MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Josue Honorato Escalera,
Appellant-The defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 10, 2024

Court of Appeals Case No. 23A-CR-816

Appeal from the Tippecanoe Superior Court

The Honorable Randy J. Williams, Judge

Trial Court Cause No. 79D01-2007-F2-31

Memorandum Decision by Judge Weissmann
Chief Judge Altice and Judge Kenworthy concur.

Weissmann, Judge.

[1] Josue Escalera, in an apparent manic episode, broke into 82-year-old Ruth Cornell's home, threatened her with what looked like a large knife, and forced her to go across the street with him to his parents' house. For this, Escalera was convicted of burglary while armed with a deadly weapon and criminal trespass, among other crimes. He was also found to be a habitual offender. For all of these offenses, the trial court sentenced him to an aggregate sentence of 31 years with 1 year suspended.

[2] Escalera makes three arguments on appeal. First, he attacks the sufficiency of the evidence to support his convictions. Second, he alleges that police improperly obtained incriminating statements from him after his arrest. And third, he contends his sentence is inappropriate under Indiana Appellate Rule 7(B). Finding the State presented insufficient evidence to convict Escalera of criminal trespass, we reverse that conviction. But we affirm on all remaining grounds.

Facts

[3] Cornell was sitting in her living room watching television when Escalera drove up and parked his vehicle in her front yard. Escalera quickly barged into Cornell's home and, appearing disoriented, began to shout at and threaten the elderly woman. Escalera repeatedly waved in a figure-eight pattern something that appeared to be a machete or large knife. After some time of this, Escalera

threatened to harm Cornell if she did not go with him across the street to his parents' home.

[4] Crossing the street to his parents' house, Escalera immediately began screaming at his mother and father. Meanwhile Cornell went to the garage and sat with Escalera's brother, who called the police. Officers with the Tippecanoe County Sheriff's Department were dispatched to the scene, and while en route, they were informed that Escalera was marked as "trespassed" from the property after being removed by police the week before.

[5] When Deputy Mack Carter arrived with several other officers, he found Escalera standing in the middle of the driveway while his brother and father stood off to the side, respectively holding a large stick and a shovel. Deputy Carter identified himself as a police officer and observed Escalera aggressively pace around with his fists balled up. Escalera quickly began screaming and yelling, telling the police to leave and that they were the ones trespassing.

[6] Deputy Carter instructed Escalera to get on the ground, but Escalera ignored him. Several officers attempted to detain Escalera, but he walked away. The officers followed Escalera and repeatedly ordered him to the ground. After multiple refusals, the officers moved to put Escalera in handcuffs. But when he pulled away, Deputy Carter used his taser and then detained Escalera.

[7] Paramedics arrived on scene and assessed Escalera. When Escalera repeatedly made statements attempting to explain his actions to the medics, Deputy Carter informed Escalera of his *Miranda* rights. Escalera did not acknowledge the

advisement and continued to speak. When the paramedics finished their preliminary assessment, Escalera now stated he did not want to continue speaking to the police. While Escalera went to the hospital, police searched the area for any weapon Escalera may have had. In a flower bed by the front door of Escalera's parents' house, police found a tire iron. A large knife, not belonging to Escalera's parents, was also found in the kitchen.

[8] At the hospital, after nurses had medically cleared Escalera, Deputy Carter asked about the incident and again read Escalera his *Miranda* rights. Escalera did not respond. When Escalera was released from the hospital, he was taken to the local jail. There, Escalera voluntarily spoke with Deputy Carter by asking him about charges being filed. He maintained his insistence that there had not been a knife and that he had merely "tricked" Cornell out of her home. Tr. Vol. II, p. 52.

[9] Among other crimes, the State charged Escalera with Level 2 felony burglary with a deadly weapon and Class A misdemeanor criminal trespass. The State also alleged Escalera to be a habitual offender due to an Illinois felony conviction. After a bench trial, the trial court found Escalera guilty on both counts.[1] The court then found Escalera to be a habitual offender and

[1] The State also charged Escalera with Level 3 felony kidnapping, criminal confinement as a Level 3 felony, intimidation as a Level 5 felony, residential entry as a Level 6 felony, and Class A misdemeanor resisting law enforcement. Escalera was found guilty of these charges, but the trial court vacated the residential entry, criminal confinement, and intimidation convictions on double-jeopardy grounds. The court also reduced Escalera's kidnapping conviction to a Level 6 felony.

sentenced him to an aggregate sentence of 31 years with 1 year suspended.

