MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jacob Alexander Van Dyke,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 29, 2021

Court of Appeals Case No. 20A-CR-1953

Appeal from the LaPorte Superior Court

The Honorable Michael S. Bergerson, Judge

Trial Court Cause No. 46D01-1912-MR-7

Kirsch, Judge.

[1] Jacob Alexander Van Dyke ("Van Dyke") was convicted after a jury trial of reckless homicide,[1] a Level 5 felony and was sentenced to five years executed in the Indiana Department of Correction ("DOC"). Van Dyke appeals his conviction and sentence and raises the following restated issues for our review:

I. Whether the State presented sufficient evidence to support his conviction for reckless homicide and rebutted his claim of self-defense;

II. Whether the trial court abused its discretion in sentencing Van Dyke because it did not find several of his argued mitigating factors to be mitigating; and

III. Whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

[2] We affirm.

Facts and Procedural History

[3] In October 2019, Jasson Nelson ("Nelson") was almost thirty-nine years old. *Public Tr. Vol. II* at 247. He was deaf and had "deaf dude" tattooed on his arm. *Id*. at 248-49. In October 2019, Nelson was homeless and would stay with family members or on the street in Michigan City, Indiana. *Id*. at 248. Van Dyke was also homeless and lived on the streets of Michigan City. *Public Tr. Vol. III* at 158.

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[1] *See* Ind. Code § 35-42-1-5.

[4] In the early afternoon of October 28, 2019, Ivory Hootman ("Hootman") walked through the farmer's market parking lot in Michigan City and observed several men sitting at a picnic table. *Id*. at 27-28. Sitting at the picnic table were Nelson, Van Dyke, Sam Cornell ("Cornell") and a few others. *Id*. at 34-36. Hootman asked Nelson for a cigarette, and Van Dyke jumped up from the table and told Hootman that he was "taking from the homeless" and called him the n-word. *Id*. at 37, 38. This caused Hootman to become defensive, and then Van Dyke stood up from the table and pulled out a knife. *Id*. at 39. At that point, Hootman and Nelson walked away from the table. *Id*. at 41-42. After Nelson said goodbye to Hootman, he returned to the table. *Id*. at 43. Hootman did not speak to Nelson again and learned a week later that Nelson had been killed. *Id*.

[5] Earlier in the day on October 28, 2019, Cornell and Van Dyke had spent time together before they went to the farmer's market. *Id*. at 168. Before they arrived at the parking lot of the farmer's market, Cornell had drunk about a fifth of Wild Turkey but had shared some of it with Van Dyke. *Id*. at 166-67, 170. When Cornell arrived at the parking lot, he felt "slightly intoxicated" but was still able to comprehend what was happening. *Id*. at 167. Cornell observed Nelson arrive and noticed that he was also "slightly intoxicated" and asking for a cigarette. *Id*. at 167-68. All of the men were gathered in the parking lot, and at some point, Nelson asked Cornell for a shot of whiskey. *Id*. at 172. At that point, some of the men made comments about the fact that Nelson did not

contribute to the drinking gatherings by either paying money or bringing alcohol. *Id*.

[6] Specifically, Nelson and Van Dyke began arguing. *Id*. at 173. Initially, the two men were yelling loudly at each other. *Id*. at 173-74. Cornell attempted to stop the argument because he did not want to attract attention to the area because he had marijuana in his possession and had active warrants for his arrest. *Id*. at 174. After the two continued yelling for a few minutes, Nelson shoved Van Dyke, and Van Dyke shoved Nelson back. *Id*. at 175. Nelson then hit Van Dyke in the face. *Id*. Eventually, the two began wrestling, and Nelson had Van Dyke in a headlock. *Id*. At that time, Cornell saw Van Dyke draw a knife from his waistband and make slashing and thrusting motions. *Id*. at 175, 178. Cornell saw light flash off Van Dyke's knife before Nelson stepped back, holding his chest, and said, "Are you fucking serious?" *Id*. at 175-76, 179. Nelson did not have any weapons. *Id*. at 179. At that time, Cornell left the area, and Van Dyke followed him and stated, "We need to get the fuck out of here." *Id*. at 185.

