

# MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

Robert Y. Pike,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff*

March 17, 2023

Court of Appeals Case No.  
22A-CR-1584

Appeal from the Johnson Circuit  
Court

The Honorable Andrew S.  
Roesener, Judge

Trial Court Cause No.  
41C01-1910-F4-90

**Memorandum Decision by Judge Mathias**  
Judges May and Bradford concur.

**Mathias, Judge.**

[1] Robert Y. Pike was convicted in Johnson Circuit Court of two counts of Level 4 felony child molesting. The trial court ordered Pike to serve an aggregate sentence of twenty years, with eighteen years executed in the Department of Correction and two years suspended to probation. Pike raises five issues, which we reorder and restate as:

I. Whether the trial court erred when it instructed the jury concerning the dates Pike was alleged to have committed his offenses;

II. Whether the evidence was sufficient to support his convictions;

III. Whether the trial court was required to impose concurrent sentences under the continuous crime doctrine;

IV. Whether the trial court abused its discretion when it considered uncharged child molesting allegations as an aggravating circumstance; and,

V. Whether Pike's sentence is inappropriate in light of the nature of the offenses and his character.

[2] Concluding that Pike has not established any reversible error, we affirm his convictions and sentence.

## **Facts and Procedural History**

[3] In April 2019, Pike was married to C.B.'s mother, and C.B. was ten-years-old. During that month, Pike molested C.B. on three separate occasions. The first two incidents occurred when C.B. was sitting on the couch in the living room watching television. Pike sat down next to C.B. and began rubbing her vagina over her clothing with his hand. When C.B. told him to stop on both occasions, he did. The third time Pike touched C.B., she was outside intending to walk to a friend's home when Pike told her to go wait for him inside the house. C.B.

believed she was in trouble and returned to the house. C.B. sat on the couch, and Pike walked into the living room and sat next to her. Pike touched her as he had before, rubbing her vagina with his hand over her clothing. C.B. and Pike were the only persons in the home when the molestations occurred.

[4] On April 26, 2019, C.B.'s friend, J.M., was at C.B.'s house, and C.B. invited her to spend the night. Pike, C.B.'s mother, and her brother were also present in the home. After dinner, the two girls were laying on C.B.'s bed watching cartoons on J.M.'s tablet. C.B. was laying closest to the wall and J.M. was laying on the side of the bed closest to the interior of the room.

[5] Later that evening, Pike walked into C.B.'s room to ask the girls what they were watching. Pike then knelt beside the bed next to J.M. He began rubbing J.M.'s back on top of her shirt. He then moved his hand under her shirt. Next, he moved his hand lower and began to rub her butt and then her vagina over the top of her clothing. J.M. attempted to sit up, but Pike nudged her back down. J.M. then rose to her knees, and Pike left C.B.'s room. Shortly thereafter, Pike left the house.

[6] J.M. told C.B. that Pike had touched her. J.M. seemed worried and scared. C.B. attempted to comfort J.M., and C.B. told J.M. that Pike had also touched her. C.B. decided that she would tell her brother what had happened and asked him to come into her room. But she changed her mind and asked her brother to get her mom. When C.B.'s mother came into her room, J.M. and C.B. told her that Pike had touched them.

- [7] C.B.'s mother called 911, and Johnson County Sheriff's Deputy Dillon Dallas was dispatched to the home. The deputy initially spoke to C.B.'s mother. Then he spoke to C.B. and J.M. The deputy eventually separated C.B.'s mother from the girls to speak to them so he could interview them without "too many people talking at once." Tr. Vol. 2, p. 227. C.B. described Pike touching her on three separate occasions, and J.M. explained that Pike had touched her that evening. The deputy issued a report to a detective with the Sheriff's Department and to Department of Child Services. The girls were then interviewed separately by a forensic interviewer.
- [8] The State charged Pike with two counts of Level 4 felony child molesting. Both counts alleged that the molestation occurred between April 1 and April 26, 2019.
- [9] Pike's jury trial commenced on May 10, 2022. C.B. testified that Pike touched her on three separate occasions, but she could not recall the precise dates. C.B. explained that the molestation occurred a "short time" before he did the same to J.M. on April 26, 2019. Tr. Vol. 3, pp. 18, 35. C.B. later testified that it was possible that Pike touched her in February, March, and/or April. J.M. testified to the molestation that occurred on April 26, 2019. Pike testified in his own defense and denied touching C.B. and J.M. The jury found Pike guilty as charged.
- [10] Pike's sentencing hearing was held on June 7, 2022. The State presented evidence that fifty-one-year-old Pike has seventeen prior convictions, which the

