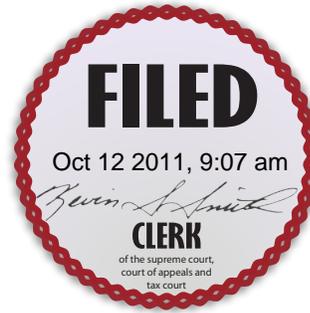


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ELLEN M. O'CONNOR
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LUIS GONZALES,)

Appellant-Defendant,)

vs.)

No. 49A04-1102-CR-73)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause Nos. 49G05-1005-FA-41003, 49G05-1005-FA-42084, 49G05-1005-FA-42138,
49G05-1005-FA-42367, 49G05-1005-FA-75177, 49G05-1005-FD-412119,
49G05-1005-FC-42064

October 12, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Luis Gonzales appeals fourteen of his thirty-one convictions, which include convictions for criminal confinement, intimidation, and sexual battery, and his sentence.¹

Gonzales raises two issues, which we revise and restate as:

- I. Whether fourteen of his convictions violate the prohibition against double jeopardy; and
- II. Whether the court abused its discretion in sentencing him.

We affirm in part and reverse and remand in part.

The relevant facts follow. Between January and May 2010, Gonzales attacked and sexually assaulted five women and two girls in the Indianapolis area. In January 2010, Gonzales approached D.M., who was carrying her baby and bags, in the hallway of her apartment building, began groping D.M. all over her body including her buttocks, and placed his hand inside D.M.'s pants. When D.M.'s baby began crying, Gonzales stopped the assault. On April 11, 2010, Gonzales approached C.A. from behind as she was about to unlock the door to her apartment, placed a gun to the back of her head, and told her to be quiet. Gonzales told C.A. to lift her shirt, and after C.A. refused Gonzales forced his hand down the front of C.A.'s pants and rubbed her vagina. Gonzales pulled his penis out of his pants, masturbated in front of her, and ejaculated.

On April 23, 2010, Gonzales attacked C.R. using a gun in the hallway of her apartment building when she arrived home from work, took forty to sixty dollars from her, inserted his penis into her vagina and anus, and told her that if she called the police

¹ Gonzales was convicted of two counts of child molesting as a class A felonies, two counts of rape as class A felonies, four counts of criminal deviate conduct as class A felonies, attempted criminal deviate conduct as a class A felony, five counts of criminal confinement as class B felonies, three counts of robbery as class B felonies, criminal confinement as a class C felony, seven counts of intimidation as class C felonies, three counts of sexual battery as class C felonies, criminal confinement as a class D felony, sexual battery as a class D felony, and public indecency as a class A misdemeanor.

he would come back and kill her. On April 24, 2010, Gonzales ran up behind E.V. as she opened her car door. Gonzales placed a gun in E.V.'s side, ordered her to unzip her pants, reached down into E.V.'s pants and digitally penetrated her vagina, and took twenty dollars from her. On May 4, 2010, Gonzales attacked thirteen-year-old D.C. in the hallway of the apartment building in which she lived, tried to pull her out of the building's front door, tried to touch the child's vagina but did not because she was moving, and ran away after D.C. started screaming.

On May 7, 2010, Gonzales grabbed H.O. as she walked from her car toward her apartment, ordered her into her car and got into the back seat behind her, and told her to drive someplace dark and turn off the motor. Gonzales ordered H.O. to climb between the seats into the backseat with him, to place the car seat in the front passenger seat, and to come closer to him. Gonzales then ordered H.O. to place his penis into her mouth, licked her vagina, and forced vaginal intercourse. Gonzales demanded H.O.'s money which was about forty to fifty dollars. On May 13, 2010, Gonzales used a gun and grabbed eleven-year-old N.V. in the child's apartment building, touched N.V.'s vagina underneath her panties, ordered N.V. to "suck his dick," placed his penis in her mouth and pushed her head. Transcript at 28. N.V. was crying and so nervous that she urinated on herself.

