MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Leroy D. Graham, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 23, 2023

Court of Appeals Case No. 22A-CR-1551

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D06-2005-F5-183

Mathias, Judge.

[1] Leroy D. Graham, Jr. appeals his conviction for attempted murder and his ensuing sentence. Graham raises three issues for our review, which we restate as follows:

> 1. Whether the trial court erred when it denied Graham's challenge to the State's use of a peremptory strike of a potential juror under *Batson v. Kentucky*, 476 U.S. 79 (1986).
>
> 2. Whether the State presented sufficient evidence to defeat Graham's claim of self-defense.
>
> 3. Whether Graham's sentence is inappropriate in light of the nature of the offense and his character.

[2] We affirm.

Facts and Procedural History

[3] In May 2020, Jhalease Sample lived with her two children and the father of one of her two children, Bashir Johnson, on Greene Street in Fort Wayne. At the time, Sample was dating Graham, and Graham spent the night at Sample's residence three or four nights a week. Johnson and Graham did not get along.

[4] The evening of May 1, Sample and Graham got into an argument about Johnson staying at Sample's residence, which resulted in Sample asking Graham to leave her residence. Later that evening, as Johnson was walking toward the refrigerator, he saw Graham out of the corner of his eye. Graham then "hit [Johnson] in the face" with a bottle. Tr. Vol. 1, p. 233. The blow "stunned" Johnson, and it took him a moment to "g[e]t conscious" again. *Id.* at

241. Johnson noticed glass on the kitchen floor, and he started to "defend[]" himself from Graham. *Id.* The two got into a fight and went through a table.

[5] Sample "heard banging" and her "youngest son screaming" and ran to the kitchen. Tr. Vol. 2, p. 36. There, she saw Graham and Johnson fighting. She also saw "blood everywhere." *Id.* And she saw Graham "waving around" a knife that she recognized as "a black steak knife." *Id.* at 101.

[6] Sample broke up the fight, and Graham "ran out" of her house. *Id.* at 41. Johnson did not remember how the fight came to an end, but once Graham had left the residence, he remembered being "woozy" and looking down and seeing his shirt soaked in blood. Tr. Vol. 1, p. 243. Sample called 9-1-1 and reported that there had been a stabbing. Paramedics arrived on the scene and rendered emergency aid to Johnson before taking him to a nearby hospital. At the hospital, Johnson learned that he had been stabbed three times in the left side, including a stab wound near his heart, and that he had multiple cuts on his body. Meanwhile, law enforcement officers secured Sample's apartment and recovered a bloody, black steak knife from the scene.

[7] The State charged Graham in an amended information with attempted murder. During jury selection, the State recognized Potential Juror 47 from a prior trial in which she had been the alleged victim, and she and the prosecutor "did not get along well at all." Tr. Vol. 1, p. 20. The State moved to strike her "before she even gets up here," but the court denied that request. *Id.* at 19. During the ensuing voir dire of Potential Juror 47, she acknowledged that she knew the

prosecutor, but she stated that she believed she could be "fair" notwithstanding that prior relationship. *Id.* at 42. However, when asked if she could be fair to Johnson given the unusual living arrangement between Sample, Johnson, and Graham, Potential Juror 47 stated she "d[id not] know" if she could be fair to Johnson because that living arrangement was "a sticky situation." *Id.* at 46. She suggested she might be able to be fair "with more facts," but she was "up in the air." *Id.*

[8] The State used a peremptory challenge to strike Potential Juror 47 from the venire, and the court dismissed her from the courtroom. The court then empaneled a jury and released all other potential jurors. Thereafter, Graham objected to the State's use of a peremptory challenge to strike Potential Juror 47 under *Batson v. Kentucky*. The court responded, "she's already been excused. . . . Hypothetically, if you won your *Batson* challenge—she's already left." *Id.* at 93. Nonetheless, the court asked the State for a race-neutral reason for its use of the peremptory challenge on Potential Juror 47, and the State responded:

> number one[,] she was a prior victim of ours. Even though she says she can be fair, I know she can't be fair. Number two, when asked a question about the living situation she definitely hemmed and hawed about it. She says she doesn't know if she can be fair . . . . [T]hat's the reason I struck her . . . .

