MEMORANDUM DECISION

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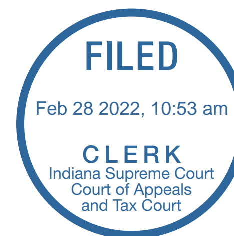

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IN THE
COURT OF APPEALS OF INDIANA

Shane Lewis Allen,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 28, 2022

Court of Appeals Case No. 21A-CR-1773

Appeal from the Allen Superior Court

The Honorable John C. Bohdan, Magistrate

Trial Court Cause No. 02D04-2006-CM-1592

Baker, Senior Judge.

Statement of the Case

[1] In response to widespread reporting and social media coverage of George Floyd's death while in police custody, many people across the country understandably took to the streets in staged, large-scale demonstrations to

protest against that kind of law enforcement behavior. Protesters throughout Indiana likewise took to the streets to protest and express public outrage over the fact and manner of Floyd's death, and others came from outside this state to participate here. This appeal asks us to examine the consequences which follow when those protests turn from peaceful gatherings to widespread riotous, violent, and criminal behavior where officers' lawful attempts to deescalate matters are disregarded.

[2] Shane Lewis Allen, a Michigan resident, appeals from his convictions of one count each of Class A misdemeanor resisting law enforcement,[1] Class A misdemeanor refusal to leave an emergency area,[2] and Class B misdemeanor false informing,[3] arising from just such a protest that regressed into chaos, lawlessness, violence, and criminal behavior. While we recognize citizens' rights to peacefully protest to express their frustrations, we cannot condone criminal behavior that occurs when the fervor of a protest intensifies to riot-like conditions and officers' lawful orders to disperse the gathering, to ensure that public safety and public services are restored, are ignored. The jury agreed and determined that Allen engaged in criminal behavior in association with the protest; therefore, finding no error here, we affirm.

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[1] Ind. Code § 35-44.1-3-1(a) (2019).

[2] Ind. Code § 35-44.1-4-5 (2012).

[3] Ind. Code § 35-44.1-2-3(d) (2016).

Issues

[3] The following issues are presented for our review.

> I. Did the trial court abuse its discretion by admitting Exhibit Number 4 into evidence without objection?
>
> II. Is there sufficient evidence to support Allen's convictions for resisting law enforcement and refusal to leave an emergency incident area?
>
> III. Is Allen's sentence inappropriate in light of the nature of his offenses and his character?

Facts and Procedural History

[4] The facts supporting Allen's convictions follow. On the evening of May 29, 2020, a protest in response to George Floyd's death had been organized in downtown Fort Wayne, Indiana. However, the sheer number of protesters, each with a zeal to seek justice, combined with the fever pitch that ignited an extreme range of emotions, regressed to the point of riot-like conditions as people converged in Fort Wayne. Protesters were yelling, screaming, honking the horns of their vehicles, and throwing objects. Cars were parked in the middle of streets, some of which were left running. Individuals were playing music as loudly as they could, including a song called "F* *k the Police." Tr. Vol. II, p. 42.

[5] At around 7:00 p.m., Fort Wayne Police Department Detective Brian Martin was called to the scene initially described as civil unrest in downtown Fort Wayne. It took him longer than normal to reach downtown due to the volume

of cars and people walking in the streets bearing signs and shouting. Once Detective Martin arrived at the command post that had been set up near the Allen County Jail because police were unable to access the City-County Building or the Fort Wayne Police Department, he put on protective equipment. While he was readying himself, the civil unrest became violent with people yelling, screaming, honking horns, and throwing objects, including frozen water bottles, rocks, and other things. Protesters had taken stop signs to use as shields, put on masks, and found pylons to carry around. A large group of protesters were concentrated around Freimann Park and Freimann Square, completely shutting down the flow of traffic in the area. Emergency vehicles were unable to come and go because the area was gridlocked. For example, fire trucks were prevented from crossing town, and ambulances were prevented from reaching nearby St. Joseph Hospital.

