MEMORANDUM DECISION

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

Jennifer L. Koethe
Navarre, Florida

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Steven J. Hosler
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Gina Lynn Shoffner,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

September 1, 2021

Court of Appeals Case No. 21A-CR-75

Appeal from the LaPorte Circuit Court

The Honorable Thomas Alevizos, Judge

Trial Court Cause No. 46C01-1902-F5-180

Robb, Judge.

Case Summary and Issues

[1] Gina Shoffner appeals her conviction of operating a motor vehicle while privileges are forfeited for life, a Level 5 felony. Shoffner raises multiple issues for our review, which we restate as: (1) whether her conviction was improper because she operated the motor vehicle during an "extreme emergency" as defined by Indiana Code section 9-30-10-18; (2) whether the trial court abused its discretion in sentencing her; and (3) whether her sentence is inappropriate considering the nature of her offense and her character. Concluding Shoffner failed to meet her burden to establish an extreme emergency, the trial court did not abuse its discretion, and the sentence is not inappropriate, we affirm.

Facts and Procedural History

[2] On February 8, 2019, Shoffner was alone at Michelle Kerrigan and Larry Phillips' home. Shoffner was on the phone with her mother when she heard her mother's dog yelp, her mother yell, and then the phone went dead. Shoffner testified that she believed her mother had fallen down the stairs because six months earlier her mother had fallen and fractured her knee. Shoffner attempted to call her mother back and tried calling her son and Phillips, but no one answered. Shoffner then decided to drive to her mother's house. Shoffner stated that she did not call 9-1-1 because she believed she could get to her mother quicker than they could. *See* Transcript, Volume II at 70. Similarly,

Shoffner did not run to her mother's home, which was only four blocks from Kerrigan's, because driving would be faster. *See id.*

[3] On Shoffner's way out of the house she passed a neighbor, Michelle Blonien, but did not ask Blonien to drive her to her mother's home. *See id.* at 96. Blonien testified that when she saw Shoffner the day of the incident, Shoffner was running down the stairs frantically, claimed something had happened to her mother, and was acting "[v]ery neurotic[, v]ery freaked out[, v]ery scared." *Id.* at 100. Shoffner was driving to her mother's house when Officer Adam Jaskowiak of the LaPorte City Police Department, pulled behind her.

[4] While driving behind Shoffner, Officer Jaskowiak ran the vehicle's license plate to check for arrest warrants and whether the car was reported stolen. The Bureau of Motor Vehicles ("BMV") records retrieved by his in-car computer listed Shoffner as the owner of the vehicle and indicated that she was a lifetime habitual traffic violator. Officer Jaskowiak followed Shoffner's vehicle for several blocks before the vehicle came to a stop on its own. While Officer Jaskowiak followed her, Shoffner did not speed, stopped at all stop signs, and came to complete stops at intersections.

[5] When Shoffner came to a stop at her mother's house, she attempted to get out of her vehicle, but Officer Jaskowiak turned his cruiser's lights on and ordered Shoffner to return to her vehicle. Officer Jaskowiak informed Shoffner that he stopped her because the owner of the vehicle was an habitual traffic violator.

Shoffner told Officer Jaskowiak that she was not the owner of the vehicle and stated her name was Virginia Wright but said that she did not have State Identification with her. Shoffner provided Officer Jaskowiak with a date of birth and social security number; however, his in-car computer found no match in the BMV records to the identifying information provided by Shoffner.[1] When Officer Jaskowiak returned to the vehicle he called out using Shoffner's real name and she responded immediately. Shoffner then confirmed her actual identity and was arrested. During Shoffner's interaction with Officer Jaskowiak, she made no claim that she was driving due to an emergency. *See id.* at 43.

[6] On February 11, 2019, the State charged Shoffner with operating a motor vehicle while privileges are forfeited for life, a Level 5 felony, and false informing, a Class B misdemeanor. The State later amended the charging information to include an habitual offender enhancement to the count of operating a motor vehicle while privileges are forfeited for life.

[7] Following a jury trial, Shoffner was found guilty as charged. Subsequently, Shoffner admitted to being an habitual offender. The trial court sentenced Shoffner to fifty-four months for operating a motor vehicle while privileges are forfeited for life and six months for false informing, to be served concurrently in the Indiana Department of Correction ("DOC") with no time suspended.

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[1] Officer Jaskowiak testified that the photo in the BMV records matched Shoffner. *See* Tr., Vol. II at 39-40.

Additionally, Shoffner was sentenced to two years under the habitual offender enhancement. Shoffner now appeals.[2]

Discussion and Decision

I. Sufficiency of Evidence

A. Standard of Review

[8] Shoffner argues that her conviction must be reversed because she believed an extreme emergency existed requiring her to operate a vehicle. *See* Appellant's Brief at 13. This is essentially a challenge to the sufficiency of the evidence. *See Moore v. State*, 702 N.E.2d 762, 763 (Ind. Ct. App. 1998).

