ATTORNEY FOR APPELLANT

Robert P. Magrath
Alcorn Sage Schwartz & Magrath
Madison, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Cole Hornsby,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 31, 2023

Court of Appeals Case No. 22A-CR-1329

Appeal from the Dearborn Superior Court

The Honorable Jonathan N. Cleary, Judge

Trial Court Cause No. 15D01-2202-F6-51

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Cole Hornsby (Hornsby), appeals his conviction and sentence for stalking, a Level 6 felony, Ind. Code § 35-45-10-5(a).

[2] We affirm.

ISSUES

[3] Hornsby presents this court with three issues, which we restate as:

(1) Whether his constitutional right to a speedy trial was violated;
(2) Whether the trial court abused its discretion when it admitted evidence of his prior possession of a handgun on school grounds; and
(3) Whether his sentence is inappropriate in light of the nature of his offense and his character.

FACTS AND PROCEDURAL HISTORY

[4] Hornsby and L.P. attended the same schools in Dearborn County, Indiana, since middle school, but they were never friends or romantically involved. In 2016 when Hornsby and L.P. were juniors at East Central High School, L.P. worked at a K-Mart in Harrison, Ohio, as a cashier. Hornsby would come through L.P.'s check-out lane when other lanes were open to purchase magnum-sized condoms and attempt small talk with L.P., who was not receptive. During this period, Hornsby contacted L.P. on social media enquiring about gaining employment at K-Mart. L.P. did not respond.

[5] During their senior year which spanned from the fall of 2017 to the spring of 2018, Hornsby would come to L.P.'s locker on a daily basis to stare and smirk at her, attempt small talk, and to ask her out on dates. L.P. told Hornsby repeatedly to his face that she was not interested and to leave her alone, but Hornsby continued. After her stated rejections of Hornsby's advances went unheeded by him, L.P. attempted to ignore Hornsby. In response, Hornsby would call her a bitch for ignoring him. L.P. did not respond to Hornsby's further attempts to contact her on social media, and she blocked Hornsby from calling her cellphone. On a daily basis, Hornsby parked next to or near L.P. in the East Central parking lot so that he could speak to L.P. and walk with her to and from the high school. L.P. did not want to speak or walk with Hornsby, and she told him to leave her alone. After Hornsby continued to park next to L.P., she would wait in her car, sometimes until after the school bell had rung, in an attempt to avoid him. Hornsby also waited. In a further attempt to avoid Hornsby, L.P. changed where she parked. Hornsby also changed where he parked. On one occasion as Hornsby followed L.P. from the school building to the parking lot and L.P. quickened her pace to avoid him, Hornsby tripped her. L.P. yelled at Hornsby, "Leave me alone[!]" (Transcript Vol. VI, p. 32). Hornsby did not leave L.P. alone. Hornsby stared at L.P. in the one class they shared senior year and continued to do so even after the teacher changed their seating assignments.

[6] Hornsby's unwanted advances upset, overwhelmed, and frightened L.P. to the point that L.P., who was an active and engaged student, did not want to go to

school. L.P. was afraid to go outside by herself and had family members escort her whenever possible. On Tuesday, April 10, 2018, at the prompting of her parents, L.P. went to East Central's Assistant Principal, Chad Swinney (Swinney), and reported Hornsby's unwanted conduct. Swinney confirmed L.P.'s report by talking to students whose lockers were close to L.P.'s and by reviewing the high school's parking lot surveillance footage. On Saturday, April 14, 2018, East Central's prom took place. Swinney observed Hornsby follow L.P. around the large prom venue over the course of several hours. One of L.P.'s friends used her cellphone to record Hornsby standing close to L.P., staring at L.P. and saying nothing. Eventually, Swinney took Hornsby outside and asked him why he was following L.P. On Monday, April 16, 2018, Swinney met with Hornsby and told Hornsby that his contact with L.P. was unwanted and that it had to stop. On Tuesday, April 17, 2018, a handgun was found in Hornsby's truck that was parked on East Central school grounds. This was in contravention to East Central's school rules, and Hornsby was immediately expelled. When L.P. was informed of Hornsby's possession of a handgun on school grounds, she was even more fearful for her safety.

