MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Kelly Starling
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Caroline G. Templeton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Anthony Owens,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 3, 2023

Court of Appeals Case No.
22A-CR-12

Appeal from the
Marion Superior Court

The Honorable
Cynthia L. Oetjen, Judge

Trial Court Cause Nos.
49D30-2009-F5-27715
49D30-2010-F3-33343

Memorandum Decision by Judge Vaidik
Judges Riley and Bailey concur.

Vaidik, Judge.

Case Summary

[1] Anthony Eugene Owens was convicted of several offenses he committed over five days and found to be a habitual offender. The trial court sentenced him to an aggregate term of twenty-six years, with two years suspended to probation. Owens now appeals some of his convictions as well as his sentence. Except for remanding the case for correction of an error in the written sentencing order, we affirm Owens's convictions and sentence.

Facts and Procedural History

[2] On August 28, 2020, J.C.[1] was trying to sell his red 2005 Chevrolet Silverado, which bore the license-plate number EER318. He was at his sister's house on West Washington Street in Indianapolis when a man, who had "a tattoo that looks like a set of red lips" on his neck, rode up on a bicycle holding a Goodwill bag and bottle of water. Tr. Vol. II p. 152. The man said he was interested in buying the truck and asked J.C. if he could test drive it. J.C. said yes so long as he rode along. The man left his bicycle, Goodwill bag, and bottle of water at J.C.'s sister's house.

[3] The man drove to a nearby church parking lot, stopped the truck, and got out. He then pulled a pistol from behind his back, loaded it, and pointed it at J.C., demanding that he hand over the title to his truck. When J.C. hesitated, the

[1] J.C. is also referred to as J.S. in the record.

man said: "I am not fu**ing with you. Give me the title to your truck or I'll blow your fu**ing brains out." *Id.* at 154. J.C. threw the title on the seat as he jumped out of the truck. According to J.C., the gun "looked like a .45" and had a black barrel and brown handle. *Id.*

[4] J.C. flagged down a passerby, who called 911. Officers from the Indianapolis Metropolitan Police Department responded and went to J.C.'s sister's house to collect the bicycle, Goodwill bag, and water bottle that the man had left behind. Inside the Goodwill bag were a green t-shirt and pair of khaki shorts. A latent print was lifted from the water bottle, and it was later identified as Owens's fingerprint. Officers went to a nearby Goodwill store to see if there was surveillance footage of the suspect and recovered video of a man buying a pair of khaki shorts, green t-shirt, and bottle of water. The video was later played for the jury at trial.

[5] Four days later, on September 1, the police still had not identified the man or found J.C.'s red truck. Around 11:15 p.m. that night, Kasey Carr, who was the manager of a Family Dollar store on the west side of Indianapolis, was leaving the store after closing for the night when a red truck blocked her into her parking spot. Owens approached Carr's car and knocked on her window. Carr recognized Owens because he lived in the area, visited the store several times a week, had "memorable" tattoos (including a "mouth" on his neck), and had applied for a job there before. *Id.* at 193. Carr told Owens to leave, and when he did not do so, she called 911. Owens heard Carr call 911 and drove off. Carr told the 911 operator that the license-plate number of the red truck was

EER318. Responding officers learned that the truck had been stolen "in an armed carjacking" a few days earlier and decided to canvas the area. *Id.* at 220.

[6] Shortly after midnight, Paul Silvia stopped at a Speedway gas station on the west side of Indianapolis. He had just gotten off work and was driving a truck that belonged to his employer, Central Indiana Tire & Retreading. The truck had several tools in it. Silvia left the truck running and went inside the gas station. When he returned a few minutes later, the truck was gone. According to surveillance video from Speedway, Owens drove a red truck to the gas station and parked. Shortly after Silvia went inside the store, Owens walked around Silvia's truck before getting in it and driving off. About fifteen minutes later, the surveillance video showed Owens walk back to the gas station, get in the still-parked red truck, and drive away.

