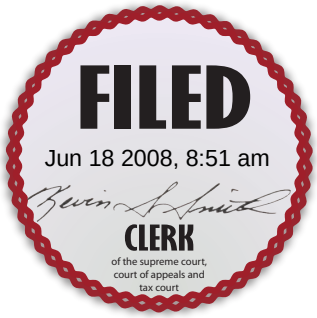

ATTORNEY FOR APPELLANT:

MICHAEL E. HUNT
Monroe County Chief Public Defender
Bloomington, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANTONIO DAVIDSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 53A01-0712-CR-540
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Marc R. Kellams, Judge
Cause No. 53C02-0501-FB-3

June 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Antonio Davidson appeals the sentence imposed by the trial court after he pleaded guilty to criminal recklessness, as a class D felony; intimidation, as a class D felony, and battery, as a class A misdemeanor.

We affirm.

ISSUE

> Whether the aggregate sentence violates the statutory limitation for imposing consecutive sentences after the offender's conviction on non-violent offenses.

FACTS

On January 4, 2005, the State originally charged that Davidson had committed four criminal offenses: rape, as a class B felony; criminal deviate conduct, as a class B felony; battery, as a class C felony; and criminal confinement, as a class D felony. The offenses were alleged to have occurred on December 29, 2004, and against the victim S.G. After discovery, the hearing of various motions, and multiple continuances, a jury trial was scheduled to take place on November 29, 2006.

On November 28, 2006, the State filed an amended information, alleging that on December 29, 2004, Davidson had committed three criminal offenses against S.G. Specifically, the State charged him with criminal recklessness inflicting serious bodily injury, a class D felony; intimidation, a class D felony; and battery, a class A misdemeanor. That same day, Davidson appeared before the trial court and tendered his plea agreement with the State. The agreement provided that Davidson would plead guilty to the charges of the amended information. The plea agreement further provided that the

trial court had the discretion to determine the length and executed portion of the sentences that he would receive on the two class D felony offenses (criminal recklessness and intimidation), with "2 years of probation" imposed on the aggregated class D felony sentences; a sentence of "one year executed on" the class A misdemeanor battery offense; and that "[a]ll sentences are consecutive" to each other. (App. 21).

During the hearing on November 28, 2006, Davidson's counsel elicited from Davidson a series of admissions that the trial court found to establish "a factual basis" for his plea of guilty to each of the charges in the amended information. (Tr. 12). Accordingly, the trial court accepted his plea and entered judgment of conviction for the three separate criminal offenses: "criminal recklessness, a D felony, intimidation, a D felony, and battery, an A misdemeanor." *Id.* Both Davidson and the State agreed to waive the pre-sentence investigation.

On July 5, 2007, and August 16, 2007, the trial court held sentencing hearings. The State described Davidson's criminal history, and Davidson's counsel affirmed its accuracy. The trial court found the nature and circumstances surrounding the injuries Davidson inflicted on S.G. and his prior criminal history to be aggravating factors, and ordered Davidson to serve the "maximum aggravated sentence of three years" for the offense of criminal recklessness, as a class D felony. (Tr. 74). Based upon "the same prior criminal history aggravating" factor, the court imposed a three-year sentence for the offense of intimidation, as a class D felony, "with two years suspended, pursuant to" the plea agreement. *Id.* For the offense of battery, as a class A misdemeanor, the court imposed a one-year sentence. The trial court then ordered all sentences to be served

consecutively. In summary, it imposed an aggregate sentence of seven years, with five years executed and two years suspended to probation.

DECISION

The trial court's sentencing authority is only that which is conferred by the legislature. *Cooper v. State*, 831 N.E.2d 1247, 1252 (Ind. Ct. App. 2005), *trans. denied*. Moreover, a trial court generally "cannot order consecutive sentences in the absence of express statutory authority." *Reed v. State*, 856 N.E.2d 1189, 1199 (Ind. 2006). Indiana Code section 35-50-1-2(c) authorizes the trial court to "order terms of imprisonment to be served consecutively." However, that authority is limited as follows:

> [E]xcept for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under [the habitual offender or habitual controlled substance offender provisions], 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.

