

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

John B. Norris
Vandivier Norris & Solomon
Franklin, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Supervising Deputy Attorney
General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Zakari E. Miller,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 1, 2022

Court of Appeals Case No.
21A-CR-2016

Appeal from the Johnson Superior
Court

The Honorable Lance D. Hamner,
Judge

Trial Court Cause No.
41D03-1906-F3-47

Najam, Judge.

Statement of the Case

[1] Zakari E. Miller appeals his conviction for criminal confinement, as a Level 3 felony, the finding that he used a firearm in the commission of that offense, and his sentence following a bifurcated jury trial. Miller raises six issues for our review, which we restate as the following five issues:

1. Whether Miller preserved his argument that the trial court erred when it permitted the State to amend its information to allege a use-of-firearm enhancement after the omnibus date.
2. Whether the trial court abused its discretion when it denied Miller's motion for a mistrial.
3. Whether the State presented sufficient evidence to support Miller's conviction and enhancement.
4. Whether the trial court abused its discretion when it sentenced Miller.
5. Whether Miller's sentence is inappropriate in light of the nature of the offense and his character.

[2] We affirm.

Facts and Procedural History

[3] In November 2018, Miller and Abby Organ were married after about one month of dating. Abby worked the 6:00 p.m. to 6:00 a.m. shift as an EMT for

the Greenwood Fire Department, and Miller was unemployed. They lived together with Abby's young daughter in an apartment in Greenwood.

- [4] After returning home from her shift the morning of May 29, 2019, Abby went to bed, woke up around 3:00 p.m., picked up her daughter from school, and went to her parents' nearby home. Miller then called Abby. He "was screaming and yelling and telling [her that she] needed to get home now." Tr. Vol. 2 at 164. Abby's mother, Stacy Stahl, overheard Miller saying, "what the f*ck are you doing, why are you there?" *Id.* at 134. Abby then left to return to her apartment and left her daughter in the care of the daughter's uncle. Stacy went to the gym.
- [5] Upon returning to the apartment, Miller "start[ed] an argument about [Abby] being gone." *Id.* at 167. Abby "was done with it," so she walked back to her bedroom and shut the door behind her. *Id.* Miller followed her and "hit the door, which put a hole in the door" and opened it. *Id.* He then "shoved" Abby down between the bed and the closet door. *Id.* Abby was "scared" and "scoot[ed her] way back to the corner, by the closet." *Id.* at 168-69. Miller obtained a firearm and began "pacing back and forth" in front of the door to the room while holding the firearm and "stating that he's done with this[] and he's done dealing with it." *Id.* at 169. Abby interpreted Miller's statements to mean that "he was going to shoot [her]," and she thought she "was going to die." *Id.* Miller then "walk[ed] over" to within about five feet of Abby and "put[] the gun to [her] head," repeating that "he was just done." *Id.* at 170.

- [6] Abby was too scared to move, but she managed to get Stacy on her phone, and Stacy in turn called 9-1-1. Law enforcement officers arrived at the apartment shortly thereafter and knocked on the apartment door. In the bedroom, Miller asked, “who is at the door?” *Id.* at 172. He then “unloaded the weapon” by taking the magazine out and “pull[ing] back the slide[] so the bullet flew out.” *Id.* Miller opened the apartment door, and officers immediately detained and arrested him.
- [7] After officers read Miller his *Miranda* rights, Miller inconsistently stated that the bedroom door had previously been broken and also that Miller had just kicked it in, and he inconsistently stated that he had unloaded the firearm “in the heat of [the] argument” and also that he had unloaded it when “he heard it was the police” knocking on the door. *Id.* at 199, 228. He also told officers that he “had been deployed three times” to “Kuwait, Afghanistan[,] and Iraq,” when in fact Miller has “never left the United States.” Tr. Vol. 3 at 5-6.
- [8] The State charged Miller with Level 3 felony criminal confinement and Level 6 felony pointing a firearm. While out on bail, Miller missed a scheduled court hearing. The court issued an arrest warrant, and law enforcement officers in Maine located Miller there in the course of a traffic stop. An Indiana officer then extradited Miller back to Indiana.
- [9] The court set Miller’s omnibus date for August 14, 2019. Nonetheless, on July 1, 2021, twelve days before the commencement of Miller’s trial, the State moved to amend the charging information to add as an enhancement that

Miller had used a firearm in the commission of the criminal confinement.

