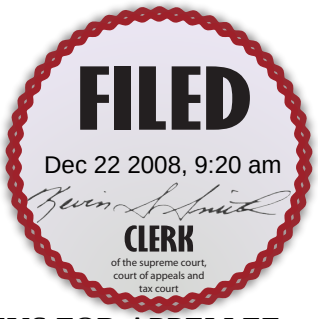

ATTORNEY FOR APPELLANT:

JAMES R. REED
Morocco, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General

KIP S. MCDONALD
Law Clerk
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

BOBBY WAYNE TABOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0804-CR-159
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause Nos. 45G04-0705-FC-50, 45G04-0710-FC-128

December 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Bobby Wayne Tabor pleaded guilty to three counts of burglary,[1] each as a Class C felony, and was sentenced to an aggregate sentence of twelve years. He appeals raising the following restated issues:

I. Whether the trial court's imposition of consecutive sentences violated Indiana Code section 35-50-1-2(c); and

II. Whether his sentence was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

On May 1, 2007, Tabor used a rock to break a window in order to enter John Cicco's Menswear in Merrillville, Indiana in Lake County. He took a drill, cash, merchandise, discount cards, and keys to a Ford van from the store without the consent of any representative of John Cicco's Menswear. That same date, Tabor used a metal pipe to break a window and gain entry into Bennigan's Restaurant, which is located only a few hundred feet from the menswear store and also in Lake County. He entered with the plan to take property from the restaurant without consent, and once inside, he caused extensive damage. On May 7, 2007, Tabor broke two closed windows in order to enter an AG Edwards office located in Merrillville. After entering the building, Tabor took a credit card belonging to an employee without consent.

Tabor was initially charged, under cause number 45G04-0705-FC-50 ("Cause 50"), with two counts of burglary, each as a Class C felony, resulting from the break-ins at John

[1] *See* Ind. Code § 35-43-2-1.

Cicco's Menswear on May 1 and the AG Edwards office on May 7. He was also charged, under Cause 50, with three counts of fraud, each as a Class D felony, and three counts of attempted fraud, each as a Class D felony as a result of using the credit card he took. After negotiating an initial plea agreement and entering a guilty plea, new charges were filed under a new cause number, 45G04-0710-FC-128 ("Cause 128"), for Tabor's break-in of the Bennigan's Restaurant on May 1. He was charged with burglary as a Class C felony and criminal mischief as a Class D felony. As a result of these new charges, Tabor was allowed to withdraw his guilty plea, and a new plea agreement including both cause numbers was reached.

Under the new plea agreement, Tabor pleaded guilty to three counts of burglary, each as a Class C felony, and the remaining charges under both cause numbers were dismissed. The State also agreed not to pursue an habitual offender enhancement under Cause 128. The plea agreement left sentencing to the trial court's discretion, and the parties were free to argue their position. At the sentencing hearing, the trial court sentenced Tabor to six years for each burglary count, with the two counts under Cause 50 to run concurrently with each other and the count under Cause 128 to run consecutively to the other sentences for an aggregate sentence of twelve years executed. Tabor now appeals.

DISCUSSION AND DECISION

I. Consecutive Sentences

The decision to impose consecutive sentences lies within the discretion of the trial court and is reviewed on appeal for an abuse of discretion. *Williams v. State*, 891 N.E.2d

621, 630 (Ind. Ct. App. 2008); *Ramon v. State*, 888 N.E.2d 244, 254 (Ind. Ct. App. 2008). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Ramon*, 888 N.E.2d at 254. In some cases, the trial court's discretion when imposing consecutive sentences is restricted by statute. Indiana Code section 35-50-1-2(c) provides, in relevant part:

> The court may order terms of imprisonment to be served consecutively . . . . However, except for crimes of violence, the total consecutive terms of imprisonment . . . 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 a felony higher than the most serious of the felonies for which the person has been convicted.

Tabor argues that his sentence imposed by the trial court violates Indiana Code section 35-50-1-2(c) because his crimes of burglary were not crimes of violence and because the crimes for which consecutive sentences were given arose out of an episode of criminal conduct. He contends that the burglaries that occurred at John Cicco's Menswear and Bennigan's Restaurant occurred on the same date, only a few hours apart, and in close proximity to each other. He therefore claims that these two burglaries were part of the same episode of criminal conduct, and the total of his consecutive terms allowed by statute for his Class C felony burglaries is ten years, the advisory sentence for a Class B felony.

