MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Matthew J. McGovern
Fishers, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Tyler G. Banks
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Brandon Lee Lothery,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 24, 2023

Court of Appeals Case No. 22A-CR-2156

Appeal from the Clark Circuit Court

The Honorable Bradley B. Jacobs, Judge

Trial Court Cause Nos. 10C02-2005-F5-131
10C02-1907-F2-17

Memorandum Decision by Judge Bailey
Judges Brown and Weissmann concur.

Bailey, Judge.

Case Summary

[1] Following a jury trial, Brandon Lothery appeals his convictions and sentence for possession of a narcotic drug, as a Level 6 felony;[1] possession or use of a legend drug, as a Level 6 felony;[2] and possession of a hypodermic syringe, a Level 6 felony.[3] Following his guilty plea to possession of methamphetamine, as a Level 4 felony,[4] he appeals his sentence for the same.

[2] We affirm.

Issues

[3] Lothery raises the following four restated issues on appeal:

I. Whether the trial court erred in admitting evidence against him because it was obtained in violation of the Fourth Amendment.

---

[1] Ind. Code § 35-48-4-6(a).

[2] I.C. §§ 16-42-19-13 and 16-42-19-27.

[3] I.C. § 16-42-19-18(a).

[4] I.C. § 35-48-4-6.1(a) and (c).

II. Whether the evidence against him was obtained in violation of Article 1, Section 11 of the Indiana Constitution because the vehicle and/or his person were searched without first advising him of his right to an attorney as recognized in *Pirtle v. State*, 323 N.E.2d 634 (Ind. 1975).

III. Whether the trial court's error, if any, in admitting evidence of past crimes, wrongs, or other bad acts was harmless.

IV. Whether Lothery's sentence is inappropriate in light of the nature of the offenses and his character.

Facts and Procedural History

[4] On July 15, 2019, the police were dispatched to a gas station to investigate a report of an unconscious, unresponsive man sitting in a silver van. When an officer arrived, he found Lothery asleep in the silver van. Lothery consented to a search of the vehicle, and the officer found drug paraphernalia and a large plastic bag containing five smaller baggies that contained methamphetamine. Under cause number 10C02-1907-F2-17 ("F2-17"), Lothery was charged with dealing and possession of methamphetamine and was alleged to be a habitual offender. Lothery subsequently entered into a plea agreement in F2-17, under which he pled guilty to Level 4 felony possession of methamphetamine, the other charges would be dropped, and his sentence would be capped at six years.

[5] On the evening of May 16, 2020, Officer Eric Kruse of the Charlestown Police Department received a call from dispatch that a person located at the Creekside

Apartments had reported that drug activity was occurring in the apartment parking lot. When Officer Kruse arrived at the scene, he turned off his headlights, did not activate emergency lights or spotlights, and did not block anyone in with his vehicle. Officer Kruse exited his vehicle and approached the informant who was still in the parking lot. Officer Kruse spoke with the informant, who stated that he had smelled marijuana coming from a silver car that was parked in the lot. The informant pointed out the silver vehicle to Officer Kruse.

[6] Officer Kruse then approached the silver vehicle. As he did so, the driver of the vehicle—later identified as Brian Crum—opened his driver's side door and placed one foot on the ground outside the door. Crum asked Officer Kruse, "What's happening?," and Officer Kruse asked, "What's up, dude?" State's Ex. 1 at 21:29:10. Crum replied, "Nothing, smoking a cigarette." *Id*. Officer Kruse then asked Crum, "Ain't smokin' no weed?" *Id*. Crum replied, "No, ain't got no weed" and stated that he and the passenger were "just sitting here, talking." *Id*. Officer Kruse asked, "Y'all got your id on ya'?" *Id*. at 21:29:30. Lothery, who was seated in the front passenger seat, stated that he did not have identification with him.

[7] Crum, who had by now fully exited the vehicle, asked Officer Kruse whether someone had said that he and Lothery were "smoking weed," and Officer Kruse replied, "Yeah, I guess another car." *Id*. at 21:29:50. Officer Kruse then asked Crum to stand at the back of the car next to Officer Dickerson, who had recently arrived at the scene. Crum did so, and Officer Kruse walked to the

passenger-side front door and opened it. Officer Kruse said to Lothery, "You ain't got no id on ya'?," and Lothery replied, "No." *Id*. at 21:30:02. Officer Kruse "asked Mr. Lothery to step out of the vehicle,"[5] and Lothery moved a case from his lap to the center of the vehicle and exited. Tr. v. II at 173. Lothery then walked toward the back of the vehicle.

