MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Eric S. Cullum,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

October 18, 2022

Court of Appeals Case No. 22A-CR-210

Appeal from the Greene Circuit Court

The Honorable Erik C. Allen, Judge

Trial Court Cause No. 28C01-2105-F2-3

Crone, Judge.

Case Summary

[1] On appeal from convictions for two counts of level 2 felony dealing in methamphetamine, Eric Cullum challenges the admission of certain evidence, the denial of his motion for continuance, and the denial of his motion for mistrial. Additionally, he contends that the trial court abused its discretion in sentencing him and asserts that his sentence is neither appropriate nor proportional. Finding no reversible error, we affirm.

Facts and Procedural History

[2] In 2021, a Bloomington police officer, who a few years previously heard Cullum's name referenced regarding possible narcotics sales,[1] learned from a confidential informant (CI) that the CI could purchase methamphetamine from Cullum. A controlled buy was planned to occur at Cullum's residence in Lyons. On April 12, 2021, the CI went to Cullum's home, where he ultimately paid Cullum $400 for fourteen grams of methamphetamine. During the transaction, which was videotaped, Cullum used drug slang, discussed needing more supply, spoke about getting a pound of methamphetamine for $5000, and made it clear that he had checked the criminal history of potential buyers and associates.

[1] We discourage citations to testimony that was deemed hearsay and/or stricken from the record. *See* Tr. Vol. 2 at 206, 110-11. However, support for this assertion exists elsewhere in the record when the same officer testified about his time working for the Greene County Sheriff's Department. *Id.* at 183.

[3] On May 13, 2021, Greene County Drug Task Force members surveilling Cullum's home saw a pickup truck pull onto Cullum's shared driveway and, shortly thereafter, depart. The truck engaged in a traffic infraction, which led officers to stop it. The driver was arrested for possession of methamphetamine. Based upon the April controlled buy and the May traffic stop, officers sought and were issued a search warrant for Cullum's residence.

[4] Officers executed the search of Cullum's residence on May 14, 2021, around 4:00 a.m., and found 57.08 grams of methamphetamine, various baggies of assorted sizes, a smoking device, and almost $3000 cash. Most items were found in the primary bedroom near Cullum's side of the bed. Officers located Cullum and two men in the garage of the residence. Cullum had a digital scale and residue in his pocket; the two men were in possession of methamphetamine.

[5] Although the State originally charged Cullum with five counts, it dismissed three and prosecuted him for two level 2 felony methamphetamine dealing counts. Count 1 concerned conduct occurring during the April 12, 2021 controlled buy, and count 2 stemmed from the May 14, 2021 search. A two-day jury trial commenced on November 30, 2021. Cullum attended the first day, during which defense counsel objected to the evidence recovered from the search. The court heard argument, took judicial notice of the search warrant, overruled the objection, and admitted various photographs, testimony, and exhibits.

[6] Cullum did not show up on December 1, 2021, for the second day of his trial. Defense counsel moved for a continuance, relaying that Cullum had claimed via email and phone call that he was ill. The State objected, noting that the bulk of evidence had been admitted on the first day and stressing that Cullum's prior remarks and actions had caused concern that Cullum would not appear. The trial court denied the motion to continue. After a morning break in the trial, the court asked for an update regarding Cullum's absence. Defense counsel explained that Cullum's wife had emailed stating he was vomiting, yet defense counsel had spoken via phone with Cullum, who stated an ambulance was on the way. The trial proceeded.

[7] At the conclusion of the State's case, defense counsel explained that she had again tried calling and emailing Cullum but received no answer from him or his wife. Cullum's wife was reported to have left the residence. The defense moved for a mistrial, asserting that Cullum was denied the right to testify and that defense counsel would not call additional witnesses without the defendant's testimony. The State objected to the mistrial motion, and after some deliberation the trial court denied the motion. Defense counsel rested, and the jury found Cullum guilty on both counts. The court issued a warrant for Cullum's arrest.

[8] Six days later, Cullum was found in Sullivan County and arrested on the warrant. In early January 2022, the court sentenced Cullum to an aggregate twenty-eight-year sentence, with twenty-four years executed and four suspended to probation. Additional facts shall be supplied where relevant.

Discussion and Decision

Section 1 – Cullum has waived review of the admission of evidence obtained from the search of his home.

