MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

William T. Myers
Marion, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

James Dana Powers, Sr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 11, 2021

Court of Appeals Case No. 20A-CR-1808

Appeal from the Huntington Superior Court

The Honorable Jennifer E. Newton, Judge

Trial Court Cause No. 35D01-1912-F5-386

Najam, Judge.

Statement of the Case

[1] James Dana Powers, Sr. appeals following his convictions for two counts of domestic battery and two counts of intimidation, all as Level 5 felonies, and his aggregate sixteen-year sentence. Powers raises three issues for our review:

1. Whether the State presented sufficient evidence to support his convictions for intimidation, as Level 5 felonies.

2. Whether the trial court abused its discretion when it sentenced him.

3. Whether his sixteen-year sentence is inappropriate in light of the nature of the offenses and his character.

[2] We affirm.

Facts and Procedural History

[3] On November 30, 2019, Jeff Downey and Aaron Utterback went to the home that Powers shared with his girlfriend, T.T, to "check[] on some money" that Powers owed Utterback. Tr. Vol. 2 at 55. The four individuals sat around a table talking. At some point, T.T. told Downey that she liked his hat, so Downey gave it to her, and she put it on. Powers got mad and "slap[ped]" T.T. in the back of the head in order to knock the hat off. *Id*. at 91. Powers and T.T. then got into an argument that "lead out into the street." *Id*. at 58.

[4] Downey and Utterback convinced T.T. to leave with them and go to Utterback's house. While there, Downey and Utterback tried to "calm [T.T.] down." *Id*. at 116. T.T. then called Powers and told him where she was.

Approximately fifteen minutes later, Powers arrived at Utterback's house. Downey opened the door, and Powers "bolted" around him and went straight to T.T. *Id*. at 118. Powers then hit T.T. several times in the back of the head.

[5] Downey and Utterback tried to "divert" Powers' attention away from T.T. *Id*. at 65. Downey went outside to the backyard and started yelling at Powers to get him to come outside. Utterback joined Downey outside, and Powers ultimately followed. Powers then pulled a knife from either his pants or his jacket and started walking toward Downey and Utterback while "pointing the knife out towards" them. *Id*. at 67. Powers was "going at" Downey and Utterback with the knife "above his head" and his "elbow bent." *Id*. at 68. Utterback was concerned that Powers might stab him or Downey, and he believed that Powers was "threaten[ing]" his and Downey's lives, so he called 9-1-1. *Id*. at 166. Officers responded "in about a minute," and Powers threw down the knife and fled the scene. *Id*. at 72. Officers ultimately detained Powers and located the knife.

[6] The State charged Powers with two counts of domestic battery, as Level 5 felonies, for his actions against T.T. and two counts of intimidation, as Level 5 felonies, for his actions against Downey and Utterback. Following his trial, the jury found Powers guilty of all four counts,[1] and the court entered judgment of

---

[1] The jury considered whether Powers was guilty of two counts of domestic battery, as Class A misdemeanors. Following the trial, Powers stipulated to the fact that he has a prior conviction for battery against T.T., which elevated the domestic battery offenses to Level 5 felonies. *See* Appellant's App. Vol. 2 at 209.

conviction accordingly. At a sentencing hearing, the court identified as aggravating factors Powers' criminal history, including "the fact that [he] left a string of [v]ictims from violent acts over thirty (30) plus years," and Powers' lack of remorse. Tr. Vol. 4 at 135. The court did not identify any mitigators. Accordingly, the court sentenced Powers to five years each for the domestic battery convictions and three years each for the intimidation convictions, all to run consecutively for an aggregate sentence of sixteen years executed in the Department of Correction. This appeal ensued.

Discussion and Decision

Issue One: Sufficiency of the Evidence

[7] Powers first asserts that the State presented insufficient evidence to support his two convictions for intimidation.[2] Our standard of review on a claim of insufficient evidence is well settled:

> For a sufficiency of the evidence claim, we look only at the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 687 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh the evidence. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*.

Love v. State, 73 N.E.3d 693, 696 (Ind. 2017).

[2] Powers does not challenge his convictions for domestic battery.