[8] Officer Kruse asked Lothery and Crum, "There ain't nothing illegal in the car or anything like that?," and both men replied, "No." State's Ex. 1 at 21:31:16. Officer Kruse then asked if he could search the vehicle, and Crum said, "Go ahead." *Id*. While Crum and Lothery stood at the back of the vehicle with Officer Dickerson, Officer Kruse opened the front passenger side door and began his search of the vehicle. Immediately upon putting his head into the vehicle, Officer Kruse "could smell … the marijuana inside the vehicle." Tr. v. II at 174. In his search Officer Kruse found, on the driver's side, a marijuana grinder and, in the center console, a soft case containing a plastic bag with an off-brown powder he believed to be heroin.

[9] After his search, Officer Kruse stated to Lothery and Crum, "You got a grinder in there," and Crum stated that the grinder belonged to him. State's Ex. 1 at 21:38:19. Officer Kruse stated, "Just 'cuz I found that stuff in the car, I gotta read you your rights, alright?," and proceeded to give Lothery and Crum the

---

[5] Officer Kruse testified that he asked Lothery to step out of the vehicle, although he cannot be heard making that request on the video from his body camera, which was admitted as State's Exhibit 1.

Miranda warning. *Id*. at 21:38:32. Lothery and Crum both stated that they understood their *Miranda* rights.

[10] Officer Kruse then stated again that there was a grinder in the car, along with "papers." *Id*. at 21:39:03. Lothery asked, "What? Are you trying to say we're arrested or something?," to which Officer Kruse replied, "No, I gotta ask you these questions." *Id*. at 21:39:36. Officer Kruse then stated to Lothery, "let me talk to you separately over here," and walked with Lothery to the front driver's side of the vehicle while Crum remained at the back of the vehicle with Officer Dickerson.

[11] Officer Kruse then stated to Lothery, "Whose baggie was that in the center console area? It was a little soft case, looked like heroin to me. Was that yours?" *Id*. at 21:40:04. Lothery replied that it was not his, that he did not know whose it was, and that he and Crum had just been talking in the car. Officer Kruse asked Lothery if he had known what was in the console, and Lothery said no. Officer Kruse then asked Lothery, "Do you have anything on you?," and Lothery said, "No, check me, man," as he raised up his arms. *Id*. at 21:40:29. Officer Kruse searched Lothery and felt a "bulge of plastic bags" inside the "bottom of [Lothery's] drawers." Tr. v. II at 174. Based on the "contour and shape" of the bulge of plastic bags, Officer Kruse believed they contained narcotics. *Id*. Officer Kruse placed Lothery in handcuffs. He then walked Lothery toward the back driver's side of the vehicle, faced Lothery toward the vehicle, and leaned Lothery against it. Officer Kruse then retrieved from Lothery's person a syringe, two cellophane plastic wrappers that had

white residue in them, and one Ziplock plastic bag containing "orange powder substances" that Lothery admitted was suboxone. *Id*. at 175. Subsequent testing showed the substance to be Buprenorphine, a legend drug.

[12] Officer Kruse retrieved from the car the soft case containing what he believed to be heroin. He took the case to Lothery and asked if it was his. Lothery replied in the negative, and Officer Kruse then asked Lothery if it belonged to Crum. Lothery said he did not know. Crum then stated several times that he had not seen Lothery use heroin "since he's been out." E.g., State's Ex. 1 at 21:47:49.

[13] On May 22, 2020, under cause number 10C02-2005-F4-131 ("F4-131"), the State charged Lothery with Count I, possession of methamphetamine, as a Level 5 felony;[6] Count II, possession of heroin, a narcotic drug, as a Level 6 felony; Count III, unlawful possession of Buprenorphine and Naloxone, legend drugs, as a Level 6 felony; and Count IV, unlawful possession of a hypodermic syringe, as a Level 6 felony. Lothery filed a motion to suppress all evidence from the search of the vehicle and his person, and the court held a hearing on the same on April 19, 2022. The court denied the motion to suppress. At the jury trial, over Lothery's continuing objections, the court admitted State's Exhibit 1, the video from Officer Kruse's body camera, and State's Exhibit 2, a still photograph taken from the video on Officer Kruse's body camera. Officer Kruse testified that Exhibit 2 was a picture of Lothery with "the soft black case

[6] I.C. § 35-48-4-6.1(a) and (b).

where [Officer Kruse] located the brown powdery substance that [he] recognized as heroin" laying in Lothery's lap. The picture was taken from the point in the video where Officer Kruse first opened the passenger side front door in order to allow Lothery to exit the vehicle.

