MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Paul J. Podlejski
Anderson, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

J.T. Whitehead
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Michael D. Wayne Fleming, III,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 16, 2021

Court of Appeals Case No. 20A-CR-935

Appeal from the Madison Circuit Court

The Honorable Andrew Hopper, Judge

Trial Court Cause No. 48C03-1808-MR-2097

Tavitas, Judge.

Case Summary

[1] Michael Fleming, III, appeals his sentence for murder, a felony, and attempted murder, a Level 1 felony. After an attempted marijuana purchase went wrong, Fleming—one of the would-be purchasers—became embroiled in a shootout. A jury found Fleming guilty of all charges. The trial court sentenced Fleming to an advisory fifty-five-year sentence for the murder conviction and an additional thirty-year sentence, to be served consecutively, for the attempted murder conviction. Fleming now appeals, arguing that the trial court abused its discretion by improperly analyzing the aggravating and mitigating factors. Fleming further argues that his sentence is inappropriate in light of the nature of his offenses and his character. Because we cannot agree, we must affirm.

Issues

[2] Fleming raises two issues, which we restate as:

I. Whether the trial court abused its discretion by considering the fact that Fleming was convicted of multiple counts and the fact that there were multiple victims as aggravators for purposes of sentencing.

II. Whether Fleming's sentence is inappropriate in light of the nature of the offenses and his character.

Facts

[3] While in Anderson, Ryan Green's car suffered a punctured tire, and Green called Bryce Patterson for assistance. Patterson, along with his cousin, Dorien

Patterson ("Dorien"), drove from Fortville to Anderson to assist in replacing the flat tire with a temporary replacement. Unbeknownst to Patterson, Green was preparing for a drug deal when his car sustained the flat tire outside a gas station. The other passengers in Green's car at the time were his brother, Michael Kincade[1]; Kincade's girlfriend, McKenzie Ford, who was pregnant; and the two would-be drug purchasers: Orlando Sutton and Fleming. The plan was for Green and Kincade to sell a quarter of a pound of marijuana to Sutton and Fleming for $550.00.

[4] Shortly before Patterson arrived and began repairs, Sutton and Fleming went into the gas station, supposedly to obtain the cash needed for the transaction. Sutton and Fleming had requested to be taken to the gas station for that purpose. Surveillance footage from the gas station, however, appears to show Sutton and Fleming merely miming the actions necessary to withdraw cash from an ATM; neither actually withdrew any money. Fleming later admitted to having a firearm on his person at that time. When Patterson arrived, Kincade overheard Sutton and Fleming discussing the fact that Patterson "[l]ooks like he has money." Tr. Vol. II p. 161.

[5] Patterson suggested that driving with three people in the back of Green's car was unwise with the temporary tire, and Patterson offered for Kincade and Ford to ride with Patterson and Dorien. Green drove Sutton and Fleming.

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[1] Both the record and the briefs contain discrepancies with respect to the correct spelling of Kincade's name. We adopt this spelling based on Kincade's own testimony. *See* Tr. Vol. II p. 149.

Patterson, in the dark as to their destination, followed. The two cars arrived at a location on 12th street. Sutton and Fleming exited Green's vehicle and disappeared behind a nearby house. Returning a few minutes later, Sutton and Fleming approached Patterson's car. Patterson was in the driver's seat, Dorien was in the passenger seat, Ford sat on the rear passenger side, and Kincade sat across from Ford on the rear driver's side.

[6] Sutton and Fleming approached the car on the rear driver's side, where Kincade passed them a bag of marijuana out the window. After inspecting the marijuana and passing it back to Kincade, Sutton and Fleming drew pistols and told the occupants of the car to "give me all you got."[2] Kincade attempted to comply, but before he could, Sutton and Fleming opened fire.[3] Fleming fired five shots, one of which struck Patterson in the back of the head, and another of which struck Kincade in the left arm. Kincade noticed that Fleming's weapon had a laser sight for accuracy. Patterson was taken to the hospital and pronounced dead shortly thereafter.

[7] Sutton and Fleming fled on foot, but Fleming eventually turned himself in after a warrant was issued for his arrest. The State charged Fleming with: Count I, murder; Count II, felony murder; Count III, attempted murder, a Level 1

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[2] There are some minor, albeit non-substantive, inconsistencies in the record as to the precise phrasing of the demand.

