MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Tyler D. Helmond
Voyles Vaiana Lukemeyer Baldwin & Webb
Indianapolis, 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

Gustav Ryburn,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 16, 2024

Court of Appeals Case No. 22A-CR-2415

Appeal from the Knox Superior Court

The Honorable Gara Lee, Judge

Trial Court Cause No. 42D01-2104-FA-1

Memorandum Decision by Judge Kenworthy
Judges Bailey and Tavitas concur.

Kenworthy, Judge.

Case Summary

[1] Gustav Thomas Jeramiah Ryburn appeals his convictions for Class A felony burglary resulting in bodily injury[1] and Class A felony criminal deviate conduct[2] and accompanying eighty-year sentence. Ryburn raises several issues for our review, which we restate as:

> 1. Did the trial court erroneously deny Ryburn's Criminal Rule 4(C) motion for discharge?
>
> 2. Did the trial court err in admitting into evidence the victim's in-court identification of Ryburn?
>
> 3. Did the trial court err in admitting into evidence a portion of a detective's cross-examination testimony?
>
> 4. Did the trial court abuse its discretion when sentencing Ryburn?
>
> 5. Does Ryburn's sentence warrant revision under Indiana Appellate Rule 7(B)?

[2] We affirm.

---

[1] Ind. Code § 35-43-2-1(2) (1999).

[2] I.C. § 35-42-4-2(b) (1998).

Facts and Procedural History

[3] In the fall of 2008, B.S. was a twenty-one-year-old radiology student at Vincennes University. On the night of November 21, 2008, B.S. met up with a friend, Lindsey, and they went to a party. B.S. had a test the next morning, so she did not drink any alcoholic beverages and left the party after a short time. B.S. and Lindsey went back to B.S.' on-campus apartment. Before falling asleep, B.S. talked on the phone with her boyfriend for about an hour then briefly called her parents to wish them goodnight.

[4] Sometime during the night, an unidentified man sat on the edge of B.S.' bed and woke her up. Having never seen the man before, B.S. was scared and tried to reach for her cell phone. To avoid raising the man's suspicion, B.S. answered his questions about her hair color and what she was studying at university. Before temporarily departing B.S.' bedroom to use the restroom, the man told B.S. he had a gun and instructed her not to move—threatening to kill her if she did. B.S. complied.

[5] When the unidentified man returned from the restroom, he was no longer wearing pants. He knelt beside B.S.' bed and began masturbating. The man again threatened to kill B.S. if she disobeyed his commands. When B.S. refused to have sex with the man, he became angry and violent. The man began to punch and choke B.S. repeatedly. At one point, B.S. pleaded for the man to just kill her.

[6] Amid the brutality, the unidentified man forced B.S. to put his penis into her mouth. The man then made B.S. perform oral sex on him to the point he ejaculated into her mouth. Although the man told her to swallow the seminal material, B.S. spat the man's ejaculate onto her bedroom floor instead. The man continued to punch B.S. in her face, choke her, and knock her to the ground. B.S. thought the man was leaving her for dead.

[7] After redressing and preparing to leave, the man glanced back at B.S. and noticed she was still moving. He punched her again, said "die, bitch," and left. *Tr. Vol. 3* at 23. B.S. passed out. In total, the incident lasted around an hour.

[8] When she regained consciousness, B.S. was confused and tried to walk out of her room. B.S. made it to the apartment's kitchen, where she collapsed. Lindsey found B.S. soon after, dressed her, and took her to the hospital. There, hospital staff conducted a forensic examination and collected blood and DNA samples from B.S. The results were placed in a rape kit.

[9] The next day, police began to investigate the assault of B.S. While searching B.S.' apartment, police used an ultraviolet light to locate a small, damp spot "no bigger than the size of a quarter or half dollar," on the bedroom's carpet. *Id.* at 76. Because the spot glowed blue under the ultraviolent light, the crime scene investigator believed it might be a "source for biological material." *Id.* The investigator collected a sample of the material and submitted it to the Indiana State Police Laboratory for DNA testing. The testing revealed the

sample contained a sperm fraction and a non-sperm fraction. The sperm fraction originated from a single male source.

[10] After B.S. was released from the hospital, she provided a physical description of her attacker to police. Based on B.S.' description, law-enforcement officers created a composite sketch of the unidentified man. Police placed a poster containing the sketch "all over the university campus, different places of town, the police department . . . wherever [they] could put it, social media." *Tr. Vol. 4* at 12. Over the next couple months, police continued to investigate and collected DNA samples from about fifty to sixty individuals they thought could have been connected to the assault. None of the collected samples matched the DNA sample taken from B.S.' floor.

