ATTORNEY FOR APPELLANT:

RANDY M. FISHER
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

CHARLES E. WHITE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A05-0612-CR-705
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0007-FA-31

November 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Charles White appeals his convictions and sentences for criminal deviate conduct as a class A felony,[1] strangulation as a class D felony,[2] and domestic battery as a class A misdemeanor.[3] White raises two issues, which we revise and restate as:

I. Whether his convictions for criminal deviate conduct and domestic battery violate the Fifth Amendment's prohibition against double jeopardy;

II. Whether the trial court abused its discretion in sentencing White; and

III. Whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. M.W. had been married to White for about a month when White, M.W., and White's four-year-old son, E.W., moved from Minnesota to Fort Wayne, Indiana. On the drive, White threatened M.W. with a box cutter and punched her on the mouth.

After arriving in Fort Wayne, on July 1, 2006, White accused M.W. of stealing his cell phone. He pushed her and then put his hands around her neck and choked her until she could not breathe. White then punched her in the stomach, hit her on the face, pushed her into the wall, and left the room.

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[1] Ind. Code § 35-42-4-2 (2004).

[2] Ind. Code § 35-42-2-9 (Supp. 2006).

[3] Ind. Code § 35-42-2-1.3 (Supp. 2006).

That evening, White accused M.W. of looking at another man and slapped her. Later that night, White was angry with M.W. because she was not asleep yet and stomped on her legs and tried to smother her with a pillow. White then pulled her pants down and shoved his fingers into her vagina. White again choked M.W. and then ripped her underwear off of her and forcefully shoved his hand into her vagina. White made M.W. go into the bathroom where he "stuffed [her] whole head in the toilet" and flushed the toilet a few times. Transcript at 198. White then hung M.W. out of the bathroom window. White also threatened M.W. with a pair of scissors while they were in the bathroom.

White then made M.W. get dressed and fix him food. When M.W. spilled the food, White threw the food at her and made her perform oral sex on him while he held a fork against her face. White then made M.W. go with him to a grassy field near the house. White had the scissors in his hand and asked M.W. which one of her eyes she liked the most because he was going to poke the other one out. White made M.W. perform oral sex on him again while he held the scissors.

They eventually returned to the house where White again punched M.W. on her face and stomach, kicked her, and choked her with an extension cord. Four-year-old E.W. was in the room during the abuse, and White "made it like it was a game," and E.W. was laughing. Id. at 208. When White told M.W. to get ice for her face, M.W. escaped out the front door of the house and obtained help.

The State charged White with criminal deviate conduct as a class A felony, criminal deviate conduct as a class B felony, strangulation as a class D felony, and domestic battery as a class A misdemeanor. After a trial, the jury found White guilty of criminal deviate conduct as a class A felony, strangulation as a class D felony, and domestic battery as a class A misdemeanor, but not guilty of criminal deviate conduct as a class B felony.

At the sentencing hearing, the trial court found White's lack of a criminal history as a mitigating factor and the nature and circumstances of the offenses as an aggravating factor. Specifically, the trial court considered the "absolute brutality of the offenses," the fact that White "seemed to gain some pleasure from torturing [M.W.]," the length of time over which the offenses occurred, the number of injuries M.W. suffered, and the intentional infliction of pain and humiliation. Sentencing Transcript at 24. The trial court found that the aggravator outweighed the mitigator but sentenced White to the advisory sentences of thirty years for criminal deviate conduct as a class A felony, one and one-half years for strangulation, and one year for domestic battery as a class A misdemeanor. Due to the "multiple nature of the offenses," the trial court ordered White to serve the sentences consecutively. Id. at 25.

I.

The first issue is whether White's convictions for criminal deviate conduct and domestic battery violate the Fifth Amendment's prohibition against double jeopardy.[4] "The Double Jeopardy Clause protects against successive prosecutions following conviction, reprosecution after acquittal, and multiple punishments for the same offense." Games v. State, 684 N.E.2d 466, 473 (Ind. 1997) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076 (1969)), modified on reh'g on other grounds by 690 N.E.2d 211 (Ind. 1997), cert. denied, 525 U.S. 838, 119 S. Ct. 98 (1998). In interpreting the Double Jeopardy Clause, the Indiana Supreme Court has held that "[w]here legislative intent is clear that multiple punishment is intended, double jeopardy is not violated and further inquiry into the statutory elements is not appropriate." Id. at 474. "It is only when legislative intent to impose multiple punishments is uncertain that further inquiry is required." Id. at 475. The further inquiry, which is known as the "same elements" test, "determines whether or not a legislature intended to impose separate punishments for multiple offenses arising in the course of a single act or transaction." Id.