court considered as an aggravating circumstance. Pike admitted that he is an alcoholic but that he was active in Alcoholics Anonymous and has a sponsor. During the hearing, Pike's sister and two of Pike's daughters testified that Pike molested them when they were younger. Pike's alleged molestation of his daughters was reported to law enforcement, but he was not charged. The trial court considered this uncharged conduct as an aggravating circumstance and assigned "great weight" to it. Tr. Vol. 4, p. 2. The trial court considered Pike's employment history and substance abuse treatment to be mitigating factors. The court then ordered Pike to serve consecutive ten-year sentences for each conviction. The court ordered eighteen years to be served in the Department of Correction and suspended two years to probation.

[11] Pike now appeals his convictions and sentence.

## **I. Jury Instruction**

[12] The trial court instructed the jury that on Count I, Pike "is accused . . . of having committed child molest[ing] against C.B. between February 1, 2019 and April 26, 2019." Appellant's App. p. 174. Further, the court instructed that the "State has presented evidence that the Defendant may have committed more than one act of child molest[ing] against C.B. between February 1, 2019 and April 26, 2019." *Id.* And finally, to find Pike guilty, the court instructed the jury that they had to unanimously "agree that the State proved beyond a reasonable doubt that Defendant committed the same specific, single act of child

molest[ing] against C.B. between February 1, 2019 and April 26, 2019.”<sup>1</sup> *Id.*

Pike observes that the instruction is inconsistent with the dates alleged in Count I of the charging information, in which the State alleged that he molested C.B. between April 1, 2019, and April 26, 2019. However, Pike did not object to the instruction at trial.

[13] Because Pike failed to object, he waived the issue for appeal and must establish fundamental error. See *Pattison v. State*, 54 N.E.3d 361, 365 (Ind. 2016).

Fundamental error is an error so blatant and substantial that the trial court should act even without a request or objection from a party. *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014); *Pattison*, 54 N.E.3d at 365 (explaining that “[e]rror is fundamental if it is ‘a substantial blatant violation of basic principles’ and where, if not corrected, it would deny a defendant fundamental due process”) (quotation omitted). “This exception to the general rule requiring a contemporaneous objection is narrow, providing relief only in ‘egregious circumstances’ that made a fair trial impossible.” *Pattison*, 54 N.E.3d at 365 (citing *Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013)).

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<sup>1</sup> This instruction is consistent with our supreme court’s holding in *Baker v. State*, 948 N.E.2d 1169, 1178 (Ind. 2011), in which the court explained that, where the State does not designate a “specific act (or acts) on which it relies to prove a particular charge[,]” the jury “should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged.”

[14] Pike claims that the instruction did not instruct the jury on all elements necessary to convict, and, therefore, he did not receive a fair trial. Appellant's Br. at 29. However,

the precise time and date of the commission of a child molestation offense is not regarded as a material element of the crime. Accordingly, this Court has long recognized "that time is not of the essence in the crime of child molesting. It is difficult for children to remember specific dates, particularly when the incident is not immediately reported as is often the situation in child molesting cases.

*Baker v. State*, 948 N.E.2d 1169, 1174 (Ind. 2011) (quoting *Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992)).

[15] Time was not an essential element of Pike's offenses or his defense. His defense was that C.B. and J.M. were not credible. C.B. was ten years old when Pike molested her, and she testified at trial approximately three years after the molestation occurred. C.B. testified that the three incidents of molestation occurred a "short time" before Pike molested J.M. on April 26, 2019. Tr. Vol. 3, pp. 18-19. On cross-examination, C.B. agreed that it was possible that the molestation occurred in February or March 2019.