[7] Meanwhile, Officer Justin Musser was patrolling the area for J.C.'s truck when he spotted a truck that matched the description and license-plate number. When Officer Musser started following the truck, it sped up. Officer Musser activated his lights and siren, but the truck didn't stop, and a high-speed chase ensued. The truck eventually drove off the road, and Owens exited the truck and began running. Officer Musser ordered Owens to stop, but he kept running. The police set up a perimeter, and Owens was found in the backyard of a house, "sweating profusely, out of breath," and "sitting at a table smoking a cigarette." *Id.* at 245. Owens had a gun holster on his hip (but no gun). Officers searched J.C.'s truck and found a glass pipe and ammunition. Neither the glass pipe nor the ammunition were in J.C.'s truck when it was stolen.

[8] J.C.'s truck was returned to him later in the day on September 2. The next day, Silvia's work truck was found parked in a neighborhood and returned to him with tools missing. When J.C. got his truck back, he found items inside that did not belong to him, including tools, a pawn ticket in Owens's name, a duffel bag containing an insurance card in Owens's name, and a clipboard with work orders from Central Indiana. The tools were confirmed to be the tools missing from Silvia's truck.

[9] The State charged Owens in two separate cause numbers for the above crimes. In Cause Number 49D30-2010-F3-33343, the State charged Owens with Level 3 felony robbery (for the August 28 incident involving J.C., enhanced from a Level 5 felony because it was committed while armed with a deadly weapon), Level 4 felony unlawful possession of a firearm by a serious violent felon (for the August 28 incident involving J.C.), Level 6 felony auto theft (for the September 2 incident regarding Central Indiana's truck), and Level 6 felony theft (for the September 2 incident regarding Central Indiana's tools). In Cause Number 49D30-2009-F5-27715, the State charged Owens in connection with the September 2 police pursuit with Level 6 felony resisting law enforcement (for fleeing while using a vehicle), Class A misdemeanor resisting law enforcement, and Class A misdemeanor possession of paraphernalia (elevated from a Class C misdemeanor based on a prior conviction).[2] The State later

[2] The State also charged Owens with Level 5 felony operating a motor vehicle after forfeiture of license for life but later dismissed it.

sought to join the two cases for trial, which the trial court granted, and alleged that Owens is a habitual offender.

[10] A jury trial was held in November 2021. Before opening statements, the trial court gave the jurors preliminary instructions both in writing and orally. In particular, Preliminary Instruction 5 identified the charges against Owens. Appellant's App. Vol. III p. 160. As part of the instruction, the jury was given a copy of the charging information. *Id.* at 161-62. The signature block included the name of the elected prosecutor and the electronic signature of the deputy prosecutor trying the case. In addition, the information included the following introductory language before stating the factual allegations underlying the charges: "On this date, the undersigned Deputy Prosecuting Attorney of the Nineteenth Judicial Circuit, being duly sworn on his/her oath (or having affirmed), says that in Marion County, Indiana . . . ." *Id.* at 161. Owens did not object to Preliminary Instruction 5 or ask for any changes. When the court read the instruction to the jury, it omitted "the formal parts," including the part about the deputy prosecutor "being duly sworn on his/her oath (or having affirmed)." Tr. Vol. II p. 126.

[11] The jury found Owens guilty of Level 3 felony robbery, Level 4 felony possession of a firearm by a serious violent felon, Level 6 felony auto theft, Level 6 felony theft, Level 6 felony resisting law enforcement, Class A

misdemeanor resisting law enforcement, and Class C misdemeanor possession of paraphernalia.[3] It also determined that Owens is a habitual offender.

[12] At the time of sentencing, Owens was thirty-six years old and had twenty-eight arrests, several juvenile adjudications, and fourteen criminal convictions (ten felonies and four misdemeanors). For his criminal convictions, Owens has served time in jail and prison and been placed on probation and community corrections, both of which he has violated. Owens was on community corrections when he committed these crimes. The State introduced into evidence a phone call Owens made from jail in which he said he didn't know why he was facing so much time because he could have killed J.C. Sent. Ex. 1.

