Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

DARREN BEDWELL
Marion County Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana

FILED
Sep 22 2011, 10:04 am
CLERK
of the supreme court, court of appeals and tax court

IN THE COURT OF APPEALS OF INDIANA

QUANARDEL WELLS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-1012-CR-731
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
The Honorable Amy Barbar, Magistrate
Cause No. 49G22-0910-FA-90869

September 22, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Quanardel Wells was charged in an eleven-count information with five counts of criminal deviate conduct as class A felonies, one count of rape as a class A felony, three counts of criminal confinement, one as a class B felony and two as class C felonies, and strangulation and intimidation, both as class D felonies. The charges involve offenses committed at different times against four separate victims. Wells brings this interlocutory appeal of the trial court's order denying his motion to sever the offenses for separate trials with respect to each victim. Wells presents the following restated issue for review: Did the trial court err in denying his motion for severance?

We affirm.

Pursuant to Ind. Appellate Rule 31, Wells submitted, and the trial court certified, a verified statement of evidence. The following facts are drawn from Wells's certified verified statement of evidence. Over a period of approximately four weeks in June and July of 2009, four prostitutes were abducted and forced against their will to perform sexual acts upon their abductor. We will set out the facts of each incident on a victim-by-victim basis.

At approximately 4:12 a.m. on June 10, 2009, L.H. was walking in the vicinity of North Keystone and East 10th Street in Indianapolis when she was approached by a heavy-set, black male in his 40's. The man drove a silver, two-door car with a sun roof and manual transmission. The driver asked L.H. if she wanted to make some money and she got into the car. The driver thereafter offered to pay L.H. $20.00 for fellatio, and she agreed. The man drove toward East 10th Street "over by the Ritter area", *Appellant's Appendix* at 138, where he stopped and smoked crack cocaine. He then asked L.H. to perform fellatio, which she did, but stopped when he wanted more drugs. He drove onto the highway and told L.H. to close

her eyes, not say anything, and "suck his dick again and when he was done, then [she] was to swallow it and to swallow it all and if [she] spit any of it out, he was gonna hurt [her]." *Id*. at 140. Under threat of harm, L.H. complied. He told L.H. to sit up when she was done, but to keep her eyes shut and not say a word. When the car came to a stop, the man rolled down the window and instructed L.H. to do it again, but she refused. She also refused when he instructed her to take her pants down. At that point, L.H. tried to get out of the car, but the man jumped on L.H. and pulled the door shut. A struggle ensued, during which the man had his hands around L.H.'s throat. L.H. finally managed to escape through the passenger window, after which the man drove away, having never paid the promised money to L.H. It was not until she enlisted the aid of a passer-by that L.H. learned she was in Carmel, Indiana, at the entrance to the Mohawk Hills apartment complex near 126th Street and Keystone Avenue. Several weeks later, when L.H. viewed a photo array containing Wells's photograph, she was unable to positively identify her assailant.

At approximately 2:57 a.m. on June 24, 2009, M.M. was walking near East 10th Street and North Sherman Drive when what M.M. described as a small, black vehicle with a sunroof and a manual transmission approached her and stopped. M.M. described the driver as a black male in his mid to late 40's, bald, with glasses, and weighing 230-240 pounds. She walked to the passenger-side door and the driver asked her where she was heading. When M.M. leaned into the car, the driver grabbed her by her hair and pulled her into the vehicle. Holding her by the hair, the man told her if she would do exactly as he instructed, she would not get hurt. As he drove, the man smoked a crack pipe. He told her to put his penis in her mouth "and don't let it come out of [her] mouth and [she was] to do it slow. All

the way down and all the way up to the tip and it better not fall outa [her] mouth and [he would not] tell [her] more than once." *Id*. at 175. M.M. complied, but noted that the man was not able to attain an erection during the ordeal. While this occurred, the man asked M.M. if her "pussy was clean" but told her not to take his penis out of her mouth when she answered. *Id*. at 176. M.M. nodded her head. The man started to undo M.M.'s belt and take things out of her pockets. She began fighting with him in the vicinity of 30th Street and North Arlington Avenue and the man began punching her. The car ran into a curb and the man pushed her out of the vehicle. She noted the license plate number as the man drove away and reported it to the police.

The license plate number she reported was registered to a 2002 black Chevy Cavalier LS, belonging to Susan Shafer, who lived in an apartment in the Mohawk Hills apartments in Carmel, Indiana near 126th Street and Keystone Avenue. Wells also lived at that address. When questioned by police, Shafer indicated that Wells often took her Cavalier out late at night. In fact, in a journal entry dated June 23-24, 2009, Shafer wrote that Wells "went out @ 7ish-4am. Took bank card." *Id*. at 230.

