MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Matthew J. McGovern
Anderson, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Andrew L. Buttrum,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 25, 2021

Court of Appeals Case No. 20A-CR-14

Appeal from the Vanderburgh Circuit Court

The Honorable David D. Kiely, Judge

Trial Court Cause No. 82C01-1809-F1-6545

Najam, Judge.

Statement of the Case

[1] Andrew L. Buttrum appeals his conviction for attempted murder, a Level 1 felony, his adjudication as a habitual offender, and his aggregate sentence of forty-five years executed. Buttrum raises three issues for our review, which we restate as the following two issues:

1. Whether the trial court erred when it denied Buttrum's post-trial motion for a new trial.

2. Whether Buttrum's sentence is inappropriate in light of the nature of the offense and his character.

[2] We affirm.

Facts and Procedural History

[3] Buttrum has an extensive history of mental illness. On September 26, 2018, Buttrum, unprovoked, attacked Tim Brinkley with a knife inside an Evansville gas station. Bystanders were able to stop the attack, but Brinkley suffered severe injuries. Law enforcement officers apprehended Buttrum shortly thereafter.

[4] The State charged Buttrum with attempted murder, as a Level 1 felony, and with being a habitual offender. Buttrum filed a notice of mental disease or defect, and the trial court appointed Dr. David C. Cerling and Dr. Donna Culley to determine whether Buttrum was competent to stand trial and whether he "was legally sane or insane at the time" of the offense. Appellant's App. Vol. II at 55 (capitalization removed).

[5] Both doctors interviewed Buttrum, reviewed police records of the incident, reviewed his medical records, and filed written reports with the court. Dr. Cerling's report concluded that Buttrum was competent to stand trial. With respect to Buttrum's sanity at the time of the offense, Dr. Cerling concluded as follows:

> At the time of the alleged offense, the defendant claims that he does not recall the actions ascribed to him. It appears likely that this psychotic disorder was not being consistently treated medically at the time of the offense and indeed he may well have had substantially impaired reasoning and perceptions that led to his actions, though again he claims not to recall those actions specifically. In view of his denying recall of his alleged actions, a definitive statement about his ability to appreciate the wrongfulness of his actions cannot be given. Regarding his current status, he presents with currently active symptoms of delusional ideation and auditory hallucinations . . . .

Id. at 68.

[6] Dr. Culley's report likewise concluded that Buttrum was competent to stand trial. Regarding his sanity at the time of the offense, Dr. Culley concluded:

> Mr. Buttrum does have a long and well documented history of mental illnesses. However, . . . there is no evidence that Mr. Buttrum was experiencing specific hallucinations or delusions that would have directly accounted for or resulted in the behaviors leading to the alleged charges. He did not report hallucinations to the police after his arrest nor did he report having hallucinations during his [ensuing] conversations with his brother or sister. He consistently stated that he did not remember what had occurred, but did not report that he engaged in the alleged attack as a result of hallucinations or delusions. There is

> no credible evidence of specific hallucinations or delusions involving the victim in this case that would have le[d] Mr. Buttrum to engage in the alleged stabbing.

Id. at 74.

[7] Near the beginning of Buttrum's ensuing jury trial, the court asked whether any information had been shared with Dr. Cerling and Dr. Culley following the submission of their written reports. The State responded that it had sent the doctors a recording of an interview investigators had had with Buttrum. Buttrum's counsel stated that there was "no confirmation" that either of the doctors had reviewed that interview, but the State clarified that "[t]hey have." Tr. Vol. II at 179.[1] The court also stated, "I think they have." *Id.* Buttrum's counsel did not inquire further, did not move for a continuance, did not object, and did not raise any other concerns about that interview, its pretrial availability and submission to the doctors, or the doctors' review of it and its possible impact on their opinions.

[8] The State called Brinkley and a witness to testify about the attack. Dr. Cerling also testified and reaffirmed his conclusion that he could not say whether Buttrum was insane at the time of the offense. Dr. Culley similarly testified and reaffirmed her conclusion that Brinkley was not insane at the time of the offense. In doing so, she testified that part of her review included "videos of

[1] The pagination of the second volume of the transcript is not consistent with the .pdf pagination.

interviews with the police investigator." Tr. Vol. III at 76. In particular, she stated:

> My opinion regarding sanity[] is that he did appreciate the wrongfulness of his conduct at the time of the offense. In forensic work, you really have to have a connection between the mental illness and the behaviors that go into the offense. *And during my evaluation, during the conversations, during the investigator[']s interview on the date of the crime, Mr. Buttrum never reported hallucinations directing him to engage in those behaviors*.
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> * * *
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> Q [by Buttrum's counsel]: And when you say he did not report any hallucinations or delusions related to this incident, is it fair to say that he reported he did not remember?
>
> A. Yes. I specifically asked several questions because that's germane to the legal question. So, I asked in different ways about any perception issues, any delusions, any hallucinations. The police investigator also asked specifically during his interview about that. *Now, Mr. Buttrum did on two occasions during that interview say I'm hearing voices to hurt you. I think one was to choke you, and one was to punch you. But he didn't act on those. He was able to conform his conduct*. . . .

