MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joshua A. Kelley,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 4, 2022

Court of Appeals Case No. 21A-CR-2388

Appeal from the Steuben Superior Court

The Honorable William C. Fee, Judge

Trial Court Cause No. 76D01-1806-F1-457

Najam, Judge.

Statement of the Case

[1] Joshua A. Kelley appeals following his convictions for two counts of attempted murder, Level 1 felonies; manufacturing methamphetamine, as a Level 4 felony; two counts of possession of methamphetamine, as Level 5 felonies; carrying a handgun without a license, as a Level 5 felony; pointing a firearm, as a Level 6 felony; and theft, as a Level 6 felony; as well as his enhancements for using a firearm in the commission of an offense and for being a habitual offender. Kelley raises four issues for our review, which we consolidate and restate as the following two issues:

1. Whether the State presented sufficient evidence to support his convictions for attempted murder and theft.

2. Whether his 115-year sentence is inappropriate in light of the nature of the offenses and his character.

[2] We also *sua sponte* address whether the court erred when it entered judgment of conviction on two counts and then merged those convictions.

[3] We affirm and remand with instructions.

Facts and Procedural History

[4] At approximately 10:30 a.m. on June 14, 2018, law enforcement officers responded to a report of a "dead person" at the Traveler's Inn. Tr. Vol. 2 at 231. Officer Jordan Trippe with the Freemont Police Department was the first to arrive. Once there, he spoke with a member of the management team and obtained a list of rooms that were occupied the night before and had not yet

been vacated that morning. Shortly thereafter, Steuben County Sheriff's Deputy Patrick Reardon and Freemont Town Marshall Joe Patterson arrived with a fourth officer. The four officers began checking the rooms. Officer Trippe knocked on the door to room number 12 but did not receive an answer. Deputy Reardon then asked the manager to open the door. Before entering, Deputy Reardon "loudly" announced that they were police officers. *Id*. at 234. When they still did not receive a response, the officers entered the room to "check it." *Id*.

[5] The officers did not see anyone in the room, but they noticed that the bathroom door was closed. Deputy Reardon knocked on that door and again announced that they were police but did not get a response. Deputy Reardon then opened the door and saw Kelley "sitting on the toilet in the bathroom with a gun" pointed "right in [Deputy Reardon's] face." *Id*. at 235. Deputy Reardon immediately closed the bathroom door, and the officers quickly exited the room. Deputy Reardon turned left out of the room and ran around the corner of the building. Officer Trippe and Marshall Patterson turned right. Officer Trippe ran to the rear of a white Kia SUV that was in the parking lot.

[6] From his location, Officer Trippe had "a good view" of room 12. *Id*. at 249. Officer Trippe drew his firearm, and he began to move toward that room. But Officer Trippe saw Kelley "standing there pointing a gun directly at" him. *Id*. at 250. As Officer Trippe stood there, Kelley fired a shot at him. Kelley then ran back into the room and "barricaded" himself in. Tr. Vol. 3 at 26.

[7] Kelley refused to exit, so the officers called in members of the Emergency Response Team ("ERT"). The ERT officers stationed themselves in various places outside of Kelley's room. Deputy Rex Snider made phone contact with Kelley. Deputy Snider and Kelley spoke for a few minutes before the conversation ended. Deputy Snider called Kelley back sometime later, and they again spoke for a few minutes before Kelley ended the call. This pattern continued for several hours. During one of the phone conversations, Kelley informed Deputy Snider that, if officers came into his room, he "would take 2 or 3 with him." *Id*. at 225.

[8] When it became clear that Kelley was not going to voluntarily exit the hotel room, the ERT brought in an armored vehicle called a BearCat and parked it in front of Kelley's room. Several officers then stationed themselves around the BearCat, and one officer began firing gas canisters into Kelley's room. Kelley was "extremely upset" and "[a]ngry" about the gas. *Id*. at 227. After officers had fired the canisters, officers saw a bullet exit the window. Officer Shannon Temple, who was laying prone on a truck, heard "a gunshot" and "a bullet fly over his head." *Id*. at 87. And Officer Robert Marzolf, who was located next to Officer Temple, heard "a flipping noise like a projectile cutting through the air" next to his eye between him and Officer Temple. *Id*. at 98.

