MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Travis W. Phelps,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 30, 2022

Court of Appeals Case No. 22A-CR-266

Appeal from the Vanderburgh Superior Court

The Honorable Robert J. Pigman, Judge

Trial Court Cause No. 82D03-1903-MR-1814

Mathias, Judge.

[1] Travis Phelps appeals his sentence following his convictions for murder, a felony, and attempted murder, a Level 1 felony. Phelps raises a single issue for our review, namely, whether his sentence is inappropriate in light of the nature of the offenses and his character.

[2] We affirm.

Facts and Procedural History

[3] This is Phelps's second appeal in this case. In *Phelps v. State*, No. 20A-CR-831, 2021 WL 484862 *1-2 (Ind. Ct. App. Feb. 9, 2021) ("*Phelps I*"), *trans. denied*, we set out the facts and procedural history relevant to the issues in this appeal as follows:

> Austin Smith and Kelsey Cavendar were in a relationship "on and off" for "six or seven years" and had two children together. Tr. Vol. II p. 78. In early 2017, the couple broke up but remained friends. That summer, Cavendar moved into Phelps's house in Evansville, and he considered her his "girlfriend." Tr. Vol. III p. 5. On the morning of August 31, Smith called Cavendar and asked her to "hang out." Tr. Vol. II p. 68. Phelps was in the room and heard at least part of the conversation. He was "agitated" and told Cavendar not to bring Smith to the house. Tr. Vol. III p. 27.
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> When Smith arrived at Phelps's house to pick up Cavendar, she left through the back door and got in the passenger seat of Smith's car. Once in the car, she saw Phelps on the front porch of the house holding a gun. Phelps fired multiple shots at Smith's car. Smith attempted to drive off but crashed into a tree a few blocks from the house. He told Cavendar to call 911 because "he was shot." Tr. Vol. II p. 74. Neighbors who witnessed the shooting also called 911 and attempted to administer first aid to

Smith. Smith was transported to the hospital, where he received emergency surgery for a gunshot wound to the abdomen. Despite treatment, Smith never regained consciousness after the shooting. He was released to hospice care and died ten months later. The State charged Phelps with one count of murder for Smith and one count of attempted murder for Cavendar. The State also sought a sentencing enhancement for use of a firearm in the commission of the offenses.

A jury trial was held in February 2020. Christy Harris Mitchell, Phelps's neighbor, testified she was on her front porch with her husband, granddaughter, and Joseph Phelps, Phelps's father, when she heard gunfire and saw Phelps pointing a gun at Smith's car. She then testified as to a confrontation she had with Phelps while she was at the police station giving her witness statement. She stated she saw Phelps in the hallway at the police station and told him her "granddaughter was on the porch in the direction he was shooting." *Id.* at 98. She stated Phelps replied, "B*tch, I don't give a f*ck." *Id.* The State then introduced a surveillance video of this interaction. *See* Ex. 15, 0:13-0:16. The defense objected, arguing the recording had no probative value and was unfairly prejudicial. Defense counsel stated Mitchell testified as to Phelps's statement "before I had a chance to object" and asked the court to strike that testimony and admonish the jury to disregard it. Tr. Vol. II p. 100. The court overruled the objections and admitted the recording, stating it felt the statement "has probative value." *Id.*

At trial, the theory of defense was Phelps did not have intent to harm when he shot at Smith's car and he acted in self-defense. He stated there was "animosity" between he and Smith. Tr. Vol. III p. 6. He testified on the day of the shooting Cavendar put her phone on speaker while talking to Smith, and Smith had a "very aggressive" tone and stated "he was going to pull up and he was going to harm [Phelps]." *Id.* at 8, 9. Phelps also stated Cavendar told him Smith had a gun. He then testified that after Cavendar left the house, he went on his porch to smoke and noticed

> Smith's car was still there. He stated he saw the car slam on its brakes and saw Smith motion "to go grab something." *Id.* at 17. Fearing Smith was grabbing a gun, Phelps fired shots at the car. Phelps stated he was not aiming for Smith or Cavendar but was merely "trying to scare them off." *Id.* at 18.
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> After both sides presented their cases, . . . [t]he trial then proceeded to closing arguments, where the defense emphasized its theory of self-defense, stating Phelps "was actually retreating" while firing the gun, "didn't aim at anybody," and "had no intent to kill anyone . . . [h]is only intention was to protect himself[.]" *Id.* at 64.
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> The jury found Phelps guilty of murder and attempted murder.