[3] At trial, Fleming claimed that Kincade shot first. Kincade, however, testified that Kincade was unarmed. No evidence corroborated Fleming's claim.

felony; Count IV, robbery resulting in serious bodily injury, a Level 2 felony; and Count V, robbery resulting in serious bodily injury, a Level 2 felony.[4] The State dismissed Count IV before the trial. After a jury trial in February 2020, a jury found Fleming guilty as charged.

[8] The trial court conducted a sentencing hearing on March 11, 2020. Fleming testified and apologized, but the State established on cross-examination that Fleming stated to his pastor, the previous evening, that the crimes "[were] not my fault." Tr. Vol. V pp. 177-78. During the sentencing hearing, the trial court made the following statement:

> The court now finds the following aggravators and mitigators to be present in this case. As far as aggravation, we have here multiple counts with multiple victims. There were multiple victims that suffered gunshots wounds, one (l) a fatal gunshot wound and then an additional victim also suffering a gunshot wound. So, we have multiple victims here. Also, the facts and circumstances surrounding this case. A car filled with people was riddled with bullet holes at the hand of the defendant. The defendant had full knowledge that the car had a passenger in every seat. Two (2) in the front and two (2) in the back and that did not stop the defendant from firing multiple rounds into the car. As far as mitigating circumstances, the defense has requested that a lack of criminal history be found as a mitigator. The court does not find that to be a mitigating circumstance but also does not find any criminal history to be an aggravating circumstance either. As far as any other mitigating

[4] Counts I, II, and IV were charged with respect to Patterson. Counts III and V were charged with respect to Kincade.

> circumstances, the court does not find any other mitigators to be present.

Tr. Vol. V pp. 206-08. The trial court vacated Counts II and IV and imposed an advisory fifty-five-year sentence for Count I and a consecutive, advisory, thirty-year sentence for Count V for an aggregate sentence of eighty-five years in the Department of Correction. Fleming now appeals.

Analysis

I. Abuse of Discretion Claims[5]

[9] Fleming argues that the trial court abused its discretion in considering his multiple convictions and the multiple victims as aggravating factors. Fleming's entire argument on this issue appears confined to the following single paragraph:

> At sentencing, the court noted two aggravating factors to be considered: first, the nature and circumstances of the crime and second, multiple counts and multiple [v]ictims. Although the court offered [a] sentencing statement of aggravating factors, the

[5] The heading in the argument section of Fleming's brief reads: "And the Court committed an abuse of discretion for failing to enter a sentencing statement that adequately stated the reasoning for imposing consecutive sentences and omitted certain reasons for consideration that were supported by the record." Appellant's Br. p. 11 (capitalization emphasis omitted). We cannot say, however, that Fleming actually makes these arguments. Accordingly, they are waived. *See* Ind. Appellate Rule 46(A) (requiring that arguments be supported by authority and cogent reasoning); *see also Ross v. State*, 877 N.E.2d 829, 833 (Ind. Ct. App. 2007) ("Ross's argument regarding appellate counsel fails to meet a minimum standard of cogency and we decline to address it further."), *trans. denied*. Moreover, Fleming's brief contains the single conclusory line: "Furthermore, the trial Court's sentencing statement did not contain sufficiently specific reasons for imposing either the consecutive sentences or the length of sentence that Fleming received." Appellant's Br. pp. 15-16. Without authority or argument, this claim is similarly waived. Waiver notwithstanding, however, we disagree with Fleming's contentions. A simple reading of the trial court's statements during sentencing reveals that the trial court relied upon reasons sufficient to justify the sentence it imposed.

> court erred in considering "multiple counts and multiple [v]ictims" as an aggravating factor, insofar as this is not [a] stand-alone statutory aggravating factor under Ind. Code 35-38-1-7.1(a). Therefore, the weight that the trial court may have assigned to the "multiple counts and multiple [v]ictims" factor in imposing it [sic] sentence should be reconsidered.

Appellant's Br. p. 13. Fleming apparently suggests that sentencing courts are limited to specifically enumerated aggravating factors and that this Court is at liberty to reweigh the factors considered by the sentencing court in the context of an abuse of discretion analysis. Both claims are amply contradicted by case law.

