MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Cara Schaefer Wieneke
Wieneke Law Office, LLC
Brooklyn, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Sierra A. Murray
Deputy Attorney General

Samuel J. Sendrow
Certified Legal Intern
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Ashley Dawn Penwell,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 5, 2021

Court of Appeals Case No. 21A-CR-1225

Appeal from the Henry Circuit Court

The Honorable Kit C. Dean Crane, Judge

Trial Court Cause No. 33C02-2103-F6-103

Weissmann, Judge.

[1] Ashley Penwell made good on a threat to make her ex-girlfriend Sheena Moore's life "a living hell." While Moore was on the run from Penwell's alleged abuse, Penwell terrorized Moore by sending her harassing messages in violation of a protective order. Penwell pleaded guilty to Level 6 felony stalking and was sentenced to the maximum of 2 ½ years' imprisonment. On appeal, Penwell argues that her sentence is inappropriate in light of the nature of the offense and her character. We affirm.

Facts[1]

[2] Moore obtained a protective order against Penwell on March 3, 2021. In her petition for the order, Moore described two altercations with Penwell that caused Moore to fear for her and her children's safety. During the first altercation, Penwell allegedly was verbally abusive to Moore and her children, would not let them leave Moore's home, and would not leave the home herself until police forced her out. App. Vol. II, p. 22. During the second altercation, Penwell allegedly punched Moore in the face, whipped her in the head with jumper cables, and threatened to make her life "a living hell." *Id.* at 23. Moore escaped to a friend's house, where Penwell could not find her.

[1] In their appellate briefs, both Penwell and the State cite to allegations contained in Moore's petition for protective order and the probable cause affidavit. *See, e.g.*, Appellant's Br. p. 5 (citing App. Vol. II, pp. 14-15, 19-23). Though neither of these documents were admitted into evidence at sentencing, Penwell included them in her Appellant's Appendix. Accordingly, we will consider them on appeal.

[3] Eleven days after Moore obtained the protective order, Penwell violated its mandate by repeatedly contacting Moore via Facebook messenger. Specifically, Penwell sent messages to a third person who was with Moore, making statements such as:

- "'[T]ell your little friend' that she needs to shut her mouth;"
- "I know you're with her right now lying get (sic) you nowhere you should explain that to her;" and
- "This is why she's always scared to be at home and if I was her I would be too because it's not me she has to worry about."

Id. at 14. Moore called the police, and Penwell was arrested.

[4] The State charged Penwell with Level 6 felony stalking in Henry Circuit Court 2. Meanwhile, in two Henry Circuit Court 3 cases, Penwell faced Class A misdemeanor invasion of privacy charges for violating the protective order on two prior occasions. Pursuant to a plea agreement, Penwell pleaded guilty to Level 6 felony stalking in exchange for the State's dismissal of the two cases pending in Henry Circuit Court 3.

[5] At sentencing, the trial court found Penwell's extensive criminal history, violation of the protective order, and alleged invasions of Moore's privacy to be aggravating circumstances. The court gave little mitigating weight to Penwell's guilty plea and, ultimately, issued Penwell the maximum sentence of 2 ½ years' imprisonment. Penwell now appeals.

Discussion and Decision

[6] Penwell seeks relief under Indiana Appellate Rule 7(B), arguing that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and her character. In reviewing the appropriateness of a sentence, our principal role is to attempt to leaven the outliers, not to achieve a perceived "correct" sentence. *Knapp v. State*, 9 N.E.3d 1274, 1292 (Ind. 2014). Accordingly, we give "substantial deference" and "due consideration" to the trial court's sentencing decision. *Id.*

[7] As to the nature of the offense, Penwell did not merely harass and threaten Moore. She did so while Moore was "on the run" from Penwell's alleged abuse. Tr. Vol. II, p. 19. Scared of what Penwell might do next, Moore fled her home, changed her phone number, and deleted her social media accounts. She also obtained a protective order prohibiting Penwell from contacting her. But Penwell was undeterred. She found a way to contact Moore and sent her intimidating messages, justifying Moore's fear. App. Vol. II, p. 14.

[8] Penwell claims the messages she sent to Moore "did not make obvious threats of violence" and that "[t]here was nothing disturbing or otherwise egregious" about her conduct. Appellant's Br. p. 8. This claim, however, completely ignores the circumstances surrounding Penwell's stalking, particularly the emotional impact on her victims. As Moore explained at sentencing: "I never imagined that still to this day my daughter would feel unsafe to be in her own home. This incident didn't just put a dent in my life, it has affected my whole

family. Most importantly, my children." Tr. Vol. II, p. 19. The nature of the offense does not warrant relief.

[9] As to Penwell's character, the presentence investigation report reveals that she has 6 prior felony and 9 prior misdemeanor convictions in the last 13 years. These include convictions for passing bad checks, forgery, and theft by deception as well as aggravated burglary and multiple assaults. Penwell also violated a protective order in this case despite having been arrested for 2 similar violations only a few days prior. "[A]lthough a record of arrests by itself is not evidence of a defendant's criminal history . . . it may reveal that he or she has not been deterred even after having been subjected to the police authority of the State." *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007) (citing *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005)). That appears to be the case here.

[10] Penwell acknowledges her lengthy criminal history but claims a maximum sentence is inappropriate because "her harassing behavior occurred after she stopped taking medication for her mental health disorders." Appellant's Br. p. 9. Our Supreme Court has identified several factors to consider in weighing the mitigating force of a mental health issue. *Weeks v. State*, 697 N.E.2d 28, 30 (Ind. 1998). These factors include the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime. *Id.*

[11] Though Penwell testified at sentencing that she is manic bipolar and has post-traumatic stress disorder, she did not provide any evidence linking these mental

health issues to her stalking of Moore. The record is also silent as to why Penwell stopped taking her unidentified medication. Whatever the reason, it appears to have gone against Moore's advice, as Penwell reflected: "Maybe if I would have listened to her sooner about medication, we wouldn't be sitting here today." Tr. Vol. II, p. 25. Penwell's character argument is unavailing.

[12] Considering the nature of the offense and Penwell's character, we do not find inappropriate the maximum sentence of 2 ½ years imposed by the trial court.

[13] Affirmed.

Mathias, J., and Tavitas, J., concur.