[11] In February 2009, Jedidiah Ryburn—Ryburn's brother—went to the Vincennes University Police Department. Jedidiah stated he had seen someone on campus who matched the sketch of B.S.' attacker. Based on Jedidiah's statement and because he had a "different act and demeanor about him," Detective Steve Chesser decided to interview him. *Id.* at 13. During the interview, Jedidiah acted strangely and refused to take off the sunglasses he was wearing. Jedidiah became more nervous and defensive as the interview progressed. Detective Chesser asked Jedidiah to provide a DNA sample. Jedidiah refused. He then told Detective Chesser he would provide a DNA sample later if the detective "close[d] . . . in on some leads." *Id.* at 14. Jedidiah then abruptly left.

[12] Detective Chesser conducted surveillance on Jedidiah as he walked away from the police station. Another law-enforcement officer stopped Jedidiah. Detective Chesser watched as Jedidiah dropped a cigarette he had been smoking. Jedidiah, however, noticed the law-enforcement officer look down at the cigarette. So Jedidiah picked up the cigarette and later disposed of it in a nearby dumpster. Having seen Jedidiah place the cigarette in the dumpster, Detective Chesser went and collected it. The retrieved cigarette butt was sent to the Indiana State Police Laboratory to determine whether it contained DNA matching the sample collected from B.S.' floor.

[13] Maranda Michael—a DNA analyst with the Indiana State Police Laboratory—analyzed the cigarette butt. Although Michael considered the cigarette butt a "poor sample," there was enough DNA information on it for her to determine the DNA was "not consistent" with the sample collected from B.S.' floor. *Tr. Vol. 3* at 161. Michael's testing excluded Jedidiah as the source for the DNA sample found on B.S.' floor.

[14] The case then went "cold."

[15] By October 2018, Detective Stacy Reese had taken over as lead investigator of B.S.' case. Around that time, Detective Reese contacted Parabon NanoLabs, a company that provides DNA services for law enforcement agencies. Based on DNA evidence police had previously collected, and information provided by Parabon, the suspect pool was limited to Ryburn and Jedidiah. With this information in mind, police contacted two half-brothers of Ryburn and

Jedidiah. Police collected DNA samples from each half-brother. Analysis of these DNA samples indicated—with "over 90 percent" certainty—they were taken from a relative of the source of the DNA collected from B.S.' floor. *Tr. Vol. 4* at 53.

[16] Police then obtained a warrant for Ryburn's arrest. After Ryburn was arrested in Florida and returned to Indiana, police obtained a warrant to take a buccal swab of Ryburn's DNA. Ryburn's DNA sample was sent to the Indiana State Police Laboratory and analyzed by Michael. Michael's analysis determined the DNA sample collected from B.S.' bedroom floor was "56 octillion times more likely" to have originated from Ryburn than an unknown, unrelated individual and "7.5 billion times more likely that Gustav Ryburn would be the contributor than an untested sibling." *Tr. Vol. 3* at 143, 165.

[17] On April 23, 2021, the State charged Ryburn with two counts of Class A felony rape, Class A felony burglary, Class A felony battery, and Class D felony strangulation. On May 16, 2021, Ryburn was returned to Indiana to face his pending charges. At Ryburn's initial hearing, the trial court set Ryburn's trial date for September 14, 2021, and issued a discovery order requiring the parties to disclose several items of evidence to each other within thirty days. The State filed its first answer to the trial court's discovery order on June 21, 2021. And on August 13, 2021, the State filed a supplemental discovery response.

[18] Ryburn filed his first motion to continue on September 3, 2021—eleven days before his trial was set to begin. In his motion, Ryburn conveyed the "[p]arties

agreed the case was not ready for trial as the State still had substantial DNA evidence that had not yet been disclosed." *Appellant's App. Vol. 2* at 79. The trial court granted Ryburn's motion and reset his trial for May 23, 2022.

[19] During a May 9, 2022, pretrial conference, the parties discussed Ryburn's motion in limine asking the trial court to "prohibit the State of Indiana from presenting any evidence not disclosed, discovered, and tendered to [Ryburn] as of May 9, 2022; or, in the alternative, to create a discovery cut-off date for the State of Indiana's evidentiary disclosures." *Id.* at 92. Ryburn noted several pieces of DNA evidence he had not yet received. Ryburn and the State agreed the State would turn over the evidence by May 13, 2022.

[20] Over the next couple of days, the State filed multiple supplemental discovery responses. On May 13, 2022, Ryburn again moved to continue his jury trial. Ryburn asserted he "require[d] additional time to review [the disclosed] evidence prior to the trial." *Id.* at 103. In his motion, Ryburn also argued delay caused by his continuance request should "be counted against the State for purposes of Indiana Rules of Criminal Procedure 4." *Id.* The trial court set a hearing on Ryburn's continuance request.