[8] In order to convict Powers of intimidation, as a Level 5 felony, the State was required to prove that Powers, while armed with a deadly weapon, communicated a threat to Downey and Utterback with the intent that they be placed in fear that a threat to unlawfully injury them or a threat to commit a crime will be carried out. *See* Ind. Code § 35-45-2-1(a)(4) (2020).[3] On appeal, Powers asserts that the State presented insufficient evidence to demonstrate that he had acted with the necessary intent to place Downey and Utterback in fear that he would injure them or otherwise commit a crime with the knife.

[9] Specifically, Powers contends that "the State presented no evidence of a spoken threat but relied only on the fact that Powers walked toward Downey and Utterback in the alley behind Utterback's house[.]" Appellant's Br. at 20. And Powers asserts that the State presented no evidence that he "intended to harm, cut or stab either Utterback or Downey with the knife." *Id*. Thus, he maintains that the State failed to demonstrate that he actually intended to carry out any threat. We cannot agree.

[10] There is no dispute that Powers did not verbally communicate a threat to Downey or Utterback. However, the State was not required to prove that Powers had issued a spoken threat. Rather, it is well settled that "intent may be

---

[3] The State also charged Powers with intimidation under Indiana Code Section 35-45-2-1(a)(2), which required the State to prove that Powers had communicated a threat to Downey and Utterback with the intent that they be placed in fear of retaliation for a prior lawful act. However, because we hold that the State presented sufficient evidence to demonstrate that Powers intended to place Downey and Utterback in fear that a threat will be carried out, we need not address Powers' contentions on appeal that the State failed to present sufficient evidence under the alternate theory.

proven by circumstantial evidence." *McCaskill v. State*, 3 N.E.3d 1047, 1050 (Ind. Ct. App. 2014). Intent can be inferred from a defendant's conduct and the natural and usual sequence to which such conduct logically and reasonably points. *Id.*

[11] Here, the evidence most favorable to the trial court's judgment shows that, after Downey and Utterback got Powers outside, Powers produced a knife from somewhere on his person and started walking toward Downey and Utterback while "pointing the knife out towards" them. Tr. Vol. 2 at 67. Indeed, Powers was "going at" Downey and Utterback while holding the knife "above his head" with his "elbow bent." *Id.* at 68. Further, Utterback testified that he was "concerned" that Powers was going to stab either him or Downey. *Id.* at 126. And Utterback testified that he was "fearful" because he believed Powers had "threatened" his and Downey's lives. *Id.* at 166. In other words, a reasonable fact-finder could infer that, when Powers brandished a knife, he had intended to place Downey and Utterback in fear that he would unlawfully injury them or commit a crime with the knife. *See* I.C. § 35-34-2-1(4)(a). As such, the State presented sufficient evidence to support his convictions for intimidation, as Level 5 felonies.[4]

---

[4] Powers briefly asserts that "Utterback himself testified that Powers was focused on Downey and not Utterback[.]" Appellant's Br. at 19. To the extent that is a challenge to the sufficiency of the evidence to support Powers' conviction for intimidation against Utterback, that is simply a request for this Court to reweigh the evidence, which we will not do.

Issue Two: Abuse of Discretion in Sentencing

[12] Powers next contends that the trial court abused its discretion when it sentenced him. Sentencing decisions lie within the sound discretion of the trial court. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). 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) (citation omitted).

[13] A trial court abuses its discretion in sentencing if it does any of the following:

> (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."

Id. (quoting *Anglemyer v. State*, 868 N.E.2d 482, 490-91 (Ind.), *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007)).

[14] Here, Powers was convicted of four crimes, all as Level 5 felonies. The sentencing range for a Level 5 felony is one year to six years, with an advisory sentence of four years. Ind. Code § 35-50-2-6(b). Following a sentencing hearing, the court identified as aggravating factors Powers' criminal history, including the fact that that criminal history spans more than thirty years and includes violent acts against multiple victims, and his lack of remorse. The

court did not identify any mitigating factors. Accordingly, the court imposed an enhanced sentence of five years for each of the battery convictions and a sentence of three years for each of the intimidation convictions, all to run consecutively.