[7] On April 17, 2018, the State charged Hornsby in Cause Number 15C01-1904-F5-30 (Cause -30, or the gun case) with Level 5 felony carrying a handgun without a license on or within 500 feet of a school. On April 22, 23, and 24, 2018, Hornsby sent L.P. messages on social media asking her to unblock him so that he could call her and exclaiming that ". . . [he] could not quit thinking about [her]." (Exh. Vol. p. 5). L.P. did not respond to these messages. From

April 17, 2018, to December 24, 2018, Hornsby attempted to call L.P. thirty-one times from jail while he was in custody for the gun case. L.P. did not answer Hornsby's calls. L.P. graduated high school in the spring of 2018 and began college, hoping that Hornsby's involvement in her life was over.

[8] On February 3, 2019, L.P.'s parents were returning to the family home, which was located at the end of a dead-end street, when they spotted Hornsby's car on their street. L.P.'s father told Hornsby, "Look, just stop. Man to man, Cole, just stop," to which Hornsby responded that he just wanted to talk to L.P. (Tr. Vol. IV, p. 244). On February 28, 2019, L.P. was granted a protective order against Hornsby, effective until February 28, 2021. Hornsby was personally served with the protective order on March 1, 2019. On March 5, 2019, Hornsby, who had pleaded guilty in Cause -30, was sentenced to four years in the Department of Correction (DOC), with three years and ninety-five days suspended to time served.

[9] On June 22, 2019, L.P. saw Hornsby in a bar in Harrison, Ohio. Hornsby left the bar as soon as he was spotted by L.P., and he spent the night and the next day at the home of his cousin Ian, who did not have a lock on his cellphone. On June 23, 2019, L.P., who had never met Ian, received a text from Ian's cellphone, stating:

> Hey this is Ian Hornsby, and i just wanted to let you know that cole said if you don't drop the protective order by the end of the week, he's going to hire a lawyer and take you to court over it. He said he'll leave you completely alone, but the protective order

> will be dropped one way or another, because it's completely unnecessary.

(Exh. Vol. p. 19) (sic throughout). During an ensuing investigation, Ian denied sending this text to L.P. On July 5, 2019, the State charged Hornsby in Cause Number 15D01-1907-CM-565 (Cause -565) with Class A misdemeanor invasion of privacy for allegedly violating the protective order by sending L.P. a text through a third party on June 23, 2019. On August 27, 2019, the trial court held an initial hearing in Cause -565, and Hornsby was released on his own recognizance. On September 13, 2019, the State filed a notice alleging that Hornsby had violated his probation in the gun case by committing the new offense of invasion of privacy, as charged in Cause -565. On October 12, 2019, Hornsby used the texting device of a fellow inmate at the Dearborn County Law Enforcement Center to send L.P. a message. Hornsby was subsequently found to have violated his probation in the gun case, and on December 4, 2019, the probation revocation court imposed the entirety of Hornsby's three-year, ninety-five-day suspended sentence. During his allocution at his probation revocation sentencing hearing, Hornsby expressed his love for L.P., who was present at the hearing. Hornsby was remanded to the DOC. On December 9, 2019, the trial court granted the State's motion to dismiss Cause -565 without prejudice.

[10] On June 25, 2020, the State charged Hornsby in Cause Number 15D01-2006-F6-260 (Cause -260) with Level 6 felony stalking based on conduct alleged to have occurred between August 19, 2017, and December 4, 2019. The State also

charged Hornsby with two counts of invasion of privacy for allegedly violating the protective order on June 23, 2019, and October 12, 2019. Hornsby was still serving his Cause -30 probation revocation sentence when the State filed the Cause -260 charges. Hornsby was not served with an arrest warrant in Cause -260, and no initial hearing was held in the matter. During the pendency of Cause -260, Hornsby filed several pro se motions, including an August 11, 2020, motion for a speedy trial.

[11] On August 12, 2021, Hornsby was transported from the DOC to Dearborn County to attend a hearing in Cause -30 post-conviction relief proceedings he had filed. That same day, Hornsby was served with an arrest warrant in Cause -260, and the trial court granted the State's motion to dismiss Cause -260 without prejudice. Hornsby was returned to the DOC, where he had a projected release date of April 19, 2022.

[12] On February 17, 2022, the State filed an Information under Cause Number 15D01-2202-F6-51 (Cause -51, or the instant matter), charging Hornsby with Level 6 felony stalking for conduct alleged to have occurred between April 1, 2018, and December 4, 2019. On February 24, 2022, Hornsby filed a pro se motion to dismiss arguing that there was a lack of evidence to support the charge. On February 25, 2022, the trial court held Hornsby's initial hearing and granted Hornsby's pro se speedy trial motion, setting his jury trial for April 12, 2022. No evidence was heard on Hornsby's pro se motion to dismiss. The trial court took Hornsby's pro se motion to dismiss under advisement and subsequently denied that motion.

