MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Marietto V. Massillamany
Massillamany Jeter & Carson LLP
Fishers, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Tyler Banks
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Robert James Plato, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 25, 2022

Court of Appeals Case No. 21A-CR-1870

Appeal from the Madison Circuit Court

The Honorable Andrew R. Hopper, Judge

Trial Court Cause No. 48C03-1907-F6-1715

Crone, Judge.

Case Summary

[1] Robert James Plato, Jr., was convicted of level 6 felony intimidation following a jury trial, and he also admitted to being a habitual offender. The trial court sentenced him to an eight-year aggregate sentence. He appeals arguing that the State made inappropriate comments during closing argument, that the trial court abused its discretion during sentencing, and that his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] In April 2018, Madison County Sheriff's Office Detective LeeAnn Dwiggins executed a search warrant as part of an investigation of Plato, who was incarcerated at the time. The warrant authorized Detective Wiggins to seize any "paperwork" related to the investigation. Tr. Vol. 1 at 248. Accordingly, she seized a laptop to find "documentation" related to the crime she was investigating. *Id*. After the seizure, Plato sent a letter to the Madison County Sheriff that read:

> Each and every Madison County Sheriffs vehicle, both marked and unmarked, where ever they will be found will receive a Hornady 750 gr. A Max .50 BMG[1] through its grill and engine block. For each and every vehicle that will be shot and destroyed, you can deduct $100.00 off of the bill that Madison County Sheriffs Department Owes me. The $100.00 is what the vehicle will be worth as scrap metal.

---

[1] The State explains that Hornady 50 BMG 750 gr A-Max is a type of ammunition. State's Br. at 6 n.1.

> ….
>
> You need to resolve this issue with my computer right away. Dwiggins is nothing more than a common thief not a DTF deputy and the very first time I see that thief, I will not treat her as a deputy of Madison County but as a thief, and will beat the breaks off that bitch. McDonalds, Walmart, don't matter where I see her, she will be beat like a thief!

State's Ex. 1 (underlining omitted). The sheriff's office informed Detective Dwiggins and the Indiana State Police about the letter. Detective Dwiggins was "concerned that [Plato] would be getting out of prison and [she] was concerned for [her] and [her] family." Tr. Vol. 1 at 249. The State Police interviewed Plato about the letter, and he admitted writing it.

[3] On July 17, 2019, the State charged Plato with level 6 felony intimidation. The State subsequently added a habitual offender charge. Plato later sent a letter to the trial judge telling him to get his "head out of [his] ass" and referring to him as "dumb f**k." and a "dimwit who found a legal degree in a cracker jack box." Court's Ex. 1. In the letter, Plato also referenced the deputy prosecutor representing the State, calling her a "retard" and a "dumb c*nt." *Id.* Prior to trial, Plato, who chose to represent himself, indicated to the trial court that his defense strategy was to argue that it was unlawful for Detective Dwiggins to seize his laptop because it was outside the scope of the search warrant, and therefore the State could not prove that Plato's threats were in retaliation for a prior lawful act. The State filed a motion in limine requesting that Plato be limited to challenging whether Detective Dwiggins acted lawfully when she

executed the search warrant, and not whether the search warrant itself was lawful. The trial court granted the State's motion. Following trial, the jury found Plato guilty of intimidation, and he admitted to being a habitual offender. Prior to sentencing, Plato filed a motion to withdraw his habitual offender admission, which the trial court denied. The trial court sentenced Plato to two years for intimidation, enhanced by six years for the habitual offender finding. [2] This appeal ensued.

Discussion and Decision

Section 1 – Plato has waived any challenge to the propriety of the State's closing argument.

[4] Plato begins by challenging certain comments made by the State during closing argument. Specifically, he asserts that, during its closing argument, the State briefly referenced the search warrant that was subject to the motion in limine. Plato baldly complains that it was not "fair" for the trial court to allow such reference and "there [was] no reprimand nor censorship by the trial court when the State ma[de] this forbidden argument." Appellant's Br. at 8. However, we agree with the State that Plato has "doubly waived" this issue for our review. State's Br. at 13. First, Plato did not object to the State's comments during closing argument. "Failure to object at trial waives the issue for review unless fundamental error occurred." *Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013)

[2] During sentencing, the State submitted three letters Plato sent to the deputy prosecutor threatening, among other things, to "water-board [her] with dirty toilet bowl water." Sent. Ex. 1.

(citation omitted). Plato further failed to raise the issue of fundamental error in his appellate brief. This also results in waiver of this claim on appeal. *Bowman v. State*, 51 N.E.3d 1174, 1179 (Ind. 2016) (failure to object at trial coupled with failure to raise fundamental error in appellate brief results in claim being "entirely waived."). Accordingly, we decline to address Plato's argument.

Section 2 – The trial court did not abuse its discretion during sentencing.