[9] Officers then fired another round of gas canisters into Kelley's room. Within a "second" of that, officers again observed "a shot" exit the window in the direction of the BearCat. *Id*. at 100. Officer Collin Harruff, who was stationed near the BearCat "observed a small hole on the left side pane of the glass blow

out and then [he] heard a zip past his right ear." *Id*. at 62. Officer Harruff had "no doubt it was a bullet" that went by him. *Id*. at 63.

[10] Deputy Snider continued to make phone contact with Kelley. During one of the phone conversations, Kelley informed Deputy Snider that he was in the bathroom and that he could hear police officers "in front of the window." *Id*. at 230. And Kelley stated that he "would kill anyone that came into his room." *Id*. at 227. Kelley ultimately exited the room because he "couldn't take [the gas] anymore." *Id*. at 228. After apprehending Kelley, Officers searched Kelley's room. There, one officer located a semi-automatic handgun between the box spring and the mattress. The gun was "chambered" and "ready to fire." *Id*. at 110. Another officer found a baggie that contained methamphetamine.

[11] Officers also searched Kelley's car. There, they discovered a "one pot methamphetamine lab" and methamphetamine. Tr. Vol. 4 at 5. They also discovered a shotgun that had been placed inside a gray and white sheet. Officers ran the serial number for the shotgun and learned that it had been reported stolen. And the officers were able to confirm that Kelley did not have a license to carry a handgun. In addition, officers examined the white Kia SUV, and they observed a bullet hole in that vehicle.

[12] The State ultimately charged Kelley with two counts of attempted murder, Level 1 felonies (Counts 1 and 2); pointing a firearm, as a Level 6 felony (Count 3); carrying a handgun without a license, as a Class A misdemeanor (Count 4); manufacturing methamphetamine, as a Level 4 felony (Count 5); two counts of

possession of methamphetamine, as Level 5 felonies (Counts 6 and 7); theft, as a Level 6 felony (Count 8); and carrying a handgun without a license, as a Level 5 felony (Count 12). In addition, the State filed three counts alleging that Kelley had used a firearm in the commission of an offense (Counts 9, 10, and 11), and the State alleged that Kelley was a habitual offender (Count 13).[1]

[13] The court held a trifurcated jury trial. During the first phase, Marshall Patterson testified that, after he and the other officers had left room 12, he saw Kelley exit the room, take a "shooter stance," and fire a bullet. Tr. Vol. 3 at 15. Sergeant Lamar Helmuth then testified that the trajectories for the bullets fired through the windows were "near level." *Id*. at 152, 157. In addition, Sergeant Timothy Dolby testified that the bullet trajectory for the bullet that hit the Kia had a "near level" trajectory. *Id*. at 127. And he testified that it was "pretty obvious" that the bullet had been fired from room 12. The State then presented the testimony of Gary Miller, who testified that the shotgun officers had recovered from Kelley's car was his and that it had been stolen from his residence in April 2018.

[14] Kelley then testified in his defense. He testified that, while he thought the shotgun was "too good to be true" when he bought it "off the street," he was "surprised" to learn that it was stolen. Tr. Vol. 4 at 53, 58. He also testified that he had bought the shotgun in exchange for money and methamphetamine.

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[1] The State also initially charged Kelley with intimidation, as a Level 5 felony, and with two additional counts of being a habitual offender, but the State dismissed those counts.

He further testified that it "always runs through your mind when you are f**king with that s**t like that" that it "could be stolen" because there "is no loyalty in the streets in the drug game." *Id*. at 59. And he testified that he did not intend to shoot any of the officers and that he "hit what [he] was aiming at." *Id*. at 70.

[15] Following the first phase of the trial, the jury found Kelley guilty of Counts 1 through 8. The court then entered judgment of conviction accordingly. *See id*. at 122; *see also* Appellant's App. Vol. 2 at 87-88. After the second phase of the trial, the jury found that Kelley had used a firearm in the commission of the offenses. And, following the third phase, the jury found Kelley guilty of Count 12 and that Kelley was a habitual offender. *See* Tr. Vol. 4 at 142.

[16] Following a sentencing hearing, the court identified as aggravating Kelley's "extensive" criminal history, which includes crimes of violence and drug-related crimes; that Kelley "blame[d] others"; and that Kelley was on bond for a prior offense when he committed the instant offense. *Id*. at 161. The court did not identify any mitigators. As such, the court found that the aggravators "far outweigh[ed] the absence of mitigation" and sentenced Kelley to an aggregate term of 115 years in the Department of Correction.[2] This appeal ensued.