Id. at 94. The court accepted the State's race-neutral reason and overruled Graham's *Batson* challenge.

[9] At the ensuing jury trial, Johnson, Sample, and several first responders testified for the State. Graham testified in his own defense and stated that Johnson was the one with the knife, and Graham had merely defended himself from Johnson. The jury found Graham guilty of attempted murder.

[10] At the close of the ensuing sentencing hearing, the trial court found as follows:

> I do not find any mitigators. As aggravators[,] you have a prior criminal history including the [ten] misdemeanors, four [f]elonies. You have prior crimes of violence, [and] prior attempts at rehabilitation have failed. You've had probation revoked three times, suspended sentence[s] modified twice, [and] you were on bond when this crime was committed. [I a]lso note the escalating criminal behavior . . . up to . . . the F1 Attempted Murder.

Tr. Vol. 2, pp. 218-19. The court then sentenced Graham to thirty-eight years in the Department of Correction. This appeal ensued.

1. Graham did not preserve his *Batson* challenge for appellate review, but the State also provided race-neutral reasons for striking Potential Juror 47.

[11] On appeal, Graham first asserts that the trial court erred when it denied his *Batson* challenge to the State's use of a peremptory strike on Potential Juror 47. "Under the Equal Protection Clause of the Fourteenth Amendment, a party can not constitutionally use a peremptory challenge to strike a prospective juror solely on account of the juror's race." *Schumm v. State*, 866 N.E.2d 781, 789 (Ind. Ct. App.), *clarified on reh'g on other grounds*, 868 N.E.2d 1202 (2007) (citing *Batson v. Kentucky*, 476 U.S. 79, 89 (1986)). As we have explained:

> When a party raises a *Batson* challenge, the trial court must engage in a three-step test. *Highler v. State*, 854 N.E.2d 823, 826 (Ind. 2006). "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race." *Id.* at 826–27. Second, "the burden shifts to the State to present a race-neutral explanation for striking the juror." *Id.* at 827. Third, the trial court must evaluate "'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Id.* at 828 (quoting *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam)). We afford great deference to a trial court's determination that a prosecutor's motivation for striking a juror was not improper, and will reverse only if we conclude the trial court's decision was clearly erroneous. *Id.*

Id.

[12] However, Graham did not properly preserve his *Batson* challenge for appellate review. As we have held: "[i]n order for error to be preserved for review, a timely and adequate objection must be raised at trial. *Brown v. State* (1981), 275 Ind. 441, 417 N.E.2d 333, 338. The proper time for [a *Batson*] objection was immediately after the peremptory challenges were made." *Chambers v. State*, 551 N.E.2d 1154, 1158 (Ind. Ct. App. 1990). Graham did not raise his *Batson* challenge immediately after the State had made its peremptory challenge and instead waited until after the trial court had dismissed Potential Juror 47. Indeed, before ruling on Graham's challenge, the trial court noted that his untimely objection precluded the court from being able to grant him effective

relief. We therefore conclude that Graham did not properly preserve his *Batson* challenge for appellate review.

[13] Graham's waiver notwithstanding, we cannot say that the trial court's denial of his *Batson* challenge is clearly erroneous. When asked to provide a race-neutral reason for its use of a peremptory challenge of Potential Juror 47, the State provided two: first, that it knew Potential Juror 47 and simply did not believe her when she said she could be fair; and, second, that Potential Juror 47 seemed uncertain as to whether she could be fair in assessing Graham's attack on Johnson given the unusual living arrangement at Sample's residence. Both of those reasons were valid reasons for the State's use of its peremptory challenge, and we therefore cannot say the trial court erred when it denied Graham's *Batson* objection.

