MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Tony Allen White,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 2, 2024

Court of Appeals Case No. 23A-CR-1077

Appeal from the Madison Circuit Court

The Honorable Angela G. Warner Sims, Judge

Trial Court Cause No. 48C01-2210-F3-2944

Memorandum Decision by Judge Foley
Judges Pyle and Tavitas concur.

Foley, Judge.

[1] Tony Allen White ("White") pleaded guilty to Level 3 felony armed robbery pursuant to a plea agreement.[1] The trial court sentenced White to fourteen years executed in the Indiana Department of Correction ("DOC"). White now appeals, raising two issues for our review:

> I. Whether the trial court abused its discretion when it failed to consider as mitigating the undue hardship White's dependent children would experience due to his imprisonment; and
>
> II. Whether his sentence is inappropriate in light of the nature of the offense and his character.

[2] We affirm.

Facts and Procedural History

[3] On October 10, 2022, around 8:30 in the morning, Ronda Harter ("the victim") arrived at the office building where she worked and immediately knew that someone else was on the property because the back gate was open and the doors were unlocked. She left the front door unlocked for other employees and walked back to her office. She heard the front door open, looked down the hall, and saw a man, later identified as White—wearing a black hoodie and a black face mask—standing in the front office. White asked whether the owner was present, and the victim responded that the owner had not yet arrived. White

[1] Ind. Code § 35-42-5-1(a)(1).

then walked to the victim's office, pulled out two knives, and placed one of the knives against the left side of the victim's neck. With the knife still pressed against the victim's neck, White attempted to take the victim's phone and said, "Take your clothes off, bitch." Tr. Vol. I p. 20. White then noticed the victim's purse on the floor. At that point, White took the purse, put the knives on the victim's desk, and fled from the office building, leaving the victim with an injury on her neck. The victim told another employee what happened and contacted the police. When the police officers arrived, they observed "red marks on the left side of [the victim's] neck" and began looking for White. Appellant's App. Vol. II p. 45. The police officers found White at a camper located near the office building and arrested him.

[4] The State charged White with Level 3 felony armed robbery and also sought a habitual offender enhancement. White entered into a plea agreement under which he pleaded guilty to armed robbery in exchange for the State's dismissal of the enhancement, with sentencing left to the discretion of the trial court. A sentencing hearing was held, where White gave a statement in which he took accountability for his actions, and the victim gave a victim impact statement.

[5] The victim testified that, before the incident took place, she was friendly, outgoing, not afraid to travel alone, and believed the best in others. Now, however, she was jumpy, afraid, and unable to trust anyone. The victim testified that White not only stole her purse, but also robbed her of her sense of security, confidence, and trust. She now carries a weapon on her keyring and sees everyone as a potential threat. She also testified that, because of White's

criminal conduct, her employer was forced to move to a new location after sixty years and installed a new security system at the new location. The trial court sentenced White to fourteen years executed in the DOC. White now appeals.

Discussion and Decision

I. Mitigating Factor

[6] White argues that "[t]he trial court abused its discretion by failing to include statutory mitigators that are significant and supported by the record." Appellant's Br. p. 8. Sentencing decisions are within the sound discretion of the trial court and this court reviews only for an abuse of discretion. *Anglemeyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). 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." *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006) (quoting *In re L.J.M.*, 473 N.E.2d 637, 640 (Ind. Ct. App. 1985)). A trial court abuses its discretion when it: (1) relies on aggravating or mitigating factors not supported in the record; (2) omits reasons that are clearly supported in the record; (3) uses a legally improper reason to impose a sentence; or (4) entirely fails to enter a sentencing statement. *Anglemeyer*, 868 N.E.2d at 491–92. "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." *Id.* at 493 (citing *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999)).

> As our courts have determined in the past, the trial court does not abuse its discretion in failing to consider a mitigating factor that was not raised at sentencing. *Georgopulos v. State*, 735 N.E.2d 1138, 1145 (Ind. 2000); *see also Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006) ("[I]f the defendant fails to advance a mitigating circumstance at sentencing, this court will presume that the factor is not significant, and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal.").

Id. at 492.

[7] White specifically claims that the trial court abused its discretion when it did not consider as mitigating the undue hardship White's dependent children would experience due to his imprisonment. However, White did not present this issue for consideration at the sentencing hearing. Therefore, we cannot say the trial court abused its discretion by failing to consider an unargued mitigating factor. *See Koch v. State*, 952 N.E.2d 359, 375 (Ind. Ct. App. 2011) (finding no abuse of discretion where the defendant did not argue at the sentencing hearing that his alleged mental illness constituted a mitigating circumstance).[2]

II. Inappropriate Sentence

[8] White also claims that his sentence is inappropriate in light of the nature of the offense and his character. The Indiana Constitution authorizes independent

[2] In any case, White reported "no Court-ordered Child support payment" and "financial instability insofar as meeting basic needs" in the presentence investigation report. Appellant's App. Vol. II pp. 37–38. Otherwise, the record is silent on whether White supported his dependent children before his incarceration.

appellate review and revision of a trial court's sentencing decision. *See* Ind. Const. art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). Our Supreme Court has implemented this authority through Indiana Appellate Rule 7(B), which allows this court to revise a sentence when the sentence is "inappropriate in light of the nature of the offense and the character of the offender." Our review of a sentence under Appellate Rule 7(B) is not an act of second guessing the trial court's sentence; rather, "[o]ur posture on appeal is [ ] deferential" to the trial court. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016) (citing *Rice v. State*, 6 N.E.3d 940, 946 (Ind. 2014)). "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).