[15] On appeal, Powers contends that the trial court abused its discretion when it ordered the sentences for his intimidation convictions to run consecutive to each other and when it ordered them to run consecutive to the sentences for his domestic battery convictions. He also contends that the trial court relied on an improper aggravator when it sentenced him. We address each argument in turn.

Imposition of Consecutive Sentences

[16] Powers contends that the trial court abused its discretion when it ordered him to serve consecutive sentences. On this question, Powers first contends that the trial court abused its discretion when it ordered his intimidation sentences to run consecutive to each other. "The decision to impose consecutive sentences lies within the discretion of the trial court." *Gross v. State*, 22 N.E.3d 863, 869 (Ind. Ct. App. 2014). Further, a single aggravating circumstance may be sufficient to support the imposition of consecutive sentences. *Id*.

[17] Powers' argument on this issue is unclear. But he appears to assert that the court's order for consecutive sentences was an abuse of discretion based on the nature of the offenses. Indeed, he asserts that the offenses consisted only of him "responding to Downey's challenge to walk outside" and "simply walking toward Downey while Utterback was outside to war[n] Downey of the knife."

Appellant's Br. at 23. In essence, he considers one of the victims to have been a mere witness or bystander. We cannot agree that the nature of the offenses is grounds to avoid the imposition of consecutive sentences.

[18] But even if we were to agree with Powers' characterization of the evidence, Powers ignores the fact that the trial court identified two aggravating factors, namely, his extensive criminal history and his lack of remorse. Either one of those aggravators, on its own, would have been sufficient for the court to impose consecutive sentences. *See Gross*, 22 N.E.3d at 869. In addition, we note that the Indiana Supreme Court has held that, when the perpetrator commits the same offense against two victims, "consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person." *Serino v. State*, 798 N.E.2d, 852, 857 (Ind. 2003). As such, the court did not err when it ordered his two sentences for intimidation to run consecutively.

[19] Still, Powers also contends that the court erred when it ordered his intimidation sentences to run consecutive to the sentences for domestic battery for an aggregate sentence of sixteen years. Indiana Code Section 35-50-1-2 provides that

> *except for crimes of violence*, the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the period described in subsection (d).

I.C. § 35-50-1-2(c) (emphasis added).[5] And subsection (d) provides that, if the most serious crime for which the defendant is sentenced is a Level 5 felony, the total of the consecutive terms of imprisonment may not exceed seven years. I.C. § 35-50-1-2(d)(2).

[20] Powers acknowledges that his two five-year consecutive sentences for domestic battery were not illegal because they were crimes of violence pursuant to Indiana Code Section 35-50-1-2(a)(7)(D). *See* Appellant's Br. at 22. However, he contends that the court erred when it ordered his sentences for two counts of intimidation to run consecutive to the domestic battery sentences because intimidation is "not included in the list of crimes of violence[.]" Appellant's Br. at 23. In other words, Powers appears to argue that, because his two convictions for intimidation were not crimes of violence, Indiana Code Section 35-50-1-2 limited the trial court's ability to make those sentences consecutive to his other sentences.

[21] But our Supreme Court has previously rejected that argument. In *Johnson v. State*, the Court held that "the limitations the statute imposes on consecutive sentences do not apply between crimes of violence and those that are not crimes of violence." 749 N.E.2d 1103, 1110 (Ind. 2001). In that case, the Court held that the trial court had not erred when it ordered a sentence for an offense not defined as a crime of violence to run consecutive to sentences for crimes of

---

[5] The State appears to concede that Powers' offenses constituted a single episode of criminal conduct. *See* Appellee's Br. at 21.

violence. *See id*. Similarly, here, because Powers was sentenced for two crimes of violence in addition to two crimes that are not defined as crimes of violence, the court did not err when it ordered his intimidation sentences to run consecutive to his sentences for domestic battery.