[6] Officers were required to gather into groups of six to eight and form lines, attempting to disperse the crowd. Every time this happened, a large crowd of about fifty to one hundred people would splinter off into small groups and circle back around the officers. Several people were arrested due to their presence in the emergency zone even after being ordered to leave. Others were arrested for behavior such as criminal recklessness, criminal mischief, disorderly conduct, and resisting law enforcement. This disobedience to law enforcement officers' commands was evidence supporting Allen's testimony that "the sentiment towards the police [has] been gradually declining." Tr. Vol. II, pp. 187-88.

[7] Detective Martin was stationed on foot at the Freimann Square area until nearly midnight. He was instructed to prevent people from entering the courthouse lawn, from damaging nearby buildings, and committing other forms of vandalism or looting. Announcements were made from a public-address system frequently instructing people that the area was an emergency incident area and that it was unlawful for them to continue to remain there. At that time, some of the people in the Freimann Square area began to leave.

[8] Shortly after midnight, Allen and two others approached Freimann Square on foot and became argumentative with officers as they approached. Allen and the others were told to leave, but they challenged the order by continuing to walk towards Freimann Square. The public address system continued to play the announcement to disperse. Detective Martin identified Allen as the leader of the group because he was more vocal than the rest, and Detective Martin and Officer Kirk Franceus ordered Allen to "just turn around and leave." *Id.* at 51, 134.

[9] Allen was repeatedly commanded to leave, but he refused. Instead, he continued to challenge the officers and was eventually told by Officer Franceus that he was going to be arrested. Allen continually attempted to pull away after Officer Franceus approached, and Allen had to be brought down to the ground by three or four officers, who struggled to arrest him. Allen attempted to pull equipment off a police officer's uniform and eventually removed the officer's weapon, knocking it to the ground. The helmet was knocked off another officer's head during the melée. Allen's behavior stopped only when he was

tased and handcuffed. These events occurred in approximately one minute to a couple of minutes before officers were able to effect the arrest.

[10] Once Allen was in handcuffs, Officer Franceus asked Allen for his name. Allen replied that his name was Duncan Lemp.[4] At the time, Officer Franceus believed that Duncan Lemp was Allen's true identity but later determined it was not. Allen eventually gave his true identity after learning he would not be able to bond out if he were booked into the jail as a "John Doe." *Id.* at 153.

[11] The State charged Allen with one count each of Class A misdemeanor resisting law enforcement, Class A misdemeanor refusal to leave an emergency area, and Class B misdemeanor false informing. Allen took the stand during the jury trial to testify to his version of the events leading to his arrest.

[12] Although Allen never told police officers at the time that he was a reporter, Allen testified that he had attended a B.L.M. event in Elkhart, Indiana, to report on it, after which he received a text about the protest in Fort Wayne. Allen stated that "as a reporter" on social media the events taking place in Fort Wayne were "much more sensational." *Id.* at 187. Allen went to Fort Wayne with two others "to report on it because people have a right to know these things." *Id.* Upon his arrest, he gave the name Duncan Lemp because he knew

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[4] Duncan Lemp was the name of an individual who was fatally shot on March 12, 2020, in a no-knock police raid at Lemp's home in Potomac, Maryland, as they attempted to serve a warrant. The officers' actions were found to be reasonable under the circumstances. *See* https://www.montgomerycountymd.gov/SAO/Resources/Files/REPORTMarch2020Event.pdf (last visited February 16, 2022).

that in certain situations as an "activism campaign, a lot of people were giving that name to police when they had interactions with them." Tr. Vol. II, p. 195. He believed that, while a lot of attention was given to the police-action deaths of George Floyd and Breonna Taylor, "Duncan Lemp kind of got swept under the rug." *Id.* Though Allen testified on direct examination that he had no problem with police officers, he testified on cross examination that prior to the night in question he had posted a statement on social media saying, "F**k the police. What a tasteless joke. All cops are bad. I have said it before and I will keep on saying it." *Id.* at 203. Additionally, Detective Martin testified over Allen's objection that he had reviewed Allen's Facebook account postings, and, at some point in June of 2019, Allen had made a Facebook post which read, "I'm in the f**k the police business, Cops***ers." Tr. Vol. II, p. 69; Exhibit Vol. 1, p. 5 (State's Exhibit 3).

