MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Wendy Owen Payne,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 22, 2021

Court of Appeals Case No. 21A-CR-1067

Appeal from the Vanderburgh Superior Court

The Honorable Robert J. Pigman, Judge

Trial Court Cause No. 82D03-1907-MR-5029

Altice, Judge.

Case Summary

[1] Wendy Payne appeals the five-year executed sentence that was imposed following her conviction for reckless homicide, a Level 5 felony. Payne claims that the trial court abused its discretion in sentencing her and that the sentence is inappropriate in light of the nature of the offense and her character. We affirm.

Facts and Procedural History

[2] On July 20, 2019, fifty-three-year-old Payne stabbed and killed her husband, Edward, during an argument at their Evansville home. Immediately after the stabbing, Payne called 911 and her neighbor, admitting in both calls that she had just killed her husband. When police officers arrived at the residence, Payne was wearing a blood-covered nightgown and smelled of alcohol. It was determined that Edward died of sharp force trauma to the chest from a stab wound to the heart. Edward also had cuts on his shoulder and chest, as well as defensive wounds on his left hand.

[3] The State charged Payne with murder on July 22, 2019. Following a three-day jury trial that concluded on March 16, 2021, Payne was found guilty of reckless homicide, a lesser-included offense of murder. On May 7, 2021, the trial court

held a sentencing hearing. Payne presented testimony regarding her alcohol counseling and the progress she had made toward sobriety while incarcerated. Payne pointed out that she had no prior convictions and testified that she was remorseful about the incident.

[4] The trial court found the nature and the circumstances of the offense, the repeated use of a deadly weapon during the offense, and Payne's longstanding alcohol abuse, as aggravating factors. Although the trial court identified Payne's lack of criminal history as a mitigating factor, it did not give it significant weight. At the hearing, the trial court stated

> [W]hether your intent was reckless which was what the jury found—it involved a sustained use of that weapon, *not just a single stab wound as you described on the witness stand. That is not how this offense occurred and the victim suffered a number of wounds that indicated, I believe as the Prosecutor characterized it at trial, a slashing-type attack in which numerous efforts were made to, to harm the victim. . . . There's been a long period of alcohol abuse here. . . .* [T]he alcohol abuse continued and it ultimately culminated in Edward . . . losing his life so I don't find that to be an aggravating circumstance but a slightly mitigating one because after having gone through the [alcohol abuse] program which is designed as you know to give you the tools and the means to deal with substance abuse, alcohol abuse, it didn't, it didn't take.
>
> . . .
>
> I did not select the maximum sentence even though there was a death involved here because Indiana law clearly reserves that sentencing range for the worst of the worst, you are not that. *You are not the worst of the worst by any stretch of the imagination but five*

> *years, I think, is an appropriate sentence here.* Anything below five years would seriously depreciate the seriousness of this crime, the loss of a human life, the use of a deadly weapon, *the fact that [Edward] had other wounds on his body indicating a series of assaults upon his person.*

Transcript Vol. III at 110-112 (emphases added). The trial court then sentenced Payne to five years of incarceration. She now appeals.

Discussion and Decision

I. Abuse of Discretion

A. Mitigating Circumstances

[5] Payne claims that the trial court abused its discretion in sentencing her because it failed to identify mitigating factors that were supported by the record. Sentencing decisions are within the authority of the trial court and are only reviewed 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. 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. *Holsapple v. State,* 148 N.E.3d 1035, 1039 (Ind. Ct. App. 2020). Examples include failing to enter a sentencing statement at all, failing to explain the underlying reasons for the aggravators and mitigators that were found, omitting reasons that are clearly supported by the record and were advanced for consideration, and giving reasons that are improper as a matter of law. *Anglemyer*, 868 N.E.2d at 490.

[6] Trial courts are required to enter sentencing statements whenever imposing a sentence for a felony. *Id.* If the sentencing order includes a finding of aggravating or mitigating circumstances, the statement must explain why each factor has been determined to be mitigating or aggravating. *Id.*

[7] The finding of mitigating factors is not mandatory and rests within the discretion of the trial court. *O'Neill v. State,* 719 N.E.2d 1243, 1244 (Ind. 1999). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. *Gross v. State,* 769 N.E.2d 1136, 1140 (Ind. 2002). In other words, the trial court is not compelled to credit mitigating factors in the same way as would the defendant. *Pennington v. State,* 821 N.E.2d 899, 905 (Ind. Ct. App. 2005). Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Sherwood v. State,* 749 N.E.2d 36, 38 (Ind. 2001).

[8] On the other hand, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." *Id.* 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. *Carter v. State,* 711 N.E.2d 835, 838 (Ind. 1999).

