MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Iven D. Walker,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 3, 2021

Court of Appeals Case No. 20A-CR-2197

Appeal from the Delaware Circuit Court

The Honorable Marianne Vorhees, Judge

Trial Court Cause No. 18C01-2002-F5-26

May, Judge.

[1] Iven D. Walker appeals following his conviction of Level 5 felony domestic battery.[1] Walker presents four issues for review, which we revise and restate as:

> I. Whether the trial court erred in allowing the State to exercise a peremptory challenge excluding an African American venireperson;
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> II. Whether the trial court erred in allowing the State to present evidence of Walker's prior convictions of domestic battery against the victim;
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> III. Whether the trial court erred in instructing the jury regarding the admissibility of Walker's prior convictions; and
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> IV. Whether Walker's sentence is inappropriate given the nature of his offense and his character.

We affirm.

Facts and Procedural History

[2] At approximately 6:00 p.m. on February 19, 2020, Walker and D.R. were at a bus stop at the intersection of Memorial Drive and Madison Street in Muncie, Indiana. Walker and D.R. had been dating for approximately two years. Walker asked D.R. for a cigarette, and D.R. offered him a rolled cigarette. Walker became upset because he wanted a "real" cigarette. (Tr. Vol. II at 44.)

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[1] Ind. Code § 35-42-2-1.3.

Walker then started reaching into D.R.'s pockets and a struggle ensued. David Sheveily, a retired reserve police officer, was sitting in his vehicle at the intersection waiting for the traffic light to turn, when he observed Walker push D.R. to the ground. Walker started to punch D.R. in the face and stomp on her. D.R. raised her arms to protect herself, and she ripped her coat trying to get away from Walker.

[3] Once the light turned green, Sheveily pulled into a nearby Walgreens parking lot. Sheveily yelled at Walker to stop hitting D.R., but Walker did not stop punching D.R. until Sheveily walked near them and threatened to intervene. Sheveily then called 911, and he observed Walker and D.R. walk across the street into a CVS. Officer Gage Winters and Officer Lauren Skiner from the Muncie Police Department responded to the 911 call. Officer Skiner spoke with Sheveily and D.R., and Officer Winters spoke with Walker. The officers then arrested Walker and transported him to jail.

[4] On February 26, 2020, the State charged Walker with Class A misdemeanor domestic battery[2] and Class B misdemeanor battery.[3] The State also filed a notice of intent to seek an enhanced penalty as to each charge based upon a prior conviction.[4] While Walker was in jail awaiting trial, he participated in video visits with D.R. During the visits, Walker told D.R. that he needed her

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[2] Ind. Code § 35-42-2-1.3(a)(1).

[3] Ind. Code § 35-42-2-1(c)(1).

[4] Ind. Code § 35-42-2-1(g)(4).

"to help him[.]" (*Id.* at 47.) Walker asked D.R. to contact the prosecutor's office and recant her statement, but D.R. refused. He also asked D.R. if she planned to appear at his trial and said he "wasn't worried about it" after D.R. told him she would not appear. (*Id*. at 117.)

[5] Prior to trial, the State filed notice of intent to introduce evidence pursuant to Indiana Rule of Evidence 404(b) regarding three previous domestic violence incidents between Walker and D.R. The first incident occurred on September 21, 2018, and although Walker was arrested and charged with Level 6 felony attempted strangulation[5] and Level 6 felony domestic battery following the incident, those charges were later dismissed. The second incident occurred on January 14, 2019. Walker was arrested and convicted of Level 6 felony domestic battery after the incident. The third incident occurred on November 12, 2019, and resulted in another Level 6 felony domestic battery conviction for Walker. The State explained that it intended to introduce the Rule 404(b) evidence in the instant case to establish "the relationship between the parties, specifically the hostility and conflict of said relationship." (App. Vol. II at 59.) Walker filed a memorandum in opposition to the State's motion and argued that the evidence of prior domestic violence incidents was inadmissible. After a hearing, the trial court ruled that evidence relating to the domestic violence incident that did not result in a criminal conviction was inadmissible, but

[5] Ind. Code § 35-42-2-9 (strangulation) & Ind. Code § 35-41-5-1 (attempt).

evidence regarding the two incidents that resulted in convictions was admissible.

