MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

David J. Engstrom,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 8, 2023

Court of Appeals Case No. 22A-CR-413

Appeal from the Tippecanoe Superior Court

The Honorable Randy J. Williams, Judge

Trial Court Cause No. 79D01-2007-F1-10

Memorandum Decision by Judge Weissmann
Judges May and Crone concur.

Weissmann, Judge.

[1] David Engstrom slashed a bicycling teenager's neck and was later convicted of attempted murder. Engstrom appeals his conviction, arguing that the State did not prove he intended to kill the teenager and that prosecutorial misconduct deprived him of a fair trial. He also challenges his 30-year sentence, contending it was based on improper considerations and unduly harsh. Finding no error, we affirm both his conviction and sentence.

Facts

[2] Seventeen-year-old M.G. was bicycling past Engstrom in a Lafayette alley when Engstrom reached out and slashed M.G.'s neck with a knife. Bleeding and in great pain, M.G. stopped at a nearby house for help. Police were called and quickly apprehended Engstrom, who was still nearby and carrying a folding knife. M.G. was rushed to the hospital, where his wound was sutured. The hospital released M.G. the next day.

[3] The State charged Engstrom with Level 1 felony attempted murder, Level 3 felony aggravated battery, two counts of Level 5 felony battery, and Level 6 felony criminal recklessness. While in jail awaiting trial, Engstrom told his aunt during a recorded telephone call that he intentionally attacked the teenager M.G. for the attention the crime would bring him.

[4] At his two-day jury trial, Engstrom conceded that he cut M.G.'s neck but denied any intent to kill him. The jury returned verdicts of guilty on all five charged offenses, but the trial court entered conviction only as to the attempted

murder count. The court sentenced Engstrom to 30 years imprisonment, with 2 years suspended to probation. Engstrom appeals both his conviction and sentence.

Discussion and Decision

[5] Engstrom claims the State failed to prove beyond a reasonable doubt that he had the specific intent to kill M.G.—an essential element of attempted murder. Engstrom also alleges he was denied a fair trial through prosecutorial misconduct during closing arguments. Lastly, Engstrom alleges the trial court abused its discretion when considering aggravating and mitigating circumstances during his sentencing and that his 30-year sentence is inappropriate under Indiana Appellate Rule 7(B) in light of the nature of the offense and the character of the offender.

[6] We conclude the State proved Engstrom's specific intent to kill M.G. We also conclude that Engstrom was not deprived of a fair trial through prosecutorial misconduct because either the prosecutor's statements were not misconduct or Engstrom failed to show he was placed in grave peril. We also find no sentencing error and that the 30-year sentence was not inappropriate.

I. Sufficient Evidence of Intent to Kill

[7] Attempted murder occurs when a person, acting with the specific intent to kill, engages in conduct that constitutes a substantial step toward killing another person. Ind. Code §§ 35-42-1-1(1), -41-5-1(a). Engstrom claims the State failed

to prove beyond a reasonable doubt that he acted with the specific intent to kill M.G.

[8] In reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh evidence and reverse only where no reasonable factfinder could find all elements of the crime proven beyond a reasonable doubt. *Id.*

[9] In support of his argument that the State failed to prove his specific intent to kill, Engstrom points to evidence showing he did not know M.G., he cut M.G. in an alley equipped with a security video, he casually walked around the area immediately after committing the offense, and he admitted committing the offense to gain attention and make friends in jail. Engstrom also notes that he used a pocketknife in the attack and did not pursue M.G. afterward.

[10] The jury could reasonably infer Engstrom's specific intent to kill from his use of a deadly weapon. In *Miller v. State*, 106 N.E.3d 1067, 1074 (Ind. Ct. App. 2018), this Court ruled that a pocketknife was a "deadly weapon" from which an intent to kill could be inferred when the knife was used to slit the victim's throat.[1] Here, evidence showed Engstrom cut M.G.'s throat with the pocketknife, causing M.G. to feel that his neck had been "unzipped" and that

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[1] Indiana Code § 35-31.5-2-86 defines "deadly weapon" to include a "weapon . . . that in the manner it: (A) is used; (B) could ordinarily be used; or (C) is intended to be used; is readily capable of causing serious bodily injury."

he would die. Tr. Vol. II, p. 119. The cut was deep enough to require hospitalization. These facts could have convinced a reasonable jury that Engstrom possessed the intent to kill.