[9] Cullum contends that the trial court abused its discretion by admitting into evidence the methamphetamine, digital scales, baggies, and cash that police seized when they searched his residence pursuant to a warrant. He argues that insufficient evidence supported the probable cause finding, thus making the warrant invalid. Citing the Fourth Amendment to the United States Constitution, Cullum advocates application of the exclusionary rule rather than the good faith exception. Moreover, he asserts that the admission of the evidence could not be deemed harmless.

[10] To preserve an issue for appeal, counsel must lodge a contemporaneous objection at trial. *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010). If counsel requests a continuing objection, subsequent affirmative statements that counsel has no objection to the evidence waives an appellate challenge to the admissibility of evidence. *Hostetler v. State*, 184 N.E.3d 1240, 1247 (Ind. Ct. App. 2022), *trans. denied*. An "'appellant cannot on the one hand state at trial that he has no objection to the admission of evidence and thereafter in this Court claim such admission to be erroneous.'" *Halliburton v. State*, 1 N.E.3d 670, 679 (Ind. 2013) (quoting *Harrison v. Sta*te, 258 Ind. 359, 363, 281 N.E.2d 98, 100 (1972)).

[11] Here at trial, when the State began to elicit testimony from the officer involved in the May 14, 2021 search, defense counsel objected to and moved to suppress the admission of evidence found during the search. Defense counsel asserted that the warrant was improperly based on stale information from the April 12, 2021 controlled buy and further contended that the May 13, 2021 traffic stop was pretextual and did not give rise to additional probable cause. Tr. Vol. 2 at 136-37. The State claimed that the search warrant affidavit included additional information that supported the probable cause finding and faulted the defense for not previously filing a motion to suppress. The court took judicial notice of the search warrant and the supporting affidavit then overruled the defense objection. Defense counsel did not request a continuing objection.

[12] The trial proceeded, and photographs of the evidence seized during the May 14, 2021 search were admitted into evidence as follows:

> [State's witness]: On the right side of the photograph is a small plastic Ziplock bag containing the crystal and there is a container with a lid in the center that contained white crystal-like substance also and then it looks like a Gold Peak Tea bottle that has been modified into a paraphernalia smoking device.
>
> Q: Is that a fair and accurate representation of what those items looked like in their location whenever you discovered them during your search?
>
> A: Yes.
>
> Q: Showing Exhibit 7 to the Defense. Move to admit.

[Defense counsel]: No objection.

BY THE COURT: I'm sorry no objection?

[Defense counsel]: That is correct.

BY THE COURT: 7 is admitted.

Id. at 142. The State moved to admit exhibits 9, 10A, 10B, 11, and 13, which were photographs showing Cullum's dresser, his top dresser drawer, an organizer within the drawer, a Ziplock bag of blue pills, a Ziplock bag containing off-white tainted powder found inside the dresser, and Cullum's wallet with his driver's license. Ex. Vol. 4 at 16, 17, 18, 19, 21. Defense counsel volunteered, "No objection." Tr. Vol. 2 at 146. Likewise, defense counsel stated, "No objection," when the State introduced exhibit 14, evidence of the digital scales. Tr. Vol. 3 at 7.[2] When the State introduced the 13.47 grams and the 43.61 grams of methamphetamine and the corresponding certificates of analysis as exhibits, the defense made no objection. *Id*. at 33, 38, 48, 53; Ex. Vol. 2 at 15, 20, 32-35.

[2] Defense counsel initially objected to exhibit 16, a compilation of evidence already shown in prior exhibits that were admitted without objection, at first arguing that the photo also included other possibly prejudicial miscellaneous items not discussed by the officer. Tr. Vol. 2 at 151. When the witness explained that the miscellaneous items were digital scales, defense counsel replied, "I guess I would still object that it is cumulative and there are other photographs entered. It is not necessary." *Id*. at 152. Defense counsel's cumulative concern comes too late to rectify the failure to object to the admission of the prior exhibits of separately photographed items.

[13] We need not determine whether the trial court abused its discretion by admitting the evidence found during the search authorized by the warrant because Cullum has waived appellate review of this question. During the examination of the State's initial witness, defense counsel argued for suppression of the evidence resulting from the search authorized by the warrant. Yet, when overruled, defense counsel lodged no continuing objection, and to the contrary, affirmatively voiced no objection when various evidence was introduced. While a showing of fundamental error can overcome waiver, Cullum makes no claim that the admission of the evidence seized during the search of his residence constituted fundamental error. Like that of the defendant in *Hostetler*, Cullum's admissibility challenge is waived. *See* 184 N.E.3d at 1247 n.7.