[13] On March 4, 2022, Hornsby, who by this time was represented by counsel, filed a second motion to dismiss with supporting memorandum, claiming, among other things, that his prosecution in the instant matter violated his state and federal speedy trial rights. On March 7, 2022, the trial court held a hearing on Hornsby's second motion to dismiss. Hornsby requested that the trial court take judicial notice of his previous criminal and post-conviction cases. Neither Hornsby nor the State presented evidence at the hearing.

[14] On March 25, 2022, the trial court issued a detailed order denying Hornsby's motion to dismiss on procedural grounds as well as on the merits. Noting that Indiana Rule of Criminal Procedure 3 requires that all bases available to a defendant for a motion to dismiss must be raised at the same time, the trial court denied Hornsby's second motion to dismiss because his speedy trial arguments were available to him, but were not raised, when he filed his February 24, 2022, pro se motion to dismiss. Before addressing the merits of Hornsby's arguments, the trial court took judicial notice of Causes -30, -565, -260, -51, the Cause -30 post-conviction proceedings, the protective order proceedings, and of "all State of Indiana Executive and Supreme Court pandemic Orders from 2020 to current." (Appellant's App. Vol. II, p. 84). The trial court concluded that the four-part balancing test announced in *Barker v. Wingo*, 407 U.S. 514 (1972), for assessing federal constitutional speedy trial right claims weighed in favor of the State and denied Hornsby's second motion to dismiss.

[15] On April 4, 2022, the State filed its notice of intent to introduce evidence at trial that Hornsby had possessed a handgun at East Central High School on April 17, 2018. The State argued that the proffered evidence went "directly towards the actual fear of the victim and gives substantial weight to the reasonableness of said fear" and that it was admissible pursuant to Indiana Trial Rule 404(b) to show Hornsby's knowledge, motive, plan, intent, and lack of mistake about his contacts with L.P. during the period alleged in the Information. (Appellant's App. Vol. II, p. 201). Also on April 4, 2022, Hornsby filed a motion in limine, in relevant part seeking to exclude all evidence of, or reference to, his prior arrest, guilty plea, or incarceration for the gun case. After a hearing that same day, the trial court preliminarily ruled that the State could show that Hornsby had possessed a firearm at school on the day in question, which was within the timeframe of the allegations, but it precluded the State from referring to the subsequent legal ramifications of that possession.

[16] On April 11, 2022, the trial court convened Hornsby's three-day jury trial. During the cross-examination of Swinney, Hornsby elicited testimony that he had consented to the search of his truck on April 17, 2018, leading to the discovery of the gun, which had been found in a locked box. L.P.'s father related that after Hornsby was spotted on their street on February 3, 2019, and after L.P. obtained the protective order, they had installed a security system with cameras and had distributed a flier in their neighborhood with Hornsby's picture asking to be alerted if Hornsby was seen. L.P.'s mother testified that L.P. was so frightened of Hornsby that she would not use the front or back door

of their family home because there were bushes there where Hornsby could hide. L.P.'s mother explained that they had not reported Hornsby's conduct earlier because they did not want him to be in trouble. L.P. testified that Hornsby's unwanted conduct at school caused her to feel overwhelmed, upset, and scared and that she was even more frightened after he was arrested for having a handgun at their school. Hornsby's conduct had caused L.P. to procure a permit to carry a concealed firearm. As part of Hornsby's case-in-chief, Hornsby's father testified that Hornsby was driving his father's truck on April 17, 2018, and that the gun found in the truck belonged Hornsby's father. The jury found Hornsby guilty as charged.

[17] On May 11, 2022, the trial court held Hornsby's sentencing hearing. L.P.'s father read L.P.'s victim impact statement into the record in which she told the trial court, "I just want to be left alone so that I can live my life without fear, and the same for my family." (Tr. Vol. VI, p. 213). During his allocution, Hornsby apologized for calling L.P. a bitch. The trial court found as an aggravating factor that the harm and injury to L.P. was greater than necessary to accomplish the offense, in that Hornsby's harassing conduct went on for years and "was a way of life for [] L.P." (Tr. Vol. VI, p. 241). Although declining to find Hornsby's age to be a mitigating factor, the trial court noted that it had taken Hornsby's age into consideration. The trial court also stated that it had considered Hornsby's expression of remorse but did not accord it substantial weight given that he had not apologized for any of his behavior apart from the name calling. The trial court sentenced Hornsby to two years.