[11] As for Engstrom's claim that lack of motive undermined the State's case, we note that we affirmed an attempted murder conviction under similar facts in *Miller.* Miller attacked a stranger with no evidence of motive, and walked away after slitting the victim's throat. *Miller*, 106 N.E.3d at 1069. Engstrom's claim merely asks us to reweigh the evidence before the jury and reach a different conclusion. As in *Miller*, we find the evidence was sufficient to establish Engstrom acted with the specific intent to kill M.G. when he sliced the teenager's neck.

II. Prosecutorial Misconduct

[12] Engstrom next claims he did not receive a fair trial because the prosecutor committed misconduct during closing argument by commenting on Engstrom's failure to testify and by improperly vouching for the strength of the State's case. When reviewing a claim of prosecutorial misconduct, we first determine whether the prosecutor engaged in misconduct. *Craft v. State*, 187 N.E.3d 340, 347 (Ind. 2022). We then consider whether that misconduct, measured by case law and the Indiana Rules of Professional Conduct, placed the defendant in a position of grave peril to which he should not have been subjected. *Id.*

[13] We measure the gravity of the peril by the probable persuasive effect of the misconduct on the jury's decision, not the degree of the conduct's impropriety.

Collins v. State, 966 N.E.2d 96, 106 (Ind. 2012). We reverse when the evidence is close and the trial court does not alleviate the prejudicial effect of the misconduct. *Turnbow v. State*, 637 N.E.2d 1329, 1333-34 (Ind. Ct. App. 1994).

A. Comments on Failure to Testify

[14] Engstrom focuses his prosecutorial misconduct claim on two sections of the prosecutor's closing arguments. In the first, the prosecutor argued:

> [Prosecutor]: . . . Knowingly or intentionally. A person engages in conduct intentionally when he engages in the conduct, it is his conscious objective to do so. A person engages in conduct knowingly if when he engages in the conduct[,] he is aware of a high probability that he is doing so. So, again, similar to specific intent, hard to know without specifically hearing the words from the defendant's mouth himself. During the altercation. However, --- (sic)
>
> [Defense Counsel]: Judge, objection . . .

Tr. Vol. II, p. 171.

[15] In a hearing outside the presence of the jury, Engstrom argued that the prosecutor's statements amounted to a comment on Engstrom's failure to testify. The trial court overruled Engstrom's objection, finding the prosecutor was merely stating that the jury could infer from Engstrom's statements during jail calls that his actions were knowing and intentional. App. Vol. IV, pp. 131-33.

[16] The prosecutor continued with her closing argument, during which she later stated:

> He already touched on it. Your head doesn't come off like a screw top, I can just pull off and look in your brain and say yep, there it is, you do have specific intent. I have to infer from your actions, from what you did. (Inaudible). He didn't go down and slash on his calf, no, he went right across his neck. The only instances in which we would have specific intent that would apparently satisfy, (inaudible), actually said, I specifically intended to kill and I'm sorry, ladies and gentleman [sic], you're just not going to get that. You have to use your common sense, through all that inferences and the inferences in this case (inaudible) . . .
>
> What you will not see in there is any instruction on (inaudible), not self-defense. There (inaudible) no evidence, there is no evidence, you heard no evidence, all you heard was (inaudible). (Inaudible) about straight forward as a case can be and I'm asking you to find him guilty as charged.

App. Vol. II, pp. 171, 181-82, 184.

[17] On appeal, Engstrom claims that the prosecutor's comments on Engstrom's failure to testify violated his right against self-incrimination under the Fifth Amendment to the United States Constitution. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. A prosecutor violates this right when making "a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence." *Moore v.*

State, 669 N.E.2d 733, 739 (Ind. 1996). Engstrom bears the burden of proving the remark penalized his exercise of the right to remain silent. *Id.* at 736.

[18] Engstrom has not established prosecutorial misconduct. The statements suggesting the jury had not heard evidence of self-defense were an appropriate statement of fact about the issues before the jury, not a comment on Engstrom's failure to testify. *See Dumas v. State*, 803 N.E.2d 1113, 1118 (Ind. 2004) (noting that comment on the lack of defense evidence is proper so long as the State focuses on the absence of any evidence to contradict the State's evidence and not on the accused's failure to testify).

