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ATTORNEY FOR APPELLANT:

MATTHEW J. MCGOVERN
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MARTIN MONTGOMERY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-1009-CR-484
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0907-FB-859

October 27, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Martin Montgomery ("Montgomery") appeals from his convictions of two counts of Criminal Deviate Conduct, each as Class B felonies.[1]

We affirm.

Issues

Montgomery raises two issues for our review, which we restate as:

I. Whether it was reversible error for the trial court not to sever the counts against him into separate trials; and

II. Whether his sentence derives from an abuse of discretion or is inappropriate.

Facts and Procedural History

During the events giving rise to his convictions in this case, Montgomery was a police officer with the Evansville Police Department. On November 18, 2008, Montgomery and another officer responded to a call from James Murphy ("Murphy"), an apartment building property manager, regarding the conduct of two tenants, T.L. and T.W., who were same-sex partners; at the time, T.L. was subject to an arrest warrant for failure to pay child support in Warrick County. Before he arrived at the scene, Montgomery notified dispatch that the second officer's presence would not be necessary, and that officer was told not to respond, leaving Montgomery alone to respond to the call.

Murphy took Montgomery to the apartment T.L. and T.W. shared with Danny Lee Lawson ("Lawson"). When Montgomery knocked on the door, T.L. and T.W. answered, and

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[1] Ind. Code § 35-42-4-2(a)(1).

Montgomery asked T.L. her name. T.L. identified herself, and Montgomery immediately placed her under arrest and took her to his squad car.

After Murphy left the scene, Montgomery asked T.L. whether T.W. was her girlfriend and whether she would be willing to "do anything" to avoid going to jail. (Tr. 202.) T.L. answered both of these in the affirmative, and Montgomery told her that he wanted to watch T.L. and T.W. engage in a sex act. T.L. did not want to go to jail, and therefore agreed. Montgomery and T.L., who was still handcuffed, returned to the apartment.

Upon reentering the apartment, Montgomery released the handcuffs. T.L. told T.W. to go with her to a back room and further told T.W. that if she did not comply, Montgomery would take her (T.L.) to jail. Montgomery followed the two. When they entered the dark room, T.L. told T.W. to pull down her pants. T.L. then performed oral sex upon T.W., penetrating T.W.'s vagina with her tongue, while Montgomery used a flashlight to illuminate the scene.

This continued for several minutes, until Lawson approached the door of the room. At Lawson's approach, T.L. ceased to engage in any further sex acts and Montgomery turned off the flashlight. Montgomery told T.L. that she had not done a very good job because T.W. was not "very wet" (Tr. 208), told her that she needed to turn herself in the next day, and indicated that he would return in a few days to make sure she had done so. He did not return.

In a separate incident on March 1, 2009, J.C. and her same-sex partner, D.J., had been fighting, and D.J. called police to request that J.C. be removed from her home. Again, Montgomery and another officer were called. Again, before reaching the dispatched location

Montgomery informed dispatch that the other officer's presence would not be necessary and the other officer's dispatch orders were cancelled. Montgomery collected J.C.'s car keys and brought J.C. to his car, returning the car keys when he got into the car. He then drove J.C. to her apartment.

J.C. got out of the car and headed to her apartment as Montgomery followed. When J.C. got to her apartment, Montgomery followed her inside and suggested that since D.J. had refused to have sex with her, perhaps J.C. would be willing to perform oral sex upon him. When J.C. refused, Montgomery advanced toward her, pushed her down by her shoulders toward his genital area, took off his gun belt, unzipped his pants, and forced J.C. to perform oral sex upon him.

After some time had passed, Montgomery forced J.C. into her bedroom and told her to get on the bed. Once J.C. was on the bed Montgomery forced J.C. to have anal sex with him, then vaginal sex, and then oral sex once more. After Montgomery finished, he dressed himself fully and left.

At some point in July 2009, T.L., who was an alcoholic, was hospitalized for treatment after attempting suicide. While awaiting treatment, she was handcuffed to a gurney to prevent her from leaving and told police that she had been forced to engage in a sex act with a police officer. An ensuing internal affairs investigation led to the identification of Montgomery as the perpetrator of the acts against both T.L. and J.C.