[13] At the conclusion of the trial, Allen was found guilty on all counts. The trial court noted that though Allen did not object to serving his sentence on electronic monitoring, there were practical problems in implementing that sentencing option because Allen lived in another state. Allen was sentenced to concurrent sentences of 365 days with 275 days suspended for both resisting law enforcement and refusing to leave an emergency area, along with a 180-day concurrent sentence with 90 days suspended for his false informing conviction. The executed portion of each of these sentences was to be served in the Allen County Confinement Facility. Allen now appeals.

Discussion and Decision

I. Admission of Exhibit Number 4

[14] State's Exhibit Number 4 is a cell phone video recording Allen took of his arrest for the present offenses, which he later posted to social media. On appeal, Allen challenges the court's decision to admit the exhibit, claiming that the court abused its discretion by admitting evidence to show motive and intent, causing "undue prejudice" prohibiting "Allen from receiving a fair [trial]." Appellant's Br. p. 13.

[15] It is well established that a trial court has broad discretion in ruling on the admissibility of evidence, which will be disturbed only upon a showing of an abuse of that discretion. *Cutshall v. State*, 166 N.E.3d 373, 378 (Ind. Ct. App. 2021). Equally well established is that an abuse of discretion occurs when the court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id.* Further, even when we find an abuse of discretion by admission of the challenged evidence, we will not reverse the judgment if the admission of evidence constituted harmless error. *Id.*

[16] The record reveals that Allen filed a motion for a preliminary ruling on the admissibility of the sum total of the State's exhibits as disclosed in the State's notice of Indiana Evidence Rule 404 (b) evidence. *See* Appellant's App. Vol. II, pp. 70-79. After taking the matter under consideration, the court preliminarily concluded that, subject to a proper foundation being made, only State's Exhibit

Number 4 would be admissible, with the balance of the items ruled either too prejudicial under the balancing test of Indiana Evidence Rule 403, or simply not relevant. *See id.* at 93-96.

[17] During the trial, the State first referred to State's Exhibit Number 4 in its opening statement with Allen's counsel making a similar reference during his opening statement, saying,

> [Y]ou can hear this in the video, he's got another camera, a professional camera and you can hear him taking pictures of the other officers. He does that. There's no issues.

Tr. Vol. II, p 33.

[18] Next, when the State offered Exhibit Number 4 into evidence, the court asked Allen's counsel if there was any objection to its admission. Allen's counsel explicitly stated, "[p]rovided it's the full video, Judge, I have no objection." *Id.* at 132-33. The State confirmed for the court that it was the full video, after which the court said, "All right. We'll show without objection State's 4 is admitted into evidence." *Id.* at 133.

[19] During cross-examination of Fort Wayne Police Officer Kirk Franceus, the witness through which State's Exhibit Number 4 was identified, offered, and admitted, Allen's counsel asked the officer if he recalled Allen recording his confrontation with the officers at the time. That recording was State's Exhibit Number 4, and the officer indicated that he did remember Allen recording them. Allen's counsel later played portions of the recording for the jury during closing argument, pausing it to emphasize the exchanges between Officer

Franceus and Allen in his argument. After Allen's counsel experienced difficulties in playing the video, Allen's counsel stated, "You're gonna [sic] have the video in your deliberation room. If you can watch it, please watch that." *Id.* at 224.

