The allegations in Counts I through VI put Mendoza on notice that the State sought convictions for the following acts that occurred over the respective timeframes: one act of sexual deviate conduct with A.M.; one attempted act of sexual intercourse or sexual deviate conduct with A.M.; two acts of sexual deviate conduct with B.M.; one act of sexual deviate conduct with M.M.; and one act of fondling or touching C.M. The accompanying affidavit provided Mendoza with each daughter's more detailed allegations of certain misconduct that occurred within those time periods. And those allegations ultimately served as the basis for which the State, at trial, sought conviction on Counts I through VI. *Compare* Appellant's Conf. App. pp. 19–20, *with* Tr. Vol. 3, pp. 73–84.

[37] Under these facts and circumstances, the State's decision to allege broad timeframes in Counts I through VI did not deprive Mendoza fair notice of the charges against him or impair his ability to prepare an adequate defense. Thus, that decision did not infringe on Mendoza's right to due process. Yet, even if we found error in the way the State charged these counts, Mendoza has failed to show that any such error prejudiced him to an extent that he was unable to receive a fair trial. He has thus failed to show fundamental error on this point as well.

[38] We now turn to Mendoza's argument that one of his convictions was not supported by sufficient evidence.

III. The State presented sufficient evidence to support Mendoza's conviction for Class A felony attempted child molesting.

[39] Mendoza next challenges the sufficiency of evidence supporting his conviction for the attempted child molestation of A.M. When reviewing a claim of insufficient evidence, we consider only the evidence and the reasonable inferences favorable to the judgment, and we neither reweigh the evidence nor judge witness credibility. *Marshall v. State*, 832 N.E.2d 615, 620 (Ind. Ct. App. 2005), *trans. denied*. "We will affirm the judgment if it is supported by 'substantial evidence of probative value . . . even [if] there is some conflict in that [evidence].'" *Gibson v. State*, 51 N.E.3d 204, 210 (Ind. 2016) (quoting *Bieghler v. State*, 481 N.E.2d 78, 84 (Ind. 1985)).

[40] In Count V, the State charged Mendoza with Class A felony attempted child molesting based on conduct with A.M. To prove Mendoza's guilt, the State needed to establish that he knowingly or intentionally engaged in an overt act constituting a substantial step toward penetrating A.M.'s vagina with his penis.[7] *See* I.C. §§ 35-42-4-3(a)(1), 35-41-1-26, 35-41-5-1 (2001); *Louallen v. State*, 778 N.E.2d 794, 796–97 (Ind. 2002). Mendoza asserts that "[t]here simply was no evidence presented a trial that [he] ever intended to, wanted, or ever attempted penetration of A.M.'s vagina." Appellant's Br. at 36. We disagree.

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[7] Though the State charged Count V based on "sexual intercourse" **or** "sexual deviate conduct," the evidence at trial, the prosecutor's argument in closing, and the State's brief on appeal all reveal that Mendoza's conviction was ultimately premised on evidence of attempted sexual intercourse. *See* Tr. Vol. 4, pp. 74–75; Appellee's Br. at 37–38.

[41] Whether a defendant knowingly or intentionally engaged in certain actions can be "inferred from the defendant's conduct and the natural and usual sequence to which such conduct reasonably points." *Boling v. State*, 982 N.E.2d 1055, 1057 (Ind. Ct. App. 2013). Here, Mendoza's actions, as described by A.M. at trial, reasonably points to a conclusion that he took a substantial step toward penetrating her vagina with his penis.

[42] A.M. testified that, when she was thirteen years old, Mendoza called her into his bedroom, to help him with "bills or something." Tr. Vol. 3 p. 89. He proceeded to force her onto his bed where he removed her pants and underwear. *Id.* at 90–91. Mendoza then "took his pants off and [] started rubbing his penis on [A.M.'s] vagina." *Id.* at 91. Though A.M. testified that Mendoza's penis "stayed outside" her vagina, *id.*, evidence of actual penetration was not required. Rather, the State needed to prove that Mendoza took a substantial step toward penetration. And based on A.M.'s testimony that Mendoza rubbed his exposed penis on her exposed vagina, a reasonable jury could find that he engaged in an overt act that constituted a substantial step toward sexual intercourse with A.M. *See Boling*, 982 N.E.2d at 1057–58. Thus, the State presented sufficient evidence to support Mendoza's conviction of Class A felony attempted child molesting.

