MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Anthony T. Wilburn,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 21, 2022

Court of Appeals Case No. 22A-CR-11

Appeal from the Huntington Circuit Court

The Honorable Davin G. Smith, Judge

Trial Court Cause No. 35C01-1905-F2-123

Mathias, Judge.

[1] Anthony T. Wilburn appeals his conviction for Level 3 felony robbery and his sentence following remand instructions from our Court in *Wilburn v. State*, 177

N.E.3d 805 (Ind. Ct. App. 2021), *trans. not sought* ("*Wilburn I*"). Wilburn raises two issues for our review, which we restate as the following three:

I. Whether Wilburn forfeited his argument that our instructions in *Wilburn I* were contrary to law.

II. Whether the trial court abused its discretion when it sentenced Wilburn.

III. Whether his sentence is inappropriate in light of the nature of the offense and his character.

[2] We affirm.

Facts and Procedural History

[3] We set out the facts underlying Wilburn's convictions in his first appeal:

> On May 25, 2019, Kylie Clay was working as a cashier at the Save-On Liquor store on Parkmoor Drive in Huntington. Save-On Liquor had both interior and exterior surveillance cameras, and the exterior cameras were equipped with infrared technology. The store closed at midnight, and shortly before midnight, Clay started performing the usual closing routine. At two minutes before midnight, Clay locked one of the front doors and was waiting next to the doors until midnight to lock the other door.
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> A man entered the store and knocked Clay to the ground so hard that she dropped her cell phone and her keys, and the man dropped a black gun. The man was wearing black shoes, black pants, a black hoodie, "green and gray gloves," and a bandana over his face. Clay saw a "sliver of skin" between the man's gloves and sleeves and realized that the man was African

American. The man told Clay, "[G]et down. Don't be stupid about this." The man made Clay crawl to the register, and he "instantly grabbed a paper bag out from under the counter." While the man held the brown paper bag, Clay put the bills and change, including a roll of nickels and a roll of pennies, into the bag. Less than $150.00 was in the cash register at that time. The man repeatedly asked about the safe, but Clay did not have access to the safe.

The assailant left, and Clay called 911 to report that the store had been robbed by an African American male armed with a "small handgun" and "wearing [a] dark-colored or black bandana and a dark hoodie and black shoes." Clay also reported that the suspect was running toward Guilford Street. Officer Darius Hillman of the Huntington City Police Department heard the dispatch with the suspect's description and direction of travel. Officer Hillman responded to the area of Guilford Street and, a few blocks away from the Save-On Liquor store, observed an African American male, later identified as Wilburn, wearing black pants, black boots, and a white tank top. Wilburn "ducked down" behind a bush, and Officer Hillman exited his police car. Wilburn then walked across the street, and Officer Hillman noticed that Wilburn was "breathing very heavily." Officer Hillman ordered Wilburn to stop and show his hands, but Wilburn began sprinting away. Eventually, Wilburn fell and was handcuffed by Officer Hillman.

Upon searching Wilburn, Officer Hillman found rolls of coins and a brown paper bag containing loose dollar bills in Wilburn's pants near his ankle. The markings on the bottom of the brown bags found at Save-On Liquor store matched the markings on the bottom of the brown paper bag found in Wilburn's pants. In a yard near the corner of Mulberry and Guilford Streets, officers located a black jacket with a hood; a baseball cap; a black, yellow, and white bandana; two gloves; and a replica handgun. DNA analysis of the jacket showed "very strong support for the

> proposition that Anthony T. Wilburn is a contributor to the DNA profile."
>
> Although Clay did not initially identify Wilburn as the perpetrator of the robbery, when Clay was interviewed by the police a few hours later that night, she informed officers that she thought Wilburn was the man that robbed the store. Wilburn was a friend of another Save-On Liquor employee, and Clay had seen Wilburn at Save-On Liquor "multiple times." Clay was "familiar with his voice."
>
> The State charged Wilburn with burglary, a Level 2 felony; robbery, a Level 3 felony; and resisting law enforcement, a Class A misdemeanor. The State also alleged that Wilburn was an habitual offender. . . .

