MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Charlie Davis Leshore, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 12, 2024

Court of Appeals Case No. 23A-CR-1079

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D04-9804-CF-207

Memorandum Decision by Judge Riley
Judges Crone and Mathias concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Charlie Leshore, Jr. (Leshore), appeals his sentence for burglary, a Class B felony, Ind. Code § 35-43-2-1 (1982); two Counts of robbery, Class B felonies, I.C. § 35-42-5-1 (1984); rape, a Class A felony, I.C. § 35-42-4-1 (1989); and two Counts of criminal confinement, Class B felonies, I.C. § 35-42-3-3 (1989).

[2] We affirm.

ISSUES

[3] Leshore presents this court with four issues, which we restate as:

(1) Whether the trial court abused its discretion by considering elements of the offenses as aggravating circumstances;

(2) Whether Leshore's seventy-year sentence is inappropriate in light of the nature of his offenses and his character;

(3) Whether Leshore may challenge the entry of judgment and his sentences for criminal confinement based on his argument that those offenses were lesser-included offenses of his robbery convictions; and

(4) Whether the trial court violated Indiana Code section 35-50-2-11 (1996) when sentencing Leshore for Class A felony rape within the sentencing range for a Class A felony.

FACTS AND PROCEDURAL HISTORY

[4] On April 4, 1998, Leshore and Troy Phinezy (Phinezy) kicked in the door of a home located at 3015 McCormick Avenue in Fort Wayne, Indiana, and entered without the permission of its owner. Leshore and Phinezy were armed with a firearm, and they entered with the intent to rob the occupants of the home, E.D., M.G., E.R., G.B., and A.C. After entering and while armed with a firearm, Leshore demanded money from G.B. and M.G. Leshore confined E.D., M.G., E.R., G.B., and A.C. in a bathroom of the home without their consent. While in the home, Leshore had sexual intercourse with M.G. without her consent while he or Phinezy was armed with a firearm.

[5] On April 13, 1998, the State filed an Information, charging Leshore with Class B felony burglary, Class C felony possession of a handgun with obliterated identification marks, three Counts of Class B felony robbery, Class A felony rape, Class D felony criminal recklessness, and two Counts of Class B felony criminal confinement. The State also filed separate applications pursuant to Indiana Code section 35-50-2-11 to have any sentences imposed for the criminal confinement charges enhanced due to Leshore's use of a firearm. The probable cause affidavit filed in support of the charges detailed that while raping M.G., Leshore held a gun to her head and tapped her forehead with the muzzle of the firearm. The affidavit further provided that during the offenses, Leshore discharged the firearm inside the home in close proximity to others.

[6] On February 16, 1999, the trial court convened Leshore's jury trial, and voir dire began. The State had all its witnesses present and ready for trial. After the

lunch break on the first day of jury selection, the parties reached a plea agreement. That same day, Leshore pleaded guilty pursuant to his plea agreement to Class B felony burglary, two Counts of Class B felony robbery, Class A felony rape, and two Counts of Class B felony criminal confinement, and the State dismissed the remaining charges and the firearm sentencing enhancement for the criminal confinement charges. Leshore's plea agreement did not contain any sentencing recommendation.

[7] On March 4, 1999, the probation report filed its presentence investigation report which detailed Leshore's criminal history and other aspects of his life. Starting at the age of fourteen, Leshore had been adjudicated delinquent for criminal conversion, two Counts of resisting law enforcement, criminal trespass, carrying a handgun without a permit, and what would have been Class D felony cocaine possession if committed by an adult. Leshore had been placed at the Wood Youth Center twice before being committed to the Indiana Boys School in the summer of 1995. Leshore turned eighteen in 1997. As an adult, Leshore had a 1998 conviction for minor consuming alcohol. Leshore had two dependent children for whom he was court ordered to pay support. Leshore admitted to being $6,000 in arrears on his child support, taking only one of his children into account. From July 1996 to January 1998, Leshore reported being employed at three jobs, two of which he quit and the third from which he was fired for tardiness. In his version of the offenses, Leshore explained that the burglary and the robberies were the result of him demanding money from the victims that was owed to him, and he denied using a firearm, instead stating