[7] Nelson was taken to a hospital in Michigan City before he was transported to a hospital in South Bend. *Id*. at 2-3. He was pronounced dead at 8:13 a.m. on November 2, 2019. *Id*. at 99. An autopsy was conducted on November 5, 2019, and the forensic pathologist found that the manner of death was homicide or death by the hands of another, and the cause of death was a stab wound to his right mid-chest that injured his pericardium and ascending aorta. *State's Ex. 19*.

[8] On November 18, 2019, Van Dyke gave a statement to police and acknowledged that he was at the farmer's market parking lot on October 28, 2019 and had waved to Nelson. *State's Ex. 18*. He remembered that Hootman asked for cigarettes and that Van Dyke replied by asking why he was bumming cigarettes from a homeless person. *Id*. Van Dyke said that he got up to leave the parking lot area, and Nelson came up running behind him to grab his arm; Van Dyke reported that he pushed Nelson. *Id*. Van Dyke denied any further physical altercation with Nelson. *Id*. He claimed that the black eye that he was observed to have the day after Nelson was stabbed was caused because he "got jumped" by three or four guys. *Id*.

[9] On December 17, 2019, the State charged Van Dyke with murder. *Appellant's Public App. Vol. 2* at 14-15. A jury trial began on August 17, 2020 and concluded on August 20, 2020. *Id*. at 9-11. At trial, Cornell testified while dressed in a jail jumpsuit. *Public Tr. Vol. III* at 150-51. He explained that, at that time, he was serving a sentence for a theft case but no longer had any open criminal cases. *Id*. at 151. He also testified that he did not have a deal with the State for his testimony. *Id*. at 193. Cornell testified that he was an alcoholic and had been drinking heavily since he was thirteen years old. *Id*. at 151. Cornell further testified that he had been diagnosed with bipolar manic schizoaffective disorder when he was fourteen years old, and as part of his illness, he experienced auditory hallucinations. *Id*. at 153-54. Although Cornell was prescribed medication that he was not taking in October 2019, he stated that he was not experiencing hallucinations on that date. *Id*. at 157-58.

At the conclusion of the jury trial, Van Dyke was found guilty of Level 5 felony reckless homicide, a lesser included offense of murder. *Appellant's Public App. Vol. 2* at 11.

[10] A sentencing hearing was held on September 24, 2020. *Id*. at 12. A pre-sentence investigation ("the PSI") was done in preparation for the sentencing, and it reflected that Van Dyke was thirty-five years old at the time of sentencing. *Appellant's Conf. App. Vol. 2* at 198. The PSI established that, as an adult, Van Dyke had convictions for battery with a deadly weapon, furnishing liquor to a minor, disorderly conduct, public intoxication, theft, false informing, battery resulting in bodily injury, battery against a public safety official, and intimidation. *Id*. at 201-05. At the time of sentencing, Van Dyke had an active warrant in Nevada for disorderly conduct and one in Michigan for operating a vehicle with a high blood alcohol content. *Id*. at 202, 203-04. He also had pending charges for three counts of criminal mischief and one count of burglary of a dwelling. *Id*. at 205. In total, Van Dyke had been arrested or charged on twenty-three occasions as an adult, resulting in at least two felony convictions and eleven misdemeanor convictions. *Id*. at 206. He had previously been sentenced to prison, jail, community corrections, and probation but had never served any time in DOC. *Id*. He had previously violated probation and pretrial supervision orders. *Id*.

[11] At the sentencing hearing, Van Dyke apologized to Nelson's family and expressed remorse that "a man lost his life." *Public Tr. Vol. IV* at 83. He advanced six proposed mitigating factors to the trial court: (1) that the crime

was a result of circumstances unlikely to recur; (2) the victim of the crime induced or facilitated the offense; (3) substantial grounds excused or justified the offense but fell short of establishing a legal defense; (4) the victim provoked the offense; (5) Van Dyke was likely to respond affirmatively to a shorter sentence; and (6) his expression of remorse. *Id*. at 83-84. The trial court found Van Dyke's criminal history and that he was a high risk to reoffend as aggravating factors. *Id*. at 88.[2] As mitigating factors, the trial court found that the victim was a willing participant in the "street fight" and that Van Dyke expressed some remorse. *Id*. at 88-89. The trial court found that the aggravating factors outweighed the mitigating factors and sentenced Van Dyke to a term of five years fully executed in DOC. *Id*. at 89. Van Dyke now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

