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IN THE  
COURT OF APPEALS OF INDIANA

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Trent Michael Weaver,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

June 14, 2022

Court of Appeals Case No.  
21A-CR-2424

Appeal from the Pulaski Superior  
Court

The Honorable Crystal A. Kocher,  
Judge

Trial Court Cause No.  
66D01-2011-F5-26

**Najam, Judge.**

### Statement of the Case

[1] Trent Michael Weaver appeals his eight-year aggregate sentence after he pleaded guilty pursuant to an open plea to dealing in a narcotic drug and

reckless homicide, both as Level 5 felonies. Weaver presents two issues for our review, which we restate as:

1. Whether the trial court abused its discretion when it imposed separate sentences for Weaver's convictions after he pleaded guilty to both counts pursuant to an open plea.
2. Whether the trial court abused its discretion when it imposed consecutive sentences for Weaver's convictions.
3. Whether the trial court abused its discretion when it used an element of Weaver's reckless homicide offense to impose enhanced consecutive sentences.

[2] We affirm.

### **Facts and Procedural History**

[3] In 2020, Weaver and Kyle Button were friends. They had known each other for "several years[,]” and, "in the past couple years,” had worked together at a job where they were "constantly driving on the road together.” Tr. Vol. 2 at 52. While working together, they "[a]lways shared the same hotel room[,]” "were comfortable with each other[,]” and there was "never a dull moment” between them. *Id.* They had used heroin in each other's presence "a couple of times” in "late [2019], early 2020[,]” but did not do so on a regular basis. *Id.* at 53.

[4] On November 15, 2020, Weaver and Button exchanged social media direct messages. Button's brother had just passed away, and Button was looking for some pain pills. Weaver messaged Button and asked Button if he needed drugs.

They then exchanged messages regarding how much product Weaver would purchase, where the product would be purchased, and how Weaver would deliver the product to Button.

[5] Weaver traveled to Logansport, purchased two one-half-gram bags of heroin in rock form, and met Button at an apartment in Winamac at around 6:45 p.m. Weaver held out the two bags of heroin in his hand, and he allowed Button to choose the bag he wanted. Button reimbursed Weaver for one-half of the purchase price of the heroin, and the two then “went [their] separate ways.” *Id.* at 54. Later that evening, at 7:49 p.m., Button messaged Weaver and questioned his share of the heroin, indicating that his share was “short on weight.” Sept. 23 Tr. at 19.<sup>1</sup> Weaver assured Button that he had weighed the heroin and that Button had received the proper amount.

[6] Button drove to the home he shared with his girlfriend, Billi Rains, and their four children, who ranged in age from five months to five years old. Button and Rains went to bed between 8:00 p.m. and 8:30 p.m., after putting the children to bed. At some point that night, Button used the heroin he had purchased from Weaver and then climbed back into bed with Rains.

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<sup>1</sup> After the court reporter prepared the transcript that included the September 27, and October 12, 2021, guilty plea and sentencing hearings, Weaver asked the trial court to order the court reporter to prepare a transcript of the September 23, 2021, guilty plea hearing in this case. The motion was granted, and the court reporter prepared an additional transcript of the hearing but did not label the transcript with a distinguishing volume number. In this opinion, we refer to the transcript of the September 23 hearing as “Sept. 23 Tr.”

- [7] Rains woke up around 3:00 a.m. on November 16, found Button unresponsive and not breathing, and immediately called 9-1-1. The police responded to the call and found Button in the bedroom, dead. Button's body was cold to the touch and livor mortis had begun. Rains provided the police with access to Button's cell phone, and the police saw the messages that Weaver and Button had exchanged earlier regarding the heroin. Rains allowed the police to search the home. One of the investigating officers found in Button's wallet a plastic bag that contained .3 gram of heroin.
- [8] Later that afternoon, Weaver traveled to the Pulaski County Sheriff's Department and asked to speak with an officer. After being advised of and waiving his *Miranda* rights, Weaver admitted to Officer Alec Berger that he had sold Button one-half gram of heroin. An autopsy identified the cause of Button's death as fentanyl and morphine toxicity. Ex. Vol. 3 at 4.
- [9] The State charged Weaver with dealing in a narcotic drug and reckless homicide, both as Level 5 felonies. Specifically, Weaver was charged as follows:

Count 1:

. . . on or about November 16, 2020 at 714 North Market Street, Winamac in Pulaski County, State of Indiana, Trent Michael Weaver did knowingly or intentionally deliver heroin, pure or adulterated, a narcotic drug classified in schedule I contrary to the form of the statutes in such cases made and provided by I.C. 35-48-4-1(a)(1) . . . .