[16] Pike has not established that he was denied a fair trial. He does not claim that the instruction misled the jury or that the instruction impaired his defense. Because the actual date the molestation occurred was not an essential element of the offense in this case, we conclude that the trial court did not commit fundamental error when it tendered the instruction to the jury.

## II. Sufficient Evidence

- [17] Appellate review of a claim of insufficient evidence is well settled. “When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility.” *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). We consider only the evidence supporting the verdict and any reasonable inferences that can be drawn from such evidence. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). And “[w]e will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt.” *Bailey*, 907 N.E.2d at 1005.
- [18] [Indiana Code section 35-42-4-3\(b\)](#) provides that “[a] person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Level 4 felony.” Pike does not dispute that C.B.’s and J.M.’s testimonies established the elements of this offense.
- [19] Pike’s claim that the evidence is insufficient to support his Level 4 felony child molesting convictions centers on his argument that neither C.B. nor J.M. was a credible witness. He also argues that their testimony is less than credible when considered with an allegedly flawed investigation by Deputy Dallas.
- [20] Deputy Dallas admitted that he was not an experienced deputy in April 2019, and that he had not received specialized training in interviewing children. And



in April 2019, the Johnson County Sheriff's Department did not have protocol or specialized training for handling "a situation like this" with "the road officer responding." Tr. Vol. 2, p. 232. The deputy agreed that he did not properly interview the girls and explained that, in 2021, the sheriff's department established new protocol for interviewing children. *Id.*

[21] The remainder of Pike's argument focuses on attacking C.B.'s credibility. He claims her testimony was inconsistent and that she was unable to remember specific details, including the dates the molestation occurred. He also argues that the girls had a motive to lie. Finally, Pike relies on his own testimony to argue that he did not touch either C.B. or J.M.

[22] Pike made all of these same arguments to the jury, *see* Tr. Vol 2, pp. 176-184, and it was within the province of the jury to determine the credibility and weight to give to each witnesses' testimony and Deputy Dallas's investigation. C.B.'s and J.M.'s testimonies were sufficient to establish that Pike committed two counts of Level 4 child molesting. For all of these reasons, we conclude that the evidence is sufficient to support Pike's two Level 4 felony child molesting convictions.

### **III. Continuous Crime Doctrine**

[23] Pike argues that his "conduct amounted only to a single chargeable crime or alternatively his sentences should have r[un] concurrently." Appellant's Br. at 29. Pike claims that "C.B.[']s and J.M.'s allegations were closely connected in time, place and continuity of action." Appellant's Br. at 30.

[24] Pike claims his argument falls under the continuous crime doctrine which

is a rule of statutory construction and common law limited to situations where a defendant has been charged multiple times with the same offense. The continuous crime doctrine does not seek to reconcile the double jeopardy implications of two distinct chargeable crimes; rather, it defines those instances where a defendant's conduct amounts only to a single chargeable crime.

*Hines v. State*, 30 N.E.3d 1216, 1219 (Ind. 2015) (quotation and citation omitted). The doctrine “applies only where a defendant has been charged multiple times with the same ‘continuous’ offense.”<sup>2</sup> *Id.* However, our court recently held that our supreme court’s decisions in *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020) and *Powell v. State*, 151 N.E.3d 256 (Ind. 2020) “‘not only overruled the constitutional substantive double jeopardy test in *Richardson*’ [v. *State*, 717 N.E.2d 32 (Ind. 1999)],” the decisions “‘also swallowed statutory and common law to create one unified framework for substantive double jeopardy claims—including the continuous crime doctrine.’” *Madden v. State*, 162 N.E.3d 549, 558 (Ind. 2021) (quoting *Jones v. State*, 159 N.E.3d 55, 61 (Ind. Ct. App. 2020), *trans. denied*).

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<sup>2</sup> Pike also cites to [Indiana Code section 35-50-1-2\(c\)](#), which allows the trial court to impose consecutive sentences for multiple offenses but also imposes a sentencing limitation for convictions that arise out of a single episode of criminal conduct. But, as Pike also observes in his brief, the sentencing limitation does not apply to “crimes of violence” and child molesting is defined as a crime of violence in [subsection 35-50-1-2\(a\)\(12\)](#). Therefore, the trial court was statutorily authorized to impose consecutive sentences in this case without limitation pursuant to [Indiana Code section 35-30-1-2\(c\)](#).