[14] Following trial, a jury found Lothery not guilty of Count I and guilty of all other charges. Following a consolidated sentencing hearing, the trial court sentenced Lothery to six years in the Department of Correction for the Level 4 felony conviction in F2-17 and two and a half years each for the Level 6 felonies in Counts II, III, and IV in F4-131, to be served concurrently to each other but consecutive to the six-year sentence in F2-17. Thus, Lothery received a total aggregate sentence of eight and a half years in cases F2-17 and F4-131. This appeal ensued.

Discussion and Decision

Fourth Amendment

Standard of Review

[15] Lothery asserts that the trial court erred when it denied his motion to suppress evidence because the evidence was obtained in violation of the Fourth Amendment to the United States Constitution. Because he appeals following a bench trial and his conviction, the issue on appeal is more properly framed as one regarding the admissibility of the challenged evidence. *See Clark v. State*, 994 N.E.2d 252, 259 (Ind. 2013).

> In reviewing a trial court's determination on the admissibility of evidence garnered from an allegedly illegal search, we do not reweigh the evidence, we consider conflicting evidence in a light most favorable to the trial court's ruling, and we defer to the trial court's factual determinations unless they are clearly erroneous. However, we consider afresh questions regarding the constitutionality of a search or seizure.

Guthery v. State, 180 N.E.3d 339, 346 (Ind. Ct. App. 2021) (citations and quotation omitted), *trans. denied*.

Consensual Encounter

[16] Lothery asserts that the police violated his Fourth Amendment right to be free from unreasonable searches and seizures by illegally seizing him prior to the searches of the vehicle and his person.[7] The Fourth Amendment protects "[t]he right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV. However, "a person is not seized within the meaning of the Fourth Amendment by police officers merely approaching an individual in a public place and asking if the person is willing to answer questions." *Sellmer v. State*, 842 N.E.2d 358, 362 (Ind. 2006) (holding there was no Fourth Amendment violation where the officer merely approached the defendant in a retail store and "request[ed] that she step outside to answer questions"); *see also State v. Williamson*, 852 N.E.2d

[7] Lothery acknowledges that Crum consented to the search of the vehicle and that Lothery himself consented to the search of his person. However, he asserts that those consents were not valid because he was illegally seized at the time of the consent.

962, 965 (Ind. Ct. App. 2006) ("A citizen's knowledge that the person asking her questions is a police officer is not enough, by itself, to cause the citizen to believe that she is being detained or arrested." (citation omitted)).

[17] To determine whether an encounter with the police is a seizure within the meaning of the Fourth Amendment, courts must consider "whether the challenged police conduct *objectively* manifests an intent to restrain." *Torres v. Madrid*, 141 S.Ct. 989, 998, -- U.S. – (2021) (emphasis in original). That is, detention, as generally required to show a seizure, "'turns on an evaluation, under all the circumstances, of whether a reasonable person would feel free to disregard the police and go about his or her business.'" *R.H. v. State*, 916 N.E.2d 260, 263 (Ind. Ct. App. 2009) (quoting *Finger v. State*, 799 N.E.2d 528, 532 (Ind. 2003)), *trans. denied*; *see also Baxter v. State*, 103 N.E.3d 1180, 1188 (Ind. Ct. App. 2018) ("A person is 'seized' only when, by means of physical force or a show of authority, his or her freedom of movement is restrained.). Examples of circumstances under which a reasonable person would believe he was not free to leave, such that a detention has occurred, include: "(1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the person of the citizen; (4) the use of language or tone of voice that implies compulsion; and (5) accusation of criminal activity." *Baxter*, 103 N.E.3d at 1188.