[19] The remainder of the prosecutor's challenged statements either: 1) admit that specific intent to kill and general intent to commit a crime are difficult to prove absent a defendant's own expression of either type of intent; or 2) note that the jury was presented with no direct evidence of Engstrom's intent so any finding of intent would have to be inferred from the evidence. As the trial court found, the import of these statements was informing the jury that it could infer Engstrom's intent to commit attempted murder from the evidence. The prosecutor's statements did not expressly or implicitly refer to Engstrom's failure to testify. More importantly, a jury would not reasonably interpret these

statements as an invitation to draw an adverse inference from Engstrom's failure to testify. *See id.* [2]

B. Vouching Comments

[20] Engstrom also contends the prosecutor committed misconduct during closing arguments by vouching for the strength of the State's case through the following statements:

> We were able to get a photograph of him, we didn't say, hey [M.G.], can we get some photographs for, potential, evidence (inadible) [sic]. What we did see though is the video and I think that is more than sufficient to show you the agregious [sic] nature of this (inaudible) after the fact and the weeks of treatment that he had to go through and the healing process that he had to go through. *I'm going to show you one more time. If this isn't attempted murder, I don't know (inaudible)* . . .
>
> *(Inaudible) about straight forward [sic] as a case can be* and I'm asking you to find him guilty as charged.

Tr. Vol. II, pp. 182, 184 (emphases added).

[21] Engstrom did not object to the comments nor did he seek either a mistrial or an admonishment. The State claims he waived any error as a result. *See Ryan v.*

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[2] Engstrom also contends the prosecutor improperly "conflated specific intent with substantial step" during closing arguments. Appellant's Br., p. 19. But Engstrom fails to support that claim with citations to authority or sufficiently connect it to his seemingly primary claim that the prosecutor improperly commented on his silence. Engstrom also did not object to the prosecutor's arguments on that basis. Therefore, he has waived this ancillary claim. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring cogent reasoning and citations to authority support the argument in appellant's brief); *Heckard v. State*, 118 N.E.3d 823, 830 (Ind. Ct. App. 2019) (finding appellant waived any error in closing arguments by failing to object at trial).

State, 9 N.E.3d 663*,* 667 (Ind. 2014) ("To preserve a claim of prosecutorial misconduct, the defendant must—at the time the alleged misconduct occurs—request an admonishment to the jury, and if further relief is desired, move for a mistrial.").

[22] Our standard of review changes when a claim of prosecutorial misconduct has been waived through a failure to object. *Id.* Under these circumstances, the defendant must establish not only the grounds for prosecutorial misconduct but also establish that the prosecutorial misconduct constituted fundamental error. *Id.* at 667-68. The fundamental error doctrine is an extremely narrow exception to the waiver rule. *Id.* at 668. The defendant faces the heavy burden of proving that the alleged errors are so prejudicial to the defendant's rights as to render a fair trial impossible. *Id.*

[23] Even if we assume the prosecutor's comment was improper, Engstrom has not established that he was harmed by the statement, let alone placed in grave peril by it. Instead, he largely focuses his grave peril argument on his unsuccessful claim that the prosecutor improperly commented on his silence.

[24] In any case, the probable persuasive effect of the prosecutor's statements appears minimal, given the overwhelming evidence of Engstrom's guilt. *See Collins*, 966 N.E.2d at 106. Security video footage showed Engstrom attacking M.G. in the alley with a knife and cutting his throat, and Engstrom admitted doing just that. Any statements by the prosecutor as to the strength of the State's case reasonably would not have impacted the jury after it was presented

with Engstrom's confession and video confirmation. Without proof of grave peril, no prosecutorial misconduct occurred, and the trial court was not required to intervene. *See Ryan*, 9 N.E.3d at 668 (stressing that fundamental error essentially means that the trial court erred by not acting when it should have); *Craft*, 187 N.E.3d at 347 (noting that grave peril is an essential element of prosecutorial misconduct). We reject Engstrom's claim that he is entitled to a new trial due to prosecutorial misconduct during closing arguments.

III. Sentencing

[25] Lastly, Engstrom challenges his sentence of 30 years imprisonment, with 2 years suspended to probation, for attempted murder. First, he claims the trial court abused its discretion by relying on improper reasons for the sentence. Second, he argues his sentence is inappropriate in light of the nature of the offense and the character of the offender. We find neither an abuse of discretion nor an inappropriate sentence.

A. Abuse of Discretion

[26] Engstrom argues that the trial court abused its discretion by finding as aggravating circumstances: 1) his criminal history; 2) that the harm, injury, or loss suffered by the victim was significant and greater than the elements required to prove Engstrom's commission of attempted murder; and 3) the offense was personal and random in nature. Sentencing decisions rest within the sound discretion of the trial court and are reviewed for an abuse of that discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh.*,

875 N.E.2d 218 (2007). A sentencing court abuses its discretion when the record does not support its reasons for imposing sentence including any findings of aggravating and mitigating circumstances. *Id.*

[27] Engstrom contends the record does not support the trial court's finding of the three aggravating circumstances. As to his criminal history, Engstrom's only conviction prior to his commission of the attempted murder was for contributing to the delinquency of a minor, a misdemeanor, in 1995. But he also was convicted of battery by bodily waste that he committed shortly after the attempted murder and to which he pleaded guilty and was sentenced before the attempted murder sentencing.

