MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Gilberto Reyna,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 16, 2024

Court of Appeals Case No.
23A-CR-2490

Appeal from the Marion Superior Court

The Honorable Cynthia L. Oetjen, Judge

Trial Court Cause No.
49D30-9312-CF-164695

Opinion by Judge Tavitas
Judges Mathias and Weissmann concur.

Tavitas, Judge.

Case Summary

[1] In 1995, Gilberto Reyna was convicted of attempted murder, rape, and criminal deviate conduct, all Class A felonies; criminal confinement, a Class B felony; and carrying a handgun without a license, a Class A misdemeanor. We affirmed Reyna's convictions on direct appeal. Decades later, Reyna sought post-conviction relief, and the post-conviction court ordered a new sentencing hearing on Reyna's rape and criminal confinement convictions. On resentencing, the trial court imposed a sentence of forty-five years on each of these two counts and ordered all the sentences, except for the one imposed on the attempted murder conviction, to be served concurrently to each other but consecutive to the sentence for attempted murder. Reyna appeals and argues that: (1) his new sentence exceeds the statutory limits for consecutive sentences arising out of a single episode of criminal conduct, and (2) the trial court abused its discretion by not giving any mitigating weight to Reyna's good behavior and educational achievements while in prison. We disagree and, accordingly, affirm.

Issues

[2] Reyna presents two issues for our review, which we restate as:

I. Whether the sentence imposed by the trial court on resentencing exceeds the statutory limit for consecutive sentences arising out of a single episode of criminal conduct.

II. Whether the trial court abused its discretion by failing to give any mitigating weight to Reyna's good behavior and educational achievements while he was incarcerated.

Facts

[3] On December 3, 1993, K.D. was at a party in Indianapolis that Reyna also attended. At the party, K.D. observed that Reyna had a handgun tucked into the waist of his pants. Eventually, Reyna, K.D., and K.D.'s friend, Tommy Blair, left the party in Blair's Jeep, and the three drove to a liquor store. Blair parked, got out of the Jeep, and went inside the store. While Blair was inside, another man, Kevin Couch, came out of the store and approached the car parked next to Blair's Jeep. Reyna called out to Couch and said, "What's up?" Ex. Vol. I p. 18. Couch replied, "I don't know, man. What's up with you?" *Id*. Reyna then pulled out his handgun and repeatedly fired at Couch.[1] Blair returned to the car, and Reyna told him, "Go, man, go! Let's go!" *Id*. at 20. K.D., still in the back seat of the Jeep, wept and asked to be dropped off at her friend's house, but Blair kept driving. Reyna turned to K.D. and said, "Man, I told you I was going to get him. I told you last night I was going to get him." *Id*. at 20-21.

[4] Blair kept driving the Jeep, and Reyna told him to pull over onto a neighborhood street. Reyna stated that he "still [had] some unfinished business." *Id*. at 21. K.D. was frightened and begged Blair not to pull over.

[1] Couch survived the shooting.

Reyna replied, "Pull over because I don't trust her. I don't trust her." *Id.* K.D. told Reyna, "I won't say nothing. I promise I won't say nothing." *Id.* But Reyna kept repeating, "I don't trust her." *Id.* Blair continued to drive, and Reyna told K.D., "I will shoot you. . . . And if you say anything, . . . I'll go after your parents. I'll go after your family. I'll go after anybody." *Id.* K.D. again promised not to say anything, and Blair kept driving. As Blair drove, he told Reyna, "Let's let [K.D.] off at this gas station." *Id.* at 21-22. This prompted Reyna to look at K.D. and say, "If I decide to let you off, . . . and if you say anything, I'll come back and I'm going to kill you. I'm going to kill your parents, your mom and your dad and your aunts, uncles, everybody. . . . I'm going to kill them." *Id.* at 22.