[6] The trial court conducted a jury trial on October 19 and 20, 2020. During voir dire, Walker raised a *Batson*[6] objection to the State's use of a peremptory challenge to excuse Juror 15, who was an African American woman. The State then explained:

> Our office receptionist knows the family. Her [sic] daughters play together on volleyball. . . based on her personal relationships with her, that [Juror 15] can be difficult to get along with in group settings. She is oftentimes somebody who is very opinionated and doesn't get along well with others, and the State doesn't believe based on that information from our office receptionist that she would make—be a good fit for the jury in this kind of requirement where you need to work cooperatively with others and people of very strong opinions and strong personalities would not be good. That's the basis for the State striking her.

(Tr. Vol. II at 20.) The court then allowed the parties to further question Juror 15. Juror 15 confirmed that she knew the receptionist in the prosecutor's office because the receptionist coached Juror 15's daughter's volleyball team. Juror 15 also acknowledged there sometimes was tension among the parents of the volleyball players. The trial court ruled:

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[6] *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986).

> The prosecution has offered a race-neutral basis for striking the juror in question, that being that the prosecution believes that through these volleyball interactions that she is going to be a person who might cause confrontation and might be difficult to deal with in the jury room. That doesn't have anything to do with her race. In fact, I didn't know my [sic] myself either that she was black. I couldn't recognize that with her mask on.
>
> So I don't think that the defendant has shown purposeful discrimination here. I would note the language in [an unidentified Court of Appeals opinion discussing court procedure following a *Batson* objection] also indicates that the procedure places great responsibility in the hands of the Trial Judge, who is in the best position to determine whether a preemptory challenge is based on an impermissible factor. This is a difficult determination because of the nature of peremptory challenges, that they are often based on subtle impressions and intangible factors, so I do find that the State has based this preemptory challenge on several impressions and unchangeable factors, and not on an impermissible factor of race.
>
> So I will allow the State to exercise a preemptory challenge as to [Juror 15].

(*Id*. at 24-25.)

[7] After voir dire, the trial court read the jury a series of preliminary instructions, including Preliminary Instruction 10:

> You will hear evidence in this case that the Defendant was previously convicted of domestic battery offenses committed against [D.R.]. The State is seeking to use this evidence only for one purpose: to show motive, more specifically, that the

> Defendant had hostility toward [D.R.], and this hostility may be the motive for the charged act of domestic violence.
>
> You are to use this evidence only for this purpose and not for any other purpose or reason.

(App. Vol. II at 122.) During trial, Walker renewed his objections to the State's presentation of Rule 404(b) evidence, and the trial court overruled Walker's objections. Before the State presented the Rule 404(b) evidence, the trial court reminded the jury about Preliminary Instruction 10. Officer Mariah Copeland of the Muncie Police Department testified that on January 14, 2019, she responded to a domestic violence call and arrested Walker for committing a battery against D.R. Sergeant Kristofer Swanson of the Muncie Police Department similarly testified that he responded to a domestic violence call on November 12, 2019, and he arrested Walker for committing a battery against D.R. Walker then testified that he pled guilty to charges of domestic battery following both arrests. The jury returned a verdict of guilty on all counts, and the trial court entered judgment of conviction on only the Level 5 felony domestic battery charge to avoid any double jeopardy violation.

[8] The trial court held a sentencing hearing on November 23, 2020, and sentenced Walker to a term of six years in the Indiana Department of Correction. The trial court found several aggravating factors, including: (1) Walker's lengthy criminal history; (2) Walker's two previous domestic battery convictions against the same victim; (3) Walker's attempt to get the victim to recant; (4) Walker being in a position of trust with the victim; and (5) Walker being on supervised

probation at the time of the instant offense. The trial court also identified one mitigating factor, Walker's history of alcohol abuse, but the court assigned that factor little or no mitigating weight.