At approximately 1:00 p.m. on July 4, 2009, L.B. was walking in the area of West 10th Street and North Goodlet Avenue in Indianapolis. A small, sporty dark or black two-door car with a sunroof[1] pulled up near her. The driver of the vehicle, a black male, was bald and heavyset, with tattoos on his arms. He summoned her to his vehicle. L.B. told police immediately after the incident that when she went to the vehicle, the man grabbed her and

[1] L.B. did not mention the sunroof in an interview with police shortly after the incident, but she did recall the sunroof when she spoke with a detective about the incident approximately one month later.

pulled out a knife. When interviewed by a detective approximately one month later, however, L.B. indicated that the man gave her $20.00 and promised her more money and crack cocaine in exchange for sex. She agreed and the man drove her to the American Inn motel in Speedway, where the man rented a room using the name of Quanardel Wells.

Once in the room at the motel, the man produced a green-handled kitchen knife and told L.B., "bitch, I'll kill you if you make one move." *Id*. at 150. The man forced L.B. to have oral, anal, and vaginal intercourse "all night long." *Id*. at 151. The man smoked crack cocaine during the sexual activity. While L.B. was performing fellatio on him, the man said, "Bitch, if you let this dick fall out of your mouth, you better suck it from the end to the end. From the head to the end. And if you let it fall out of your mouth, I'm gonna cut your face up." *Id*. at 752. He also threatened to kill L.B. During her ordeal, L.B. did not cry out or try to escape out of fear of being cut. When they checked out the next morning, her assailant told her that they would both go to jail if she told anyone. After taking cigarettes and money from L.B.'s purse, the man dropped her off a few blocks from her home. L.B. later identified Wells from a photo array as the man who had assaulted her. L.B. went home and told her roommate, N.M., about the incident.

At approximately 1:00 a.m. on July 8, 2009, N.M. was walking on Goodlet Street between West 10th Street and West 11th Street in Indianapolis when a man drove up in a small, two-door, shiny new black sports car. She later noted that the car had a manual transmission. The driver was a heavy-set man with dark skin and tattoos on his back and arm. He asked Moore if she wanted to make some money and she said she did. She changed her mind, however, when she had "a funny eerie feeling" about the situation. *Id*. at 159. At that point, the man forced her into the car at knifepoint. He gave her $50.00 and told her to calm down and that he would not hurt her. He drove to the American Inn in Speedway, Indiana and parked across the street. The man took out a crack pipe and began smoking cocaine. After he did so, he locked the car doors, grabbed N.M.'s head, and said "[B]itch, you're gonna suck my dick and I don't want it to come outa your mouth." *Id*. at 162. The man held a knife to N.M.'s back while she performed fellatio on him. He threatened to cut her face if she got up. N.M. unlocked the door, grabbed the knife, and threw it out of the car window. She then grabbed her purse and shoes and jumped out of the car, leaving in the car her cell phone and money that the man had given to her. N.M. reported that her assailant did not ejaculate. She later viewed a photo array, from which she identified Wells as the man who forced her to perform oral sex on him.

On August 3, 2009, the State charged Wells as set out above. On July 27, 2010, Wells filed his motion to sever the offenses. The trial court denied the motion following a hearing. Wells asked the trial court to certify its order for interlocutory appeal and the trial court granted his request. This court later granted Wells's motion to file an interlocutory appeal. On May 19, 2011, Wells filed a motion to certify his verified statement of evidence pursuant

to App. R. 31. The trial court granted the motion and certified Wells's verified statement of the evidence.

Wells contends the trial court erred in denying his motion to sever the offenses he is alleged to have committed into separate causes, one per victim. He contends that he is entitled to severance as a matter of right. Even assuming that is not the case, he argues, he is entitled to severance of the charges in order to promote a fair determination of the merits of his case. We will address these arguments in turn.

Ind. Code Ann. § 35-34-1-9 (West, Westlaw through end of 2011 1st Regular Sess.) provides:

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

On the other hand, "[w]henever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses." I.C. § 35-34-1-11 (West, Westlaw through end of 2011 1st Regular Sess.). "Offenses may be sufficiently 'connected together' to justify joinder under subsection 9(a)(2) 'if the State can establish that a common *modus operandi* linked the crimes and that the same motive induced that criminal behavior.'" *Jackson v. State*, 938 N.E.2d 29, 35 (Ind. Ct. App. 2010), *trans. denied* (quoting *Ben-Yisrayl v. State*, 690 N.E.2d 1141, 1145 (Ind. 1997), *cert. denied*, 525 U.S. 1108 (1999)).

The trial court has no discretion with respect to severing charges joined solely on the ground that they were of the same or similar character – the defendant has a right to severance in such cases under I.C. § 35-34-1-11. Therefore, we employ a de novo standard when reviewing the trial court's decision in this regard. *Jackson v. State*, 938 N.E.2d 29.

