ATTORNEY FOR APPELLANT

Mark S. Lenyo
South Bend, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Evan Matthew Comer
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Anthony Malone,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 27, 2022

Court of Appeals Case No. 21A-CR-2380

Appeal from the St. Joseph Superior Court

The Honorable Jeffrey L. Sanford, Judge

Trial Court Cause No. 71D03-2003-MR-5

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Anthony Malone (Malone), appeals his sentence for reckless homicide, a Level 5 felony, Ind. Code § 35-42-1-5, and an enhancement for the use of a firearm in the commission of the offense, I.C. § 35-50-2-11.

[2] We affirm.

ISSUES

[3] Malone presents two issues on appeal, which we restate as:

(1) Whether the trial court abused its discretion at sentencing; and

(2) Whether Malone's sentence is inappropriate in light of the nature of the offense and his character.

FACTS AND PROCEDURAL HISTORY

[4] At around 2:00 a.m. on March 14, 2020, DeAshay Thompson (Thompson), and Ciara Williams (Williams) drove to a Phillips 66 gas station located in South Bend, Indiana. The gas station was a known as "[k]ind of an after[-]party spot." (Transcript Vol. II, p. 169). Thompson and Williams were thereafter joined by William's boyfriend, Andre Jones (Jones), and some of Jones' friends. Thereafter, a group of other people arrived, including Malone, Malone's friends, and Malone's girlfriend, Shakyla Freeman (Freeman), whom Williams had never met.

[5] At some point thereafter, three women walked across the street toward the vehicle in which Malone was seated. One of the women, Evelyne Toe (Toe), jumped on top of the car and sat down to take a picture. Upon seeing that, Freeman exited the vehicle, slapped Toe in her face, and an altercation ensued. The people that were there, including Williams and Thompson, gathered to watch the fight. Malone also exited the vehicle and kicked Toe in the face several times. Malone drew his gun and pointed it at Toe. An onlooker told Malone that he should not be kicking Toe, and Malone pointed his gun at the man and yelled, "[s]tep the fuck back." (Tr. Vol. II, p. 165).

[6] Once Williams saw that Malone had a gun, she walked away, but Thompson remained to watch the fight. Malone also attempted to start a fight with one of Jones' friends, and Jones intervened and confronted Malone. After the confrontation between Malone and Jones dissolved, Malone was walking back to his car, but he turned back around and fired a single shot toward Jones. The bullet missed Jones and struck Thompson in the neck. When Jones saw that Thompson had been shot, he rushed to give her aid. Jones then grabbed a gun belonging to another person at the scene and he shot at Malone. He continued firing as Malone's car drove away from the gas station.

[7] At approximately 2:27 a.m., South Bend Police Department officers were dispatched to the scene due to multiple shots fired and the fact that a woman had been injured. Officer Hunter Miller (Officer Hunter) was the first one to arrive at the scene. Thompson was unresponsive and had no pulse. Officer Hunter and other officers attempted to stop the bleeding from Thompson's neck

with a bandage and tried to load her into a patrol vehicle. The officers were unsuccessful, but around that time, an ambulance arrived, and Thompson was transported to a nearby hospital. Thompson succumbed to her injuries and later died. The pathologist report ruled that Thompson's death was a homicide caused by a single gunshot wound to the front right side of her neck. The report indicated that the bullet had been lodged in the base of Thompson's neck near her spine.

[8] At the scene of the shooting, the officers located numerous shell casings and other ballistic evidence, as well as surveillance video from the gas station. Officers also received several civilian videos of the incidents leading up to the shooting. A number of witnesses were interviewed, and Malone emerged as a suspect to the shooting. A warrant was thereafter issued for his arrest. A couple of weeks after the shooting, the police located Malone. After a high-speed chase spanning several counties, and resulting in a vehicle wreck, Malone was arrested.

[9] On March 23, 2020, the State filed an Information, charging Malone with murder, a felony, and a firearm sentencing enhancement. A four-day jury trial was held starting on August 16, 2021. At the close of the evidence, the jury found Malone guilty of the lesser included offense of reckless homicide, a Level 5 felony. Malone then pleaded guilty to the firearm enhancement charge. On September 20, 2021, the trial court conducted a sentencing hearing and sentenced Malone to six years for the reckless homicide conviction and

enhanced his sentence by fifteen years for the use of the firearm for an aggregate sentence of twenty-one years.