[18] Hornsby now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Speedy Trial*

A. *Standard and Scope of Review*

[19] Hornsby argues that his constitutional right to a speedy trial has been infringed. "In evaluating whether delay has violated a defendant's constitutional rights, we review issues of fact using a clear error standard and questions of law de novo." *State v. Azania*, 865 N.E.2d 994, 1002 (Ind. 2007). Findings of fact are only clearly erroneous when there are no facts or reasonable inferences in the record to support them. *L.A.F. v. State*, 698 N.E.2d 355, 356 (Ind. Ct. App. 1998).

[20] As a threshold matter, we address the State's argument that Hornsby has failed to provide us with an adequate record to review his claim. The resolution of Hornsby's speedy trial claim entails examination of the proceedings and filings in Causes -30, -565, -260, and -51. Hornsby did not include the chronological case summaries and court filings relevant to those matters in his Appendix. The State represents to this court that the records of Causes -565 and -260 are not available on MyCase and were not available to the State by other means. Citing caselaw holding that a defendant's failure to provide a complete record on appeal may result in the waiver of an issue for our consideration, the State urges us to find Hornsby's speedy trial claim waived.

[21] In its March 25, 2022, order denying Hornsby's second motion to dismiss, the trial court took judicial notice of all of the relevant Causes and entered findings of fact based upon those judicially-noticed matters. Our own search of Indiana's unified court management system revealed that the records of Causes -565 and -260 were sealed on May 20, 2022, pursuant to Indiana Code section 35-38-9-1. The records of Cause -30, Hornsby's gun case, have not been sealed. As such, we are tasked with reviewing matters which were relied upon by the trial court in issuing its order, but which are now at least partially inaccessible for that purpose. Neither Hornsby nor the State requested that Causes -565 and -260 be unsealed for purposes of this appeal. However, we decline to find that Hornsby has waived his speedy trial claim for our review. Hornsby exercised his statutory right to have Causes -565 and -260 sealed, the State did not dispute Hornsby's counsel's representations of factual matters at the March 7, 2022, hearing, and neither party contends that the factual findings entered by the trial court in its March 25, 2022, are clearly erroneous. In addition, the State acknowledges that it was able to address Hornsby's appellate arguments based on the trial court's order denying his second motion to dismiss. Therefore, we rely on the facts regarding Causes -565 and -260 as set forth by the trial court in its order and proceed with our analysis within that framework.

B. *Barker v. Wingo*

[22] A criminal defendant's right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article 1, section 12 of

the Indiana Constitution.[1] *Watson v. State*, 155 N.E.3d 608, 614 (Ind. 2020). This constitutional guarantee protects three interests of defendants, namely, preventing excessive pretrial incarceration, minimizing anxiety and concern to the defendant, and decreasing the possibility that the defense will be negatively impacted. *Id*. at 616. In determining whether a violation of a defendant's speedy trial right has occurred, we deploy the balancing test announced in *Barker v. Wingo*, 407 U.S. 514 (1972), which "assesses both the government's and the defendant's conduct and takes into consideration (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the speedy trial right, and (4) any resulting prejudice." *Id*. at 614 (citing *Barker*, 407 U.S. at 530). None of these factors are dispositive, and we consider them all within the context of the particular case. *Id*. at 616. We have traditionally applied the *Barker* analysis to speedy trial claims brought under both our federal and state constitutions.[2] *Id*. at 614.

[23] Regarding the length of the delay, in the trial court proceedings the parties focused on the time that elapsed between the filing of the charges in Cause -260 on June 25, 2020, and the dismissal of the Cause -260 charges on August 12, 2021, which the trial court found was a delay of up to 414 days. On appeal,

---

[1] Hornsby does not contend that the timing of his trial violated Indiana Rule of Criminal Procedure 4.

[2] The *Watson* court noted that, due to differences in the language between the speedy trial provisions of the Sixth Amendment and Article 1, section 12, "an analysis distinct from *Barker* may be more suitable" when addressing speedy trial claims brought under our state constitution. *Watson*, 155 N.E.3d at 614 n.2. However, Hornsby has not developed a separate argument under Article 1, section 12, and, therefore, we will apply the *Barker* analysis.