[21] At the hearing, Ryburn confirmed receipt of the requested evidence, but noted that because of the "voluminous nature" of the evidence he would need more time to adequately review it. *Tr. Vol. 2* at 34. And according to Ryburn, the State's late discovery could raise a Criminal Rule 4(C) issue. In response, the State argued it had complied with the trial court's May 13 discovery deadline

and any additional time Ryburn needed to review the evidence should be attributed to him for Criminal Rule 4 purposes. When given the choice between proceeding to trial as scheduled and preventing the State from using any of the recently turned over items or continuing the trial and attributing the delay to Ryburn, Ryburn chose the extra time. The trial court granted Ryburn's motion and reset his trial for August 16, 2022.

[22] On August 9, 2022, the State moved to amend its charging information. The amended information replaced Ryburn's previous charges with one count of Class A felony burglary resulting in bodily injury and one count of Class A felony criminal deviate conduct. The trial court granted the State's request the same day it was filed.

[23] On August 12, 2022, Ryburn filed a motion for discharge under Indiana Criminal Rule 4(C). He also sought sanctions against the State for what he perceived to be discovery violations. The trial court denied both motions on August 16, 2022, and Ryburn proceeded to trial that day. Following his four-day jury trial, Ryburn was found guilty as charged. The trial court sentenced Ryburn to an aggregate term of eighty years imprisonment—two consecutive forty-year terms. Additional facts are provided when necessary.

1. Ryburn Is Not Entitled to Discharge Under Indiana Criminal Rule 4(C)

[24] Ryburn first seeks relief under Indiana Criminal Rule 4(C)—the "one-year rule." Generally, we review a trial court's ruling on a motion for discharge

under Criminal Rule 4(C) for an abuse of discretion. *Battering v. State*, 150 N.E.3d 597, 600 (Ind. 2020). When the relevant facts are undisputed and the issue is a question of law, however, we review a Criminal Rule 4(C) motion for discharge *de novo*. *Id.*

[25] In relevant part, Criminal Rule 4(C) provides:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar[.][3]

[26] Both the United States and Indiana Constitutions guarantee a criminal defendant the right to a speedy trial. U.S. Const. amend. VI; Ind. Const. art. 1, § 12. And Criminal Rule 4(C) helps protect this right by placing an affirmative duty on the State to bring a defendant to trial within one year from the later of two dates: (1) the filing of charges or (2) the arrest. Ind. Crim. R. 4(C). But Criminal Rule 4(C) is "not intended to be a mechanism for providing defendants a technical means to escape prosecution." *Austin v. State*, 997 N.E.2d 1027, 1037 (Ind. 2013).

---

[3] Criminal Rule 4 was amended effective January 1, 2024. But for purposes of this case, we use the version in effect when Ryburn was tried in August 2022. Regardless, the operative language of the rule has not substantively changed. *Compare* Ind. Crim. R. 4(C) (1987), *with* Ind. Crim. R. 4(C) & 4.1 (2024).

[27] Criminal Rule 4(C) recognizes that some delays are inevitable and allows the one-year period to be extended in certain circumstances based on the actions of either the State, the defendant, or the trial court. *Battering*, 150 N.E.3d at 598; *see* C.R. 4(C) & (F) (1987) (specifying delays caused by the defendant, emergency, or court congestion extend the one-year timeline). For example, a criminal defendant extends the one-year period "by seeking or acquiescing in delay resulting in a later trial date." *Battering*, 150 N.E.3d at 601 (quoting *Pelley v. State*, 901 N.E.2d 494, 498 (Ind. 2009)).

[28] Additionally, if, during the one-year period, the trial court sets a trial date that is beyond the one-year period, "and the defendant is or should be aware that the setting is beyond that period, it is his obligation to object at the earliest opportunity so that the court can reset the trial for a date within the proper period." *State v. Myers*, 101 N.E.3d 259, 262 (Ind. Ct. App. 2018) (quoting *State v. Delph*, 875 N.E.2d 416, 420 (Ind. Ct. App. 2007), *trans. denied*). "If the defendant sits idly by and does not object to the trial date, he will be deemed to have acquiesced to the date." *Id*; *see also Battering*, 150 N.E.3d at 601 (stating a criminal defendant "generally waives rights under Rule 4(C) by failing to offer a timely objection to trial dates set outside the one-year limitation").

[29] Turning to this case, Ryburn and the State do not dispute the underlying timeline. The following table outlines the dates and events relevant to our analysis:

Date	Event
April 23, 2021	State charges Ryburn.
May 16, 2021	Ryburn is returned to Indiana.
May 20, 2021	Initial Hearing conducted; jury trial set for September 14, 2021.
September 3, 2021	Ryburn files a motion to continue.
September 3, 2021	Trial court grants Ryburn's motion to continue; jury trial reset for May 23, 2022.
May 13, 2022	Ryburn files a motion to continue.
May 13, 2022	Trial court sets hearing on Ryburn's motion to continue.
May 16, 2022	Trial court grants Ryburn's motion to continue; jury trial reset for August 16, 2022.
August 12, 2022	Ryburn files a motion to dismiss and discharge under Indiana Criminal Rule 4(C).

