MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Tyler D. Helmond
Voyles Vaiana Lukemeyer, Baldwin & Webb
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Tina L. Mann
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Marcos Leon,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 12, 2021

Court of Appeals Case No. 21A-CR-107

Appeal from the Vanderburgh Circuit Court

The Honorable Celia Pauli, Magistrate

Trial Court Cause No. 82C01-2001-F6-769

Crone, Judge.

Case Summary

[1] Marcos Leon appeals the sentencing order issued by the trial court following his guilty plea to Level 6 felony attempted voyeurism. He contends the trial court abused its discretion in declining to enter his conviction as a Class A misdemeanor. We affirm.

Facts and Procedural History

[2] Leon owned a restaurant in Evansville. In January 2020, Leon placed his cell phone in a concealed place in the restaurant's unisex restroom to take a photograph or video recording of the occupants. Later that month, the State charged Leon with one count of Level 6 felony attempted voyeurism. Leon pled guilty without a plea agreement.

[3] At sentencing, Leon asked the trial court to enter his conviction as a Class A misdemeanor, noting he had a limited criminal history—one misdemeanor for driving without a license—and he had lost his business and his family had disowned him because of the case. The State objected and stated, "Looking at [Indiana Code section 35-38-1-1.5][1], converting a conviction to a Class A Misdemeanor requires the consent of the prosecuting attorney." Tr. Vol. II p. 38. The State further argued the conviction should not be entered as a Class A

[1] The State actually cited to Indiana Code section "38-35-1-1.5," which does not exist. We agree with Leon that the State "was presumably referring to Indiana Code § 35-38-1-1.5." Appellant's Br. p. 10.

misdemeanor because Leon's crime "is extremely concerning" and if someone had not noticed his concealed phone, his criminal behavior "could have gone on for who knows how long." *Id.* at 39.

[4] The trial court found three mitigating factors: Leon is at low risk to reoffend, has a limited criminal history with no prior felonies, and pled guilty and expressed remorse. The court found "the nature and circumstances of this offense" to be an aggravating factor. *Id.* at 40. Specifically, the court stated:

> Like [the State] said, this could have been worse. We don't know who could have been in the bathroom when you were recording. Could have been children, we don't know. And so for that reason, the Court enters judgment of conviction as a level 6 felony and sentences the defendant to one year . . . executed at the Department of Correction[].

Id.

[5] Leon now appeals.[2]

[2] The parties dispute whether we can consider facts laid out in the probable-cause affidavit but not established in the plea. Because we decide the case without referencing those challenged facts, we need not reach this issue.

Discussion and Decision

I. Applicable Statutes

[6] Leon argues the trial court was not presented "an accurate summary of the complete law of alternative misdemeanor sentencing." Appellant's Br. p. 10. Specifically, Leon notes that at sentencing the State argued its consent to an alternative-misdemeanor sentence was needed under Indiana Code section 35-38-1-1.5(a), which provides:

> A court may enter judgment of conviction as a Level 6 felony with the express provision that the conviction will be converted to a conviction as a Class A misdemeanor if the person fulfills certain conditions. A court may enter a judgment of conviction as a Level 6 felony with the express provision that the conviction will be converted to a conviction as a Class A misdemeanor only if the person pleads guilty to a Level 6 felony that qualifies for consideration as a Class A misdemeanor under IC 35-50-2-7, and the following conditions are met:
>
> **(1) The prosecuting attorney consents.**
>
> (2) The person agrees to the conditions set by the court.

(Emphasis added).