[12] Van Dyke argues that the evidence presented at trial was insufficient to support his conviction. When we review the sufficiency of the evidence to support a conviction, we do not reweigh the evidence or assess the credibility of the witnesses. *Peppers v. State*, 152 N.E.3d 678, 682 (Ind. Ct. App. 2020). We consider only the evidence most favorable to the trial court's ruling and the

[2] The trial court originally found an additional aggravating factor that Van Dyke was on probation at the time of the current offense. *Tr. Vol. IV* at 88. However, Van Dyke informed the trial court that he had finished his probationary term, and the trial court struck that factor. *Id*. at 89-90.

reasonable inferences that can be drawn from that evidence. *Lock v. State*, 971 N.E.2d 71, 74 (Ind. 2012). We also consider conflicting evidence in the light most favorable to the trial court's ruling. *Oster v. State,* 992 N.E.2d 871, 875 (Ind. Ct. App. 2013), *trans. denied*. A conviction will be affirmed if there is substantial evidence of probative value that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Wolf v. State*, 76 N.E.3d 911, 915 (Ind. Ct. App. 2017).

[13] Van Dyke asserts that the evidence presented to the jury was insufficient to find him guilty of reckless homicide. He first contends that no inference could reasonably be drawn to support the verdict because Cornell was an unreliable witness. Van Dyke argues that Cornell was intoxicated at the time of the altercation and suffered from mental illness and that he repeatedly changed his version of what happened to police until he wanted to receive assistance from the State with his pending criminal charges.

[14] A person commits reckless homicide when he or she recklessly kills another human being. Ind. Code § 35-42-1-5. "A person engages in conduct 'recklessly' if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct." Ind. Code § 35-41-2-2(c). A defendant's reckless homicide conviction may be sustained when the evidence "shows that a defendant understood the precise nature of the danger before him yet chose to disregard it." *Shepherd v. State*, 155 N.E.3d 1227, 1234 (Ind. Ct. App. 2020)

(citing *Beeman v. State*, 232 Ind. 683, 690, 115 N.E.2d 919, 922 (1953)), *trans. denied*.

[15] Here, the evidence presented at trial showed that Van Dyke initiated a confrontation with Nelson about alcohol. *Public Tr. Vol. III* at 172-73. The fight between Van Dyke and Nelson eventually became physical, and after exchanging shoves and punches with Nelson and wrestling around, Van Dyke ended up in a headlock by Nelson. *Id*. at 175. At that point, Van Dyke drew a knife from the waistband of his pants. *Id*. at 175, 177-78. He was then observed making slashing and thrusting motions, and Nelson then backed up, holding his chest. *Id*. at 178, 179. An autopsy later revealed that Nelson's cause of death was a stab wound to his chest. *State's Ex. 19*. Therefore, the evidence presented showed that Van Dyke drew a deadly weapon and attacked Nelson with it. *See Miller v. State*, 106 N.E.3d 1067, 1074 (Ind. Ct. App. 2018) ("It is well-settled that a knife may be considered to be a deadly weapon."), *trans. denied*. We conclude that this evidence of Van Dyke's actions supported a reasonable inference that he understood the nature of the danger posed and disregarded it. *See Shepherd*, 155 N.E.3d at 1234.

[16] Contrary to Van Dyke's assertion, the jury acted within its province to decide to believe Cornell's testimony and find his testimony to be reliable. It is the role of the trier of fact to resolve conflicts in the evidence and to decide which witnesses to believe or disbelieve. *Moore v. State*, 27 N.E.3d 749, 755-56 (Ind. 2015). The jury was informed that Cornell was an alcoholic, who drank to dull the effects of his bipolar manic schizoaffective disorder. *Public Tr. Vol. III* at

151, 153-56. The jury heard testimony that Cornell was prescribed medication for his disorder in October 2019 and that he was not taking the medication at the time of the crime. *Id*. at 157. Cornell also testified that he drank close to a fifth of whiskey before arriving at the farmer's market parking lot on the night of October 28, 2019. *Id*. at 165-67. The jury clearly found Cornell credible and believed his testimony. Van Dyke's request is for this court to judge Cornell's credibility and come to a different conclusion than that of the jury, which we cannot do. *Peppers*, 152 N.E.3d at 682.