Hornsby argues that the charges brought against him in Causes -565, -260, and -51 were based on the same conduct, and he contends that the length of the delay among the three Causes was over two and one-half years, without offering a precise day count of the delay. However, even if we were to accept Hornsby's contention that the time elapsed among the three Causes should be aggregated, the total amount of time involved from the date the Cause -565 charge was filed on July 5, 2019, until the hearing on Hornsby's second dismissal motion on March 7, 2022 was only 591 days and was not in excess of 913 days, as Hornsby asserts: (1) **Cause -565** July 5, 2019, to December 9, 2019–158 days; (2) **Cause -260** June 25, 2020, to August 12, 2021–414 days; (3) **Cause -51** February 17, 2022, to March 7, 2022–19 days. The time elapsed between the dismissal and refiling of the charges is not relevant for our purposes. *See, e.g., Sweeney v. State*, 704 N.E.2d 86, 100-02 (Ind. 1998) (omitting the days elapsed between the dismissal and refiling of charges in considering the total amount of delay for constitutional speedy trial analysis). If the total delay approaches one year, it is presumed to be prejudicial for purposes of evaluating this factor, and we then "consider the extent to which the delay exceeds that triggering threshold." *Watson*, 155 N.E.3d at 616-17. The appropriateness of the length of the delay depends on the circumstances of the case, with more delay being tolerated for more complex cases. *See Logan v. State*, 16 N.E.3d 953, 962 (Ind. 2014) (concluding that more than three-and-one-half-year delay in the trial of a Class C felony was "substantial" and unreasonable).

[24] Here, the total delay was 226 days over the presumptive threshold, which the State concedes triggers a further analysis of the *Barker* factors. However, the delay in excess of the threshold in this case, less than eight months, is nothing akin to the delays at issue in *Logan*, *Barker* (over five years), or *Watson* (nearly six and a half years). *Barker*, 407 U.S. at 533; *Watson*, 155 N.E.3d at 617. In addition, we have recognized that relief for a speedy trial violation has "generally been limited to situations where the delay exceeds the statute of limitations for an alleged offense." *McCarthy v. State*, 176 N.E.3d 562, 569 (Ind. Ct. App. 2021) (holding that an eighteen-month delay, which was shorter than the shortest statute of limitation for the charges brought, weighed only slightly against the State). The highest felony level charged against Hornsby among the three Causes was stalking as Level 6 felony, which is subject to a 1825-day statute of limitation. I.C. § 35-41-4-2(a)(1). The total delay in this case, 519 days, does not approach the limit of the statute of limitations for that offense. In light of these circumstances, we conclude that the length of the delay weighs slightly against the government.

[25] In considering the reasons for the delay, we consider who is more responsible, the defendant or the government. *Watson*, 155 N.E.3d at 617. Delays caused by the government due to justifiable reasons do not weigh against the government, while delays attributable to negligence or bad faith, such as a purposeful attempt to hinder the defense, do weigh against the government. *Id*. Here, the trial court found that the delay in bringing Hornsby to trial was attributable to the facts that (1) he was serving his Cause -30 sentence during the

longest portion of the delay, namely the delay attributable to Cause -260, and (2) COVID-19 restrictions were in place which interfered with the transporting of inmates. The trial court also found that there was no evidence that the government had acted negligently or in bad faith with deliberate intent to harm Hornsby's defense. On appeal, Hornsby has not shown that these factual findings are clearly erroneous. We conclude that any delay attributable to COVID-19 was justifiable and that any remaining delay weighs against the government, but only slightly.

[26] Next, we consider to what extent Hornsby asserted his speedy trial right. *Watson*, 155 N.E.3d at 618. In doing so, we consider both the frequency and the force of the defendant's assertions of his right, and we keep in mind any conduct by the defendant which is contrary to his assertion of that right. *Id*. Here, the trial court concluded that Hornsby had sufficiently asserted his speedy trial right for purposes of its *Barker* analysis. This is a legal conclusion to which we owe no deference. *Azania*, 865 N.E.2d at 1002. We observe that Hornsby filed no speedy trial motions in Cause -565. On August 11, 2020, Hornsby filed a speedy trial motion in Cause -260, but he followed that motion with an August 20, 2020, motion for dismissal; a September 9, 2020, motion for initial hearing alleging double jeopardy concerns; a November 12, 2020, motion to have the Cause -260 warrant withdrawn;[3] and a December 23, 2020, motion to reconsider the denial of his motion to have the Cause -260 warrant withdrawn.

[3] Hornsby was not served with an arrest warrant in Cause -260 until August 12, 2021.

These subsequent motions filed by Hornsby attacked the validity of the charges, which is inconsistent with an expressed desire to be brought to trial on those charges. In the instant matter, Hornsby's motion for a speedy trial was granted the same day he requested it. Given these circumstances, we conclude that this factor is neutral for our purposes.