[18] Here, Officer Kruse's initial approach to the vehicle and his questioning of the occupants was a consensual encounter to which the Fourth Amendment is inapplicable. There was no threatening presence of several officers, only Officer

Kruse and, later, Officer Dickerson. Although the officers were in uniform, they did not "display" or brandish their weapons. *See U.S. v. Drayton*, 536 U.S. 194, 205 (2002) (holding officer's wearing of holstered firearm at time of encounter was unlikely to contribute to coerciveness of that encounter, for Fourth Amendment purposes, absent an "active brandishing" thereof). Officer Kruse did not touch Crum or Lothery, and he used a very casual, almost friendly tone of voice that would not be perceived by a reasonable person as a tone "imply[ing] compulsion." *Baxter*, 103 N.E.3d at 1188. Nor did Officer Kruse accuse Crum and/or Lothery of criminal activity. Rather, Officer Kruse merely asked Crum whether he was "smokin' weed," and replied in the affirmative when Crum asked if someone had said he and Lothery were "smoking weed." State's Ex. 1 at 21:29:10; 21:29:50. Officer Kruse never "notified" Lothery that he was "investigating [him and Crum] for marijuana use and drug activity," as Lothery contends. Appellant's Br. at 17. In fact, Officer Kruse did not mention criminal activity at all to Lothery, who had remained seated in the car while Officer Kruse was initially talking to Crum.

[19] Given the above factors, a reasonable person would not conclude that Lothery was detained merely from Officer Kruse's initial approach and questioning. That questioning was not a seizure, but a consensual encounter to which Fourth Amendment rights did not attach. *See Powell v. State*, 912 N.E.2d 853, 862 (Ind. Ct. App. 2009) (concluding an officer's initial approach towards a parked vehicle in which defendant was an occupant was a consensual encounter, rather than an investigatory stop or a seizure under the Fourth

Amendment because, although the officer was in police uniform and driving a fully marked squad vehicle, the officer did not: activate the emergency lights or siren of his vehicle; approach the vehicle occupied in a manner that would be considered aggressive or intimidating; display a weapon as he approached the vehicle; or use any language or speak in tone of voice which mandated compliance).

Reasonable Suspicion for Investigative Stop

[20] However, the consensual encounter arguably became a seizure when Officer Kruse opened Lothery's passenger side door and asked Lothery to exit the vehicle. A seizure occurs when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. *State v. Carlson*, 762 N.E.2d 121, 126 (Ind. Ct. App. 2002) (citing *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). The test for the existence of such a "show of authority" is an objective one: "not whether the particular citizen actually felt free to leave, but 'whether the officer's words and actions would have conveyed that to a reasonable person.'" *Rutledge v. State*, 28 N.E.3d 281, 288 (Ind. Ct. App. 2015) (quoting *Clark v. State*, 994 N.E.2d 252, 261 (Ind. 2013)). Thus, "a consensual encounter may become a seizure when a police officer orders a suspect to freeze or get out of a vehicle." *Johnson v. State*, 856 N.E.2d 706, 711 (Ind. Ct. App. 2005).

[21] Arguably, Officer Kruse's actions would have conveyed to a reasonable person that they were not free to leave. *See id*. However, even assuming Officer Kruse

"seized" Lothery for Fourth Amendment purposes when he asked Lothery to exit the vehicle, that seizure was justified by reasonable suspicion of criminal activity.

[22] "The Fourth Amendment permits brief investigative stops … when a law enforcement officer has a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Navarette v. California*, 572 U.S. 393, 396 (2014) (quotation and citation omitted). The reasonable suspicion necessary to justify an investigative stop is dependent upon both the content of information possessed by police and its degree of reliability. *Id*. at 397. Reasonable suspicion for an investigative stop is not limited to information from a law enforcement officer's personal observation; it can be based on information supplied by another person. *Id*.

[23] Although a tip from an anonymous informant in some circumstances may be sufficient to support reasonable suspicion for an investigative stop,[8] a tip from a known informant is generally considered to be more reliable. *See, e.g., Florida v. J.L.*, 529 U.S. 266, 270 (2000) ("Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated,… an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." (citations and quotations omitted)); *see also Johnson v. State*, 157 N.E.3d 1199, 1204 (Ind. 2020) (citing

[8] Even an anonymous tip is sufficient to supply reasonable suspicion if corroborated by the officer's observations. *Corbett v. State*, 179 N.E.3d 475 (Ind. Ct. App. 2021).