[13] The trial court found the following aggravators: (1) Owens has a lengthy juvenile and criminal history; (2) J.C. experienced "trauma" and "lost money on [his] truck"; (3) there were two victims, J.C. and Central Indiana; (4) Owens made a "troubl[ing]" and "callous" phone call from jail; and (5) Owens was on community corrections when he committed the crimes. Tr. Vol. III pp. 151-52. The court found no mitigators. In Cause Number 33343, the court sentenced Owens to eleven years for Level 3 felony robbery, enhanced by eleven years for being a habitual offender, eleven years for Level 4 felony unlawful possession of

[3] The jury found Owens guilty of possession of paraphernalia as a Class C misdemeanor, and the trial court sentenced him to sixty days for the "misdemeanor C." Tr. Vol. III p. 154. However, the court's written sentencing order incorrectly lists the conviction as a Class A misdemeanor. *See* Appellant's App. Vol. II p. 23. The parties agree this case should be remanded so the court can issue an amended sentencing order correcting this error. In accordance with the parties' request, we remand this case to the trial court.

a firearm by a serious violent felon, two years for Level 6 felony auto theft, and two years for Level 6 felony theft. The court ordered the robbery and unlawful-possession sentences to be served concurrently and the auto-theft and theft sentences to be served concurrently and then ordered each group to be served consecutively, for a total of twenty-four years. In Cause Number 27715, the court sentenced Owens to two years for Level 6 felony resisting law enforcement, one year for Class A misdemeanor resisting law enforcement, and sixty days for Class C misdemeanor possession of paraphernalia. The court ordered these sentences to be served concurrent to each other but consecutive to Cause Number 33343, for an aggregate term of twenty-six years. The court suspended two of those years to probation, leaving twenty-four years to serve.

[14] Owens now appeals.

Discussion and Decision

I. Jury Instruction

[15] Owens contends the trial court erred by including an unredacted copy of his charging information as part of Preliminary Instruction 5 because the information states that the deputy prosecutor made the allegations "being duly sworn on his/her oath (or having affirmed)." We normally review a trial court's jury instructions for an abuse of discretion, but because Owens did not object to Preliminary Instruction 5 in the trial court, he has waived the issue and must show fundamental error. *See Pattison v. State*, 54 N.E.3d 361, 365 (Ind. 2016). Fundamental error is an error so blatant and substantial that the trial court

should act even without a request or objection from a party. *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014), *reh'g denied*.

[16] Owens argues that giving the instruction with the affirmation language included was fundamental error because it "emphasized the purported accuracy of the facts the State was required to prove," "impeded on the jury's decision making," and "encouraged the jury to accept that the charges had already been sworn to by a public official under the penalties of perjury." Appellant's Br. p. 31. We rejected a similar fundamental-error claim in *Lynn v. State*, 60 N.E.3d 1135 (Ind. Ct. App. 2016), *trans. denied*. There, the trial court's Preliminary Instruction 4 included the following affirmation language from the original charging information: "The undersigned affiant does hereby swear or affirm under the penalties of perjury that . . . ." *Id.* at 1138, 1139. We "strongly advise[d]" redaction of such language, noting it "has no place in jury instructions[.]" *Id.* at 1139. But we held that the giving of the instruction did not amount to fundamental error:

> In addition to Preliminary Instruction 4, the jury was specifically instructed that "[t]he charges which have been filed are the formal methods of bringing the Defendant to Trial. The filing of charges . . . is not to be considered by you as any evidence of guilt." The jurors were instructed that a person charged with a crime is presumed to be innocent and that the State bore the burden to prove each element of the crime charged beyond a reasonable doubt. The jurors were also told to consider the instructions as a whole and that they were the exclusive judges of the evidence and facts as they found them. Accordingly, we conclude that Preliminary Instruction Number 4 did not invade the province of the jury and that the affirmation language did not

> so affect the entire charge that the jury was misled. Indeed, the jury's decision to find Lynn guilty of the lesser-included class B misdemeanor battery rather than the charged A misdemeanor indicates that the jury was not substantially influenced by the affirmation language such that Lynn was deprived of a fair trial. Under the circumstances, Lynn has failed to demonstrate fundamental error.