Between May and September 2010, the State charged Gonzales under seven different cause numbers with a total of thirty-nine offenses in connection with his assault of the seven victims,² including five counts under cause number 49G05-1005-FA-42367

² The charges under each of the seven cause numbers relate to a different victim. Gonzales was

(“Cause No. 367”) for the alleged offenses against C.A. including criminal confinement as a class B felony.³

On January 21, 2011, Gonzales pled guilty to all the charges against him. At his sentencing hearing, the State agreed to dismiss eight counts. In addition, the State recognized the mitigating factor that Gonzales accepted responsibility by pleading guilty and recommended that Gonzales receive a total sentence of 201 years. Gonzales asked the court to consider the fact that he accepted responsibility. The court acknowledged that Gonzales accepted responsibility and observed the “sheer ferocity, the number of victims, [and] the short period of time.” *Id.* at 96. The court found that the mitigating circumstances were “grossly outweighed” by the aggravating circumstances. *Id.* The trial court sentenced Gonzales to forty years each for his class A felony convictions against five of the victims, ordered five of the sentences for convictions against the different victims to be served consecutive to each other, and ordered all other sentences to be served concurrently. Thus, Gonzales received an aggregate sentence of 200 years.

I.

The first issue is whether fourteen of Gonzales’s convictions violate Indiana’s prohibition against double jeopardy.⁴ The State argues that Gonzales gained an

charged with at least one class A felony offense under five of the cause numbers.

³ Gonzales was also charged under Cause No. 367 with two counts of attempted criminal deviate conduct as class A felonies, two counts of intimidation as class C felonies, sexual battery as a class C felony, and public indecency as a class A misdemeanor. One of the criminal deviate conduct counts was later dismissed.

⁴ Gonzales challenges four convictions for criminal confinement as class B felonies against N.V., E.V., C.R., and C.A., one conviction for criminal confinement as a class D felony against D.M., seven convictions for intimidation as class C felonies against E.V., C.R., and C.A., and two convictions for sexual battery as class C felonies against H.O.

advantageous position by pleading guilty and thus waived the right to contest his convictions on appeal. The Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” IND. CONST. art. 1, § 14. In Richardson v. State, the Indiana Supreme Court developed a two-part test for Indiana double jeopardy claims, holding that “two or more offenses are the ‘same offense’ in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.” 717 N.E.2d 32, 49 (Ind. 1999).

Initially, we note that Gonzales fails to develop a cogent argument as to each of his fourteen challenged convictions that Indiana’s prohibition against double jeopardy requires reversal of the convictions, and thus he has waived his claims. See Shane v. State, 716 N.E.2d 391, 398 n.3 (Ind. 1999) (holding that the defendant waived argument on appeal by failing to develop a cogent argument).

In addition, we note that, generally, a defendant who pleads guilty is not allowed to raise a double jeopardy challenge to his convictions. McElroy v. State, 864 N.E.2d 392, 396 (Ind. Ct. App. 2007), trans. denied. Specifically, the Indiana Supreme Court has explained: “[D]efendants who plead guilty to achieve favorable outcomes give up a plethora of substantive claims and procedural rights, such as challenges to convictions that would otherwise constitute double jeopardy.” Id. (citing Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004) (citation omitted)). In Hayes v. State, on the day that Hayes’s jury trial

was to begin he “submitted an ‘open’ guilty plea to all four counts, i.e., he pled guilty to each of the charged offenses but the trial court was left with discretion over the length of the sentence.” 906 N.E.2d 819, 820 (Ind. 2009). The trial court then found Hayes guilty on all four counts but sua sponte merged judgment as to one count “under the actual evidence test.” Id. On appeal in Hayes, the Court cited Lee, 816 N.E.2d at 40, and noted that “it does not appear to us that it was necessary for the trial court to have merged Hayes’s [convictions].” Id. at 821. The Court also noted that Hayes “did not (and under Tumulty v. State,⁵ could not), appeal his convictions.” Id. at 821.

In McElroy, we observed that the defendant pleaded guilty as charged, but that he did so without the benefit of a plea agreement, that he did not have any charges reduced or dismissed, and that the State did not recommend that he receive any sort of cap or limit to his sentence. 864 N.E.2d at 396. As a result, we concluded that the defendant’s “guilty plea was not entered to achieve some sort of advantageous position” and that the defendant could raise a double jeopardy argument following his guilty plea. Id.