Discussion and Decision

[10] Escalera makes three arguments in this appeal. First, he challenges the sufficiency of the evidence supporting his convictions. Second, he argues the police improperly obtained his self-incriminating statements. And third, he contends his 31-year sentence is inappropriate under Indiana Appellate Rule 7(B). We address each in turn.

I. Sufficiency of the Evidence

[11] A conviction will be upheld so long as probative evidence exists from which the factfinder could reasonably find the defendant guilty beyond a reasonable doubt. *Suggs v. State*, 51 N.E.3d 1190, 1193 (Ind. 2016). "All probative evidence, even where it might be conflicting, and the reasonable inferences to be drawn from that evidence are viewed in the light most favorable to the judgment of conviction." *Sallee v. State*, 51 N.E.3d 130, 133 (Ind. 2016). The evidence need not overcome every reasonable hypothesis of innocence. *Id.* We do not re-weigh evidence or re-evaluate the credibility of witnesses. *Suggs*, 51 N.E.3d at 1193.

Criminal Trespass

[12] We start with Escalera's challenge to his conviction for Class A misdemeanor criminal trespass. To convict Escalera of this offense, the State needed to prove that he knowingly or intentionally entered the real property of another person after being denied entry by either the property owner or the owner's agent. Ind.

Code § 35-43-2-2(b)(1). As relevant here, the denial of entry must have been made by way of either a written or oral "personal communication." Ind. Code § 35-43-2-2(c)(1). Escalera alleges insufficient evidence exists to establish that he was personally denied entry to his parents' home by either his parents or their agent. We agree.

[13] The State points to no evidence that Escalera's parents personally denied him entry prior to his arrest. Instead, the State simply contends that Escalera was on notice of his status as a trespasser because police removed him from the property one week earlier. But this prior removal does not inherently establish that Escalera received the required "personal communication" denying him entry from the property owner. *See Glispie v. State*, 955 N.E.2d 819, 821-23 (Ind. Ct. App. 2011) ("A police officer . . . cannot create a trespass violation by asking [the defendant] to leave and then arrest [the defendant] when he refuses to do so." (quoting *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 763 (7th Cir. 2006))). Therefore, to use Escalera's prior removal as proof that he had been warned, the State needed to introduce evidence that the property owners denied him entry. We see no such evidence.

[14] Nor was Deputy Carter acting as an "agent" of the property owners when he told Escalera to leave. Although Escalera argues that Deputy Carter was not an

agent under its common law meaning, "agent" is a statutorily defined term.[2] As used in Indiana's Criminal Code, the word "agent" means "an operator, a manager, an adult employee, or a security agent employed by a store." Ind. Code § 35-31.5-2-12. Deputy Carter, as an on-duty police officer, falls outside this definition. *Young v. State*, 217 N.E.3d 571, 573-74 (Ind. Ct. App. 2023) (holding that a police officer did not act as an "agent" despite the officer's testimony that the business "had asked [the police department] to act as [its] agent" and handle trespass violations).

[15] Thus, Escalera's conviction for Class A misdemeanor criminal trespass must be reversed.

Burglary with a Deadly Weapon

[16] Escalera also stands convicted of Level 2 felony burglary committed with a deadly weapon. A person commits regular burglary, a Level 5 felony, by "breaking and entering" into "the building or structure of another person, with intent to commit a felony or theft in it." Ind. Code § 35-43-2-1. The crime is upgraded to a Level 2 felony when "committed while armed with a deadly weapon." Ind. Code § 35-43-2-1(3)(A). Escalera alleges insufficient evidence exists to establish the deadly weapon element.

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[2] Escalera's reliance on *Glispie* for this framework is understandable, yet ultimately mistaken. As this Court recently noted in a different case, "*Glispie* was decided before" the General Assembly adopted a definition of the term "agent." *Young v. State*, 217 N.E.3d 571, 574 n.3 (Ind. Ct. App. 2023). We echo our colleague's observation in *Young* that the General Assembly's chosen definition "place[s] an impractical burden on police officers" yet similarly find ourselves bound "to apply the statute as written." *Id.* at 574-75.