that only Phinezy possessed a firearm during the offenses. Leshore's version of the rape was as follows: "[Phinezy] had the gun. I told [M.G.] we were gonna have sex. We had sex. I wasn't armed. She was probably scared because [Phinezy] had the gun." (Appellant's App. Vol. II, p. 246).

[8] On March 8, 1999, the trial court held Leshore's sentencing hearing. Victim E.R., whose home Leshore had broken into and entered, spoke at the hearing. E.R. stated that she was the mother of eight children, at least some of whom were present in the home during the offenses, which occurred over a period of almost two hours. E.R. related that her "younger kids had to hear all of this and they thought it was me, you know." (Sent. Tr. pp. 11-12). E.R. further related that during the offenses, her fifteen-year-old son dropped out of a window and fled to alert the police. M.G. also spoke at the hearing and stated that E.R. was present in the living room while she was being raped and witnessed the offense.

[9] Part of Leshore's sentencing argument was that his conduct was less culpable than Phinezy's and that he should receive a sentence less than the seventy years that Phinezy had received. During argument, Leshore's counsel requested that the trial court take judicial notice of the probable cause affidavit, without requesting that its consideration of the affidavit be limited to just certain facts. As part of the State's sentencing argument, the deputy prosecutor provided the trial court with a copy of the sentencing order from Phinezy's criminal case, wherein he had pleaded guilty to the same charges as Leshore, except for the fact that Phinezy had been charged with raping a different victim. Leshore did

not object to the trial court's consideration of Phinezy's sentencing order, which included the sentencing court's findings and conclusions and indicated that Phinezy had received a seventy-year sentence.

[10] The trial court found as mitigating circumstances that Leshore was eighteen years old when he committed the offenses and that he had accepted responsibility by pleading guilty. The trial court found three aggravating circumstances: (1) the violent nature of the offenses; (2) Leshore's criminal record; and (3) Leshore's lack of remorse for the offenses. In support of the 'nature of the offenses' aggravator, the trial court found as follows:

> The breaking into a person's house and holding multiple persons hostage effectively while he robs some and rapes some. At some point apparently a gun was fired which would simply enhance the utter fear I would think of the folks who were there at that house at that time and also particularly the nature of the rape. I understand Class A felony [r]ape, in order to enhance it to a Class A [felony] requires a weapon, but the significant use of the weapon in this case where he taps her on the head with it, threatens her with it, all during a time when she's thoroughly humiliated as this occurs to her in the presence of others is an aggravating – and like I said, the essential violent nature and the factors that I've just recited of these offenses.

(Sent. Tr. p. 22). In support of its consideration of Leshore's criminal history, the trial court found that while some of his record consisted of less serious offenses, Leshore had true-findings for carrying a handgun without a license, felony cocaine possession, and resisting law enforcement, all of which it concluded demonstrated Leshore's "total disrespect for the law." (Sent. Tr. p.

23). Regarding its third aggravating circumstances, Leshore's lack of remorse, the trial court cited Leshore's statements in his presentence investigation report denying that he possessed a gun during the offenses and his rationalization of the offenses as taking his own money back from the victims. The trial court further found that it had a policy of imposing consecutive sentences to acknowledge that separate offenses had occurred.

[11] The trial court found that the aggravating circumstances substantially outweighed the mitigating circumstances and sentenced Leshore to forty years for his rape conviction and to ten years for each of his other convictions. The trial court ordered Leshore to serve his sentences for the robberies concurrently and the sentences for the two criminal confinements concurrently but to serve all his other sentences consecutively, resulting in an aggregate sentence of seventy years.