Miller objected to the State's proposed amendment on the ground that it would be a double jeopardy violation to add the enhancement to the charges and also because the State's amendment was untimely. On the latter basis, Miller argued only that the State had not "identified good cause . . . for the late amendment," and Miller expressly represented to the court that he was "not asking . . . for a continuance to remedy the late filing of this enhancement." Appellant's App. Vol. 2 at 43. The trial court overruled Miller's objection and permitted the amendment.

[10] The trial court bifurcated Miller's jury trial between the two felony charges and the alleged enhancement. During the first phase, the State called Abby as a witness, and she recounted the events of May 29, 2019. Thereafter, the jury found Miller guilty of criminal confinement and not guilty of pointing a firearm.

[11] During the second phase, the State again called Abby as a witness. During that testimony, defense counsel asked her if Miller "cock[ed]" the firearm "to where it was ready to fire," and Abby responded, "[t]here was one in the chamber, yes." Tr. Vol. 3 at 66. On re-direct, she acknowledged that she had not been asked that question during the first phase of Miller's trial.

[12] During deliberations on the enhancement, a juror submitted the following question to the court:

The victim stated only in the enhancement that the defendant . . . “[c]hambered[”] a round in her presence. This is a problem in relation to my decision of the credibility of the victim, since it was not mentioned previously. Can I change my decision on the guilt for count 1[?]

Id. at 71. The trial court informed the juror that “the answer is no, you cannot change the verdict.” *Id.* at 68. Miller then moved for a mistrial, which the trial court denied. Thereafter, the jury found Miller guilty on the enhancement.

[13] Following a sentencing hearing, the trial court found as aggravating circumstances that Miller left the jurisdiction while out on bail and had to be extradited back to Indiana and that Miller lied about his military service with the arresting officers. As mitigating circumstances, the court found that Miller had a limited criminal history;¹ that, while Miller did require extradition, he “didn’t flee and commit new crimes”; that Miller’s character and attitude indicate that he is unlikely to commit another crime; that Miller was willing to participate in therapy; that the crime was a result of circumstances unlikely to recur; that Miller was likely to respond affirmatively to probation or short-term imprisonment; that Miller would benefit from cognitive behavioral therapy; that Abby was not injured; and Miller’s prior service in the military. *Id.* at 111-13. The court then found that the mitigators outweighed the aggravators, “but not substantially so,” and sentenced Miller to seven years on the Level 3 felony

¹ Miller had no juvenile or adult criminal history, but he did have a deferred prosecution for theft.

with an additional term of five years for the firearm enhancement. *Id.* at 113. The court ordered Miller to serve eight of those twelve years executed, with six executed with the Department of Correction, and the remaining four years suspended to probation. The court also recommended that the Department of Correction enroll Miller in the “purposeful living units serve,” or PLUS, program, and advised Miller that the court would be willing to consider a modification of his sentence if he successfully completes the PLUS program. *Id.* at 114. This appeal ensued.

Discussion and Decision

Issue One: Amendment to the Charging Information

[14] On appeal, Miller first asserts that the trial court abused its discretion when it permitted the State to amend the charging information twelve days before trial to add the firearm enhancement. We generally review the trial court’s decision on whether to permit an amendment to a charging information for an abuse of discretion. *Howard v. State*, 122 N.E.3d 1007, 1013 (Ind. Ct. App. 2019), *trans. denied*. An abuse of discretion occurs when the trial court’s judgment is “clearly against the logic and effect of the facts and circumstances before it or is contrary to law.” *Id.* (quotation marks omitted).

[15] Under Indiana Code Section 35-34-1-5(b)(2) (2018), the trial court may permit the State to make a post-omnibus-date amendment to an information as to a matter of substance “at any time . . . before the commencement of trial[] if the amendment does not prejudice the substantial rights of the defendant”

According to Miller, the State's late amendment of adding the firearm enhancement prejudiced his substantial rights because it compelled him to shift his defense strategy away from emphasizing "that he has a constitutional right to carry a firearm on his person, which was his practice at the time [and] of which Abby was aware, and also that he unloaded the firearm during his and Abby's argument and put the handgun on the bed." Appellant's Br. at 20.

[16] But Miller's objection to the trial court did not suggest that the State's amendment imperiled his defense strategy. Rather, his objection to the trial court was two-fold: that the amendment was barred by double jeopardy,² and that the State did not have good cause for the untimely amendment. Miller's first assertion was an admission to the trial court that the facts underlying the amendment were within the facts of the original charges for which Miller had already prepared his defense. Miller's second argument was a nonstarter: as we have recognized, a showing of good cause is "not required of the State under Indiana Code Section 35-34-1-5(b)(2)." *Howard*, 122 N.E.3d at 1017.

