MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Josey Robert Keesling,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 17, 2021

Court of Appeals Case No.
21A-CR-816

Appeal from the Bartholomew
Superior Court

The Honorable James D. Worton,
Judge

Trial Court Cause No.
03D01-2001-F3-16

Darden, Senior Judge.

Statement of the Case

[1] Josey Keesling appeals the sentence he received for his conviction of armed robbery. We affirm.

Issue

[2] Keesling presents one issue for our review, which we restate as: whether his sentence is inappropriate.

Facts and Procedural History

[3] Although the guilty plea transcript reveals little about the nature of Keesling's offense, a more detailed version exists in the probable cause affidavit, which was referred to in and attached to the pre-sentence investigation report and which Keesling cites in his appellate brief. *See* Appellant's App. Vol. 2, p. 32, III., A.; Appellant's Br. pp. 6-7.

[4] On December 28, 2019, Keesling and a female acquaintance were traveling in Keesling's father's car after "drinking and partying." Tr. Vol. II, p. 24. When they stopped at a gas station and Keesling exited the car and went inside, his acquaintance drove off in his father's car and left him stranded. Keesling then went across the street to another gas station where an employee, Mechelle Ritchison, was standing outside on her break. Keesling approached Ritchison from behind, grabbed her, and demanded the keys to her vehicle while threatening her with a knife. Ritchison fought back against Keesling's assault and suffered several cuts. The attack ended with Keesling grabbing Ritchison's

car keys from her pocket and fleeing in her vehicle. Ritchison was transported to the hospital for treatment, and one cut required stitches to close the wound.

[5] Having received a report of an armed robbery and auto theft, the police located Ritchison's vehicle on the interstate. When police attempted to stop the vehicle, Keesling fled with police in pursuit. Eventually, Keesling pulled over and surrendered. Officers found a bloody knife in Keesling's jacket.

[6] Based on this incident, the State charged Keesling with armed robbery, a Level 3 felony;[1] auto theft, a Level 5 felony;[2] and resisting law enforcement, a Level 6 felony.[3] Pursuant to a plea agreement, Keesling pleaded guilty to armed robbery, and the State dismissed the remaining two charges. The plea agreement left Keesling's sentence to the discretion of the trial court. Following a sentencing hearing, the court sentenced Keesling to fourteen years, all executed. Keesling now appeals his sentence.

Discussion and Decision

[7] In this appeal, Keesling challenges his sentence as inappropriate in light of the nature of the offense and his character.

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[1] Ind. Code § 35-42-5-1 (2017).

[2] Ind. Code § 35-43-4-2 (2019).

[3] Ind. Code § 35-44.1-3-1 (2019).

[8] Although a trial court may have acted within its lawful discretion in imposing a sentence, article 7, sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014). However, "we must and should exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires us to give 'due consideration' to that decision and because we understand and recognize the unique perspective a trial court brings to its sentencing decisions." *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). Such deference to the trial court's judgment should 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). Thus, the question under Appellate Rule 7(B) is not whether another sentence is *more* appropriate; rather, the question is whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). The defendant bears the burden of persuading the appellate court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[9] To assess whether a sentence is inappropriate, we look first to the statutory range established for the class of the offense. Here, Keesling was convicted of a Level 3 felony, for which the advisory sentence is nine years, with a minimum sentence of three years and a maximum sentence of sixteen years. Ind. Code § 35-50-2-5 (2014). The court sentenced Keesling to fourteen years—an aggravated but not maximum sentence.

[10] Next, we look to the nature of the offense. Having consumed alcohol and drugs, Keesling snuck up behind a woman, cut her several times with a knife, and then stole her car. He asserts this armed robbery is no more upsetting or harmful to the victim than any other, even though the victim here suffered several cuts, one of which required stitches. In the victim's statement, she indicated that her anxiety is "much worse" since Keesling attacked her and that due to the attack she was forced to change jobs, now earning $3 less per hour, because her family was suffering anxiety about the attack and "couldn't handle [her] working there anymore." Appellant's App. Vol. 2 Confidential, p. 32.