Improper Aggravator

[22] Powers next asserts that the court relied on an improper aggravator when it sentenced him. Specifically, Powers contends that the court "brief[ly] mention[ed] that Powers had taken a knife to the 2nd house." Appellant's Br. at 23. And Powers asserts that that "mention of the knife as an aggravating factor violates prohibitions against using an element of the offense to aggravate the sentence." *Id*. Powers is correct that, "[w]here a trial court's reason for imposing a sentence greater than the advisory sentence includes material elements of the offense, absent something unique about the circumstances that would justify deviating from the advisory sentence, that reason is 'improper as a matter of law.'" *Gomilla v. State*, 13 N.E.2d 846, 852-53 (Ind. 2014) (quoting *Anglemyer*, 868 N.E.2d at 491).

[23] However, while the trial court mentioned that Powers had taken a knife with him to Utterback's house, the court did not identify that as an aggravating factor. Rather, the court only mentioned it to explain why it did not believe Powers' claim that he had acted to protect T.T. when he took the knife to Utterback's house. *See* Tr. Vol. 4 at 135-36. Further, the court specifically identified as aggravating factors Powers' extensive criminal history, which spans over thirty years, and his lack of remorse. Accordingly, it is clear that the

trial court did not rely on the fact that Powers had taken a knife with him when it imposed his sentence. The trial court did not abuse its discretion when it sentenced Powers.

Issue Three: Inappropriateness of Sentence

[24] Finally, Powers contends that his sentence is inappropriate in light of the nature of the offenses and his character. However, Powers' argument on this issue is as follows:

> While the facts in this case show that the offenses occurred in two different locations, they involved the same people over a very short period of time. The consecutive sentences for both battery convictions as well as both intimidation convictions disregards the fact that the two battery charges involved lesser degrees of contact upon the victim and further disregards the testimony of Utterback that Powers was focused on Downey and not him.

Appellant's Br. at 24-25. In other words, Powers' argument is simply that his aggregate sixteen-year sentence is inappropriate only in light of the nature of the offenses. He makes no argument that his sentence is inappropriate in light of his character.[6]

[25] However, that argument, by itself, is not sufficient to invoke this Court's authority to revise a sentence under Indiana Appellate Rule 7(B). As this Court has previously explained, revision of a sentence under Rule 7(B) "requires the

---

[6] Indeed, Powers acknowledges that his "three- and five-year sentences may have been appropriate sentences for hitting [T.T.] in the face and pointing a knife at Downey, considering Powers' criminal history." *Id.* at 25

appellant to demonstrate that his sentence is inappropriate in light of the nature of the offense *and* the character of the offender." *Sanders v. State*, 71 N.E.2d 839, 843 (Ind. Ct. App. 2017) (quotation marks omitted, emphasis in original), *trans. denied*. The language of that rule plainly requires "the appellant to demonstrate that his sentence is inappropriate in light of *both* the nature of the offenses and his character." *Id*. (quotation marks omitted, emphasis in original). Because Powers' argument on appeal does not address his sentence in relation to his character, he has waived our review of the appropriateness of his sentence. *See id*.

[26] Waiver notwithstanding, Powers has failed to persuade us that his sixteen-year executed sentence is inappropriate. Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. Whether we regard a sentence as inappropriate at the end of the day turns on "our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case." *Id*. at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] 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).

[27] Here, Powers has not shown that his sentence is inappropriate. With respect to the nature of the offenses, Powers slapped his girlfriend in the back of her head when she put on a hat given to her by another man. Then, Powers followed her to a second location, where he proceeded to hit her several times in the head. And, when Downey and Utterback attempted to intervene, Powers threatened them with a knife. As to his character, Powers has a criminal history that spans more than thirty years and includes at least two prior felony convictions and at least four misdemeanor convictions.[7] In addition, Powers has had his probation revoked twice. As such, we cannot say that Powers' sentence is inappropriate in light of the nature of the offenses and his character.

Conclusion

[28] In sum, the State presented sufficient evidence to support Powers' convictions for intimidation, as Level 5 felonies. In addition, the trial court did not abuse its discretion when it sentenced Powers, and Powers' sentence is not inappropriate. We therefore affirm Powers' convictions and sentence.

[29] Affirmed.

Pyle, J., and Tavitas, J., concur.

---

[7] The PSI indicates that Powers' criminal history includes nine prior convictions. However, some of the offenses occurred outside of Indiana, and the level of those offenses is unknown. *See* Appellant's App. Vol. 2 at 217.