[17] Thus, Miller's new argument on appeal that the amendment imperiled his defense strategy was not raised to the trial court and has been waived. Further, his double-jeopardy argument to the trial court undermines his argument on appeal. And Miller also affirmatively requested that the trial court not continue

² We have previously held that, because the firearm enhancement statute establishes only an additional penalty, it does not implicate double-jeopardy concerns with respect to an underlying conviction. *Cooper v. State*, 940 N.E.2d 1210, 1215-16 (Ind. Ct. App. 2011).

the trial in light of the State’s proposed amendment; insofar as his argument on appeal is that he had inadequate time to prepare a new defense to account for the amendment, then, he invited any such error. We therefore cannot say that the trial court abused its discretion when it permitted the State to amend the charging information to add the firearm enhancement.

Issue Two: Motion for Mistrial

[18] Miller next asserts that the trial court abused its discretion when it denied his motion for a mistrial. “[G]ranted or denying a mistrial is reviewed only for abuse of discretion.” *Knapp v. State*, 9 N.E.3d 1274, 1283 (Ind. 2014) (quotation marks omitted). A defendant is entitled to a mistrial “only if the defendant demonstrates that he was so prejudiced” by misconduct “that he was placed in a position of grave peril.” *Inman v. State*, 4 N.E.3d 190, 198 (Ind. 2014). A “mistrial is an extreme remedy in a criminal case which should be granted only when nothing else can rectify a situation.” *Knapp*, 9 N.E.3d at 1284 (quotation marks omitted). “Our deferential review of decisions to grant or deny a mistrial reflects that the trial court is in the best position to gauge the surrounding circumstances of the event and its impact on the jury.” *Id.* (quotation marks omitted).

[19] Here, after returning a verdict against Miller based on the evidence presented in the first phase of the trial, during the second phase, and after having heard additional evidence not before the jury in the first phase, one juror informed the court that he was reconsidering his vote on the guilty verdict. There was no misconduct or grave peril on which to premise a motion for a mistrial. Rather,

one juror, after the fact and based on additional testimony that was not before the jury in the first phase, second-guessed his vote to find Miller guilty. Indiana has long prohibited “allow[ing] dissatisfied jurors [from] destroy[ing] a verdict after assenting.” *Griffin v. State*, 754 N.E.2d 899, 902 (Ind. 2001), *aff’d on reh’g*, 763 N.E.2d 450 (Ind. 2002). The rule that a jury cannot impeach its own verdict applies here. We therefore affirm the trial court’s denial of Miller’s motion for a mistrial.

Issue Three: Sufficiency of the Evidence

- [20] Miller also asserts that the State failed to present sufficient evidence to support his conviction and enhancement. As our Supreme Court has made clear:

For sufficiency of the evidence challenges, we consider only probative evidence and reasonable inferences that support the judgment of the trier of fact. On sufficiency challenges, we will neither reweigh evidence nor judge witness credibility. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

Hall v. State, 177 N.E.3d 1183, 1191 (Ind. 2021).

- [21] The State presented sufficient evidence to show that Miller committed Level 3 felony criminal confinement. To show that Miller committed that offense, the State was required to show beyond a reasonable doubt that Miller knowingly or intentionally confined Abby without her consent while armed with a deadly weapon. I.C. § 35-42-3-3(b)(2)(A) (2018). To “confine” someone “means to substantially interfere with the liberty” of that person. I.C. § 35-42-3-1 (2018).

[22] Miller asserts that the State failed to show that he confined Abby, but Miller is incorrect. The evidence most favorable to the judgment shows that Miller followed Abby into the bedroom and then pushed Abby down onto the floor between the bed and the closet. Miller then armed himself and paced around the room, including between Abby and the door to the room. While pacing, he said to Abby that he was “done dealing with” her. Tr. Vol. 2 at 169. Miller then pointed the firearm at Abby from about five feet away.³ We conclude that a reasonable factfinder could readily have found from those facts that Miller substantially interfered with Abby’s liberty. Therefore, we affirm his conviction for Level 3 felony criminal confinement.