[12] On December 20, 2021, Leshore filed a petition seeking permission to file a belated appeal of his sentencing which the trial court denied. Following this court's affirmance of the trial court's denial of that petition, on February 28, 2023, our supreme court reversed, thus permitting the instant appeal. *Leshore v. State*, 203 N.E.3d 474 (Ind. 2023).

[13] Leshore now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Elements of Offenses as Aggravating Circumstances*

[14] Leshore argues that the trial court erred when it impermissibly used elements of the offenses of burglary and rape as aggravating circumstances. Leshore was sentenced in 1999 under our former presumptive sentencing scheme, which provided for a fixed-term presumptive sentence as well as upper and lower sentencing limits for each class of felony. *Anglemyer v. State*, 868 N.E.2d 482, 485-86 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. If a trial court deviated from the presumptive sentence, "it was required to '(1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance ha[d] been determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of circumstances.'" *Id*. (quoting *Prickett v. State*, 856 N.E.2d 1203, 1207 (Ind. 2006)).

[15] Under the former sentencing scheme, we review a trial court's sentencing for an abuse of its discretion. *Harris v. State*, 659 N.E.2d 522, 527 (Ind. 1995). One way in which a trial court abuses its discretion is by considering a material element of an offense as an aggravating circumstance for purposes of increasing a sentence over the presumptive term. *Widener v. State*, 659 N.E.2d 529, 532 (Ind. 1995). However, "particularized circumstances relating to such factual elements" may be used for enhancing a presumptive sentence. *Id*.; *see also Gomillia v. State*, 13 N.E.3d 846, 851 (Ind. 2014) (observing that it had been the law of Indiana for nearly three decades that "a fact which comprises an element

of the crime may not also constitute an aggravating factor absent individualized circumstances").

[16] Leshore argues that the trial court abused its discretion when it found that he had engaged in "breaking into a person's house and holding multiple persons hostage effectively while he robs some and rapes some[,]" because breaking and entering is an element of the offense of burglary. (Sent. Tr. p. 22). This argument is unpersuasive for at least two reasons. The presumptive term for a Class B felony was ten years. *See* Ind. Code § 35-50-2-5 (1977). Here, the trial court imposed the presumptive term of ten years for Leshore's Class B felony burglary conviction, and, thus, it did not improperly enhance that offense using a material element. In addition, while we agree that the offense of Class B felony burglary has "break[ing] and enter[ing]" as a material element, the trial court did not simply find that Leshore had broken and entered. I.C. § 35-43-2-1. Rather, it found that the breaking and entering was part of a suite of crimes committed by Leshore against multiple victims. As the State correctly points out, "[i]t is a well[-]established principle that the fact of multiple crimes or victims constitutes a valid aggravating circumstance that a trial court may consider in imposing consecutive or enhanced sentences." *O'Connell v. State*, 742 N.E.2d 943, 952 (Ind. 2001) (citing *Noojin v. State*, 730 N.E.2d 672, 679 (Ind. 2000); *Sanquenetti v. State*, 727 N.E.2d 437, 443 (Ind. 2000); and *Little v. State*, 475 N.E.2d 677, 686 (Ind. 1985)). Therefore, we find no abuse of the trial court's discretion.

[17] Leshore also challenges the trial court's findings regarding the use of a firearm during the rape, which he contends also comprised an impermissible use of a material element of his rape conviction, which was elevated to a Class A felony due to being committed "while armed with a deadly weapon[.]" (Appellant's App. Vol. II, p. 36); I.C. § 35-42-4-1. The trial court found that a gun had been fired inside the home creating fear in the victims and that Leshore had tapped M.G.'s head with the gun and threatened her with the gun while raping her. As such, the trial court did not simply find that Leshore had committed the rape while armed with a deadly weapon. It found the particularized circumstances that Leshore had discharged the weapon in close proximity to others, greatly enhancing their fear, and that he had tapped M.G. on the forehead with the firearm while raping her. Neither of these circumstances is an element of Class A felony rape. I.C. § 35-42-4-1 (providing that Class A felony rape occurs when a person intentionally has sexual intercourse with a member of the opposite sex when the other person is compelled by force and the offense is committed while armed with a deadly weapon).