[11] Finally, we turn to the character of the offender. The trial court found four aggravating circumstances, three of which illustrate Keesling's character. The first is Keesling's criminal history, which the court determined is "a significant aggravator." Tr. Vol. II, p. 33. Even a minor criminal history is a poor reflection of a defendant's character. *Moss v. State*, 13 N.E.3d 440, 448 (Ind. Ct. App. 2014), *trans. denied*. Yet, Keesling's criminal history is far from minor.

[12] As a juvenile, Keesling committed resisting law enforcement, a Class A misdemeanor if committed by an adult, and possession of marijuana, a Class B misdemeanor if committed by an adult. With regard to these adjudications, he violated his probation and failed to complete counseling and the "Thinking for a Change" program.

[13] As an adult, Keesling has accumulated seven misdemeanor and four felony convictions including false informing, consumption of alcohol by a minor, public intoxication, resisting law enforcement, possession of marijuana, burglary, theft, escape, and auto theft. He also has Ohio convictions for assault, felony failure to comply with a police officer, and felony receiving stolen property. In addition, Keesling has violated his probation and home detention several times, has failed to appear, and, at the time of the preparation of the pre-sentence investigation report, had yet another pending charge.

[14] The second aggravator found by the court is Keesling's accrual of multiple petitions to revoke when he has been given the opportunity of serving terms of probation. Such probation violations, as well as his violations of home detention, show an overall pattern of noncompliance.

[15] The court found as a third aggravator the fact that Keesling has had several opportunities for treatment, both in and outside penal facilities, but has been unsuccessful. Keesling admits to a significant substance abuse history, which began in his teen years and includes alcohol, marijuana, cocaine, methamphetamine, inhalants, heroin, and LSD. He also states that he has

overdosed twice on heroin and was administered Narcan. Although Keesling claims that his criminal behavior is due to his substance abuse problem, this does not necessarily indicate his sentence is inappropriate and should be revised in favor of a more lenient sentence, especially given his record of squandered opportunities and pattern of noncompliance. *See Hape v. State*, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009) (trial court did not err in failing to consider defendant's substance abuse as mitigating factor, especially when defendant is aware of substance abuse problem but has not taken appropriate steps to treat it), *trans. denied*; *Bennett v. State*, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003) (holding that defendant's alcoholism could properly have been considered aggravating circumstance), *trans. denied*; *Iddings v. State*, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002) ("a history of substance abuse is sometimes found by trial courts to be an aggravator, not a mitigator"), *trans. denied*. Indeed, in his appellate brief, Keesling presents no additional information from that presented at sentencing concerning his substance abuse issue. Thus, in the absence of compelling evidence portraying his character in a positive light, the trial court's judgment should prevail.

[16] In an attempt to portray his character in a positive light, Keesling points out that, in addition to his present willingness to attend a treatment program, he pleaded to the most serious felony with which he was charged, and he read a letter of apology to the victim. However, the court already considered Keesling's plea to the highest felony and found it to be the sole mitigating factor. *See* Tr. Vol. II, p. 33. The finding of mitigating circumstances is within

the discretion of the trial court, and the court is not obligated to give the same weight to a proffered mitigating factor as does the defendant. *Page v. State*, 878 N.E.2d 404, 408 (Ind. Ct. App. 2007), *trans. denied*. The trial court found this factor to be mitigating, and Keesling presents no additional information that would cause this Court to override the decision of the trial court.

[17] Additionally, the trial court heard Keesling's letter of apology to the victim and did not find his remorse to be mitigating. Substantial deference must be given to a trial court's evaluation of remorse. *Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). Other than summarizing the contents of the letter in his appellate brief, Keesling presents no argument that would support a different result than that reached by the trial court.

Conclusion

[18] Based on the foregoing, we conclude that Keesling has failed to meet his burden of demonstrating that his sentence is inappropriate. Accordingly, we affirm.

[19] Affirmed.

Bradford, C.J., and Pyle, J., concur.