MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Steven Michael Jennings,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

April 27, 2023

Court of Appeals Case No. 22A-CR-2550

Appeal from the Tippecanoe Superior Court

The Honorable Randy J. Williams, Judge

Trial Court Cause No. 79D01-2012-F2-73

Memorandum Decision by Judge Mathias
Judges May and Bradford concur.

Mathias, Judge.

[1] Steven Michael Jennings appeals his convictions for Level 4 felony unlawful possession of a firearm by a serious violent felon; Level 5 felony dealing in a substance represented to be a controlled substance; and Level 6 felony possession of a controlled substance. Jennings also appeals his adjudication as a habitual offender and his sentence. Jennings raises five issues for our review, which we reorder and restate as follows:

> 1. Whether the trial court abused its discretion when it admitted evidence seized from Jennings's apartment pursuant to a search warrant.
>
> 2. Whether the State presented sufficient evidence to support Jennings's convictions and habitual offender adjudication.
>
> 3. Whether Jennings's convictions and adjudication violate Indiana's prohibition against double jeopardy.
>
> 4. Whether the trial court improperly applied double enhancements to Jennings's sentence.
>
> 5. Whether Jennings's sentence is inappropriate in light of the nature of the offenses and his character.

[2] We affirm.

Facts and Procedural History

[3] On August 6, 2020, Lafayette Police Department Sergeant Shawn Verma and other officers responded to a tip of illegal drug use. At the location identified in that tip, the officers encountered two subjects with spice, or synthetic

marijuana. One of the subjects informed Sergeant Verma that he had purchased the spice from Steven Jennings, and, while the subject did not know Jennings's exact address, he did describe the building in which Jennings lived and its location. Sergeant Verma recognized those descriptions as identifying a building at 308 Perrin Avenue in Lafayette.

[4] In response to that information, Sergeant Verma and Lafayette Police Department Officer Josh Brainard immediately went to 308 Perrin Avenue. That building was a two-story building with four apartments inside, two on each floor, and an entryway into a common area. The officers entered into the common area, and they "immediately" recognized a strong "odor of spice" throughout the area. Tr. Vol. 2, p. 18, 42. The officers recognized the spice smell from their training and experience because "[t]he smell is very distinct. . . . [I]t's a very pungent, very chemical odor." *Id.* at 148.

[5] Because the odor in the common area was so strong, the officers could not immediately pinpoint from which apartment the smell emanated. Officer Brainard returned to his vehicle while Sergeant Verma stayed and approached each apartment door. Sergeant Verma "immediately" ruled out apartment one because he "couldn't smell anything coming from the door there." *Id.* at 18. He then "went to the apartment straight across," apartment two, where the smell was substantially stronger. *Id.* But that tenant opened the apartment door, and Sergeant Verma was able to verify that the smell "wasn't coming from there." *Id.* at 19.

[6] Apartment two was directly below apartment three, and because "the odor was so strong" on that side of the building, Sergeant Verma proceeded up the stairs, where "the odor got stronger." *Id.* As he approached the door to apartment three, he was "[one] hundred percent" sure the odor "was coming from that apartment." *Id.* Further, the tenant in apartment four, above apartment one and across from apartment three, had a delivery being made around that same time. That tenant opened her door for the delivery, and Sergeant Verma "did not get any odor coming from that apartment." *Id.* at 20. Meanwhile, officers searched for Jennings in a State database, and they learned that Jennings lived in apartment three. Jennings's name was also the only name on the mailbox for apartment three. *Id.* at 159.

[7] Sergeant Verma reported his observations to Officer Brainard, who applied for a search warrant for apartment three. Omitting formal elements, Officer Brainard's probable cause affidavit stated:

> On August [6], 2020[,] Sgt. Verma and [I] were conducting a follow up investigation at 308-3 Perrin Avenue[] regarding information that the tenant, Steven Jennings, was dealing synthetic drugs, commonly known as spice. Sgt. Verma and [I] went to 308-3 Perrin Avenue to make contact with the resident and entered the common door for the apartment house. While [I] was at the bottom of the steps which led up to Apt. 3, [I] could detect an odor which [I] recognized as spice. Sgt. Verma went upstairs to the door for Apt. 3 and advised [me] that he could smell the strong odor of spice coming from inside Apartment 3. Both Sgt. Verma and [I] are familiar with the odor of spice from [our] training and experience as law enforcement officers and