[18] Leshore's reliance on *Green v. State*, 424 N.E.2d 1014 (Ind. 1981), is unavailing. In that case, the trial court's only stated reason for imposing consecutive sentences for Green's Class B felony rape, Class C felony child molesting, and Class B felony criminal confinement was that "serious harm to the victims was threatened because of the use of a gun." *Id*. at 1015. The *Green* court held that "[s]ince use of a gun is part of the felony charged, it cannot alone support an enhanced sentence." *Id*. Contrary to Leshore's implication on appeal, *Green*

does not stand for the proposition that a trial court may never consider for sentencing purposes the particular circumstances of the use of a firearm during an offense which has use of a firearm as a material element; rather, in *Green* there were no particularized findings about the use of the firearm apart from the serious threat of harm to the victim that was reflected in the felony level of the offense. Here, as explained above, the trial court entered particularized findings about Leshore's use of the firearm during the offenses, and, thus, the instant case is factually distinguishable. Leshore's reliance on *Abrajan v. State*, 917 N.E.2d 709, 711-12 (Ind. Ct. App. 2009), is equally unavailing because, in that case, the trial court merely found as an aggravating circumstance that Abrajan had possessed a weapon while raping his victim. Accordingly, we find no abuse of the trial court's discretion. *See Washington v. State*, 422 N.E.2d 1218, 1221 (Ind. 1981) (holding that "[t]he fact that the use of a weapon automatically raised the counts on confinement from class D to class B felonies does not preclude the court from also considering the manner in which the gun was used as an aggravating circumstance").

II. *Inappropriateness of Sentence*

[19] Leshore requests that we independently review his sentence. The Indiana Constitution authorizes this court to review and revise sentences for defendants in criminal cases "under such terms and conditions as the Supreme Court shall specify by rules[.]" Ind. Const. art. VII, § 6. In his opening appellate brief, Leshore urges us to deploy the standard authorized by the Indiana Supreme Court which was in effect at the time he committed the offenses and pursuant to

which we assessed a sentence and revised only "when it [wa]s manifestly unreasonable in light of the nature of the offense and the character of the offender." *Redmon v. State*, 734 N.E.2d 1088, 1094 (Ind. Ct. App. 2000). However, as of January 1, 2003, pursuant to Indiana Appellate Rule 7(B), we "revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We apply this newer standard to the appeals of sentences before us after January 1, 2003, even where the defendant's offense and sentencing hearing took place before January 1, 2003. *See Serino v. State*, 798 N.E.2d 852, 856-57 (Ind. 2003) (approving of this court's application of the newer "inappropriate" standard after the adoption of the current version of Appellate Rule 7(B) when reviewing a sentence issued before it adoption).

[20] The principal role of our review under Appellate Rule 7(B) is to attempt to leaven the outliers. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). In conducting our review, we "consider not only the aggravators and mitigators found by the trial court, but also any other factor appearing in the record." *George v. State*, 141 N.E.3d 68, 73 (Ind. Ct. App. 2020), *trans. denied*. We defer to the trial court's sentencing discretion, and that deference will "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). The

defendant bears the burden to persuade the reviewing court that the sentence imposed is inappropriate. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018).

