MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Josiah Swinney
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Nicole D. Wiggins
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Robert E. Allen,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 29, 2022

Court of Appeals Case No. 22A-CR-16

Appeal from the Marion Superior Court

The Honorable Hugh Patrick Murphy, Magistrate

Trial Court Cause No. 49D27-1905-F5-19618

Tavitas, Judge.

Case Summary

[1] Robert Allen appeals his convictions and sentence for criminal confinement, a Level 5 felony; battery, a Level 5 felony; and criminal recklessness, a Level 5 felony. Allen contends that he did not knowingly and voluntarily waive his right to be present for his trial; that the evidence is insufficient to sustain his conviction for criminal confinement; and that his six-year sentence is inappropriate. Allen's arguments fail, and accordingly, we affirm.

Issues

[2] Allen raises three issues, which we restate as:

I. Whether Allen knowingly and voluntarily waived his right to be present for his trial.

II. Whether the evidence is sufficient to sustain Allen's conviction for criminal confinement.

III. Whether Allen's sentence is inappropriate in light of the nature of the offenses and Allen's character.

Facts

[3] In April 2019, Dell Howard and Charles Bigbee performed mechanical work on vehicles near the AutoZone at Eagledale Plaza in Indianapolis. Allen also performed mechanical work on cars at the same location, and Allen had previous negative interactions with Howard and Bigbee. In fact, on April 4, 2019, Bigbee called the police because of Allen's behavior.

[4] On April 16, 2019, Howard and Bigbee entered the parking lot near AutoZone in a vehicle driven by Howard. Allen pulled his vehicle in front of Howard's vehicle and "block[ed] [them] from leaving out [sic] the plaza." Tr. Vol. II p. 211. Howard stopped his vehicle to avoid hitting Allen's vehicle, which was only three to four feet from Howard's vehicle. Allen yelled, "you . . . all don't stop . . . f***ing with me." *Id.* at 185. Howard responded, "we're not f***ing with you." *Id.* Allen exited his vehicle with a gun. Bigbee saw the gun and yelled at Howard to "back up" but "it was just too late." *Id.* at 213. Bigbee exited Howard's vehicle with his own gun and fired five or six times at Allen. Allen was wounded and fell to the ground.

[5] Allen stood up, fired his gun toward Howard, and shot the windshield of Howard's vehicle. Howard "put [his] car back in gear," and drove away, which ripped the passenger side mirror off his vehicle. *Id.* at 189. Howard heard more gunfire as he drove away, and Allen shot Bigbee several times. Bigbee was wounded but survived.

[6] On May 20, 2019, the State charged Allen with criminal confinement, a Level 5 felony; battery, a Level 5 felony; and criminal recklessness, a Level 5 felony. On July 5, 2021, Allen's counsel filed a motion for a competency examination, which the trial court denied. On July 16, 2021, Allen's counsel filed a motion to reconsider the trial court's denial of his motion for a competency examination. The trial court also denied the motion to reconsider. Allen filed a notice of self-defense, and during the proceedings, he hired and fired multiple attorneys.

[7] A jury trial was held in July 2021. On the first day of the trial, the State presented its case and rested. On the second day of the trial, Allen was supposed to testify in his own defense. At the beginning of the day, however, Allen's counsel informed the trial court that Allen was "in really bad shape" and was "just not making any sense." Tr. Vol. III p. 21. The trial court brought Allen into the courtroom for an extensive discussion regarding Allen's issues with the proceedings, which included his trial counsel's failure to offer into evidence a surveillance video that Allen claimed existed, allegations of a forged probable cause affidavit, Allen's claims that he did not have an initial hearing, and Allen's desire to fire his attorney in the middle of the trial.

[8] The following discussion then occurred:

> THE DEFENDANT: Yeah. I want to withdraw because it's clear now, once again, it's clear that he has a video and he was going to represent it to the jury, but he failed to do so. And because of that I feel intimidated. I feel he's holding something back, he wanted the jury himself, he proposed to submit this because it's a part --
>
> THE COURT: All right. I'm not going to do final argument here with you. But I heard that the video didn't show the events that we've been talking about. You've had four lawyers who were capable of asking that question or finding that question out, the answer.
>
> THE DEFENDANT: It's just got to this point, sir. Where I'm asking you do I have to proceed with this --
>
> THE COURT: Yes.

THE DEFENDANT: Okay.