[9] Our standard of reviewing a sufficiency claim is well-settled: we do not reweigh the evidence or assess the credibility of the witnesses. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). Instead, we consider only the evidence most favorable to the verdict and the reasonable inferences supporting it. *Id.* Therefore, the evidence need not overcome every reasonable hypothesis of innocence. *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007). "[W]e will affirm the conviction unless no reasonable trier of fact could have found the elements of the crime beyond a reasonable doubt." *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011).

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[2] Shoffner does not challenge the six-month sentence for false informing or the two-year sentence imposed for the habitual offender enhancement. *See* Appellant's Brief at 19.

B. Extreme Emergency

[10] To convict Shoffner of operating a motor vehicle while privileges are forfeited for life, the State was required to show that Shoffner operated a motor vehicle after her driving privileges were forfeited for life. Ind. Code § 9-30-10-17(a)(1). However, "it is a defense that the operation of a motor vehicle was necessary to save life or limb in an extreme emergency." Ind. Code § 9-30-10-18(a). Shoffner bears the burden to establish the defense by a preponderance of the evidence. *Id.* Whether there was an "extreme emergency" is a question of fact for the jury. *Cain v. State,* 844 N.E.2d 1063, 1066 (Ind. Ct. App. 2006).

[11] Here, Shoffner showed no signs of an emergency while driving. Officer Jaskowiak testified that while he followed her, Shoffner did not speed, stopped at all stop signs, and came to a complete stop at intersections. *See* Tr., Vol. II at 42. Once stopped, Shoffner failed to inform Officer Jaskowiak of any emergency requiring her to operate a vehicle. *See Moore*, 702 N.E.2d at 764 (noting that defendant "did not mention at any time during the stop that he was ill or in need of medical attention"); *see also Shrum v. State*, 664 N.E.2d 1180, 1183 (Ind. Ct. App. 1996) (rejecting defendant's extreme emergency defense because passenger who allegedly had a medical emergency that required defendant to drive "did not even tell [the defendant], or the police officer, that he was experiencing an emergent health condition"). Further, clear alternatives to driving existed. Shoffner was only four blocks away from her mother's home and could have traveled on foot, she could have called 9-1-1, or she could have

asked Blonien to drive her. *See Cain*, 844 N.E.2d at 1066 (finding that the defendant "had alternatives to continuing to drive").

[12] Given the evidence, the jury was justified in determining the circumstances with which Shoffner was faced did not rise to the meaning of an extreme emergency necessitating her operation of a motor vehicle. Accordingly, the evidence was sufficient to support the conviction.

II. Sentencing

A. Abuse of Sentencing Discretion

[13] Subject to the appellate courts' review and revise power, sentencing decisions are within the sound discretion of the trial court and are reviewed only for an abuse of that discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.* (citation omitted).

[14] Our supreme court explained in *Anglemyer*:

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering 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, or the sentencing statement omits reasons that are

> clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Id. at 490-91.

[15] Shoffner argues that the "trial court abused its discretion by sentencing [her] to fifty-four (54) months in the [DOC] with no time suspended[.]" Appellant's Br. at 19. Specifically, Shoffner contends that the following mitigating circumstances were offered to the trial court and supported by the record:

- She accepted responsibility.
- She did not cause or threaten serious harm to person or property.
- Substantial grounds tending to excuse or justify her offense existed.
- She was remorseful.

See id.

[16] Here, the trial court found no mitigating factors. *See* Tr., Vol. II at 156. The finding of a mitigating circumstance is discretionary and therefore, the trial court has no obligation to accept the defendant's argument as to what constitutes a mitigating circumstance or to give the weight to mitigating evidence that the defendant would. *Hunter v. State*, 72 N.E.3d 928, 935 (Ind. Ct. App. 2017), *trans. denied*. "An allegation that the trial court failed to identify or

find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Anglemyer*, 868 N.E.2d at 493. Shoffner has failed to meet this burden.

[17] First, Shoffner argues that she accepted responsibility because although she claimed she drove due to an emergency, she never denied to the trial court that she was driving. In *Healey v. State*, we stated:

> To accept responsibility for one's actions means more than merely admitting the deed, it also connotes a sense of accountability, a willingness to accept the legal consequences flowing from those actions. For this reason, the claim that accepting responsibility for criminal conduct should be considered a mitigating factor is overwhelmingly associated with a guilty plea, i.e., an admission of guilt and a willingness to be punished for that conduct.

969 N.E.2d 607, 617 (Ind. Ct. App. 2012), *trans. denied.* Shoffner did not plead guilty; rather, she merely admits to an undisputed fact, that she was operating a vehicle. This falls short of the sort of personal accountability that would compel mitigating consideration at sentencing. *See id*.

[18] Next, Shoffner contends that her conduct did not cause or threaten serious harm or damage to person or property. However, we have previously stated that lack of violence is not a circumstance requiring mitigating weight for conviction of a crime that does not contain violence as an element. *See Banks v. State,* 841 N.E.2d 654, 659 (Ind. Ct. App. 2006) (finding no abuse of discretion

where trial court did not consider non-violence as mitigator for a crime that by definition is not a crime of violence), *trans. denied.*

[19] Shoffner also claims that even though the jury did not find her not guilty by reason of extreme emergency, she offered other substantial grounds tending to excuse or justify her offense. However, the trial court stated that it did not "believe a single thing that she said or her witness said." Tr., Vol. II at 153. "Without evidence of some impermissible consideration by the court, we accept its determination of credibility." *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002). Shoffner's argument is merely a request to reweigh the evidence which we will not do. *Bailey*, 907 N.E.2d at 1005.