August 16, 2022	Trial court denies Ryburn's motion to dismiss and discharge.
August 16, 2022	Ryburn's jury trial begins
August 19, 2022	Ryburn's jury trial concludes; jury finds Ryburn guilty as charged.

[30] The Criminal Rule 4(C) period began to run on May 16, 2021, the date Ryburn was returned to Indiana. *See Griffith v. State*, 59 N.E.3d 947, 954 (Ind. 2016) (explaining an arrest occurs once a defendant is returned to Indiana's "jurisdiction and exclusive control") (quoting *Sweeney v. State*, 704 N.E.2d 86, 100 n.27 (Ind. 1998), *cert. denied*). Thus, without any delay attributable to Ryburn, court congestion, or emergency, the State was required to bring Ryburn to trial by May 16, 2022.

[31] Ryburn and the State agree that 110 days count toward the Criminal Rule 4(C) period: the time between May 16, 2021, and September 3, 2021. Beyond this period, however, the State contends the remaining 343 days—the time between September 3, 2021, and August 12, 2022—is attributable to Ryburn. According to the State, Ryburn extended the one-year period by causing the delays—*i.e.*, filing two continuances—and by acquiescing to a trial date set beyond the one-year timeline. Ryburn counters, arguing the State's delay in providing discovery caused him to twice move to continue his trial. Thus, Ryburn

contends the delays should not be attributable to him. In essence, Ryburn argues the "discovery exception" should apply.

[32] The "discovery exception" provides that "[w]hen a trial court grants a defendant's motion for continuance because of the State's failure to comply with the defendant's discovery requests, the resulting delay is not chargeable to the defendant." *Carr v. State*, 934 N.E.2d 1096, 1101 (Ind. 2010). This exception seeks to avoid putting criminal defendants in the "untenable situation" in which they "must either go to trial unprepared due to the State's failure to respond to discovery requests or be prepared to waive their rights to a speedy trial[.]" *Wellman v. State*, 210 N.E.3d 811, 815 (Ind. Ct. App. 2023) (quoting *Biggs v. State*, 546 N.E.2d 1271, 1275 (Ind. Ct. App. 1989)). Cases applying the discovery exception often involve the State's "blatant and well-documented" failure to respond to discovery requests. *Cole v. State*, 780 N.E.2d 394, 397 (Ind. Ct. App. 2002), *trans. denied*; *see, e.g., Wellman*, 210 N.E.3d at 815 (noting although the defendant requested "labs" or "lab results" at least five times, State failed to provide the results until after the expiration of one-year period); *Biggs*, 546 N.E.2d at 1275 (noting after State had not complied with discovery requests, trial court removed case from docket until discovery was complete); *Marshall v. State*, 759 N.E.2d 665, 670 (Ind. Ct. App. 2001) (noting CCS entries and pleadings "consistently attribute . . . delays to the State's failure to provide discovery").

[33] We begin by addressing the delay caused by Ryburn's first motion to continue. Before Ryburn filed his first motion to continue on September 3, 2021, the

parties were operating under the trial court's May 20, 2021, discovery order. Pursuant to this order, the parties were to provide certain information to each other within thirty days. The State filed its answer to discovery on June 21, 2021, and supplemented its answer in mid-August. When Ryburn moved to continue his September trial date, he explained, the "[p]arties agreed the case was not ready for trial as the State still had substantial DNA evidence that had not yet been disclosed." *Appellant's App. Vol. 2* at 79. The trial court granted Ryburn's motion to continue the same day it was filed and reset Ryburn's trial date for May 23, 2022—seven days beyond the one-year period. Ryburn did not object.

[34] Here, Ryburn was not put in the "untenable situation" the "discovery exception" is designed to assuage. *See Wellman,* 210 N.E.3d at 815. Rather, as Ryburn's first motion to continue conveys, neither *he* nor the State were prepared for the upcoming trial date. *See Appellant's App. Vol. 2* at 79. Further, the facts here do not resemble the "blatant and well-documented" failure to respond to discovery requests seen in other cases where this Court applied the "discovery exception." *See, e.g.*, *Biggs*, 546 N.E.2d at 1275. Accordingly, we adhere to the general rule that a defendant extends the one-year period "by seeking or acquiescing in delay resulting in a later trial date." *Battering*, 150 N.E.3d at 601 (quotation omitted); C.R. 4(F) ("When a continuance is had on motion of the defendant, or delay in trial is caused by his act, any time limitation contained in [Criminal Rule 4] shall be extended by the amount of the resulting period of such delay caused thereby."). Therefore, the delay of

more than two hundred days caused by Ryburn's first motion to continue is attributable to him. As a result, Ryburn was brought to trial well within the period allowable under Criminal Rule 4(C) and was not entitled to discharge.[4]