> have encountered this odor numerous times during the course of [our] duties as law enforcement officers.
>
> Instead of trying to make contact with anyone in said apartment, Sgt. Verma and [I] decided to maintain surveillance of this location and request a search warrant. [I] request[] a search warrant be issued for 308-3 Perrin Avenue, which is in a two-story white apartment house with a brown front common door, with stairs inside the common door which lead up to Apt. 3, which has the number "3" affixed to the door for that unit, to search for any synthetic drugs, scales, paraphernalia, packaging materials, and for any bills, notes, receipts, ledgers, papers, items of personal property[,] or other evidence which would be evidence of possessing, using or trafficking in controlled substances, or which would help identify anyone having any possessory interest in any items of contraband which may be found in said apartment or involved in said activity.

Ex. Vol. 5, p. 9.

[8] The trial court granted the search warrant, and officers immediately executed it. The apartment was a one-bedroom apartment, and no one was inside it when the officers forced entry to execute the warrant. By the closet in the bedroom, the officers located a backpack. From inside the backpack, they seized two sandwich baggies containing nearly forty-five grams of spice, a handgun with ammunition, and two digital scales. Also inside the backpack was medical paperwork made out to Jennings. From elsewhere in the apartment, officers seized an ecstasy pill and several "roaches" of spice. Tr. Vol. 2, p. 154.

[9] Later that day, Jennings returned to his apartment and found "his door was broken down." *Id.* at 159. He called the police, and officers arrived, explained

the search, and advised him of his *Miranda* rights. Jennings then informed the officers that he was "buying and reselling the spice . . . for a profit." *Id.* at 163.

[10] The State charged Jennings with numerous offenses as well as alleging Jennings to be a habitual offender. Among those charges, the State alleged that Jennings had committed Level 4 felony unlawful possession of a firearm by a serious violent felon, in which count the State alleged that Jennings had a previous conviction in 2010 of a Class C felony ("the 2010 conviction"). The State also alleged that Jennings had committed dealing in a substance represented to be a controlled substance, which the State alleged as a Level 5 felony based on the 2010 conviction. And, while the State's information on the habitual offender allegation identified the 2010 conviction, it also identified three other qualifying prior convictions.

[11] Jennings moved to suppress the evidence seized from his apartment on the ground that the probable cause affidavit was insufficient. The trial court denied Jennings's motion. At his ensuing jury trial, the court then admitted that evidence over Jennings's objection.

[12] The jury found Jennings guilty as charged. Jennings then waived his right to a jury trial for the bifurcated habitual offender phase, after which the court found him to be a habitual offender. Following a sentencing hearing, the trial court entered judgment of conviction against Jennings for Level 4 felony unlawful possession of a handgun by a serious violent felon; Level 5 felony dealing in a substance represented to be a controlled substance; Level 6 felony possession of

a controlled substance; and adjudicated Jennings to be a habitual offender. The court then sentenced Jennings to six years on the Level 4 felony conviction, to which the court attached an additional six-year term for the habitual offender allegation. The court also ordered Jennings to serve concurrent terms of four years and two years on the Level 5 and Level 6 felony convictions, respectively, for an aggregate term of twelve years in the Department of Correction. This appeal ensued.

Issue One: Admission of Evidence

[13] We first address Jennings's argument that the trial court abused its discretion when it admitted the evidence seized from his apartment under the search warrant. As our Supreme Court has stated:

> we consider this appeal a request to review the trial court's decision to admit evidence. *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014) (citing *Guilmette v. State*, 14 N.E.3d 38, 40 (Ind. 2014)). The trial court has broad discretion to rule on the admissibility of evidence. *Guilmette*, 14 N.E.3d at 40. Rulings on the admissibility of evidence are reviewed for an abuse of discretion and ordinarily reversed when admission is clearly against the logic and effect of the facts and circumstances. *Joyner v. State*, 678 N.E.2d 386, 390 (Ind. 1997). However, when a challenge to such a ruling is predicated on the constitutionality of the search or seizure of evidence, it raises a question of law that we review de novo. *Kelly v. State*, 997 N.E.2d 1045, 1050 (Ind. 2013) (internal citations omitted).

Thomas v. State, 81 N.E.3d 621, 624 (Ind. 2017).