Count 2:

. . . on or about November 16, 2020 at 714 North Market Street, Winamac in Pulaski County, State of Indiana, Trent Michael Weaver did recklessly kill another human being, to wit: Kyle Button contrary to the form of the statutes in such cases made and provided by I.C. 35-42-1-5 . . . .

Appellant's Amend. App. Vol. 2 at 100.

[10] Weaver initially pleaded not guilty to the charges. However, on September 23, 2021, Weaver appeared before a senior judge. Weaver moved to withdraw his not-guilty plea and enter a plea of guilty to both counts pursuant to an open plea. At the hearing, the State attempted to establish a factual basis for the charges. However, the court determined that it was “not able to find a factual basis for the plea of guilty to Count 2.” Sept. 23 Tr. at 23. And the court expressed concern that Weaver, who was appearing remotely, had not seen the autopsy and toxicology reports, which were admitted into evidence without objection, which listed Button's cause of death as fentanyl and morphine toxicity. Ultimately, the court set the matter for further hearing on September 27.

[11] On September 27, Weaver again moved to withdraw his not-guilty plea and enter a plea of guilty to both counts, pursuant to an open plea. The court incorporated the proceedings from the September 23 hearing into the record, and the State then proceeded to establish the factual basis. Weaver admitted that “he did not intend for [Button] to die by taking heroin[,]” “sometimes drug

dealers will cut heroin with fentanyl[,]” “sometimes people who overdose can die from heroin[,]” “that is what happened in this case[,]” and the reckless act that had caused Button’s death was the act of Weaver “delivering . . . heroin” to Button. Tr. Vol. 2 at 33-34.

[12] The trial court accepted Weaver’s guilty plea and then proceeded to sentencing. During the sentencing phase, the State argued that Weaver should be sentenced to four and one-half years for each count and that the sentences should run consecutive to each other. Weaver argued that he should receive a three-year sentence for each count and that his sentences for Counts 1 and 2 should run concurrent with each other. Weaver also argued that the dealing and the reckless homicide offenses should merge because, while the offenses had different statutory elements, they were factually “the same thing.” *Id.* at 69. The court then asked the parties to present additional arguments regarding whether the sentences imposed for Counts 1 and 2 should run concurrent with or consecutive to each other. The State argued that the sentences could run consecutive to one another because “reckless homicide is a crime of violence pursuant to . . . statute.” *Id.* at 72. Weaver’s counsel reiterated that the offenses should merge and also argued that Button’s death could not be an aggravating circumstance in the case because his death was an element of the reckless homicide offense. The court took the arguments under consideration and continued the matter to October 12.

[13] At the October 12 hearing, the court provided the following sentencing statement:

The Court finds as aggravating factors, harm, injury, loss or damage suffered by the victim of the offense to be significant and greater than the elements necessary to prove the commission of the offense, the Defendant has a history of criminal behavior in that he has two prior felony convictions, [and] that the Defendant committed a crime of violence as defined under Indiana Code [Section] 35-50-1-2. The Court finds as a mitigating factor the Defendant's willingness to accept responsibility for his actions, which indicates the Defendant is unlikely to commit another crime such as this.

The Court further finds the sentences for Counts 1 and 2 shall be served consecutive[ ] to one another. The Court finds the crimes are not a single episode of criminal conduct in that the elements necessary to prove each count are separate and distinct and not so closely related in time, place, and circumstance. Further, under Indiana Code [Section] 35-50-1-2(a)(5), the Court finds Count 2, reckless homicide to be a crime of violence and therefore is exempted from the limitations of [S]ection 35-50-1-2(d).

*Id.* at 82.<sup>2</sup> Accordingly, the court sentenced Weaver to consecutive terms of four years each for the dealing and the reckless homicide counts. The court ordered the sentence to be served as four years in the Indiana Department of Correction, two years on work release, and two years suspended to probation. This appeal ensued.

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<sup>2</sup> The trial court included this sentencing statement in its written sentencing order. *See* Appellant's Amend. App. Vol. 2 at 195-96.

## Discussion and Decision

### *Standard of Review*

[14] Weaver challenges his sentence. Specifically, he contends that the trial court abused its discretion when it imposed separate and consecutive sentences for his dealing and his reckless homicide convictions, and when the court used an element of the reckless homicide offense to impose an enhanced consecutive sentence. Sentencing decisions lie within the sound discretion of the trial court, and a trial court has discretion to sentence a defendant to consecutive or concurrent terms of imprisonment. *See Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008); *see also* Ind. Code § 35-50-1-2(c) (2020). An abuse of discretion occurs if the decision is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Gross v. State*, 22 N.E.3d 863, 869 (Ind. Ct. App. 2014) (citation omitted), *trans. denied*.

