MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Toriono Johnson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 20, 2023

Court of Appeals Case No. 22A-CR-1581

Appeal from the Madison Circuit Court

The Honorable Mark Dudley, Judge

Trial Court Cause No. 48C06-2008-F1-1906

Memorandum Decision by Judge Riley
Chief Judge Altice and Judge Pyle concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Toriono Terrell Johnson (Johnson), appeals his convictions and sentence for attempted murder, Level 1 felony, Ind. Code §§ 35-42-1-1(1); -41-5-1(a); possession of marijuana, a Class B misdemeanor, I.C. § 35-48-4-11(a)(1); unlawful possession of a firearm by a serious violent felon, a Level 4 felony, I.C. § 35-47-4-5(c); and his adjudication as an habitual offender, I.C. § 35-50-2-8.

[2] We affirm.

ISSUES

[3] Johnson presents this court with three issues on appeal, which we restate as:

(1) Whether the State presented sufficient evidence beyond a reasonable doubt to support Johnson's conviction for attempted murder;
(2) Whether the trial court abused its discretion by failing to acknowledge Johnson's mental health and the victim's testimony as mitigating circumstances; and
(3) Whether Johnson's sentence is inappropriate in light of the nature of his offenses and his character.

FACTS AND PROCEDURAL HISTORY

[4] On August 15 and 16, 2020, Soul Fest, a food and music festival, took place at Fairview Park in Anderson, Indiana. Several hundred people came into town to attend the festival, with many people congregating at 16th and Madison

Streets, an intersection just east of Sonny Ray's, a local bar. Throughout the night, the Anderson Police Department responded to multiple calls in the area.

[5] Just after midnight on August 16, 2020, the Anderson Police Department received a call of shots fired and all available officers responded. Officer Dillon Armstrong (Officer Armstrong), who was already in the area, believed multiple shooters were present because of the different caliber firearms being discharged. The officers located Chad Branson (Branson) at West 15th and Cedar Streets, who had been shot in the abdomen. Branson informed the officers that he had been shot in the grassy area around West 16th and Cedar Streets, approximately one block south of where the officers had found him.

[6] Sergeant Joshua Branson (Sergeant Branson), Officer Armstrong, and Officer Gabe Bailey (Officer Bailey) were dispatched in an attempt to locate the area where Branson had been shot. Approximately one minute after they arrived, they heard a large amount of gunfire originating from the area of Sonny Ray's and the adjacent parking lot. The scene became chaotic. The officers observed people shooting at one another, people running in all directions, and vehicles leaving. At the same time, Aaron Boyd (Boyd) was hanging out in his truck in Sonny Ray's parking lot with a friend, Charles Harden (Harden). Boyd observed an argument near him, which escalated when an individual discharged a gun. Boyd and Harden immediately pulled away from the scene. As they started to pull away, Boyd heard more gunshots and "felt a little burn in [his] back." (Transcript Vol. I, p. 168).

[7] Meanwhile, Sergeant Bowling and Officer Bailey noticed an individual, wearing peach or orange colored clothing, later identified as Johnson, approach the driver's side of Boyd's truck within five feet, and fire several shots in the direction of the fleeing vehicle. Officers unsuccessfully attempted to apprehend Johnson, who fled the scene. Officer Bailey fired one shot, but Johnson continued to flee with the officers in pursuit. During their chase, the officers located another gunshot victim, later identified as Antonio Thompson (Thompson). A homeowner notified the officers that someone had run through his backyard. Upon a search of the backyard, the officers found peach colored shorts and a revolver, which had five spent rounds inside. Inside the shorts, the officers discovered marijuana, a digital scale, and keys to a Ford vehicle.

[8] Trooper Jason Girt (Trooper Girt) with the Indiana State Police was dispatched to the area around 1:00 a.m. Upon his arrival at Sonny Ray's, Trooper Girt saw Johnson, without pants but wearing a peach-colored shirt and white tennis shoes, running from the area. Although Trooper Girt ordered him to stop, he continued to run. A subsequent K-9 search was unsuccessful.

[9] After leaving Sonny Ray's, Boyd contacted his cousin with the request to check out his back, which appeared as if it had been grazed by a bullet. Boyd later identified bullet holes inside and outside his truck. Boyd took his vehicle to the police station the following day, where it was determined that his truck had at least four bullet holes, including one in the driver's seat headrest, as well as a broken back window on the driver's side.