Wells contends "[t]he four separate incidents at issue in this case share similarities, but are not so unique or distinctive that they must be the work of a single wrongdoer. Mere similarity between acts does not establish a common scheme or plan." *Appellant's Brief* at 15. "Modus operandi" in this context "'refers to a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer.'" *Jackson v. State*, 938 N.E.2d at 36 (quoting *Craig v. State*, 730 N.E.2d 1262, 1265 n. 1 (Ind. 2000)). According to our Supreme Court, the inquiry must be: "'Are these crimes so strikingly similar that one can say with reasonable certainty that one and the same person committed them?' Not only must the methodology of the two crimes be strikingly similar, but the method must be unique in ways which attribute the crimes to one person." *Penley v. State*, 506 N.E.2d 806, 810 (Ind. 1987) (internal quote unattributed).

In the instant case, we find that the verified statement of evidence demonstrates striking similarities that go beyond the mere "same or similar character" of the offenses. The assailant in each case targeted women walking on 10th Street in Indianapolis during the early-morning hours. The assaults took place over a period of only one month. All of the victims were prostitutes. The assailant approached each victim in a vehicle that all of the victims described in generally the same terms. With the exception of M.M., the assailant initially proposed to exchange money for sex. In M.M.'s case, the assailant pulled her into the car by

force when she leaned into the car after he asked where she was headed. In the other cases, the assailant confined the victim by force or threat of force after luring her into his car. In each case the assailant smoked crack cocaine while he forced the victims to perform oral sex on him. During three of the assaults, he warned the victim not to let his penis come out of her mouth or dire consequences would follow. He instructed the fourth victim, L.H., "to swallow it and to swallow it all and if [she] spit any of it out, he was gonna hurt [her]." *Appellant's Appendix* at 140. All of the victims described the perpetrator as a heavy-set black male in his forties. Finally, all of the victims but L.H. selected Wells's photo from a photo array. L.H. narrowed it to two photos, including Wells's and another person who apparently looked very similar to Wells, but did not unequivocally identify Wells's photo from the array.

The evidence is similarly clear with respect to the commonality of the motivation for committing the crimes. *See Jackson v. State*, 938 N.E.2d 29. It is apparent that the perpetrator was motivated to compel prostitutes to perform deviate sexual conduct upon him without him having to pay for it. Taken as a whole, the foregoing evidence reflects "a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer." *See id.* at 37. The trial court did not err in denying Wells's motion to sever offenses as a matter of right.

We next examine whether Jackson was entitled to severance of the charges in order to promote a fair determination of the merits of his case. Where severance is not a matter of right, I.C. § 35–34–1–11(a) provides:

[T]he court, upon motion of the defendant or the prosecutor, shall grant a

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

A refusal to sever charges under this provision is reviewed for an abuse of discretion. *Jackson v. State*, 938 N.E.2d 29.

Wells's primary argument in this regard is that the number of charged offenses and the complexity of the evidence relative to each "will prevent a jury from distinguishing the evidence and applying the law separately to each offense." *Appellant's Brief* at 21. He notes that his defensive strategy might differ based upon the evidence relative to each victim. For instance, he might challenge the identification of him as the perpetrator by three of the witnesses (M.M., L.H., and N.M.). With respect to the fourth (L.B.), however, he might choose instead to assert a defense of consent based upon the strength of the evidence identifying him as the person who took L.B. to the American Inn. Wells also contends the failure to separate the offenses into separate trials implicates Rule 404(a) and (b) of the Indiana Rules of Evidence "because the jury's factfinding with regard to each incident will inevitably be tainted by the evidence from the other incidents." *Reply Brief of Appellant* at 3. The latter assertion is correct to some extent, but such is always the case where an individual is tried in the same proceeding upon multiple, separate charges.

Our Supreme Court addressed essentially this same argument in *Davidson v. State*,

558 N.E.2d 1077 (Ind. 1990). In *Davidson*, the defendant was accused of drowning her two small children in a bathtub in order to collect life insurance proceeds. The two drownings occurred approximately eighteen months apart. The defendant sought severance of the offenses and her request was denied. The Supreme Court affirmed the denial, noting, "while undeniably prejudicial, the facts of each drowning comprise germane and relevant evidence *vis a vis* the other; the prejudice thus was not undue." *Id*. at 1084. Similarly, the facts of each assault in the instant case comprise relevant and germane evidence with respect to the other assaults. Thus, whatever prejudice inures to Wells is not undue. That said, the four assaults were all distinct from one another in terms of time and the identity of the victim. The trier of fact should have no difficulty "distinguish[ing] the evidence and apply[ing] the law intelligently as to each offense." I.C. § 35-34-1-11(a)(3).

Finally, we note that the number of offenses charged – eleven – is not unreasonably high, especially in view of the fact that they relate to only four victims, and thus four incidents. The evidence relative to those assaults is not complex. Therefore, we conclude that the court did not abuse its discretion in denying Wells's motion to sever.

Judgment affirmed.

DARDEN, J., and VAIDIK, J., concur.