[9] Payne asserts that the trial court failed to identify her lack of criminal history as a mitigating factor. Notwithstanding this claim, the trial court specifically

considered Payne's lack of criminal history in its sentencing order and noted it as a "mitigating circumstance." *Appellant's App. Vol. II* at 19. Indeed, the trial court observed at the sentencing hearing that Payne had previously been charged with operating a vehicle while intoxicated but acknowledged that the charge had been dismissed because Payne had completed an alcohol abuse program. The trial court pointed out, however, that Payne continued to abuse alcohol after the treatment program and that her alcohol consumption contributed to the instant offense. As a result, the trial court determined that Payne's lack of criminal history was only "slightly" mitigating, *transcript vol. III* at 110-11, which it was entitled to do. *See Bunch v. State,* 697 N.E.2d 1255, 1258 (Ind. 1998) (holding that the trial court acted within its discretion in considering the defendant's lack of prior criminal history as a mitigating factor but declining to accord it significant weight).

[10] Payne next claims that the trial court should have considered her expression of remorse as a mitigating circumstance. Although remorse has been recognized as a valid mitigating factor, the trial court "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. *Pickens v. State*, 767 N.E. 2d 530, 534-35 (Ind. 2002). That is, substantial deference is given to the trial court's evaluation of a defendant's remorse. *Phelps,* 969 N.E.2d at 1020.

[11] At the sentencing hearing, the trial court commented that

> Remorse is always difficult. Where you stand, sitting here today I am sure that you deeply regret that [Edward] is gone. *Some of your behavior at the scene and comments at the scene and some of the comments made on the phone calls that the Government played showed just the opposite. Showed virtually no remorse for what had happened and that's something only you can determine*. I really do hope in your own heart you, you've come to accept responsibility for this death, that you will live your life from this day forward in a way that atones for it as best you can by being the best possible person you can be and treating others with kindness and respect but only you know whether that's going to happen or not, only you know whether you've made that commitment and it's very difficult for a Court to assign a great deal of weight to that in my opinion because what I've seen over the years, the many, many years I've been here now, is so much of that is self-centered and based on the exigencies at the moment, that is you're facing sentence for a serious crime so I'm not going to give that much weight, if any.

Transcript Vol. III at 111 (emphasis added).

[12] It is apparent that the trial court considered all the evidence when considering whether Payne's expression of remorse could amount to a mitigating factor. The trial court was in the best position to make such assessment and nothing in the record convinces us to disturb its determination in this instance. *See, e.g., Stout v. State*, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005) (the trial court did not err in refusing to find the defendant's alleged remorse to be a mitigating factor despite defendant stating, "I'm very . . . sorry for what I did"), *trans. denied*.

[13] Payne next argues that the trial court overlooked the other proffered mitigating factors including the likelihood that she would respond affirmatively to

probation and the likelihood that she would not reoffend. As for these contentions, the trial court stated at the sentencing hearing:

> The rest of the mitigating circumstances proffered by the Defense, the Court really can't find. I don't know at this time whether you'll respond to the short term imprisonment. That's very difficult to determine. The Prosecutor is right. The prior – only prior example or piece of evidence we have to go on indicates you did not and had very little effect. We all hope, everybody hopes that you're not likely to commit another crime but that remains to be seen.

Transcript Vol. III at 111.

[14] As indicated by the trial court's statement, Payne obviously failed at her previous attempt at alcohol rehabilitation as evidenced by the fact that she subsequently stabbed her husband to death while under the influence of alcohol. The trial court's comments show that it did not overlook Payne's proposed mitigators. Rather, the trial court declined to find those factors significantly mitigating, as it was entitled to do. *See, e.g., Comer v. State*, 839 N.E.2d 721, 729 (Ind. Ct. App. 2005) (even though the trial court considered the proffered mitigating factors of the defendant's likelihood to respond affirmatively to probation and the likelihood that he would not commit another criminal offense, there was no abuse of discretion when the trial court did not deem those factors to be significant mitigating circumstances), *trans. denied*; *see also Ware v. State,* 816 N.E.2d 1167, 1178 (Ind. Ct. App. 2004) (there was no error when it was established that the trial court considered and expressly

rejected as a mitigating factor that the defendant would respond affirmatively to probation or short-term imprisonment).

[15] In sum, the trial court did not abuse its discretion with regard to Payne's proffered mitigating factors.

B. Aggravating Circumstances

[16] Payne next claims that the trial court abused its discretion in identifying the nature and circumstances of the offense as an aggravating factor. In *Anglemyer*, our Supreme Court held that the seriousness of the offense, "which implicitly includes the nature and circumstances of the crime as well as the manner in which the crime is committed, has long been held a valid aggravating factor." 868 N.E.2d at 492. Put another way, while a trial court may not use a material element of the offense as an aggravating circumstance, it may find the nature and circumstances of the offense to be an aggravating factor. *McCann v. State,* 749 N.E.2d 1116, 1120 (Ind. 2001).