THE COURT: So are you going to testify or do you want to send you off --

THE DEFENDANT: Yes, you're putting me in a no[-]win situation, sir. I can't make a statement. They're not going to submit the evidence. I can't hire another attorney. I can't get a bond. I feel being retaliatory [sic] against because there're certain deadlines that has [sic] to be met against this false prosecution, this malicious somewhat prosecution. And I'm standing in awe like, where's my help? I see this guy over here, I appreciate what he has done, but I feel it's not -- he's no longer of my best interest in this case. And I want to withdraw him ASAP. I don't want to be represented against false evidence or against evidence that will prove my guilt that they're refusing -- I'm basically just asking for him to show the video. That's all I'm asking. He said it was his --

THE COURT: You have a lawyer. You've had three before. Everybody could have asked for the same thing. It's because they believe in the Prosecutor who first of all said there's nothing on the video.

THE DEFENDANT: Well, I --

THE COURT: So that's why we're not seeing it.

THE DEFENDANT: Well, I feel that's self-damaging because we're not --

[Deputy Prosecutor]: Judge, with respect, we're wasting the Court's time. This is a trial strategy argument and --

THE COURT: I'm trying to get to a point --

[Defense Counsel]: Judge, my client insisted that he wasn't present for an initial hearing, and I obtained the initial hearing videotape through the court reporter and --

THE DEFENDANT: No, you didn't.

[Defense Counsel]: -- I heard his voice on there --

THE DEFENDANT: No, you didn't. See, that's what I'm talking about.

THE COURT: All right. Here's what you're going -- the Defense opportunity to present evidence to this jury, that's where we are right now. And so if you can testify or not, I don't care which it is, but when you get on the witness stand, answer -- listen to the question, answer those questions.

THE DEFENDANT: I don't want to go through this proceeding.

THE COURT: It's your lawyer --

THE DEFENDANT: I have to?

THE COURT: Well, your lawyer is in charge of how --

THE DEFENDANT: Do I have to?

THE COURT: Your lawyer is in charge of calling witnesses.

THE DEFENDANT: I'm not -- I refuse to contradict my legal issue by damn not representing what he offered to represent.

[Deputy Prosecutor]: Judge, is he going to testify or not?

THE DEFENDANT: If he's not going to issue that video to clarify what I've been charged with I have an absolute reason and responsibility and right not to go forward with this because I would be putting myself in harm's way.

THE COURT: The Court finds that all the lawyers that have represented you have had the opportunity to find this video --

THE DEFENDANT: That's a lie.

THE COURT: I listened to you talk, you listen to me. They've all determined that there's nothing noteworthy on there. Nothing of evidential value.

THE DEFENDANT: They never --

THE COURT: I'm not going to second guess --

THE DEFENDANT: That's my damn (inaudible).

THE COURT: -- they've determined there's no evidentiary value, I'm not second guessing everyone else sitting at those tables. So you're right here -- No.

THE DEFENDANT: I'm not participating.

THE COURT: Then, if you don't want to participate --

THE DEFENDANT: Yeah.

THE COURT: -- that means the jury's going to decide the case --

THE DEFENDANT: Let them do it.

THE COURT: -- without you.

THE DEFENDANT: I don't want be on record with them not showing that.

[Defense Counsel]: Robert. Come on, Robert. You got to testify --

THE DEFENDANT: No, I'm not. No, I'm not going to let you guys do this.

THE COURT: Okay. So if you guys don't want to testify --

THE DEFENDANT: No, no, I don't --

THE COURT: -- that's fine.

THE DEFENDANT: -- want to testify. I'm not going to be a part of a (inaudible).

THE COURT: Are you going to be in the courtroom?

THE DEFENDANT: No. Take me out and then keep punishing me like you doing [sic].

THE COURT: I need to put this on the record.

> THE DEFENDANT: I'm not going to set myself up for failure.
>
> THE COURT: I need to put this on the record that the jury, when they come back in, you won't be here, the Defense will rest presumably and that will be the end of the case.
>
> THE DEFENDANT: Continue to do what you been doing. Illegally persecuting me.

Id. at 35-39. Allen then left the courtroom and did not testify. When the jury returned its verdict, Allen again refused to return to the courtroom.

[9] The jury found Allen guilty as charged. Allen filed a motion for a mistrial for "jury misconduct and/or for competency of the defendant to stand trial," which the trial court denied. Appellant's App. Vol. II p. 140. The trial court sentenced Allen to concurrent sentences of six years with the first four years in the Department of Correction ("DOC") and the final two years in community corrections. Allen now appeals.