[27] Lastly, we consider what prejudice accrued to Hornsby as a result of the delay, and we render this assessment in light of the interests the constitutional speedy trial right is meant to protect. *Watson*, 155 N.E.3d at 619. It is Hornsby's burden to show actual prejudice resulting from the claimed speedy trial violation. *Sturgeon v. State*, 683 N.E.2d 612, 617 (Ind. Ct. App. 1997), *trans. denied*; *Sweeney*, 704 N.E.2d at 103. Here, Hornsby was released on his own recognizance in Cause -565, and he was serving his gun case sentence during the entire pendency of Cause -260 and the instant matter. Therefore, excessive pre-trial incarceration is not a factor in this case. On appeal, Hornsby does not assert that his defense was prejudiced. Rather, Hornsby contends that, because the asserted delay was in excess of one year, prejudice is presumed, and he argues that the trial court erred because it concluded that his anxiety alone was insufficient to show prejudice due to the delay in bringing him to trial. However, in *McCarthy*, we concluded that any presumption of prejudice due to a delay in excess of a year is not dispositive where, as here, the delay does not exceed the statute of limitation for the offense. *McCarthy*, 176 N.E.3d at 570. In addition, the *Watson* court observed that normally "the fact that a defendant is already incarcerated will mitigate any prejudice attributable to anxiety[,]" and

it deemed the particularized and substantial showing of anxiety resulting from a thirty-year habitual offender enhancement hanging over the defendant's head in *Watson* to be "rare". *Watson,* 155 N.E.3d at 620. Here, the trial court found that "[z]ero evidence, sworn testimony or any exhibits" had been introduced in support of Hornsby's claim of prejudice, a finding of fact that Hornsby does not contend is clearly erroneous. (Appellant's App. Vol. II, p. 87). On appeal, Hornsby does not explain how the particularized circumstances of his Level 6 felony stalking case merit a finding of prejudice based on his anxiety about the pending charge, when he was already incarcerated on the gun case during 433 of the 591 days of delay at issue here. Accordingly, we conclude that Hornsby has failed to meet his burden that he was actually prejudiced by the delay. When we balance the *Barker* factors and given that the length and reasons for the delay weigh only slightly against the government, Hornsby's assertion of his speedy trial right is neutral, and that he has failed to demonstrate any actual prejudice, we further conclude that Hornsby's constitutional speedy trial right was not infringed.

II. *Handgun Possession Evidence*

A. *Standard of Review*

[28] Hornsby contends that the trial court erred when it admitted evidence of his April 17, 2018, possession of a handgun on the grounds of East Central High School. As a general matter, we review a trial court's evidentiary rulings for an abuse of its discretion and will reverse only for an abuse of that discretion. *James v. State*, 96 N.E.3d 615, 617-18 (Ind. Ct. App. 2018), *trans. denied*.

However, Hornsby did not object to the admission of this evidence at trial. The mere filing of a motion in limine does not suffice to preserve an issue for appeal; in order to preserve error in the overruling of a pretrial motion in limine, the appellant must also object to the admission of the evidence at trial. *Martin v. State*, 622 N.E.2d 185, 187 (Ind. 1993). Failure to do so results in the waiver of that claim of error. *Id*.

[29] Our review of the pretrial hearing on Hornsby's motion in limine indicates that, directly after receiving the trial court's ruling overruling his objection to evidence pertaining to his gun case, Hornsby's counsel stated, "I'd show those as continuing objections to most of this." (Tr. Vol. II, p. 98). However, there is no indication that the trial court granted Hornsby a continuous objection. In *Hayworth v. State*, 904 N.E.2d 684, 692 (Ind. Ct. App. 2009), we held that if "the trial court does not specifically grant the right to a continuing objection, it is counsel's duty to object to the evidence as it is offered in order to preserve the issue for appeal." Given that Hornsby failed to procure a valid continuous objection and did not object at trial when the challenged evidence was offered, he has waived his claim, and in order to obtain reversal, he must demonstrate that fundamental error has occurred. *Schnitzmeyer v. State*, 168 N.E.3d 1041, 1046 (Ind. Ct. App. 2021). In order for the improper admission of prior bad acts evidence to constitute fundamental error, it "must be so prejudicial to the rights of the defendant as to make a fair trial impossible." *Sauerheber v. State*, 698 N.E.2d 796, 804 (Ind. 1998).