Id. at 78, 81 (emphases added). And Buttrum called Dr. Polly Westcott, who testified that, after her own review of the available records, it was her conclusion that Buttrum "was not aware of what he was doing" at the time of the offense and that he "was very likely reacting to some sort of . . . internal stimuli[] because of his mental disease or defect." *Id.* at 247.

[9] A jury found Buttrum guilty but mentally ill on the charge of attempted murder. Buttrum then pleaded guilty to being a habitual offender. After the jury's verdict but prior to his sentencing, Buttrum filed a motion to correct error. According to his motion, the State had withheld from him a two-page addendum to Dr. Culley's written evaluation. In her addendum, Dr. Culley reported that, following her original evaluation, she had reviewed the additional, videotaped interview of Buttrum by investigators. Dr. Culley noted that Buttrum had stated in that interview that, immediately after the attack on Brinkley at the gas station, "a voice told [Buttrum] to leave his bike there, but later . . . he told his brother that he threw it" into a nearby park. Appellant's App. Vol. II at 202-03. He also twice told the investigator that he was presently having hallucinations that were directing him to harm the investigator.

[10] But Dr. Culley also noted that Buttrum "specifically denied hearing voices telling him to harm anyone" at the moment of the attack. *Id.* at 203. As such, Dr. Culley concluded in her addendum that "the content of the . . . interview has no impact on the original opinion regarding sanity," noting again that "there is no clinical data to link any psychotic symptoms to the behaviors resulting in his legal charge" and that "there is no clinical data to support that he was unable to appreciate the wrongfulness of the conduct at the time of the offense because of a mental disease or defect."[2] *Id.* at 203. In his motion to

[2] Dr. Culley likewise reaffirmed her original conclusion that Buttrum was competent to stand trial.

correct error, Buttrum asserted that Dr. Culley's addendum was newly discovered evidence that required a retrial.

[11] The trial court held a combined hearing on Buttrum's motion to correct error and sentencing. The court then denied the motion to correct error, entered its judgment of conviction, and sentenced Buttrum to an aggregate term of forty-five years executed. This appeal ensued.

Discussion and Decision

Issue One: Denial of Motion to Correct Error

[12] On appeal, Buttrum first asserts that the trial court erred when it denied his motion to correct error. "We typically review a trial court's ruling on a motion to correct error for an abuse of discretion." *State v. Reinhart*, 112 N.E.3d 705, 709-10 (Ind. 2018). Further, a trial court is afforded broad discretion in ruling on the admissibility of evidence. *Sims v. Pappas*, 73 N.E.3d 700, 705 (Ind. 2017). We will disturb the trial court's ruling only where the challenger shows the trial court has abused that discretion. *Id.* "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id.* (quoting *Turner v. State*, 953 N.E.2d 1039, 1045 (Ind. 2011)).

[13] Buttrum asserts that the trial court erred when it denied his motion to correct error because Dr. Culley's undisclosed addendum was newly discovered evidence. To show that he is entitled to a new trial based on newly discovered evidence, Buttrum must show, among other things, that he used "due

diligence" to discover the evidence in a timely manner for trial, that the evidence "is not cumulative" of the trial evidence, and that the evidence "is not merely impeaching." *Kubsch v. State*, 934 N.E.2d 1138, 1145 (Ind. 2010). We conclude that Buttrum fails each of those tests.

[14] First, we are not persuaded that Buttrum used due diligence to discover the addendum in a timely manner. Buttrum learned near the beginning of the trial, and prior to Dr. Culley's testimony, that the doctors had reviewed the additional interview after the submission of their written evaluations. He did not inquire further about the contents of that interview or the doctors' consideration of it. He did not request a continuance or an opportunity to voir dire Dr. Culley. Instead, Buttrum responded by simply proceeding with the trial.

[15] Second, Dr. Culley's addendum was, at least in part, cumulative of the trial evidence. The addendum was based entirely on the additional interview between Buttrum and the police investigator. But Dr. Culley made specific references to that interview during her trial testimony on more than one occasion. She testified that, during the interview, Buttrum appeared to be suffering from hallucinations, and that he twice threatened the officer interviewing him. She further testified that the recording was part of the materials that she had reviewed in coming to the conclusion that Buttrum was not suffering from a mental disease or defect at the time of the offense. The addendum was merely cumulative of Dr. Culley's testimony in those respects.

[16] Third, insofar as the addendum might have added that Dr. Culley was aware that Buttrum was suffering from a hallucination shortly after the attack, when he said a voice told him to leave his bike at the gas station, Buttrum's use of that specific piece of information would have been only to attempt to impeach Dr. Culley's conclusion that Buttrum was not suffering from his mental illness at the time of the attack. Indeed, Buttrum's most essential point on appeal is that, by acknowledging that Buttrum suffered from a delusion near the time of the attack, the addendum "contains conflicting information" that "cut at the very heart of and undermined [Dr. Culley's] conclusion of sanity." Appellant's Br. at 25. In other words, Buttrum would have used the addendum to impeach Dr. Culley's conclusion on the issue of his sanity.

