MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dawn M. Carden,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 30, 2023

Court of Appeals Case No. 22A-CR-1619

Appeal from the Lake Superior Court

The Honorable Salvador Vasquez, Judge

Trial Court Cause Nos. 45G01-2010-F5-478 45G01-2102-MR-17

Opinion by Judge Tavitas

Chief Judge Altice and Judge Brown concur.

Case Summary

[1] Dawn Carden appeals her consecutive sentences totaling eleven years in the Department of Correction ("DOC"). Carden argues that the trial court abused its discretion by considering several aggravating factors and by imposing consecutive sentences. Finding that the trial court did not abuse its discretion, we affirm.

Issues

[2] Carden raises two issues on appeal, which we restate as:

I. Whether the trial court abused its discretion by considering certain aggravating factors.

II. Whether the trial court abused its discretion by imposing consecutive sentences.

Facts

[3] Carden provided guns, alcohol, and illegal drugs ranging from marijuana to MDMA[1] to numerous teenagers in Gary, Indiana. She encouraged the teenagers to call her "Mama D." Appellant's App. Vol. III p. 118. Between

[1] MDMA (*3,4-methylenedioxy-methamphetamine*), also known as Molly and Ecstasy, is "chemically similar to both stimulants and hallucinogens." https://nida.nih.gov/publications/drugfacts/mdma-ecstasymolly (last visited Jan. 11, 2023).

September 9, 2020, and October 16, 2020,[2] Carden provided firearms to Maxwell Kroll and Elijah Robinson, both age seventeen at the time, at her home in Gary.

[4] On or around October 16, 2020, Carden and her boyfriend, Alvino Amaya, believed that Kroll and Robinson had stolen a firearm that belonged to Carden's son. Early that morning, Amaya shot and killed Kroll and Robinson in a house in Griffith, Indiana. After killing the two teenagers, Amaya returned to Carden's home and told her, "I just f*****g killed [Kroll and Robinson]." Appellant's App. Vol. II p. 57. Carden then assisted Amaya in hiding the murder weapon by transporting it to a new storage unit that Carden rented under her father's name. Carden did so "with the intent to hinder the apprehension or punishment of [Amaya]." *Id.* Later that day, Robinson's girlfriend, D.S., spoke with Carden over the phone after she was unable to contact Robinson. Carden told D.S. that she had not seen Robinson since the night before.

[5] On October 21, 2020, in Cause No. 45G01-2010-F5-478 ("Cause No. 478"), the State charged Carden with three counts: Count I, dangerous control of a firearm, a Level 5 felony; Count II, dealing in marijuana, a Level 6 felony; and Count III, possession of marijuana, a Class B misdemeanor.

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[2] The Parties' stipulated factual basis delineates this date range as between September 9, 2020, and October 20, 2020, although it is impossible that Carden provided firearms to Kroll and Robinson after they were killed on October 16, 2020.

[6] On February 11, 2021, in Cause No. 45G01-2102-MR-17 ("Cause No. 17"), the State charged Carden with six counts: Count I, murder, a felony; Count II, murder, a felony; Count III, dealing in a narcotic drug, a Level 5 felony;[3] Count IV, dealing in a narcotic drug, a Level 5 felony; Counts V, contributing to the delinquency of a minor, a Level 6 felony; and Count VI, contributing to the delinquency of a minor, a Level 6 felony. On August 17, 2021, the State amended its information in Cause No. 17 to allege that Carden used a firearm in the commission of the murders.

[7] On April 18, 2022, Carden and the State executed a plea agreement wherein the State agreed to amend its information in Cause No. 17 to add Count VII, assisting a criminal, a Level 5 felony; Carden agreed to plead guilty to that offense; and Carden also agreed to plead guilty to Count I, dangerous control of a firearm, as charged in Cause No. 478.[4]

[8] At the June 9, 2022 hearing, the trial court accepted the plea agreement and entered judgments of conviction on Count I in Cause No. 478 and Count VII in Cause No. 17. The trial court proceeded to sentence Carden. The trial court found as mitigating factors that Carden pleaded guilty and admitted responsibility for the offenses. The trial court found five aggravators: 1) Carden's criminal history included two previous misdemeanor convictions; 2)

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[3] The State charged this offense under Indiana Code Section 35-48-4-1 for dealing in marijuana; however, that statute does not apply to dealing in marijuana.