[14] Further:

> Both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution require search warrants to be based on probable cause. U.S. Const. amend. IV; Ind. Const. art. I, § 11. This federal and state constitutional requirement is further codified in the Indiana Code, which lists the information that must be included in an affidavit supporting a search warrant. *See* Ind. Code § 35-33-5-2 (2021). Although the statute requires the affiant to provide the "facts known to the affiant through personal knowledge," it does not go so far as to require the affiant to explain **how** they learned those facts. *Id.* § -2(a)(3).
>
> In deciding whether to issue a search warrant, *the judge's task is to make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."* *State v. Spillers*, 847 N.E.2d 949, 952-53 (Ind. 2006) (alteration in original) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). The duty of the reviewing court . . . is to determine whether the warrant-issuing judge had a "substantial basis" for concluding that probable cause existed. *Id.* at 953; *see also McGrath v. State*, 95 N.E.3d 522, 527 (Ind. 2018). A substantial basis requires the reviewing court, with significant deference to the warrant-issuing judge's determination, "to focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause." *Spillers*, 847 N.E.2d at 953 (citing *Houser v. State*, 678 N.E.2d 95, 99 (Ind. 1997)).

Bunnell v. State, 172 N.E.3d 1231, 1234-35 (Ind. 2021) (emphasis added).

[15] Jennings asserts that the probable cause affidavit is insufficient in three respects. First, he contends that the first substantive sentence of the probable cause affidavit appeared to be premised on uncorroborated hearsay from a source

with unknown credibility. Second, he asserts that the smell of spice alone was insufficient to establish probable cause. And, third, he argues that the officers did not establish their qualifications to recognize the smell of spice.

[16] In support of his arguments, Jennings relies most significantly on two opinions from our Court and one from our Supreme Court. First, in *Buford v. State*, we held that officers did not establish probable cause of alleged "dealing" at a residence when the probable cause affidavit was premised only on an uncorroborated anonymous tip. 40 N.E.3d 911, 916 (Ind. Ct. App. 2015). It is well-established that "uncorroborated hearsay from a source whose credibility is itself unknown, standing alone, cannot support a finding of probable cause to issue a search warrant." *Newby v. State*, 701 N.E.2d 593, 598 (Ind. Ct. App. 1998) (citing *Illinois v. Gates*, 462 U.S. 213, 227 (1983)). However, "[t]he reliability of hearsay can be established in a number of ways, including . . . independent police investigation [that] corroborates the informant's statements . . . ." *Id.* (citing *Jaggers v. State*, 687 N.E.2d 180, 182 (Ind. 1997)).

[17] Jennings also relies on this Court's opinion in *Ogburn v. State*, 53 N.E.3d 464, 473 (Ind. Ct. App. 2016), *trans. denied*. In *Ogburn*, we held that officers did not establish probable cause to search an apartment when they stated in their affidavit that they had smelled burnt marijuana near the apartment. *Id.* The officers did not say in the affidavit that they had been able to rule out neighboring apartments as the source of that smell. *Id.*

[18] And, third, Jennings relies on *Bunnell v. State*, 172 N.E.3d 1231, 1235 (Ind. 2021). In *Bunnell*, our Supreme Court made clear that "the 'presence of odors' can establish probable cause for a search warrant if the following conditions are met: (1) the issuing judicial officer 'finds the affiant qualified to know the odor'; and (2) the odor 'is one sufficiently distinctive to identify a forbidden substance.'" *Id.* (quoting *Johnson v. United States*, 333 U.S. 10, 13 (1948)). Based on that law, the Court held that "a law enforcement officer is qualified to recognize the odor of raw marijuana if the officer attests, without elaboration, that they possess the requisite training and experience to detect that smell[.]" *Id.*

[19] Jennings's reliance on *Buford*, *Ogburn*, and *Bunnell* is misplaced. First, unlike in *Buford*, here the probable cause affidavit identified both "dealing" and "possessing" as possible offenses at Jennings's residence. Ex. Vol. 5, p. 9. Second, even if the affidavit's reference to "a follow up investigation" does implicate hearsay information provided to the officers by an unidentified source, unlike in *Buford* that information was not uncorroborated. *See id.* Rather, as the affidavit goes on to make clear, the officers were able to provide at least some corroboration of that information when they informed the magistrate that they went to the location of Jennings's apartment and smelled "the strong odor of spice coming from inside Apartment 3." *Id.*

[20] Further, the officers' ability to isolate the smell to apartment three, especially when coupled with the informant's tip, additionally distinguishes their affidavit from the one discussed in *Ogburn*. *See also Johnson*, 333 U.S. at 12 (noting that the officers were able to trace the smell of burning opium in a common hotel

hallway to "Room 1"). And neither is *Bunnell* helpful to Jennings, as the officers here made clear in their affidavit that they were "familiar with the odor of spice from [our] training and experience as law enforcement officers and have encountered this odor numerous times," which is consistent with *Bunnell*'s requirements. Accordingly, we reject Jennings's arguments that the affidavit was facially insufficient to support the issuance of the search warrant.

