



Richard McClaine (“McClaine”) was convicted in Marion Superior Court of three counts of Class C felony child molesting and with being a repeat sexual offender. He was sentenced to consecutive five-year terms for each child molesting conviction and his sentence was enhanced by an additional four years as a repeat sex offender, for an aggregate sentence of nineteen years. McClaine appeals and raises three issues, which we restate as:

- I. Whether the evidence was sufficient to support his child molesting convictions;
- II. Whether the trial court improperly imposed consecutive sentences under Indiana Code section 35-50-1-2; and,
- III. Whether his aggregate nineteen-year sentence is inappropriate in light of the nature of the offense and the character of the offender.

Concluding that the evidence is sufficient to support McClaine’s convictions, the trial court properly imposed consecutive sentences pursuant to Indiana Code section 35-50-1-2, and that his sentence is appropriate in light of the nature of the offense and the character of the offender, we affirm.

### **Facts and Procedural History**

On May 28, 2005, twelve-year old T.M. and twelve-year old B.S. were spending the night at the home of their friend, thirteen-year old H.H. McClaine, who is H.H.’s great uncle, was present in the home that evening along with his girlfriend and H.H.’s mother. B.S. and T.M. were not previously acquainted with McClaine. During the course of the evening, McClaine spoke to the girls, asked them their ages, and told them

on more than one occasion that they were pretty. He also requested hugs from the girls and each girl hugged McClaine.

At some point in the evening, McClaine, his girlfriend, and H.H.'s mother were sitting on the porch. As the girls walked outside onto the porch, McClaine touched T.M. on her leg as she walked by. Specifically, he ran his hand up T.M.'s leg from her knee "to her upper area on the side of her leg." Tr. p. 181. T.M. then sat in the chair next to McClaine and McClaine rubbed her hand and kissed her head. Tr. p. 178.

At another point in the evening, H.H.'s mother's dog got loose. After the dog was caught, B.S. reentered the house through a side door and McClaine followed her. McClaine began to speak to B.S. and started to hug her. He then put his hand under B.S.'s shirt touching "her bra" where it covered her breast and tried to put his hand down her pants. Tr. pp. 252, 262. When T.M. walked into the house, McClaine stopped touching B.S. and walked away from her.

Later that evening, the girls were sitting on a bed and McClaine came into the bedroom. McClaine, who was standing next to H.H. as she sat on the bed, asked H.H. for a hug. McClaine then pulled H.H.'s head toward him into the crotch area of his pants. He continued to hold H.H.'s head and told her that she was beautiful. Tr. p. 224.

Based on these three incidents, McClaine was charged with three counts of Class C felony child molesting on June 10, 2005. On September 11, 2005, the State filed an additional count alleging that McClaine was a repeat sex offender. On November 2, 2005, a bench trial was held and McClaine was found guilty of all three counts of Class C felony child molesting and with being a repeat sex offender. He was later sentenced to

serve consecutive terms of five years for each child molesting conviction and his sentence on Count I was enhanced by four years due to the repeat sex offender adjudication, for an aggregate sentence of nineteen years. McClaine now appeals. Additional facts will be provided as necessary.

### **I. Sufficient Evidence**

McClaine argues that the evidence is insufficient to support his three Class C felony child molesting convictions. We neither reweigh the evidence nor judge the credibility of the witnesses. Cox v. State, 774 N.E.2d 1025, 1029 (Ind. Ct. App. 2002). We only consider the evidence most favorable to the verdict and the reasonable inferences that can be drawn therefrom. Id. Where there is substantial evidence of probative value to support the verdict, it will not be disturbed. Armour v. State, 762 N.E.2d 208, 215 (Ind. Ct. App. 2002), trans. denied.

To convict a person of child molesting as a Class C felony, the State must prove that the defendant, with a child under fourteen, performed or submitted to any fondling or touching, of either the child or the defendant, with intent to arouse or satisfy the sexual desires of the child or the defendant. See Ind. Code § 35-42-4-3(b) (1998). McClaine argues that the State failed to present sufficient evidence of his intent to arouse or satisfy his sexual desires.

Mere touching alone is not sufficient to constitute the crime of child molesting. See Bowles v. State, 737 N.E.2d 1150, 1152 (Ind. 2000) (citing Clark v. State, 695 N.E.2d 999, 1002 (Ind. Ct. App. 1998), trans. denied.) The State must also prove beyond a reasonable doubt that the act of touching was accompanied by the specific

intent to arouse or satisfy sexual desires. Clark, 695 N.E.2d at 1002. “The intent to arouse or satisfy the sexual desires of the child or the older person may be established by circumstantial evidence and may be inferred ‘from the actor’s conduct and the natural and usual sequence to which such conduct usually points.’” Kanady v. State, 810 N.E.2d 1068, 1069-70 (Ind. Ct. App. 2004) (quoting Nuerge v. State, 677 N.E.2d 1043, 1048 (Ind. Ct. App. 1997), trans. denied).

In Pedrick v. State, 593 N.E.2d 1213, 1220 (Ind. Ct. App. 1992), the evidence at trial established that Pedrick put his arm around the shoulder of M.M. and let his hand hang, touching her breast. He also put his hand on E.J.’s shoulder and breast. On appeal, Pedrick argued that the evidence was insufficient to support an inference that he touched M.M. and E.J. with a sexual intent. In addressing Pedrick’s argument, our court noted:

Pedrick not only rested his hand on the shoulders of the female children and touched their breasts, but he rubbed N.C. and A.C. on the breast as well. Pedrick not only touched children immediately after relay races, but also touched A.C. while standing near the classroom closets at a time unrelated to the races. Pedrick not only touched K.L. on the stomach while allegedly tickling her but also ran his hand down her stomach approaching her vagina.