[17] At the sentencing hearing, the trial court made the following comments:

> First of all, [the offense] involved the use of a deadly weapon . . . from the get go. . . . [W]hether . . . your intent was reckless which was what the jury found – *it involved a sustained use of that weapon, not just a single stab wound as you described on the witness stand.* That is not how this offense occurred and *the victim suffered a number of wounds that indicated, I believe as the Prosecutor characterized it at trial, a slashing-type attack in which numerous efforts were made to, to harm the victim.*

Transcript Vol. III at 111 (emphasis added).

[18] Clearly, the trial court's findings regarding the nature of the offense are supported by the evidence. In addition to the fatal stab wound to the heart, Edward also had cuts to his shoulder, chest, and defensive wounds on his left hand. The photos admitted at trial demonstrated the extent of the injuries and blood loss. In sum, we cannot say that the trial court abused its discretion in identifying the nature and circumstances of the offense as an aggravating factor.

II. Inappropriate Sentence

[19] Payne next argues that the sentence must be set aside because a five-year term of imprisonment is inappropriate when considering the nature of the offense and her character pursuant to Ind. Appellate Rule 7(B).

[20] App. R. 7(B) provides that this court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Sentence review under App. R. 7(B) is very deferential to the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). App. R. 7(B) requires us to give due consideration to that decision and we understand and recognize the unique perspective a trial court brings to its sentencing decisions. *Stewart v. State,* 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). 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).

[21] We further note that the principal role of appellate review under App. R. 7(B) is to attempt to leaven the outliers, not to achieve a perceived "correct" result in each case. *Garner v. State,* 7 N.E.3d 1012, 1015 (Ind. Ct. App. 2014). The defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate. *Childress v. State,* 848 N.E.2d 1073, 1080 (Ind. 2006). "[T]he question under App. R. 7(B) is not whether another sentence is *more* appropriate; rather, the question is whether the sentence imposed is inappropriate." *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008) (emphasis in original).

[22] As for the nature of the offense, the advisory sentence is the starting point that the legislature has selected as an appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). 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. When determining the appropriateness of a 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 "makes it different from the typical offense accounted for by the legislature when it set the advisory sentence." *Moyer v. State,* 83 N.E.3d 136, 142 (Ind. Ct. App. 2017), *trans. denied*. In other words, 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. *Gauvin v. State,* 883 N.E.2d 99, 105 (Ind. 2008).

[23] As discussed above, the record shows that Payne's conduct went well beyond the elements necessary to commit reckless homicide as a Level 5 felony. Payne brutally stabbed Edward to death while the two were arguing. Edward's instantaneous death was caused by a knife wound to the heart, and there is no evidence that Payne exhibited any restraint when she attacked him. In addition to the fatal chest wound, the evidence showed that Edward sustained numerous cuts to his shoulder, chest, and defensive wounds to his hand. Even though Payne called 911 and cooperated with the investigating police officers, her decision to do so was likely pragmatic given her intoxication and the amount of blood at the scene. *See, e.g., Battles v. State,* 688 N.E.2d 1230, 1237 (Ind. 1997) (determining that the defendant's voluntary statement to police was not significant, as the defendant's eventual capture and arrest were unavoidable). In short, nothing about Payne's offense suggests that a five-year executed sentence is inappropriate.

[24] When examining Payne's character, we engage in a broad consideration of her qualities. *Elliott v. State,* 152 N.E.3d 27, 40 (Ind. Ct. App. 2020), *trans. denied.* An offender's character is shown by his or her "life and conduct." *Adams v. State,* 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019). Payne admitted drinking "three to five times per week," that she "lost everything in her life due to alcohol," and that her alcohol consumption played a role in the instant offense. *Appellant's Appendix Vol. III* at 69. Although Payne points to the absence of

criminal history and the bit of progress she made toward sobriety while incarcerated as qualities of her good character, we cannot say that her character is rehabilitated to the extent that her sentence should be revised. *See, e.g., Eisert v. State,* 102 N.E.3d 330, 335 (Ind. Ct. App. 2018) (observing that the defendant's attendance at bible study, AA, and NA while incarcerated did not rehabilitate his character to the extent that the sentence was inappropriate), *trans. denied*.

[25] Given the circumstances here, we cannot say that Payne's sentence was inappropriate in light of the nature of the offense and her character, and we decline to revise Payne's five-year executed sentence.

[26] Judgment affirmed.

Bailey, J. and Mathias, J., concur.