[5] Plato next asserts that the trial court abused its discretion during sentencing. "Generally speaking, sentencing decisions are left to the sound discretion of the trial court, and we review the trial court's decision only for an abuse of this discretion." *Singh v. State*, 40 N.E.3d 981, 987 (Ind. Ct. App. 2015), *trans. denied* (2016). "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." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (quotation marks omitted), *clarified on reh'g*, 875 N.E.2d 218. A trial court may abuse its discretion by: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Id*. at 490-91.

[6] Plato contends that the trial court abused its discretion during sentencing in failing "to give proper weight" to certain mitigating factors, namely his guilty

plea to the habitual offender charge and his stated remorse. Appellant's Br. at 10. However, a claim that the trial court improperly weighed aggravating and mitigating factors is not available for appellate review. *See Anglemyer*, 868 N.E.2d at 491 ("Because the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-*Blakely* statutory regime, a trial court cannot now be said to have abused its discretion in failing to 'properly weigh' such factors."). We look to whether the trial court properly identified aggravating and mitigating factors, but we do not review the weight assigned to each of the factors. *Healey v. State*, 969 N.E.2d 607, 616 (Ind. Ct. App. 2012), *trans. denied*.

[7] First, although Plato claims that the trial court overlooked his "remorse" as a mitigating factor, *see* Appellant's Br. at 10, we note that not only did Plato not proffer his remorse as a mitigating factor, our review of the transcript does not reveal anything close to an expression of remorse in Plato's statements during sentencing. "If the defendant does not advance a factor to be mitigating at sentencing, this Court will presume that the factor is not significant and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal." *Henley v. State*, 881 N.E.2d 639, 651 (Ind. 2008) (citation omitted).

[8] As for his guilty plea, Plato concedes that the trial court did not ignore his decision to plead guilty. Indeed, Plato acknowledges that the trial court simply gave little weight to his guilty plea because he attempted to withdraw it a few days after trial. While Plato believes that his plea should be reflected by a lesser

sentence, "a trial court is not obligated to weigh or credit a mitigating factor as the defendant suggests." *Lindsey v. State*, 877 N.E.2d 190, 198 (Ind. Ct. App. 2007), *trans. denied* (2008). We find no abuse of discretion.

Section 3 – Plato has not met his burden to establish that his sentence is inappropriate.

[9] We finally address Plato's claim that his eight-year aggregate sentence is inappropriate pursuant to Indiana Appellate Rule 7(B),[3] which states that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." "Sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). "Such deference 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 character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). In conducting our review, "[w]e do not look to determine if the sentence was appropriate; instead, we look to make sure the sentence was not inappropriate." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Ultimately, whether a sentence should be deemed inappropriate

[3] Although Plato clearly conflates his abuse of discretion claim with a claim that his sentence is inappropriate, the two claims are distinct and require separate analysis. *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008).

"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." *Cardwell*, 895 N.E.2d at 1224. The appellant bears the burden of persuading this Court that his sentence meets the inappropriateness standard. *Bowman*, 51 N.E.3d at 1181.

[10] Regarding the nature of the offense, the advisory sentence is the starting point that the legislature has selected as an appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). The jury found Plato guilty of a level 6 felony. The sentencing range for a level 6 felony is between six months and two-and-a-half years, with the advisory sentence being one year. Ind. Code § 35-50-2-7. In addition, Plato admitted to being a habitual offender, which carries with it a fixed term between two and six years for a person convicted of a level 6 felony. Ind. Code § 35-50-2-8(i)(2). Thus, the eight-year aggregate sentence imposed by the trial court was six months below the maximum allowable sentence.

[11] Plato offers no argument that the nature of his offense warrants a sentence reduction, nor could he. His clear threats of violence against Detective Dwiggins and the entire Madison County Sheriff's Office simply cannot be painted in a positive light. Regardless, we need look no further than Plato's character to affirm the sentence imposed by the trial court. "The character of the offender is found in what we learn of the offender's life and conduct." *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). This assessment includes consideration of the defendant's criminal history. *Johnson v. State*, 986 N.E.2d

852, 857 (Ind. Ct. App. 2013). The record reveals that Plato has a lengthy and troubling criminal history spanning over thirty years and multiple states. This includes thirteen felony convictions, some of which were for violent offenses. Plato also had another pending intimidation charge at the time of sentencing. Moreover, Plato's disrespectful letters, laden with offensive and vulgar remarks, written to the trial judge and the deputy prosecutor in this case reflect extremely negatively on his character. In short, Plato has not met his burden to establish that the eight-year sentence imposed by the trial court is inappropriate, as he has failed to present even the slightest evidence portraying in a positive light the nature of the offense and his character. Accordingly, we affirm.

[12] Affirmed.

Bradford, C.J., and Tavitas, J., concur.