[10] Malone now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sentencing*

[11] Malone claims that the trial court abused its sentencing discretion. Generally, trial courts have broad discretion in selecting a sentence. *Jackson v. State*, 105 N.E.3d 1081, 1084 (Ind. 2018). On appeal, we review a court's sentencing decision for an abuse of that discretion. *McCain v. State*, 148 N.E.3d 977, 981 (Ind. 2020). "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)), *clar'd on reh'g*. However, "we will remand for resentencing if we cannot say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances." *McCann v. State*, 749 N.E.2d 1116, 1121 (Ind. 2001) Our case law has carved out a limited exception for when a trial court has abused its discretion by exhibiting bias, instead of simply making a mistake. *See, e.g., Phelps v. State*, 24 N.E.3d 525, 529 (Ind. Ct. App. 2015).

[12] At issue here is whether the trial court abused its discretion at sentencing when it made the following statements:

> Well, it just seems to me the whole thing started because somebody not even connected with the victim in this case, somebody sat on your car, and there was a fight. You wanted to keep people back so the fight could continue when I think most people would have tried to break up the fight which kind of makes me wonder what the heck the thought process was there. And then somebody, again, not even connected with this, you decided it would be smart to pull out a gun and fire. I think you dodged a bullet in not being convicted of [m]urder because you'd be talking about a lot more time than this.

(Tr. Vol. III, pp. 112-13). Malone argues that the trial court's imposition of a fifteen-year sentence for his firearm enhancement conviction was "compensation for the trial court's belief that the jury incorrectly found [him] guilty of reckless homicide, rather than murder." (Appellant's Br. p. 12). In making his argument that the trial court abused its discretion at sentencing, Malone relies on several of our supreme court decisions such as *Gambill v. State*, 436 N.E.2d 301 (Ind. 1982), *Hammons v. State*, 493 N.E.2d 1250 (Ind.1986). and *Hamman v. State*, 504 N.E.2d 276 (Ind. 1987).

[13] In *Gambill*, the jury convicted Gambill of voluntary manslaughter instead of murder. *Gambill*, 436 N.E. 2d at 304. During sentencing, the court cited several statutory aggravating factors without elaboration and criticized the jury's verdict, asserting that a murder conviction would have been justified under the evidence. *Id*. Our supreme court determined that the trial court erred by failing to explain how the statutory aggravating factors applied to the case. *Id*. More importantly, the *Gambill* court noted that it appeared that the trial court disagreed with the jury's verdict and invaded the province of the jury by

giving Gambill the maximum sentence for voluntary manslaughter to "compensate for what he believed to be an erroneous verdict." *Id*. at 305.

[14] Similarly, in *Hammons*, Hammons was charged with murder but found guilty only of voluntary manslaughter. A sentencing hearing was held at which the trial court said: "I feel there is ample evidence to justify a finding on the murder count itself. Therefore, Mr. Hammons, the [c]ourt is going to sentence you at this time to. . . a period of twenty years. . . ." *Hammons*, 493 N.E.2d at 1251 (emphasis omitted). Upon the State's motion, the matter was remanded for resentencing because the trial court failed to adequately state facts supporting an enhanced sentence. *Id*. at 1252. At the resentencing hearing, while recounting the aggravating circumstances, the trial court said, "I tended to disagree with the jury's verdict in this particular matter and while I cannot sentence for a murder conviction, I have sentencing alternatives within the manslaughter [C]lass B felony." *Id*. at 1252 (emphasis omitted). The trial court then imposed the maximum sentence allowed for voluntary manslaughter. *Id*. Our supreme court held that the trial court abused its discretion and that the sentence appeared to be compensation for a supposedly incorrect jury verdict. *Id*. at 1253. The court reasoned that the trial court's act of intermingling its opposition to the jury verdict with a discussion of a legitimate aggravating circumstance "does not remove the suspect nature of the enhancement." *Id.* The court also distinguished the case from *Wilson v. State*, 458 N.E.2d 654 (Ind. 1984), in which a trial court had shown "mild skepticism" of the jury verdict but was not "resolutely opposed" to it. *Id*.

[15] In *Hamman*, a jury found the defendant guilty of two Counts of voluntary manslaughter instead of murder as charged. *Hamman*, 504 N.E.2d at 277. At sentencing, the trial court expressly stated its belief that the evidence in the case "precludes any possibility of the existence of sudden heat as a mitigating factor reducing murder to voluntary manslaughter," and proceeded to impose maximum and consecutive sentences for the convictions. *Id.* Our supreme court revised the sentence, concluding that the enhancement "clearly was the result of improper considerations," *i.e.*, "the judge's perceptions concerning the adequacy of the verdicts." *Id*. at 278.