Id.

The most serious offense of which Davidson was convicted is a class D felony. At the time he committed the offenses, the statute provided that the presumptive sentence for a class C felony offense was a standard, or presumptive, "term of four years." I.C. § 35-50-2-6 (amended by P.L. 71-2005, § 9, effective April 22, 2005).

Davidson argues that pursuant to Indiana Code section 35-50-1-2, the aggregate sentence imposed by the trial court cannot stand. Specifically, he argues that because his convictions were for non-violent offenses, the statute limits to four years the aggregate of any consecutive sentences. We cannot agree.

Our analysis begins by first considering whether there was a crime of violence committed pursuant to the statute. Davidson was sentenced after pleading guilty to criminal recklessness, as a class D felony; intimidation, as a class D felony; and battery, as a class A misdemeanor. The statutory list of crimes of violence contains none of these offenses. *See* Ind. Code § 35-50-1-2(1) (defining "crimes of violence" as used in Section 2). Further, we have held that the statute expresses clear legislative delineation of "the exact crimes" that are "to be considered violent crimes" in determining whether consecutive sentencing may be ordered." *Ballard v. State*, 715 N.E.2d 1276, 1279 (Ind. Ct. App. 1999). Thus, any characterization of the crimes Davidson committed on December 29, 2004, as being violent in nature is of no moment.

We next consider whether Davidson's offenses took place within a single episode of criminal conduct. The statute provides that an "'episode of criminal conduct' means offenses or a connected series of offenses that are closely related in time, place, and circumstance." I.C. § 35-50-1-2(b). As the State notes, the record herein provides scant details.[1] Nevertheless, the record does reflect the following. As to the class D felony offense of criminal recklessness, Davidson admitted that he injured S.G. when he struck her multiple times with a belt, which "caused extreme pain" and caused her "on a couple of occasions" to "pass out." (Tr. 11). As to the class D criminal offense of intimidation, Davidson admitted that he had a telephone conversation with S.G. telling her not to call

[1] The State suggests that we consider details of the offenses as found in evidence submitted by S.G. and admitted by the trial court at the sentencing hearing. However, this evidence was not before the trial court when it found and accepted the factual basis for Davidson's guilty pleas, and entered judgment of conviction on the offenses. Thus, we reject the State's suggestion.

or communicate with him and that if she did, he would inflict a serious battery upon her. As to the class A misdemeanor offense of battery, Davidson admitted that he had touched S.G. in a rude, insolent or angry manner, resulting in bodily injury to her. Thus, it is clear that Davidson was convicted upon his admission that he committed the material elements constituting the three offenses against S.G. on December 29, 2004.

It is true that, as Davidson notes, all of his offenses were committed against S.G. and on the same day. However, in *Reed*, our Supreme Court referred to the statutory language as the lodestar, specifically, its "terms: 'a connected series of offenses that are closely connected in time, place, and circumstance.'" 856 N.E.2d at 1200 (quoting I.C. § 35-50-1-2(b)). At the plea hearing, Davidson admitted that he committed the intimidation offense when he had a "telephonic conversation with" S.G. on that day, and told "her not to call [him] back and not to communicate with [him] any further," and that "if she communicated with [him] any further that [he] would inflict . . . a serious battery" upon her. (Tr. 11, 12). To commit the criminal recklessness and battery offenses to which he pleaded guilty, Davidson and S.G. had to have been in immediate physical proximity to each other. Thus, the reasonable inference is that Davidson's "telephonic conversation" with S.G. took place at a separate time, subsequent to Davidson's commission of the criminal recklessness and battery offenses. (Tr. 11). Further, Davidson's admission that the intimidation was communicated in a "telephonic conversation" leads to the reasonable inferences that this offense took place in another place and under different circumstances -- when he was not in S.G.'s physical presence.

Hence, we conclude that the offenses were not so "closely related in time, place and circumstance" as to invoke the limitations of the statute. I.C. § 35-50-1-2(b).

Accordingly, the sentences imposed by the trial court do not violate the statutory limit for consecutive offenses.

Affirmed.

NAJAM, J., and BROWN, J., concur.