

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kevin R. Hemingway,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

October 29, 2021
Court of Appeals Case No.
21A-CR-1134
Appeal from the Dearborn
Superior Court
The Honorable Jonathan N.
Cleary, Judge
Trial Court Cause No.
15D01-2009-F5-77

Crone, Judge.

Case Summary

- [1] Kevin R. Hemingway appeals his ten-year sentence following his guilty plea to level 5 felony obstruction of justice and being a habitual offender. He contends that his sentence is inappropriate based on the nature of the offense and his character. Concluding that Hemingway has failed to carry his burden to show that his sentence is inappropriate, we affirm.

Facts and Procedural History

- [2] In 2019, Hemingway met C.E., and they became engaged in December of that year. In March 2020, Hemingway committed acts against C.E., for which he was convicted of level 6 felony strangulation on April 7, 2020. On April 24, 2020, while he was on probation for his strangulation conviction and C.E. was about six months pregnant, Hemingway was arrested and charged in cause number 15C01-2004-F3-7 (Cause F3-7) with the following crimes that he allegedly perpetrated against C.E. on April 23: level 3 felony burglary, level 5 felony domestic battery with a previous conviction for battery or strangulation against the same family or household member, level 5 felony battery resulting in bodily injury to a pregnant woman,¹ level 6 felony intimidation, and class A misdemeanor interfering with reporting a crime.

- [3] Hemingway's pretrial conference was scheduled for April 26, 2020, after which the prosecutor was scheduled to meet with C.E. Before the scheduled meeting,

¹ This count was initially charged as level 5 felony strangulation, but it was amended.

Hemingway called C.E. and told her that she did not have to go to court unless subpoenaed and if law enforcement was unable to find her there would be “no case” because there is “no victim.” State’s Ex. 3 at 12:10. Then, within a half hour of the scheduled meeting, Hemingway called C.E. and asked her, “Are you sure you understood what I said cause I don’t want to say it,” and C.E. replied, “You don’t want me to go do that ... I’m not going.” State’s Ex. 5 at 01:10. During a phone call with his mother, Hemingway admitted that he “slapped her around[,]” referring to C.E. State’s Ex. 1 at 05:10. On April 27, 2020, the trial court imposed a no-contact order barring Hemingway from having any communication with C.E.

[4] Between April 28 and August 27, 2020, while Hemingway was incarcerated in the Dearborn County Jail awaiting trial in Cause F3-7, he called or attempted to call C.E. 1,559 times. In addition, Hemingway communicated with C.E. via a text messaging system known as “chirps” and online video chats.

Hemingway’s text messages to C.E. included the following:

Answer the fucking phone god damn man what is ur fn deal ur about to make me flip the fuck out and ur not gon like how far I take it I promise I promise on my sons life mf u better answer this next call or im gon make u regret it for the rest of ur miserable fn life;

since you lied and had me put n jail ima make sure u get ur prison sentence as well. I will set ur whore ass up I promise.

keep pushing me into a corner I swear on [our son's] life I will set u up on selling drugs and send u back to prison where ur whore as deserves to be u fn skank.

I'm not intertaining ur slutty ass no more..mark my words. On [our son's] life I will see tjat u go to prison, I promise I will...bye stupid.

I hope to god u get killed one day walkin down the street and a car runs u over and kills ur sorry ass, ur the biggest lying ass whore in this god dam world.

u might be happy for now. I be out soon...play ur lil games bitch I hope to god u do cause u gon see a mf u don't wanna see comin out this mf tjat I promise.

Appellant's App. Vol. 2 at 16-17.

[5] In September 2020, C.E. informed police that Hemingway had been calling and texting her and that she felt threatened and intimidated by the texts. She also stated that Hemingway had threatened to set her up for selling drugs. C.E. followed up by filing a police report, in which she repeated that Hemingway was intimidating her and sending her threatening messages, and she provided copies of the text messages.

[6] The State charged Hemingway in the underlying cause with level 5 felony obstruction of justice and class A misdemeanor invasion of privacy and also alleged that he was a habitual offender. In May 2021, Hemingway pled guilty pursuant to an open plea agreement to the obstruction charge and admitted to being a habitual offender. The State dismissed the invasion of privacy charge

and the charges pending in Cause F3-7. The trial court sentenced Hemingway to five years for obstruction of justice plus five years for the habitual offender enhancement, all executed. This appeal ensued.

Discussion and Decision

[7] Hemingway asks us to revise his sentence pursuant to Indiana Appellate Rule 7(B), which states, “The Court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” “Sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). “Such deference 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). In conducting our review, our principal role is to leaven the outliers, focusing on the length of the sentence and how it is to be served. *Foutch v. State*, 53 N.E.3d 577, 580 (Ind. Ct. App. 2016). “We do not look to determine if the sentence was appropriate; instead we look to make sure the sentence was not inappropriate.” *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012).

[8] Hemingway bears the burden to show that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g* 875 N.E.2d

218. Although Rule 7(B) requires us to consider both the nature of the offense and the character of the offender, the appellant is not required to prove that each of those prongs independently renders his sentence inappropriate. *Turkette v. State*, 151 N.E.3d 782, 786 (Ind. Ct. App. 2020), *trans. denied*; *Reis v. State*, 88 N.E.3d 1099, 1104 (Ind. Ct. App. 2017); *Connor v. State*, 58 N.E.3d 215, 218 (Ind. Ct. App. 2016); *see also Scott v. State*, 162 N.E.3d 578, 584 n.2 (Ind. Ct. App. 2021) (noting that in *Shoun v. State*, 67 N.E.3d 635 (Ind. 2017), our supreme court did not find waiver where defendant exclusively challenged his sentence under character prong). Ultimately, 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.” *Cardwell*, 895 N.E.2d at 1224.