[7] Not mentioned at sentencing, however, was that the trial court could have entered a Class A misdemeanor conviction under another statutory provision—Indiana Code section 35-50-2-7(c), which provides,

> Notwithstanding subsections (a) and (b), if a person has committed a Class D felony (for a crime committed before July 1, 2014) or a Level 6 felony (for a crime committed after June 30, 2014), the court may enter judgment of conviction of a Class A misdemeanor and sentence accordingly. However, the court shall enter a judgment of conviction of a Class D felony (for a crime committed before July 1, 2014) or a Level 6 felony (for a crime committed after June 30, 2014) if:
>
> (1) the court finds that:
>
> (A) the person has committed a prior, unrelated felony for which judgment was entered as a conviction of a Class A misdemeanor; and
>
> (B) the prior felony was committed less than three (3) years before the second felony was committed;
>
> (2) the offense is domestic battery as a Class D felony (for a crime committed before July 1, 2014) or a Level 6 felony (for a crime committed after June 30, 2014) under IC 35-42-2-1.3; or
>
> (3) the offense is possession of child pornography (IC 35-42-4-4(d)).

Notably, this statute does not require the State's consent. Therefore, Leon argues, the trial court was "empowered with a separate sentencing authority which the prosecutor's argument omitted" and because it is "unclear" if this omission affected the court's decision, remand is appropriate. Appellant's Br. p. 11. We disagree.

[8] We presume the trial court knows the law, and Leon provides no evidence to the contrary. *Emerson v. State*, 695 N.E.2d 912, 919 (Ind. 1998), *reh'g denied*. The State's argument at sentencing that its consent was needed under Section 35-38-1-1.5 is not wrong, nor did the State ever assert that Leon's ineligibility under Section 35-38-1-1.5 precluded him from qualifying under another statutory provision. Furthermore, the trial court's sentencing statement indicates it did not rely on the State's consent argument to make its decision. The court stated, "We don't know who could have been in the bathroom when you were recording. Could have been children, we don't know. **And so for that reason**, the Court enters judgment of conviction as a level 6 felony . . . ." Tr. Vol. II p. 40 (emphasis added). The trial court's reasoning for declining to enter the conviction as a Class A misdemeanor was based on the circumstances of the crime, not because the State objected. As such, Leon has failed to show there is a need for remand.

II. Abuse of Discretion

[9] Alternatively, Leon argues the trial court abused its discretion when it declined to enter judgment of conviction as a Class A misdemeanor rather than as a Level 6 felony. Specifically, Leon asserts the trial court based its decision in part on the "nature and circumstances of this offense [which is] not a valid aggravating factor." Appellant's Br. p. 8.

[10] As noted above, Indiana Code section 35-50-2-7(c) provides if a person has committed a Level 6 felony, and none of the ineligibility conditions apply, "the

court may enter judgment of conviction of a Class A misdemeanor and sentence accordingly." The trial court has "broad discretion" to grant leniency under Section 35-50-2-7. *F.D.F. v. State*, 916 N.E.2d 708, 711 (Ind. Ct. App. 2009). Trial courts may deny a defendant's request for alternative-misdemeanor sentencing "as long as the denial is supported by the logic and effect of the facts." *Alden v. State*, 983 N.E.2d 186, 189 (Ind. Ct. App. 2013), *trans. denied*.

[11] Although Leon frames his argument as one regarding an improper aggravating factor, we note the trial court does not have to find or balance aggravating or mitigating factors when deciding whether to grant a defendant's request under Section 35-50-2-7. *F.D.F*, 916 N.E.2d at 711. We therefore decline to review the court's finding of this aggravating factor and instead review for abuse of discretion the court's ultimate decision to enter a felony conviction. *See id.* (declining to review trial court's "finding and balancing of aggravators and mitigators" where the court did not have to find or balance those factors).

[12] We find no abuse of discretion here. Leon, the owner of a restaurant, placed a cell phone equipped with a camera in the restaurant's restroom intending to film the restroom's occupants. The victims of this crime could be numerous and include vulnerable populations, such as children. This is sufficient reasoning to decline a request for alternative-misdemeanor sentencing.

[13] The trial court did not abuse its discretion by denying Leon's request to enter his conviction as a Class A misdemeanor.

[14] Affirmed.

Bradford, C.J., and Brown, J., concur.