[20] We find that, despite Allen's failure to object at trial, and his decision not to raise fundamental error on appeal, the court did not abuse its discretion by admitting State's Exhibit Number 4 in evidence. First, the court's ruling on what could be characterized as a motion in limine related to the State's exhibits, was a preliminary ruling and the court's order deemed it such. We have consistently held that the pre-trial denial of a motion in limine is a preliminary ruling, the denial of which is insufficient to preserve error for appellate review absent a contemporaneous objection made at trial when the evidence is offered. *See Earlywine v. State*, 847 N.E.2d 1011, 1013 (Ind. Ct. App. 2006). The failure to object at trial to the admission of evidence results in waiver of the issue on appeal. *Stephens v. State*, 735 N.E.2d 278, 281 (Ind. Ct. App. 2000).

[21] Not only did Allen's counsel fail to object, but also counsel explicitly agreed to State's Exhibit 4's admission, referred to the exhibit in his opening and closing arguments and during cross-examination of the proponent of the exhibit, and invited the jury to watch the exhibit during deliberations. The issue is waived for our review.

[22] Waiver notwithstanding, Allen's claim fails. The State argued and the court agreed that State's Exhibit Number 4 was relevant to Allen's motive and/or

intent. The cell phone video was a recording of the confrontation between Allen and Officer Franceus and other officers leading up to his arrest. The officer testified as to that encounter, and Allen took the stand and gave his account of that confrontation. Consequently, the evidence is cumulative of that testimony. So, the error, if any, would be harmless. Assuming for the sake of argument that State's Exhibit Number 4 was erroneously admitted, we could not grant Allen the relief he seeks. If erroneously admitted evidence is cumulative, the admission of such evidence is harmless error for which we will not reverse a conviction. *See Teague v. State*, 978 N.E.2d 1183, 1189 (Ind. Ct. App. 2012). The trial court did not err.

II. Sufficiency of the Evidence

[23] Allen challenges the sufficiency of the evidence of two of his convictions; namely, resisting law enforcement and refusal to leave an emergency incident area. As best we can tell, Allen contends, without citations to the record, that the evidence is insufficient as respects the resisting law enforcement charge because, "When one of the officers was taking [Allen] into custody for refusing to leave the scene of an emergency incident area, [Allen] resisted his arms being placed behind his back." Appellant's Br. p. 14. For the refusal to leave an emergency incident area charge, Allen argues, again without citation to the record, that he "was not in an area deemed as an "emergency incident area[.]" *Id.* His argument follows that, "Allen was just simply in the area with other acquaintances. The threat of any future destruction or threat to the safety of other[s] or destruction of property against the city of Fort Wayne had long been

negated and abated, and thus, the initial stop, detainment, and arrest was unlawful." *Id.*

[24] When we review claims challenging the sufficiency of the evidence, we examine only the probative evidence and reasonable inferences that support the verdict. *Morgan v. State*, 22 N.E.3d 570, 573 (Ind. 2014). This means we will not assess witness credibility nor reweigh the evidence. *Id.* Rather, we consider only the evidence most favorable to the judgment and will affirm the conviction unless no reasonable finder of fact could find the elements of the crime proven beyond a reasonable doubt. *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000).

[25] To establish that Allen committed Class A misdemeanor refusal to leave an emergency incident area, the State was required to prove beyond a reasonable doubt that Allen, a non-firefighter, knowingly or intentionally, refused to leave an emergency incident area immediately after being requested to do so by a firefighter or law enforcement officer. *See* Ind. Code § 35-44.1-4-1.5(2016). An "emergency incident area" is defined as "a specific distance less than one hundred and fifty (150) feet in all directions from the perimeter of the emergency incident that is articulated by a law enforcement officer." Ind. Code § 35-44.1-4-2(2) (2016). Indiana Code section 35-44.1-4-1.5[5] provides a non-exhaustive list of events defined by statute as an "emergency incident." Of those events defined, at least three could be applicable here: 1) a crime scene; 2)

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[5] The Indiana Legislature could conceivably add violent protests to the list. But that has not yet happened.

a police investigation; or 3) a location where an individual is being arrested. *See* Ind. Code § 35-44.1-4-1.5(4),(5),(6).

[26] To establish that Allen committed Class A misdemeanor resisting law enforcement, the State was required to prove beyond a reasonable doubt that Allen forcibly resisted, obstructed, or interfered with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of his duties. *See* Ind. Code § 35-44.1-3-1(a).