On July 29, 2009, Montgomery was charged with one count of Criminal Deviate Conduct as to J.C. On August 31, 2009, the charging information was amended and a second

count of Criminal Deviate Conduct as to T.L. was added.

On September 14, 2009, Montgomery filed a motion for severance of the charges against him. The trial court denied his motion on June 30, 2010.

A jury trial was conducted during July 26 and July 27, 2008. Montgomery did not renew his motion to sever the charges at any point during the trial. At the trial's conclusion, the jury found Montgomery guilty of both charges. On August 26, 2010, judgment was entered against Montgomery, and he was sentenced to twelve years imprisonment for each count, with the sentences run concurrent with one another.

This appeal followed.

Discussion and Decision

Severance

Montgomery contends that the trial court erred when it did not sever the charges against him into separate trials as to T.L. and J.C. The Indiana Code provides the applicable standard for severance of charges:

> Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
>
> (1) the number of offenses charged;
>
> (2) the complexity of the evidence to be offered; and

> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

I.C. § 35-34-1-11(a). Except where a defendant is entitled to severance as of right, we review a trial court's decision on motions for severance of charges in an information or indictment for an abuse of discretion. Craig v. State, 730 N.E.2d 1262, 1265 (Ind. 2000).

Our statutes require a defendant to comply with certain procedural steps to preserve error from the denial of a pre-trial motion for severance:

> (b) If a defendant's pretrial motion for severance of offenses or motion for a separate trial is overruled, the motion may be renewed on the same grounds before or at the close of all the evidence during trial. The right to severance of offenses or separate trial is waived by failure to renew the motion.

Ind. Code Ann. § 35-34-1-12. Thus, where a defendant moves for severance before trial, is denied severance, and fails to renew that motion by the close of evidence at trial, he may not seek appeal from the denial of that motion. Rouster v. State, 600 N.E.2d 1342, 1346 (Ind. 1992).

Here, Montgomery concedes that he submitted a pretrial motion for severance, the trial court denied his motion, and he failed to renew that motion before or at the close of evidence, and that pursuant to the statute his appeal of the question of severance is therefore waived. He nevertheless advances numerous arguments that seek to avoid the consequences of his waiver. These fall into two basic categories: attacks on the validity of the waiver provisions of section 35-34-1-12, including a constitutional challenge, and a claim of fundamental error.

Generally, failure to raise constitutional issues before the trial court waives appellate

review of those issues. Baumgartner v. State, 891 N.E.2d 1131, 1135 (Ind. Ct. App. 2008) (discussing waiver with respect to the vagueness of a charging statute). Even where waiver has been found this court and our supreme court have taken up the merits of such issues where constitutionality of a statute is raised. Id.; Morse v. State, 593 N.E.2d 194, 197 (Ind. 1992) (stating that "the constitutionality of a statute may be raised at any stage of the proceeding including raising the issue sua sponte by this Court"). Here, Montgomery contends that the legislature has attempted "to foreclose judicial review based upon a technicality"—that is, by requiring that a pre-trial denial of severance be renewed by the close of evidence in order to preserve that issue for review—and has thereby violated the separation of powers doctrine. (Appellant's Reply Br. at 3.)

We cannot agree. Montgomery relies upon St. Joseph Medical Bldg. Assocs. v. City of Fort Wayne, 434 N.E.2d 130 (Ind. Ct. App. 1982), and State ex rel. City of Marion v. Grant Circuit Court, 239 Ind. 315, 157 N.E.2d 188 (1959), for the proposition that a party's right to judicial review "is not subject to the grace" of the legislature. City of Marion, 157 N.E.2d at 189. Yet the issue Montgomery poses here relates to whether he has waived appellate review of an issue, where the St. Joseph and City of Marion cases considered the more fundamental question of whether a legislative enactment could foreclose any judicial review of the merits of an administrative or lower court decision. Id. at 189 (rejecting an argument that "in the absence of fraud courts cannot judicially review the action of a city council" setting utility rates); St. Joseph Medical Bldg. Assocs., 434 N.E.2d at 131-33 (finding jurisdiction over appeals where a legislative enactment that required filing a petition

for review with a trial court "was meant as a substitute for appellate review of the trial court's decision"). Thus, the legislative enactment Montgomery challenges here does not rise to this level of interference with his right to judicial review, as he is not foreclosed under the language of the statute from meaningful judicial review of the merits of his case.