[4] After the verdicts were entered, the trial court asked Phelps whether he wanted a hearing on the firearm enhancement and, after a short colloquy, the court accepted what it believed was Phelps's guilty plea on the enhancement. Following a hearing, the trial court sentenced Phelps as follows:

> Court finds aggravating circumstances to be the Def[endant's] prior record, Def[endant's] prior criminal activity, that the Def[endant] was on probation for two separate felony convictions and the nature and circumstances of the incident being the potential harm to 4 other people, one of which was a child. Court finds no mitigating circumstances. Court notes the Indiana Risk Assessment classifies the Def[endant] as a Very High Risk to Reoffend. Court finds aggravating circumstances outweigh the mitigating circumstances calling for a sentence above the standard sentence provided by legislature. Court sentences the Def[endant] to the Dep[artment] of Corrections for a period of 60 years enhanced by the Firearm Used on Commission of Offense for a period of 10 years for a total sentence of 70 years. Sentence to be executed. On Count 2, Court

> sentences the Def[endant] to the Dep[artment] of Corrections for a period of 35 years. Sentence to be executed. Sentences in Counts 4 and 2 to be served consecutive to each other for a total sentence in this cause of 105 years.

Appellant's App. Vol. 3, p. 25.

[5] On appeal, we agreed with Phelps that he "did not knowingly, intelligently, and voluntarily waive his right to a jury trial on the enhancement." *Phelps I*, 2021 WL 484862 at *6. Accordingly, we vacated the adjudication on the firearm enhancement and remanded for proceedings on the enhancement. *Id.* Phelps had also challenged his sentence on Appellate Rule 7(B) grounds, but we did not address that issue given our disposition. On remand, Phelps pleaded guilty to the firearm enhancement. And the trial court imposed the exact same sentence. This appeal ensued.

Discussion and Decision

[6] Phelps argues that his sentence is inappropriate under Indiana Appellate Rule 7(B). Under this rule, we may modify a sentence that we find is "inappropriate in light of the nature of the offense and the character of the offender." App. R. 7(B). Making this determination "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 v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Sentence modification under Rule 7(B), however, is reserved for "a rare and exceptional case." *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).

[7] When conducting this review, we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Our role is to "leaven the outliers," not to achieve what may be perceived as the "correct" result. *Id.* Thus, deference to the court's sentence will prevail unless the defendant persuades us the sentence is inappropriate by producing compelling evidence portraying in a positive light the nature of the offense—such as showing restraint or a lack of brutality—and the defendant's character—such as showing substantial virtuous traits or persistent examples of positive attributes. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018); *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[8] Initially, we note that the trial court did not impose the maximum possible sentence. Phelps was convicted of murder and attempted murder. For murder, Phelps faced either a sentence of life imprisonment without parole or a sentence ranging from forty-five to sixty-five years with an advisory term of fifty-five years. Ind. Code § 35-50-2-3. For attempted murder, Phelps faced a sentence ranging from twenty to forty years with an advisory term of thirty years. I.C. § 35-50-2-4. And for the firearm enhancement, Phelps faced an additional sentence ranging from five to twenty years. I.C. § 35-50-2-11. Therefore, Phelps faced life imprisonment without parole or a maximum term of 125 years. The court, however, imposed a 105-year aggregate sentence. And, for reasons provided below, Phelps has failed to establish that his less-than-maximum sentence is inappropriate.

[9] Concerning the nature of his offenses, Phelps acknowledges that "Austin's death was an unquestionable tragedy." Appellant's Br. at 18. But he asserts that, "according to the State's medical expert, [Austin] would have been brain dead within minutes." *Id.* Phelps contrasts that fact with the facts in *Conley v. State*, 972 N.E.2d 864 (Ind. 2012), where the seventeen-year-old defendant choked his little brother multiple times over the course of twenty minutes, placed a bag over his head, and slammed his head against concrete before he died. On appeal, our Supreme Court described the murder as "drawn out" and noted that the victim suffered "unimaginable horror," as contrasted with "a nearly instantaneous death by a bullet." *Id.* at 876. In short, Phelps urges us to revise his sentence in light of the "nearly instantaneous death" sustained by Austin.

[10] But Phelps ignores several other significant details regarding the nature of the offenses here, namely, that Phelps was unprovoked when he fired multiple shots at Austin and Cavendar as they drove away; a child was present at the scene; and while Austin was brain dead upon arrival at the hospital, he was placed in hospice care and lived for ten months before he died. We cannot say that the nature of the offenses warrants a revised sentence.

[11] With respect to his character, Phelps contends that his criminal history is relatively minor and that he has "tremendous community and family support," as evidenced by several letters submitted to the trial court prior to sentencing. Appellant's Br. at 15. Notably, Phelps does not direct us to any evidence that he has remorse for the offenses. Indeed, the evidence shows that Phelps is not

remorseful. At the police station following the shooting, Mitchell confronted Phelps about endangering her granddaughter's life, to which he responded, "B*tch, I don't give a f*ck." *Phelps I*, 2021 WL 484862 at *1. And at the time of the instant offenses, Phelps was on probation for two separate Level 5 felonies, one for intimidation with a deadly weapon and the other for burglary. We cannot say that Phelps's sentence is inappropriate in light of his character.

[12] In sum, Phelps has not shown that his less-than-maximum sentence is inappropriate in light of the nature of the offenses and his character.

[13] Affirmed.

May, J., and Brown, J., concur.