MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joe H. McNew,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 8, 2021

Court of Appeals Case No. 21A-CR-259

Appeal from the Hamilton Superior Court

The Honorable William J. Hughes, Judge

Trial Court Cause No. 29D03-2009-CM-5358

May, Judge.

[1] Joe H. McNew appeals his conviction of and sentence for Class A misdemeanor invasion of privacy.[1] He presents two issues for our review: (1) whether the State presented sufficient evidence to support McNew's conviction; and (2) whether McNew's sentence is inappropriate given the nature of his offense and his character. We affirm.

Facts and Procedural History

[2] On June 17, 2019, McNew was released on bond pending trial for domestic violence charges. As a condition of his release, the trial court issued a no contact order directing McNew to cease contact with L.Z.-M., with whom McNew had a relationship and who was the victim of the alleged domestic violence. On September 2, 2020, L.Z.-M. went to the Hamilton County Prosecutor's Office to prepare for the upcoming trial against McNew scheduled for September 6, 2020. While at the Prosecutor's Office, Lynn Bauer, legal secretary for the Prosecutor's office, was helping prepare L.Z.-M. for trial. Bauer noticed McNew texting and calling L.Z.-M. Bauer informed L.Z.-M. that McNew was violating the no contact order by attempting to contact her. Bauer called 911 to report the violation.

[3] Deputy Kenneth Hoard went to the Prosecutor's Office to investigate the violation. After seeing the texts on L.Z.-M.'s phone, Deputy Hoard applied for

[1] Ind. Code § 35-46-1-15.1(a)(11).

a search warrant to search McNew's phone to confirm the texts were from McNew. While he was at the Prosecutor's Office, Deputy Hoard saw a phone call from McNew come into L.Z.-M.'s phone. The Prosecutor's Office informed Deputy Hoard that he could make an arrest. Deputy Hoard found McNew at his residence and asked McNew if he was aware of the no contact order. McNew did not provide a direct answer, but instead informed Deputy Hoard that he and L.Z.-M. had been talking. Deputy Hoard then took McNew to the Hamilton County Jail and took custody of a grey phone found on McNew. A search of the phone revealed numerous texts, calls, and attempted calls to L.Z.-M. after the no contact order was entered.

[4] On September 3, 2020, the State charged McNew with Class A misdemeanor invasion of privacy. The trial court held a bench trial on February 4, 2021. At trial, Bauer, L.Z.-M., and Deputy Hoard testified that they saw texts and calls on L.Z.-M.'s phone that came from McNew on September 2, 2020. L.Z.-M. testified that she knew the texts were from McNew because they contained information about her that only McNew knew. L.Z.-M. also admitted that she and McNew talked on the phone prior to her arrival at the Prosecutor's Office. The texts and subsequent call came from the same phone number that she had spoken to him on beforehand. L.Z.-M. stated that she responded to McNew because she feared for her safety and felt it was safer to respond to McNew than to ignore him.

[5] Bauer testified that she recognized McNew's phone number from her previous experience with McNew when he was a victim with the Prosecutor's Office.

Bauer also stated that after Deputy Hoard arrived, L.Z.-M. was extremely worried that McNew would be upset that police were involved. Deputy Hoard testified that he obtained a search warrant for McNew's phone. Deputy Hoard reported that a search of McNew's phone revealed the calls and texts from McNew to L.Z.-M.

[6] McNew testified that he was aware of the no contact order. He recalled the magistrate informing him of the order. McNew admitted texting and calling L.Z.-M. on September 2, 2020. McNew testified that he believed the no contact order was dismissed when a separate, previous protective order was vacated at L.Z.-M.'s request. The State presented the no contact order that McNew signed on June 18, 2019, signifying that he read and understood the order. Additionally, the State asked McNew if he was informed that the order was dismissed. McNew acknowledged the magistrate never told him the no contact order had been revoked or dismissed. At the conclusion of the bench trial, the trial court found McNew guilty and sentenced him to one year executed in the Hamilton County Jail.

Discussion and Decision

I. Insufficient Evidence

[7] When reviewing the sufficiency of evidence, we consider only the evidence, and any inferences reasonably drawn therefrom, that support the verdict. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). We do not reweigh evidence or assess the credibility of witnesses. *Id.* It is the fact finder's responsibility to evaluate

the evidence and decide whether it supports a conviction. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We affirm if the probative evidence and reasonable inferences drawn from the evidence could have led a reasonable fact finder to find each element proven beyond a reasonable doubt. *McHenry*, 820 N.E.2d at 126.

[8] "A person who knowingly or intentionally violates . . . an order issued under IC 35-33-8-3.2 . . . commits invasion of privacy, a Class A misdemeanor." Ind. Code § 35-46-1-15.1(a)(11). A person knowingly engages in conduct if, while he is doing so, he is aware of the high probability that he is engaging in the conduct. Ind. Code § 35-41-2-2(b). McNew argues the State did not present sufficient evidence to show that he "knowingly" violated the no contact order.