[10] Later on August 16, 2020, an officer located Johnson's blue Ford vehicle parked in the grassy area to the east of Sonny Ray's. Three nearby surveillance video cameras had captured two of the shooting incidents, including the shooting of Boyd's truck. When Officer Mike Lee (Officer Lee) arrived on the scene around 12:50 p.m., he overheard a conversation between Johnson and a female. Johnson observed that his shorts "should be easy to find, they are peach." (Tr. Vol. II, p. 11). Officer Lee asked Johnson if he would be willing to speak with investigators about the shooting that had occurred earlier, to which Johnson agreed. While waiting to be transported to the police station, Johnson extemporaneously stated that, "all I did was stand my ground. I didn't do anything wrong and it was crazy." (Tr. Vol. II, pp. 13-14).

[11] On August 20, 2020, the State filed an Information, charging Johnson with Level 1 felony attempted murder, Class B misdemeanor possession of marijuana, and Level 4 felony unlawful possession of a firearm by a serious violent offender. The State subsequently amended the charging Information and added an habitual offender charge. Prior to trial, the trial court ordered two competency evaluations of Johnson to be conducted. Both evaluations concluded that Johnson was competent to stand trial and that he was mentally competent at the time the offenses occurred. Neither evaluation identified that Johnson suffered from a mental disease or defect, and one evaluation explicitly concluded that Johnson "does not have a significant mental disease," and explained:

> [Johnson] does struggle with limited intelligence combined with strong opinions. He is likely to be difficult to deal with in some ways, as he seems to act on the belief that his insistence on things supersedes the need for explanation or exploration of evidence. However, he does not hold any delusional or irrational beliefs. He shows no evidence of psychosis or significant intellectual impairment. He does have borderline intellectual functioning and will need things explained to him clearly in a very concrete manner. He is capable of understanding and following directions. He may choose not to follow directions he is given, but he is capable of doing so if he chooses.
>
> It is my opinion, with reasonable medical certainty that, at the time of the offense, [Johnson] did not have a mental disease or defect, but was primarily under the influence of voluntary, alcohol-induced intoxication. It is my opinion, with reasonable medical certainty, that [Johnson] was capable of appreciating the wrongfulness of the alleged behavior at the time of the offense.

(Appellant's App. Vol. III, p. 34).

[12] On May 2 through May 5, 2022, the trial court conducted a jury trial. At the conclusion of the evidence, Johnson was found guilty as charged. On June 10, 2022, the trial court held a sentencing hearing. During the hearing, Johnson proffered several mitigators, including his mental health. He also offered the testimony of his mother and sister, both of whom believed he suffered from a mental illness. In support of Johnson, Boyd testified that he was not a victim and that Johnson did not attempt to kill him. At the conclusion, the trial court acknowledged Johnson's criminal history as aggravating factor and declined to identify any mitigating factor. It explicitly rejected Johnson's proffered remorse

mitigator because his remorse was not supported by actions, as well as Johnson's proffered mental health mitigator, clarifying that

> you did get reviewed by two mental health professionals and both of them said that you aren't suffering, or you are not suffering from a diagnosis of a mental health disease or defect. And so, based on that I'm not gonna interpose my non-expert opinion and say that you do. That's why I find that that's not in mitigation.

(Tr. Vol. II, p. 226). The trial court sentenced Johnson to thirty-five years for Level 1 felony attempted murder, enhanced by seventeen and a half years for the habitual offender charge; five months for Class B misdemeanor possession of marijuana; and ten and a half years for Level 4 felony unlawful possession of a firearm by a serious violent felon, with sentences to run concurrently, for an aggregate sentence of fifty-two and a half years executed at the Department of Correction.

[13] Johnson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

[14] Johnson contends that the State failed to present sufficient evidence beyond a reasonable doubt to support his conviction for attempted murder. Our standard of review with regard to sufficiency claims is well-settled. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Clemons v. State*, 987 N.E.2d 92, 95 (Ind.

Ct. App. 2013). We consider only the evidence most favorable to the judgment and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

[15] Murder is generally defined by statute as knowingly or intentionally killing another human being. *See* I.C. § 35-42-1-1(a). And the general attempt statute provides that "[a] person attempts to commit a crime when, acting with the culpability required for the commission of the crime, the person engages in conduct that constitutes a substantial step toward commission of the crime[.]" I.C. § 35-41-5-1(a). Despite this statutory language, it is well settled that a conviction for attempted murder requires proof of more than a "knowing" *mens rea*; it instead requires proof of specific intent to kill. *Spradlin v. State*, 569 N.E.2d 948, 950 (Ind. 1991). Accordingly, to convict Johnson of attempted murder, the State was required to prove beyond a reasonable doubt that Johnson, acting with the specific intent to kill Boyd, engaged in conduct that constituted a substantial step toward the commission of the crime of murder. *See* I.C. §§ 35-42-1-1(1); -41-5-1(a). Johnson only challenges the intent prong of the statute. Statutorily, a person engages in conduct intentionally if, when he engages in the conduct, it is his conscious objective to do so. *See* I.C. § 35-41-2-2(a). Intent to kill may be inferred from the nature of the attack and the circumstances surrounding the crime, including the use of a deadly weapon in a

manner that is likely to cause death. *Perez v. State*, 872 N.E.2d 208, 213-14 (Ind. Ct. App. 2007), *trans. denied*. In particular, "discharging a weapon in the direction of a victim is substantial evidence from which the jury could infer intent to kill." *Corbin v. State*, 840 N.E.2d 424, 429 (Ind. Ct. App. 2006).