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[2] In his Brief, Kelley repeatedly stated that his sentence was 135 years. However, in his Reply Brief, Kelley acknowledges that his sentence was actually 115 years. *See* Reply Br. at 6.

Discussion and Decision

Issue One: Sufficiency of the Evidence

[17] Kelley first asserts that the State failed to present sufficient evidence to support three of his convictions. Our standard of review on a claim of insufficient evidence is well settled:

> For a sufficiency of the evidence claim, we look only at the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh the evidence. *Id*. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*.

Love v. State, 73 N.E.3d 693, 696 (Ind. 2017). On appeal, Kelley contends that the State failed to present sufficient evidence to support his two convictions for attempted murder and his conviction for theft. We address each argument in turn.

Count 1: Attempted Murder as to Officer Trippe

[18] Kelley contends that the State failed to present sufficient evidence to support his conviction for Count 1. To convict Kelley of attempted murder, as charged in Count 1, the State was required to prove that Kelley had acted knowingly or intentionally to kill Officer Trippe and that his actions constituted a substantial step toward the commission of that crime. Ind. Code §§ 35-42-1-1; 35-41-5-1. "The intent to kill may be inferred from the deliberate use of a deadly weapon in a manner likely to cause death or serious injury." *Bethel v. State*, 730 N.E.2d

1242, 1245 (Ind. 2000). Indeed, our Supreme Court has found sufficient evidence for a conviction "when the evidence indicates that a weapon was fired in the direction of the victim." *Id*.

[19] On appeal, Kelley does not dispute that he fired a weapon. But he asserts that the State failed to prove that he fired the gun with the intent to kill Officer Trippe. In particular, Kelley contends that he "testified extensively at trial that he was not aiming at any person" but, instead, "fired toward a vehicle parked outside the room, and hit what he was aiming for." Appellant's Br. at 11-12. And he maintains that "he did not intent to strike anyone with the shots fired" and that "he had no knowledge that an officer was standing near the end of the white Kia when he fired[.]" *Id*. at 12.

[20] However, Officer Trippe testified that, after the four officers had left Kelley's room, he ran to the rear of a white Kia SUV in the parking lot. Officer Trippe also testified that, from that location, he had a "good view" of Kelley's room. Tr. Vol. 3 at 249. He further testified that, as he began to move toward Kelley's room, he saw Kelley "standing there pointing a gun directly at" him. *Id*. at 250. And Officer Trippe testified that Kelley fired the gun "right at him." *Id*. In addition, the State presented the testimony of Marshall Patterson who testified that, after he and the other officers had left Kelley's room, he saw Kelley exit, take a "shooter stance," and fire a bullet. Tr. Vol. 3 at 15. Based on that evidence, a reasonable jury could conclude that Kelley had acted with the intent to kill Officer Trippe. Kelley's argument on appeal is simply a request for this

court to reweigh the evidence, which we cannot do. The State presented sufficient evidence to support Kelley's conviction on Count 1.

Count 2: Attempted Murder as to the other Officers

[21] Kelley next contends that the State failed to present sufficient evidence to support his conviction for Count 2. To convict Kelley of attempted murder, as charged in Count 2, the State was required to prove that Kelley had acted knowingly or intentionally to kill members of the ERT and that his actions constituted a substantial step toward the commission of that crime. I.C. §§ 35-42-1-1; 35-41-5-1.

[22] Again, Kelley does not dispute that he fired a gun through the window of the hotel room. But he asserts that the State failed to prove that he had fired with the intent to kill any of the officers. Specifically, Kelley contends that he "fired his gun through a window with closed curtains, aiming upward rather than at any specific person." Appellant's Br. at 14. But as above, Kelley's argument is simply a request for this Court to reweigh the evidence, which we cannot do.

[23] The evidence most favorable to the trial court's judgment demonstrates that Deputy Snider spoke with Kelley multiple times while Kelley was barricaded in his room. During one of those phone calls, Kelley informed Deputy Snider that, if any officers entered his room, he "would take 2 or 3 with him." Tr. Vol. 3 at 225. Then, during another phone call, Kelley stated that he "would kill anyone who came into his room." *Id.* at 227. And Kelley informed Deputy Snider that he could hear police officers "in front of the window." *Id.* at 230.

