MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Corey Jule Collins Frith, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 29, 2022

Court of Appeals Case No. 22A-CR-1200

Appeal from the Lake Superior Court

The Honorable Gina L. Jones, Judge

Trial Court Cause No. 45G03-2003-F3-77

Tavitas, Judge.

Case Summary

[1] Corey Jule Collins Frith, Jr. appeals his sentence of seven years in the Department of Correction ("DOC") for his convictions for: (1) unlawful possession of a firearm by a serious violent felon, a Level 4 felony; and (2) battery by means of a deadly weapon, a Level 5 felony. Frith argues that the trial court abused its discretion by: (1) failing to find that strong provocation was a mitigator; and (2) finding that the nature and circumstances of the offense was an aggravator. Finding no error, we affirm.

Issues

[2] Frith presents two issues on appeal, which we restate as:

I. Whether the trial court abused its discretion in failing to find that strong provocation was a mitigator.

II. Whether the trial court abused its discretion in finding that the nature and circumstances of the offense was an aggravator.

Facts[1]

[3] On May 27, 2020, Frith and Dale Reptik were outside of a motel in Merrillville, Indiana. Reptik, who was unarmed, walked toward Frith with his hands "up as

[1] We draw our factual background from the parties' stipulated factual basis and, to the extent the parties do not disagree regarding its contents, the pre-sentence investigation report ("PSI"), to which the probable cause affidavit was attached. *See Robeson v. State*, 834 N.E.2d 723, 725 (Ind. Ct. App. 2005) ("The information in the PSI is presumed to be accurate unless the defendant registers an objection to the information contained

if he intend[ed] on fighting Frith." Appellant's App. Vol. II p. 18. Frith then "shot [Reptik] in his left thigh, which resulted in a great loss of blood and extreme pain." *Id*. at 64.

[4] On May 29, 2020, the State charged Frith with five counts: Count I, aggravated battery, a Level 3 felony; Count II, unlawful possession of a firearm by a serious violent felon, a Level 4 felony; Count III, battery by means of a deadly weapon, a Level 5 felony; Count IV, battery resulting in serious bodily injury, a Level 5 felony; and Count V, criminal recklessness, a Level 6, felony. On March 15, 2021, Frith pleaded guilty to Counts II and III.[2]

[5] The trial court held a sentencing hearing on April 25, 2022, and entered judgments of conviction on Counts II and III. The trial court found three aggravators: (1) Frith's criminal history; (2) the harm, injury, loss or damage suffered by the victim of the offense was significant and greater than necessary to prove the commission of the offense; and (3) Frith committed the offense in violation of the conditions of his probation.[3]

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therein, and the failure to so object waives appellate review of this issue.") (citing *Dillard v. State*, 827 N.E.2d 570, 576 (Ind. Ct. App. 2005), *trans. denied*), *trans. denied*.

[2] The State subsequently dismissed Counts I, IV, and V.

[3] The trial court listed Frith's violation of his probation as an aggravator in its oral statement but not its written sentencing order. Frith appears to argue that the trial court, thus, did not find that his probation violation was an aggravator. "In reviewing sentences in non-capital cases, appellate courts examine both the written and oral sentencing statements to discern the findings of the trial court." *Berry v. State*, 23 N.E.3d 854, 857 (Ind. Ct. App. 2015) (citing *Murrell v. State*, 960 N.E.2d 854, 859-60 (Ind. Ct. App. 2012)), *trans. denied*. "Rather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusions of the trial court." *Id.* (citing *Murrell*, 23 N.E.3d at

[6] The trial court found that Frith's guilty plea was the sole mitigator. Frith claimed, in his sentencing memorandum, that he "believed that [Reptik] was reaching for a weapon" and argued at the sentencing hearing that strong provocation should count as a mitigator. Appellant's App. Vol. II p. 70. The trial court, however, did not make any findings on strong provocation. The trial court found that the aggravators outweighed the mitigators and sentenced Frith to seven years on Count II and five years on Count III to be executed concurrently in the DOC. Frith now appeals.

Discussion and Decision

[7] Frith argues that the trial court erred by: (1) failing to find that strong provocation was a mitigator, and (2) finding that the nature and circumstances of the offense was an aggravator. We disagree.

[8] "[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

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859-60). The State argued that Frith's probation violation should be an aggravator at the sentencing hearing, and the trial court clearly found that Frith's probation violation was an aggravator in its oral statement. We conclude that the trial court found that Frith's probation violation was an aggravator.