Section 2 – The court did not abuse its discretion by denying Cullum's motion for continuance.

[14] Acknowledging that the continuance sought by his counsel was not required by statute, Cullum asserts that the trial court should have granted his motion. For support, Cullum maintains that his trial occurred during the COVID-19 pandemic, that he communicated his illness to his attorney on the second day of his trial, that neither he nor his defense witnesses testified, and that the State "had little interest comparatively" in the continuance. Appellant's Br. at 28.

[15] When a defendant's motion for continuance is made due to the absence of material evidence, absence of a material witness, or defendant's illness, *and* specially enumerated statutory criteria are satisfied, then the defendant is

entitled to the continuance as a matter of right. *Laster v. State*, 956 N.E.2d 187, 192 (Ind. Ct. App. 2011) (citing *Vaughn v. State*, 590 N.E.2d 134,135 (Ind. 1992), and Ind. Code § 35-36-7-1) (emphasis added). Cullum filed none of the statutorily required materials to warrant a continuance as of right. Because a continuance was not required by statute, we will reverse the trial court's ruling on Cullum's motion to continue only if the court abused its discretion. *See Ramirez v. State*, 186 N.E.3d 89, 96 (Ind. 2022). It is important to emphasize that there is "always a strong presumption that the trial court properly exercised its discretion." *Elmore v. State*, 657 N.E.2d 1216, 1218 (Ind. 1995). Whether there was an abuse of discretion is potentially a two-step inquiry. *Ramirez*, 186 N.E.3d at 96. First, we examine whether the trial court properly considered how the parties' diverse interests would be impacted by altering the schedule. *Id.* If it did not properly consider the impact, we then consider whether denial of the motion resulted in prejudice. *Id.* "A defendant can establish prejudice by making *specific showings* as to why additional time was necessary and how it would have benefitted the defense." *Id*. (emphasis added).

[16] Day two of Cullum's trial was to begin at 8:30 a.m. At 8:39 a.m., when the court inquired about Cullum's absence, the following discussion occurred:

> [Defense counsel]: Well, I've had, yes, several e-mails from him stating that he was ill with a high temperature and unable to come to court. I just, I spoke with him on the phone about fifteen minutes ago and he said he was ill, unable to come to court, says he had a high fever, that he might be going to the hospital, he was very unclear, as to what he was saying. I was having a hard time understanding him. But, I, I've informed him every time I

either e-mailed or spoke to him that court would proceed in his absence. I did state I would ask for a, a motion to continue the proceeding, but explain[ed] that it would most likely be denied. But yes, that's what I know about him.

[The court]: Alright. And, you indicated to him [he] needed to appear, that if he had a high temperature, security before he came in could check his temperature.

[Defense counsel]: Yes, I also, I also did – yes, I also did state that and if he was ill that, you know he could be checked out here at the courthouse, as well.

[The court]: Okay. Now, I think, we've, we've talked in part on the record in previous hearings, but I know during conversations with counsel throughout this process, Mr. Cullum has been quite dilat[o]ry. Has attempted to continue trial, did, I believe one continuance was attempting to continue this trial, requested a continuance, after that was denied, then made some assertions regarding sovereign citizen issues in an attempt to delay the trial. Has not appeared. We made record of that, did not appear to view the confidential informant video and was generally non-compliant in appearing at meetings that you had scheduled with him to prepare for trial. Is all that true?

[Defense counsel]: That is all true.

[The court]: All right. And, when M[r.] Cullum was present throughout the day yesterday, seemed, appeared to be fine, didn't raise any concerns about not feeling well or anything of that nature. Had been given the opportunity to appear here to be checked and had declined that. But it appears based on the history of his efforts to delay the trial, I know there was, I think you'd indicated there are a number of discussions with him that he was saying he was not going to appear for trial?

[Defense counsel]: That is true, as well.

[The court]: And it, it seemed to me that this is a, a basically an effort to delay the trial. State's position on anything you wish?