Discussion and Decision

I. *Batson* Challenge

[9] In *Batson v. Kentucky*, the Supreme Court of the United States held "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986). In *Powers v. Ohio*, the Supreme Court extended *Batson* by holding "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same races." 499 U.S. 400, 402, 111 S. Ct. 1365, 1365 (1991). Justice Anthony Kennedy explained that a prosecutor's use of racially discriminatory peremptory challenges impairs the criminal defendant's "right to be tried by a jury whose members are selected by nondiscriminatory criteria." *Id*. at 404, 111 S. Ct. at 1367. The practice also "harms the excluded jurors and the community at large." *Id*. at 406, 111 S. Ct. at 1370.

[10] When a criminal defendant objects to the State's preemptory strike pursuant to *Batson*, the trial court must conduct a three-step inquiry. *Cartwright v. State*, 962 N.E.2d 1217, 1220 (Ind. 2012).

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Id. at 1220-21 (internal quotation marks omitted). To make the required prima facie showing, the defendant is required to demonstrate: (1) the potential juror is a member of a cognizable racial group; (2) the State has used a peremptory challenge to exclude a member of that racial group from the jury; and (3) the facts and circumstances of the case raise an inference that the removal was based on race. *Robertson v. State*, 9 N.E.3d 765, 768 (Ind. Ct. App. 2014), *trans. denied*.

[11] Once the defendant has made the required prima facie showing, the court moves to the second step of the analysis, and the burden shifts to the State to put forth a race neutral explanation for the venireperson's exclusion. *Id*. at 767. "A step two explanation is considered race-neutral if, on its face, it is based on something other than race." *Cartwright*, 962 N.E.2d at 1221. In the third step, the defendant has the opportunity to offer additional evidence to demonstrate the State's proffered race-neutral explanation is pretextual, and then the trial court ultimately rules on whether the proffered race-neutral explanation is valid. *Id*. We afford great deference to a trial court's decision regarding whether a peremptory challenge is discriminatory, and we will set aside the trial court's finding only if it is clearly erroneous. *Forrest v. State*, 757 N.E.2d 1003, 1004

(Ind. 2001). "Clear error is that which leaves us with a definite and firm conviction that a mistake has been made." *In re C.D.*, 141 N.E.3d 845, 852 (Ind. Ct. App. 2020), *trans. denied*.

[12] Walker argues that the State did not come forth with an adequate race-neutral explanation for using a peremptory strike to exclude Juror 15.[7] We disagree. By the very nature of peremptory challenges, the rationale supporting a peremptory challenge does not have to rise to the level justifying a challenge for cause. *See Patterson v. State*, 729 N.E.2d 1035, 1039 (Ind. Ct. App. 2000) ("Although the prosecutor's reason must relate to the particular case to be tried, it need not rise to the level justifying a challenge for cause, nor need it be particularly persuasive, so long as it constitutes a valid reason for excluding the juror in question."). As the trial court noted, a person's ability to get along well with others in a group setting is not connected to race, and the receptionist in the prosecutor's office knew Juror 15 sometimes clashed with other volleyball parents. Therefore, we cannot say the trial court committed clear error in allowing the State to use a preemptory strike to exclude Juror 15. *See Whitfield v. State*, 127 N.E.3d 1260, 1268 (Ind. Ct. App. 2019) (holding State's proffered

[7] The State asserts Walker waived his *Batson* challenge by failing to present cogent argument on appeal. (Appellee's Br. at 12 (citing Ind. App. R. 46(A)(8)(a)).) However, while Walker's brief contains only a half-page of argument regarding his *Batson* challenge, we address his argument based on our long-standing preference for deciding cases on the merits. *See Milbank Ins. Co. v. Ind. Ins. Co.*, 56 N.E.3d 1222, 1228 (Ind. Ct. App. 2013) (considering merits of the parties' arguments despite untimely filing of notice of appeal).

reasons for striking juror were race neutral and not pretexts for discrimination), *trans. denied*.