[10] > We have long held that a trial judge's sentencing decisions are reviewed under an abuse of discretion standard. 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. When sentencing, a trial court abuses its discretion if it, among other things, considers reasons that are improper as a matter of law.

McCain v. State, 148 N.E.3d 977, 981 (Ind. 2020) (internal citations and quotations omitted).[6]

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[6] Indiana Code 35-38-1-7.1 holds in pertinent part:

> (a) In determining what sentence to impose for a crime, the court may consider the following aggravating circumstances:
>
> (1) The harm, injury, loss, or damage suffered by the victim of an offense was:
>
> (A) significant; and

[11] Here, the trial court imposed the advisory sentence for both convictions. Indiana Code Section 35-38-1-7.1 states that a trial court "may consider" various enumerated aggravating and mitigating factors, but does not require a trial court to do so. Indiana Code Section 35-38-1-1.3, however, does require a trial court to state its reasons in imposing a sentence for a felony other than the advisory sentence.

[12] It is axiomatic of our criminal sentence review jurisprudence that the weight a trial court assigns to particular mitigators and aggravators is not subject to review for abuse of discretion. "Because the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-*Blakely* statutory regime, a trial court cannot now be said to have abused its discretion in failing to 'properly weigh' such factors." *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007) (citing *Jackson v. State*, 728 N.E.2d 147, 155 (Ind. 2000)). "[ ] The reasons given [for a sentence], and the omission of reasons arguably supported by the record, are reviewable on appeal for an abuse

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(B) greater than the elements necessary to prove the commission of the offense.

(2) The person has a history of criminal or delinquent behavior.

* * * * *

(c) The criteria listed in subsections (a) and (b) do not limit the matters that the court may consider in determining the sentence.

(d) A court may impose any sentence that is:

(1) authorized by statute; and

(2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances.

of discretion. [ ] The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." *Id*. at 491. When a trial court imposes an advisory sentence, however, it need not state its reasons for the chosen sentence. Ind. Code § 35-38-1-1.3. Thus, here, it is simply untrue that "the weight that the trial court may have assigned to the 'multiple counts and multiple [v]ictims' factor in imposing it[s] sentence should be reconsidered." *See* Appellant's Br. p. 13.

[13] Furthermore, "[e]ven though the statute unambiguously declares that a trial judge may impose any sentence within the statutory range without regard to the existence of aggravating or mitigating factors, it is important to note that the statute does not prohibit the judge from identifying facts in aggravation or mitigation." *Anglemyer*, 868 N.E.2d at 489. This Court has long-since repudiated the idea that Indiana Code Section 35-38-1-7.1 constitutes an exhaustive list of aggravators and mitigators by which a sentencing court is bound. *See, e.g., Phelps v. State,* 914 N.E.2d 283, 292 (Ind. Ct. App. 2009) (". . . [t]he aggravating factors listed in that statute are not exclusive and trial courts may consider additional aggravating factors when determining a sentence.").

[14] Accordingly, the trial court did not abuse its discretion in considering the multiple counts and multiple victims as aggravating factors, and Fleming's first argument fails. *See Mefford v. State*, 983 N.E.2d 232, 238 (Ind. Ct. App. 2013) ("It is a well[-]established principle that the fact of multiple crimes or victims constitutes a valid aggravating circumstance that a trial court may consider in

imposing consecutive or enhanced sentences.") (quoting *O'Connell v. State*, 742 N.E.2d 943, 952 (Ind. 2001), *trans. denied*.

II. Propriety of Sentence Under Rule 7(B)

[15] Fleming next argues that his sentence was inappropriate in light of the nature of his offenses and his character. The Indiana Constitution authorizes independent appellate review and revision of a trial court's sentencing decision. *See* Ind. Const. art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). Our Supreme Court has implemented this authority through Indiana Appellate Rule 7(B), which allows this Court to revise a sentence when it is "inappropriate in light of the nature of the offense and the character of the offender." Our review of a sentence under Appellate Rule 7(B) is not an act of second guessing the trial court's sentence; rather, "[o]ur posture on appeal is [ ] deferential" to the trial court. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016) (citing *Rice v. State*, 6 N.E.3d 940, 946 (Ind. 2014)). We exercise our authority under Appellate Rule 7(B) only in "exceptional cases, and its exercise 'boils down to our collective sense of what is appropriate.'" *Mullins v. State,* 148 N.E.3d 986, 987 (Ind. 2020) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[16] "'The principal role of appellate review is to attempt to leaven the outliers.'" *McCain*, 148 N.E.3d at 985 (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). The point is "not to achieve a perceived correct sentence." *Id.* "Whether a sentence should be deemed 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.'" *Id*. (quoting *Cardwell*, 895 N.E.2d at 1224). Deference to the trial court's sentence "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).