[9] Regarding the nature of the offense, the advisory sentence is the starting point that the legislature has selected as an appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). The sentencing range for a level 5 felony is one to six years, with an advisory sentence of three years. Ind. Code § 35-50-2-6. In addition, a habitual offender finding enhances a level 5 felony sentence by two to six years. Ind. Code § 35-50-2-8(i)(2). Hemingway received a ten-year sentence.

[10] “When determining the appropriateness of a sentence that deviates from an advisory sentence, we consider whether there is anything more or less egregious about the offense as committed by the defendant that ‘makes it different from the typical offense accounted for by the legislature when it set the advisory

sentence.’” *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017) (quoting *Holloway v. State*, 950 N.E.2d 803, 807 (Ind. Ct. App. 2011)), *trans. denied*.

Hemingway was convicted of level 5 felony obstruction of justice, which is defined in relevant part as follows: during the investigation or pendency of a domestic violence case, knowingly or intentionally communicating a threat or intimidating any witness to abstain from attending or giving testimony at any hearing, trial, probation, or other criminal proceeding. Ind. Code § 35-44.1-2-2(b). Hemingway’s conduct went well beyond the elements necessary to commit level 5 felony obstruction of justice. The witness that Hemingway threatened and intimidated was the victim of the domestic violence with which he had been charged. As the State points out, victims of domestic violence are particularly susceptible to coercion by their attackers and threats of retaliatory violence are one of the chief reasons why victims refuse to cooperate with the prosecution. Appellee’s Br. at 12 (citing Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 769 (May 2005)).

[11] Further, while a single threatening communication would be sufficient to convict Hemingway of obstruction of justice, Hemingway called or attempted to call C.E. 1,559 times and threatened her with brutal physical violence multiple times. Hemingway asserts that C.E. voluntarily participated in the contact and expressed a desire for an ongoing relationship with him. Given that Hemingway threatened to harm C.E. if she did not talk to him, his argument that her contact with him was voluntary is a nonstarter. We agree with the State that “[t]he facts of this case show a defendant bent either on ensuring that he

would not be held accountable for a domestic battery that he readily admitted occurred or on dragging C.E. down with him if he was punished for his actions.” Appellee’s Br. at 14. Thus, the sheer excessiveness and violent nature of Hemingway’s communications with the victim of his domestic battery warrants a sentence well beyond the advisory.

[12] In reviewing Hemingway’s character, we engage in a broad consideration of his qualities. *Elliott v. State*, 152 N.E.3d 27, 40 (Ind. Ct. App. 2020), *trans. denied*. An offender’s character is shown by his “life and conduct.” *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019). “When considering the character of the offender, one relevant fact is the defendant’s criminal history.” *Garcia v. State*, 47 N.E.3d 1249, 1251 (Ind. Ct. App. 2015), *trans. denied* (2016).

Hemingway’s criminal history is extensive. Beginning when he was seventeen, Hemingway had a series of delinquency adjudications, including adjudications for intimidation, battery resulting in bodily injury, and false informing, and he was placed in the Indiana Boys School. After his battery adjudication, he was ordered to attend anger management classes. As an adult, Hemingway has amassed fifteen misdemeanor convictions and nine felony convictions. These include a conviction for class D felony battery resulting in bodily injury to a victim less than fourteen years old, three convictions for misdemeanor battery resulting in bodily injury, a conviction for misdemeanor invasion of privacy for violation of a no-contact order, three convictions for class D felony intimidation, and a conviction for level 6 felony strangulation. These convictions reflect an aggressive, violent character and reveal that Hemingway

often preys on particularly vulnerable individuals such as children and pregnant women. Significantly, after his conviction for strangulation, the trial court recommended treatment for domestic violence issues. It does not appear that Hemingway sought that treatment. Then, within weeks of being released on probation, Hemingway was charged with additional acts of violence against C.E. In fact, Hemingway's criminal record shows numerous probation violations. Hemingway's criminal record also shows multiple domestic battery charges that were either dismissed or pending at the time of sentencing of this case, which is suggestive of his propensity to engage in criminal activity. *See Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005) (stating that defendant's history of arrests is relevant to the trial court's assessment of defendant's character in terms of the risk that he will commit another crime). Despite numerous contacts with the judicial system and the benefit of rehabilitative placements and opportunities, Hemingway has not been deterred from engaging in criminal conduct and has committed similar crimes over and over again.

[13] Hemingway argues that he was one of fourteen children, his father abused the children and Hemingway's mother, and Hemingway has developed anger and trust issues and never received therapeutic intervention. He asserts that now, at the age of thirty-four, he recognizes that he needs help and that at the sentencing hearing he demonstrated responsibility, remorse, and a desire to change. Our review of the record shows that while Hemingway certainly emphasized a desire to change because he wanted to be part of his son's life and asked for placement in the drug court program and domestic violence

counseling, Hemingway never expressed sorrow or remorse for his actions or acknowledged the harm his criminal conduct has caused. As for his professed desire to be a family man, we note that when C.E. became pregnant, Hemingway already had a child with a different woman and a 2004 conviction for non-support of a dependent child. At the time of sentencing in the case before us, Hemingway was \$15,000 in arrears of his child support obligation. Hemingway has failed to carry his burden to show that his ten-year sentence is inappropriate in light of the nature of the offense and his character. Therefore, we affirm his sentence.

[14] Affirmed.

Bailey, J., and Pyle, J., concur.