[4] The State subsequently dismissed all remaining counts in accordance with the plea agreement.

Carden received "[p]rior leniency" in the form of probationary sentences for her misdemeanor offenses yet reoffended in the instant cases; 3) Carden's character is "dishonest and manipulative . . . [a]s demonstrated by her conduct before and after the deaths of Elijah Robinson and Maxwell Kroll"; 4) Carden is facing pending federal criminal charges for making a false statement in the acquisition of a firearm and forfeiture allegation; and 5) Carden "committed two separate and distinct offenses" and "the harm done by [Carden] substantially exceeded that which is necessary to satisfy the elements of the crime committed in both causes to which [Carden] pled guilty." Appellant's App. Vol. III p. 127. The trial court concluded that the aggravating circumstances "absolutely outweigh anything in mitigation." Tr. Vol. II p. 80.

[9] The trial court sentenced Carden to consecutive sentences of five years on the dangerous control of a firearm conviction and the maximum of six years on the assisting a criminal conviction, for a total of eleven years, to be executed in the DOC. Carden now appeals.

Discussion and Decision

[10] Carden argues that the trial court abused its discretion by considering certain aggravating factors and by imposing consecutive sentences. We disagree.

[11] "[S]ubject to the review and revise power [under Indiana Appellate Rule 7(B)], sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (citing *Smallwood v. State*, 773 N.E.2d 259, 263

(Ind. 2002)), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007); *Phipps v. State*, 90 N.E.3d 1190, 1197 (Ind. 2018). "An abuse occurs only if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Schuler v. State*, 132 N.E.3d 903, 904 (Ind. 2019) (citing *Rice v. State*, 6 N.E.3d 940, 943 (Ind. 2014)).

[12] A trial court abuses its discretion in a number of ways, including:

> (1) "failing to enter a sentencing statement at all"; (2) entering a sentencing statement in which the aggravating and mitigating factors are not supported by the record; (3) entering a sentencing statement that does not include reasons that are clearly supported by the record and advanced for consideration; or (4) entering a sentencing statement in which the reasons provided in the statement are "improper as a matter of law."

Ackerman v. State, 51 N.E.3d 171, 193 (Ind. 2016) (quoting *Anglemyer*, 868 N.E.2d at 490-91), *cert. denied*.

[13] "This Court presumes that a court that conducts a sentencing hearing renders its decision solely on the basis of relevant and probative evidence." *Schuler*, 132 N.E.2d at 905. "When an abuse of discretion occurs, this Court will remand for resentencing only if 'we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.'" *Ackerman*, 51 N.E.3d at 194 (quoting *Anglemyer*, 868 N.E.2d at 491).

I. Aggravating Factors

[14] Carden challenges the trial court's consideration of her criminal history as an aggravating factor. Carden was convicted of theft, a Class A misdemeanor, in 2011 and operating a vehicle with an alcohol concentration equivalent to or greater than .08 but less than .15, a Class C misdemeanor, in 2016. Carden argues that the trial court abused its discretion by considering Carden's criminal history as an aggravating factor and by assigning it certain weight. We disagree.