[23] Miller also asserts that the State failed to present sufficient evidence to support his sentencing enhancement for the use of a firearm. A person who knowingly or intentionally used a firearm in the commission of Level 3 felony criminal confinement may be sentenced to an additional fixed term of imprisonment between five and twenty years. I.C. § 35-50-2-11 (2018). Miller asserts that the State failed to prove the enhancement because the State did not ask the trial court during the second phase of the jury trial to incorporate the record from the

³ Miller asserts on appeal that we should disregard the evidence of him pointing the firearm at Abby because he was acquitted of the charge of pointing a firearm. But “[t]he evaluation of whether a conviction is supported by sufficient evidence is independent from and irrelevant to the assessment of whether two verdicts are contradictory and irreconcilable.” *Beattie v. State*, 924 N.E.2d 643, 648 (Ind. 2010). That is, Miller’s acquittal on the pointing-a-firearm charge is irrelevant to the evidence most favorable to his conviction for criminal confinement.

first phase, and, therefore, the State failed to prove a number of material elements, such as Miller's identity.

- [24] Miller's argument is without merit. The State expressly "move[d] to incorporate phase one of the trial into phase two," which the trial court granted. Tr. Vol. 3 at 67. We therefore affirm Miller's enhancement for the use of a firearm.

Issue Four: Abuse of Discretion in Sentencing

- [25] Miller next argues that the trial court abused its discretion when it sentenced him because it did not provide an adequate sentencing statement. One way a trial court may abuse its discretion in sentencing a criminal defendant is in not entering an adequate sentencing statement. *See Anglemeyer v. State*, 868 N.E.2d 482, 490-91 (Ind.), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). A sentencing statement is adequate if it is "sufficient for this Court to conduct meaningful appellate review." *Id.* at 492.

- [26] Miller was convicted of a Level 3 felony and received an enhancement for the use of a firearm in the commission of his offense. A Level 3 felony carries a sentencing range of three to sixteen years, with an advisory term of nine years. I.C. § 35-50-2-5(b). And, again, the firearm enhancement carries an additional term of imprisonment between five and twenty years. I.C. § 35-50-2-11. The trial court sentenced Miller to seven years on the Level 3 felony with an additional term of five years for the firearm enhancement. That is, Miller received less than the advisory sentence for the Level 3 felony and the minimal enhancement for his use of a firearm.

[27] The trial court thoroughly explained why it imposed the sentence it imposed. It considered several alleged aggravators and found that two were valid. It considered numerous alleged mitigators and found many of them also to be valid. It found the mitigators outweighed the aggravators. It found that a nuanced sentence of seven years on the Level 3 felony enhanced by five years for the firearm enhancement, with four years suspended to probation and two of the executed years to be executed outside the Department of Correction, to be appropriate on this record. The court advised the Department of Correction to consider placing Miller in the PLUS program, and it advised Miller that the court would reconsider his sentence if he successfully completed the PLUS program. The trial court’s sentencing statements are more than adequate for meaningful appellate review, and we therefore affirm its exercise of discretion in sentencing Miller.⁴

Issue Five: Appellate Rule 7(B)

[28] Last, Miller asserts that his sentence is inappropriate in light of the nature of the offense and his character. Indiana Appellate Rule 7(B) provides that “[t]he 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.” This Court has held that “[t]he advisory sentence is the starting point the legislature has

⁴ Insofar as Miller’s argument on this issue is that the trial court did not give appropriate weight to the aggravators or mitigators, the “relative weight or value” to those factors “is not subject to review for abuse” of the court’s discretion. *Anglemyer*, 868 N.E.2d at 491.

selected as an appropriate sentence for the crime committed.” *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017). And the Indiana Supreme Court has explained that:

The principal role of appellate review should be to attempt to leaven the outliers . . . but not achieve a perceived “correct” result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Defendant has the burden to persuade us that the sentence imposed by the trial court is inappropriate.

Shoun v. State, 67 N.E.3d 635, 642 (Ind. 2017) (citation omitted; omission in original).

- [29] Indiana’s flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court’s judgment “should receive considerable deference.” *Cardwell*, 895 N.E.2d at 1222. 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.” *Id.* at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). 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).” *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

- [30] Miller asserts that his sentence is inappropriate in light of the nature of the offense because Abby was not “subjected to any harm.” Appellant’s Br. at 42. He asserts that his sentence is inappropriate in light of his character based on his age, his lack of a juvenile and adult criminal history, and his low-risk assessment.
- [31] But the trial court considered all of those arguments when it imposed the nuanced sentence it imposed, and Miller presents no “compelling evidence portraying in a positive light the nature of the offense” or his character. *Stephenson*, 29 N.E.3d. at 122. Therefore, our deference to the trial court “prevail[s].” *Id.* We affirm Miller’s sentence.

Conclusion

- [32] In sum, we affirm Miller’s conviction and sentence.
- [33] Affirmed.

Bradford, C.J., and Bailey, J., concur.