[16] Malone likens the trial court's statements in his case to that of the trial court in *Gambill*, *Hammons,* and *Hamman*, and he is requesting us to remand his case for resentencing. We disagree. In the more recent decision of *McCain v. State*, 148 N.E.3d 977, 979 (Ind. 2020), our supreme court considered whether the trial court's comments at sentencing served as an improper basis for increasing a defendant's sentence. In that case, McCain had been charged with murder and a firearm enhancement charge. *Id*. The jury found McCain guilty of voluntary manslaughter but not murder. *Id*. McCain then sought a bench trial on the firearm enhancement's applicability to his manslaughter conviction. *Id*. After a bench trial, McCain was also convicted of the firearm enhancement. *Id*. During the bench trial, the trial court made multiple comments indicating that it believed McCain should have been convicted of murder by the jury. *Id*. The trial court stated that it was "the clearest case of . . . cold-blooded murder [it

had ever] seen in high definition in 32 years" and remarked that "[t]he voluntary manslaughter verdict was a gift." *Id*. at 980.

[17] The *McCain* court discussed the three cases cited by Malone. First, the *McCain* court noted that the 1980s cases illustrated that "examining a judge's sentencing decision for impermissible motives is a highly fact specific inquiry." *Id*. at 983. Second, it stated that while it highly discourages the practice, trial judges are not prohibited from expressing personal disagreements with the verdicts. *Id*. Then comparing the 1980s cases to the facts of McCain's case, the supreme court found that unlike *Gambill*, *Hammons*, and *Hamman*, the trial court's sentencing decision included a careful, detailed discussion of ten aggravating factors and six potential mitigating factors (ultimately accepting only four), both at the hearing and in a detailed sentencing order. *Id*. The court also found that in contrast to *Gambill*, *Hammons*, and *Hamman*, McCain did not receive the maximum possible sentence for his crimes, and McCain's sentence was substantially lower than what he would have received for murder. *Id*. Further, the *McCain* court found that the trial court made statements, both at the hearing and in the sentencing order, clarifying that it would filter out its personal feelings. *Id*. at 984. While the *McCain* court noted that the "disclaimer is not a magic phrase inoculating the trial court from scrutiny, it weighs against a finding of bias." *Id*. Accordingly, the supreme court concluded that trial court's comments disagreeing with the jury's verdict were insufficient to taint the sentencing decision, and it affirmed McCain's sentence. *Id*. at 986.

[18] We employ an analysis similar to the *McCain* court. The trial court's sentencing statement in this case was centered on the circumstances surrounding the crime, and Malone's criminal history. Unlike the statements in *Gambill*, the trial court's statement here was not openly hostile to the jury's decision, but was rather an observation. *See Tiller v. State*, 541 N.E.2d 885, 893 (Ind. 1989) (characterizing the trial court's statement in *Gambill* as "openly hostile to the jury's verdict" whereas in *Tiller*, the trial court merely made a statement regarding the seriousness of the crime in explaining the sentence); *see also Wilson*, 458 N.E.2d at 656 (holding that although the trial court expressed a "degree of skepticism" regarding the evidence of sudden heat supporting a manslaughter verdict over a murder verdict, the trial court was not "so resolutely opposed to the jury verdict" as in *Gambill*). While the judge's statement at sentencing revealed that he personally disagreed with the reckless homicide verdict, a judge "is not prohibited from expressing his personal disagreement." *Hamman*, 504 N.E.2d at 278. We find that the statement that Malone dodged a bullet for not being convicted of murder, viewed in the context of the record as a whole, was a similar statement to that in *McCain*, and we consider it an "evaluative statement of the circumstances surrounding the crime." *See Wilson*, 458 N.E.2d at 656.

[19] We additionally note that the record contains other evidentiary factors that show that the trial court did not abuse its discretion at sentencing. Even after it made the statement that Malone dodged a bullet for not being convicted of murder, the trial court included a discussion of Malone's lengthy criminal

history which included eleven misdemeanor charges and convictions, and it summarized his past actions as a "pattern of just, hey, I'm going to do whatever the hell I want to." (Tr. Vol. III, p. 113). Then prior to pronouncing Malone's sentence, the trial court further stated, "[i]n this offense, I just don't understand what the thought process was that night from you. But I do think given your history that you would probably continue carrying a weapon and pulling out a weapon." (Tr. Vol. III, pp. 114-15). *Cf. Gambill*, 436 N.E.2d at 305 (listed aggravators contained merely "conclusory language"); *Hammons*, 493 N.E.2d at 1251, 1253 (judge's first sentencing order failed to provide aggravators); *Hamman*, 504 N.E.2d at 279 (record did "not disclose specific conclusions" justifying the sentence enhancement).

