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IN THE
COURT OF APPEALS OF INDIANA

Tevin B. S. Attkisson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 27, 2022

Court of Appeals Case No. 21A-CR-2659

Appeal from the Elkhart Circuit Court

The Honorable Michael A. Christofeno, Judge

Trial Court Cause No. 20C01-1707-F3-40

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Tevin B.S. Attkisson (Attkisson), appeals his conviction and sentence for robbery while armed with a deadly weapon, a Level 3 felony, Ind. Code § 35-42-5-1(a).

[2] We affirm.

ISSUES

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

(1) Whether the trial court properly admitted character evidence pursuant to Indiana Evidence Rule 404(b) to establish Attkisson's identity;
(2) Whether the State presented sufficient evidence beyond a reasonable doubt to establish Attkisson was armed with a deadly weapon; and
(3) Whether Attkisson's sentence is appropriate in light of the offense and his character.

FACTS AND PROCEDURAL HISTORY

[4] On January 25, 2017, at approximately 11:00 a.m., an individual, later identified as Attkisson, dressed in a long wig, scarf, hat, large sunglasses, and carrying a large red purse, walked into the Key Bank in Elkhart, Indiana. He was described as a light-skinned, African-American or Hispanic male, who appeared to have makeup on his neck and face, and it was believed the makeup may have been covering tattoos. Inside the bank, Attkisson approached the teller and handed him a note, which stated:

> This is a robbery. I have a gun. Do not make any sudden moves or sounds or you will die. Do not press any buttons. If the police show up, we all die. **Now** give me all the money and **No** dye packs!! Fail to comply and you will die. Hurry!!

(State's Trial Exh. 20) (emphasis in original). After receiving money from the teller, Attkisson placed it in his purse and exited the bank with $2,681 of stolen cash. Left inside the bank were two $20 bills that had fallen on the floor, along with the note. A banker sitting near the teller informed the bank manager that the bank had been robbed and then proceeded to lock the doors while the manager called the police.

[5] Three weeks later, on February 14, 2017, Codie Gluchowski (Gluchowski) was working as a teller at Lake City Bank in Elkhart, Indiana. Around 1:00 p.m., Gluchowski's attention was drawn to Attkisson, who was wearing large sunglasses, and a hat, was holding a bag tightly, and who had entered through the first set of doors into the vestibule of the bank. Attkisson looked inside the bank but exited the building immediately. Finding the behavior unusual, Gluchowski contacted the security department, who recommended that she call 911. Gluchowski immediately called 911 and locked the doors to the building.

[6] Officer James Ballard (Officer Ballard) of the Elkhart Police Department responded to the call and began canvassing the area around the bank within a few minutes. He located Attkisson—who matched the description of the person observed by Gluchowski—walking down the street, carrying a large duffel bag that, when searched, contained a black wig, sunglasses, a scarf, and a red purse.

The bag did not contain any weapons or makeup; however, Attkisson was wearing makeup which was covering the tattoos on his face and neck. Attkisson informed Officer Ballard that his name was Paris Gravis. After transporting Attkisson to the police station, Attkisson identified himself correctly and admitted to being the owner of the items inside the duffel bag.

[7] On July 27, 2017, the State filed an Information, charging Attkisson with robbery while armed with a deadly weapon, a Level 3 felony. On September 20, 2021, the trial court presided over a two-day jury trial. At trial, Attkisson objected to the State's introduction of any evidence regarding his behavior at Lake City Bank pursuant to Indiana Evidence Rule 404(b). He argued that the evidence was merely used to show that he had a propensity for crime and any probative value was outweighed by its prejudice. Overruling Attkisson's objection, the trial court ruled that:

> it would be permissible for the State to introduce such evidence under Rule 404(b)(2), particularly where the admissibility of that evidence is for another purpose, such as motive, opportunity, intent, preparation, plan, knowledge, identity, and, specifically, there was sufficient evidence in this case for the [c]ourt to find by a preponderance of the evidence that [Attkisson] engaged in the acts that we're talking about at Lake City [Bank] and that those acts could be used by the State under 404(b)(2) for identification, motive, plan, modus operandi and I would also point out that from the [c]ourt's perspective the testimony regarding the events on February 14, 2017, the Lake City [Bank] events, if you will, were necessary from the State's perspective to complete the story of the alleged crime, Robbery While Armed with a Deadly Weapon, which occurred on January 25, 2017. I specifically find it would be very difficult, if not impossible, for the State to

> explain how [] Attkisson became a suspect in the robbery charged if the State were not allowed to explain the events of February 14, 2017. Now, in doing this, I did the required balancing act under 403. Again, I found that the probative value of this evidence outweighed its prejudicial harm and I, therefore, allowed it to come in.