[16] Johnson's reliance on *Bethel v. State*, 730 N.E.2d 1242 (Ind. 2000) and *Henley v. State*, 881 N.E.2d 639 (Ind. 2008) in support of his argument that the intent element of the attempted murder charge is absent is without merit. In *Bethel*, our supreme court reversed one of the defendant's convictions for attempted murder as an accomplice because the record was "devoid of any probative evidence that [the co-actor shooter] was pointing his firearm at [the victim] when he fired the weapon[.]" *Bethel*, 730 N.E.2d at 1245-46. No one was injured, there was no evidence of bullet damage, and no bullets were recovered. *Id*. In *Henley*, our supreme court, in an effectiveness of counsel argument in a post-conviction relief proceeding, held that the evidence was insufficient to establish that the defendant had the specific intent to kill another person because it only showed that when he shot at a police dog, he was unaware of the presence of the officer, and none of the shots fired "whizzed" past the officer. *Henley*, 881 N.E. 2d at 652-53.

[17] Unlike in *Bethel* and *Henley*, eyewitness testimony, surveillance footage, Boyd's injury, and the damage to Boyd's truck supported Johnson's requisite intent to kill Boyd. Sergeant Bowling and Officer Bailey noticed Johnson chasing Boyd's truck as it was leaving Sonny Ray's parking lot. They observed him approach the driver's side of the vehicle within five feet, and fire multiple shots

directly at Boyd's truck. *See, e.g., Shelton v. State,* 602 N.E.2d 1017, 1021 (Ind. 1992) (Attempted murder conviction sustained where defendant pointed handgun at victim and shot him twice from a distance of twelve and thirty feet). Three surveillance video cameras near the grassy area to the east of Sonny Ray's had captured the shooting of Boyd's truck. A bullet grazed Boyd's back and his truck was sprayed with at least four bullets. *See Perez*, 872 N.E.2d at 213-24 (finding specific intent to kill when the defendant shot into a vehicle three to five times).

[18] Johnson's reliance on Boyd's statement at the sentencing hearing that "[Johnson] wasn't trying to shoot [me]. And I truly believe that with my heart[,]" is equally unavailing as it amounts to an invitation to reweigh the evidence which we cannot do. *See Clemons*, 987 N.E.2d at 95; (Tr. Vol. II, p. 221). Accordingly, we conclude that the State presented sufficient evidence beyond a reasonable doubt establishing Johnson's intent to kill Boyd.

II. *Mitigating Circumstances*

[19] Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id*. An abuse of discretion will be found where 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. *Id*. A trial court may abuse its discretion in

a number of ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Id*. at 490-91. A trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant. *Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000).

[20] Johnson claims that his sentence should be reduced because the trial court omitted the mitigating factors of Johnson's mental health and Boyd's testimony. With respect to his mental health, Johnson points to his multiple outbursts during the proceedings which caused the trial court to remove him from part of the hearing, testimony by Johnson's sister that bipolar schizophrenia runs in the family, and testimony by Johnson's mother that Johnson had required treatment when he was fourteen because he was "seeing things and hearing things[,]" and that he was "unable to control his emotions." (Tr. Vol. II, p. 217). Despite the evidence presented by Johnson, the trial court explicitly declined to find his mental health as a mitigating factor, and relied on the competency evaluations by disinterested mental-health professionals, neither of whom identified a mental disease or defect even though both evaluations noted that Johnson may struggle due to his below-average intellectual functioning. "If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not

obligated to explain why it has found that the factor does not exist." *Anglemyer*, 868 N.E.2d at 493. Furthermore, the trial court need not consider alleged mitigating circumstances that are highly disputable in nature, weight, or significance. *Newsome v. State*, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003). Accordingly, we cannot say that the trial court abused its discretion.

[21] Johnson also contends that the trial court should have given Boyd's testimony—that "I don't – [Johnson], if this is all true, he wasn't trying to shoot me[,]"—mitigating weight. (Tr. Vol. II, p. 220). However, to give credit to Boyd's statement believing Johnson to be innocent would discredit the conclusion reached by the jury. As the trial court is not required to give the same weight to mitigating factors as does the defendant, we cannot say that the trial court abused its discretion. *See Newsome,* 797 N.E.2d at 301 (the trial court is not required to give the same weight to mitigating factors as does the defendant and is under no obligation to find mitigating factors at all).