Analysis

I. Presence at the Trial

[10] Allen contends that the trial court erred by determining that Allen knowingly and voluntarily waived his right to be present at his trial. Allen argues that his removal from the trial violated his rights under the Sixth Amendment of the

United States Constitution.[1] The Confrontation Clause of the Sixth Amendment to the United States Constitution, applicable to the states under the Fourteenth Amendment, provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 1058 (1970). "A defendant may, however, lose the right to be present at trial by consent or misconduct." *Partee v. State*, 184 N.E.3d 1225, 1234 (Ind. Ct. App. 2022), *trans. denied*. "A criminal defendant may be tried in absentia . . . if the trial court determines that the defendant knowingly and voluntarily waived that right." *Smith v. State*, 160 N.E.3d 1152, 1154 (Ind. Ct. App. 2021) (citing *Jackson v. State*, 868 N.E.2d 494, 498 (Ind. 2007)).

[11] Allen contends that he was "exclude[d]" from his defense and the reading of the verdicts. Appellant's Br. p. 11. It is clear, however, from the record that the trial court did not exclude Allen; rather, Allen refused to participate in and attend the second day of his trial, including the reading of the verdicts. The issue here, thus, is whether Allen knowingly and voluntarily waived his right to

---

[1] Allen also asserts that his rights under Article 1, Section 13 of the Indiana Constitution were violated. Allen, however, maintains that the "identical waiver rules is applicable" to Article 1, Section 13, and Allen does not make a separate argument under the Indiana Constitution. Accordingly, the issue is waived. *See Abel v. State*, 773 N.E.2d 276, 278 n.1 (Ind. 2002) ("Because Abel presents no authority or independent analysis supporting a separate standard under the state constitution, any state constitutional claim is waived.").

be present at the trial. Allen contends that he could not have knowingly and voluntarily waived this right because he did not understand the procedures and that he was giving up his right to present his defense.

[12] The record does not support Allen's claim. The record demonstrates that Allen became argumentative and disruptive with his trial counsel and the trial court on the second day of his trial. Although the trial court brought Allen into the courtroom for an extensive discussion of Allen's issues with the proceedings, Allen continued to argue with his counsel and the trial court. Ultimately, Allen refused to attend the proceedings, refused to testify in his own defense, and left the courtroom. Under these circumstances, we conclude that Allen knowingly and voluntarily waived his right to be present at the trial. Accordingly, Allen's argument fails. *See, e.g., Johnston v. State*, 126 N.E.3d 878, 889 (Ind. Ct. App. 2019) (finding that the defendant knowingly and voluntarily waived his right to be present at his trial), *trans. denied*.

II. Sufficiency of the Evidence

[13] Allen challenges the sufficiency of the evidence to sustain his conviction for criminal confinement. Sufficiency of evidence claims "warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility." *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020) (citing *Perry v. State*, 638 N.E.2d 1236, 1242 (Ind. 1994)). We consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Id.* (citing *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). "We will affirm a conviction if there is substantial evidence of

probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt." *Id.* We affirm the conviction "unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Sutton v. State*, 167 N.E.3d 800, 801 (Ind. Ct. App. 2021) (quoting *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007)).

[14] The State charged Allen with criminal confinement for confining Howard pursuant to Indiana Code Section 35-42-3-3(a), which provides: "A person who knowingly or intentionally confines another person without the other person's consent commits criminal confinement." The offense is a Level 5 felony where "it is committed by using a vehicle." I.C. § 35-42-3-3(b)(1)(B). "'[C]onfine' means to substantially interfere with the liberty of a person." I.C. § 35-42-3-1.

[15] Allen contends that he did not confine Howard because several feet separated the vehicles and because Howard had multiple other avenues to exit the parking lot. The State, however, presented evidence that Allen pulled his vehicle in front of Howard's vehicle, which cut Howard off, and "block[ed] [them] from leaving out [sic] the plaza." Tr. Vol. II p. 211. Howard was forced to stop his vehicle to avoid hitting Allen's vehicle. Allen's vehicle was only three to four feet from Howard's vehicle. In escaping from the situation, Howard hit something and ripped the passenger side mirror off his vehicle. It is unnecessary for Allen to have completely blocked all avenues of escape in order

to substantially interfere with Howard's liberty. *See, e.g., Brown v. State*, 497 N.E.2d 1049, 1052 (Ind. 1986) (affirming a conviction for criminal confinement and concluding that the fact that the victim "readily freed herself does not negate the fact that the jury could find beyond a reasonable doubt that a non-consensual confinement took place").

[16] Allen's argument is merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. *Powell*, 151 N.E.3d at 262. The State presented evidence that Allen substantially interfered with Howard's liberty, and thus, the evidence is sufficient to sustain Allen's conviction for criminal confinement. *See, e.g., Mallard v. State*, 816 N.E.2d 53, 56 (Ind. Ct. App. 2004) (concluding that the evidence was sufficient to sustain the defendant's conviction for criminal confinement where he impersonated a police officer and pulled the victim over), *trans. denied*.