[21] Still, Jennings also asserts that the probable cause affidavit was invalid because it omitted key details, namely: that Sergeant Verma initially thought the spice odor may have emanated from apartment two, which, according to Jennings, is also where Sergeant Verma first thought Jennings lived; that two other officers at the scene did not isolate the odor to apartment three; that the officers were unable to state in the affidavit "what chemicals were in spice based on odor alone"; that the affidavit did not state that the apparent anonymous informant had "made disclosures" about Jennings "while he was himself criminally investigated for drugs"; and that the affidavit omitted whether police saw anyone entering or exiting the apartment. Appellant's Br. at 28, 30.

[22] As we have explained:

> A probable cause affidavit must include all "material facts" known to law enforcement, which includes facts that "'cast doubt on the existence of probable cause.'" *Ware[v. State]*, 859 N.E.2d [708,] 718 [(Ind. Ct. App. 2007)] (quoting *Query v. State*, 745 N.E.2d 769, 772 (Ind. 2001)). Although it may not be practical to include all information related to an investigation in a probable cause affidavit, "the best course for police to follow is to include any information that could conceivably affect a probable cause

> determination." *Id.* at 719-20. . . . When material information is omitted from a probable cause affidavit, such omission will invalidate a warrant if (1) the police omitted facts with the intent to make the affidavit misleading or with reckless disregard for whether it would be misleading, and (2) *the affidavit supplemented with the omitted information would have been insufficient to support a finding of probable cause*. *Ware*, 859 N.E.2d at 718. It has been recognized that omissions from a probable cause affidavit are made with reckless disregard "if an officer withholds a fact in his ken that '[a]ny reasonable person would have known that this was the kind of thing the judge would wish to know.'" *Wilson v. Russo*, 212 F.3d 781, 788 (3rd Cir. 2000) (quoting *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir. 1993)).

Gerth v. State, 51 N.E.3d 368, 374-75 (Ind. Ct. App. 2016) (emphasis added).

[23] We cannot agree with Jennings's contention that the omitted, purportedly material information invalidated the warrant. Specifically, having reviewed the record, the purported omissions, and the probable cause affidavit, we do not hesitate to conclude that, had the affidavit been supplemented with the omitted information—insofar as that information is in fact supported by the record—the affidavit still would have supported a finding of probable cause. Accordingly, the trial court did not err when it admitted the evidence seized under the search warrant.

Issue Two: Sufficiency of the Evidence

[24] We next turn to Jennings's argument that the State presented insufficient evidence to support his convictions and habitual offender adjudication. As our Supreme Court has made clear:

> On a fundamental level, sufficiency-of-the-evidence arguments implicate a "deferential standard of review," in which this Court will "neither reweigh the evidence nor judge witness credibility," but lodge such matters in the special "province" and domain of the jury, which is best positioned to make fact-centric determinations. *See Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018). In reviewing the record, we examine "all the evidence and reasonable inferences supporting the verdict," and thus "will affirm the conviction if probative evidence supports each element of the crime beyond a reasonable doubt." *Id.*

Carmack v. State, 200 N.E.3d 452, 459 (Ind. 2023).

Level 5 Felony Dealing in a Substance Represented to be a Controlled Substance

[25] Indiana Code section 35-48-4-4.6(a) (2020) states in relevant part that "[a] person who knowingly or intentionally . . . possesses with intent to deliver . . . a substance represented to be a controlled substance" commits a Level 5 felony if the person has a prior unrelated conviction under that chapter. The statute adds that "a substance represented to be a controlled substance includes any substance," other than a substance for which one may obtain a prescription, that, by its "shape, color, size, markings or lack of markings, taste, consistency, or any other identifying physical characteristic of the substance, would lead a reasonable person to believe the substance is a controlled substance." I.C. § 35-48-4-4.6(f)(3).