[20] The State argues that even the most uncharitable reading of the trial court's comment that Malone dodged a bullet for not being convicted of murder when read in its proper context, "amounted to a legally correct statement about how Malone's sentencing exposure was reduced because of the jury's decision to find him guilty of reckless homicide rather than murder." (Appellee's Br. p. 14). Had Malone been convicted of murder he would have received a lengthier sentence as the sentencing range for that offense is between forty-five and sixty-five years with an advisory sentence of fifty-five years. *See* I.C. § 35-50-2-3. Even though Malone received six years, the maximum possible sentence for the reckless homicide conviction, his sentence was enhanced due to the firearm enhancement conviction, and the trial court was lenient by only enhancing Malone's six-year reckless homicide conviction by fifteen years and not twenty.

See I.C. § 35-50-2-11 (sentencing range for a firearm enhancement conviction is between five years and twenty years).

[21] Here, we find that the language the trial court used was more a statement regarding the seriousness of the crime and an explanation regarding the imposition of the sentence than an improper display of bias. In light of the foregoing, we hold that Malone's aggregate twenty-one-year sentence does not demonstrate an improper motive by the trial court, and we conclude that the trial court did not abuse its discretion at sentencing.

II. *Inappropriate Sentence*

[22] Malone argues that his aggregate twenty-one-year sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). The principal role of a Rule 7(B) review "should be to attempt to leaven the outliers and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). "Appellate Rule 7(B) analysis is not to determine whether another sentence is more appropriate but rather whether the sentence imposed is inappropriate." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012) (internal quotation marks and citation omitted), *reh'g denied*. Whether a sentence is inappropriate turns on "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.

[23] The sentencing range for a Level 5 felony reckless homicide is between one and six years, with an advisory sentence of three years. I.C. § 35-50-2-6(b). At the time of the offense, Indiana Code section 35-50-2-11(g), which governs the sentence enhancement, provided that "[i]f . . . the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person knowingly or intentionally used a firearm in the commission of the offense, the court may sentence the person to an additional fixed term of imprisonment of between five (5) years and twenty (20) years." Here, the trial court imposed a six-year sentence for reckless homicide and enhanced it by fifteen years for Malone's use of a gun. Malone's total sentence is twenty-one years, five years short of the maximum.

[24] In *Anderson v. State*, 989 N.E.2d 823, 827 (Ind. Ct. App. 2013), *trans. denied*, we found that the appellant waived her Rule 7(B) argument because she argued on appeal "only the 'character' prong and not the 'nature of the offense' prong." Malone argues only that his sentence was inappropriate based on his character and has made no arguments as to the nature of the offense. As such, Malone has waived any argument in this regard.

[25] Waiver notwithstanding, Malone's argument still fails. In reviewing the nature of the offense, after Toe jumped on top of Malone's vehicle to take a picture, Malone's girlfriend exited the car and slapped Toe in the face. Malone did not

attempt to break up the fight between the women, instead, he kicked Toe in the face, pointed his gun at Toe, and he pointed his gun at the crowd to prevent them from intervening or helping Toe. After aiding his girlfriend in assaulting Toe, Malone got into a separate confrontation with Jones. Malone attempted to shoot Jones, but the bullet missed Jones and struck Thompson, who was an innocent bystander.

[26] As for Malone's character, we note that at age twenty-eight, Malone had accumulated several misdemeanor adjudications as a juvenile and convictions as an adult. His juvenile adjudications consisted of burglary and resisting law enforcement (multiple). His adult criminal history consisted of carrying a handgun without a license (multiple), driving without having a license (multiple), driving while suspended (multiple), carrying a concealed weapon, intimidation, resisting arrest, and domestic battery where a protective order was filed. Malone was on probation at the time he committed the instant offenses. As the trial court noted, Malone's criminal history reflected a "pattern of just, hey, I'm going to do whatever the hell I want to." (Tr. Vol. III, p. 113). In addition, prior to his arrest for this crime, Malone was armed with a firearm, and he led the police in a high-speed chase spanning several counties.

[27] Based on the foregoing, nothing about the nature of the offense and the character of the offender warrants the imposition of less than the twenty-one-year sentence. Malone has not established that his sentence is inappropriate.

CONCLUSION

[28] Based on the foregoing, we conclude that the trial court did not abuse its discretion at sentencing and that Malone's sentence is not inappropriate.

[29] Affirmed.

[30] May, J. and Tavitas, J. concur