[5] Blair eventually drove the Jeep on westbound Interstate 70. Blair suggested dropping K.D. off at a pool hall near her house. Reyna seemed to agree with this plan, but then changed his mind and said that they would drop K.D. off at her house where Reyna could threaten her father with death if K.D. said anything about the shooting. Blair drove from the east side of Indianapolis all the way to the west side "where the airport is," and kept driving. *Id.* at 23. As they drove, Reyna phoned K.D.'s boyfriend and said, "Man, I hate to do this to you. I really do. But I'm going to have to smoke your girl." *Id.* at 24. Reyna then gave the phone to K.D., and her boyfriend asked her what had happened. But Reyna told K.D., "I don't want you to say anything. You say anything and I'm going to shoot you." *Id.* Understandably, K.D. did not tell her boyfriend

what had happened. Reyna, however, took the phone back and told K.D.'s boyfriend, "Man, I got him. I got Kevin Couch tonight." *Id.*

[6] As they continued to drive, Reyna got in the back seat of the Jeep with K.D. and told her, "I can't trust you, but if you do what I say – you're going to do what I say – then I can trust you." *Id.* at 25. Reyna then tried to unbutton K.D.'s shirt and unfasten her belt. K.D. told Reyna, "No. Don't. Stop." *Id.* Reyna responded, "If you don't do what I'm saying, I'm going to shoot you." *Id.* K.D. "shut up" due to Reyna's threats. *Id.* Reyna handed his handgun to Blair, forced K.D. to disrobe, and repeatedly raped K.D. and forced her to perform oral sex on him. After Reyna was finished, K.D. put her clothes back on.

[7] At some point later, Blair had to stop at a gas station to refuel his Jeep. K.D. saw a man walk out of the gas station and leaned toward the door, but Reyna told her, "Don't even think about it, because if you think about it [Blair] will shoot you." *Id.* at 30. K.D. stated that she needed to use the restroom. Reyna told her, "No. You're not going to have to worry about going to the bathroom ever again. . . . You're not going to have to worry about seeing your parents or seeing anybody ever again." *Id.* at 31.

[8] As Blair started the vehicle, K.D. jumped into the front seat and attempted to unlock the door or roll the window down. Reyna grabbed K.D. and attempted to pull her back in the vehicle, but eventually, Reyna pushed her out of the Jeep

onto the road. A truck driver saw K.D., picked her up, and took her to a nearby gas station. There, someone called the police.

[9] On December 8, 1993, the State charged Reyna with six counts: (1): attempted murder, a Class A felony; (2) rape, a Class A felony; (3) criminal deviate conduct, a Class A felony; (4) criminal confinement, a Class B felony; (5) carrying a handgun without a license, a Class A misdemeanor; and (6) carrying a handgun without a license, a Class D felony. The State subsequently dismissed the Class D felony charge. A three-day jury trial was held in November 1994. At the end of trial, the jury found Reyna guilty as charged.[2] In December 1994, the trial court sentenced Reyna to three consecutive terms of thirty years on each of the Class A felony convictions; a concurrent sentence of ten years on the Class B felony conviction, and a concurrent sentence of one year on the Class A misdemeanor conviction, for an aggregate sentence of ninety years.

[10] On direct appeal, Reyna argued that the trial court abused its discretion by excluding evidence that the shooting victim, Couch, was known to carry a gun and that the evidence was insufficient to prove that Reyna had the intent to kill Couch. Reyna made no argument related to his consecutive sentences on direct appeal. This Court rejected both of Reyna's arguments and affirmed in an

[2] On July 1, 1994—after Reyna's offenses but prior to his sentencing—Indiana Code Section 35-50-1-2 was amended to impose restrictions upon a trial court's authority to impose consecutive sentences arising out of a single episode of criminal conduct. We discuss this amendment in detail below.

unpublished decision. *Reyna v. State*, No. 49A02-9504-CR-194 (Ind. Ct. App. Mar. 5, 1996) (mem.).

[11] Nearly twenty-five years later, on January 28, 2020, Reyna filed a petition for post-conviction relief, in which he argued that his appellate counsel was ineffective for failing to challenge the consecutive sentences imposed on Reyna's convictions for rape and criminal deviate conduct. The post-conviction court held hearings on Reyna's petitions on October 27, 2022, and March 16, 2023. On July 12, 2023, the post-conviction court issued findings of fact and conclusions of law in which it determined that, under the doctrine of amelioration, Reyna was entitled to the benefit of the 1994 amendment to Indiana Code Section 35-50-1-2.[3]

[12] The post-conviction court determined that Reyna's acts of rape and criminal deviate conduct were part of a single episode of criminal conduct. Accordingly, the post-conviction court concluded that Reyna's consecutive thirty-year sentences for rape and criminal confinement exceeded the forty-year statutory cap imposed by Indiana Code Section 35-50-1-2. The post-conviction court, therefore, vacated Reyna's sentences on these convictions and ordered a new sentencing hearing.