B. *Rule 404(b)*

[30] Indiana Evidence Rule 404(b)(1)-(2) generally prohibits "[e]vidence of a crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character[,]" but it also provides that such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." The list of other permitted purposes enumerated in Rule 404(b)(2) is illustrative but not exhaustive. *Davis v. State*, 186 N.E.3d 1203, 1210 (Ind. Ct. App. 2022), *trans. denied*. In addition,

> Rule 404(b) is designed to prevent the jury from making the "forbidden inference" that prior wrongful conduct suggests present guilt. . . . [T]he purpose behind Evidence Rule 404(b) is to prevent[ ] the State from punishing people for their character, and evidence of extrinsic offenses poses the danger that the jury will convict the defendant because . . . he has a tendency to commit other crimes. In assessing the admissibility of evidence under Evidence Rule 404(b), the trial court must first determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act, and then balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403. The effect of Rule 404(b) is that evidence is excluded only when it is introduced to prove the forbidden inference of demonstrating the defendant's propensity to commit the charged crime.

Hall v. State, 137 N.E.3d 279, 284 (Ind. Ct. App. 2019) (quoting *Laird v. State*, 103 N.E.3d 1171, 1176-77 (Ind. Ct. App. 2018) (cleaned up), *trans. denied*).

[31] Hornsby argues that evidence pertaining to his possession of a handgun at the high school he attended with L.P. was irrelevant because the handgun was not used in the offense, he had consented to the search of his truck, the gun was locked away, and because both the truck and the gun belonged to his father. However, in order to prove the offense of stalking, the State was required to show that the conduct at issue would cause "a reasonable person to feel terrorized, frightened, intimidated, or threatened" and that the conduct "actually cause[d] the victim to feel terrorized, frightened, intimidated, or threatened." I.C. § 35-45-10-1; *Buti v. State*, 185 N.E.3d 433, 436 (Ind. Ct. App. 2022). Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Ind. Evidence Rule 401(a)-(b). This court has acknowledged that guns can provoke fear in an average citizen and that "[t]his is all the more true in the school environment[.]" *S.B. v. Seymour Cmty. Schs.*, 97 N.E.3d 288, 296 (Ind. Ct. App. 2018), *trans. denied*. While we are mindful that Hornsby did not show his firearm to L.P. on April 17, 2018, we conclude that evidence that Hornsby had possessed a firearm in his truck at school, a truck which he frequently parked near L.P.'s in the school parking lot where some of the stalking conduct occurred, was relevant to showing both that L.P was fearful or intimidated by Hornsby and that her fear was objectively reasonable. Hornsby's arguments are more pertinent to what weight the jury could ascribe to the handgun possession evidence and not to its admissibility.

[32] Neither can we credit Hornsby's assertion that this evidence was inadmissible under Rule 403, which provides that a trial court may exclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Rule 403 only prohibits the admission of "*unfairly* prejudicial" evidence. *Hall v. State*, 177 N.E.3d 1183, 1194 (Ind. 2021) (emphasis in the original, recognizing that evidence which is introduced for a legitimate purpose and not to exploit or inflame the jury is not prohibited under Rule 403). As we have already explained, this evidence was relevant for another purpose apart from the forbidden inference, it occurred within the charged timeframe, and there is no indication that the State introduced it in order to inflame the jury. Hornsby provides us with no legal authority holding that a defendant's possession of a handgun at the location where stalking is alleged to have occurred is so unfairly prejudicial so as to bar its admission, and we are aware of none.

[33] However, even if the evidence of Hornsby's possession of a handgun at school had been improperly admitted, we cannot conclude that fundamental error occurred as a result. In assessing whether fundamental error has occurred, "[o]ur task is to look at all that happened, including the erroneous action, and decide whether the error had substantial influence upon the verdict to determine whether the trial was unfair." *Townsend v. State*, 632 N.E.2d 727, 730 (Ind. 1994). L.P.'s fear of Hornsby was established through her own testimony as well as the testimony of several other witnesses, including her mother and

father. The State did not unduly emphasize Hornsby's gun possession in its argument to the jury, and the jury received an instruction that its verdict "should not be based on sympathy or bias." (Appellant's App. Vol. III, p. 23). In addition, Hornsby put evidence and argument before the jury that he did not own the truck or the gun and that he never showed it to L.P. On appeal, Hornsby does not provide us with any argument that the admission of this evidence constituted fundamental error. In light of these circumstances, we cannot conclude that the admission of the challenged evidence impacted the jury's verdict or that it deprived Hornsby of the possibility of a fair trial.