(Transcript Vol. II, pp. 58-59). At the close of the evidence, the jury found Attkisson guilty as charged.

[8] On November 4, 2021, the trial court conducted the sentencing hearing. At sentencing, the trial court found as mitigating factors that Attkisson had good familial relationships, had obtained his GED, and had an employment history. As aggravating factors, the trial court found Attkisson's criminal history, his probation violations and failures to appear in court, his use of illegal substances, the unsuccessful use of other sanctions to rehabilitate Attkisson, the wearing of a disguise in the current offense, and the use of a fake name to avoid detection and accountability for his crime. At the conclusion of the hearing, the trial court sentenced Attkisson to sixteen years, with fourteen years executed at the Department of Correction and two years suspended to probation.

[9] Attkisson now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

I. *Admissibility of Evidence*

[10] Attkisson first contends that the trial court abused its discretion when it admitted the events that occurred at the Lake City Bank, finding that the

evidence was relevant for purposes of identification, motive, plan, or modus operandi in accordance with Evidence Rule 404(b)(2). Trial courts have broad discretion in ruling on the admissibility of evidence. *Griffith v. State*, 788 N.E.2d 835, 839 (Ind. 2003). We will disturb a trial court's evidentiary ruling only where it is shown that the court abused its discretion. *Id.* An abuse of discretion occurs if a trial court's decision to admit or exclude evidence is clearly against the logic and effect of the facts and circumstances before it. *Turner v. State*, 953 N.E.2d 1039, 1059 (Ind. 2011). We will disregard an error in the admission of evidence as harmless unless the error affects a party's substantial rights. *Luke v. State*, 51 N.E.3d 401, 416-17 (Ind. Ct. App. 2016).

[11] Over Attkisson's objection, the State introduced evidence about Attkisson's uncharged behavior at the Lake City Bank. The evidence introduced established that Attkisson, while wearing large sunglasses, and a hat, and tightly holding a bag, entered through the first set of doors into the vestibule of the bank. Attkisson looked inside the bank but exited the building immediately. Finding his behavior peculiar, the bank teller at Lake City Bank contacted the police department and locked the building's doors. The trial court admitted the evidence pursuant to Evidence Rule 404(b)(2) because "identification is clearly the issue in this case." (Tr. Vol. II, p. 57).

[12] Indiana Evidence Rule 404(b)(1) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as "proving motive, opportunity, intent,

preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Ind. Evidence Rule 404(b)(2). The rule was designed to assure that the State, relying on evidence of uncharged misconduct, may not punish a person for his character. *Bishop v. State*, 40 N.E.3d 935, 951 (Ind. Ct. App. 2015). The standard for assessing the admissibility of 404(b) evidence is: (1) the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) the court must balance the probative value of the evidence against its unfair prejudicial effect pursuant to Indiana Evidence Rule 403. *Id*. In determining whether the trial court abused its discretion, we employ the same test. *Id.* at 952.

[13] In this case, the evidence was admitted for the limited purpose of establishing identity. Attkisson correctly observes that evidence of other crimes admitted under the identity exception are generally evaluated based on whether the crimes are signature crimes with a common modus operandi. *See id*. The signature crime test focuses on the similarity and uniqueness between the charged and uncharged conduct rather than the time frame between the different criminal episodes. *Id*. at 952-53. "It is for this reason that our precedent has set a high bar for admitting signature crime evidence, focusing instead on whether the crimes are 'so strikingly similar that one can say with reasonable certainty that one and the same person committed them.'" *Id*. at 953 (quoting *Davis v. State*, 598 N.E.2d 1041, 1048 n. 2 (Ind.1992)). Courts need not look to the signature crime test, however, when the challenged

evidence is so specifically and significantly related to the charged crime in time, place, and circumstance as to be logically relevant to one of the particular excepted purposes. *Id*. at 952.

[14] Here, Attkisson's unique signature in committing the offense, which was similar to the uncharged conduct at the Lake City Bank, established his identity as the perpetrator of the robbery at Key Bank. In both the charged and uncharged conduct, Attkisson was wearing a disguise. Evidence presented reflects that during the charged offense at Key Bank, Attkisson was dressed in a long wig, scarf, hat, large sunglasses, and was clutching a large red purse. He appeared to have makeup on his neck and face, which was used to cover his tattoos. Similarly, during the uncharged conduct at Lake City Bank, Attkisson was wearing large sunglasses, a hat, and was tightly holding a large bag. He was wearing makeup to cover the tattoos on his face and neck. After Attkisson's arrest, the search of the bag revealed a black wig, sunglasses, a scarf, and a red purse.

[15] We find that the evidence surrounding the events at Lake City Bank was relevant to the identity of Attkisson as the person who robbed the Key Bank based on the unique elements of the disguise and makeup to cover the facial tattoos, and its probative value outweighed any unfair prejudice to Attkisson. Therefore, the trial court did not abuse its discretion by admitting the evidence over Attkisson's objection.