[25] Even if we were to apply the continuous crime doctrine, the evidence does not support Pike’s claim that his offenses were continuous. Although the molestations involved similar conduct, Pike molested two victims on separate dates. And J.M. was not present when Pike molested C.B. on dates prior to April 26, 2019. Moreover, double jeopardy concerns are not implicated in this case because Pike committed multiple separate criminal acts against two separate victims. *See id.*

## IV. Sentencing Claims

### *A. Uncharged Acts and an Aggravating Circumstance*

[26] Next, Pike argues that the trial court abused its discretion when it considered his sister’s and daughters’ allegations of molestation as an aggravating circumstance. We review a trial court’s consideration of aggravating and mitigating factors in imposing the defendant’s sentence for an abuse of discretion. *See Crouse v. State*, 158 N.E.3d 388, 393 (Ind. Ct. App. 2020). “An abuse occurs only 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.” *Schuler v. State*, 132 N.E.3d 903, 904 (Ind. 2019) (citing *Rice v. State*, 6 N.E.3d 940, 943 (Ind. 2014)).

[27] A trial court abuses its discretion during sentencing by:

- (1) “failing to enter a sentencing statement at all”;
- (2) entering a sentencing statement in which the aggravating and mitigating factors are not supported by the record;
- (3) entering a sentencing statement that does not include reasons that are clearly supported

by the record and advanced for consideration; or (4) entering a sentencing statement in which the reasons provided in the statement are “improper as a matter of law.”

*Ackerman v. State*, 51 N.E.3d 171, 193 (Ind. 2016) (quoting *Anglemyer v. State*, 868 N.E.2d 482, 490-91) (Ind. 2007), *clarified on reh’g* 875 N.E.2d 218 (Ind. 2017)).

[28] Pike’s sister and two of his three daughters testified that Pike molested them when they were younger. Pike’s sister testified that he fondled her when she was ten or eleven years old and again when she was eighteen. Tr. Vol. 3, pp. 230-32. She stated that she told their parents, but their parents did not report the alleged fondling to the police. *Id.* at 232. Two of Pike’s daughters also testified that Pike had molested them several years ago when they were young children. *Id.* at 235, 242. Both daughters testified that the alleged molestations were reported to law enforcement in Hancock County, but Pike was not charged. *Id.* at 235-37, 242.

[29] “Allegations of prior criminal activity need not be reduced to conviction before they may be properly considered as aggravating circumstances by a sentencing court.” *Harlan v. State*, 971 N.E.2d 163, 170 (Ind. Ct. App. 2012) (citing *Beason v. State*, 690 N.E.2d 277, 281 (Ind.1998)). And a trial court does not abuse its discretion in sentencing when it considers allegations of prior sexual abuse as an aggravating circumstance. *See Carter v. State*, 711 N.E.2d 835, 840 (Ind. 1999). However, our court has observed that trial courts should be cautious in considering uncharged allegations of molestation where there is no admission

of such conduct by the defendant. See *Chastain v. State*, 144 N.E.3d 732, 734 (Ind. Ct. App. 2020) (noting that “[w]ith respect to the third alleged victim, . . . Chastain has not admitted to molesting her, and the State has not filed charges against him based on these allegations. Accordingly, on remand, the trial court should be cautious in its consideration of the uncharged allegations.”).

[30] Although it was within the discretion of the trial court to consider Pike’s sister’s and daughters’ statements before imposing Pike’s sentence, the trial court considered the uncharged conduct to be a “significant aggravating circumstance” and “put great weight on that.” Tr. Vol. 4, p. 2. Under these facts and circumstances, we conclude that the trial court abused its discretion when it considered Pike’s sister’s and daughters’ allegations as a significant aggravating circumstance. No other evidence corroborated the allegations, and the alleged molestation of Pike’s daughters was reported to law enforcement but did not result in arrest or criminal charges.