A. *Nature of the Offense*

[21] When assessing the nature of an offense, the advisory sentence is the starting point that the legislature selected as an appropriate sentence for the particular crime committed. *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006); *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). Because Leshore was sentenced under the presumptive sentencing scheme, the presumptive sentence for the offenses is our starting point. At the time of the commission of the offenses, the sentencing range for a Class A felony was between twenty and fifty years, with a presumptive sentence of thirty years. I.C. § 35-50-2-4 (1995). The sentencing range for a Class B felony at the time of the offenses was between six and twenty years, with a presumptive sentence of ten years. I.C. § 35-50-2-5 (1977). Leshore pleaded guilty to one Class A felony and to five Class B felonies. Thus, his potential maximum sentencing exposure was 150 years. The trial court imposed presumptive ten-year sentences for all the Class B felony convictions and an enhanced sentence of forty years for the Class A felony rape. The trial court ordered Leshore to serve his sentences for the two robberies concurrently and his sentences for the two criminal confinements concurrently but to serve all his other sentences consecutively, resulting in an aggregate sentence of seventy years.

[22] The nature of the offenses is that Leshore, armed with a firearm, acted in concert with Phinezy to break down the door of a private home while there

were at least five direct victims and an unknown number of E.R.'s children present in the home, all with the intent to rob the victims of money Leshore thought he was owed. Over the course of almost two hours, Leshore took E.D., M.G., E.R., G.B., and A.C. hostage and robbed two of those victims. Leshore raped M.G. in the living room, at times tapping the muzzle of his gun against her forehead. E.R. commented at sentencing that her younger children had to listen to Leshore raping M.G. and that they thought that it was their own mother they were hearing being raped. E.R. was forced to witness M.G.'s rape. An older child of E.R.'s risked physical injury by dropping out of a window and fleeing to alert the authorities. Thus, Leshore engaged in a protracted and violent series of crimes that undoubtedly terrorized his multiple victims in order to procure money from them. Given these circumstances, we see nothing inappropriate about Leshore's seventy-year aggregate sentence.

[23] Despite the presence of these factors in the record before us, Leshore contends that his sentence should be revised because the trial court impermissibly used elements of the offenses as aggravating circumstances, an argument which we have already found to be without merit. Leshore also argues that the trial court's finding that M.G. had been "thoroughly humiliated" by being raped "in the presence of others" was unsupported by the record because there was nothing in the probable cause affidavit, Information, guilty plea transcript, or

the presentence investigation report indicating that other persons witnessed the rape.[1] (Appellant's Br. p. 27).

[24] However, at his guilty plea hearing, Leshore admitted that while they were in the house and while "either [he] or [Phinezy] had a gun on [M.G.]," he had sexual intercourse with M.G. (G.P. Tr. p. 21). It may be reasonably inferred from the fact that either one of the co-defendants had a gun on the rape victim that both were present during the rape. In addition, in his version of the rape reported in the presentence investigation report, Leshore contended that Phinezy held the gun and that M.G. was scared because Phinezy had the firearm, admissions from which it may also be inferred that Phinezy was present while Leshore raped M.G. In addition, E.R. confirmed at sentencing that she had witnessed M.G.'s rape. Thus, this factor was supported in the record.

[25] Leshore further contends that we should revise his sentence because the trial court considered Phinezy's sentencing order and thus "relied upon information outside the record in fashioning the sentence." (Appellant's Br. pp. 27-28). However, it was Leshore's counsel who first brought up the Phinezy's seventy-

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[1] For the first time on appeal, in his reply brief Leshore contends that the trial court's findings that he tapped M.G. on the head with the muzzle of his gun while raping her and that he raped her in the presence of others violated *Blakely v. Washington*, 542 U.S. 296 (2004). However, arguments raised for the first time in a reply brief are waived. *French v. State*, 778 N.E.2d 816, 826 (Ind. 2002) (finding that French waived an issue "by not raising it in his principal brief"). We also observe that the probable cause affidavit details Leshore's use of the firearm during M.G.'s rape. At sentencing, Leshore's counsel requested that the trial court take judicial notice of the probable cause affidavit, without asking that its use for sentencing be limited. Thus, Leshore invited any error. Invited error is not reversible error. *Batchelor v. State*, 119 N.E.3d 550, 556 (Ind. 2019).

year sentence as part of his argument that Leshore should receive a lesser sentence than Phinezy because his conduct was less culpable, and Leshore did not object when the deputy prosecutor provided a copy of Phinezy's sentencing order to the trial court at sentencing. "'When the failure to object accompanies the party's affirmative requests of the court, it becomes a question of invited error[,]'" and we do not review invited error. *Batchelor*, 119 N.E.3d at 556 (quoting *Durden v. State*, 99 N.E.3d 645, 651 (Ind. 2018)).