[The State]: You, you laid out my position, judge. I was going to, to make mention of all the points that, that you already raised. And, and the three of us, to be clear for the record, the three of us had discussed this possibility at our, I think sort of an informal pre-trial conference before the trial started last week that this was perhaps going to be a possibility based upon Mr. Cullum's actions throughout the history of this case, that he would fail to show for his, for his trial. So, I would object to the continuance. Obviously, we are in the middle of, of trying this case. In fact, the bulk of the evidence has been put on through Investigator Goodman yesterday, including the CI video and his discovery of the methamphetamine in the defendant's bedroom. So, my request is that the court deny the motion to continue and that we finish up the trial today as scheduled.

[The court]: Any other record, [defense counsel]?

[Defense counsel]: No.

Tr. Vol. 2 at 171-73. Thereafter, the court, defense counsel, and the State discussed what to tell the jury, and ultimately defense counsel expressed the desire that the court make no statement regarding Cullum's lack of attendance. *Id*. at 174-77.

[17] Trial proceeded until a morning break, when the court held a sidebar and explained that the jury had submitted a note asking about Cullum's absence. The judge asked if the parties wished for him to provide any explanation

beyond saying that Cullum "was not present." *Id*. at 236. Defense replied, "[t]hat was perfect[,]" and the State agreed. *Id*. at 237. The court then inquired if defense counsel had received further communications regarding Cullum. Defense counsel noted that she had received an email apparently written by Cullum's wife using his account and reporting that he was "violently puking" and thus unable to leave. *Id*. Yet, defense counsel also relayed "contradictory" information that she had personally spoken on the phone with Cullum, who stated that an ambulance was on the way. *Id*. The court determined:

> So, again, you know, maybe if [you] can follow up and you get any additional information, we'll reconsider that. But again, I think that with the conflicting information that provided is consistent with his history of kind of delaying it, attempting to delay the proceedings. Again, he was clearly advised to be present. He's been ordered, at each time the case was set, and when it was set for the date to begin yesterday that he was ordered to appear for the trial. If he failed to appear, not only a warrant could be issued, but that the matter could be tried in his absence if he failed to appear. So, I think he was clear, clearly advised of that and well aware of that. And, it seems from the court's view, consistent with his efforts in the past here, that he's, he's just not appeared. I, I certainly [am] skeptical based on all the information being provided about his claims of being ill, so. Alright, if you hear anything else, please let the court know.

Id. at 237-38.

[18] The trial proceeded until the State finished its case, at which point the court conferred with the parties outside the jury's presence and once more inquired about the status of Cullum. Defense counsel stated that she had called Cullen

twice during the prior hour and a half but "had no answer from him." Tr. Vol. 3 at 59. Additionally, Cullum's counsel had sent an email (because that was how she had previously reached her client's wife) explaining that the State had rested its case, that the defense was ready to proceed, and that Cullum needed to attend immediately if he wished to testify. Defense counsel also contacted wife's attorney, who stated that wife was no longer with Cullum and had "actually left that residence and went somewhere else." *Id.* at 60.

[19] As the above detailed excerpts demonstrate, the trial court did not deny the continuance motion lightly but instead carefully considered the matter. Indeed, the court even went so far as to request status updates throughout the day in case something changed that would justify granting the continuance. While the court knew that Cullum could not testify when he was not present, the court had serious doubts about the veracity of the claimed illness given the contradictory information, the lack of any supporting information from courthouse officials, medical professionals, etc., plus several past delay tactics and no-shows by Cullum. The court was provided with no information regarding when Cullum might appear. The court had to weigh further delay against the reality that one day of the trial had already finished, yet additional witnesses and jurors had appeared and were ready for day two. Even if the trial court could have more specifically verbalized its weighing of the diverse interests of the parties, Cullum has not established prejudice. The defense offered no specific showings as to how additional time would have benefitted Cullum. The defense chose not to call any of its other witnesses. Further, the

defense provided no indication as to what Cullum or the defense witnesses that were never called might have stated to sway the jury. Accordingly, we cannot conclude that Cullum has overcome the strong presumption that the trial judge, who presided over the entirety of the case, properly exercised its discretion in denying the motion for continuance.[3]

Section 3 – The court did not abuse its discretion by denying the defense motion for mistrial.