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Id. (quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932)). "If Blockburger is satisfied, the court assumes that the statutes are not punishing the same

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[4] White also mentions the state prohibition against double jeopardy, but he does not develop a cogent argument. Consequently, White has waived this argument. See, e.g., Cooper v. State, 854 N.E.2d 831, 842 (Ind. 2006); Ind. Appellate Rule 46(A)(8)(a).

offense and multiple punishment is constitutionally permitted." Id. "If the test is not satisfied, double jeopardy is violated." Id.

Here, White contends that "the domestic battery conviction is inherently contained in the same offense as Criminal Deviate Conduct."[5] Appellant's Brief at 16. The offense of criminal deviate conduct is governed by Ind. Code § 35-42-4-2, which provides that "[a] person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct when: (1) the other person is compelled by force or imminent threat of force . . . commits criminal deviate conduct, a Class B felony." The offense is a class A felony if "it is committed while armed with a deadly weapon." Ind. Code § 35-42-4-2(b)(2). On the other hand, the offense of domestic battery is governed by Ind. Code § 35-42-2-1.3, which provides:

> A person who knowingly or intentionally touches an individual who:
>
> (1) is or was a spouse of the other person;
> (2) is or was living as if a spouse of the other person as provided in subsection (c); or
> (3) has a child in common with the other person;
>
> in a rude, insolent, or angry manner that results in bodily injury to the person described in subdivision (1), (2), or (3) commits domestic battery, a Class A misdemeanor.

Applying the Blockburger test, the criminal deviate conduct and the domestic battery statutes plainly contain at least one separate and distinct element. The criminal

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[5] White also states that "[d]omestic Battery is the same offense as . . . Strangulation for double jeopardy purposes." Appellant's Brief at 15. However, he does not develop this argument further. Consequently, he has waived the argument for failure to make a cogent argument. See, e.g., Cooper, 854 N.E.2d at 842; Ind. Appellate Rule 46(A)(8)(a).

deviate conduct statute requires that the victim perform or submit to deviate sexual conduct, which is not required under the domestic battery statute. Further, the domestic battery statute requires that the victim be the spouse, a person living as if a spouse, or a person who has a child in common with the defendant, which is not required under the criminal deviate conduct statute. Consequently, White's convictions do not violate the Double Jeopardy Clause. See, e.g., Smith v. State, 717 N.E.2d 1277, 1280 (Ind. Ct. App. 1999) (holding that the defendant's convictions for robbery and confinement did not violate the Blockburger test), trans. denied.

II.

The next issue is whether the trial court abused its discretion in sentencing White. We note that White's offenses were committed after the April 25, 2005, revisions of the sentencing scheme.[6] In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on rehearing, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

[6] White also states in his appellant's brief that "[t]he trial court violated the Defendant's Sixth Amendment Constitutional rights by finding aggravating factors without the use of a jury." Appellant's Brief at 12 (citing Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g denied). White does not develop a cogent argument. Consequently, White has waived this argument. See, e.g., Cooper, 854 N.E.2d at 842; Ind. Appellate Rule 46(A)(8)(a). Moreover, White's offenses were committed after the statutory revisions were enacted to remedy Sixth Amendment violations disapproved in Blakely.

A trial court abuses its discretion if it fails "to enter a sentencing statement at all," enters "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," enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration," or considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "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 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

White argues that the trial court overlooked significant mitigating circumstances, abused its discretion in weighing the aggravator and mitigator, and abused its discretion by imposing consecutive sentences.

A. Mitigating Circumstances.

White argues that the trial court overlooked the fact that he had no criminal history and the fact that his imprisonment would impose hardship upon his son. "The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." Ellis v. State, 736 N.E.2d 731, 736 (Ind. 2000). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to

proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001). However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

We first note that the trial court specifically found White's lack of a criminal history as a mitigating factor. Thus, White's argument regarding this mitigator fails. As for the hardship to White's son, "[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999). Here, E.W.'s mother is deceased, and E.W. was living with White. However, the trial court considered and rejected this proposed aggravator as follows:

> Your son is currently in the custody of Child Protective Services due to these offenses and my memory Mr. White is that your son was present when many of these events were occurring between you and the victim. I refuse to consider as a mitigating circumstance incarceration would impose an undue hardship on your child.