[28] Engstrom claims his 1995 conviction is too remote to be considered. Yet, a trial court may consider any conviction in a defendant's criminal history if, as here, those records are reflected in the presentence investigation report. *Robertson v. State*, 871 N.E.2d 280, 287 (Ind. 2007). Even a limited criminal history will suffice as an aggravating circumstance. *See Atwood v. State*, 905 N.E.2d 479, 488 (Ind. Ct. App. 2009). And criminal activity that occurs after the offense for which the defendant is being sentenced—including Engstrom's battery by bodily waste—is a proper sentencing consideration. *Sauerheber v. State*, 698 N.E.2d 796, 806 (Ind. 1998). The trial court therefore did not abuse its discretion in finding Engstrom's criminal behavior to be aggravating.

[29] As to the excess victim harm, injury, or loss aggravator, Engstrom contends M.G.'s injury was a superficial laceration. Attempted murder does not require

proof of an injury. *See Davis v. State*, 558 N.E.2d 811, 812 (Ind. 1990) (affirming conviction for attempted murder where intended victim suffered no harm); Ind. Code §§ 35-42-1-1, 41-5-1(a). But here, Engstrom cut M.G.'s neck to the point M.G. believed his neck had been "unzipped," and his injury required hospitalization. Tr. Vol. II, p. 119. Therefore, the trial court did not abuse its discretion in finding the injury M.G. suffered was significant and greater than the elements required to prove Engstrom's commission of attempted murder.

[30] Neither did the trial court improperly consider as an aggravating circumstance that the offense was personal and random. Engstrom argues that all attempted murders are personal. He further claims that the randomness of the offense would be a mitigating, not aggravating, circumstance because proof of specific intent to kill is required for an attempted murder conviction. But attempted murders may be random and still involve a specific intent to kill. *See, e.g., Echols v. State*, 722 N.E.2d 805, 807-09 (Ind. 2000) (affirming convictions for random attempted murders where jury was required to find specific intent to kill). The trial court did not abuse its discretion.

B. Sentence Not Inappropriate

[31] Even if the trial court does not abuse its discretion in sentencing a defendant, this 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." App. R. 7(B). This review requires substantial deference to the trial

court because the "principal role of [our] review is to attempt to leaven the outliers, and not to achieve a perceived correct sentence." *Scott v. State*, 162 N.E.3d 578, 584 (Ind. Ct. App. 2021) (citations omitted).

[32] Engstrom contends his 30-year sentence is inappropriate under the "nature of the offense" prong because "there was nothing aggravating about the offense itself." Appellant's Br., p. 28. But the trial court only imposed the advisory sentence. *See* Ind. Code § 35-50-2-4(b) (setting the sentencing range for Level 1 felonies at 20 to 40 years imprisonment, with an advisory sentence of 30 years). The advisory sentence "is the starting point the Legislature selected as appropriate for the crime committed." *Pierce v. State*, 949 N.E.2d 349, 352 (Ind. 2011). The alleged lack of egregious circumstances therefore does not advance Engstrom's claim that his advisory sentence was inappropriate. We also reject Engstrom's claim that M.G. suffered "minimal" injuries in the attack (Appellant's Br., p. 29), given the location of M.G.'s injury, his hospitalization, and his fear that he might die. The nature of the offense—slashing a teenaged stranger's neck—does not support a sentence below the advisory level.

[33] Engstrom's character also does not support a sentencing revision. The trial court found various aspects of Engstrom's character—his mental health struggles, remorse, and support from others—were mitigating. App. Vol. II, p. 14. On appeal, Engstrom cites all three of those mitigating circumstances as reasons for greater leniency, but he elaborates only on his mental illness.

[34] Engstrom, now 50 years old, has struggled with mental illness for 30 years. He has been diagnosed with schizoaffective disorder, both bipolar type and depressive type, which causes him to experience psychosis, including delusions. Engstrom argues that his symptoms were aggravated by isolation caused by the COVID-19 pandemic and his lack of medication for six days before the offense.

[35] But Engstrom's prior criminal conduct reflects poorly on his character. And his stated motive for the offense in slashing an innocent teenager's neck—to gain attention—is particularly reprehensible. Given all of these considerations, Engstrom has fallen short of meeting his heavy burden of establishing that his 30-year advisory sentence, with two years suspended to probation, is inappropriate.

[36] We affirm the trial court's judgment.

May, J., and Crone, J., concur.