[20] Cullum's mistrial argument closely tracks his continuance argument. He claims that he was sick and unable to attend his trial and that the absence of testimony by him or his witnesses denied him his "constitutional right to testify in his own behalf[.]" Appellant's Br. at 30. He maintains that the trial court's denial of his motion for mistrial was an abuse of discretion that harmed him, "placing him in grave peril, which was ultimately realized." *Id*.

[21] A mistrial is an extreme remedy that is warranted only when no other curative action can be expected to remedy the situation. *Lucio v. State*, 907 N.E.2d 1008, 1010-11 (Ind. 2009). Because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury, we afford great deference to the trial court's discretion in determining whether to grant a mistrial. *Booher v. State*, 773 N.E.2d 814, 820 (Ind. 2002). "To prevail on

[3] At the time the trial court denied the motion for continuance, the judge was unaware that Cullum would leave the county for six days before being arrested on the warrant or that no independent evidence of illness (COVID-19 or otherwise) would be presented even after trial.

appeal from the denial of a motion for mistrial, the appellant must establish that the questioned conduct 'was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected.'" *Mickens v. State*, 742 N.E.2d 927, 929 (Ind. 2001) (quoting *Gregory v. State*, 540 N.E.2d 585, 589 (Ind. 1989)). "The gravity of the peril is determined by the probable persuasive effect on the jury's decision." *Baumholser v. State*, 186 N.E.3d 684, 692 (Ind. Ct. App. 2022), *trans. denied.*

[22] Generally, a criminal defendant has a right to be present at all stages of the trial. *Lampkins v. State*, 682 N.E.2d 1268, 1273 (Ind. 1997). However, a defendant may waive this right and be tried in absentia if the trial court determines that the defendant knowingly and voluntarily waived that right. *Soliz v. State*, 832 N.E.2d 1022, 1029 (Ind. Ct. App. 2005), *trans. denied*. The trial court may presume a defendant voluntarily, knowingly, and intelligently waived his right to be present and try the defendant in absentia upon a showing that the defendant knew the scheduled trial date but failed to appear. *Ellis v. State,* 525 N.E.2d 610, 611-12 (Ind. Ct. App. 1987). The best evidence of this knowledge is the defendant's presence in court on the day the matter is set for trial. *Fennell v. State,* 492 N.E.2d 297, 299 (Ind. 1986). By the same token, a defendant who has been tried in absentia must be afforded an opportunity to explain his absence and thereby rebut the initial presumption of waiver. *Ellis,* 525 N.E.2d at 612. As a reviewing court, we consider the entire record to determine whether the defendant voluntarily, knowingly, and intelligently waived his right to be present at trial. *See Reel v. State,* 567 N.E.2d 845, 846 (Ind. Ct. App. 1991).

Finally, a defendant's explanation of his absence is a part of the evidence available to a reviewing court in determining whether it was error to try him in absentia. *Fennell,* 492 N.E.2d at 299.

[23] At the conclusion of the State's presentation of its case, Cullum's counsel moved for a mistrial, explaining as follows:

> You know a large part of my case that I was going to present was my client. He was going to testify and, I believe, the information he has would be helpful for the jury. You know, without him being here, he's not, he's, I guess, for lack of better words, being denied his right to be able to testify on his behalf. And, I believe, that's going to detrimentally affect his case. And also, the other evidence that I was going to present, I had several other witnesses subpoenaed and, you know, without him being here, I, I don't believe it makes sense for my case and for, for his benefit to call those witnesses, as well. I think without him being here to testify, I believe, that the witnesses['] testimony would end up being more detrimental to him than helpful. So, it's just, it's really put a kink in how I am able to proceed in representing my client. And I don't believe I am able to do a, without my client being here, I don't believe I am able to do a thorough job representing him and making sure that, you know, his, that I am advocating on his behalf.

Tr. Vol. 3 at 60-61. The court asked defense counsel about the other potential witnesses besides Cullum. She stated that she had planned to elicit testimony from the CI, the driver of the truck that had been pulled over and found to have methamphetamine, and the two men found with methamphetamine in Cullum's garage during the May search. However, she excused them and provided no specifics as to what information they might have provided.