Sentencing Transcript at 23-24. At the trial, M.W. testified that, as White was beating her, four-year-old E.W. was in the room. White made the beating a game for E.W., and

E.W. laughed during the abuse. Under these circumstances, we cannot say that the trial court abused its discretion when it rejected this proposed mitigator. See, e.g., Grund v. State, 671 N.E.2d 411, 419 (Ind. 1996) (finding no "error in the trial court's failure to find hardship [to the defendant's children] to be a mitigating factor").

B. Balancing of Aggravator and Mitigator.

White argues that the trial court failed to properly "consider, balance or weigh the mitigating and aggravating circumstances." Appellant's Brief at 14-15. Pursuant to Anglemyer, the balancing of the aggravators and mitigators is not subject to our review for abuse of discretion. Consequently, we cannot review White's argument. See, e.g., Anglemyer, 868 N.E.2d at 491.

C. Consecutive Sentencing.

White seems to contend that the trial court abused its discretion by imposing consecutive sentences. However, White fails to offer any cogent argument in support of this assertion. Consequently, he has waived the argument. See, e.g., Cooper, 854 N.E.2d at 842; Ind. Appellate Rule 46(A)(8)(a).

Waiver notwithstanding, in order to impose consecutive sentences, the trial court must find at least one aggravating circumstance.[7] Marcum v. State, 725 N.E.2d 852, 864

[7] White notes "[t]rial counsel accurately pointed out the trial court may not use the time period and the acts themselves constitute [sic] both mitigating factors to enhance a sentence and impose consecutive sentences." Appellant's Brief at 15. We presume that White is attempting to argue that the trial court could not use the same aggravator to both enhance the sentences and impose consecutive sentences. However, the trial court here did not impose enhanced sentences, and the trial court used a separate aggravator to impose consecutive sentences. Moreover, the Indiana Supreme Court has held that "[t]he same aggravating circumstance may be used to both enhance a sentence and justify consecutive terms." Marcum v. State, 725 N.E.2d 852, 864 (Ind. 2000), reh'g denied; Kilpatrick v. State, 746 N.E.2d

(Ind. 2000), reh'g denied. Due to the "multiple nature of the offenses," the trial court ordered White to serve the sentences consecutively. Sentencing Transcript at 25. The decision to impose consecutive sentences for multiple offenses is generally within the trial court's discretion. Kilpatrick v. State, 746 N.E.2d 52, 62 (Ind. 2001). We conclude that the trial court did not abuse its discretion by imposing consecutive sentences. See, e.g., id. (holding that the trial court did not abuse its discretion in sentencing the defendant, including imposing consecutive sentences).

III.

The final issue is whether White's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

White focuses upon his character and emphasizes that he had no prior criminal history. However, White's character is evident from his actions against his wife and his comments at the sentencing hearing. At the sentencing hearing, White expressed little or no remorse for his actions. Rather, White blamed his wife for his offenses, alleging that

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52, 62-63 (Ind. 2001) ("We reject Kilpatrick's claim that the trial court is required to identify the factors that support the sentence enhancement separately from the factors that support consecutive sentences.").

she had abused E.W. The evidence presented at trial demonstrated that, over several days, White repeatedly beat, choked, sexually assaulted, and threatened his wife, M.W. Some of the abuse was committed while his four-year-old son, E.W., was in the room. The trial court correctly noted the "absolute brutality of the offenses," the fact that White "seemed to gain some pleasure from torturing [M.W.]," the length of time over which the offenses occurred, the number of injuries M.W. suffered, and the intentional infliction of pain and humiliation. Sentencing Transcript at 24. Given the brutal nature of the offenses and the character of the offender, we cannot say that the sentence imposed by the trial court is inappropriate. See, e.g., Reyes v. State, 848 N.E.2d 1081, 1083 (Ind. 2006) (holding that the defendant's sentence was not inappropriate given the brutal nature of the offense and the defendant's secretive, dishonest, and manipulative character).

For the foregoing reasons, we affirm White's convictions and sentences for criminal deviate conduct as a class A felony, strangulation as a class D felony, and domestic battery as a class A misdemeanor.

Affirmed.

RILEY, J. and FRIEDLANDER, J. concur