[9] On June 17, 2019, the trial court issued a no contact order requiring McNew to have no contact with L.Z.-M. following his release from custody pending trial for a separate domestic violence matter involving L.Z.-M. On June 18, 2019, McNew signed a statement agreeing that he had read and understood the no contact order. On September 2, 2020, L.Z.-M. was at the Prosecutor's Office preparing for the upcoming trial when McNew texted and called her. At trial, Bauer, L.Z.-M., and Deputy Hoard testified that they saw the calls and texts from McNew. Although no one saw McNew texting and calling L.Z.-M., Bauer and L.Z.-M. associated the phone number the texts and calls came from with McNew from their previous encounters with him. Additionally, Deputy Hoard testified that McNew had the grey phone described in the warrant on his

person when he was taken into custody. Deputy Hoard reported that a search of McNew's phone revealed numerous calls and texts going to L.Z.-M.

[10] During his testimony, McNew admitted that he texted and called L.Z.-M. on September 2, 2020. McNew also testified that he remembered the magistrate informing him of the no contact order. McNew argued that he thought the no contact order was dropped, but he testified that he was never brought into court and told that it was no longer in effect, and that he continued to contact L.Z.-M. McNew's argument invites us to reweigh the evidence, which we cannot do. *See McHenry*, 820 N.E.2d at 126 (the appellate court does not reweigh evidence). The State presented sufficient evidence that McNew knowingly violated the no contact order. *See Blair v. State*, 62 N.E.3d 424, 428 (Ind. Ct. App. 2016) (holding the fact finder was not required to believe the defendant's testimony that he never received the protective order and therefore was unaware of its existence).

II. Inappropriate Sentence

[11] The trial court has discretion over sentencing and the court's judgment should receive substantial deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). However, we may revise a sentence if we determine it is inappropriate based on the nature of the offense and the character of the offender. App. R. 7(b). McNew holds the burden of persuading this Court that his sentence is inappropriate. *See Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). A

person who commits a Class A misdemeanor shall be sentenced to no more than one year. Ind. Code § 35-50-3-2.

[12] McNew argues that his sentence is inappropriate because the severity of the crime, his culpability, and the damage done to others does not justify the sentence imposed. McNew notes that L.Z.-M. previously asked the court to vacate a separate protective order. McNew also points out that L.Z.-M. contacted him and responded when he reached out to her. He also argues that L.Z.-M.'s victim statement was more appropriate for the domestic violence case because her statements were not related to the invasion of privacy charge. McNew also argues that L.Z.M.'s victim statement contradicts the fact that she asked the court to dismiss a separate, previous protection order. Finally, McNew argues that the trial court should have considered the fact that he has not contacted L.Z.-M. since the invasion of privacy charge. He contends that this demonstrates his ability to follow court orders.

[13] McNew received the no contact order as a condition of his release on bond after being charged with nine offenses of which L.Z.-M. was the victim. At trial, L.Z.-M. testified that she felt like she had to respond to McNew to survive. Despite the previous domestic violence in their relationship, L.Z.-M. stated that she felt safer responding to McNew and that she feared for her safety thinking about what McNew would do to her if she tried to end their relationship. L.Z.-M. stated that "[McNew] broke [her] both physically and mentally." (Tr. Vol. II at 39.) She felt that even her kids suffered from having McNew in her life. Based thereon, McNew's sentence is not inappropriate based on the nature of

his offense. *See Eisert v. State*, 102 N.E.3d 330, 335 (Ind. Ct. App. 2018) (the defendant's repeated violations of his pre-trial release and court orders when committing multiple acts of invasion of privacy does not suggest that he respects the court's authority), *trans. denied*.

[14] We consider an offender's criminal history when analyzing the character of the offender. *Webb v. State*, 149 N.E.3d 1234, 1241 (Ind. Ct. App. 2020). We first note that McNew was charged with the offense in this case immediately preceding trial for several other charges related to his relationship with L.Z.-M. Prior to sentencing for this invasion of privacy, McNew was convicted of Level 3 felony criminal confinement while armed with a deadly weapon;[2] Class A misdemeanor domestic battery;[3] Level 6 felony domestic battery resulting in moderate bodily injury;[4] Level 5 felony criminal confinement with bodily injury;[5] Level 6 felony intimidation where threat is to commit forcible felony;[6] Level 6 felony strangulation;[7] and Class A misdemeanor interference with the reporting of a crime.[8] The trial court sentenced McNew a total of nine years, five years executed at Hamilton County Community Corrections and four years

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[2] Ind. Code § 35-42-3-3(a).

[3] Ind. Code § 35-42-2-1.3(a)(1).

[4] Ind. Code § 35-42-2-1.3(b).

[5] Ind. Code § 35-42-3-3(a).

[6] Ind. Code § 35-45-2-1(a)(1).

[7] Ind. Code § 35-42-2-9(c).

[8] Ind. Code § 35-45-2-5(1).

suspended to probation. The no contact order at issue in this case arose out of McNew's release on bond pending trial for these charges. McNew has committed numerous serious offenses, all against the same victim. Based thereon, McNew's sentence is not inappropriate based on his character. *See Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007) (the nature and number of prior offenses in relation to the current offense is significant in considering the character of the offender).

Conclusion

[15] The State presented sufficient evidence supporting McNew's conviction of invasion of privacy. Additionally, McNew did not demonstrate that his sentence was inappropriate based on the nature of his offense and his character. Accordingly, we affirm.

[16] Affirmed.

Bailey, J., and Robb, J., concur.