II. Admission of Rule 404(b) Evidence

[13] Decisions regarding the admission of evidence are left to the sound discretion of the trial court, and we review such decisions for an abuse of discretion. *Wolpert v. State*, 47 N.E.3d 1246, 1247 (Ind. Ct. App. 2015), *trans. denied*. "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law." *Id*. We will affirm a trial court's decision to admit evidence if it can be sustained by any theory supported by the record, even if the trial court did not rely on the theory. *Id*. Walker argues Indiana Rule of Evidence 404(b) prohibited the State from presenting evidence that he was arrested for battering D.R. on two previous occasions.

[14] Rule of Evidence 404(b) concerns evidence of crimes, wrong, or other acts, and it provides:

> (1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) *Permitted Uses; Notice in a Criminal Case*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

> (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
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> (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

This rule is intended "to prevent the jury from assessing a defendant's present guilt on the basis of his propensities—the so-called 'forbidden inference.'" *Embry v. State*, 923 N.E.2d 1, 9 (Ind. Ct. App. 2010) (quoting *Hicks v. State*, 690 N.E.2d 215, 218-19 (Ind. 1997)), *trans. denied*.

[15] If the evidence of other crimes, wrongs, or acts is intended to prove motive rather than a propensity for crime and if the evidence's probative value outweighs the danger of unfair prejudice, it is admissible. *Id*. As we explained in *Embry*:

> "[P]roof of the defendant's motive to commit the charged crime lends itself to three legitimate theories of logical relevance." 1 Imwinkelried, [*Uncharged Misconduct Evidence*], § 5:35 (1999). "Evidence of motive may be offered to prove that the act was committed, or to prove the identity of the actor, or to prove the requisite mental state." 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure* § 5240 (1978).
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> When evidence of motive is offered for those purposes, "[n]umerous cases have held that where a relationship between parties is characterized by frequent conflict, evidence of the defendant's prior assaults and confrontations with the victim may be admitted to show the relationship between the parties and motive for committing the crime." *Iqbal v. State,* 805 N.E.2d 401, 408 (Ind. Ct. App. 2004).

Id.

[16] In *Whitham v. State*, the State charged Whitham with attempting to murder his grandmother, and at trial, Whitham's grandmother testified that Whitham had attacked her on two prior occasions. 49 N.E.3d 162, 164-65 (Ind. Ct. App. 2015), *trans. denied*. On appeal, Whitham argued that the trial court erred in allowing his grandmother to testify about the previous attacks. *Id*. at 166. However, we noted that:

> The Indiana Supreme Court has made clear that "hostility is a paradigmatic motive for committing a crime." *Hicks* [*v. State*, 690 N.E.2d 215, 222 (Ind. 1997)] (quotations omitted). And where the defendant and the victim have a frequently hostile relationship, evidence of those prior hostilities "are … usually admissible" under Rule 404(b). *Id.* at 222-23.

Id. at 167. Consequently, we held the grandmother's testimony about the prior attacks was admissible to show a pattern of hostility and motive. *Id*.

[17] Similarly, in the instant case, the evidence related to Walker's previous batteries of D.R. demonstrated an abusive relationship and hostility that could have motivated Walker to react by punching and kicking D.R. when she did not offer him the type of cigarette he wanted. We accordingly hold the trial court did not abuse its discretion by admitting this evidence. *See*, *e.g.*, *id*. (holding evidence was admissible under the circumstances).

III. Jury Instructions Regarding 404(b) Evidence

[18] Walker also challenges the trial court's reading of Preliminary Instruction 10. However, instead of providing an argument specific to Preliminary Instruction 10, Walker simply "restates his argument concerning Issue No. 2, concerning the granting of the State's 404(B) motion." (Appellant's Br. at 13.) We require parties presenting issues on appeal to support each contention with cogent argument and citation to relevant authority. *See* Ind. App. R. 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22."). Consequently, Walker's argument regarding Preliminary Instruction 10 is waived. *See Lacey v. State*, 124 N.E.3d 1253, 1257 n.8 (Ind. Ct. App. 2019) (defendant waived argument by failing to present cogent argument or cite appropriate authority).