[31] “When an abuse of discretion occurs, this Court will remand for resentencing only 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.’” *Ackerman*, 51 N.E.3d at 194 (quoting *Anglemyer*, 868 N.E.2d at 491). “In other words, the defendant must have been prejudiced by the improper aggravators.” *Larkin v. State*, 173 N.E.3d 662, 671 (Ind. 2021) (citing *McDonald v. State*, 868 N.E.2d 1111, 1114 (Ind. 2007)).

- [32] The trial court imposed ten years for each Level 4 felony conviction and suspended two years of Pike's sentence on Count 2 concerning victim J.M. Pike's sentences on both counts are two years less than the twelve-year maximum allowed for a Level 4 felony. *See Ind. Code § 35-50-2-5.5.*
- [33] The trial court found two unchallenged aggravating circumstances: Pike's significant criminal history and his position of trust with both victims, but particularly his stepdaughter C.B. Pike's criminal history consists of seventeen convictions including felony convictions for theft, non-support of a dependent, operating while intoxicated, and possession of a cannabinoid. Pike has several misdemeanor disorderly conduct, battery, domestic battery, and operating while intoxicated convictions. He also violated probation multiple times while serving his sentences for his prior criminal convictions. Pike violated the position of trust he had with his ten-year-old stepdaughter, who lived with Pike and her mother. The court weighed these aggravators against the mitigating circumstances: Pike's employment history and participation in substance abuse treatment. The court found that the mitigating circumstances were not entitled to significant weight.
- [34] Although the trial court indicated that it was giving significant weight to the uncharged molestation allegations against Pike, the court also found that the remaining aggravating circumstances were significant. Pike's criminal history alone would support a sentence close to the maximum allowable sentence. When Pike's criminal history is considered with Pike's violation of C.B.'s trust,

we can say with confidence that the trial court would have imposed the same sentence in this case.

### *C. Inappropriate Sentence*

- [35] Finally, Pike argues that his sentence is inappropriate in light of the nature of the offenses and his character. Under [Indiana Appellate Rule 7\(B\)](#), we may modify a sentence that we find is “inappropriate in light of the nature of the offense and the character of the offender.” 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). Sentence modification under [Rule 7\(B\)](#), however, is reserved for “a rare and exceptional case.” *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).
- [36] 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). Our role is to “leaven the outliers,” not to achieve what may be perceived as the “correct” result. *Id.* Thus, deference to the trial court’s sentence will prevail unless the defendant persuades us the sentence is inappropriate by producing 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).

[37] The sentencing range for a Level 4 felony is two to twelve years. *See Ind. Code § 35-50-2-5.5*. Pike's ten-year sentence for each count is less than the maximum he could have received. And for the sentence imposed on Count 2, the trial court suspended two years to probation. The court ordered the sentences to be served consecutively, for an aggregate term of twenty years, with two years suspended to probation.

[38] Pike's argument concerning the nature of his offenses focuses on his denial that he committed the offenses at issue. Pike ignores the jury's finding that he molested two ten-year old girls, one of whom was his stepdaughter. Moreover, his stepdaughter C.B. testified that Pike molested her on three occasions, but Pike was only charged and convicted of one offense.

[39] Turning to Pike's character, Pike observes that he generally has been gainfully employed and voluntarily sought treatment for his alcohol addiction. But he also has seventeen prior criminal convictions and multiple violations of probation. He has not demonstrated that he is able to live a law-abiding life. Importantly, he also violated his position of trust with his stepdaughter who lived with him, and he molested a ten-year-old girl who was spending the night at his house. Pike's character more than supports sentences close to the maximum allowable sentence.

[40] For all of these reasons, we conclude that Pike's aggregate twenty-year sentence, with two years suspended to probation, is not inappropriate in light of the nature of the offenses and his character.



## Conclusion

[41] Pike has not established that the trial court erred when it instructed the jury and his convictions are supported by sufficient evidence. Pike is also not entitled to relief under the continuous crime doctrine. Finally, we affirm Pike's sentence in all respects.

[42] Affirmed.

May, J., and Bradford, J., concur.