[43] Next, we address Mendoza's claim that he received ineffective assistance of trial counsel.

IV. Mendoza has failed to show that he was denied the effective assistance of trial counsel.

[44] Mendoza alleges "a myriad of serious errors" by trial counsel which he asserts amounts to ineffective assistance. Appellant's Br. at 46. To succeed on this claim, Mendoza must make two showings: (1) trial counsel's performance was deficient by falling below an objective standard of reasonableness; and (2) he was prejudiced by the deficient performance such that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *Bobadilla v. State*, 117 N.E.3d 1272, 1280 (Ind. 2019).

[45] We initially note that Mendoza has elected to raise this ineffective-assistance claim on direct appeal. Though doing so is not prohibited, post-conviction proceedings are usually the preferred forum for such claims as making the two necessary showings often requires the development of new facts not present in the trial record. *Rogers v. State*, 897 N.E.2d 955, 964–65 (Ind. Ct. App. 2008), *trans. denied*. Further, by bringing this claim now, the issue is foreclosed from collateral review. *Id.* at 965. Nevertheless, we address Mendoza's alleged errors and explain why he has failed to demonstrate that he received ineffective assistance.

[46] Mendoza maintains that his trial counsel was ineffective for failing to: (1) object to the identical language used in Counts II and III; (2) object to the forty-year consecutive sentences imposed on those counts; (3) object to the "incredibly long timespans" alleged in Counts I through VI; (4) indicate, to both the trial

court and jury, "the lack of any evidence of attempted penetration"; (5) object to the court's "inadequate [jury] instruction on mens rea with respect to [C]ounts V and VII"; and (6) argue "available and obvious mitigating factors" at sentencing. Appellant's Br. at 46–51. However, none of these alleged errors amounts to deficient performance, let alone prejudice.

[47] Mendoza's first three allegations of error fail for reasons provided above. As we explained in Sections I and II, his convictions and sentences for the crimes alleged in Counts II and III do not violate the prohibition against double jeopardy, and the way in which the State charged Counts I through VI did not violate Mendoza's right to due process. Thus, he has failed to show that trial counsel was ineffective for failing to object on these grounds.

[48] Mendoza's fourth allegation of error also fails as it is directly refuted by the record. He contends that "trial counsel was ineffective for failing to point out to the trial court and to the jury the lack of any evidence of attempted penetration or intent to penetrate that is required for attempted molestation through sexual intercourse." Appellant's Br. at 48. Yet, during closing, Mendoza's trial counsel explicitly argued, "if there is a rubbing on the outside of the body and there is no palpable attempt to penetrate, that's not an attempt. It's a fondling . . . . So there isn't any evidence before you . . . that this was a clear attempt to penetrate." Tr. Vol. 4, pp. 94–95. We caution Mendoza's appellate counsel to more thoroughly examine the record in the future, particularly when claiming an "error" by trial counsel that did not occur.

[49] Mendoza's fifth allegation of error, that counsel should have objected to the trial court's jury instructions for Counts V and VII, demonstrates a misunderstanding of the relevant law. He seems to argue that, because each count was charged as an attempt, the court needed to instruct the jury that Mendoza "had to act with specific intent to commit the underlying crime." Appellant's Br. at 48. This is incorrect. Neither of the crimes underlying Count V (child molestation) or Count VII (incest) are specific-intent crimes; rather, each requires that the defendant acted knowingly. *See* I.C. §§ 35-42-4-3(a)(1), 35-46-1-3. And the attempt statute provides that the person must act "with the culpability required for commission of the crime." I.C. § 35-41-5-1; *see also* *Miller v. State*, 77 N.E.3d 1196, 1197 n.1 (2017) (per curiam). Here, the court's instructions on Counts V and VII correctly applied these principles. *See* Tr. Vol. 4, pp. 111–14. Thus, trial counsel did not commit error by failing to object to jury instructions that correctly stated the law.