[17] Further, to the extent that Van Dyke attempts to invoke the incredible dubiosity rule, we find that his claim fails. Under the incredible dubiosity rule, "a court will impinge on the jury's responsibility to judge the credibility of the witnesses only when it has confronted 'inherently improbable' testimony or coerced, equivocal, wholly uncorroborated testimony of 'incredible dubiosity.'" *Moore*, 27 N.E.3d at 756 (quoting *Tillman v. State,* 642 N.E.2d 221, 223 (Ind. 1994)). To invoke the application of the incredible dubiosity rule, a defendant must show that there is: (1) a sole testifying witness; (2) the testimony is inherently contradictory, equivocal, or the result of coercion; and (3) a complete absence of circumstantial evidence. *Moore*, 27 N.E.3d at 756. Van Dyke's contention is that Cornell's testimony should not have been believed because his testimony at trial differed from what he had initially told police. However, just because a witness's testimony contradicts his earlier statements does not make the testimony incredibly dubious. *Smith v. State*, 163 N.E.3d 925, 930 (Ind. Ct. App. 2021) (citing *Stephenson v. State*, 742 N.E.2d 463, 498 (Ind. 2001), *cert.*

denied, 535 U.S. 1105 (2002)). Cornell's testimony at trial was consistent and unequivocal, and therefore, the incredible dubiosity rule does not apply. We conclude that the jury acted within its province to believe Cornell's testimony and find it to be reliable, and we cannot substitute our judgement for that of the jury.

[18] Van Dyke next argues that, even if we find that Cornell's testimony was credible, the State failed to disprove that he acted in self-defense. He asserts that the evidence showed that Nelson initiated the fight and hit him and then held him in a headlock. As a result, Van Dyke contends that he was justified in using reasonable force to protect himself from Nelson's use of unlawful force. He maintains that this evidence established that he acted in self-defense, and the State failed to disprove his claim that his actions were done in self-defense.

[19] A valid claim of defense of oneself or another person is legal justification for an otherwise criminal act. Ind. Code § 35-41-3-2(a); *Quinn v. State*, 126 N.E.3d 924, 927 (Ind. Ct. App. 2020). A person is justified in using reasonable force, including deadly force, against another person to protect himself if he reasonably believes that force is necessary to prevent serious bodily injury or the commission of a forcible felony. Ind. Code § 35-41-3-2(c). To prevail on a claim of self-defense, the defendant must show that he: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. *Quinn*, 126 N.E.3d at 927. Once a defendant raises a claim of self-defense, the State has the burden of negating at least one of the necessary

elements. *Id*. (citing *Kimbrough v. State*, 911 N.E.2d 621, 635 (Ind. Ct. App. 2009); *Miller v. State*, 720 N.E.2d 696, 700 (Ind. 1999)). The State may meet its burden by rebutting the defense directly, by affirmatively showing the defendant did not act in self-defense, or by relying on the sufficiency of the case-in chief. *Id.* Whether the State has met its burden is a question for the trier of fact. *Id.*

[20] The standard for reviewing a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same standard used for any claim of insufficient evidence. *Id*. We neither reweigh the evidence nor judge the credibility of witnesses. *Id*. We will reverse a conviction only if no reasonable person could say that the State negated the defendant's self-defense claim beyond a reasonable doubt. *Id.*