[26] According to Jennings, the State presented insufficient evidence that he violated section 35-38-4-4.6(a) because the exact molecular composition of his compound of spice was not identified by statute as a controlled substance until

after Jennings's arrest. Jennings's argument is a nonstarter. The whole point of section 35-48-4-4.6(a) is that the substance in a defendant's possession is not itself a controlled substance but instead is "represented to be a controlled substance." And, in his closing argument to the jury, Jennings admitted that his compound of spice violated that statute. Tr. Vol. 2, p. 217. There is no reversible error on this issue.

Level 4 Felony Unlawful Possession of a Firearm by a Serious Violent Felon and Level 6 Felony Possession of a Controlled Substance

[27] Jennings also asserts that the State failed to show that he possessed the handgun found in the backpack in his apartment. The State used the handgun to support an element of both Jennings's conviction for Level 4 felony possession of a firearm by a serious violent felon and his conviction for Level 6 felony possession of a controlled substance. *See* I.C. §§ 35-47-4-5(c), -48-4-7(b); *see also* I.C. § 35-48-1-16.5(2).

[28] Jennings asserts that the State failed to show that he constructively possessed the handgun because the State did not demonstrate that he was the sole occupant of apartment three. It is well-established that possession of an item may be either actual or constructive. *See, e.g.*, *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004). Constructive possession occurs when a defendant has: (1) the capability to maintain dominion and control over the item; and (2) the intent to maintain dominion and control over it. *Id.* The capability element of constructive possession may be met when the State shows that the defendant is "in possession of the premises," regardless of whether his "possession of the

premises is exclusive or not." *Id.* at 340-41. Likewise, the intent element of constructive possession is shown when the State demonstrates the defendant's knowledge of the presence of the contraband, which "may be inferred from . . . the exclusive dominion and control over the premises containing the contraband." *Canfield v. State*, 128 N.E.3d 563, 572 (Ind. Ct. App. 2019), *trans. denied*.

[29] Jennings's argument to the contrary notwithstanding, the State demonstrated that he was the sole and exclusive occupant of apartment three, and, thus, the State demonstrated both his capability and intent to maintain dominion and control over the handgun. The officers confirmed in State databases that Jennings's address was at apartment three. Jennings's name, and no other name, appeared on the mailbox for apartment three. The apartment was a one-bedroom apartment. When Jennings first arrived at the apartment after the officers had searched it, he called the police and reported that "*his* door was broken down." Tr. Vol. 2, p. 159 (emphasis added). And, inside the apartment—indeed, inside the backpack with the handgun and spice—officers found medical paperwork in Jennings's name. Jennings also admitted that he was "buying and reselling the spice . . . for a profit." *Id.* at 163. No other persons ever arrived at the apartment, and no evidence, such as photographs, personal belongings, or paperwork, suggested any other person lived in or even frequently visited the apartment. Accordingly, the State demonstrated that Jennings had exclusive dominion, control, and possession over the apartment and, by extension, the handgun within it.

Habitual Offender Adjudication

[30] To demonstrate that Jennings was a habitual offender, the State was required to show, in relevant part, that he had three prior unrelated felony convictions. I.C. § 35-50-2-8(d).[1] To support its allegation, the State presented conviction records that showed that Jennings had been convicted in 2018 of Level 6 felony operating while intoxicated; in 2013 of Class D felony possession of marijuana; and in 2008 of Class D felony possession of marijuana.

[31] Jennings asserts that the State's records did not sufficiently identify him as the defendant in each of those cases. We disagree. The records in all three cases included Jennings's name, date of birth, and driver's license number. The records in two of the cases also included his social security number and booking photographs. Jennings's date of birth, driver's license number, and social security number were all admitted during the first phase of his trial. Further, each of the three prior convictions were resolved by way of plea agreements, and each of the plea agreements contains nearly identical signatures purporting