[3] Our Supreme Court has reached the same conclusion. *See Richards v. State*, 681 N.E.2d 208, 213 (Ind. 1997) (holding that, under the doctrine of amelioration, trial court properly applied 1994 amendment to Indiana Code Section 35-50-1-2 to crimes committed in 1992).

[13] On September 23, 2023, the trial court held a new sentencing hearing. On resentencing, the trial court ordered Reyna's sentences to be served as follows: (1) thirty years on the attempted murder conviction; (2) forty-five years on the rape conviction; (3) forty-five years on the criminal deviate conduct conviction; (4) ten years on the criminal confinement conviction; and (5) one year on the conviction for carrying a handgun without a license. The trial court ordered all the sentences except the sentence for attempted murder to be served concurrently; the trial court then ordered these concurrent sentences to be served consecutively to the sentence on the attempted murder conviction, for an aggregate sentence of seventy-five years. Reyna now appeals.

Discussion and Decision

I. Consecutive Sentences for Crimes Arising Out of a Single Episode of Criminal Conduct

[14] In 1994, Indiana Code Section 35-50-1-2 was amended to impose a "previously nonexistent restraint upon a trial court's discretion when imposing consecutive sentences." *Salone v. State*, 652 N.E.2d 552, 562 (Ind. Ct. App. 1995). Specifically, the statute was amended to include the following language:

> Except as provided in subsection (b),[4] the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the aggravating and mitigating circumstances in IC 35-38-1-7.1(b) and IC 35-38-1-7.1(c) in making a determination under this subsection. The

[4] Subsection (b) applies to situations in which, "after being arrested for one (1) crime, a person commits another crime." I.C. § 35-50-1-2(b) (1994) This subsection is inapplicable here.

> court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for murder and felony convictions for which a person receives an enhanced penalty because the felony resulted in serious bodily injury if the defendant knowingly or intentionally caused the serious bodily injury,[5] **the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 [the habitual offender statute] and IC 35-50-2-10 [the habitual substance offender statute], to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive 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**.

I.C. § 35-50-1-2(a) (1994). In essence, the statute provides that "the total of the consecutive terms to which a defendant may be sentenced for felony convictions arising out of an 'episode of criminal conduct' must not exceed the presumptive sentence for a felony which is one class of felony higher than the most serious of the felonies for which the defendant has been convicted." *Trei v. State*, 658 N.E.2d 131, 133 (Ind. Ct. App. 1995).

[15] Reyna argues that "the five offenses for which [he] stands convicted arose out of a single episode of criminal conduct." Appellant's Br. p. 13. He thus concludes that "the aggregate of consecutive sentences for the five offenses

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[5] Both parties agree that Reyna did not receive "an enhanced penalty because the felony resulted in serious bodily injury if the defendant knowingly or intentionally caused the serious bodily injury." I.C. § 35-50-1-2(a) (1994). As the statute is written today, the limits on consecutive sentences are inapplicable to "crimes of violence," which is defined to include attempted murder, rape, and criminal deviate conduct. I.C. § 35-50-1-2(a), (d). Thus, if Reyna were sentenced under the current statute, there would be no limit to the consecutive sentences imposed by the trial court.

cannot exceed forty years," *id*. at 14, which was the presumptive sentence for murder, the felony that is one class higher than the highest class of felony of which Reyna was convicted.