### *Issue One: Imposition of Separate Sentences After an Open Plea*

[15] Weaver first contends that the trial court abused its discretion when, after he pleaded guilty pursuant to an open plea, the court imposed separate sentences for his dealing and his reckless homicide convictions, and that the court “exceeded its authority under Indiana Code [Section] 35-38-1-6” when it sentenced him on both counts. Appellant’s Br. at 17. The statute provides that, if “a defendant is charged with an offense and an included offense in separate counts[ ]” and “the defendant is found guilty of both counts[,] judgment and sentence may not be entered against the defendant for the included offense.”



Ind. Code § 35-38-1-6 (2021). Weaver maintains that, under the facts and circumstances of this case, the dealing offense is an “included offense” of reckless homicide, and the court could not impose sentences for both his dealing and his reckless homicide convictions. Appellant’s Br. at 17. To support his argument, Weaver turns our attention to his guilty plea hearing, where, according to Weaver, the State “made it clear[] that the reckless act that caused death was the act of Weaver delivering heroin”; the State failed to “develop a record suggesting the offenses were separate and distinct”; and, “[to] the contrary, the [State] repeatedly made it clear that the offense of dealing in a narcotic was included within the offense of reckless homicide.” *Id.*

[16] The State characterizes Weaver’s argument regarding his separate sentences as a direct appeal of his convictions for both dealing in a narcotic drug and reckless homicide, as violations of the constitutional prohibition against double jeopardy. Indeed, Weaver’s argument is similar to a double jeopardy violation argument. However, as Weaver states in his Reply Brief, he challenges only his sentence, and his argument on appeal is that the trial court “abused its sentencing discretion when it entered separate and consecutive sentences for the same criminal conduct.” Appellant’s Reply Br. at 4.

[17] Turning to Weaver’s argument, we note that, just as a defendant can waive the right to raise a double jeopardy claim on direct appeal when he pleads guilty to two offenses which might violate the prohibition against double jeopardy, Weaver, by pleading guilty, has waived his right to challenge the trial court’s imposition of separate sentences for the dealing and the reckless homicide

convictions on grounds that dealing is a lesser included offense of reckless homicide. *See, e.g., Yost v. State*, 150 N.E.3d 610, 613 (Ind. Ct. App. 2020) (a challenge to Yost’s convictions could not be brought by direct appeal where he pleaded guilty pursuant to an open guilty plea). Weaver chose to plead guilty under an open plea to both dealing and reckless homicide. Having done so, Weaver cannot now claim that the trial court is prohibited from imposing separate sentences for each offense on grounds that his dealing offense is a lesser included offense of reckless homicide. He has waived this claim. And, even if we were to assume that the court erred when it imposed separate sentences for each offense, which it did not, Weaver would have invited the error. *See Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005) (“The doctrine of invited error is grounded in estoppel,” and under this doctrine, “a party may not take advantage of an error that [ ]he commits, invites, or which is the natural consequence of h[is] own neglect or misconduct.”) Weaver entered into an open plea, pleaded guilty to both offenses, and received a sentence for each offense to which he pleaded guilty. Thus, we hold that the trial court did not abuse its discretion when it imposed separate sentences for his dealing and his reckless homicide convictions.

### ***Issue Two: Imposition of Consecutive Sentences***

[18] Next, Weaver contends that the trial court abused its discretion when it imposed consecutive sentences for his dealing and reckless homicide convictions. “In general, a trial court cannot order consecutive sentences in the absence of express statutory authority.” *Slone v. State*, 11 N.E.3d 969, 972 (Ind.

Ct. App. 2014) (citation omitted). Indiana Code Section 35-50-1-2 authorizes the imposition of consecutive sentences and limits “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[,]” which is defined as “offenses or a connected series of offenses that are closely related in time, place, and circumstance.” “In order to impose consecutive sentences, the trial court must find at least one aggravating circumstance.”<sup>3</sup> *Gross*, 22 N.E.3d at 870.

[19] Section 35-50-1-2(c) states in relevant part 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).” (Emphasis added.) Section 35-50-1-2(d) provides in relevant part,

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 may not exceed the following: . . .  
(2) [i]f 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 (7) years[.]

[20] We first note that reckless homicide is a “crime of violence” pursuant to Section 35-50-1-2(a)(5) and, therefore, is exempted from the limitations of Section 35-50-1-2(d). And to the extent that Weaver argues that Button’s death was the

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<sup>3</sup> Here, the trial court found three aggravating circumstances and one mitigating circumstance. Appellant’s Amend. App. Vol 2 at 195-96.

result of an “episode of criminal conduct,” we remind Weaver that he pleaded guilty to both dealing in a narcotic drug and reckless homicide pursuant to an open plea. He cannot challenge his convictions on direct appeal, and, indeed, he states emphatically in his Appellant’s Brief that, in this appeal, “he is not challenging the validity of his convictions.” Appellant’s Br. at 34; *see also Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996) (“One consequence of pleading guilty is restriction of the ability to challenge the conviction on direct appeal.”). Therefore, we hold that the trial court did not abuse its discretion when it imposed consecutive sentences for Weaver’s convictions.