III. *Sentence*

A. *Standard of Review*

[34] Hornsby requests that we revise his sentence, which he argues is overly harsh. "Even when a trial court imposes a sentence within its discretion, the Indiana Constitution authorizes independent appellate review and revision of this sentencing decision." *Hoak v. State*, 113 N.E.3d 1209, 1209 (Ind. 2019). Thus, we may revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Id*. The principal role of such review is to attempt to leaven the outliers. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). The defendant bears the burden to persuade the reviewing court that the sentence imposed is inappropriate. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018).

B. *Nature of the Offense*

[35] When assessing the nature of an offense, the advisory sentence is the starting point that the legislature selected as an appropriate sentence for the particular crime committed. *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006); *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). The jury found Hornsby guilty of Level 6 felony stalking. A Level 6 felony carries a sentencing range of between six months and two and one-half years, with an advisory sentence of one year. I.C. § 35-50-2-7(b). The trial court sentenced Hornsby to two years. Thus, the trial court imposed an aggravated, but not the maximum, sentence.

[36] The nature of this offense is that over a period of years, Hornsby inflicted unwanted contact on L.P. at school, during extracurricular functions, at her home, and at her work. L.P. told Hornsby 'no', but he would not listen. School administrators, L.P.'s father, and finally the court through a protective order also told Hornsby 'no', but he would not listen. Hornsby called L.P. a bitch and tripped her when she tried to go about her business and would not respond to him. L.P. had a right to attend high school and live her life free of Hornsby's intervention. Hornsby violated that right, again and again. In order to prove the offense of stalking, the State was required to show that Hornsby engaged in harassing behavior on more than one occasion. *Falls v. State*, 131 N.E.3d 1288, 1290 (Ind. 2019) (acknowledging that Indiana's appellate courts have long held that the term 'repeated' in the stalking statute means 'more than once'). Hornsby's harassment of L.P. through in-person contact, social media, and through cellphone calls greatly exceeded that which was necessary to prove

one count of stalking. Hornsby's offense rendered L.P. fearful to be at school, at home, and in public. L.P. eventually obtained a protective order against Hornsby, and she procured a permit to carry a firearm. L.P.'s victim's impact statement indicated that Hornsby's offense affected both her and her family. In short, we can discern nothing about this offense which renders an elevated sentence inappropriate.

C. *Character of the Offender*

[37] Upon reviewing a sentence for inappropriateness, we look to a defendant's life and conduct as illustrative of his character. *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018), *trans. denied*. Hornsby was twenty-two years old at the time of his sentencing hearing, but he had already exhibited a pronounced lack of willingness and/or ability to control his behavior. Hornsby would not comply with L.P.'s repeated requests that he leave her alone, and he committed a serious school rule infraction and a criminal offense by bringing a handgun to school. Hornsby received a suspended sentence for his handgun offense, but he violated his probation by being arrested for contacting L.P. in contravention of the protective order she had procured against him. At Hornsby's sentencing hearing, the trial court took judicial notice of the records of Cause -30, the gun case, which included a history of his ten DOC writeups for violations including fighting, possession of unauthorized property, and refusing orders.

[38] We also find Hornsby's behavior at his sentencing hearing in this matter to be significant. Hornsby apologized for calling L.P. a bitch, but he did not acknowledge or apologize for his many other acts of harassment that caused

L.P. fear to the extent that she felt that she had to arm herself. This demonstrates to us that Hornsby has not accepted responsibility for the gravity of his offense and its effect upon his victim, L.P. We reject Hornsby's implication that his obsessive conduct was misguided puppy love. While Hornsby emphasizes to us that he was a young man when he committed the offense, we observe that L.P was also young when she had to endure Hornsby's invasion upon her life. 'No' is a full sentence that even the young can understand, and the fact that Hornsby refused to heed the 'no' of L.P., the school administration, L.P.'s father, the protective order, the rules of probation in the gun case, and at the DOC does not reflect well upon his character. Accordingly, we decline to revise his sentence to the advisory sentence that he requests.

CONCLUSION

[39] Based on the foregoing, we conclude that Hornsby's constitutional right to a speedy trial was not infringed and that the trial court did not abuse its discretion when it admitted evidence that he possessed a handgun at school. In addition, we conclude that Hornsby's two-year sentence is not inappropriate given the nature of his offense and his character.

[40] Affirmed.

[41] Bailey, J. and Vaidik, J. concur