In this case, although Gonzales did not plead guilty pursuant to a plea agreement, we find that Gonzales did gain an advantageous position through his open plea. Specifically, the court and the State agreed that Gonzales faced a maximum available sentence of more than 600 years. At sentencing, the State agreed to dismiss eight of the counts against Gonzales and requested an aggregate sentence of 201 years. Because he

⁵ Tumulty v. State held that “a conviction based upon a guilty plea may not be challenged by motion to correct errors and direct appeal.” 666 N.E.2d 394, 395 (Ind. 1996) (quoting Weyls v. State, 266 Ind. 301, 362 N.E.2d 481, 482 (1977)). The proper avenue for challenging one’s conviction pursuant to a guilty plea is through filing a petition for post-conviction relief and presenting evidence at a post-conviction proceeding. Tumulty, 666 N.E.2d at 396.

pled guilty and achieved an advantageous position by doing so, we decline to address Gonzales's double jeopardy arguments on direct appeal. See Hayes, 906 N.E.2d at 820-822 (noting that the defendant pled guilty to four counts and that it was not necessary for the trial court to merge any counts on double jeopardy grounds); Gonzales v. State, 831 N.E.2d 845, 847 (Ind. Ct. App. 2005) (observing that the defendant received a benefit by pleading guilty pursuant to an agreement and noting that the trial court ordered a ten-year sentence where the court could have ordered a fifty-year sentence had the defendant gone to trial), trans. denied.

Nevertheless, although we decline to address Gonzales's double jeopardy arguments, we note that the State, in the summary of argument section of its appellate brief, states that "apart from his conviction confining C.A., none of the other convictions challenged by Gonzales violate double jeopardy principles." Appellee's Brief at 11. In addition, in the argument section of its brief, the State argues with respect to Gonzales's confinement conviction against C.A. that "Gonzales[] argues that his C.A. confinement conviction should be vacated [and argues] that his confinement of C.A. was no greater than necessary to commit his other crimes against her" and that "[t]he State submits that this argument may have some merit but that Gonzales' conviction should nevertheless be upheld for the reasons previously argued." Id. at 19.⁶ As the State essentially concedes that Gonzales's conviction for criminal confinement against C.A. as a class B felony under Count III of Cause No. 367 should be vacated, we reverse and remand with

⁶ Gonzales argues that his conviction under Cause No. 367 for the criminal confinement of C.A. as a class B felony should be vacated because the confinement "was no greater than that necessary to commit the Attempted CDC and Sexual Battery." Appellant's Brief at 20.

instructions to vacate this conviction and amend the abstract of judgment accordingly. In all other respects, we affirm Gonzales's convictions.⁷

II.

The next issue is whether the trial court abused its discretion in sentencing Gonzales. We review the sentence for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). A trial court abuses its discretion if it: (1) fails “to enter a sentencing statement at all;” (2) 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;” (3) enters a sentencing statement that “omits reasons that are clearly supported by the record and advanced for consideration;” or (4) considers reasons that “are improper as a matter of law.” Id. at 490-491. However, 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. at 491.

Gonzales argues that he “pled guilty as charged to seven serious felony cases without any plea agreement and the trial court abused its discretion in only giving a cursory nod to this mitigating circumstance.” Appellant's Brief at 23. Gonzales argues that remand for resentencing is appropriate because “[t]his Court cannot say with confidence that the trial court would have imposed the same sentence had it properly considered the substantial mitigating circumstances of such an open, all encompassing

⁷ We note that vacating Gonzales's conviction under Cause No. 367 for criminal confinement of C.A. as a class B felony will not alter Gonzales's aggregate sentence as the trial court ordered that sentence to be served concurrent with Gonzales's forty-year sentence for attempted criminal deviate conduct as a class A felony under that cause number.

plea.” Id. at 25. Gonzales also argues that while the court “did address [his] acceptance of responsibility in his gigantic guilty plea, [the court] gave such actual little weight to it, it was an abuse of discretion.” Id.

The determination of mitigating circumstances is within the discretion of the trial court. Rogers v. State, 878 N.E.2d 269 (Ind. Ct. App. 2007), trans. denied. The trial court is not obligated to accept the defendant’s argument as to what constitutes a mitigating factor, and a trial court is not required to give the same weight to proffered mitigating factors as does a defendant. Id. To the extent Gonzales argues that the trial court improperly assessed the weight to be assigned to his guilty plea as a mitigating circumstance, we note that the argument is, in essence, a request for this court to reweigh that factor, which we may not do. See Anglemeyer, 868 N.E.2d at 490-491. Based upon the record, we cannot say that the court abused its discretion in sentencing Gonzales.

For the foregoing reasons, except for Gonzales’s conviction for confinement of C.A. as a class B felony under Count III of Cause No. 367, we affirm Gonzales’s convictions and sentence.

Affirmed in part, reversed and remanded in part.

BAKER, J., and KIRSCH, J., concur.