[50] Finally, Mendoza's trial counsel was not ineffective during sentencing. Mendoza lists several "things that trial counsel should have argued at sentencing" in mitigation, including his age, his "good relationships" with his daughters, that he did not harm or threaten them, that A.M. and B.M. "were able to get on with their lives," and that neither C.M. nor M.M. wanted "their father to get in trouble or go to prison for his actions." Appellant's Br. at 50. Yet, the sentencing judge, who also presided over Mendoza's trial and reviewed the presentence investigation report, was already aware of these circumstances. Additionally, despite the arguments to the contrary, trial counsel argued on

Mendoza's behalf at sentencing by (1) recognizing his desire to maintain his innocence, (2) noting that "he's always been gainfully employed" and "a provider for his family," and (3) requesting advisory sentences to run concurrently. Tr. Vol. 4, pp. 132–33. Simply put, Mendoza has failed to show that there is a reasonable probability that he would have received a different sentence if trial counsel had argued more or different mitigating circumstances, particularly when the trial court was already aware of the only additional circumstances Mendoza asserts should have been raised.

[51] In sum, Mendoza has failed to demonstrate that any of the alleged errors by trial counsel, whether individually or cumulatively, satisfies the two-part *Strickland* test. Thus, Mendoza has not shown that he was denied the effective assistance of counsel.

[52] We now address Mendoza's final argument, that the sentence imposed by the trial court is inappropriate.

V. Mendoza has failed to demonstrate that his sentence is inappropriate.

[53] Mendoza argues that his aggregate 216-year sentence is inappropriate under Indiana Appellate Rule 7(B), which provides the standard by which we exercise our constitutional authority to review and revise sentences. Under this rule, we modify a sentence when we find that "the sentence is inappropriate in light of the nature of the offense and the character of the offender." App. R. 7(B). Making this determination "turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad

other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Yet, sentence modification under Rule 7(B) is reserved for "a rare and exceptional case." *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).

[54] When conducting this review, we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Indeed, our role is 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*, 895 N.E.2d at 1225. Thus, deference to the sentence imposed by the trial court will prevail unless the defendant produces compelling evidence portraying in a positive light the nature of the offense—such as showing restraint or a lack of brutality—and the defendant's character—such as showing substantial virtuous traits or persistent examples of positive attributes. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018); *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[55] Before explaining why Mendoza has failed to show that his sentence is inappropriate, we first emphasize the disparity between the sentence he *did* receive and the maximum sentence he *could* have received. Mendoza was convicted of seven felonies. For each of the five Class A felony convictions, Mendoza faced between twenty and fifty years, with an advisory sentence of thirty years. I.C. § 35-50-2-4(a). For the Class C felony conviction, he faced between two and eight years, with an advisory sentence of four years. I.C. § 35-50-2-6(a). And for the Level 4 felony conviction, Mendoza faced between two

and twelve years, with an advisory sentence of six years. I.C. § 35-50-2-5.5. Thus, Mendoza faced a possible aggregate sentence of 270 years. The court, however, imposed a sentence of 216 years: consecutive sentences of forty years for each Class A felony, six years for the Class C felony, and ten years for the Level 4 felony. And while the court imposed an enhanced sentence on each conviction, the court did not impose a maximum sentence. Turning to the nature of Mendoza's offenses and his character, we find that he has failed to show that his less-than-maximum sentence is inappropriate.

[56] In analyzing the nature of the offenses, we look at the extent and depravity of the defendant's conduct. *See, e.g., Crabtree v. State,* 152 N.E.3d 687, 704 (Ind. Ct. App. 2020), *trans. denied*. The extent and depravity of Mendoza's conduct is more than appalling. For nearly twenty years, he repeatedly molested his four daughters from their early years into their mid-teens: he fondled them, made them engage in oral sex with him, performed oral sex on them, and even forced them to submit to sexual intercourse—each time until he ejaculated. *See* Tr. Vol. 3, pp. 86–92; 130–38; 162–66; Vol. 4, pp. 35–45. And Mendoza has not produced any evidence, let alone "compelling evidence," that portrays the revolting nature of his offenses in a positive light. *Stephenson*, 29 N.E.3d at 122. In fact, quite the opposite is true.