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[1] Jennings argues that the State failed to identify the precise subsection on which it relied to establish his adjudication as a habitual offender and, thus, his adjudication should be reversed for a lack of notice. But Jennings did not object to the purported lack of clarity of the State's allegation, and he may not raise the issue for the first time on appeal. *See* Ind. Appellate Rule 46(A)(8)(a); *cf. Wright v. State*, 690 N.E.2d 1098, 1104 (Ind. 1997) ("Having failed to request a continuance after the court granted the motion to amend, defendant has waived this issue on appeal."). Further, in its habitual offender allegation, the State alleged that Jennings had four prior felony convictions—but one of those prior felony convictions, the 2010 conviction, was also identified by the State in its information as an essential element both for the Level 4 felony charge of unlawful possession of a firearm by a serious violent felony and also for the Level 5 felony charge of dealing in a substance represented to be a controlled substance. That left the other three prior felony convictions to prove the habitual offender allegation, and we agree with the State that the only subsection through which the State could prove the habitual offender allegation based on the remaining three prior felonies was § 35-50-2-8(d).

to be Jennings's signature. Accordingly, the State readily demonstrated that Jennings was the defendant in the predicate convictions, and it therefore presented sufficient evidence to support his adjudication as a habitual offender.

Issue Three: Double Jeopardy

[32] Jennings next asserts that his three convictions and his habitual offender adjudication violate Indiana's prohibition against double jeopardy. In 2020, our Supreme Court overruled Indiana's precedent regarding claims of substantive double jeopardy violations. *Wadle v. State*, 151 N.E.3d 227, 235 (Ind. 2020). Now, claims of substantive double jeopardy violations—where, as here, the defendant is convicted of violating multiple criminal statutes—are governed by the following two-part inquiry:

> First, a court must determine, under our included-offense statutes, whether one charged offense encompasses another charged offense. Second, a court must look at the underlying facts—as alleged in the information and as adduced at trial—to determine whether the charged offenses are the "same." If the facts show two separate and distinct crimes, there's no violation of substantive double jeopardy, even if one offense is, by definition, "included" in the other. But if the facts show only a single continuous crime, and one statutory offense is included in the other, then the presumption is that the legislation intends for alternative (rather than cumulative) sanctions.

Id.

[33] Jennings was convicted of Level 4 felony unlawful possession of a firearm by a serious violent felon, Level 5 felony dealing in a substance—spice—represented

to be a controlled substance, and Level 6 felony possession of a controlled substance—the ecstasy pill—which offense was enhanced based on Jennings's possession of the firearm. Simply, none of those offenses encompasses, either inherently or factually, another of the offenses. Indeed, Jennings's argument to the contrary is based on pre-*Wadle* double-jeopardy precedent, which is no longer good law.[2] *See id.*

[34] Neither is Jennings's habitual offender adjudication problematic. Jennings argues that his 2013 conviction had already been enhanced by his 2008 conviction, and he therefore cannot now again receive an enhancement based on his 2008 conviction. He cites no authority for this proposition,[3] and his assertion is not within the framework of substantive double jeopardy claims prohibited by *Wadle*. We therefore reject this argument and hold that Jennings has not demonstrated a violation of his substantive double jeopardy rights.

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[2] Likewise, we reject Jennings's reliance on pre-*Wadle* "common law" double jeopardy analyses, which were part-and-parcel with the substantive claims of double jeopardy that the *Wadle* Court expressly superseded. *See, e.g.*, *Rice v. State*, 199 N.E.3d 815, 820-21 (Ind. Ct. App. 2022), *trans. denied*. In a footnote, Jennings also suggests that *Wadle* does not apply here because it was decided after he committed his offenses. Appellant's Br. at 40 n.6. But the Indiana Supreme Court has outlined a three-part test of "relevant considerations in determining whether to apply new rules of state criminal procedure retroactively," and Jennings in no way assesses how that test might apply to this appeal. *Membres v. State*, 889 N.E.2d 265, 272 (Ind. 2008). We therefore conclude that Jennings has not preserved any such argument for our review. *See* Ind. Appellate Rule 46(A)(8)(a). And we similarly conclude that, insofar as Jennings intended to raise an argument on appeal under the "continuous crime doctrine" apart from his double-jeopardy argument, Jennings again has not supported any such argument with cogent reasoning, and, therefore, we also do not consider this purported argument either. *See id.*

[3] Neither is there a double enhancement problem here, as Indiana Code section 35-50-2-8(e) expressly allows a prior conviction to support a habitual offender adjudication "even if the sentence for the prior unrelated felony was enhanced for any reason."

Issue Four: Sentencing Enhancements

[35] We next turn to Jennings's argument that the trial court applied an improper double enhancement to his sentence when it used the predicate felony for Jennings's Level 4 felony unlawful possession of a firearm by a serious violent felon as a predicate felony for finding Jennings to be a habitual offender. But, as noted above, we agree with the State that the trial court did not do this; instead, the predicate three felonies for the habitual offender adjudication were prior convictions other than the 2010 conviction, which was used to support Jennings's conviction on the Level 4 felony.