III. Inappropriate Sentence

[17] Next, Allen challenges his six-year sentence. The Indiana Constitution authorizes independent appellate review and revision of a trial court's sentencing decision. *See* Ind. Const. art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). Our Supreme Court has implemented this authority through Indiana Appellate Rule 7(B), which allows this Court to revise a sentence when it is "inappropriate in light of the nature of the offense and the

character of the offender."[2] Our review of a sentence under Appellate Rule 7(B) is not an act of second guessing the trial court's sentence; rather, "[o]ur posture on appeal is [ ] deferential" to the trial court. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016) (citing *Rice v. State*, 6 N.E.3d 940, 946 (Ind. 2014)). We exercise our authority under Appellate Rule 7(B) only in "exceptional cases, and its exercise 'boils down to our collective sense of what is appropriate.'" *Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020) (per curiam) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[18] "'The principal role of appellate review is to attempt to leaven the outliers.'" *McCain v. State*, 148 N.E.3d 977, 985 (Ind. 2020) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). The point is "not to achieve a perceived correct sentence." *Id.* "Whether a sentence should be deemed inappropriate '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.* (quoting *Cardwell*, 895 N.E.2d at 1224). Deference to the trial court's sentence "should prevail 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

[2] Though we must consider both the nature of the offense and the character of the offender, an appellant need not prove that each prong independently renders a sentence inappropriate. *See, e.g., State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020) (granting a sentence reduction based solely on an analysis of aspects of the defendant's character); *Connor v. State*, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016); *see also Davis v. State*, 173 N.E.3d 700, 707-09 (Tavitas, J., concurring in result).

character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[19] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). In the case at bar, Allen was convicted of three Level 5 felonies. Indiana Code Section 35-50-2-6(b) provides: "A person who commits a Level 5 felony (for a crime committed after June 30, 2014) shall be imprisoned for a fixed term of between one (1) and six (6) years, with the advisory sentence being three (3) years." The trial court here sentenced Allen to six years with four years in the DOC and two years in community corrections.

[20] Our analysis of the "nature of the offense" requires us to look at the nature, extent, and depravity of the offense. *Sorenson v. State*, 133 N.E.3d 717, 729 (Ind. Ct. App. 2019), *trans. denied*. Here, Allen argues that Bigbee fired at him first and that bystanders were not harmed in the incident. Bigbee testified that he shot first after seeing Allen get out of his vehicle with his gun. The record demonstrates that the jury rejected Allen's self-defense and that Allen initiated a confrontation in a public parking lot. Allen stopped his vehicle in front of Howard and Bigbee's vehicle; exited his vehicle with a handgun; and after being shot by Bigbee, fired multiple shots, which damaged Howard's vehicle and seriously injured Bigbee.

[21] Our analysis of the character of the offender involves a "broad consideration of a defendant's qualities," *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019), including the defendant's age, criminal history, background, and remorse. *James v. State*, 868 N.E.2d 543, 548-59 (Ind. Ct. App. 2007). Fifty-six-year-old Allen contends that he is a hard worker and was an integral part of his church. Allen testified that he is active in his church, and Allen's sister testified that Allen has always been employed or receiving disability benefits.

[22] Allen also argues that many of his convictions were expunged, which shows his ability to avoid criminal conduct for many years. "The significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, proximity, and number of prior offenses in relation to the current offense." *Sandleben v. State*, 29 N.E.3d 126, 137 (Ind. Ct. App. 2015) (citing *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006)), *trans. denied*. "Even a minor criminal history is a poor reflection of a defendant's character." *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020) (citing *Moss v. State*, 13 N.E.3d 440, 448 (Ind. Ct. App. 2014), *trans. denied*). Between 1988 and 2005, Allen received nine misdemeanor convictions and three felony convictions. The State notes that, although most of the convictions have been expunged, expunged convictions may be disclosed in a presentence report. *See* I.C. § 35-38-9-6(a)(3).

[23] While we acknowledge that Allen's lengthy criminal history is remote in time from the current offenses and that most of the convictions have been expunged, his criminal history is still a relevant consideration. Given the seriousness of

Allen's offenses and his criminal history, we cannot say that Allen's six-year sentence is inappropriate in light of the nature of the offense and the character of the offender.

Conclusion

[24] Allen knowingly and voluntarily waived his right to be present during these proceedings. Moreover, the evidence is sufficient to support Allen's conviction for criminal confinement, and his sentence is not inappropriate in light of the nature of the offense and the character of the offender. Accordingly, we affirm.

[25] Affirmed.

Riley, J., and May, J., concur.