[24] Before ultimately denying the motion for mistrial, the trial court took great pains to outline its reasoning. The judge recounted the multiple advisements and various delays since the initial hearing in the case then stated:

> I will make a finding that clearly, [Cullum's] been advised, the date and time, the trial, he was aware of that, he was here yesterday, didn't appear today. But had been previously advised, at least once, but I think at least twice, actually, that if he failed to appear, the matter would be tried in his absence. And, I think there's no legitimacy to his claims of being ill today. Again, the communications that he was violently ill an[d], an ambulance was on its way and then ambulance wasn't there, but he was throwing up and then now his wife says she is apparently left him under the circumstances that, you know, that it doesn't add up to me. So, I think, there's a knowingly and voluntarily waiver of his right to appear. And, with that, I'll proceed in his absence as we have today and continue with the trial and deny the motion for a mistrial[.]

Id. at 64.

[25] To reiterate, Cullum was aware of his trial date, had notice of the ramifications of failing to appear, and was provided with procedures that could have easily verified his claimed illness. Cullum chose not to go to the courthouse on the second day and have his temperature taken. He opted not to be evaluated for illness at the courthouse. He did not text a screen shot of a positive test result, a thermometer showing a fever, or an outgoing call to a doctor, hospital or 911. Moreover, after trial, Cullum did not file a motion to set aside jury verdict. A hearing on such a motion would have provided another chance to present evidence (had it existed) that Cullum had been ill. *See, e.g., Soliz*, 832 N.E.2d

1022. Further, during sentencing, Cullum did not avail himself of yet another opportunity to introduce any documentation or evidence to support his bare assertion of illness. To the contrary, the additional evidence unearthed during sentencing, revealing that he had left the county, cut against his claim of illness.

[26] In sum, the judge who had presided over the lifetime of the case was faced with yet another attempt to delay its resolution, without any documented reason, for an indefinite amount of time, and with no indication as to how postponement or retrial would alter the outcome. The court viewed Cullum as having denied himself the right to appear and testify at his own trial, and hence, whatever peril Cullum might have endured was brought about by Cullum's own conduct. From our vantage point on appeal, and with the benefit of the record from trial through sentencing, we cannot disagree with the conclusions that Cullum subjected himself to the consequences of not appearing for his second day of trial and did not demonstrate how his presence would have changed the result. Despite several opportunities, Cullum never offered corroborating evidence of his assertion of illness. Given the circumstances, the trial court did not err in disbelieving his assertion. Accordingly, Cullum has failed to meet his burden to establish that the trial court abused its discretion in denying the motion for mistrial. *See Griffin v. State*, 501 N.E.2d 1077, 1078 (Ind. 1986) (concluding defendant voluntarily absented himself from day two of his trial, thus waived his right to be present during trial and to confront witnesses against him).

Section 4 – Cullum has not demonstrated that his sentence was an abuse of discretion, inappropriate, or disproportionate.

[27] Cullum makes a threefold challenge to his sentence. First, he maintains that the trial court abused its discretion by not finding Cullum's remorse or his addiction to be mitigating factors. Second, he asserts that his sentence was inappropriate given his character and the nonviolent nature of his crimes. Finally, he contends that his sentence is unconstitutionally disproportionate.

[28] Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g* 875 N.E.2d 218. So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion occurs where 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. *Id.* A sentencing statement must include those mitigators that the trial court found to be significant. *Battles v. State*, 688 N.E.2d 1230, 1236 (Ind. 1997). Yet, if after defense counsel argues a particular mitigator, the trial judge does not find the existence of said mitigating factor, the judge need not explain why it has found that the factor did not exist. *Anglemyer*, 868 N.E.2d at 493 (citing *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993)).

[29] In its sentencing order, the court found two aggravating factors:

> 1. Defendant violated a term of pre-trial release by failing to appear for the second day of the trial by jury on December 1,

> 2021. Defendant asserts that he was severely ill and not able to attend. The Court made specific findings on the record the day of the trial regarding Defendant's efforts to delay the trial and his representations that he would not appear, and the evidence presented at the sentencing hearing further supports the Court's conclusion that Defendant intentionally failed to appear in an effort to avoid the authority of the Court to bring him to trial. This shows poor character and a likelihood to re-offend.
>
> 2. In addition to his failure to appear for the second day of the trial by jury, Defendant was notified by his counsel on the evening of December 1, 2021 that a warrant was issued for his arrest. On December 1, 2021, Defendant and his wife vacated the camper they had been living in that is on property located near Linton, Greene County, Indiana, and fled to a neighboring county (Sullivan County, Indiana). Defendant fled and was able to avoid service of the arrest warrant until he was located on December 7, 2021, in Sullivan County, Indiana. He was located through phone activity with the assistance of the US [Marshal's] service. Defendant changed his phone number in a further attempt to avoid detection and avoid service of the arrest warrant. This is indicative of poor character and a likelihood to re-offend.