Wilburn I, 177 N.E.3d at 808-09 (record citations omitted; alterations in original).

[4] A jury found Wilburn guilty of Level 2 felony burglary, Level 3 felony robbery, and Class A misdemeanor resisting law enforcement, and Wilburn then admitted to being a habitual offender. The trial court entered judgment of conviction against Wilburn for the Level 2 felony burglary and the Class A misdemeanor resisting law enforcement and for being a habitual offender. The trial court "merged" the Level 3 felony robbery with the burglary conviction and sentenced Wilburn to an aggregate term of thirty-four years in the Department of Correction. *Id.* at 809.

[5] Wilburn appealed the admission of certain evidence and the sufficiency of the evidence supporting the burglary and robbery charges. We affirmed the

admission of the evidence and held that the State presented sufficient evidence to support the charge of robbery. *Id.* at 810-14, 815-16. However, we held that the State failed to present sufficient evidence to show that Wilburn committing the "breaking" into a structure required for burglary when he entered "a public business during business hours." *Id.* at 814-15. We therefore affirmed in part, reversed in part, and remanded the case to the trial court with instructions that the court "enter judgment of conviction for robbery, a Level 3 felony, and resentence Wilburn in accordance with this opinion." *Id.* at 815. Wilburn did not petition for rehearing or seek transfer to the Indiana Supreme Court.

[6] On remand, the trial court held a new sentencing hearing. At that hearing, Wilburn argued for the first time that his Level 3 robbery conviction had in fact been vacated when the trial court originally merged it into the Level 2 burglary conviction and, as such, the court could not enter judgment on the Level 3 robbery despite the instructions from our Court in *Wilburn I*. The trial court disagreed and entered judgment of conviction against Wilburn for Level 3 robbery. The court then sentenced Wilburn as follows:

> I am going to find that the aggravators in this case are the criminal history including Mr. Wilburn being on probation and on bond at the time this offense was committed. I'll show that the mitigators are the admission to the habitual offender enhancement along with the support Mr. Wilburn has from his family. However, I am going to show that the aggravators outweigh the mitigators.

Tr. Vol. 2, pp. 23-24. The court then sentenced Wilburn to an aggregate term of thirty years executed. This appeal ensued.

Discussion and Decision

I. Double Jeopardy

[7] On appeal, Wilburn first asserts that the trial court violated his right to be free from double jeopardy when it entered judgment of conviction on the Level 3 felony robbery after having previously "merged" that conviction with the Level 2 felony burglary. Appellant's Br. at 12-13. We cannot agree for two reasons.

[8] First, Wilburn did not challenge our instructions in *Wilburn I* in which we directed the trial court to do exactly as it did. That was Wilburn's opportunity to point out an error in our instructions, either by way of a petition for rehearing or a petition for transfer to the Indiana Supreme Court. Wilburn did not challenge our instructions; instead, he sat idly by and waited for the hearing on remand in the trial court to raise his double-jeopardy argument for the first time. But the trial court had no discretion to disregard our instructions by that point. Therefore, we conclude that Wilburn has forfeited his double-jeopardy argument.

[9] Wilburn's forfeiture notwithstanding, he is simply incorrect that reinstating a previously vacated jury verdict violates double jeopardy. As then-Judge Rucker explained for our Court:

> where a defendant has been previously convicted and the conviction has been set aside or vacated by the trial court, the

> defendant may be later sentenced [on that conviction] without there existing a double jeopardy violation. *See, e.g.*[,] *State v. Haines*, 545 N.E.2d 834, 835 n. 4 (Ind. Ct. App. 1989), *trans. denied*[] (ordering reinstatement of jury verdicts after trial court vacated them noting "[w]e observe *sua sponte* that reinstatement of the jury's verdict is not barred by double jeopardy principles.").