[17] Though the State did not tie Escalera to any specific weapon recovered from the crime scene, a conviction for committing an offense "while armed" may be sustained even though the deadly weapon was not found following the offense. *See Gray v. State*, 903 N.E.2d 940, 943 (Ind. 2009) (holding that a conviction relying on the use of a deadly weapon may be sustained even when the weapon was not "revealed" during the crime nor admitted into evidence at trial). And even without the specific weapon, the State presented plenty of evidence to allow the factfinder to determine beyond a reasonable doubt that Escalera was armed.

[18] Chief among this evidence was Cornell's testimony that Escalera "threatened" her while holding something she "thought . . . was a knife." Tr. Vol. II, pp. 60, 68. Although Cornell was not sure the knife police recovered from Escalera's parents' house was the same knife Escalera used to threaten her, she stated "[i]t's a possibility." *Id.* at 69. This testimony comprised sufficient evidence that Escalera was armed with a knife. *See Gorman v. State*, 968 N.E.2d 845, 851 (Ind. Ct. App. 2012) ("[A] victim's testimony that he or she saw the defendant use what was believed or 'figured' to be a gun is, by itself, sufficient proof of the use of a deadly weapon." (quoting *Harvey v. State*, 542 N.E.2d 198, 200 (Ind. 1998))).

[19] Escalera attempts to liken his case to *Gray v. State*, in which the Indiana Supreme Court found insufficient evidence supported a deadly weapon enhancement where the victims did not personally observe the weapon. 903 N.E.2d at 943. But unlike the victims in *Gray*, Cornell explicitly testified that

she observed Escalera holding what she thought was a knife. Escalera is entitled to argue—as he did at his trial—that Cornell was an unreliable witness and unsure of her own memory. Tr. Vol. II, p. 74. But under these facts, the factfinder was well within its discretion to believe Cornell. *Gorman*, 968 N.E.2d at 847.

[20] Sufficient evidence supports Escalera's conviction for Level 3 felony burglary with a deadly weapon.

Habitual Offender

[21] As his last sufficiency challenge, Escalera contends that the State failed to prove he qualified as a habitual offender. After committing a Level 1 to 4 felony, a defendant may be found to be a habitual offender if he has been previously convicted of two unrelated felonies and at least one of those felonies was not a Level 6 felony or Class D felony. Ind. Code § 35-50-2-8(b). Escalera contends his out-of-state convictions do not satisfy this requirement.

[22] Out-of-state offenses will be treated as equivalent to an Indiana Level 6 felony conviction when "the convicted person might have been imprisoned for more than one (1) year but less than two and one-half (2½) years" for the out-of-state offense. Ind. Code § 35-50-2-1(a)(2). Escalera notes that his Illinois conviction resulted in only a 2-year executed sentence, with 180 days set aside for "conditional discharge." State's Exh. 21. From this, Escalera asserts it is unknown what effect the 180-day conditional discharge had on his overall sentence. Therefore, he argues it is possible his Illinois sentence was not greater

than the 2½ years required for it to be considered equivalent to a non-Level 6 Indiana felony.

[23] This argument misses the mark. What matters is not the sentence the defendant received but that he "*might have been imprisoned*" for more than 2½ years. Ind. Code § 35-50-2-1(a)(2) (emphasis added). Because Escalera's Illinois burglary conviction contemplated a sentence between 3 and 7 years, it was equivalent to an Indiana crime greater than a Level 6 felony.

[24] Accordingly, the trial court properly determined that Escalera was a habitual offender.