[35] Moreover, Ryburn acquiesced to a trial date set beyond the one-year period; thereby waiving his rights under Criminal Rule 4(C). *See Battering*, 150 N.E.3d at 601 (noting that failing to offer a timely objection to trial dates set outside the one-year limitation results in waiver of Criminal Rule 4(C) rights). Said another way, Ryburn was or should have been aware the trial court set his trial date beyond the expiration of the one-year period following its September 3, 2021, order granting his request for a continuance. Rather than objecting at the earliest opportunity so that the trial court could reset the trial for a date within the proper period, Ryburn sat idly by. Ryburn concedes as much. *See Appellant's Br.* at 18–19 ("[I]t was possible for the trial court to schedule a trial date within Rule 4(c) and Ryburn did not object[.]"); *see also Appellant's Reply Br.* at 5–6 (conceding acquiescence). He therefore acquiesced to the later date and waived his Criminal Rule 4(C) rights. *See Myers*, 101 N.E.3d at 262.

[4] Because we hold the delay caused by Ryburn's first motion to continue extended the one-year period, even if we were to apply the "discovery exception" and count the time between Ryburn's second motion for a continuance and the filing of his motion for discharge, Ryburn was still brought to trial within the one-year period of Criminal Rule 4(C).

2. Ryburn Waived His Challenge to B.S.' In-Court Identification

[36] Next, Ryburn contends the trial court abused its discretion by admitting into evidence B.S.' in-court identification of him. He claims B.S.' identification testimony was tainted by an unduly suggestive pretrial process, and admitting the testimony violated his due process rights. The State counters, arguing Ryburn waived his claim on appeal because he failed to timely object at trial.

[37] Before addressing the merits of Ryburn's claim, we must first determine whether he properly preserved the alleged error at the trial level. *See Durden v. State*, 99 N.E.3d 645, 651 (Ind. 2018). "To preserve a claim for review, counsel must object to the trial court's ruling and state the reasons for that objection." *Id.*; Ind. Evidence Rule 103(a)(1) (preventing a claim of trial error in admitting evidence from being presented on appeal unless there is a timely trial objection stating the specific ground for the objection—unless the ground was apparent from the context). This procedure not only gives the trial court an opportunity to cure the alleged error, but also can result in "enormous savings in time, effort and expense to the parties and the court[.]" *Durden*, 99 N.E.3d at 651 (quoting *State v. Daniels*, 680 N.E.2d 829, 835 (Ind. 1997)). At bottom, a party's failure to object to an alleged error at trial results in waiver. *Id.*

[38] While testifying, B.S. identified Ryburn three times. B.S. first identified Ryburn in response to a question about what woke her up during the night of November 21, 2008: B.S. pointed at Ryburn and stated, "It was him." *Tr. Vol. 3* at 14. Ryburn did not object. Instead, Ryburn himself—not his counsel—

clarified: "For purpose of the record, Your Honor, she pointed to me." *Id.* After some follow-up questions, it was determined that B.S. had identified Ryburn as the man who woke her up.

[39] Later during her testimony, B.S. was shown pictures depicting the condition of her face following the incident. Police had taken the photos while B.S. was receiving care at the hospital. The prosecutor inquired: "How did your face get like that?" *Id.* at 27. Like before, B.S. explained, "[f]rom him," referring to Ryburn. *Id.* Again, Ryburn did not object.

[40] B.S.' third identification of Ryburn came near the conclusion of her testimony on direct examination. The prosecutor asked B.S. his final question: "Today when you walked in and saw [Ryburn] did you have any doubt that man that you identified was the man who did this to you that night?" *Id.* at 30. Ryburn objected before B.S. could answer, claiming the question was "asked and answered as well as highly prejudicial." *Id.* at 31. The trial court overruled Ryburn's objection. B.S. answered, "It's him." *Id.* at 33.

[41] At trial, B.S. twice identified Ryburn as her assailant without any objection. By failing to object until B.S.' third in-court identification, Ryburn failed to preserve the alleged error for appellate review. *See Durden*, 99 N.E.3d at 651. Furthermore, the bases of Ryburn's trial objections—"asked and answered as well as highly prejudicial"—are not the same grounds upon which he now seeks relief on appeal. *Tr. Vol. 3* at 31. Rather, on appeal, Ryburn claims admitting the testimony violated his due process rights. He made no such claim at trial

and has thus waived any consideration of it on appeal. *See Durden*, 99 N.E.3d at 651; *see also* Evid. R. 103(a)(1).[5]

3. No Error in Admitting Detective Reese's Cross-Examination Testimony

[42] Ryburn next argues the trial court erred in admitting into evidence Detective Reese's cross-examination testimony about her decision process for determining whether to pursue additional suspects based on the laboratory analysis of Ryburn's DNA sample collected from B.S.' apartment. According to Ryburn, the trial court admitted the testimony in violation of Indiana Evidence Rules 704(b) and 403. We review a trial court's admission of evidence for abuse of discretion, reversing only if the trial court's ruling was "clearly against the logic and effect of the facts and circumstances before it and errors affect a party's substantial rights." *Hall v. State*, 177 N.E.3d 1183, 1193 (Ind. 2021).