Appellant's App. Vol. 2 at 151. The court found two mitigating factors: no prior criminal record and a long history of mental health issues. However, the court discounted the weight of the former due to Cullum's admission that he had been selling methamphetamine to support his own use and due to additional evidence, revealed during the sentencing hearing, which strongly indicated an ongoing operation of dealing in significant quantities of methamphetamine. *Id.* at 151-52. The court similarly discounted the latter mitigator because rather than seek proper treatment for his decades-long mental health challenges,

Cullum "turned to illegal substances and illegal activit[ies]." *Id*. at 152. The court determined that the aggravating factors significantly outweighed the mitigating factors and viewed Cullum's actions as "strong indicators of poor character, lack of respect for the authority of the Court and the Rule of Law, and [] a strong indicator to the Court that he is likely to re-offend." *Id*.

[30] Because Cullum alleges that the trial court abused its discretion in failing to find his remorse and his addiction as mitigators, he must establish that the "mitigating evidence was both significant and clearly supported by the record." *Anglemyer*, 868 N.E.2d at 493 (citing *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999)). Our review of a trial court's determination of a defendant's remorse is similar to our review of credibility judgments: without evidence of some impermissible consideration by the trial court, we accept its determination. *Hape v. State*, 903 N.E.2d 977, 1002-03 (Ind. Ct. App. 2009), *trans. denied*.

[31] When questioned by his counsel at the sentencing hearing, Cullum admitted his actions were wrong and that he was sorry for what his dealing had done to his family and the community. Tr. Vol. 3 at 151. Yet, he also stated that dealing "obviously cost me a lot[,]" thus implying regret that he was caught rather than remorse for his actions. *Id*. at 149. Moreover, the court heard Cullum attempt to deflect responsibility by claiming that his drug dealing was necessitated by his methamphetamine habit, which he asserted was caused by his mental health problems. Given the equivocal nature of Cullum's expressions of remorse, we cannot say the court abused its discretion by not finding remorse to be a mitigating factor. *See Cardwell v. State*, 895 N.E.2d 1219, 1226 (Ind. 2008)

(finding that despite defendant's self-condemning admission, the court was free to question whether he was genuinely remorseful).

[32] Regarding the addiction question, where, as here, a defendant "is aware of a substance abuse problem but has not taken appropriate steps to treat it, the trial court does not abuse its discretion by rejecting the addiction as a mitigating circumstance." *Hape*, 903 N.E.2d at 1002 (citing *Bryant v. State*, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004), *trans. denied*). Testimony revealed that although Cullum had sought mental health assistance, he had not taken steps to address his years-long, heavy use of methamphetamine.[4] Thus, Cullum has not shown that the court abused its discretion by not finding his addiction to be a mitigating circumstance.

[33] We next examine Cullum's appropriateness challenge to his sentence. Pursuant to Indiana Appellate Rule 7(B), we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Cullum has the burden to show that his sentence is inappropriate. *Anglemyer*, 868 N.E.2d at 490. Although Rule 7(B) requires us to consider both the nature of the offense and the character of the offender, the appellant is not required to prove that each of those prongs independently renders his sentence inappropriate. *Reis v. State*, 88 N.E.3d 1099, 1104 (Ind. Ct.

[4] To the extent Cullum's addiction stemmed from a history of mental health struggles, the court did find the mental health issues to be a mitigating factor, though not a weighty one.

App. 2017). Instead, the two prongs are separate inquiries that we ultimately balance to determine whether a sentence is inappropriate. *Connor v. State*, 58 N.E.3d 215, 218 (Ind. Ct. App. 2016). In reviewing sentences, our main role is to leaven the outliers rather than necessarily achieve the perceived correct result in each case. *Cardwell*, 895 N.E.2d at 1225. Aside from the length of a sentence, we also focus on where a sentence will be served. *See Livingston v. State*, 113 N.E.3d 611, 613 (Ind. 2018).