B. Character of the Offender

[26] Neither do we find Leshore's sentence inappropriate in light of his character. Upon reviewing a sentence for inappropriateness, we look to a defendant's life and conduct as illustrative of his character. *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018), *trans. denied*. By the age of eighteen, Leshore had amassed six adjudications, one of which would have been Class D felony cocaine possession if committed by an adult, and another for possession of a handgun without a license, an adjudication which we find particularly relevant because the instant offenses also involved a firearm. Leshore had the benefit of two placements at the Wood Youth Center and a commitment to the Indiana Boys School, yet he chose to reoffend and did so by committing a series of serious offenses. Despite having two dependent children, Leshore had a dismal employment record and apparently committed the instant offenses as an alternate means to procure money. Leshore demonstrated little remorse about the offenses, downplaying to the presentence investigator his use of a firearm

and describing his rape of M.G. as "I told [M.G.] we were gonna have sex. We had sex." (Appellant's App. Vol. II, p. 246).

[27] Leshore argues that his age militates for a reduced sentence. However, the trial court already took Leshore's age into account when fashioning its sentence, and our supreme court has recognized that youth does not always merit a sentence revision. *See Sensback v. State*, 720 N.E.2d 1160, 1164-66 (Ind. 1999) (declining to revise the defendant's sentence for a murder committed when she was eighteen after observing that "[a]t eighteen, Sensback is beyond the age at which the law commands special treatment by virtue of youth"). Leshore also directs our attention to the fact that he pleaded guilty, another factor already considered by the trial court. We decline to revise Leshore's sentence on this basis, as we observe that he did not plead guilty until jury selection had already begun and the State had all its witnesses present. *See Richardson v. State*, 906 N.E.2d 241, 246 (Ind. Ct. App. 2009) (holding that Richardson's guilty plea was not entitled to significant mitigating weight, as it came one week before trial, there was strong evidence of Richardson's guilt, and he demonstrated a lack of remorse). Leshore also argues that his adjudication for cocaine possession and his adult conviction for minor in consumption of alcohol suggest that "he had an untreated and undiagnosed addiction problem." (Appellant's Br. p. 29). However, without more evidence in the record to support that contention, we decline to revise Leshore's sentence on that basis. In short, Leshore has failed to present us with any "compelling evidence portraying in a positive light" the nature of the offenses or his character.

Stephenson, 29 N.E.3d at 122. Accordingly, we do not disturb the trial court's sentencing order.

III. *Criminal Confinement as Lesser-Included Offense*

[28] Leshore next asks us to reverse his convictions for criminal confinement. Leshore argues that those convictions were factually lesser-included offenses of his robbery convictions, and, therefore, that entry of judgment and sentencing on the confinement charges violated Indiana Code section 35-38-1-6(2), which provides that if a defendant is charged with and convicted of an offense and an included offense in separate counts "[j]udgment and sentence may not be entered against the defendant for the included offense." The State counters that Leshore may not challenge his criminal confinement convictions on direct appeal following his guilty plea. We agree with the State.