II. *Sufficiency of the Evidence*

[16] Next, Attkisson contends that the State presented insufficient evidence to establish beyond a reasonable doubt that he committed robbery while armed with a deadly weapon. Our standard of review for sufficiency claims is well-settled. We do not reweigh evidence or assess the credibility of witnesses. *O'Connell v. State*, 742 N.E.2d 943, 949 (Ind. 2001). Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict and will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id*.

[17] Because Attkisson was charged with robbery while armed with a deadly weapon, the State was required to prove beyond a reasonable doubt that Attkisson knowingly or intentionally took property from Key Bank by using force or threatening force, or by putting someone in fear while armed with a deadly weapon. I.C. § 35-42-5-1(a). If all of the elements of the charge are established, the offense is categorized as a Level 3 felony. I.C. § 35-42-5-1(a). If no deadly weapon is present during the commission of the offense, the robbery is charged as a Level 5 felony. I.C. § 35-42-5-1(a). Focusing his challenge on the element enhancing the charge from a Level 5 felony to a Level 3 felony, Attkisson contends that there is no evidence that he was "in fact armed with a deadly weapon." (Appellant's Br. p. 20). The sole evidence that Attkisson possessed a firearm during the Key Bank robbery was the note handed to the bank teller that stated he had a gun. No witness ever identified seeing Attkisson with a gun, the surveillance videos never showed Attkisson

having a gun, and when Attkisson was searched and questioned following the events at Lake City Bank, he did not have a gun. As no evidence points to Attkisson ever having had a gun in his possession, he requests this court to reduce his charge to the lesser included offense as the Level 5 felony.

[18] In *Gray v. State*, 903 N.E.2d 940 (Ind. 2009), our supreme court considered the proof required to sustain a conviction for robbery with a deadly weapon even though the gun or other deadly weapon was not revealed during the robbery. In *Gray*, the defendant was convicted of two Counts of robbery as Class B felonies. *Id*. at 941-42. While robbing an Arby's restaurant, Gray kept his right hand in his jacket pocket. *Id*. "Figur[ing]" what they saw to be a gun, employees assumed Gray was armed. *Id*. at 942. Gray told them that "no one would get hurt" if they cooperated. *Id*. at 946. Four days later, Gray robbed a Long John Silver's restaurant. *Id*. at 942. Gray carried something in his pocket, which one of the employees "thought" to be a gun. *Id*. He told them, "you're going to get shot" but never actually stated he had a gun. *Id*. Gray was stopped by the police approximately 200 feet from the restaurant. *Id*. Upon searching Gray, the officers located the money from the robbery but no gun, even though they did locate an electric shaver in Gray's right pocket. *Id*.

[19] The *Gray* court found that "[a]lthough no one testified to seeing a gun, in both cases, Gray communicated that he was armed[,] and "[w]ithout more, Gray's statements and conduct at both stores [was] sufficient to permit the jury to find that he was in fact armed at the time of both offenses." *Id*. at 945-46. Therefore, a defendant's statement that he had a weapon is probative evidence

"that he was in fact armed." *Id*. at 945. Moreover, the court emphasized that although Gray did not explicitly refer to a gun, Gray's "conduct and statements [during the first robbery] . . . permitted the jury to infer that Gray had communicated . . . that he had a gun." *Id*. Gray's behavior of "keeping his hand in his pocket and statements that 'no one would get hurt' if the employees cooperated clearly implied that he could and would injure those who resisted . . . ." *Id*. at 945-46. But because Gray was arrested almost immediately after leaving Long John Silver's and officers found no weapon on Gray, the supreme court found it impossible to conclude that Gray, despite his statement that the employees might get shot, was in fact armed during the Long John Silver's robbery and reduced the Long John Silver's conviction to robbery as a Class C felony. *Id*. at 946. The supreme court affirmed the conviction as a Class B felony for the Arby's robbery. *Id*.

[20] Likewise, here, Attkisson's statement and implication that he had a weapon is itself evidence that he was in fact armed. *See id*. In the note handed to the teller Attkisson explicitly stated, "I have a gun." (State's Trial Exh. 20). His demand to the teller, "[d]o not make <u>any</u> sudden moves or sounds or you <u>will</u> die. Do not press any buttons. If the police <u>show</u> up, we <u>all</u> die. **Now** give me all the money and **No** dye packs!! Fail to comply and you will die[,]" clearly implied that he could and would injure those who resisted and the cooperation of the teller—who was trained to "always assume they have a weapon"—is evidence that the employee believed Attkisson was armed. (State's Trial Exh. 20) (emphasis in original); (Tr. Vol. I, p. 144). Although the employee's belief in

and of itself "is not sufficient to establish armed robbery, [] it is evidence that [Attkisson] communicated that he was armed." *Gray*, 903 N.E.2d at 946.