[20] Lastly, Shoffner contends that her remorse is a mitigating factor. Remorse has been recognized as a valid mitigating circumstance. *Hape v. State*, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009), *trans. denied*. But the trial court "possesses the ability to directly observe a defendant and can best determine whether a defendant's remorse is genuine." *Phelps v. State*, 969 N.E.2d 1009, 1020 (Ind. Ct. App. 2012), *trans. denied*. A trial court's assessment of a defendant's proclaimed remorse is similar to a determination of credibility. *See Pickens*, 767 N.E.2d at 534-35. Therefore, "[s]ubstantial deference must be given to the trial court's evaluation of a defendant's remorse." *Phelps*, 969 N.E.2d at 1020. Here, the trial court was in the best position to assess any remorse exhibited by Shoffner and determined it was not a mitigating factor. Nothing in the record convinces us to disturb this determination.

[21] We conclude the trial court did not abuse its discretion by failing to find Shoffner's proffered mitigating circumstances.

B. Inappropriate Sentence

[22] Shoffner also contends her sentence was inappropriate in light of the nature of the offense and her character. Indiana Appellate Rule 7(B) provides, "The 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." Sentencing decisions rest within the discretion of the trial court and, as such, should receive considerable deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). "Such deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[23] The defendant bears the burden of demonstrating his sentence is inappropriate under the standard, *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006), and we may look to any factors in the record for such a determination, *Reis v. State*, 88 N.E.3d 1099, 1102 (Ind. Ct. App. 2017). Ultimately, "whether we regard a sentence as [in]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." *Cardwell*, 895 N.E.2d at 1224.

[24] The advisory sentence is the starting point our legislature has selected as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. The sentencing range for a Level 5 felony is one to six years with an advisory sentence of three years. Ind. Code § 35-50-2-6(b). Here, the trial court sentenced Shoffner to fifty-four months – or four and one-half years – to be served in the DOC. When evaluating a defendant's sentence that deviates from the advisory sentence, we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence. *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017), *trans. denied*.

[25] The nature of the offense is found in the details and circumstances of the commission of the offense and the defendant's participation in it. *Washington v. State*, 940 N.E.2d 1220, 1222 (Ind. Ct. App. 2011), *trans. denied*. Here, Shoffner's conduct was not severe, and this consideration alone would likely not justify a sentence greater than the advisory. However, we must also consider the character of the offender.

[26] The "character of the offender" portion of the Rule 7(B) standard permits a broader consideration of the defendant's character. *Anderson v. State*, 989

N.E.2d 823, 827 (Ind. Ct. App. 2013), *trans. denied*. "A defendant's life and conduct are illustrative of his or her character." *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018), *trans. denied*. And the trial court's recognition or non-recognition of aggravators and mitigators serves as an initial guide in determining whether the sentence imposed was inappropriate. *Stephenson v. State*, 53 N.E.3d 557, 561 (Ind. Ct. App. 2016).

[27] When considering the character of the offender prong of our inquiry, one relevant consideration is the defendant's criminal history. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). "The significance of a criminal history . . . varies based on the gravity, nature, and number of prior offenses in relation to the current offense." *Id.* And we have held that "[e]ven a minor criminal record reflects poorly on a defendant's character[.]" *Reis*, 88 N.E.3d at 1105.

[28] The trial court found Shoffner's extensive criminal history to be an aggravating factor. *See* Tr., Vol. II at 155. Shoffner's criminal history includes eight felony and fourteen misdemeanor convictions. *See* Appendix of Appellant, Volume 2 at 174-83. Further, although the number of her convictions alone is significant, the majority of her previous convictions are also driving offenses. Shoffner has been convicted of operating while intoxicated eleven times and, including this case, has been convicted of driving while an habitual traffic violator four times. *Id.*

[29] Therefore, given the nature of the offense *and* the character of the offender, we cannot say that Shoffner has persuaded us her sentence is inappropriate.

Conclusion

[30] We conclude there was sufficient evidence that no extreme emergency existed. Further, the trial court did not abuse its discretion in sentencing Shoffner and, after giving due consideration to the nature of Shoffner's offense and her character, we conclude her fifty-four-month sentence is not inappropriate. Accordingly, we affirm.[3]

[31] Affirmed.

Bradford, C.J., and Altice, J., concur.

[3] On August 13, 2021, Shoffner's counsel filed a Motion to Withdraw Appearance which will be granted simultaneously with this opinion. On August 25, 2021, Shoffner tendered a pro se motion for leave to proceed with a supplemental brief but at the time of its tendering Shoffner was still represented by counsel therefore her motion was not filed. However, even if her motion had been filed the issues raised are premature.