[57] At trial, each of Mendoza's daughters disclosed several examples of their father's horrific conduct. A.M., who was molested by Mendoza from age seven until her mid-teens, described a time when he forced her to perform oral sex on him in a locked bathroom. Tr. Vol. 3, pp. 87–88. B.M., had a similar experience

when she was "five or six" years old. Tr. Vol. 4, pp. 36–39. She also recalled a time when Mendoza molested her and A.M. together while pornography played on the television. *Id.* at 40–41. M.M. described similar actions by Mendoza, Tr. Vol. 3, pp. 162–65, which stopped when she was thirteen or fourteen years old because she told him, "I don't want to do that no more." *Id.* at 175. C.M., who first remembered being molested around age four or five, recalled her sixteenth birthday when Mendoza got her a MacBook computer only because she allowed "him to continue doing" what he had been doing for years. *Id.* at 133, 136–37, 39. Simply put, the vile facts underlying Mendoza's convictions supports the sentence imposed by the trial court. *See Sorenson v. State*, 133 N.E.3d 717, 728–29 (Ind. Ct. App. 2019), *trans. denied*. And our consideration of his character does not alter this conclusion.

[58] The fact that Mendoza consistently and repeatedly molested each of his four daughters over several years exposes deplorable character. *See Newsome v. State*, 797 N.E.2d 293, 302 (Ind. Ct. App. 2003), *trans. denied*. And his character is degraded even further when recognizing that Mendoza, who was in the utmost position of care and trust over his daughters, led them to believe that his actions were "normal," Tr. Vol. 3, pp. 92, 151; Vol. 4, p. 45, and what families did "back in the day, like in the Bible," Tr. Vol. 4, p. 45. C.M. testified that, for years, she "thought it happened to every little girl." Tr. Vol. 3, p. 139.

[59] Aside from Mendoza's conduct with his daughters, a review of his presentence investigation report (PSI) reveals that he has previously been convicted of conspiracy to sell cocaine; a crime for which he was sentenced to seventy

months in federal prison. Appellant's Conf. App. p. 67. He was deported upon release, only to return to this country illegally a few years later. *Id.* Though we acknowledge this criminal behavior is decades old, it still reflects poorly on his character. *See, e.g.*, *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020). And while Mendoza asserts that he "is not likely to ever re-offend," Reply Br. at 21, the PSI indicates otherwise: his score on the Indiana Risk Assessment System placed him in the "HIGH risk category," Appellant's Conf. App. p. 70.

[60] In sum, Mendoza routinely molested each of his four daughters for several years. Based on that conduct, the State could have sought scores of convictions; but it instead charged Mendoza with only seven offenses. A jury found him guilty as charged, and the court imposed a less-than-maximum sentence on each conviction, resulting in an aggregate 216-year sentence. Mendoza has not produced compelling evidence that portrays in a positive light either the nature of the offenses or his character, and thus he has not met his burden to show that the sentence is inappropriate.[8]

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[8] The dissent would find Mendoza's "sentence inappropriate because multiple consecutive sentences for the same victim can create sentences so long that the term of incarceration no longer reflects the nature of the offense, undermining our sentencing scheme." *Post,* at 1-2. Though this generalized concern may be a legitimate issue for our legislature to consider, it is not a proper basis for exercising our limited authority under Appellate Rule 7(B). As noted above, Rule 7(B) requires "due consideration of the trial court's decision" and downward revision is reserved for exceptional cases in which a defendant affirmatively demonstrates, with compelling evidence, that the sentence imposed is inappropriate. Our colleague does not identify any such evidence but points only to Mendoza's argument that "he 'did not kill anyone,' and as such is not 'the worst of the worst.'" *Post,* at 2 (quoting Appellant's Br. at 44). Whether Mendoza is the "worst of the worst" is irrelevant, as the trial court did not impose a maximum sentence. *See Hamilton v. State*, 955 N.E.2d 723, 727 (Ind. 2011). Thus, because Mendoza has not presented any compelling evidence to persuade us that his sentence is inappropriate, on that basis alone revision is not called for. Yet, two other well-settled

Conclusion

[61] Mendoza was convicted of Counts II and III for two sufficiently distinct acts of deviate sexual conduct, and thus those convictions and sentences do not violate the prohibition against double jeopardy. Further, though the State could have been more precise with the language it used to charge Mendoza, he has failed to show that alleged deficiencies violated his right to due process. At trial, the State presented sufficient evidence to support Mendoza's conviction for Class A felony attempted child molesting. And finally, Mendoza has failed to establish either that he received ineffective assistance of trial counsel or that his sentence is inappropriate.