Ind. Code § 35-44.1-2-3(d)) (finding report of criminal activity from "disinterested third party" was reliable enough to provide reasonable suspicion for investigative stop where the informant remained at the scene and confirmed his account to law enforcement, "subjecting himself to false informing if he concocted the story."). Our Supreme Court has noted that indicia of the reliability of a "concerned citizen's" volunteered tip includes: (1) whether the citizen has personally witnessed the reported crime; (2) whether the police subsequently corroborate details of the citizen's report; (3) whether the citizen has identified herself and thereby subjected herself to civil liability or prosecution for false reporting; and (4) the absence of circumstances casting the citizen's reliability into question. *Duran v. State*, 930 N.E.2d 10, 17 (Ind. 2010) (citing *Trimble v. State*, 842 N.E.2d 798, 803-04 (Ind. 2006)).

[24] Here, the police had received a tip from a citizen who had reportedly smelled a strong odor of marijuana first-hand as he walked past the silver vehicle occupied by Lothery. That citizen remained at the scene in the parking lot, spoke with Officer Kruse when he arrived, confirmed his report to Officer Kruse, and pointed out to Officer Kruse the vehicle in question. Furthermore, there was no evidence "casting the citizen's reliability into question." *Id*. And Officer Kruse subsequently corroborated the citizen's report when he smelled a strong odor of marijuana in the silver vehicle. Thus, the report from the known informant provided reasonable suspicion that the occupants of the silver vehicle were engaged in criminal activity—i.e., the possession and use of marijuana. Officer Kurse's investigatory detention of Lothery when he asked Lothery to

exit the vehicle did not violate Lothery's Fourth Amendment rights, and the trial court did not err in admitting evidence the police subsequently found.

Art. I, Sec. 11/*Pirtle*

[25] Lothery asserts that his rights under Article I, Section 11, of the Indiana Constitution were violated because Officer Kruse did not advise him of his right to an attorney before searching Crum's vehicle and Lothery's person. Like the Fourth Amendment, Article I, Section 11 protects the right of citizens to be free from unreasonable searches and seizures. In *Pirtle v. State*, 323 N.E.2d 634, 640 (Ind. 1975), our Supreme Court held that, under Article 1, Section 11, "a person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent."

Search of the Vehicle

[26] However, a person's rights under Article I, Section 11 and discussed in *Pirtle* "are personal to an individual and may not be vicariously asserted." *State v. Allen*, 187 N.E.3d 221, 227 (Ind. Ct. App. 2022) (citing *Peterson v. State*, 674 N.E.2d 528, 533-34 (Ind. 1996)), *trans. denied*. Thus, our Supreme Court has held that a passenger in a vehicle has no standing under the Fourth

Amendment or Article I, Section 11[9] to challenge the search of the vehicle because he has no expectation of privacy in it. *Campos v. State*, 885 N.E.2d 590, 598 (Ind. 2008); *see also Rakas v. Illinois*, 439 US 128, 134 (1978) (citations omitted) ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed…. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, … it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections."); *Peterson*, 674 N.E.2d at 534 ("[T]o challenge evidence as the result of an unreasonable search or seizure under Article I, Section 11, a defendant must establish ownership, control, possession, or interest in either the premises searched or the property seized."). Furthermore, "[i]t is the burden of the defendant challenging the constitutionality of a search under either our federal or state Constitutions to establish his standing to do so." *Allen*, 187 N.E.3d at 227.

[27] Here, Lothery has not even claimed—much less established—that he had ownership, control, possession, or an interest in Crum's vehicle or in the soft case that Officer Krum found in the center console. Therefore, Lothery has not

[9] *See Campos v. State*, 885 N.E.2d 590, 598 (Ind. 2008) ("[W]e believe federal precedent addressing standing of a passenger asserting an interest in a searched vehicle is equally applicable under the Indiana Constitution.").

carried his burden of establishing that he has standing to challenge the search of Crum's vehicle, and his *Pirtle* claim as to that search is without merit.