[24] The evidence also demonstrates that, when it became clear that Kelley would not exit the room, the ERT brought in the BearCat and began firing gas canisters into Kelley's room, which caused Kelley to be "extremely upset" and "angry." *Id*. at 227. After officers fired some of the canisters, Kelley fired a shot out of the window. Officer Temple heard the gunshot and heard "a bullet fly over his head." *Id*. at 87. And Officer Marzolf, who was located next to Officer Temple, "heard a flipping noise like a projectile cutting through the air" next to his eye between him and Officer Temple. *Id*. at 98. Then, after officers fired another round of gas canisters, Kelley again fired a shot through the window toward the BearCat. Officer Harruff, who was stationed near the BearCat, "heard a zip past his right ear," and he had "no doubt that it was a bullet." *Id*. at 62-63. In addition, the State presented the testimony of Sergeant Helmuth, who testified that the bullet trajectories for the two bullets fired through the window were "near level." *Id*. at 152, 157.

[25] In other words, the evidence demonstrates that Kelley was angry at the officers for firing gas canisters into his room and that he had threatened to kill officers at least twice. And the evidence demonstrates that Kelley had heard officers outside his window, that he fired his gun out of his window, and that he fired the gun level to the ground. A reasonable jury could conclude from that evidence that Kelley had fired at the officers instead of up in the air and that he had fired with the intent to kill one of them. The State presented sufficient evidence to support Kelley's conviction on Count 2.

Count 8: Theft

[26] Kelley also contends that the State failed to present sufficient evidence to support his conviction for theft. To convict Kelley of theft, as a Level 6 felony, the State was required to prove that Kelley had knowingly or intentionally exerted unauthorized control over a firearm of another person with the intent to deprive the other person of its value. *See* I.C. § 35-42-4-2(a)(1)(B)(i).

[27] On appeal, Kelley acknowledges that he was in possession of Miller's stolen shotgun. However, he contends that the State failed to present any evidence that he knowingly or intentionally possessed a stolen firearm. A person engages in conduct intentionally if, when he engages in the conduct, "it is his conscious objective to do so." I.C. § 35-41-2-2(a). And a person engages in conduct knowingly if, when he engages in the conduct, "he is aware of a high probability that he is doing so." I.C. § 35-41-2-2(b). In particular, Kelley asserts that "the only evidence against [him] was his possession of the gun approximately two months after it was stolen." Appellant's Br. at 16. And he contends that he testified "unequivocally" that he did not know it was stolen. *Id*.

[28] Kelley is correct that, while the unexplained possession of recently stolen property is generally sufficient to support a theft conviction, when considering what it means to possess an item recently, our Court has held that the "unexplained possession of a handgun two and one-half weeks after the theft is not sufficient to support a conviction." *Morgan v. State*, 427 N.E.2d 1131, 1133 (Ind. Ct. App. 1981). And, here, Miller testified that his shotgun was stolen in

April 2018, and officers did not find Kelley in possession of that gun until two months later, in June. Thus, we agree with Kelley that the fact that he was in possession of the shotgun alone is not sufficient to support his conviction. But that is not the only evidence the State presented in support of the conviction.

[29] During its cross-examination of Kelley at trial, the State questioned him about the shotgun. Kelley testified that he had purchased the shotgun "off the street" in exchange for methamphetamine and cash. Tr. Vol. 4 at 58. Further, Kelley confirmed that it "always" runs through his mind when "f**king with that s**t" that it "could be stolen." *Id*. at 59. And Kelley testified that, "when you are dealing in illegal activities, it all goes together. I mean, you don't know what you are getting into." *Id*. Stated differently, Kelley's own testimony demonstrates that he "always" considers it a possibility that a firearm purchased on the streets could be stolen. *Id.*

[30] Based on Kelley's own statements, a reasonable jury could infer that, when Kelley purchased the shotgun, he did so knowing with a high probability that he was purchasing a stolen firearm. In other words, a reasonable jury could conclude that there was a high probability that Kelley knew that the shotgun was stolen such that he knowingly purchased the stolen property. We hold that the State presented sufficient evidence to support Kelley's conviction for theft. We therefore affirm Kelley's convictions.