[17] In sum, we conclude that Buttrum cannot show that the addendum was newly discovered evidence. He has not met his burden to show that he used due diligence to obtain the addendum in a timely manner when he merely acquiesced in proceeding with trial; much of the addendum is cumulative of Dr. Culley's trial testimony, including that the additional interview had no impact on her conclusion that Buttrum was not insane at the time of the offense; and, insofar as the addendum adds that Dr. Culley was aware that Buttrum suffered from a delusion near the time of the attack, that evidence is, at best, merely impeaching. Therefore, the trial court did not abuse its discretion when it denied Buttrum's motion to correct error.

[18] Still, Buttrum further asserts, for the first time on appeal, that the trial court's judgment denied him his constitutional right to confront Dr. Culley. But we

agree with the State that Buttrum has not preserved that argument for appellate review. Again, Buttrum's counsel was informed early in the trial that the doctors had reviewed the additional recording of Buttrum's interview with the investigator since submitting their written evaluations, yet Buttrum did not request a continuance, object, or otherwise raise any concerns about that potential information. Instead, he chose to proceed. And neither did he raise his constitutional issue in his motion to correct error. We therefore conclude that this issue is not properly before us, and we decline to consider it. *See, e.g.*, *A.C. v. Ind. Dep't of Child Servs. (In re N.G.)*, 51 N.E.3d 1167, 1173 (Ind. 2016) ("a party on appeal may waive a constitutional claim . . . by raising it for the first time on appeal.").

Issue Two: Indiana Appellate Rule 7(B)

[19] Buttrum next asserts that his forty-five-year aggregate sentence is inappropriate in light of the nature of the offense and his character. Indiana Appellate Rule 7(B) provides that "[t]he 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." This Court has held that "[t]he advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed." *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017). And the Indiana Supreme Court has recently explained that:

> The principal role of appellate review should be to attempt to leaven the outliers . . . but not achieve a perceived "correct"

> result in each case. Defendant has the burden to persuade us that the sentence imposed by the trial court is inappropriate.

Shoun v. State, 67 N.E.3d 635, 642 (Ind. 2017) (cleaned up).

[20] 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, 1222 (Ind. 2008). 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 facts 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).

[21] Where, as here, mental illness is a factor in sentencing, our Supreme Court has set out four factors to guide our review of the sentence's alleged inappropriateness. *See Weeks v. State*, 697 N.E.2d 28, 31 (Ind. 1998). These factors include: (1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any

nexus between the disorder or impairment and the commission of the crime. *Biehl v. State*, 738 N.E.2d 337, 340 (Ind. Ct. App. 2000) (citing *Weeks*, 697 N.E.2d at 31), *trans. denied*.

[22] The sentencing range for a Level 1 felony is twenty to forty years, with an advisory sentence of thirty years. Ind. Code § 35-50-2-4(b) (2020). An adjudication as a habitual offender carries an additional fixed term of six to twenty years for Buttrum's conviction of a Level 1 felony. I.C. § 35-50-2-8(i)(1). Here, the court identified as aggravating factors Buttrum's high risk of recidivism and his criminal history, which "display[ed] a pattern of violence." Tr. Vol. IV at 22. The court also noted that Buttrum was on parole at the time of the instant offense and that he had had multiple less-restrictive placements revoked for not abiding by the terms of those placements. The court found Buttrum's history of mental illness to be a mitigating factor, including that Buttrum had "obviously suffered through tremendous trauma throughout his life." *Id.* at 21. The court then imposed a term of thirty-five years for the Level 1 felony conviction and an additional term of ten years for the habitual offender adjudication.

[23] On appeal, Buttrum contends that his sentence is inappropriate in light of the nature of the offense and his character due to his extensive history of mental illness. There is no dispute that Buttrum has a long history of serious mental illness. The trial court did not find otherwise; indeed, it expressly and properly found Buttrum's mental illness to be a mitigating circumstance. Buttrum's

argument on appeal, then, is simply that this Court should give more weight to that mitigating circumstance than the trial court did.

[24] We decline to do so. Having reviewed the four above factors, we conclude, as the trial court did, that Buttrum is entitled to some mitigating weight for his mental illness. However, we also note that the jury's verdict reflects its reliance on Dr. Culley's opinion that there was no relationship between Buttrum's mental illness and the instant offense. We also agree with the trial court's finding of aggravating circumstances, which Buttrum does not challenge on appeal, in particular Buttrum's violent criminal history, the prior failures of less-restrictive placements, and that Buttrum was on parole at the time of the instant offense. And we cannot say that the trial court's balancing of the aggravators and mitigators was inappropriate.

[25] As our Supreme Court has made clear, deference to the trial court in sentencing prevails unless there is a compelling basis in the record for this Court to find otherwise. *See Stephenson*, 29 N.E.3d at 122. We are not convinced that this record presents such a compelling basis. Accordingly, we cannot say that Buttrum's sentence is inappropriate in light of the nature of the offense and the character of the offender, and we affirm his sentence.

[26] Affirmed.

Riley, J., and Crone, J., concur.