[21] Referencing the evidence of identity admitted by the trial court over his objection, Attkisson now argues that because the trial court permitted evidence of the Lake City Bank events, noting the similarities between both robberies and the items he had in his possession, it is reasonable to assume that the same items were possessed during each event, and thus no deadly weapon was present in either robbery. While certainly logical, we find Attkisson's argument to be unpersuasive. *Gray* clearly indicates that each event should be evaluated independently and on its own merits. *See id*. While the arrest immediately following the Long John Silver's robbery revealed that Gray did not possess a weapon, our supreme court did not transfer and impose this evidence on the Arby's robbery. Rather, analyzing each robbery separately with its own evidence, the supreme court reduced the Long John Silver's conviction to robbery as a Class C felony, while affirming the conviction and sentence for the Arby's robbery. *See id*. Similarly here, merely because no gun was located after the search upon Attkisson's arrest following his presence at the Lake City Bank, does not permit us to speculate that no gun was present during the robbery at the Key Bank despite Attkisson's clear statement to the contrary. Therefore, we affirm Attkisson's conviction of robbery while armed with a deadly weapon as a Level 3 felony.

III. *Sentencing*

[22] Lastly, Attkisson contends that his sentence is inappropriate in light of the nature of the offense and his character. Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence authorized by statute 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. "The 7(B) appropriateness inquiry is a discretionary exercise of the appellate court's judgment, not unlike the trial court's discretionary sentencing determination." *Knapp v. State*, 9 N.E.3d 1274, 1291-92 (Ind. 2014), *cert. denied*, 135 S.Ct. 978 (2015). "On appeal, though, we conduct that review with substantial deference and give due consideration to the trial court's decision—since the principal role of our review is to attempt to leaven the outliers, and not to achieve a perceived correct sentence." *Id*. at 1292. Accordingly, the question under Appellate Rule 7(B) is not whether another sentence is more appropriate; rather, the question is whether the sentence imposed is inappropriate. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). It is the defendant's burden on appeal to persuade the reviewing court that the sentence imposed by the trial court is inappropriate. *Chappell v. State*, 966 N.E.2d 124, 133 (Ind. Ct. App. 2012), *trans. denied*.

[23] Attkisson was convicted of robbery while armed with a deadly weapon, a Level 3 felony. The sentencing range for a Level 3 felony is three to sixteen years, with an advisory sentence of nine years. I.C. § 35-50-2-5. The trial court imposed a maximum sentence, with two of those years suspended to probation. An appropriateness review pursuant to Appellate Rule 7(B) must take into account all aspects of the sentence, including whether any time is suspended

and where the sentence is to be served. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

[24] Regarding the nature of the offense, we note that Attkisson disguised himself as a woman, entered a bank, and threatened the life of a teller to force him into surrendering an amount of cash. Attkisson committed a premeditated crime that inflicted fear and trauma on a blameless victim.

[25] Turning to his character, we note—as did the trial court—Attkisson's criminal history. As a juvenile, Attkisson was adjudicated delinquent for receiving stolen property, theft (twice), and possession of marijuana. As an adult, Attkisson was convicted of and sentenced to twelve years, with six years suspended, for robbery while armed or resulting in bodily injury. After being released to probation, his probation was revoked twice and he was eventually released to supervised parole. He was on parole for that offense when he committed the instant crime. After being arrested for the instant offense, Attkisson lied to law enforcement by providing a false name to avoid detection or being held responsible for his actions. During these proceedings, Attkisson failed to appear, resulting in the issuance of a warrant for his arrest. He absconded from trial for nearly six months and only reappeared in court after he was arrested on the warrant. Attkisson also admitted to ongoing marijuana use over many years.

[26] Attkisson now argues that he should get a downward revision of his sentence based on the positive relationship with his parents and son, the obtaining of his

GED, and that incarceration would be a hardship. However, Attkisson fails to acknowledge that he already received the benefits of these factors by the trial court's consideration of them as mitigating circumstances and the imposition of a partially suspended sentence. Accordingly, based on the facts before us, we cannot say that Attkisson's sentence is inappropriate in light of the nature of the offense and his character.

CONCLUSION

[27] Based on the foregoing, we hold that (1) the trial court did not abuse its discretion by admitting evidence of an uncharged offense pursuant to Indiana Evidence Rule 404(b)(2) to establish Attkisson's identity; (2) the State presented sufficient evidence beyond a reasonable doubt to establish Attkisson was armed with a deadly weapon; and (3) Attkisson's sentence is not inappropriate in light of the offense and his character.

[28] Affirmed.

[29] May, J. and Tavitas, J. concur