[16] The question of whether certain offenses constitute a single episode of criminal conduct is a fact-intensive inquiry to be determined by the trial court. *Grimes v. State*, 84 N.E.3d 635, 643 (Ind. Ct. App. 2017) (citing *Schlichter v. State*, 779 N.E.2d 1155, 1157 (Ind. 2002); *Slone v. State*, 11 N.E.3d 969, 972 (Ind. Ct. App. 2014)). 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).[6] "In determining whether multiple offenses constitute an episode of criminal conduct, the focus is on the timing of the offenses and the simultaneous and contemporaneous nature, if any, of the crimes." *Grimes*, 84 N.E.3d at 643 (quoting *Williams v. State*, 891 N.E.2d 621, 631 (Ind. Ct. App. 2008)). Our Supreme Court has explained that "although the ability to recount each charge without referring to the other can provide additional guidance on the question of whether a defendant's conduct constitutes an episode of criminal conduct, it is not a critical ingredient in resolving the question. Rather,

[6] The 1994 amendment to Indiana Code Section 35-50-1-2 did not define the term "episode of criminal conduct." The following year, however, "the legislature defined the language 'episode of criminal conduct' as 'offenses or a connected series of offenses that are closely related in time, place, and circumstance.'" *Trei*, 658 N.E.2d at 133 (quoting I.C. § 25-50-1-2(b) (1995). This 1995 amendment "was intended to clarify, and not change, the 1994 version of the statute." *Tedlock v. State*, 656 N.E.2d 273, 276 (Ind. Ct. App. 1995). In *Tedlock*, we held that the "legislature intended that the term 'episode' as used in the 1994 amendment have the definition provided in the 1995 amendment as set out above." *Id*. Thus, this statutory definition of an "episode of criminal conduct," applies to Reyna's claims.

the statute speaks in less absolute terms[.]" *Harris v. State*, 861 N.E.2d 1182, 1188 (Ind. 2007) (quoted in *Grimes*, 84 N.E.3d at 643 n.2).

[17] Here, Reyna was convicted of five offenses: (1) attempted murder; (2) rape; (3) criminal deviate conduct; (4) criminal confinement; and (5) carrying a handgun without a license. Reyna claims that all of his convictions arose out of a single episode of criminal conduct because "[t]he offenses were separated by no more than a few minutes, and they were closely connected in time, place, and circumstance." Appellant's Br. p. 13. We disagree.

[18] Reyna shot at Couch at a liquor store on the east side of Indianapolis. Then Reyna and Blair fled the scene with K.D. in the Jeep. It was not until quite some time later, after the group had driven from the east side to somewhere past the airport on the west side, that Reyna raped K.D. and forced her to perform oral sex on him. Thus, Reyna committed two episodes of criminal conduct. The first episode occurred when Reyna, possessing a handgun, pointed it at and shot at Couch. It was this episode that gave rise to Reyna's convictions for attempted murder and carrying a handgun without a license. The second episode of criminal conduct occurred after Reyna had fled the scene in the Jeep with Blair; several minutes after the shooting—enough time to drive across Indianapolis—Reyna raped K.D. and forced her to perform oral sex on him. When he was finished, Reyna threatened to kill K.D. if she fled and held her inside the car as she tried to flee. This episode of conduct gave rise to Reyna's convictions for rape, criminal deviate conduct, and criminal confinement.

[19] On resentencing, the trial court ordered the sentences on all of Reyna's convictions, except for the sentence on the attempted murder conviction, to be served concurrently.[7] The trial court also ordered Reyna's aggregate concurrent sentences of forty-five years to be served consecutively to Reyna's thirty-year sentence for attempted murder, for an aggregate sentence of seventy-five years. This sentence does not violate Indiana Code Section 35-50-1-2 because the attempted murder conviction did not arise out of the same episode of criminal conduct as the convictions for rape, criminal conduct, and criminal confinement. In terms of the statute, the two episodes are not closely related in time, place, and circumstance. *See Evans v. State*, 81 N.E.3d 634, 641 (Ind. Ct. App. 2017) (holding that defendant's convictions for unlawful possession of syringes and escape arose out of separate criminal episodes where, after being found in possession of syringes, defendant was cleared by medical personnel at the hospital and then, when being taken to jail from the hospital, defendant kicked door of police car and fled); *Newman v. State*, 690 N.E.2d 735, 737 (Ind. Ct. App. 1998) (holding that defendant's convictions for burglary, theft, escape, and resisting law enforcement arose out of three episodes of criminal conduct where officers ordered defendant to get out of his car but defendant instead fled in and ultimately crashed his car; officers then found items on defendant that had been stolen from a tavern; and later, while being treated for injuries at the hospital, defendant fled from the hospital).

[7] The limitation on consecutive sentences found in Indiana Code 35-50-1-2 obviously does not apply to concurrent sentences.