[36] Jennings also asserts that the trial court applied an improper double enhancement when it allowed the State to use the 2010 conviction to both establish an element of his Level 4 felony conviction and to enhance his conviction for dealing in a substance represented as a controlled substance to a Level 5 felony. However, "where separate counts are enhanced based on the same prior felony conviction . . . , if the trial court orders the sentences to run concurrently, the enhancements . . . operate just once to increase the defendant's term of imprisonment." *Sweatt v. State*, 887 N.E.2d 81, 84 (Ind. 2008). And that is what happened here: the trial court ordered Jennings's sentences for the Level 4 and Level 5 felony convictions to run concurrently. Therefore, there is no double enhancement problem.

Issue Five: Sentencing Appropriateness

[37] Last, Jennings asserts that his aggregate sentence of twelve years executed in the Department of Correction is inappropriate in light of the nature of the offenses and his character. Under Indiana Appellate Rule 7(B), we may modify a sentence that we find is "inappropriate in light of the nature of the offense and the character of the offender." Making this determination "turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Sentence modification under Rule 7(B), however, is reserved for "a rare and exceptional case." *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).

[38] When conducting this review, we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Our role is to "leaven the outliers," not to achieve what may be perceived as the "correct" result. *Id.* Thus, deference to the trial court's sentence will prevail unless the defendant persuades us the sentence is inappropriate by producing compelling evidence portraying in a positive light the nature of the offense—such as showing restraint or a lack of brutality—and the defendant's character—such as showing substantial virtuous traits or persistent examples of positive attributes. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018); *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[39] Initially, we note that the trial court did not impose the maximum possible sentence allowed. The trial court entered judgment of conviction against Jennings on a Level 4 felony, a Level 5 felony, and a Level 6 felony, and it found him to be a habitual offender. A Level 4 felony carries a sentencing range of two to twelve years with an advisory sentence of six years. I.C. § 35-50-2-5.5. A Level 5 felony carries a sentencing range of one to six years with an advisory sentence of three years. I.C. § 35-50-2-6. A Level 6 felony carries a sentencing range of six months to two-and-one-half years with an advisory sentence of one year. I.C. § 35-50-2-7. And, here, Jennings's adjudication as a habitual offender carried an additional fixed term between six and twenty years. I.C. § 35-50-2-8(i)(1). Thus, Jennings faced a maximum term of 40.5 years.

[40] In imposing Jennings's sentence, the trial court found as aggravating factors Jennings's criminal history, namely, eleven "petitions to revoke with [six] found true," four motions "to execute with [four] found true and [one] pending," and that Jennings was "on probation at the time of the instant offense[s]." Appellant's App. Vol. 3, p. 105. The court also found Jennings's substance abuse history and the failure of prior attempts at rehabilitation as aggravating factors. In mitigation, the court found that Jennings had "taken advantage of programs while in custody," his employment history, and his cooperation with law enforcement. *Id.* The court imposed a six-year term on Jennings's Level 4 conviction, to which the court attached an additional six-year term for being a habitual offender. The court then imposed concurrent terms of four years on the

Level 5 felony conviction and two years on the Level 6 felony conviction, for an aggregate term of twelve years.

[41] We cannot say that Jennings's sentence is inappropriate. Regarding the nature of the offenses, Jennings possessed over forty-four grams of spice with the intent to deal it. He also was in possession of a pill of ecstasy and a firearm. Regarding his character, he has an extensive criminal history, numerous prior violations of suspended placements, and he was on probation at the time of the instant offenses.

[42] Still, Jennings asserts that his twelve-year sentence is inappropriate based on his age, his family, his educational history, his employment history, his mental health, and his attempts at treatment. The trial court already accounted for some of those purported mitigators when it sentenced Jennings, and Jennings has not persuaded us that the remainder are significant. Neither has Jennings produced compelling evidence portraying in a positive light the nature of the offense and his character. Accordingly, we cannot say that his aggregate twelve-year sentence is inappropriate.

Conclusion

[43] For all of the above-stated reasons, we affirm Jennings's convictions, his adjudication as a habitual offender, and his sentence.

[44] Affirmed.

May, J., and Bradford, J., concur.