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)).

[9] A trial court may abuse 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. Stat*e, 51 N.E.3d 171, 193 (Ind. 2016) (quoting *Anglemyer*, 868 N.E.2d at 490-91), *cert. denied*.

[10] "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.3d 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. Mitigator—Strong Provocation

[11] Frith argues that the trial court erred by failing to find that strong provocation was a mitigator. We disagree.

[12] The trial court "'is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance or to give the proffered mitigating circumstances the same weight the defendant does.'" *Weisheit v. State*, 26 N.E.3d 3, 9 (Ind. 2015) (quoting *Wilkes v. State*, 917 N.E.2d 675, 690 (Ind. 2009), *cert. denied*), *cert*. *denied.* "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Anglemyer*, 868 N.E.2d at 493 (citing *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999)).

[13] Indiana Code Section 35-38-1-7.1(c)(5) provides, in relevant part, that trial courts may consider as a mitigator whether "[t]he person acted under strong provocation." Frith argues that Reptik provoked him by approaching him "with a posture suggesting attack and caus[ing] Frith to believe that [Reptik] was reaching for a weapon." Appellant's Br. p. 9.

[14] "We assume statutory language was used intentionally, and we attempt to give meaning and effect to every word." *Toomey v. State*, 887 N.E.2d 122, 124 (Ind. Ct. App. 2008) (citing *Merritt v. State*, 829 N.E.2d 472, 475 (Ind. 2005)). Here, the words "*strong* provocation" suggest that not every instance of provocation should be a mitigator. *See* Ind. Code § 35-38-1-7.1(c)(5) (emphasis added); s*trong*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (3rd Ed. 2000) (defining strong as, e.g., "[e]xtreme; drastic.").

[15] The trial court did not err in failing to find that strong provocation was a mitigator. In *Tunstill v. State*, the victim initiated the combat by kicking and striking the defendant, and the defendant stabbed the victim. 568 N.E.2d 539, 541 (Ind. 1991).[4] The trial court in *Tunstill* did not find that strong provocation was a mitigator. *Id*. at 545. The Indiana Supreme Court declined to remand with instructions that the trial court consider strong provocation as a mitigator because the evidence of strong provocation was "subject to some dispute."[5] *Id*. at 546.

[16] Here, as in *Tunstill*, Frith introduced a deadly weapon into a weapons-free combat. While the victim in *Tunstill* did not appear armed, Frith's claim, in his sentencing memorandum, was the only indication that Reptik appeared to reach for a weapon, and, moreover, no such weapon was found. The trial court, thus, had no obligation to believe Frith's claim that he was strongly provoked. *See Williams v. State*, 51 N.E.3d 1205, 1211 (Ind. Ct. App. 2016) ("It is proper for a trial court to make a determination of credibility during

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[4] We observe that *Tunstill* was decided under Indiana's pre-*Blakely* sentencing regime. *See Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), *reh'g. denied*; *Anglemyer v. State*, 868 N.E.2d 482 (discussing Indiana's post-*Blakely* sentencing regime). This, however, does not affect our analysis of whether the trial court abused its discretion by failing to find that strong provocation was a mitigator.

[5] The Court in *Tunstill* did, however, conclude that one of the defendant's proffered mitigators—"that the victim induced or facilitated the offense"—was clearly supported by the record. 568 N.E.2d at 546. Accordingly, the Court remanded with instructions that the trial court, at a new sentencing hearing, "reflect consideration of this mitigating evidence and the weight accorded to it by the court." *Id*.

sentencing.") (citing *Pickens v. State*, N.E.2d 530, 535 (Ind. 2002)). Accordingly, the trial court did not err.[6]

II. Aggravator—Nature and Circumstances of the Offense

[17] Frith argues that the trial court improperly found that the nature and circumstances of the offense was an aggravator. Specifically, Frith argues that the trial court improperly considered Reptik's injuries as an aggravator because "the use of a deadly weapon in committing a battery necessarily involves the infliction of serious bodily injury." Appellant's Reply Br. p. 9-10. We disagree.