2. The State presented sufficient evidence to defeat Graham's claim of self-defense.

[14] Graham also asserts that the State failed to present sufficient evidence to negate his claim of self-defense. As our Supreme Court has made clear:

> For sufficiency of the evidence challenges, we consider only probative evidence and reasonable inferences that support the judgment of the trier of fact. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). On sufficiency challenges, we will neither reweigh evidence nor judge witness credibility. *Love v. State*, 73 N.E.3d 693, 696 (Ind. 2017). We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.*

Hall v. State, 177 N.E.3d 1183, 1191 (Ind. 2021). Further:

> A defendant can raise self-defense as a justification for an otherwise criminal act. I.C. § 35-41-3-2; *Miller[v. State]*, 720 N.E.2d [696,] 699 [(Ind. 1999)]. When self-defense is asserted, the defendant must prove he was in a place where he had a right to be, "acted without fault," and reasonably feared or apprehended death or great bodily harm. *Miller*, 720 N.E.2d at 699-700. The State must then negate at least one element beyond a reasonable doubt "by rebutting the defense directly, by affirmatively showing the defendant did not act in self-defense, or by simply relying upon the sufficiency of its evidence in chief." *Lilly v. State*, 506 N.E.2d 23, 24 (Ind. 1987). We will reverse a conviction only if no reasonable person could say the State overcame the self-defense claim beyond a reasonable doubt. *Id.*

Larkin v. State, 173 N.E.3d 662, 670 (Ind. 2021).

[15] Graham's argument on this issue is that Johnson could not recall the details of the fight in his testimony, while Graham testified that Johnson was the person with the knife, and Graham acted in self-defense. But Graham's argument simply asks this Court to disregard the evidence most favorable to the jury's finding. That evidence showed that Graham was the initial aggressor and that he stunned Johnson with the initial blow, and Sample testified that she observed Graham wielding a knife during the fight. And there is no question that Johnson suffered the knife injuries. The jury was free to not believe Graham's self-serving testimony and to instead credit the testimony of Johnson and Sample. Thus, the State presented sufficient evidence to negate Graham's claim of self-defense.

3. Graham's sentence is not inappropriate.

[16] Last, Graham contends that his thirty-eight-year sentence is inappropriate in light of the nature of the offense and his character. Under Indiana Appellate Rule 7(B), we may modify a sentence that we find is "inappropriate in light of the nature of the offense and the character of the offender." Making this determination "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). Sentence modification under Rule 7(B), however, is reserved for "a rare and exceptional case." *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).

[17] When conducting this review, we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Our role is to "leaven the outliers," not to achieve what may be perceived as the "correct" result. *Id.* Thus, deference to the trial court's sentence will prevail unless the defendant persuades us the sentence is inappropriate by producing compelling evidence portraying in a positive light the nature of the offense—such as showing restraint or a lack of brutality—and the defendant's character—such as showing substantial virtuous traits or persistent examples of positive attributes. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018); *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[18] Initially, we note that Graham did not receive the maximum sentence. Attempted murder is a Level 1 felony. I.C. § 35-41-5-1(a). A Level 1 felony carries a sentencing range of twenty to forty years with an advisory sentence of thirty years. I.C. § 35-50-2-4(b). Graham received a thirty-eight-year sentence.

[19] We cannot say that Graham's sentence is inappropriate. In his brief, Graham merely states that he "respectfully requests that the court review the sentence imposed and reduce his sentence . . . to a fixed term that is appropriate . . . ." Appellant's Br. at 21. This statement is not argument supported by cogent reasoning, and it is not sufficient to meet Graham's burden of showing that his sentence is inappropriate. *See* Ind. Appellate Rule 46(A)(8)(a). Indeed, Graham's statement on appeal makes no showing at all of facts that portray in a positive light the nature of the offense—such as showing restraint or a lack of brutality—and the defendant's character—such as showing substantial virtuous traits or persistent examples of positive attributes. *Robinson*, 91 N.E.3d at 577; *Stephenson*, 29 N.E.3d at 122. In any event, we agree with the trial court that Graham's lengthy and escalating criminal history, the fact that he was on bond when he committed the instant offense, and the brutality of his attack on Johnson demonstrate that Graham's thirty-eight-year sentence is not inappropriate. We therefore affirm his sentence.

Conclusion

[20] For all of the above-stated reasons, we affirm Graham's conviction for attempted murder and his resulting sentence.

[21] Affirmed.

Robb, J., and Foley, J., concur.