III. *Inappropriateness of the Sentence*

[22] Lastly, Johnson contends that his fifty-two and a half years sentence is inappropriate in light of the nature of the offenses and his character and requests this court for a downward revision of his imposed aggregate sentence. Sentencing is primarily "a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). Nevertheless, although a trial court may have acted within its lawful discretion in fashioning a sentence, our court may revise the

sentence "if, after due consideration of the trial court's decision, [we] find[ ] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). "The principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." *Cardwell*, 895 N.E.2d at 1225. Ultimately, "whether we regard a sentence as appropriate 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 factors that come to light in a given case." *Id*. at 1224. We focus on "the length of the aggregate sentence and how it is to be served." *Id.* Our court does "not look to see whether the defendant's sentence is appropriate or if another sentence might be *more* appropriate; rather, the test is whether the sentence is 'inappropriate.'" *Barker v. State*, 994 N.E.2d 306, 315 (Ind. Ct. App. 2013), *trans. denied.*

[23] The advisory sentence is the starting point selected by the General Assembly as a reasonable sentence for the crime committed. *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006). Here, the trial court sentenced Johnson to thirty-five years for Level 1 felony attempted murder, which carried a possible sentence between twenty and forty years, with an advisory sentence of thirty years. *See* I.C. § 35-50-2-4(b). Johnson received five months for Class B misdemeanor possession of marijuana, which carried an imprisonment sentence of not more than 180 days. *See* I.C. § 35-50-3-3. He was also sentenced to ten and a half

years for Level 4 felony unlawful possession of a firearm by a serious violent felon, which carried a possible sentence between two and twelve years, with the advisory sentence being six years. *See* I.C. § 35-50-2-5.5. The trial court enhanced his sentence by seventeen and a half years for his habitual offender adjudication, which carried a sentencing range between six to twenty years. *See* I.C. § 35-50-2-8(i)(1). Johnson's aggregate sentence amounted to fifty-two and a half years. Johnson now bears the burden of persuading our court that this sentence is inappropriate. *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). The trial court's judgment should prevail unless it is "overcome by compelling evidence portraying in a positive light the nature of the offense . . . and the defendant's character." *Stephenson v. State*, 29 N.E.3d 111, 111-12 (Ind. 2015).

[24] With respect to the nature of the crimes, we observe that Johnson started shooting in the busy parking lot of a popular hangout spot on a weekend that the town was hosting a music festival. Unconcerned that innocent bystanders might get hurt, Johnson chased down Boyd and attempted to shoot him several times. After fleeing the scene in an attempt to evade apprehension, Johnson tried to rid himself of incriminating evidence by dropping his gun and shedding his pants which contained marijuana. We cannot find any "compelling evidence" warranting a revision of Johnson's sentence. *See id*.

[25] Turning to Johnson's character, we note that "[a] defendant's criminal history is relevant in assessing his character." *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). Johnson has an extensive criminal history. As a juvenile,

he was adjudicated as a delinquent for disorderly conduct and resisting arrest. As an adult, Johnson had acquired eleven different convictions over seventeen years, had been committed to the Department of Correction six times, had completed drug court twice, and had his probation revoked twice. His convictions include robbery, assisting a criminal, theft, multiple Counts of possession of marijuana, multiple Counts of resisting law enforcement, and multiple Counts of dealing in a narcotic drug. Johnson was on probation when he committed the instant offenses.

[26] Johnson now contends that "seemingly every interested party in the case argued a lesser sentence was appropriate," with Boyd arguing that he would hate for the sentence to be "a lot of years," and the State and probation department both advising that a forty-five-year executed sentence would be appropriate. (Appellant's Br. p. 23). However, just because the State and probation department suggested that one sentence would be appropriate, does not indicate that a different sentence is inappropriate. *See King*, 894 N.E.2d at 268 (the question under Appellate Rule 7(B) is not whether another sentence is more appropriate but rather whether the sentence imposed is inappropriate). As we cannot say that Johnson's aggregate sentence is inappropriate based on the nature of the offenses and his character, we affirm the trial court's imposition of his fifty-two and a half years executed sentence.

CONCLUSION

[27] Based on the foregoing, we hold that the State presented sufficient evidence beyond a reasonable doubt to support Johnson's conviction for attempted

murder. We also hold that the trial court did not abuse its discretion in sentencing Johnson and his sentence is not inappropriate.

[28] Affirmed.

[29] Altice, C. J. and Pyle, J. concur