---

[5] A claim waived by a defendant's failure to raise a contemporaneous objection can be reviewed on appeal if the reviewing court determines that fundamental error occurred. *See, e.g., Trice v. State,* 766 N.E.2d 1180, 1182 (Ind. 2002). But on appeal, Ryburn provides no argument that his unpreserved claim of error amounted to fundamental error, thereby waiving appellate review of that claim. *See Isom v. State*, 170 N.E.3d 623, 645 (Ind. 2021) (citing Ind. Appellate Rule 46(A)(8)(a)) (concluding that failure to raise argument on appeal resulted in waiver). Waiver aside, we discern no fundamental error. The "fundamental error" exception to waiver is "extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). Put another way, fundamental error exists when the "alleged errors are so prejudicial to the defendant's rights as to 'make a fair trial impossible.'" *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014) (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)). Even if we were to agree with Ryburn that admitting B.S.' identification testimony was error, such error was not so prejudicial as to make a fair trial impossible. Ryburn cross-examined B.S. about her identification testimony and the jury was entitled to determine her credibility. In short, Ryburn has not shown a clear and blatant violation of a basic principle of due process. Therefore, there was no fundamental error.

[43] Under Indiana's evidence rules, a witness may testify to their opinion of the facts and circumstances if the opinion is "(a) rationally based on the witness's perception; and (b) helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue." Evid. R. 701. Even an opinion that "embraces an ultimate issue" is admissible. Evid. R. 704(a).

[44] Evidence Rule 704(b), however, "draws a bright-line exception." *Williams v. State*, 43 N.E.3d 578, 581 (Ind. 2015). Under this Rule, a witness "may not testify to opinions concerning intent, guilt, or innocence in a criminal case[.]" Evid. R. 704(b). "The jury, not the witness, is responsible for deciding the ultimate issues in a trial, and opinion testimony concerning guilt 'invades the province of the jury in determining what weight to place on a witness' testimony.'" *Williams*, 43 N.E.3d at 581 (quoting *Blanchard v. State*, 802 N.E.2d 14, 34 (Ind. Ct. App. 2004)). Said another way, such opinion testimony is inadmissible because it "usurps the jury's 'right to determine the law and the facts.'" *Id.* (quoting Ind. Const. art. 1, § 19).

[45] Thus, even in criminal cases, opinion testimony may include "evidence that *leads* to an [incriminating] inference, even if no witness could state [an] opinion with respect to that inference." *Id.* (quoting *Steinberg v. State*, 941 N.E.2d 515, 526 (Ind. Ct. App. 2011), *trans. denied*). "But an opinion must stop short of the question of guilt—because under Rule 704(b) and our constitution, that is one 'ultimate issue' that the jury alone must resolve." *Id.*

[46] Ryburn called Detective Reese as a witness and asked her several questions about why police did not obtain a DNA sample from Jedidiah besides the one collected from his disposed cigarette butt. During cross-examination, the State asked Detective Reese about how she continued to investigate the case after obtaining a sample of Ryburn's DNA. Ryburn's alleged evidentiary error relates to Detective Reese's affirmative response to the following question during her cross-examination testimony:

> Q: Okay. You followed leads that developed this [DNA] profile and led to the arrest of [Ryburn], and then you served a search warrant on him, got his DNA. You caused that sample of his DNA to be tested, and the lab tells you that that DNA was the DNA that [B.S.] spit on her carpet during her sexual assault, correct?
>
> A. Correct.

Tr. Vol. 4 at 65–66. According to Ryburn, Detective Reese's affirmative response constitutes inadmissible evidence under Evidence Rule 704(b) because it is an opinion concerning Ryburn's guilt. We disagree.

[47] By affirming the lab results revealed the DNA sample collected from B.S.' bedroom floor matched the sample given by Ryburn, Detective Reese did not embrace the ultimate question of Ryburn's guilt. Rather, Detective Reese's testimony is more like an opinion of identity. And although an opinion of identity may imply or lead to an inference of guilt, it does not embrace the ultimate question of guilt because it does not reach every element of the charged offense. *See Williams*, 43 N.E.3d at 582. The State was still required to prove

the other elements of Ryburn's offenses beyond a reasonable doubt for the jury to find guilt. The testimony did not usurp the role of the jury and was not admitted in violation of Evidence Rule 704(b).