Issue Two: Appropriateness of Sentence

[31] Kelley next contends that his 115-year aggregate sentence is inappropriate in light of the nature of the offenses 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 recently held that "[t]he advisory sentence is the starting point the legislature has 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 recently 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. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind.), as amended (July 10, 2007), *decision clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

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

[32] 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).

[33] Here, Kelley was convicted of multiple offenses, ranging from Level 1 felonies to Level 6 felonies, and he was found guilty of two different enhancements. Following a sentencing hearing, the court identified as aggravating factors Kelley's "extensive" criminal history, which includes crimes of violence and drug-related crimes; that Kelley "blame[d] others"; and that Kelley was on bond for a prior offense when he committed the instant offense. Tr. Vol. 4 at 161. And the court did not identify any mitigators. As such, the court sentenced Kelley to an aggregate term of 115 years in the Department of Correction.

[34] On appeal, Kelley contends that his sentence is inappropriate in light of the nature of the offenses because his "actions were not more egregious than the typical offense envisioned by the legislature when it set an advisory sentence for such conduct." Appellant's Br. at 18. He maintains that, as "foolish and troubling as [his] crimes were, it was disproportionately harsh to impose an effective life sentence for crimes which caused no physical harm to anyone." *Id*. We cannot agree. In one day, Kelley engaged in a multi-hour standoff with

law enforcement during which he threatened law enforcement officers and fired multiple shots at them; illegally possessed multiple firearms, including one stolen firearm; possessed methamphetamine; and manufactured methamphetamine. And he committed all of those acts while on bond for a prior offense. As such, Kelley has not persuaded us that his sentence is inappropriate in light of the nature of the offenses. Further, we consider both the nature of the offenses *and* Kelley's character in our review. *See Williams v. State*, 891 N.E.2d 621, 623 (Ind. Ct. App. 2008). And Kelley's bad character also persuades us that his sentence is not inappropriate.

[35] Kelley has a lengthy criminal history that spans more than twenty years and includes one juvenile delinquency adjudication, six felony convictions, and eight misdemeanor convictions. In addition, as the trial court found, Kelley has been offered alternative sentences in the past, but he has never successfully completed a placement on community corrections, and he has violated the terms of his probation. In other words, Kelley has engaged in a life of crime and continues to break the law despite the court's prior grant of lenience. Further, courts have attempted to provide Kelley treatment for his substance abuse problems, but Kelley continues to both use and manufacture drugs, which reflects poorly on his character. As such we cannot say that his sentence is inappropriate.

Issue Three: Judgment of Conviction

[36] Finally, we *sua sponte* consider whether the trial court erred when it entered judgment of conviction on two counts. Following the first phase of the trial, the

jury found Kelley guilty of, among other offenses, Count 4, carrying a handgun without a license, as a Class A misdemeanor. The court then entered judgment of conviction on that count. *See* Tr. Vol. 4 at 121-22. Then, following the third phase, the jury found Kelley guilty of Count 12, carrying a handgun without a license, as a Level 5 felony, and the court entered judgment of conviction. *See id*. at 142.

[37] Then, in its orders and abstract of judgment, the court "merged" Counts 4 and 12. Appellant's App. Vol. 2 at 118-26, 128. But it is well settled that, if a trial court enters judgment of conviction on a jury's guilty verdict, "then simply merging the offenses is insufficient and vacation of the offense is required" in order to remedy any double jeopardy concerns. *Kovats v. State*, 982 N.E.2d 409, 414-415 (Ind. Ct. App. 2013). Here, because the court entered judgment of conviction on Counts 4 and 12 and then simply "merged" them, we remand with instructions for the court to vacate Kelley's conviction for carrying a handgun without a license, as a Class A misdemeanor, as charged in Count 4.

Conclusion

[38] In sum, the State presented sufficient evidence to support Kelley's convictions for attempted murder and theft. And Kelley's sentence is not inappropriate in light of the nature of the offenses and his convictions. Accordingly, we affirm those convictions and his sentence. However, the court erred when it entered judgment of conviction on both Counts 4 and 12 and then simply merged them. We thus remand with instructions for the court to vacate Kelley's conviction on Count 4.

[39] Affirmed and remanded with instructions.

Vaidik, J., and Weissmann, J., concur.