[21] Here, the State's evidence established that Van Dyke was a willing participant in the violence that occurred. "A person who provokes, instigates, or participates willingly in the violence does not act without fault for the purpose of self-defense." *Richardson v. State*, 79 N.E.3d 958, 964 (Ind. Ct. App. 2017), *trans. denied*. A willing participant in the violence "must declare an armistice before he or she may claim self-defense." *Id*. The evidence presented at trial showed that Van Dyke and Cornell spent the day of October 28, 2019 drinking whiskey and were hanging out with others, including Nelson. *Public Tr. Vol. III* at 169-70. At some point, Nelson asked Cornell for a shot of the whiskey, and a fight began between Van Dyke and Nelson over alcohol. *Id*. at 172-73. The dispute eventually became physical, with the two shoving each other, and Nelson punching Van Dyke. *Id*. at 175. Cornell told the two to stop the fight,

but neither did. *Id*. at 174. Both Van Dyke and Nelson began to wrestle around, and when Nelson got Van Dyke in a headlock, Van Dyke drew a knife from his waistband and stabbed Nelson. *Id*. at 175. The evidence showed that Van Dyke willingly participated in a physical confrontation that escalated and did not attempt to withdraw from the confrontation. This was sufficient evidence to rebut Van Dyke's claim of self-defense.

[22] Additionally, the jury could have reasonably concluded that Van Dyke used an unreasonable amount of force. A claim of self-defense will fail if the person uses more force than is reasonably necessary under the circumstances. *Weedman v. State*, 21 N.E.3d 873, 892 (Ind. Ct. App. 2014), *trans. denied*. "'Where a person has used more force than necessary to repel an attack the right to self-defense is extinguished, and the ultimate result is that the victim then becomes the perpetrator.'" *Id*. (quoting *Hollowell v. State,* 707 N.E.2d 1014, 1021 (Ind. Ct. App. 1999)). The evidence showed that, at most, after wrestling around, Nelson had Van Dyke in a headlock. *Public Tr. Vol. III* at 178. Nelson was not armed, and Van Dyke was the one who introduced deadly force into the fight. *Id*. at 178-79. The jury could have reasonably concluded that Van Dyke used more force than necessary to defend himself against Nelson's non-lethal attack, and we, therefore, conclude that the evidence presented at trial rebutted Van Dyke's claim of self-defense. Sufficient evidence was presented at trial to support Van Dyke's conviction for reckless homicide.

II. Abuse of Discretion

[23] Sentencing determinations are within the trial court's discretion and will be reversed only for an abuse of discretion. *Harris v. State*, 964 N.E.2d 920, 926 (Ind. Ct. App. 2012), *trans. denied*. 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." *Gross v. State*, 22 N.E.3d 863, 869 (Ind. Ct. App. 2014), *trans. denied*. A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all"; (2) enters "a sentencing statement that explains reasons for imposing a sentence -- including a finding of aggravating and mitigating factors if any -- but the record does not support the reasons"; (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration"; or (4) considers reasons that "are improper as a matter of law." *Anglemyer v. State,* 868 N.E.2d 482, 490-91 (Ind. 2007), *clarified on reh'g,* 875 N.E.2d 218 (Ind. 2007). The relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. *Id.* at 491.

[24] Van Dyke argues that the trial court abused its discretion when it sentenced him because it failed to find several of his proffered mitigating factors. He specifically contends that the trial court should have found the following factors as mitigating: (1) the crime was a result of circumstances unlikely to recur; (2) substantial grounds excused or justified the offense but fell short of establishing a legal defense; (3) Nelson provoked Van Dyke; and (4) Van Dyke had never

served time in DOC and would likely respond affirmatively to a shorter sentence instead of a longer one. Because these factors were presented by him during sentencing and clearly supported by the record, Van Dyke asserts that the trial court abused its discretion in sentencing him.

[25] The finding of mitigating circumstances is within the discretion of the trial court. *Hale v. State*, 128 N.E.3d 465, 464 (Ind. Ct. App. 2019), *trans. denied*. An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id*. The trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance. *Id.*

[26] At sentencing, Van Dyke proposed six mitigating factors: the crime was a result of circumstances unlikely to recur; the victim of the crime induced or facilitated the offense; a substantial ground either excused or justified the offense but fell short of establishing a legal defense; the victim provoked the offense; Van Dyke would likely respond affirmatively to a shorter sentence; and his remorse. *Public Tr. Vol. IV* at 83-84. When it pronounced sentence, the trial court identified as mitigating factors that Nelson was a willing participant in the fight and that Van Dyke showed some remorse. *Id*. at 88-89. When it acknowledged that Nelson was a willing participant in the fight and found that to be a mitigating factor, the trial court found Van Dyke's proposed mitigating factors that (1) the victim facilitated the offense, (2) a substantial ground justified the offense but fell short of establishing a legal defense, and (3) the

victim provoked the offense. The trial court was not obligated to identify mitigating factors in exactly the same way that Van Dyke characterized them. *See Hale*, 128 N.E.3d at 464.