[15] As for the trial court's consideration of Carden's criminal history as an aggravator, Indiana Code Section 35-38-1-7.1(a)(2) permits a trial court to consider whether "[t]he person has a history of criminal or delinquent behavior" as an aggravator; *see also Smith v. State*, 889 N.E.2d 261, 263 (Ind. 2008). As for the weight of Carden's criminal history, the trial court did not assign any specific weight to this factor. In any case, "'a trial court can[]not . . . be said to have abused its discretion in failing to properly weigh' aggravators or mitigators." *Morrell v. State*, 118 N.E.3d 793, 796 (Ind. Ct. App. 2019) (quoting *Anglemyer*, 868 N.E.2d at 491) (internal quotation marks omitted), *trans. denied*. The trial court, accordingly, did not abuse its discretion in considering Carden's criminal history as an aggravator.[5]

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[5] Carden argues that her previous offenses are remote and not sufficiently similar to the instant offenses to warrant a maximum sentence. She further argues that the trial court abused its discretion by considering as aggravating factors Carden's pending federal charges for making a false statement in the acquisition of a

[16] Carden also argues that the trial court improperly considered as an aggravating factor that "the harm done by [Carden] substantially exceeded that which is necessary to satisfy the elements of the crime committed in both causes to which [she] pled guilty." Appellant's App. Vol. III p. 127. We disagree.

[17] Pursuant to Indiana Code Section 35-38-1-7.1(a), "[i]n determining what sentence to impose for a crime, the court may consider the following aggravating circumstances:"

> (1) The harm, injury, loss, or damage suffered by the victim of an offense was:
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> (A) significant; and
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> (B) greater than the elements necessary to prove the commission of the offense.

While a trial court cannot enhance a sentence based on the material elements of the offense alone, "the trial court may properly consider the particularized circumstances of the material elements of the crime" to be an aggravating factor." *Hudson v. State*, 135 N.E.3d 973, 989 (Ind. Ct. App. 2019) (citing *Kien v. State*, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003), *trans. denied*); *see also Gomilla v. State*, 13 N.E.3d 846, 852-53 (Ind. 2014).

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firearm and the fact that Carden reoffended in the instant cases despite "[p]rior leniency" for her previous offenses. Appellant's App. Vol. III p. 127. We do not address these arguments because the trial court properly considered Carden's criminal history as an aggravating factor, and the trial court found at least one other valid aggravator.

[18] Carden argues that the trial court failed to explain how Carden's conduct exceeded the material elements of her offenses. Indiana Code Section 35-47-10-6 provides:

> An adult who knowingly or intentionally provides a firearm to a child whom the adult knows:
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> > (1) is ineligible for any reason to purchase or otherwise receive from a dealer a firearm; or
> >
> > (2) intends to use the firearm to commit a crime;
>
> commits dangerous control of a firearm, a Level 5 felony.

Indiana Code Section 35-44.1-2.5(a) provides:

> A person not standing in the relation of parent, child, or spouse to another person who has committed a crime or is a fugitive from justice who, with intent to hinder the apprehension or punishment of the other person, harbors, conceals, or otherwise assists the person commits assisting a criminal, a Class A misdemeanor. However, the offense is:
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> * * * * *
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> > (2) a Level 5 felony . . . if the assistance was providing a deadly weapon.

[19] Here, the trial court observed that Carden "furnish[ed] firearms" to Robinson and Kroll, whereas the dangerous control of a firearm statute only required Carden to have provided one firearm to either Robinson or Kroll. Tr. Vol. II p.

76. Similarly, the trial court observed that Carden assisted Amaya after he murdered both Robinson and Kroll. The assisting a criminal statute, however, only requires that the person receiving the defendant's assistance committed "a crime" and, here, Amaya committed two murders. I.C. § 35-44.1-2.5(a). Carden's conduct, thus, included activity beyond the elements necessary to prove the offenses of which she was convicted. The trial court did not abuse its discretion by finding that this factor was aggravating. The trial court, thus, found several aggravating factors, and, therefore, it did not abuse its discretion by imposing an enhanced sentence. *See Morrell*, 118 N.E.3d at 796 ("[I]f a sentencing court improperly applies an aggravating circumstance but other valid aggravating circumstances exist, a sentence enhancement may still be upheld." (citing *Means v. State*, 807 N.E.2d 776, 788 (Ind. Ct. App. 2004), *trans. denied*.). [6]

II. Consecutive Sentences

[20] Carden next argues that the trial court abused its discretion by imposing consecutive sentences. We disagree.

