MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Tyree Q. Barfield
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Jodi K. Stein
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Thomas A. May,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 23, 2023

Court of Appeals Case No. 22A-CR-2220

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause No. 02D05-2201-F5-7

Memorandum Decision by Judge Bailey
Judges Tavitas and Kenworthy concur.

Bailey, Judge.

Case Summary

[1] Thomas A. May was convicted of Intimidation, as a Level 5 felony,[1] Pointing a Firearm, as a Level 6 felony,[2] and Neglect of a Dependent, as a Level 6 felony,[3] for which he received an aggregate sentence of three years. An additional fixed term of twenty years was added to his sentence, pursuant to Indiana Code Section 35-50-2-11. May does not challenge his convictions but challenges the evidence to support the sentencing enhancement and his aggregate sentence. We affirm.

Issues

[2] May presents two issues for review:

I. Whether sufficient evidence supports the imposition of an additional fixed term of imprisonment for pointing a firearm at a police officer; and

II. Whether May's sentence is inappropriate.

Facts and Procedural History

[1] Ind. Code § 35-45-2-1.

[2] I.C. § 35-47-4-3.

[3] I.C. § 35-46-1-4.

[3] During the evening of January 7, 2022, May was at his Fort Wayne residence with his mother, Victoria Duke, and his daughter D.M. May, who had ingested Oxycodone and alcohol, placed a gun under his chin and threatened suicide. Duke instructed the homeowner, Diana Spillers, to call 9-1-1, and Spillers did so.

[4] Fort Wayne Police Officers Allissa Barnhorst and William Turriff were dispatched to May's residence. Due to the nature of the dispatch, the officers arrived without using police sirens or lights. They were each in full uniform, and each activated a body camera when approaching the door of May's residence. The officers knocked and waited a short time. Upon receiving dispatch instructions to enter, the officers did so and then were directed by Spillers toward a bedroom.

[5] As they approached the bedroom, the officers could hear distressed voices, one of a young girl screaming, "No, Dad, please," and the other of an older female begging, "Don't Andrew. Please stop." (Tr. Vol. II, pg. 133.) Officer Barnhorst stopped in the doorway and observed May standing in the middle of the room holding a firearm. Officer Barnhorst said, "Hey," whereupon May looked directly at her, said "F*** you," and pointed his firearm at the officer. (*Id.* at 134-35.) Officer Barnhorst commanded, "Drop the gun," (*Id.* at 136), and she and Officer Turriff unholstered their weapons and began to back up down a hallway. Officer Turriff requested back-up officers as Officer Barnhorst repeatedly ordered May to drop his firearm.

[6] Duke attempted unsuccessfully to hold back May, and he advanced down the hallway with his weapon in hand. May encountered Officer Barnhorst in the living room, took a "shooting stance," and pointed his firearm directly at the officer. (*Id.* at 141.) Officer Barnhorst again commanded May to drop his weapon, but he did not comply. Officer Barnhorst discharged one round from her firearm and the bullet struck May near his groin. The officers summoned emergency medical assistance personnel and rendered aid until their arrival.

[7] On July 19, 2022, May was brought to trial before a jury on one count of Intimidation, as a Level 5 felony, two counts of Pointing a Firearm, as Level 6 felonies, and one count of Neglect of a Dependent, as a Level 6 felony.[4] The State also alleged that a sentencing enhancement for use of a firearm was appropriate. On July 21, the jury found May guilty of Intimidation, Neglect of a Dependent, and one count of Pointing a Firearm. The jury reconvened and found that the State had established beyond a reasonable doubt the requisite elements for the firearms sentencing enhancement.

[8] On August 19, 2022, the trial court imposed upon May a sentence of three years for Intimidation and concurrent sentences of two years each for Pointing a Firearm and Neglect of a Dependent. The trial court then attached an additional fixed twenty-year term to May's sentence, pursuant to Indiana Code Section 35-50-2-11(e).

---

[4] Three additional charges were dismissed prior to trial.

Discussion and Decision

Sufficiency of the Evidence

[9] Indiana Code Section 35-50-2-11(e) provides:

> The state may seek, on a page separate from the rest of a charging instrument, to have a person who allegedly committed a felony or misdemeanor other than an offense (as defined under subsection (b)) sentenced to an additional fixed term of imprisonment if the state can show beyond a reasonable doubt that the person, while committing the felony or misdemeanor, knowingly or intentionally:
>
> (1) pointed a firearm; or
>
> (2) discharged a firearm;
>
> at an individual whom the person knew, or reasonably should have known, was a police officer.