Id. (citations omitted).

[17] As in *Lynn*, other instructions in this case lead us to conclude that the giving of Preliminary Instruction 5 was not fundamental error. Preliminary Instruction 1 said the jury "should not form or express any conclusion or judgment about the outcome of the case until the court submits the case to you for your deliberations." Appellant's App. Vol. III p. 155. Preliminary Instruction 3 and Final Instruction 15 said, "Under the Constitution of Indiana, the jury has the right to determine both the law and the facts." *Id.* at 158, 182. Preliminary Instruction 4 and Final Instructions 16 and 23 addressed the presumption of innocence and the State's obligation to overcome it with proof beyond a reasonable doubt. *Id.* at 159, 183, 190. Preliminary Instruction 6 and Final Instruction 21 stated, "The charges that have been filed are the formal method of bringing the defendant to trial. The filing of a charge or the defendant's arrest is not to be considered by you as any evidence of guilt." *Id.* at 172, 188. Preliminary Instruction 7 and Final Instruction 23 said the State's burden to prove the charges beyond a reasonable doubt is "a strict and heavy burden." *Id.* at 173, 190. Preliminary Instruction 8 and Final Instruction 22 told the jurors they were "the exclusive judges of the evidence[.]" *Id.* at 174, 189. Final

Instruction 14 stated, "You are to consider all of the instructions, both preliminary and final, together. Do not single out any certain sentence or any individual point or instruction and ignore the others." *Id.* at 181. And perhaps most importantly, Final Instruction 25 provided, "Statements made by the attorneys are not evidence." *Id.* at 192.

[18] Owens argues this case is distinguishable from *Lynn* because "[i]n *Lynn*, the court reasoned that the conviction of a lesser included offense proved that the jury was not substantially influenced by the affirmation language." Appellant's Br. p. 31. While we noted that the defendant's conviction on a lesser offense indicated that the jury was not substantially influenced by the affirmation language, we found there was no fundamental error even without that based on the other instructions given. In other words, the fact that the defendant was convicted of a lesser offense bolstered our holding but wasn't the basis for it. The giving of Preliminary Instruction 5 did not constitute fundamental error here.[4]

[4] Owens points out that there is a pattern instruction that can be used to inform the jury of the charges against the defendant—Indiana Pattern Criminal Jury Instruction 1.0700—and that it was amended in response to *Lynn* to specifically provide for redaction of affirmation language. "In this case, the State of Indiana has charged the Defendant with [Count 1: (insert Count 1), Count 2: (insert Count 2), etc.] The charge(s) read(s) as follows: _____ [insert the Charge (**with oath or affirmation language redacted**)]." (Emphasis added). For the reasons stated above, the failure to follow this pattern instruction did not amount to fundamental error.

II. Sufficiency of the Evidence

[19] Owens contends the evidence is insufficient to support his convictions for Level 3 felony robbery and Level 4 felony unlawful possession of a firearm by a serious violent felon, which stem from the August 28 incident involving J.C.'s truck. Owens does not challenge the sufficiency of the evidence for his other convictions. When reviewing sufficiency-of-the-evidence claims, we neither reweigh the evidence nor judge the credibility of witnesses. *Willis v. State*, 27 N.E.3d 1065, 1066 (Ind. 2015). We only consider the evidence supporting the verdict and any reasonable inferences that can be drawn from the evidence. *Id.* A conviction will be affirmed if there is substantial evidence of probative value to support each element of the offense such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

[20] Owens first argues the evidence is insufficient to support these convictions because "no one identified [him] as the person who took the Chevy truck from [J.C.] on August 28, 2020." Appellant's Br. p. 25. J.C. testified that the robber left behind some possessions, including a Goodwill bag and water bottle, when they left for a test drive of his truck. Officers later recovered the Goodwill bag, which contained a green t-shirt and pair of khaki shorts, and water bottle. Testing revealed Owens's fingerprint on the water bottle. In addition, surveillance video from Goodwill, which showed a man purchasing these items, was played for the jury. Although J.C. couldn't identify Owens from a photo array or the Goodwill video, he said the robber had a tattoo of a set of red lips on his neck. Evidence was admitted at trial showing that Owens has a

unique tattoo of a set of red lips on his neck. *See* Ex. 72 (photo of Owens's tattoo). Also, as Owens concedes, four days after the robbery he was seen driving J.C.'s truck. A few hours later, an officer tried to pull over Owens in the truck, but he didn't stop and led the police on a high-speed chase. This evidence is sufficient to identify Owens as the person who took J.C.'s truck.

