ATTORNEY FOR APPELLANT:

GARY L. GRINER
Mishawaka, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

WILLIE NORMAN, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0904-CR-208
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0803-FB-32

October 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Willie Norman, Jr. ("Norman") appeals his convictions and sentence for two counts of Robbery,[1] as Class B felonies, and one count of Receiving Stolen Property, as a Class D felony.[2] We affirm.

Issues

Norman presents two issues for review:

I. Whether the trial court's failure to sever the charges and hold separate trials constituted fundamental error; and

II. Whether his aggregate forty-three-year sentence is inappropriate.

Facts and Procedural History

During November of 2007, Norman, his nephew, Chester Higgins ("Higgins"), and Demarlon Johnson ("Johnson") planned to rob a Chase Bank branch in Elkhart that Norman had patronized and "scoped out" for robbery. (Tr. 308). On November 7, Norman drove to the bank after instructing the younger men on how to dress and conduct themselves and what to expect inside the bank. Norman waited in an SUV that Higgins had stolen to serve as the get-a-way vehicle. Higgins and Johnson went inside, dressed in black and carrying handguns.[3] They subdued the customers and employees, and took approximately $15,000. Norman then drove Higgins and Johnson back to change vehicles and split the money.

On January 15, 2008, Norman met with another of his nephews, Cecil Hall ("Hall"),

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[1] Ind. Code § 35-42-5-1.
[2] Ind. Code § 35-43-4-2.
[3] Johnson testified that his handgun "didn't work" because of a missing firing pin. (Tr. 314.)

and Hall's friend Kalyn Butler ("Butler"), to plan a second robbery of the same Chase Bank branch. Norman instructed Hall and Butler as to how to commit the robbery, and told them to take weapons. On the following day, Norman drove Hall and Butler to the Chase Bank branch. Hall and Butler, armed, dressed in black and wearing masks, entered the bank. Butler pointed his gun at assistant branch manager Timothy Hayden and instructed Hayden to fill a bag with money. Butler hit Hayden in the head, causing Hayden to fall. Hall and Butler obtained approximately $12,000. Norman drove Hall and Butler back to another vehicle; they switched vehicles and then proceeded to a residence where the trio split the money.

Investigations of the robberies led to the arrests of Higgins, Johnson, Hall and Butler, each of whom pled guilty to robbery and implicated Norman. Norman was charged with two counts of Conspiracy to Commit Robbery, two counts of Robbery, and one count of Receiving Stolen Property (the SUV). At the conclusion of a jury trial on February 11, 2009, Norman was found guilty as charged.

Because of double jeopardy concerns, the trial court did not enter judgments of conviction on the conspiracy counts. On March 19, 2009, the trial court sentenced Norman to twenty years imprisonment for each of the Robbery counts, and three years imprisonment for the Receiving Stolen Property count, all consecutive. He now appeals.

Discussion and Decision

I. Severance

Norman claims that he had an absolute entitlement to severance of the charges against him, and thus the trial court committed fundamental error by failing to sua sponte order

multiple trials.

Indiana Code Section 35-34-1-11(a) provides:

> 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.

Indiana Code Section 35-34-1-12(a) provides:

> A defendant's motion for severance of crimes or motion for a separate trial must be made before commencement of trial, except that the motion may be made before or at the close of all the evidence during trial if based upon a ground not previously known. The right to severance of offenses or separate trial is waived by failure to make the motion at the appropriate time.

(emphasis added.) A defendant has an "automatic right" to have a separate trial on counts joined solely for similarity "if he makes a timely motion for severance." Muse v. State, 419 N.E.2d 1302, 1305 (Ind. 1981). However, a defendant waives his right to have similar offenses tried separately when he fails to make a timely motion for severance. Id.

In Muse, the appellant failed to request severance of two theft charges against him but claimed fundamental error. Our Supreme Court disagreed that there was fundamental error, stating:

> Defendant claims that the potential prejudice to defendants from the joinder of unrelated offenses is so great that they should not even be put in a position of having to request a separation. We disagree. The legislature provided

> adequate protection from prejudice for defendants when it gave defendants the automatic right to a severance whenever the offenses are joined solely because they are of the same or similar character. The burden is on defendant to make a timely motion for severance, but the court has no discretion to deny a severance under those conditions. Since defendant in this case failed to make a timely motion for severance, he has waived his right to have the offenses tried separately and we find no error here.

Id. Norman made no pre-trial or trial motion to sever the charges against him. His right, if any, to separate trials was waived by his failure to make an appropriate motion.

II. Sentence

For a Class B felony, the advisory sentence is ten years, while the maximum sentence is twenty years. Ind. Code § 35-50-2-5. For a Class D felony, the advisory sentence is one and one-half years, while the maximum sentence is three years. Ind. Code § 35-50-2-7. Norman was sentenced to twenty years for each of his robbery convictions, and three years for receiving stolen property, to be served consecutively. Thus, he received the maximum sentence for his offenses.

Under Indiana Appellate Rule 7(B), this "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. Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007).

More recently, the Court reiterated 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. "[W]hether 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.

As to the nature of the robbery offenses, Norman recruited young men, including two of his nephews, and instructed them in the art of bank robbery. He scouted out and recommended the bank branch to be robbed. Norman engaged in a significant amount of premeditation, conducting planning sessions where he told the young men what to wear and how to conduct themselves inside the bank. Norman also advised them to take handguns, although he anticipated that there would be both customers and employees inside the bank. After the young men complied with his instructions, Norman would drive them away and switch vehicles. The nature of the receiving stolen property offense is that Norman took possession of a stolen automobile for the purpose of using it to drive to a bank branch targeted for robbery and escape afterward.

With regard to his character, Norman's criminal history has spanned forty years. He has been convicted of seven felonies and fourteen misdemeanors. One of his crimes involved circumstances where younger accomplices were induced to commit armed robbery. On four occasions, Norman violated the terms of probation. He was on probation when the instant offenses were committed. Clearly, prior rehabilitative efforts have failed, and any past leniency accorded to Norman has not influenced him to live a law-abiding life.

In light of the nature of the offenses and the character of the offender, Norman has not convinced this court that his sentence is inappropriate.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.