Rule 7(B) principles reveal additional flaws in the dissent and further shows why Mendoza's sentence is not inappropriate. First, harsher sentences are suitable "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," *Hamilton*, 955 N.E.2d at 727; *see Hart v. State*, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005) (recognizing that "there is no greater position of trust than that of a parent to his own young child"). Second, when a defendant commits the same or similar offenses against multiple victims, enhanced and consecutive sentences are necessary to "vindicate the fact that there were separate harms and separate acts against more than one person." *Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003). Under these two principles, Mendoza's enhanced and consecutive sentences were warranted: he violated the ultimate position of trust by committing multiple, horrific acts of child molestation against his four biological daughters. Indeed, these circumstances are drastically different than those in the cases cited in the dissent. *See Horton v. State*, 949 N.E.2d 346, 347–48 (Ind. 2011) (nine convictions based on defendant's molestation of a single victim over a six-month period); *Rivers v. State*, 915 N.E.2d 141, 144 (Ind. 2009) (defendant molested his niece "on two occasions (charged as three) in a relatively short period of time"); *Harris v. State*, 897 N.E.2d 927, 929–30 (Ind. 2008) (two convictions on identically worded counts involving one victim, maximum sentence imposed on each count to run consecutively, and the trial court failed to "explain its reasons for selecting the sentence"); *Smith v. State*, 889 N.E.2d 261, 262 (Ind. 2008) (four convictions based on defendant's molestation of a single victim over a three-year period). Finally, contrary to our colleague's suggestion, Mendoza's 216-year aggregate sentence is not "aberrant in Indiana law." *Post,* at 1; *see Sorenson*, 133 N.E.3d at 729 (finding that a defendant failed to show that his 570-year aggregate sentence—based on multiple molestation convictions—was inappropriate); *Macias v. State*, 20A03-1506-CR-758, 2016 WL 1569662, at *7 (Ind. Ct. App. Apr. 19, 2016) (same for 200-and-one-half-year aggregate sentence); *Everage v. State*, 48A04-1207-CR-391, 2013 WL 1227905, at *3–5 (Ind. Ct. App. Mar. 7, 2013) (same for 253-year aggregate sentence); *Haddock v. State*, 800 N.E.2d 242, 247–48 (Ind. Ct. App. 2003) (same for 326-year aggregate sentence). Mendoza's remorseless and horrific acts against his own four daughters, each over a period of years, more than justify this less-than-maximum sentence.

[62] We affirm.

Altice, J. concurs.

Weissmann, J. concurs in part and dissents in part with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

Juan E. Mendoza,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

Court of Appeals Case No.
19A-CR-2784

Weissmann, Judge, concurring in part and dissenting in part.

[63] I concur with the majority's disposition of Mendoza's convictions. However, I respectfully dissent as to its finding under App. R. 7(B). Mendoza's 216-year sentence is inappropriate in light of the nature of the offenses. Sentencing a non-capital defendant to what amounts to three or four life sentences is aberrant in Indiana law and invites sentencing escalation that jeopardizes the coherence of Indiana's sentencing framework.

[64] We should find the sentence inappropriate because multiple consecutive sentences for the same victim can create sentences so long that the term of

incarceration no longer reflects the nature of the offense, undermining our sentencing scheme. The Indiana General Assembly has established a system of escalating sentencing ranges for increasingly culpable conduct. *See* Ind. Code §§ 35-50-1-1 to -10-1. Within that system, the harshest punishments are reserved for people convicted of murder. Ind. Code §§ 35-50-2-3; 35-50-2-9. And yet, Mendoza's aggregate sentence for victimizing his four daughters falls comfortably within the sentencing range for four separate murders (180 years to 260 years), capital punishment and life imprisonment aside. Ind. Code § 35-50-2-3.