[21] Owens also argues the evidence is insufficient to support his conviction for unlawful possession of a firearm by a serious violent felon and enhancement to his robbery conviction for being armed with a deadly weapon because "[n]o firearm was ever found in connection to this case." Appellant's Br. p. 28. Owens, however, cites no case law that a gun must be admitted into evidence to prove that the defendant possessed it. Indeed, the State points out in its brief that the case law states the opposite, that is, that it is not necessary to introduce the weapon into evidence. *See Gray v. State*, 903 N.E.2d 940, 943 (Ind. 2009); *Gorman v. State*, 968 N.E.2d 845, 851 (Ind. Ct. App. 2012), *trans. denied*; *Williams v. State*, 834 N.E.2d 225, 229 (Ind. Ct. App. 2005). Owens filed a reply brief but didn't respond to the State's claim. J.C.'s testimony that a man pointed a gun at him during the robbery is sufficient to prove possession. We therefore affirm Owens's convictions for Level 3 felony robbery and Level 4 felony unlawful possession of a firearm by a serious violent felon.

III. Inappropriate Sentence

[22] Finally, Owens contends that his sentence is inappropriate and asks us to reduce it. Indiana Appellate Rule 7(B) provides that an appellate 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." The appellate court's role under Rule 7(B) is to "leaven the outliers," and "we reserve our 7(B) authority for exceptional cases." *Faith v. State*, 131 N.E.3d 158, 159-60 (Ind. 2019) (quotation omitted). "Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case." *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014) (citing *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008)). "[A]ppellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." *Cardwell*, 895 N.E.2d at 1225. Because we generally defer to the judgment of trial courts in sentencing matters, defendants must persuade us that their sentences are inappropriate. *Schaaf v. State*, 54 N.E.3d 1041, 1044-45 (Ind. Ct. App. 2016).

[23] The nature of the offenses does not merit a reduction in Owens's sentence. As defense counsel acknowledged at the sentencing hearing, this is a "particularly serious case." Tr. Vol. III p. 148. Owens went on a multiple-day crime spree in which he stole a truck from J.C. at gunpoint and threatened to "blow [his] fu**ing brains out," drove the stolen truck to a gas station and stole another truck, and led the police on a high-speed chase. In total, Owens was convicted of seven offenses.

[24] Owens's character also does not warrant a reduction in his sentence. Owens concedes his criminal history is "lengthy." Appellant's Br. p. 20. Indeed, he has twenty-eight arrests, several juvenile adjudications, ten felony convictions, and four misdemeanor convictions. But Owens claims that his criminal history is not "serious" because most of his convictions are for "traffic related driving offenses, largely for driving without a license." *Id.* While Owens has several felony convictions for operating a vehicle after forfeiture of license for life, he also has felony convictions for criminal confinement, intimidation, and theft. In addition, Owens has served time in jail and prison and been placed on probation and community corrections, both of which he has violated. Owens was also on community corrections when he committed these crimes. Although Owens says he has drug problems for which he has never received treatment, he has previously been ordered to comply with drug-treatment and mental-health programs. Finally, and perhaps most telling of his character, Owens placed a call from jail in which he claimed he didn't know why he was facing so much time because he could have killed J.C. Owens has failed to persuade us that his twenty-six-year sentence, with two years suspended to probation, is inappropriate.

[25] We remand the case for correction of the error in the written sentencing order but otherwise affirm the trial court.

[26] Affirmed in part and reversed and remanded in part.

Riley, J., and Bailey, J., concur.