[34] Looking at the nature of the offenses, we note that the advisory sentence "is the starting point the Legislature selected as appropriate for the crime committed." *Pierce v. State*, 949 N.E.2d 349, 352 (Ind. 2011). The jury convicted Cullum of two counts of level 2 felony methamphetamine dealing. The advisory sentence for a level 2 felony is seventeen and one-half years, with a range of ten through thirty years. Ind. Code § 35-50-2-4.5. The trial court ordered Cullum imprisoned for sixteen years, with two years suspended to supervised probation for count 1, to be followed by twelve years in prison with two years suspended to supervised probation for count 2. Hence, he received a twenty-eight-year aggregate sentence, with four years suspended to probation.

[35] Because his sentence is well below the maximum (and even beneath the advisory level on each count) and is partially suspended, Cullum must climb a steep hill to convince us the sentence is inappropriate. Cullum focuses on the nonviolent nature of his crimes, asserting there was no evidence of harm done to person or property. However, his crimes did not involve an insignificant amount of drugs nor a one-time mistake. The evidence supporting the

convictions demonstrated that Cullum sold a total of over seventy grams of methamphetamine to three different buyers during two different incidents. He sold out of his home, where his wife and children lived. While the nature of his offenses could have been worse, his offenses easily justify slightly-less-than-advisory sentences.

[36] As for his character, Cullum stresses his lack of criminal history, limited education, parental responsibilities, long-term mental health issues, and addiction. Lack of officially documented criminal history is admirable, but the evidence from the sentencing hearing indicated Cullum had been engaged in illegal activity for some time. While his limited education might give pause, it is difficult to commend his child-rearing responsibilities when they occurred while dealing methamphetamine and self-medicating with illegal drugs. We agree with the trial court's assessment that Cullum's failure to appear and his decision to flee indicate a character that is likely to re-offend. Cullum has not met his burden of demonstrating that his sentence is inappropriate in light of the nature of his offenses or his character.[5]

[37] Finally, Cullum relies upon our state's constitution to argue that his sentence is not proportioned and graduated to the nature of his offenses. Article 1, Section 16 provides, "All penalties shall be proportioned to the nature of the offense."

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[5] Cullum makes a cursory challenge to the consecutive nature of his sentences. Appellant's Br. at 33. However, because a single aggravating circumstance may justify consecutive sentences, this challenge fails. *See Gilliam v. State*, 901 N.E.2d 72, 74 (Ind. Ct. App. 2009).

Whether a statute is constitutional on its face is a question of law, which we review de novo. *State v. Moss-Dwyer,* 686 N.E.2d 109, 110 (Ind. 1997). We have repeatedly observed that the legislature has the primary responsibility for determining the appropriate penalties for crimes committed in this state. *See, e.g., id.* at 111. Our review of legislative prescriptions of punishment is highly restrained and very deferential. *Id.* "When considering the constitutionality of a statute, we begin with the presumption of constitutional validity, and therefore the party challenging the statute labors under a heavy burden to show that the statute is unconstitutional." *Person v. State,* 661 N.E.2d 587, 592 (Ind. Ct. App. 1996), *trans. denied.* We are not at liberty to set aside a legislatively sanctioned penalty merely because it seems too severe. *Moss-Dwyer,* 686 N.E.2d at 112. A criminal penalty violates the proportionality clause only when it is not graduated and proportioned to the nature of the offense. *Conner v. State,* 626 N.E.2d 803, 806 (Ind. 1993). More precisely, a sentence violates the proportionality clause where it is so severe and entirely out of proportion to the gravity of offense committed as to shock public sentiment and violate the judgment of a reasonable people. *Pritscher v. State,* 675 N.E.2d 727, 731 (Ind. Ct. App. 1996).

[38] The jury convicted Cullum of two counts of dealing in methamphetamine/delivery of methamphetamine in an amount of ten grams or more. *See* Ind. Code § 35-48-4-1.1(a)(1). It is no secret that methamphetamine exacts a devastating toll upon individuals, families, communities, and property. Hence, our legislature deemed dealing in greater quantities of

methamphetamine to be a level 2 felony. Given the seventy-plus total grams of methamphetamine that Cullum dealt, coupled with the aggravating factors found, we cannot say that a less-than-advisory sentence on both counts would shock public sentiment or violate the judgment of reasonable people. Therefore, we see no violation of our state constitution's proportionality provision. Finding no reversible error, we affirm.

[39] Affirmed.

Vaidik, J., and Altice, J., concur.