[48] Ryburn claims, even if Detective Reese's cross-examination testimony were admissible under Evidence Rule 704(b), it should have been excluded under Evidence Rule 403. In essence, Ryburn argues the probative value of Detective Reese's testimony was substantially outweighed by a danger of misleading the jury. The trial court may exclude relevant evidence if its "probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury[.]" Evid. R. 403. A trial court has wide discretion on issues of relevance and unfair prejudice. *Snow v. State*, 77 N.E.3d 173, 176 (Ind. 2017). And a reviewing court considers the totality of the circumstances and views conflicting evidence in the light most favorable to the trial court's ruling. *Id.*

[49] Ryburn argues that the challenged portion of Detective Reese's testimony mischaracterized the evidence—thereby misleading the jury—because it insinuates the DNA sample taken from B.S.' bedroom floor "matched" Ryburn's DNA. From Ryburn's point-of-view, Detective Reese could not convey that it was "'correct' that the lab said it was [Ryburn's] DNA" because Michael testified only about the high probability of a match. *Appellant's Br.* at 27. According to Michael's analysis, the DNA sample collected from B.S.' floor was "56 octillion times more likely" to have originated from Ryburn than an unknown, unrelated individual and "7.5 billion times more likely that

Gustav Ryburn would be the contributor than an untested sibling." *Tr. Vol. 3* at 143, 165.

[50] Detective Reese testified to—and the question elicited—her process and decision making during the investigation. The mention of the results of the DNA test had minimal risk of confusing the jury. And because such risk did not substantially outweigh the testimony's probative value, we cannot say the trial court abused its discretion in admitting Detective Reese's affirmative response into evidence.[6]

4. The Trial Court Did Not Abuse Its Discretion When Sentencing Ryburn

[51] Next, Ryburn argues the trial court abused its discretion when sentencing him because it failed to find Ryburn's lack of criminal history as a mitigating factor. Sentencing decisions lie within the sound discretion of the trial court and we review such decisions only for an abuse of discretion. *Owen v. State*, 210 N.E.3d 256, 269 (Ind. 2023); *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005) ("The

[6] Even if it was error to admit a portion of Detective Reese's testimony, such error would be harmless. For the erroneous admission of evidence to constitute reversible error, it must impact the substantial rights of a party. *Hall*, 177 N.E.3d at 1193. Generally, the improper admission of evidence is harmless if a conviction is supported by "substantial independent evidence of guilt satisfying the reviewing court there is no substantial likelihood the challenged evidence contributed to the conviction." *Hoglund v. Sate*, 962 N.E.2d 1230, 1238 (Ind. 2012). Here, as explained above, Michael testified the DNA sample collected from B.S.' bedroom was "56 octillion times more likely" to have originated from Ryburn than an unknown, unrelated individual and "7.5 billion times more likely that Gustav Ryburn would be the contributor than an untested sibling." *Tr. Vol. 3* at 143, 165. Further, B.S. unequivocally identified Ryburn as her attacker on three separate occasions during her testimony. Given the substantial independent evidence of Ryburn's guilt, we are satisfied that there is no substantial likelihood the challenged portion of Detective Reese's testimony contributed to Ryburn's convictions.

finding of mitigating factors is within the discretion of the trial court."). A trial court abuses its discretion when its 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." *Owen,* 210 N.E.3d at 269 (quoting *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007)).

[52] There are several ways a trial court may abuse its discretion, including: failing to enter a sentencing statement; providing reasons not supported by the record or improper as a matter of law; or "omit[ting] reasons that are clearly supported by the record and advanced for consideration." *Anglemyer*, 868 N.E.2d at 491. But a trial court does not have "any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence[.]" *Id.* So a trial court cannot abuse its discretion in failing to "properly weigh" aggravating and mitigating factors. *Id.* (noting such review of the merits of a sentence may only be done based on Appellate Rule 7(B)).

[53] "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Id.* at 493. If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, however, the trial court need not explain why it has determined that factor does not exist. *Id.* And the trial court is "not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance." *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000).

[54] During Ryburn's sentencing hearing, the trial court found two aggravating factors: "the harm[,] injury, loss, or damage suffered by the victim was significant and greater than the elements necessary to prove commission of the offenses" and "[Ryburn] threatened to harm the victim of the offense if she told anyone about the offense."[7] *Tr. Vol. 5* at 157–58.

[55] When discussing Ryburn's criminal history, the trial court explained:

> I'm going to find that it's neither an aggravating nor a mitigating factor. There was some slight evidence of criminal activity. There were no prior convictions, and so I'm going to find that it basically evens out there, I'm not going to find either a mitigating or aggravating factor with regards to criminal activity.

Id. at 158.

[56] We read the trial court's statement to encompass consideration of Ryburn's criminal history as a potential mitigating factor. Said another way, the trial court considered the mitigating factor argued by Ryburn at sentencing and decided it did not mitigate his offense. The trial court was not obligated to accept Ryburn's contention that his criminal history mitigated his offense. *See Rascoe*, 736 N.E.2d at 249. And upon making this determination, the trial court

---

[7] A single aggravating factor may support the imposition of a consecutive and/or enhanced sentence. *See Mathews*, 849 N.E.2d at 589. The imposition of consecutive sentences is "a separate and discrete decision from sentence enhancement," although both can be dependent on the same aggravating factor. *Id.* Thus, each one of the properly identified aggravating factors alone would be sufficient to impose Ryburn's enhanced, consecutive sentences.

was not required to explain why it determined the proffered mitigator did not exist. *See Anglemyer*, 868 N.E.2d at 493.