[10] May does not contest that the State proved that he committed an eligible offense. To secure the additional fixed term, the State was required to show, beyond a reasonable doubt, that May knowingly or intentionally pointed a firearm at an individual that May knew, or reasonably should have known, was a police officer. May claims that the evidence did not show that he knew, or reasonably should have known, that he was "in the presence of police officers" because: "his vision was obscured,"; the officers were dispatched on a "Priority 2 run" conducted without police lights and sirens; the officers "never

announced themselves,"; and "everything happened too quickly" while he was "in the fog of suicidal ideation." Appellant's Brief at 17-20.

[11] The standard by which we review a claim of insufficient evidence is well-settled:

> Upon a challenge to the sufficiency of evidence to support a conviction, a reviewing court does not reweigh the evidence or judge the credibility of the witnesses, and respects "the jury's exclusive province to weigh conflicting evidence." … We have often emphasized that appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. Expressed another way, we have stated that appellate courts must affirm "if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt."

McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005) (internal citations omitted).

[12] The evidence most favorable to the jury's verdict is that May was standing in the middle of a room with sufficient lighting to permit both his mother and his daughter to recognize the entrants as police officers. The officers were dressed in full uniform. Officer Barnhorst began to issue commands, consistent with a show of authority. Officer Turriff initiated a call to dispatch, stating that he needed "more units." (Tr. Vol. I, pg. 162.) May then availed himself of an additional opportunity to observe the officers as he pursued them down a hallway, assumed a shooting stance, and pointed his firearm directly at Officer

Barnhorst. May's claim that the circumstances of the encounter hindered his perceptions is merely a request to reweigh the evidence, which we reject.

Sentence

[13] Upon conviction of a Level 5 felony, May was subject to a sentence of between one and six years, with an advisory sentence of three years. I.C. § 35-50-2-6(b). Upon conviction of a Level 6 felony, May was subject to a sentence of between six months and two and one-half years, with an advisory sentence of one year. I.C. § 35-50-2-7(b). As a sentencing enhancement for use of a firearm, May was subject to an additional fixed term of five years to twenty years. I.C. § 35-50-2-11(h). Accordingly, May received an advisory sentence for his Level 5 felony conviction, an enhanced concurrent sentence for his Level 6 felony conviction, and the maximum permissible sentencing enhancement.

[14] As mitigating circumstances, the trial court found that May was remorseful, had mental health concerns, and had no felony convictions. The trial court found the nature and circumstances of the offenses and the extraordinary emotional impact upon Officer Barnhorst to be aggravating circumstances. Also, the trial court identified as aggravators May's self-reported contact with the juvenile justice system, his misdemeanor conviction for possession of marijuana, and the failure of rehabilitative efforts.

[15] May maintains that his sentence is inappropriate in light of the nature of the offense and his character. Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a trial

court's sentencing order. *E.g., Livingston v. State*, 113 N.E.3d 611, 613 (Ind. 2018). This appellate authority is implemented through Indiana Appellate Rule 7(B). *Id*. Revision of a sentence under Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. *See* Ind. Appellate Rule 7(B); *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. *Baumholser v. State*, 62 N.E.3d 411, 417 (Ind. Ct. App. 2016), *trans. denied*. It is the defendant's burden to "persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." *Roush v. State*, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007).

[16] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The principal role of appellate review is to attempt to "leaven the outliers." *Id*. at 1225. Whether we regard a sentence as inappropriate at the end of the day 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*. at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] 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] As to the nature of the offenses, May endangered several individuals, including his young daughter. May had ingested Oxycodone and was voluntarily intoxicated, having a blood alcohol content of 0.30. He was afforded numerous opportunities to disarm himself but chose to advance toward officers, ultimately forcing one officer to discharge her weapon. Officer Barnhorst testified at the sentencing hearing that she feared she was about to die and suffered great trauma from having to shoot another person. May's offenses were not accompanied by a show of "restraint" or "lack of brutality" on his part. *Id.* at 122.

[18] Nor does May's character support a sentence revision. Despite his contacts with the juvenile justice system and conviction of a drug offense, May continued to abuse substances. Although May reportedly suffers from some mental health issues, he had not sought counseling and medication in the preceding six years. Rather, he daily ingested substances for which he did not have a prescription, including Percocet, Oxycodone, Vicodin, and Morphine. He also used methamphetamine regularly. We perceive no "substantial virtuous traits or persistent examples of good character." *Id.*

[19] We cannot say that May's sentence is inappropriate in light of the nature of his offenses and his character.

Conclusion

[20] Sufficient evidence supports the imposition of an additional fixed term of imprisonment for use of a firearm. May has failed to persuade us that his sentence is inappropriate.

[21] Affirmed.

Tavitas, J., and Kenworthy, J., concur.