[27] As for Allen's conviction for refusal to leave an emergency incident area, Allen does not challenge the mens rea element, that the riot-like conditions on that evening in that area would constitute an emergency incident, or the fact that he would have been within 150 feet of that area. Instead, he argues that the emergency incident had ended by the time he arrived at the scene.

[28] The record, however, reflects that when officers attempted to disperse the crowd, splinter groups would surround officers trying to break them up and would throw objects at officers, honk car horns loudly, and leave their vehicles in the roadways, blocking ingress and egress. Announcements were frequently made from a public-address system informing people to leave, that the area was an emergency area, and that it was unlawful for them to remain in the area.

[29] The statute allows law enforcement officials to declare when an emergency incident has occurred and to order people away from the area. The determination of whether the statute was followed, and whether the elements of the crime have been proven is a matter for the jury, which in this case, found

against Allen. The evidence showed that Officer Franceus ordered Allen to leave the emergency incident area, and Allen refused. The officers were present because the civil unrest had not yet subsided. His argument on appeal that the emergency had abated by the time he arrived at that location, is merely an attempt to have us reweigh his testimony against that of Officer Franceus, a task we are forbidden to undertake. *See Morgan*, 22 N.E.3d at 573.

[30] As for his conviction of resisting law enforcement, we observe that an officer may lawfully arrest an individual if the officer has probable cause to believe that an individual committed a crime. *See Fentress v. State*, 863 N.E.2d 420, 423 (Ind. Ct. App. 2007). Here, Officer Franceus and Officer Martin had probable cause to believe that Allen had committed the crime of refusing to leave an emergency incident area. Allen was ordered to leave and did not obey the officers' commands. When officers attempted to arrest Allen for his non-compliance, he repeatedly tried to pull himself away from the arresting officers, and it took three or four officers to subdue him. During the skirmish, Allen was able to take possession of an officer's weapon and throw it on the ground. Another officer's helmet was knocked off during the struggle. The officers had to use a taser to stop Allen's resistance. Because he was lawfully under arrest, it was a violation of the statute for Allen to resist the officers in that way. *See Tyson v. State*, 140 N.E,3d 374, 377 (Ind. Ct. App. 2020) (forcible resistance can be actual physical contact or active threat of use of strength, power, or violence), *trans. denied*.

[31] We conclude that there was sufficient evidence to support Allen's convictions of both refusing to leave an emergency incident area and resisting law enforcement.

III. Inappropriate Sentence

[32] Allen argues that his sentence is inappropriate in light of his character and the nature of his offenses, seeking relief under Indiana Appellate Rule 7(B). Allen says that "[a]s an individual who is not a citizen of the jurisdiction, with a [prior] conviction that almost falls outside of the ten (10) year admissible evidentiary prejudicial [e]ffect for propensity of offenses, the sentence handed down runs afoul of the acts committed." Appellant's Brief p. 15. After Allen's conviction on all three counts, the trial court sentenced him to concurrent sentences of 365 days with 275 days suspended for both resisting law enforcement and refusing to leave an emergency area, along with a 180-day sentence concurrent with 90 days suspended for his false informing conviction.

[33] Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Appellate Rule 7(B), which provides that a 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). The defendant has the burden of persuading us that his

sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

[34] "Whether we regard a sentence as inappropriate 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 facts that come to light in a given case." *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017) (citing *Cardwell v. State*, 895 N.E.2d 1219, 1224) (Ind. 2008) (internal quotations omitted)). "The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate." *Id.*

[35] Deference to the trial court "prevail[s] 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)." *Id.* (quoting *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015)). The Court's role under Rule 7(B) is to "leaven the outliers," *Cardwell*, 895 N.E.2d at 1225, and we reserve our 7(B) authority for exceptional cases. *Taylor v. State, 86 N.E.3d 157, 165 (Ind. 2017), reh'g denied*.