[57] On appeal, Ryburn has the burden of showing that the trial court failed to identify a mitigating factor that is "both significant and clearly supported by the record." *Id.* Prior to this case, Ryburn did not have any criminal convictions. He did, however, have multiple arrests, including one for an alleged sexual assault. Therefore, we cannot say Ryburn's criminal history was a "significant" mitigating factor such that the trial court erred by failing to find it as one.[8]

5. Ryburn's Sentence Does Not Warrant 7(B) Revision

[58] Lastly, Ryburn asks us to review and revise his sentence.[9] The Indiana Constitution authorizes this Court to review and revise a trial court's sentencing decision as provided by rule. Ind. Const. art. 7, § 6. Indiana Appellate Rule 7(B) provides we may 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

---

[8] Even if the trial court erred by failing to find Ryburn's criminal history as a mitigating factor, such error would not require remand. "[R]emand for resentencing may be the appropriate remedy if [an appellate court] cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Anglemyer*, 868 N.E.2d at 491 (emphasis omitted). Here, the trial court properly found two aggravating factors, each of which alone would be sufficient to impose a consecutive and/or aggravated sentence. *See Mathews*, 849 N.E.2d at 589. Because we can say with confidence the trial court would have imposed the same sentence even if it had considered Ryburn's criminal history as a mitigating factor, remand would be unnecessary. *See Anglemyer*, 868 N.E.2d at 491.

[9] The trial court sentenced Ryburn to forty years for Class A felony burglary resulting in bodily injury and an additional forty years for Class A felony criminal deviate conduct. *See* I.C. § 35-50-2-4 (2005) (providing for a sentence of twenty to fifty years for a Class A felony, with a thirty-year advisory sentence).

offender." The principal role of appellate review is to leaven the outliers, not to achieve a perceived correct sentence in each case. *Conley v. State*, 183 N.E.3d 276, 288 (Ind. 2022). Thus, "we reserve our 7(B) authority for exceptional cases." *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019) (per curiam).

[59] "[S]entencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). "Such deference 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). The question "is not whether another sentence is more appropriate; rather, the question is whether the sentence imposed is inappropriate." *Helsley v. State*, 43 N.E.3d 225, 228 (Ind. 2015) (quoting *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008)) (emphasis omitted). Whether we regard a sentence as inappropriate "turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad 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 a revised sentence is warranted. *Harris v. State*, 165 N.E.3d 91, 99 (Ind. 2021).

[60] Beginning with the nature of Ryburn's offense, we note Ryburn's conduct resulted in significant harm to B.S. Markedly brutal, devoid of restraint, and lacking in regard for B.S., Ryburn's offense was nothing short of egregious.

After breaking into B.S.' apartment, Ryburn punched and choked B.S. several times and with enough force she eventually lost consciousness. When B.S. refused to have sex with Ryburn, he repeatedly threatened to kill her and forced her to perform oral sex on him. Eventually, Ryburn left B.S. for dead. The nature of Ryburn's offense weighs heavily against 7(B) revision.

[61] Ryburn also contends his sentence is inappropriate in light of his character. When analyzing the character of the offender, we consider several of the defendant's qualities, like the defendant's age, criminal history, background, past rehabilitative efforts, and remorse. *Pritcher v. State*, 208 N.E.3d 656, 668 (Ind. Ct. App. 2023). Ryburn directs us to his military service, his lack of criminal history, and his young age—nineteen years old—at the time of his offense to support his argument for revision. Although Ryburn did not have a history of criminal convictions before this case, he did have several interactions with police that reflect poorly on his character—including an alleged sexual assault. *See Chastain v. State*, 165 N.E.3d 589, 599 (Ind. Ct. App. 2021) (stating "allegations of prior criminal activity may be considered during sentencing even if the defendant has not been convicted of an offense related to the activity"), *trans. denied*. Even Ryburn's minor criminal history reflects poorly on his character. *See Pritcher*, 208 N.E.3d at 668. The trial court's judgment in sentencing is entitled to considerable deference and Ryburn has not presented compelling evidence of substantial virtuous traits or persistent examples of his good character that would warrant overriding such deference.

[62] In sum, Ryburn's eighty-year-aggregate sentence is not inappropriate in light of the nature of his offense and his character.

Conclusion

[63] Ryburn is not entitled to discharge under Criminal Rule 4(C). Further, Ryburn waived his evidentiary argument regarding B.S.' in-court identification of him and the trial court did not err in admitting into evidence the challenged portion of Detective Reese's cross-examination testimony. The trial court also did not abuse its discretion when sentencing Ryburn and Ryburn's eighty-year-aggregate sentence does not warrant 7(B) revision.

[64] Affirmed.

Bailey, J., and Tavitas, J., concur.