Search of Lothery's Person

[28] As to the search of Lothery himself, the rule in *Pirtle* is not applicable because Officer Kruse did not ask Lothery for consent to search his person; rather, Lothery volunteered to be searched. *See, e.g.*, *McCoy v. State*, 193 N.E.3d 387, 391-92 (Ind. 2022) (noting a *Pirtle* warning is required only when a person has been detained "and … *is asked to consent* to a home or vehicle search" (emphasis added)). And Lothery does not contend that his offer to allow a search of his person was coerced in any way. Moreover, even if *Pirtle* was applicable, there is no question that Officer Kruse did advise Lothery of his right to an attorney prior to searching his person. Lothery has failed to show a *Pirtle* violation.

Evidence of Other Bad Acts/Harmless Error

[29] Lothery challenges the trial court's admission of evidence in State's Exhibit 1, the video from Officer Kruse's body camera, in which Crum can be heard stating that he has not seen Lothery use heroin "since he's been out." State's Ex. 1 at 21:47:25. Lothery asserts that evidence was inadmissible under Indiana Rule of Evidence 404(b)(1), which states: "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." This restriction is designed to prevent the jury "from indulging in the forbidden inference that a criminal defendant's prior wrongful conduct suggests present

guilt." *Fairbanks v. State*, 119 N.E.3d 564, 568 (Ind. 2019) (internal quotation and citation omitted). Presumably, Lothery's contention is that the jury relied upon Crum's challenged statements to find that Lothery was the person who possessed the heroin, the other drugs, and the syringe.

[30] The admission or exclusion of evidence is left to the discretion of the trial court, and we will reverse that decision only for an abuse of discretion. *E.g.*, *Collins v. State*, 966 N.E.2d 96, 104 (Ind. Ct. App. 2012). "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law." *Id*. (citations omitted). We consider any conflicting evidence most favorable to the trial court's ruling and any uncontested evidence favorable to the defendant. *Id*.

[31] We first note that Crum does not state in the challenged portions of the video that Lothery had been "in jail," as Lothery acknowledges. Appellant's Br. at 23. Rather, the video only references the period of time since Lothery "got out," and that could refer to any number of things. However, the video does contain statements from Crum from which the jury could have inferred that Lothery had used heroin in the past, which is evidence of a prior "bad act" within the meaning of Rule 404(b).

[32] Second, we note that Lothery has not waived his challenge to this evidence, as the State contends. The State asserts that Lothery's objections were "untimely." Appellee's Br. at 15. However, Lothery filed a motion in limine regarding the evidence of prior bad acts on April 18, 2022, prior to trial. And,

at trial, Lothery objected on the grounds of foundation and his "previous[] objection" to the admission of the video into evidence. Tr. V. II at 212. Lothery has not waived his challenge to the evidence of his past heroin use.

[33] Finally, we conclude that the error, if any, in the admission of the challenged statements made by Crum referencing Lothery's past heroin use was not reversable error as it was harmless. Not all errors in admitting evidence of other bad acts require reversal; rather, such errors are to be disregarded as harmless error unless they affect the substantial rights of the party. *Caldwell v. State*, 43 N.E.3d 258, 267 (Ind. Ct. App. 2015) (citing *Lewis v. State*, 34 N.E.3d 240, 248 (Ind. 2015), *trans. denied*. In determining whether a party's substantial rights have been affected by erroneous admission of evidence, we consider the evidence's "probable impact on the factfinder." *Hoglund v. State*, 962 N.E.2d 1230, 1238 (Ind. 2012). Improper admission of evidence is harmless error "if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court there is no substantial likelihood the challenged evidence contributed to the conviction." *Id.*; *see also, e.g.*, *Corbett v. State*, 179 N.E.3d 475, 490-91 (Ind. Ct. App. 2021) (finding admission of evidence of bad acts was harmless error where the guilty verdict was supported by significant independent evidence and the State did not rely heavily on the other-acts evidence), *trans. denied*.

[34] Here, any error in the admission of the statements made by Crum was harmless. There was substantial independent evidence that Lothery was the person who possessed the heroin, including the picture of Lothery with the soft

black case in which the heroin was contained laying on his lap and the video of him moving it to the center of the vehicle when Officer Kruse asked him to exit the vehicle. There also was substantial independent evidence that Lothery possessed a legend drug and a syringe, as the video and Officer Kruse's testimony show that those items were found on Lothery's person. Thus, there was no substantial likelihood that the challenged evidence contributed to the conviction.