Taflinger v. State, 698 N.E.2d 325, 327 (Ind. Ct. App. 1998). Thus, Wilburn's argument is without merit, and we affirm his conviction for Level 3 felony robbery.

II. Sentencing Discretion

[1] We next consider Wilburn's argument that the trial court abused its discretion when it sentenced him. As our Supreme Court has made clear:

> We have long held that a trial judge's sentencing decisions are reviewed under an abuse of discretion standard. An abuse of discretion occurs if 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.

McCain v. State, 148 N.E.3d 977, 981 (Ind. 2020) (cleaned up). Further:

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Anglemyer v. State, 868 N.E.2d 482, 490-91 (Ind.), *clarified on other grounds on reh'g*, 875 N.E.2d 218 (2017).

[2] Here, Wilburn asserts that the trial court failed to give appropriate mitigating weight to the mitigators found by the court, namely, that he pleaded guilty to the habitual offender enhancement and he had strong family support. But the weight assigned by the trial court to mitigators is not available for appellate review. *Id.* at 491.

[3] Wilburn also asserts that the trial court abused its discretion because it "should have found his progress that he has made while incarcerated and his young son to be mitigating factors." Appellant's Br. at 17. However, Wilburn makes no contention that those purported mitigators are "clearly supported by the record" or otherwise significant. *See Anglemyer*, 868 N.E.2d at 490-91; *see also* Ind. Appellate Rule 46(A)(8)(a). We therefore cannot say that the trial court abused its discretion when it declined to find those factors to be worthy of any mitigating weight. The trial court did not abuse its discretion when it sentenced Wilburn.

III. Appellate Rule 7(B)

[4] Last, we address Wilburn's argument that his sentence is inappropriate in light of the nature of the offense and his character. Indiana Appellate Rule 7(B) provides that "[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the

offender." This Court has held that "[t]he advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed." *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017). And the Indiana Supreme Court has explained that:

> The principal role of appellate review should be to attempt to leaven the outliers . . . but not achieve a perceived "correct" result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Defendant has the burden to persuade us that the sentence imposed by the trial court is inappropriate.

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

[5] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. Whether we regard a sentence as inappropriate at the end of the day turns on "our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case." *Id.* at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[6] The sentencing range for a Level 3 felony is between three and sixteen years, with an advisory term of nine years. Ind. Code § 35-50-2-5(b) (2019). Wilburn's habitual offender enhancement subjected him to an additional term between six and twenty years. I.C. § 35-50-2-8(i)(1). And a Class A misdemeanor conviction carries a term of up to one year incarceration. I.C. 35-50-3-2. The trial court sentenced Wilburn to fifteen years on the Level 3 felony robbery conviction, enhanced by fourteen years for being a habitual offender, and to a consecutive one-year term on the Class A misdemeanor conviction. Wilburn's aggregate term of thirty years was thus seven years below the maximum term he faced.

[7] Wilburn asserts that his sentence is an inappropriate outlier that should be revised. Specifically, he asserts that the nature of the offense shows that no one was seriously injured and the business was able to resume normal operations after the robbery. He further asserts his character shows only a "moderate criminal history." Appellant's Br. at 16.

[8] But we cannot agree that Wilburn's sentence is inappropriate. Regarding the nature of the offense, Wilburn knocked down a store employee near closing time and demanded the store's cash. He then fled the scene and disregarded officer's instructions to stop. Regarding his character, he has five prior felony convictions, nine prior misdemeanor convictions, and six violations of probation or parole. Further, Wilburn presents no evidence, let alone "compelling evidence," that portrays the nature of the offense and his character "in a positive light." *Stephenson*, 29 N.E.3d at 122. Thus, deference to the trial court's sentencing "prevail[s]." *Id.* We affirm Wilburn's sentence.

Conclusion

[9] For all of the above reasons, we affirm Wilburn's conviction for Level 3 felony robbery and his aggregate thirty-year sentence.

[10] Affirmed.

Brown, J., and Molter, J., concur.