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[6] Carden also argues that the trial court abused its discretion because "maximum sentences are reserved for the worst offenders and offenses." Appellant's Br. p. 11 (citing *Buchanan v. State*, 767 N.E.2d 967, 97[3] (Ind. 2002). This argument confuses a claim that the trial court abused its discretion during sentencing with a claim that one's sentence is inappropriate, which we review separately under Appellate Rule 7(B). *See, e.g.*, *Buchanan*, 767 N.E.2d at 972-73. In other words, a trial court may impose a sentence that we, on review, find inappropriate, without abusing its discretion, and an argument that one's offense is not "the worst of the worst" is probative of whether the sentence is inappropriate but not of whether the trial court abused its discretion. Here, Carden clarifies in her Reply Brief that she invokes the worst of the worst doctrine "to point out why the proffered aggravators were improper"—an abuse of discretion argument—but does not make any cogent argument that her sentence is inappropriate under Appellate Rule 7(B). Reply p. 10. Accordingly, any contention that Carden's sentence is inappropriate pursuant to Appellate Rule 7(B) is waived. *See Burnell v. State*, 110 N.E.3d 1167, 1171 (Ind. Ct. App. 2018) (explaining that Ind. App. R. 46(A)(8) requires a "cogent argument and citation to legal authority").

[21] "In its sound discretion, a trial court may impose consecutive or concurrent terms of imprisonment." *S.B. v. State*, 175 N.E.3d 1199, 1202-03 (Ind. Ct. App. 2021) (citing *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008)); *see also* Ind. Code § 35-50-1-2. "'[C]onsecutive sentences are based upon the principle that each separate and distinct criminal act should receive a separately experienced punishment.'" *Young v. Ind. Dep't of Correction*, 22 N.E.3d 716, 719 (Ind. Ct. App. 2014) (quoting *Crider v. State*, 984 N.E.2d 618, 621 (Ind. 2013)), *trans. denied*. The trial court may properly consider aggravating circumstances in determining whether sentences should be served consecutively. I.C. § 35-50-1-2(c).

[22] We first observe that Carden's argument is unavailable on appellate review under the invited error doctrine. Our Supreme Court recently clarified the contours of this doctrine:

> [T]o establish invited error, there must be some evidence that the error resulted from the appellant's affirmative actions as part of a deliberate, "well-informed" trial strategy. A "passive lack of objection," standing alone, is simply not enough. And when there is no evidence of counsel's strategic maneuvering, we are reluctant to find invited error based on the appellant's neglect or mere acquiescence to an error introduced by the court or opposing counsel.

Batchelor v. State, 119 N.E.3d 550, 558 (Ind. 2019). "[W]hereas waiver generally leaves open an appellant's claim to fundamental-error review, invited error typically forecloses appellate review altogether." *Id*. at 556.

[23] If the trial court erred, which we do not find, any error was clearly invited by Carden. During sentencing, Carden, through counsel, stated, without any prompting, "I believe that consecutive sentencing is appropriate in this case. I'm not gonna argue for nonconsecutive sentencing or concurrent sentencing in this case." Tr. Vol. II p. 60.

[24] Invited error notwithstanding, the trial court did not abuse its discretion in imposing consecutive sentences. Here, Carden's dangerous control of a firearm conviction and assisting a criminal conviction involved completely separate acts on different dates and are, thus, separate and distinct offenses. *See Crouse v. State*, 158 N.E.3d 388, 394 (Ind. Ct. App. 2020) (holding trial court did not abuse its discretion in imposing four consecutive sentences when defendant robbed four different convenience stores on four different dates). In addition, the trial court found at least two valid aggravating factors. The trial court, therefore, could properly find that Carden's convictions warranted consecutive sentences.

Conclusion

[25] The trial court did not abuse its discretion in sentencing Carden to a consecutive sentence of eleven years. Accordingly, we affirm.

[26] Affirmed.

Altice, C.J., and Brown, J., concur.