[20] Because Reyna's conviction for attempted murder did not arise out of the same episode of criminal conduct as his convictions for rape, criminal deviate conduct, and criminal confinement, the trial court did not violate Indiana Code Section 35-50-1-2 when resentencing Reyna.

II. Abuse of Sentencing Discretion

[21] Reyna also claims that the trial court abused its discretion when sentencing him by failing to give any mitigating weight to Reyna's good behavior and educational achievements while incarcerated.

[22] Sentencing determinations are generally within the trial court's discretion. *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993).[8] On appeal, we will reverse the trial court's sentencing decision only if there has been a manifest abuse of discretion. *Id*. If a trial court relies upon aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances. *Widener v. State*, 659 N.E.2d 529, 533 (Ind. 1995) (citing *Hammons v. State*, 493 N.E.2d 1250, 1254 (Ind. 1986)).

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[8] We apply the sentencing law as it was at the time Reyna committed his offenses. *See Whittaker v. State*, 33 N.E.3d 1063, 1065 (Ind. Ct. App. 2015) ("Generally, the sentencing statutes in effect at the time a defendant commits an offense govern the defendant's sentence."). An exception to this general rule is the doctrine of amelioration. *Id.*

[23] Although a trial court must consider all evidence of mitigating circumstances offered by the defendant, the finding of a mitigating factor rests within the court's discretion. *Harris v. State*, 659 N.E.2d 522, 528 (Ind. 1995) (citing *Aguirre v. State*, 552 N.E.2d 473, 476 (Ind. 1990)). Thus, a trial court does not abuse its discretion by failing to find mitigation when a proffered mitigator is highly disputable in nature, weight, or significance. *Smith v. State*, 670 N.E.2d 7, 8 (Ind. 1996) (quoting *Wilkins v. State*, 500 N.E.2d 747, 749 (Ind. 1986)). Although the failure to find mitigating circumstances clearly supported by the record may imply that the sentencing court improperly overlooked them, the court is obligated neither to credit mitigating circumstances in the same manner as would the defendant, nor to explain why it chose not to find mitigating circumstances. *Crawley v. State*, 677 N.E.2d 520, 523 (Ind. 1997) (citing *Johnson v. State*, 580 N.E.2d 959, 961 (Ind. 1991)). We will not remand for resentencing if we can say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances. *Angleton v. State*, 686 N.E.2d 803, 817 (Ind. 1997) (citing *Day v. State*, 560 N.E.2d 641, 642 (Ind. 1990)).

[24] Reyna argues that the trial court abused its discretion by not finding Reyna's good behavior and educational achievements while incarcerated to be mitigating. We disagree. As noted by the State, Reyna has already received a benefit for his educational achievements by receiving credit time toward his sentence. Moreover, Reyna's behavior while incarcerated has not been as good as he claims. Reyna has received twelve write-ups while incarcerated. He was

caught drinking alcohol in 2007 and was in possession of a contraband cell phone in 2015. Although Reyna has not received any write-ups since 2015, given his prior misconduct, the trial court was not required to consider Reyna's good behavior as significant or clearly supported by the record.

[25] Moreover, even if the trial court did abuse its discretion by failing to consider Reyna's educational achievements and behavior while incarcerated as mitigating, any error would be harmless. Reyna has a considerable criminal history, including convictions for robbery, battery, and intimidation. Reyna also did not succeed when previously offered the grace of probation. And, as detailed above, the circumstances of Reyna's crimes in this case were nightmarish. We are confident that, even if the trial court did consider Reyna's proffered mitigators, it would have imposed the same sentence. *See Angleton*, 686 N.E.2d at 817 (citing *Day*, 560 N.E.2d at 642).

Conclusion

[26] Reyna's five convictions did not arise out of a single episode of criminal conduct, and the sentence imposed by the trial court did not exceed the statutory limits for consecutive sentences set forth in Indiana Code Section 35-50-1-2. Nor did the trial court abuse its discretion by failing to consider Reyna's good behavior and educational achievements while incarcerated as mitigating. Even if it did, any error was harmless. Accordingly, we affirm the trial court's sentencing decision.

[27] Affirmed.

Mathias, J., and Weissmann, J., concur.

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