[27] As for Van Dyke's proffered mitigating factors that the circumstances of the crime were unlikely to recur or that Van Dyke is likely to respond affirmatively to short-term incarceration, we do not find that the trial court abused its discretion in not finding them to be mitigating. When looking to Van Dyke's criminal history, this is not the first time that he has been intoxicated in public and gotten in a fight. *Appellant's Conf. App. Vol. 2* at 201-06. He has previous convictions for battery with a deadly weapon, battery resulting in serious bodily injury, battery against a public safety official, and public intoxication on several occasions. *Id*. at 201-04. Because the instant offense was not an isolated occurrence, the trial court was well within its discretion to conclude that the circumstances of the crime were in fact likely to recur. *See Mehringer v. State*, 152 N.E.3d 667, 674 (Ind. Ct. App. 2020) (finding that because the offense was not an isolated occurrence, there was no abuse of discretion in not finding that the offense was unlikely to recur as a mitigating factor), *trans. denied*. Additionally, contrary to Van Dyke's claim that he is likely to respond affirmatively to a short period of incarceration, his criminal history does not support this. He has previously served sentences in jail, community corrections, and probation but has not yet served any time in DOC. *Appellant's Conf. App. Vol. 2* at 206. He has also previously violated the terms of probation granted to him. *Id*. at 201, 203, 204, 206. Further, Van Dyke was assessed to

be a high risk to reoffend according to the Indiana Risk Assessment System ("IRAS"). *Id*. at 208. *See Mehringer*, 152 N.E.3d at 674 (the IRAS may be considered to supplement and enhance a judge's evaluation). Based on his criminal history, the trial court was within its discretion to decline to find that Van Dyke was likely to respond affirmatively to short-term incarceration as a mitigating factor. The trial court did not abuse tis discretion when it sentenced Van Dyke.

III. Inappropriate Sentence

[28] Pursuant to Indiana Appellate Rule 7(B), this court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Our Supreme Court has explained that the principal role of appellate review should be to attempt to leaven the outliers, "not to achieve a perceived 'correct' result in each case." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). We independently examine the nature of Van Dyke's offense and his character under Appellate Rule 7(B) with substantial deference to the trial court's sentence. *Satterfield v. State*, 33 N.E.3d 344, 355 (Ind. 2015). "In conducting our review, we do not look to see whether the defendant's sentence is appropriate or if another sentence might be more appropriate; rather, the test is whether the sentence is 'inappropriate.'" *Barker v. State*, 994 N.E.2d 306, 315 (Ind. Ct. App. 2013), *trans. denied*. Whether a sentence is inappropriate ultimately depends upon "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." *Cardwell*, 895 N.E.2d at 1224. The defendant bears the burden of persuading us that his sentence is inappropriate. *Id*.

[29] Van Dyke argues that his sentence is inappropriate based on the nature of his offense and his character. He contends that he was remorseful and expressed his sympathy and condolences to Nelson's family at sentencing, stating that it was an unfortunate event and that he was sorry that a man lost his life. *Public Tr. Vol. IV* at 83. Van Dyke also asserts that although he has a prior criminal history, he has never served time in DOC and that according to the State's only eyewitness, Nelson started the fight on the night of the crime. Van Dyke, therefore, urges this court to revise his sentence.

[30] Here, Van Dyke was found guilty of reckless homicide, which is a Level 5 felony. A person who commits a Level 5 felony shall be imprisoned for a fixed term of between one and six years, with the advisory sentence being three years. Ind. Code § 35-50-2-6(b). The trial court sentenced Van Dyke to five years executed in DOC, which is more than the advisory but less than the maximum sentence allowed.

[31] As this court has recognized, the nature of the offense is found in the details and circumstances of the commission of the offense and the defendant's participation. *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). "When determining the appropriateness of a sentence that deviates from an advisory sentence, we consider whether there is anything more or less egregious about

the offense as committed by the defendant that 'makes it different from the typical offense accounted for by the legislature when it set the advisory sentence.'" *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017) (quoting *Holloway v. State*, 950 N.E.2d 803, 807 (Ind. Ct. App. 2011)), *trans. denied*.