[9] When considering the nature of the offense, we look to the advisory sentence, which is the starting point our legislature chose as an appropriate sentence for the crime committed. *Anglemyer*, 868 N.E.2d at 494. Indiana Code section 35-50-2-5(b) provides: "A person who commits a Level 3 felony . . . shall be imprisoned for a fixed term of between three (3) and sixteen (16) years, with the advisory sentence being nine (9) years." White's fourteen-year executed sentence is five years above the advisory sentence and two years below the maximum possible sentence for his offense.

[10] White contends that "the record does not support the conclusion that the nature of this armed robbery is deserving of a sentence five (5) [years] longer than the advisory sentence established by the legislature." Appellant's Br. p. 11. When reviewing the nature of the offense, this court considers "the details and circumstances of the commission of the offense." *Merriweather v. State*, 151 N.E.3d 1281, 1286 (Ind. Ct. App. 2020). Here, the nature of the offense reveals that White, while wearing a black face mask and armed with two knives, entered an office building wherein only the victim was present and asked whether the owner was present. After the victim informed White that the owner had not yet arrived, White walked to the victim's office, pulled out those two knives, placed one knife against the victim's neck and tried to take her phone. With the knife still pressed against the victim's neck, White demanded that she take off her clothes. When White noticed the victim's purse on the floor, he took the purse, put the knives on her desk, and fled from the office building, leaving the victim with red marks on the left side of her neck.

[11] White's actions left more than the red marks on the victim. The victim testified that, before her encounter with White, she was "friendly, outgoing[,] not afraid to travel alone, [and] believed in the best about others." *Id.* at 27. However, White's criminal conduct had changed her in that his actions "took away [her] sense of security, self confidence[,] and trust." *Id.* at 28. She is now "jumpy[,] afraid[,] and [unable to] trust anyone." *Id.* She now carries a weapon on her keyring and sees everyone as a potential threat. White's actions not only affected the victim, but also the victim's employer, who moved to a new

location after sixty years and installed a new security system at the new location. The record is devoid of—and White has failed to present any—compelling "evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality)." *Stephenson*, 29 N.E.3d at 122. Therefore, White has not shown that the sentence is inappropriate in light of the nature of the offense.

[12] White also claims that his sentence is inappropriate in light of his character. "When considering the character of the offender, one relevant fact is the defendant's criminal history." *Johnson v. State*, 986 N.E.2d 852, 856 (Ind. Ct. App. 2013). The significance of the criminal history varies based on the gravity, nature, and number of prior offenses in relation to the current offense. *Id.* The evidence presented at sentencing revealed that White has an extensive criminal history. White has five prior misdemeanor and ten prior felony convictions, consisting of: (1) two criminal mischiefs; (2) trespass; (3) possession of marijuana; (4) robbery; (5) two check frauds; (6) two domestic batteries; (7) four dealings in marijuana; (8) failure to return to lawful detention; and (9) false informing. *See* Appellant's App. Vol. II pp. 32–36. White asserts that "[w]hile [his] criminal history creates room for concern, the remorse he displays for his actions is more indicative of his character[,]" and therefore, a reduced sentence is appropriate. Appellant's Br. pp. 11, 10. We note that the trial court took White's remorse into consideration when pronouncing White's sentence. However, in reviewing his sentence, we look at White's expression of remorse in light of White's extensive criminal history that not only spanned over twenty-

eight years but was also filled with prior offenses involving conduct similar to his current offense. Continuing to commit crimes after frequent contacts with the judicial system is a poor reflection on White's character. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007); *see also Connor v. State*, 58 N.E.3d 215, 221 (Ind. Ct. App. 2016) (continued crimes indicate a failure to take full responsibility for one's actions). Moreover, White has multiple violations under both community corrections and probation from his prior offenses which demonstrate his unwillingness to take advantage of prior opportunities of leniency. White has not demonstrated "substantial virtuous traits or persistent examples of good character" that support his assertion that his fourteen-year sentence is inappropriate based on his character. *Stephenson*, 29 N.E.3d at 122.

Conclusion

[13] Based on the foregoing, we conclude that the trial court did not abuse its discretion when it did not consider as mitigating the alleged undue hardship to White's dependent children due to his imprisonment, and White's sentence is not inappropriate in light of the nature of the offense and his character.

[14] Affirmed.

Pyle, J., and Tavitas, J., concur.