[19] Waiver notwithstanding, the trial court enjoys broad discretion in instructing the jury, and we will reverse only for an abuse of that discretion. *Snell v. State*, 866 N.E.2d 392, 395 (Ind. Ct. App. 2007). "Jury instructions are to be considered as a whole and in reference to each other, and we will not reverse the trial court's decision as an abuse of discretion unless the instructions as a whole mislead the jury as to the law of the case." *Walls v. State*, 993 N.E.2d 262, 268 (Ind. Ct. App. 2013), *trans. denied*. As the trial court did not err in admitting evidence of Walker's prior batteries of D.R. to show motive, the trial court did not err in instructing the jury regarding the specific purpose for which

the evidence was introduced. *See Wilhelmus v. State*, 824 N.E.2d 405, 415-16 (Ind. Ct. App. 2005) (holding trial court should have admonished jury, prior to introduction, that evidence of defendant's prior involvement in a methamphetamine lab was being introduced solely with respect to the issue of identity).

IV. Appropriateness of Sentence

[20] We may revise a sentence if it "is inappropriate in light of the nature of the offense and the character of the offender." *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008) (citing Ind. Appellate Rule 7(B)). We consider the aggravators and mitigators found by the trial court and any other factors appearing in the record. *Baumholser v. State*, 62 N.E.3d 411, 417 (Ind. Ct. App. 2016), *trans. denied*. Our determination of appropriateness "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). The appellant must demonstrate his sentence is inappropriate. *Baumholser*, 62 N.E.3d at 418.

[21] When considering the nature of the offense, the advisory sentence is the starting point for determining the appropriateness of a sentence. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). A Level 5 felony is punishable by a term of imprisonment between one and six years with an advisory sentence of three years. Ind. Code § 35-50-2-6. The trial court deviated from the advisory sentence by sentencing Walker to the

maximum term of imprisonment available. Thus, we look to whether there is anything about Walker's offense that makes it more or less egregious than "the 'typical' offense accounted for by the legislature when it set the advisory sentence." *Holloway v. State*, 950 N.E.2d 803, 807 (Ind. Ct. App. 2011).

[22] Walker's offense was particularly egregious. He pushed D.R. to the ground, punched her, and stomped on her. He committed this crime in a public place, and he did not stop battering D.R. until a bystander intervened. This case represents Walker's third domestic battery conviction and D.R. was the victim in each case. Walker also attempted to pressure D.R. into not cooperating with the prosecution. Thus, we cannot say his sentence is inappropriate given the nature of his offense. *See Kunberger v. State*, 46 N.E.3d 966, 974 (Ind. Ct. App. 2015) (holding sentence was not inappropriate given the nature of domestic violence incident between defendant and ex-girlfriend).

[23] When we consider an offender's character, "one relevant fact is the defendant's criminal history." *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). Walker's criminal history is significant. Walker was forty-five years old at the time of his sentencing, and his adult criminal history dates to 1995. He had nine previous felony convictions, including convictions of theft, forgery, and battery resulting in bodily injury. He also accumulated eight prior misdemeanor convictions. Courts had placed Walker on probation over a dozen times before, but Walker repeatedly violated its terms, resulting in his probation being revoked eight times. As the trial court explained in its sentencing order, "the only time [Walker] was not committing crimes was

during the approximately 10 year period from 2001 to 2011 when he was in the DOC." (App. Vol. II at 228.) Consequently, we cannot say imposition of a maximum sentence was inappropriate. *See Hill v. State*, 157 N.E.3d 1225, 1231 (Ind. Ct. App. 2020) (holding imposition of maximum sentence was not inappropriate).

Conclusion

[24] The trial court did not commit clear error in determining that the State's proffered reason for striking Juror 15 was race-neutral and non-pretextual. Further, the trial court did not abuse its discretion in admitting evidence regarding Walker's prior batteries of D.R. or instructing the jury regarding the purpose for which the evidence was being introduced. Walker and D.R. had a volatile, hostile relationship, and the evidence was relevant to Walker's motive. Additionally, we cannot say Walker's sentence was inappropriate given the egregious nature of his offense and his character, particularly his criminal history. Therefore, we affirm the trial court.

[25] Affirmed.

Bailey, J., and Robb, J., concur.