We also cannot agree with Montgomery's contention that the statute imposes a needless "technicality" in the form of the severance motion renewal requirement, even after the trial court has been fully apprised of the basis upon which severance is sought. We have previously rejected such arguments in the face of waived review of motions for severance, noting that while such arguments are "not unappealing," the language of section 35-34-1-12 and prior decisions of our supreme court require such renewal. Hobson v. State, 495 N.E.2d 741, 744 (Ind. Ct. App. 1986) (citing, inter alia, Anderson v. State, 431 N.E.2d 777 (Ind. 1982), and Dorton v. State, 419 N.E.2d 1289 (Ind. 1981)). We see no reason to deviate from statutory enactment and binding precedent in Montgomery's case, or to reach any conclusion other than that Montgomery has waived appellate review of his motion to sever the charges against him.

Waiver notwithstanding, we also cannot conclude that Montgomery is entitled to relief from the trial court's denial of his motion on the final basis he advances, namely that the denial of severance constitutes fundamental error. A fundamental error is one "so prejudicial to the rights of the defendant as to make a fair trial impossible." Black v. State, 829 N.E.2d 607, 610 (Ind. Ct. App. 2005) (quoting Merritt v. State, 822 N.E.2d 642, 643 (Ind. Ct. App. 2005)), trans. denied. The fundamental error exception "is an extremely narrow one,"

available only where there are "clearly blatant violations of basic elementary principles of due process" where the harm posed by the trial court's decision "cannot be denied." Id. (quoting Benson v. State, 762 N.E.2d 748, 755 (Ind. 2002)).

Here, Montgomery asserts that the trial court's error comes by allowing similar but unrelated charged offenses to be tried together. Though a defendant may be entitled to severance as of right for wholly unrelated yet similar offenses, where the charged offenses share a common modus operandi such that "the episodes … were the 'handiwork of the same person' and not solely because they were of the same or similar character," we leave severance to the discretion of the trial court. Booker v. State, 790 N.E.2d 491, 495 (Ind. Ct. App. 2003) (quoting Craig, 730 N.E.2d at 1265), trans. denied.

In the case now before us, there is ample evidence of similar modus operandi in Montgomery's offenses against T.L., T.W., and J.C. Specifically, in each case, Montgomery targeted women in same-sex relationships involved in disturbances called into the Evansville Police Department's dispatch. In each case, before reaching the location of the disturbance, Montgomery notified dispatch that the second officer alerted to the call was unnecessary, thereby assuring that there would be no other police officers at the scene. Montgomery then used his status as a police officer to compel his victims to engage in sexual acts: he threatened T.L. with arrest and imprisonment if she did not perform sex acts upon T.W., and led J.C. to fear physical harm if she did not comply with his demands for sexual favors. Ample evidence of this was introduced at trial, and thus we cannot conclude that the trial court would have erred had Montgomery timely renewed his motion to sever, much less that

failure to sever the charges constitutes a deprivation of Montgomery's fundamental due process rights.

We therefore conclude that Montgomery has waived the issue of severance on appeal, and, waiver notwithstanding, fundamental error does not obtain to provide him with relief.

Sentence

Montgomery also challenges the trial court's imposition of concurrent twelve year sentences. He advances two arguments. First, Montgomery argues that the trial court abused its discretion when it took into account whether a lower sentence would tend to depreciate the seriousness of his offense. Second, he contends that the sentence is inappropriate and should be revised downward pursuant to our authority under Appellate Rule 7(B).

As to Montgomery's first contention, our legislature amended the sentencing statutes in the wake of Blakely v. Washington, 542 U.S. 296 (2004), to provide for advisory, not presumptive sentences. Anglemyer v. State, 868 N.E.2d 482, 487 (Ind. 2007) (citing Blakely, supra; Smylie v. State, 823 N.E.2d 679 (Ind. 2005); and I.C. § 35-50-2-3 to -7), decision clarified on reh'g, 875 N.E.2d 218, 2007 (Ind. 2007). The imposition of a sentence and its appellate review now follow the scheme set forth in Anglemyer:

> To summarize, the imposition of sentence and the review of sentences on appeal should proceed as follows:
>
> 1. The trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence.
>
> 2. The reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion.