II. No Reversible Error in the Admission of Escalera's Incriminating Statements

[25] Escalera next argues that the trial court erred by admitting into evidence incriminating statements he made to Deputy Carter. Those statements consisted of Escalera blaming his behavior on a combination of prescription pills and alcohol, as well a general discussion of the underlying events. Appellant's Br., pp. 28-29. Escalera contends that Deputy Carter "elicited [these] incriminating statements" after Escalera clearly "stated that he did not want to talk" to police. *Id.* That said, "[e]rrors in the admission of evidence . . . are to be disregarded unless they affect the substantial rights of a party." *Robertson v. State*, 877 N.E.2d 507, 514 (Ind. Ct. App. 2007). Harmless error exists when "substantial independent evidence of guilt" exists that renders it "unlikely that the erroneously admitted evidence played a role in the conviction . . . the

substantial rights of the [defendant] have not been affected, and we deem the error harmless." *Id.*

[26] Escalera relates none of his incriminating statements to his convictions or provides any example of prejudice. Indeed, as seen above, the challenged statements were irrelevant to any of the convictions Escalera has challenged in this appeal. Thus, at best, Escalera alleged harmless error and we decline to address his arguments on this issue as such. *See Crocker v. State*, 989 N.E.2d 812, 823 (Ind. Ct. App. 2013) (finding the admission of incriminating statements harmless error).

III. Escalera's Sentence is not Inappropriate.

[27] Lastly, Escalera challenges his sentence under Indiana Appellate Rule 7(B). A sentence may be revised under this rule if "after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). Our "principal role" in reviewing sentence appropriateness is to "attempt to leaven the outliers" and "not to achieve a perceived 'correct' sentence." *Knapp v. State*, 9 N.E.3d 1274, 1292 (Ind. 2014). The trial court's sentence is entitled to substantial deference and prevails unless "overcome by compelling evidence portraying in a positive light the nature of the offense . . . and the defendant's character." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[28] Escalera was sentenced to 24 years for burglary with a deadly weapon, plus 6 years for being a habitual offender; 2½ years for kidnapping; and 1 year each

for criminal trespass and resisting law enforcement. Escalera's kidnapping sentence was ordered to run concurrently with his burglary and habitual offender sentences, while his criminal trespass and resisting law enforcement convictions were ordered to run concurrently with each other but consecutive to Escalera's other sentences.[3] Ultimately, Escalera received an aggregate sentence of 31 years.

[29] Escalera does not argue that the respective natures of his offenses justify revision. But for the sake of completeness, we note that he stands convicted of multiple felonies and several misdemeanors, committed against an elderly woman, his own family, and law enforcement—all while using a deadly weapon.

[30] Turning then to Escalera's character, we similarly find no basis for relief. As a starting point, we note Escalera's significant and lengthy criminal history. Even setting aside his juvenile adjudications, Escalera had committed 3 felonies and 11 misdemeanors before the events of this case. These prior convictions reflect poorly on his character. *See Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020). Further, Escalera has consistently failed to attend court hearings, repeatedly failed drug screens, and had his probation revoked a significant number of times. From these facts we agree with the State that Escalera has

[3] Although Escalera's criminal trespass conviction was reversed, this does not require any adjustment to his aggregate sentence as the trespass conviction ran concurrently.

shown a "consistent disregard for the law" that renders him unsuitable for sentencing relief. Appellee's Br., p. 45; *Prince*, 148 N.E.3d at 1174-75.

[31] On the other hand, we recognize Escalera's apparent mental health struggles and long-running issue with substance abuse. Though Escalera does not assert that his current crimes "share[] a nexus" with his recognized mental health and substance abuse problems, the connection exists here. *Kellams v. State*, 198 N.E.3d 375, 376 (Ind. 2022) (Rush, C.J., dissenting from the denial of transfer) (mem.). That said, "sentence modification under Rule 7(B) is reserved for 'a rare and exceptional case.'" *Id.* (quoting *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam). Escalera fails to show how this is such a case. Escalera committed his crimes against his parents' 82-year-old neighbor while using a deadly weapon. His actions were only the latest instance of a pattern of criminal conduct that demands serious consequences. Thus, Escalera's struggles with addiction and mental health issues do not support a revision of his sentence.

Conclusion

[32] The State presented sufficient evidence to convict Escalera of Level 2 felony burglary while armed with a deadly weapon and for the trial court to find he is a habitual offender. We therefore affirm the trial court's judgment as to those issues. We also affirm Escalera's aggregate 31-year sentence, finding he has not shown it to be inappropriate in light of the nature of his offenses and his character. However, we reverse Escalera's conviction for Class A misdemeanor criminal trespass because the State did not prove that Escalera's parents or their agent denied him entry to their property.

[33] Affirmed in part and reversed in part.

Altice, C.J., and Kenworthy, J., concur.