Id. Our court then concluded, “[w]hile the evidence of Pedrick’s sexual intent in touching M.M. and E.J. is not overwhelming, it is sufficient to sustain those convictions in light of the evidence of the surrounding circumstances of Pedrick’s conduct with several other children that same morning.” Id.

In this case, while McClaine was sitting on the porch, he touched T.M. on her leg as she walked by. Specifically, he ran his hand up T.M.’s leg from her knee “to her upper area on the side of her leg.” Tr. p. 181. T.M. then sat in the chair next to McClaine and

McClaine rubbed her hand and kissed her head. Tr. p. 178. With regard to B.S., McClaine started to hug B.S. but then put his hand under B.S.'s shirt touching "her bra" where it covered her breast and tried to put his hand down her pants. Tr. pp. 252, 262. A short time later, McClaine stood next to H.H. as she sat on a bed and asked H.H. for a hug. McClaine then pulled H.H.'s head toward him into the crotch area of his pants. He continued to hold H.H.'s head and told her that she was beautiful. Tr. p. 224. At trial, the girls testified that they felt uncomfortable when McClaine was touching them. Tr. pp. 178, 223-224, 263-64.

On more than one occasion throughout the evening when these incidents occurred, McClaine told the girls that they were pretty. He also requested hugs after telling them that they were pretty. Tr. p. 177. While H.H., B.S., and T.M. were on the porch with McClaine, H.H. heard McClaine say, "I can't, they're too young." Tr. p. 316. Finally, at one point in the evening, McClaine left the house, but later returned. Upon seeing that the girls were upset, McClaine asked what was wrong. Tr. p. 303. When H.H.'s mother replied, "you ask them," McClaine stated, "I didn't touch them," and walked out of the house. Tr. p. 303.

Under these facts and circumstances, we conclude that the evidence is sufficient to support McClaine's three child molesting convictions. If we were to examine each touching removed from the context of McClaine's own statements and all of the incidents that occurred over the course of the evening, we might reach a different conclusion, particularly with regard to the touching of T.M. However, after reviewing each incident within the totality of the circumstances, we conclude that the evidence is sufficient to

establish that McClaine touched T.M., B.S., and H.H. with the intent to arouse or satisfy his sexual desires.

## **II. Consecutive Sentences**

McClaine next argues that “the actions of Mr. McClaine which form the basis for the convictions entered constitute one episode of criminal conduct within the meaning of [Indiana Code section] 35-50-1-2 so that the sentence should not have exceeded the advisory sentence for a B felony, ten years.” Br. of Appellant at 12. Indiana Code section 35-50-1-2(c) provides that the trial court may

order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, *except for crimes of violence*, the total of the consecutive terms of imprisonment, . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

Ind. Code § 35-50-1-2(c) (2004 & Supp. 2006) (emphasis added).

Child molesting is defined as a crime of violence in section 35-50-1-2(a). Therefore, contrary to McClaine’s argument, the trial court was not required to consider whether the molestations constituted a single episode of criminal conduct, and the court properly imposed consecutive sentences under Indiana Code section 35-50-1-2.

## **III. Inappropriate Sentence**

Finally, we must consider whether McClaine’s sentence is inappropriate in light of the nature of the offense and the character of the offender. Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court’s decision, the court concludes the sentence is inappropriate in light of the nature of the

offense and character of the offender. Ind. Appellate Rule 7(B) (2005); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied.

Pursuant to Indiana Code section 35-50-2-6 (Supp. 2006), “[a] person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years.” McClaine was sentenced to serve consecutive terms of five years for each Class C felony child molesting conviction and his sentence on Count I was enhanced by four years due to the repeat sex offender adjudication, for an aggregate sentence of nineteen years. McClaine does not argue that the five-year sentences for each conviction are inappropriate. Rather, he contends that his sentence is inappropriate because the trial court ordered him to serve the terms consecutive to each other.

Concerning the nature of the offenses, the trial court made the following statement during the sentencing hearing:

What I find more persuasive is the fact that there are multiple victims here. He committed these three offenses within the course of a single day, probably within the course of a few hours. And I think each individual victim in this case is entitled to their separate punishment, rather than grouping these together in concurrent sentencing.

Tr. p. 354. Our supreme court has concluded that a trial court may properly impose consecutive sentences where the offenses are committed against multiple victims. See Estes v. State, 827 N.E.2d 27, 29 (Ind. 2005) (“Estes committed the offenses against two victims, so at least one consecutive sentence is appropriate.”).

Concerning the character of the offender, as we have noted above, McClaine is a repeat sex offender, and therefore, the trial court stated that the risk that McClaine would

reoffend “is substantial.” Tr. p. 354. In 1994, he was convicted of Class B felony child molesting. Also, in 1994, McClaine was convicted of Class D felony intimidation. Finally, in 1980, McClaine was convicted of misdemeanor public intoxication and misdemeanor driving while intoxicated.

In light of McClaine’s criminal history, which includes a prior Class B felony child molesting conviction, and the fact that these offenses were committed against three separate victims, we conclude that McClaine’s aggregate nineteen-year sentence is appropriate in light of the nature of the offenses and the character of the offender.

### **Conclusion**

The evidence is sufficient to support McClaine’s three convictions for Class C felony child molesting. The trial court properly imposed consecutive sentences pursuant to Indiana Code section 35-50-1-2, and McClaine’s aggregate nineteen-year sentence is appropriate in light of the nature of the offense and the character of the offender.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.