[18] "A trial court may not use a material element of the offense as an aggravating factor, but it may find the nature and particularized circumstances surrounding the offense to be an aggravating factor." *Gober v. State*, 163 N.E.3d 347, 354 (Ind. Ct. App. 2021) (citing *Caraway State*, 959 N.E.2d 847, 850 (Ind. Ct. App. 2011), *trans. denied*), *trans. denied*; *see also* Ind. Code § 35-38-1-7.1(a)(1). "When a sentence is enhanced based upon the nature and circumstances of the crime, however, 'the trial court must detail why the defendant deserves an enhanced sentence under the particular circumstances.'" *Caraway*, 959 N.E.2d at 850 (quoting *Plummer*, 851 N.E.2d 387, 391 (Ind. Ct. App. 2006)).

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[6] Frith relies on *Crisler v. State*, in which the Indiana Supreme Court noted that the trial court found there was "the possibility of the presence of an element of provocation" when witness testimony corroborated the defendant's claim that the victim, though unarmed, appeared to reach for a firearm before the defendant shot her. 509 N.E.2d 822, 823 (Ind. 1987). That is not the case here where only Frith's claim, in his sentencing memorandum, suggests that Reptik appeared to reach for a weapon.

[19] Frith was convicted of battery by means of a deadly weapon, a Level 5 felony, and possession of a firearm by a serious violent felon, a Level 4 felony. The offense of battery is governed by Indiana Code Section 35-42-2-1(c)(1), which reads, in relevant part, "a person who knowingly or intentionally [] touches another person in a rude, insolent, or angry manner . . . commits battery." Under subsection (g):

> The offense . . . is a Level 5 felony if one (1) *or* more of the following apply:
>
> (1) The offense results in serious bodily injury to another person.
>
> (2) The offense is committed with a deadly weapon.

I.C. § 35-42-2-1(g) (emphasis added). Here, Frith was convicted of battery with a deadly weapon, not battery resulting in serious bodily injury. Indiana Code Section 35-31.5-2-86(a) defines "deadly weapon" as

> (1) A loaded or unloaded firearm.
>
> (2) A [device] . . . that in the manner it:
>
> (A) is used;
>
> (B) could be used; or
>
> (C) is intended to be used;
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> is readily capable of causing serious bodily injury.

[20] The foregoing authorities demonstrate that the offense of battery by means of a deadly weapon only required the State to prove Frith touched Reptik in a rude,

insolent, or angry manner using a firearm. Frith's offense did not require the State to prove serious bodily injury. As we have explained:

> Although the two offenses [battery by means of a deadly weapon and battery resulting in serious bodily injury] are similar, they each contain one element that the other offense does not contain. One requires proof that [the defendant] inflicted severe bodily injury, and the other requires proof that [the defendant] used a deadly weapon. Thus, one offense focuses upon the result of the touch, while the other focuses upon the means used to accomplish the touch.

Noble v. State, 734 N.E.2d 1119, 1124 (Ind. Ct. App. 2000), *trans. denied*. Serious injury, thus, is not a material element of battery by means of a deadly weapon.

[21] The trial court found that Reptik's injury was an aggravator because it was significant and greater than necessary to prove Frith's underlying offense of battery by means of a deadly weapon. Because serious injury is not a material element of Frith's offense, the trial court did not err in finding that Reptik's injury was an aggravator.

[22] Frith appears to argue that because the definition of a "deadly weapon" includes devices capable of causing serious bodily injury then "the use of a deadly weapon in committing a battery necessarily involves the infliction of serious bodily injury." Appellant's Reply Br. p. 10. We disagree. The fact that a device is *capable* of causing serious bodily injury does not mean its use must *result* in serious bodily injury. And battery by means of a deadly weapon does

not require serious bodily injury to occur. A person, thus, may commit battery by means of a deadly weapon without causing serious bodily injury.

[23] Even if it was error for the trial court to find that the nature and circumstances of the offense was an aggravator, the error was harmless. "[O]ne valid aggravating factor is enough to enhance a sentence." *Harris v. State*, 163 N.E.3d 938, 956 (Ind. Ct. App. 2021) (citing *Gleason v. State*, 965 N.E.2d 702, 712 (Ind. Ct. App. 2012)), *trans. denied*. Here, Frith does not argue the trial court erred in finding that his criminal history was an aggravator. The trial court, additionally, only found one mitigator. We are confident that the trial court would impose the same sentence even if it did not find that the nature and circumstances of the offense was an aggravator. Any error, accordingly, was harmless.

Conclusion

[24] The trial court did not err in failing to find that strong provocation was a mitigator, nor did the trial court err in finding that the nature and circumstances of the offense was an aggravator. Accordingly, we affirm.

[25] Affirmed.

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