[36] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Kunberger v. State*, 46 N.E.3d 966 (Ind. Ct. App. 2015); *Thompson v. State*, 5 N.E.3d 383 (Ind. Ct. App. 2014), *trans denied*. Here, the sentencing range for a Class A misdemeanor is a fixed term of not more than

one year. *See* Ind. Code § 35-50-3-2 (1977). The sentencing range for a Class B misdemeanor is a fixed term of not more than one hundred eighty days. *See* Ind. Code § 35-50-3-3 (1977). Further, when considering whether a sentence is inappropriate, appellate courts may consider all aspects of the penal consequences imposed by the trial judge in sentencing the defendant, including whether all or part of the sentence is suspended. *See Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010). Allen received the maximum sentence for each of his crimes, to be served concurrently, but with the bulk of the sentences suspended to probation.

[37] The "nature of offense" compares the defendant's actions with the required showing to sustain a conviction under the charged offense, *Cardwell*, 895 N.E.2d at 1224, while the "character of the offender" permits for a broader consideration of the defendant's character. *Douglas v. State*, 878 N.E.2d 873, 881 (Ind. Ct. App. 2007). When considering the character of the offender, one relevant fact is the defendant's criminal history, and "[t]he significance of criminal history varies based on the gravity, nature, and number of prior offenses in relation to the current offense." *Garcia v. State*, 47 N.E.3d 1249, 1251 (Ind. Ct. App. 2015), *trans. denied*. 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).

[38] Here, we find nothing exceptional in Allen's sentences to warrant correction. As for the nature of the offenses, Allen arrived at the scene of a protest that had

become the setting for rioting and violence. He refused to obey the officers' commands to leave the area that had been deemed an emergency incident area. Public broadcasts over loudspeakers further announced that the area was one that individuals were commanded to evacuate and avoid, as their presence there was unlawful. Allen chose to continue toward the area and to challenge the officers' lawful commands. Officers were required to abandon their primary duty to re-establish lawful behavior in that area to enforce Allen's obedience to their commands. Allen's resistance was so forceful it required three or four officers to effect his arrest. During his struggle with the officers, Allen was able to strip an officer of his weapon and another officer's helmet was knocked off. Allen then lied to police officers about his identity in an effort to publicize the name Duncan Lemp, whose death he believed was under reported.

[39] As for Allen's character, the record before us establishes that he has a prior conviction for resisting law enforcement. "Even a minor criminal history is a poor reflection of a defendant's character." *Moss v. State*, 13 N.E.3d 440, 448 (Ind. Ct. App. 2014). Allen argues that his sentence is inappropriate because his prior "conviction that almost falls outside of the ten (10) year admissible evidentiary prejudicial affect for propensity of offenses" was improperly considered and that "the sentence handed down runs afoul of the acts committed." Appellant's Br. p 15. Allen seemingly relies on the language of Indiana Evidence Rule 609(b), which prohibits impeachment of witnesses by use of a prior conviction more than ten years old, though he does not cite to the

Rule. Nonetheless, the Rule is inapplicable in sentencing, and his argument along those lines is unavailing. *See* Ind. Evidence Rule 101(d)(2).

[40] Even so, Allen's prior conviction for resisting law enforcement demonstrates that Allen has not been deterred from engaging in similar behavior, leading to his current conviction. We have no way of determining from the record how old Allen's prior conviction is aside from his assertion in his brief. He has not directed us to a record citation. The court correctly concluded that Allen's criminal history, nevertheless, was significant enough to reflect negatively upon his character.

[41] Allen has not met his burden of showing us that his sentence, which was largely suspended to probation, warrants a downward revision on appeal. The court did not err.

Conclusion

[42] In light of the foregoing, we conclude that there was no error in the admission of State's Exhibit 4, that there is sufficient evidence to support Allen's convictions of resisting law enforcement and refusal to leave an emergency incident area, and that his sentence is not inappropriate. The trial court is affirmed in all respects.

[43] Affirmed.

Najam, J., and Weissmann, J., concur.