[29] It has long been the law in Indiana that criminal defendants who plead guilty may not challenge the validity of their conviction on direct appeal but must, instead, raise such a challenge through a post-conviction proceeding. *Tumulty v. State*, 666 N.E.2d 394, 395-96 (Ind. 1996). In addition, Leshore agreed to plead guilty to the criminal confinement and robbery charges, and, thus, he forfeited his right to claim that those convictions violated double jeopardy. *See Davis v. State*, 771 N.E.2d 647, 649 n.4 (Ind. 2002) (observing that one of the rights defendants who plead guilty give up is the right to challenge their convictions that would otherwise be double jeopardy).

[30] None of the cases relied upon by Leshore in support of his contention that his convictions were violative of section 35-38-1-6(2) involved convictions that resulted from a guilty plea, and none resulted in merely vacating a sentence rather than vacating the conviction and sentence. *See Wethington v. State,* 560 N.E.2d 496, 506-08 (Ind. 1990) (convictions for robbery and criminal confinement after trial held to be double jeopardy, resulting in the vacating of the criminal confinement conviction); *Harvey v. State*, 719 N.E.2d 406, 410-12 (Ind. Ct. App. 1999) (Harvey's convictions for robbery and criminal confinement following trial found to violate section 35-38-1-6; conviction for criminal confinement vacated); *Ryle v. State*, 549 N.E.2d 81, 84 (Ind. Ct. App. 1990) (holding that Ryle's conviction for criminal confinement following trial violated double jeopardy, as it was a factually included offense of his robbery conviction; conviction for confinement vacated), *trans. denied*. Because Leshore may not challenge his convictions as violative of double jeopardy after pleading guilty, we do not address this claim further.

IV. *Indiana Code Section 35-50-2-11 (1996)*

[31] Leshore's final argument is that his forty-year sentence for M.G.'s rape violated Indiana Code section 35-50-2-11 (1996), which, at the time Leshore was sentenced, provided in relevant part as follows:

> (b) As used in this section, "offense" means:
>
> (1) a felony under 35-42 that resulted in death or serious bodily injury;
>
> (2) kidnapping; or

(3) criminal confinement as a Class B felony.

> (c) The state may seek, on a page separate from the rest of a charging instrument, to have a person who allegedly committed an offense sentenced to an additional fixed term of imprisonment if the state can show beyond a reasonable doubt that the person knowingly or intentionally used a firearm in the commission of the offense.
>
> (d) If after a sentencing hearing a court finds that a person who committed an offense used a firearm in the commission of the offense, the court may sentence the person to an additional fixed term of imprisonment of five years.

Leshore's contention on this issue is that he was sentenced to an additional ten years of imprisonment for his rape conviction even though the State did not file a separate charging document seeking an enhancement under the statute.

[32] This argument is unpersuasive for several reasons. The State did not avail itself of section 35-50-2-11 to enhance Leshore's Class A felony rape charge,[2] most likely because the Class A felony rape, codified at Indiana Code section 35-42-4-1, was not "an offense" for purposes of the statute because it did not include an allegation that the offense had resulted in death or serious bodily injury. *See* I.C. § 35-50-2-11(b)(1). The trial court sentenced Leshore for his Class A felony rape conviction within the statutory parameters then in effect. See I.C. § 35-50-2-4 (1995) (providing a sentencing range for a Class A felony between twenty and fifty years, with a presumptive sentence of thirty years). The trial court did

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[2] The State filed separate charging instruments pursuant to section 35-50-2-11 seeking to have the Class B felony criminal confinement charges enhanced, but it dismissed those enhancements as part of Leshore's plea agreement.

not impose a fixed term of five years for Leshore's use of a firearm during the rape. We conclude that Leshore's argument is without merit.

CONCLUSION

[33] Based on the foregoing, we hold that the trial court did not abuse its discretion in sentencing Leshore and that his aggregate seventy-year sentence is not inappropriate given the nature of his offenses and his character. We further hold that Leshore forfeited his right to bring his double jeopardy claim and that his rape sentence did not implicate the use of a firearm sentencing enhancement statute.

[34] Affirmed.

[35] Crone, J. and Mathias, J. concur