[17] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). A reviewing court is thus "unlikely to consider an advisory sentence inappropriate." *Shelby v. State*, 986 N.E.2d 345, 371 (Ind. Ct. App. 2013), *trans denied*. Rather, the defendant "bears a particularly heavy burden in persuading us that his sentence is inappropriate when the trial court imposes the advisory sentence." *Fernbach v. State*, 954 N.E.2d 1080, 1089 (Ind. Ct. App. 2011), *trans. denied*.

[18] In the case at-bar, Fleming was convicted of murder, pursuant to Indiana Code Section 35-42-1-1(2), and attempted murder, pursuant to Indiana Code Section 35-42-1-1(1). Indiana Code Section 35-50-2-3 provides that, "[a] person who commits murder shall be imprisoned for a fixed term of between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years." Attempted murder, as charged here, constituted a Level 1 felony, and as such, warranted a sentence under Indiana Code Section 35-50-2-4, which provides that ". . . a person who commits a Level 1 felony (for a crime committed after

June 30, 2014) shall be imprisoned for a fixed term of between twenty (20) and forty (40) years, with the advisory sentence being thirty (30) years." Thus, the trial court sentenced Fleming to the advisory sentence for each of his two convictions.

[19] When considering the "nature of the offense," we examine the nature, extent, and depravity of the offense. *Sorenson v. State*, 133 N.E.3d 717, 729 (Ind. Ct. App. 2019), *trans. denied*. Here, prior to his offenses, Fleming was engaged in an illegal drug purchase. Fleming and his associate, Sutton, in the midst of the transaction, fired indiscriminately and repeatedly into a vehicle containing four people, one of whom was pregnant. The fact that no money was withdrawn from the gas station ATM, combined with the comment that Patterson "[l]ooks like he has money," suggests that Fleming and Sutton *planned* to rob Patterson, Kincade, and Green, rather than committing the act on the spur of the moment. Tr. Vol. II p. 161. Fleming committed a senseless act, taking a life, injuring another, and putting still others at risk, all for $550.00 worth of marijuana.

[20] Our analysis of the character of the offender involves a "broad consideration of a defendant's qualities," *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019), including the defendant's age, criminal history, background, and remorse. *James v. State*, 868 N.E.2d 543, 548-59 (Ind. Ct. App. 2007). Fleming points to his Indiana Risk Assessment System evaluations, which were relatively low, as well as his limited criminal history, which consists of a single juvenile adjudication. We acknowledge Fleming's minor criminal history. Fleming was eighteen at the time of his crimes, hardly enough time for him to

have developed a significant adult criminal record. Fleming was not forthcoming with police, despite turning himself in, and his story changed several times. At sentencing, the State vigorously contested the suggestion that Fleming had exhibited genuine remorse, establishing that his in-court apology was less than heartfelt. The trial court found no mitigators, and Fleming has not shown that he possesses "substantial virtuous traits or [exhibits] persistent examples of good character." *Stephenson*, 29 N.E.3d at 122.

[21] A criminal appellant bears a substantial burden in persuading us that an advisory sentence is inappropriate. *Fernbach,* 954 N.E.2d at 1089. Fleming has not met his burden. Accordingly, we cannot conclude that his sentence is inappropriate in light of the nature of his offenses or his character. And where, as here, multiple convictions are based upon harm to more than one victim, we cannot say that consecutive advisory sentences are inappropriate. We must affirm.

Conclusion

[22] The trial court did not abuse its sentencing discretion. Fleming's sentence is not inappropriate in light of the nature of his offenses and his character. We affirm.

[23] Affirmed.

Najam, J., and Pyle, J., concur.