[65] As Mendoza argues, though his crimes are serious, he "did not kill anyone," and as such is not "the worst of the worst." Appellant's Br. p. 44. The majority points to one case in which a sentence for child molesting longer than 200 years was upheld. *Sorenson*, 133 N.E.3d at 728-29.[9] *Sorenson*'s 570-year sentence is itself an outlier, outstripping the nearest sentence (this one) by more than 300 years. One case does not justify further departure from a sentencing scheme that reserves its harshest punishment for crimes Mendoza did not commit.

[9] I surveyed child molesting appeals from the past ten years and identified one other case in which a sentence similar to Mendoza's was upheld. However, the defendant in that case, *Sharp v. State*, No. 18A2-1419-PC-728, 2015 WL 7725971 *5 (Ind. Ct. App. Nov. 30, 2015), was also convicted of two counts of burglary, one count of rape, two counts of criminal confinement, and one count of criminal deviate conduct. His actions—breaking into homes to assault children—differ from Mendoza's enough that I think it is an inapt comparator. In every other child molesting case I found from that period, the sentence was significantly less than 200 years.

[66] The majority quotes extensively from *Cardwell v. State* to affirm Mendoza's 216-year sentence. In reaching the opposite conclusion, I am swayed by *Cardwell*'s direction "to leaven the outliers" by focusing on the aggregate sentence. 895 N.E.2d at 1225. *Cardwell* also cautions courts to consider the number of victims in determining whether to impose consecutive sentences "if for no other reason than to preserve potential deterrence of subsequent offenses." *Id.*

[67] Our Supreme Court pointed to this same language when it revised the sentence of a man convicted of nine counts of child molesting against the same victim. *Horton v. State*, 949 N.E.2d 346, 348 (Ind. 2011). This man subjected his seven-year-old victim to daily sexual violation, damaged her bowels and infected her with oral and genital herpes. *Id.* The Court revised his sentence from 324 years in prison to 110 in part by running some of the sentences concurrently rather than consecutively. *Id.* By making this revision, the Supreme Court reigned in an outlier sentence and considered the inappropriateness of running sentences consecutively for the same victim.

[68] I would apply the same measured approach here because there is a point where multiple consecutive sentences involving the same victim result in an inappropriate sentence. *See, e.g.*, *Horton*, 949 N.E.2d at 349; *Harris v. State*, 897 N.E.2d 927, 930 (Ind. 2008) (holding that aggregate 100-year sentences for two counts of child molesting was inappropriate and remanding with instructions to revise sentence to fifty years each to be served concurrently); *Rivers v. State*, 915 N.E.2d 141, 144 (Ind. 2009) (holding that sixty-year aggregate sentence of two thirty-year sentences served consecutively was inappropriate and revising

sentences to be served concurrently for a total of thirty years); *Smith v. State*, 889 N.E.2d 261, 264-65 (Ind. 2008) (holding that 120-year aggregate sentence of four thirty-year sentences served consecutively was inappropriate and revising sentence to sixty years).

[69] I am not saying consecutive sentences for disparate acts on the same victim can never be appropriate. But I believe Mendoza's sentence specifically is inappropriate because the nature of the offense, even with multiple victims, does not justify a 216-year sentence. To place this length of time in context, Indiana has been a state for only 204 years, meaning Mendoza's current sentence exceeds the length of our statehood by a little more than a decade.

[70] Even though there are four victims here, the lower court's decision to run all seven of his sentences consecutively rendered Mendoza's aggregate sentence inappropriate. I respectfully submit that because Counts II and III both involved B.M., those forty-year sentences should run concurrently with one another. Likewise, Counts I and V both involve A.M. and thus should also be served concurrently. Finally, Counts VI and VII both involve C.M. The six-year sentence for Count VI should be served concurrently with the ten-year sentence for Count VII. Because Mendoza harmed multiple victims, sentences between the victims should run consecutively. Accordingly, I would find Mendoza's 216-year sentence inappropriate in light of the nature of the offenses and resentence him to 130 years by ordering Counts III, V, and VI to run concurrently with the remaining counts. Such a sentence reflects the seriousness of Mendoza's offenses and the harm he caused to multiple victims but fits more

appropriately within our sentencing scheme. In all other respects, I am in accord with the majority opinion.