[35] Moreover, while the video from Officer Kruse's body camera does contain statements by Crum from which a jury could infer that Lothery had used heroin in the past, those statements were not clear and were made in the background while others were talking—all of which makes it less likely that the jury relied upon those statements for its conviction. *See Gridley v. State*, 121 N.E.3d 1071, 1077 (Ind. Ct. App. 2019) (finding harmless error in admission of bad acts evidence where the statement was "fragmentary at best" (citing *Schlomer v. State*, 580 N.E.2d 950, 955 (Ind. 1991)), *trans. denied*. Additionally, in its case against Lothery, the State did not rely on Crum's statements relating to past heroin use; in fact, the State did not even mention those statements in its opening and closing arguments. *See Corbett*, 179 N.E.3d at 490-91. Rather, the State stressed the evidence that the drugs and syringe were found on Lothery's person and the evidence "that the case that contained heroin was in the lap of the defendant when Kruse approached." Tr. v. III at 90. Appellate Rule 7(B)

[36] Any error in the court's admission of evidence from which Lothery's past heroin use could be inferred was harmless.

Appellate Rule 7(B)

[37] Lothery contends that his sentence is inappropriate in light of the nature of the offenses and his character. Article 7, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." *Roush v. State*, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration in original). This appellate authority is implemented through Indiana Appellate Rule 7(B). *Id.* Revision of a sentence under Rule 7(B) requires the appellant to demonstrate that his sentence is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); *see also Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

[38] 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 v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The principal role of appellate review is to attempt to "leaven the outliers." *Id.* at 1225. 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 factors 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).

[39] We begin by noting that the sentencing range for a Level 4 felony, to which Lothery pled guilty in F2-17, is a term of between two and twelve years, with an advisory sentence of six years. I.C. § 35-50-2-5.5. For his Level 4 felony conviction, Lothery received the advisory sentence, which "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007). For his three Level 6 felony convictions in F4-131, Lothery received a sentence of two and a half years for each conviction, which is within the sentencing range for Level 6 felonies. I.C. § 35-50-2-7.

[40] Our review of the record discloses nothing about the nature of Lothery's offenses that would warrant a sentence revision. "The nature of the offense is found in the details and circumstances of the commission of the offense and the defendant's participation." *Zavala v. State*, 138 N.E.3d 291, 301 (Ind. Ct. App. 2019) (quotation and citation omitted), *trans. denied*. Lothery was in possession of multiple drugs on multiple occasions, and he was also in possession of drug paraphernalia. And, while Lothery notes that he "struggle[es] with addiction," Appellant's Br. at 31, he fails to demonstrate why that fact should be a mitigating factor, *see Bennett v. State*, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003), *trans. denied*. We cannot say Lothery's offenses were accompanied by any apparent restraint or regard for others. *See Stephenson*, 29 N.E.3d at 122.

[41] Nor does Lothery's character warrant a sentence revision. "The significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, and number of prior offenses in relation to the current offense." *Denham v. State*, 142 N.E.3d 514, 517 (Ind. Ct. App. 2020) (quotation and citation omitted), *trans. denied*. Here, Lothery has a criminal history that began in 2008 and included: convictions for carrying a handgun without a license; four convictions for unlawful possession of a syringe; two convictions for possession of methamphetamine; two convictions for possession of marijuana; two convictions for resisting law enforcement; two convictions for possessing heroin in Kentucky; and a conviction for felony theft. In all, the officer who compiled Lothery's presentence report found that Lothery had "seven (7) prior Misdemeanor convictions and eight (8) prior Felony convictions" in addition to a pending case in Kentucky. App. v. II at 90. Further, Lothery had a previous petition to revoke his probation granted. Lothery's extensive criminal history reflects poorly on his character.

[42] We cannot say that Lothery's aggregate sentence is inappropriate in light of the nature of the offenses and his character.

Conclusion

[43] The admission of the evidence against Lothery was not an abuse of discretion because it was not obtained in violation of the Fourth Amendment to the United States Constitution or Article I, Section 11 of the Indiana Constitution. Further, any error in the admission of evidence of Lothery's past crimes,

wrongs, or other bad acts was harmless, as there was substantial independent evidence of Lothery's guilt such that there was no substantial likelihood that the challenged evidence contributed to his convictions. And we find nothing in the nature of Lothery's offenses or character warranting a revision of his sentence.

[44] Affirmed.

Brown, J., and Weissmann, J., concur.