### ***Issue Three: Enhanced Consecutive Sentence***

[21] Finally, Weaver contends that the trial court abused its discretion when it imposed enhanced consecutive sentences for his dealing and reckless homicide convictions. In its sentencing order, the trial court found three aggravators:

1. The “harm, injury, loss or damage suffered by the victim of the offense to be significant and greater than the elements necessary to prove the commission of the offense[.]”
2. “[Weaver] has a history of criminal behavior in that he has two prior felony convictions[.]”
3. “[Weaver] committed a crime of violence as defined under [Indiana Code Section] 35-50-1-2.”

Appellant’s Amend. App. Vol. 2 at 195-96. The court sentenced Weaver to four years each for his dealing and reckless homicide convictions and ordered the sentences to run consecutive to each other.

[22] As we noted previously, sentencing decisions rest within the sound discretion of the trial court, and we review such decisions for an abuse of discretion. *Hudson v. State*, 135 N.E.3d 973, 979 (Ind. Ct. App. 2019). “An abuse of discretion will be found where 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.” *Id.* For example, a trial court may abuse its discretion by:

(1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law.

*Id.* “In cases where the trial court has abused its discretion, we will remand for resentencing only ‘if we 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.’” *Bryant v. State*, 959 N.E.2d 315, 322 (Ind. Ct. App. 2011) (quoting *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g* 875 N.E.2d 218 (Ind. 2007)).

[23] Weaver argues that his sentence is “problematic” for three reasons: (1) “the sentencing statement did not include a reasonably detailed explanation of why both counts should be aggravated and also served consecutively”; (2) “death was an element of the reckless homicide offense and it was also the reason the offense was a violent offen[s]e under [Indiana Code Section] 35-50-1-2”; and (3)

“the court identified the same aggravator (i.e., death) twice in its sentencing statement.” Appellant’s Br. at 37. We note that causing death is an element of reckless homicide. *See* I.C. § 35-42-1-5 (“A person who recklessly kills another human being commits reckless homicide, a Level 5 felony.”). Thus, Weaver’s argument follows from the proposition that it is generally improper for a trial court to use an element of the offense as an aggravating factor to justify imposing an above-advisory sentence, absent something unique about the circumstances of the offense, because the legislature accounts for the elements of an offense when it sets the advisory sentence. *Gomillia v. State*, 13 N.E.3d 846, 852-53 (Ind. 2014).

[24] However, when evaluating the nature and circumstances of the offense, “the trial court may properly consider the particularized circumstances of the factual elements as aggravating factors.” *McCarthy v. State*, 749 N.E.2d 528, 539 (Ind. 2001). The trial court must then “detail why the defendant deserves an enhanced sentence under the particular circumstances.” *Vasquez v. State*, 762 N.E.2d 92, 98 (Ind. 2001). Generally, this aggravator is “thought to be associated with particularly heinous facts or situations.” *Id.* at 97 (quoting *Smith v. State*, 675 N.E.2d 693, 698 (Ind. 1996)).

[25] Here, the trial court found as an aggravating factor that the “harm, injury, loss or damage suffered by [Button]” was “significant and greater than the elements necessary to prove the commission of the offense[.]” Appellant’s Amend. App. Vol. 2 at 195. But we need not decide whether the trial court’s explanation was sufficiently detailed to support the nature and circumstances of the offense

aggravator. A trial court may order consecutive sentences based on one valid aggravating factor. *Kayser v. State*, 131 N.E.3d 717, 723 (Ind. Ct. App. 2019). And that one valid aggravator may be used both to enhance a sentence and to justify consecutive sentences. *Id.* Here, the trial court found two additional aggravating factors, including Weaver’s criminal history. That aggravating factor, which he does not challenge, is sufficient to justify the imposition of consecutive sentences. *See e.g., Gleason v. State*, 965 N.E.2d 702, 712 (Ind. Ct. App. 2012) (explaining that the defendant’s unchallenged criminal history aggravating factor alone was sufficient to justify his consecutive sentences). The trial court found at least one valid aggravating factor. Therefore, we hold that the court did not abuse its discretion when it imposed enhanced consecutive sentences.

[26] Neither can we find, as Weaver urges this Court to do, that the trial court’s sentencing statement is inadequate. The trial court’s sentencing statement in this case indicates that the trial court found Weaver’s criminal history to be an aggravating factor. And the record supports the finding of Weaver’s criminal history, which includes two felony convictions, as an aggravating factor. The trial court did not abuse its discretion when it sentenced Weaver. The judgment of the trial court is affirmed.

[27] Affirmed.

Bradford, C.J., and Bailey, J., concur.