> 3. The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse.
>
> 4. Appellate review of the merits of a sentence may be sought on the grounds outlined in Appellate Rule 7(B).

Id. at 491.

Thus, in addressing Montgomery's contention that the trial court's consideration of whether a lower sentence would depreciate the seriousness of his offense, we review the trial court's decision for an abuse of discretion.

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence-including a finding of aggravating and mitigating factors if any-but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91.

Montgomery characterizes the trial court's consideration of whether a lower sentence would "depreciate the seriousness of the crime" as an abuse of discretion. He draws our attention to our holdings in Eversole v. State, 873 N.E.2d 1111, 1114 n.1 (Ind. Ct. App. 2007), trans. denied, and Pinkston v. State, 836 N.E.2d 453 (Ind. Ct. App. 2005), trans. denied, which both hold that this consideration is appropriate only when a trial court relies upon it to enter an advisory sentence for an offense rather than a sentence below the advisory.

We have affirmed the use of this aggravating circumstance where a defendant has

committed multiple offenses and the trial court concluded that entering concurrent sentences would depreciate the seriousness of the offenses. Upton v. State, 904 N.E.2d 700, 703 (Ind. Ct. App. 2009), trans. denied. Our decision in Upton cited our supreme court's holding that "when the perpetrator commits the same offense against two victims, enhanced and consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person." Id. (quoting Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003)). Here, Montgomery was convicted of two offenses against two separate victims and received concurrent twelve-year terms of imprisonment. Under these circumstances, we cannot say that the trial court abused its discretion in considering whether a shorter term would depreciate the seriousness of his offenses.

We turn now to Montgomery's second contention, that his sentence was inappropriate and should be revised pursuant to Appellate Rule 7(B). Montgomery contends that his concurrent twelve-year sentences are inappropriate, and that his term should be revised to an aggregate term of eight years, two years less than the advisory term of ten years for Criminal Deviate Conduct, as a Class B felony.

In Reid v. State, the Indiana Supreme Court reiterated the standard by which our state appellate courts independently review criminal sentences:

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature

> of the offense and the character of the offender. The burden is on the defendant to persuade us that his sentence is inappropriate.

876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

The Court more recently stated that "sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. One purpose of appellate review is to attempt to "leaven the outliers." Id. at 1225. "Whether we regard a sentence as appropriate at the end of the day 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." Id. at 1224.

Regarding the nature of his offenses, Montgomery urges us to take into account that his conduct lacked the brutality sometimes present in other sexual offenses, arguing that he never struck or beat his victims or threatened them with violence. Yet Montgomery used his power as a police officer to compel T.L. and T.W. to engage in sex acts, with the express threat that he would take T.L. to jail if she and T.W. failed to comply with his demand. Indeed, T.W. testified that she complied in part because Montgomery was "the man with the badge and the gun, that's what I was afraid of." (Tr. 258.)

Montgomery also took advantage of his position as a police officer—that is, the implied threat of force—when he coerced J.C. to engage in sex acts with him. J.C. testified that she felt threatened by Montgomery's position as a police officer, and was certain that she

would not be believed if she reported Montgomery's actions to law enforcement because he was a police officer and had told her no one would believe her. Thus, we conclude that the nature of Montgomery's offenses go beyond that contemplated by the advisory sentences set forth by our legislature.

As to Montgomery's character, we acknowledge that he maintained consistent employment for many years, including as a commended police officer; had children who relied upon him; was a dependable member of his family; and had no prior criminal record. None of this so distinguishes Montgomery as to outweigh the grievous nature of his offenses, where his very position as a police officer was used to coerce his victims into compliance with his wishes.

In light of the nature of his offenses and his character, we cannot agree with Montgomery that his aggregate twelve-year sentence is inappropriate.

Conclusion

Montgomery waived his challenge to severance on appeal, and despite his wavier of the issue, the trial court's denial of severance does not amount to fundamental error. We further conclude that the trial court did not abuse its discretion in considering aggravators and mitigators and that Montgomery's sentence is not inappropriate in light of the nature of his offenses and his character.

Affirmed.

MATHIAS, J., and CRONE, J., concur.