As Tabor's crimes of burglary do not meet the definition of "crime of violence," we must only determine if they constitute an episode of criminal conduct. *See* Ind. Code § 35-50-1-2(a). An "episode of criminal conduct" means "offenses or a connected series of offenses that are closely related in time, place, and circumstance." Ind. Code § 35-50-1-2(b). There is no requirement that the victims be the same, and the acts of two crimes are almost

always distinct in at least one element. *Harris v. State*, 861 N.E.2d 1182, 1187 (Ind. 2007). Although the ability to recount each charge without referring to details of the other can provide additional guidance as to whether a defendant's conduct constitutes an episode of criminal conduct, it is not a critical element. *Id*. (quoting *Reed v. State*, 856 N.E.2d 1189, 1200 (Ind. 2006)). Instead, the statute uses less absolute terms: "a connected series of offenses that are closely connected in time, place, and circumstance." *Id*.

Here, Tabor pleaded guilty to three counts of burglary, each as a Class C felony, and was sentenced to six years for each. The trial court ordered the two burglaries under Cause 50, which consisted of the burglary of John Cicco's Menswear on May 1 and the burglary of AG Edwards on May 7, to be served concurrently with each other and ordered the burglary under Cause 128, which was the burglary of Bennigan's Restaurant on May 1, to be served consecutively to the other sentences. At the time of Tabor's crimes, the advisory sentence for the felony that is one class of a felony higher than a C felony was ten years. *See* Ind. Code § 35-50-2-5.

As to the circumstances of the crimes, the record shows that the exact time of the burglaries is not known, but, on May 1, 2007, Tabor broke a closed window with a metal pipe to gain entry into the Bennigan's Restaurant. This occurred at approximately 1:17 a.m. as that was when the alarm was activated. While inside, Tabor caused extensive damage to the restaurant. Additionally, sometime before 8:00 a.m. that same morning, which was when the owner arrived, Tabor used a rock to break a closed window to enter John Cicco's Menswear, which is located near the Bennigan's Restaurant. After gaining entry, Tabor took

a drill, cash, merchandise, discount cards, and keys to a Ford van. Therefore, Tabor burglarized two closely-located businesses during the early morning hours of May 1, 2007. We conclude that these burglaries were "closely related in time, place, and circumstances." I.C. § 35-50-1-2(b). Thus, the burglaries constitute a single episode of criminal conduct under Indiana Code section 35-50-1-2(c). *See Henson v. State*, 881 N.E.2d 36, 39 (Ind. Ct. App. 2008), *trans. denied* (defendant burglarized two neighboring garages during early morning hours of same night, and crimes were found to be single episode of criminal conduct). Although Tabor's burglaries of Bennigan's Restaurant and John Cicco's Menswear were a single episode of criminal conduct and were not crimes of violence, we note that the trial court ordered that the sentence for the burglary of Bennigan's Restaurant, Cause 128, to run consecutively to the concurrent sentences for the burglaries under Cause 50. Therefore, Tabor's sentence under Cause 128 was ordered to run consecutively to the sentence for the burglary at AG Edwards, as well as the burglary at John Cicco's Menswear. As the AG Edwards burglary occurred six days after the burglary at Bennigan's Restaurant, the two crimes were not part of a single episode of criminal conduct, and the trial court did not abuse its discretion in ordering Tabor's sentence under Cause 128 to run consecutively to the sentences under Cause 50.

II. Inappropriate Sentence

Appellate courts may revise a sentence after careful review of the trial court's decision if they conclude that the sentence is inappropriate based on the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Even if the trial court followed the

appropriate procedure in arriving at its sentence, the appellate court still maintains a constitutional power to revise a sentence it finds inappropriate. *Hope v. State*, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005).

Tabor argues that his aggregate sentence of twelve years was inappropriate in light of the nature of the crime and his character. He specifically contends that, as to the nature of the offense, his Class C felony burglary convictions were not crimes of violence and should not be considered in the same light as other Class C felony crimes that involve violence against victims. He also claims that, although he has an extensive criminal history, a substantial portion of the convictions occurred more than eight years prior to the present crimes and that he should have received an offset to his sentence because of his serious alcohol problems.

As to the nature of the offense, Tabor broke into three separate businesses, gaining entry by smashing windows and causing extensive damage. Once inside, he took items such as cash, merchandise, discount cards, a credit card, and keys to a van. As a result of these crimes, Tabor caused additional damage because the businesses had to be closed for several days after the crimes occurred. As for Tabor's character, the evidence showed that he had an extensive criminal record consisting of nine misdemeanors and four felonies. Additionally, Tabor was on probation at the time he committed the present crimes. The evidence demonstrated that past leniency for his crimes had not deterred him from committing further offenses. We therefore conclude that a twelve-year aggregate sentence was not inappropriate in light of the nature of the offense and his character.

Affirmed.

VAIDIK, J., and CRONE, J., concur.