[32] The evidence presented showed that Van Dyke spent the earlier part of October 28, 2019, drinking whiskey with Cornell. *Public Tr. Vol. III* at 170. The two men walked to the parking lot of the farmer's market where they continued to drink with others, including Nelson. *Id*. at 165, 170-71. At some later point, Nelson asked for a shot of the whiskey, and an argument erupted between Van Dyke and Nelson. *Id*. at 172-73. The argument quickly escalated from yelling to shoving and punching. *Id*. at 173-75. When Nelson got Van Dyke in a headlock, Van Dyke drew a knife against the unarmed Nelson and stabbed him once in the heart. *Id*. at 175-76, 178-79; *State's Ex. 19*. Nelson died of that single stab wound to his chest. *State's Ex. 19*. Nelson was not armed, and Van Dyke was the one who introduced deadly force into the fight and used more force than necessary to defend himself against Nelson's non-lethal attack. Van Dyke has failed to portray the nature of his offense in a positive light, "such as accompanied by restraint, regard, and lack of brutality" that is required to prove that his sentence should be revised. *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). Thus, Van Dyke has failed to show that his sentence is inappropriate considering the nature of his offense.

[33] The character of the offender is found in what we learn of the offender's life and conduct. *Perry*, 78 N.E.3d at 13. When considering the character of the

offender, one relevant fact is the defendant's criminal history. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). The evidence showed that Van Dyke had convictions for battery with a deadly weapon, furnishing liquor to a minor, disorderly conduct, public intoxication, theft, false informing, battery resulting in bodily injury, battery against a public safety official, and intimidation. *Appellant's Conf. App. Vol. 2* at 201-05. At the time of sentencing, Van Dyke had an active warrant in Nevada for disorderly conduct and one in Michigan for operating a vehicle with a high blood alcohol content, and he also had pending charges for three counts of criminal mischief and one count of burglary of a dwelling. *Id*. at 202, 203-04, 205. In total, Van Dyke had been arrested or charged on twenty-three occasions as an adult, resulting in at least two felony convictions and eleven misdemeanor convictions. *Id*. at 206. He had previously been sentenced to prison, jail, community corrections, and probation but had never served any time in DOC, and he had previously violated probation and pretrial supervision orders. *Id*.

[34] Our Supreme Court has emphasized that "the extent, if any, that a sentence should be enhanced [based upon prior convictions] turns on the weight of an individual's criminal history." *Duncan v. State,* 857 N.E.2d 955, 959 (Ind. 2006). "This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." *Bryant v. State,* 841 N.E.2d 1154, 1156 (Ind. 2006). Van Dyke's criminal history includes convictions for battery offenses and for

public intoxication, which are both related to the instant offense. *Appellant's Conf. App. Vol. II* at 201-05. Further, the number and type of his criminal convictions indicates a disdain for the law and that he has not been deterred from committing offenses even after being subjected to past consequences.

[35] At trial, Hootman testified about an interaction with Van Dyke earlier in the day on October 28, 2019 where Hootman was walking through the farmer's market parking and asked Nelson for a cigarette. *Public Tr. Vol. III* at 26-28, 35-37. Van Dyke jumped up from the table and confronted Hootman saying "you're taking from the homeless" and calling him the n-word. *Id*. at 38. Hootman testified further that Van Dyke pulled a knife during this confrontation, and Hootman left the area at that point. *Id*. at 39, 41. Van Dyke's willingness to fight over minor, perceived slights and his action of pulling out a knife during such a minor confrontation does not reflect well on his character. He has not shown that his sentence is inappropriate in light of his character.

[36] Van Dyke's arguments do not portray the nature of his crimes and his character in "a positive light," which is his burden under Appellate Rule 7(B). *See Stephenson*, 29 N.E.3d at 122. Van Dyke has not shown that his sentence is inappropriate in light of the nature of the offense and the character of the offender. We, therefore, affirm the sentence imposed by the trial court.

[37] Affirmed.

Altice, J., and Weissmann, J., concur.