MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Robert Lee Perkins,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 13, 2022

Court of Appeals Case No. 22A-CR-151

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause No. 79D02-2009-F4-61

Najam, Judge.

Statement of the Case

[1] Robert Lee Perkins appeals his sentence and the trial court's restitution order following his convictions for intimidation, as a Level 5 felony, and rioting, as a Level 6 felony, pursuant to a guilty plea. Perkins presents two issues for our review:

1. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

2. Whether the trial court abused its discretion when it ordered him to pay restitution.

[2] We affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[3] During the evening of May 31, 2020, Perkins attended a political protest outside the Tippecanoe County Courthouse. Perkins' sister had given him an explosive device to take to the protest, and she had told him to light it and throw it "if things get out of control." Tr. at 19. At approximately 10:30 p.m., Perkins was standing near the Courthouse entrance, and he lit the explosive device and threw it at the Courthouse doors. The force of the blast was so great that it broke the windows on the two sets of doors at the entrance to the Courthouse. Thomas Murtaugh, a county commissioner who was in a building across the street at the time, felt the building shake as a result of the blast. Nobody was injured by the explosion, but it incited the crowd, and law enforcement officers began to use tear gas to disperse the crowd. Perkins ran home.

[4] Investigators with the Tippecanoe County High Tech Crime Unit were able to identify Perkins based on video footage of the protest posted on social media. The State charged Perkins with attempted arson, as a Level 4 felony; intimidation, as a Level 5 felony; criminal recklessness, as a Level 6 felony; and rioting, as a Level 6 felony. Perkins pleaded guilty pursuant to a plea agreement to intimidation, as a Level 5 felony, and rioting, as a Level 6 felony. The State dismissed the remaining charges. Perkins' plea agreement left sentencing to the trial court's discretion.

[5] At sentencing, the trial court heard evidence regarding the amount of damages sustained as a direct result of Perkins' actions, as well as the expenses incurred by Tippecanoe County in preparing for the protests that day and in cleaning up graffiti and other property damage. The trial court identified the following aggravators:

> the overall seriousness of the offense (there were numerous people present that could have been seriously injured including law enforcement inside the Courthouse); the harm, injury or loss suffered is more than necessary to prove the elements of the offense; and Defendant attempted to avoid detection by fleeing the scene.

Appellant's App. Vol. 2 at 12. The court then identified the following mitigators: Perkins' "mild intellectual disability," his guilty plea, his expression of remorse, and lack of criminal history. *Id.* The court ordered Perkins to pay restitution in the amount of $5,000. And the court sentenced him as follows: four years for intimidation, as a Level 5 felony, and two years for rioting, as a

Level 6 felony. The court ordered that the sentences would run concurrently, with one year and 183 days executed in the Department of Correction and the balance suspended to probation. This appeal ensued.

Discussion and Decision

Issue One: Appellate Rule 7(B)

[6] Perkins first contends that his sentence is inappropriate in light of the nature of the offenses and his character. Indiana Appellate Rule 7(B) provides that "[t]he 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." This Court has held that "[t]he advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed." *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017). And the Indiana Supreme Court has explained that:

> The principal role of appellate review should be to attempt to leaven the outliers . . . but not achieve a perceived "correct" result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Defendant has the burden to persuade us that the sentence imposed by the trial court is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind.), as amended (July 10, 2007), *decision clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

Shoun v. State, 67 N.E.3d 635, 642 (Ind. 2017) (omission in original).

[7] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. Whether we regard a sentence as inappropriate at the end of the day turns on "our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case." *Id*. at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[8] The sentencing range for a Level 5 felony is one to six years, with an advisory sentence of three years. Ind. Code § 35-50-2-6 (2021). The sentencing range for a Level 6 felony is six months to two and one-half years, with an advisory sentence of one year. I.C. § 35-50-2-7. Here, the trial court imposed a four-year sentence for intimidation, as a Level 5 felony, and a two-year sentence for rioting, as a Level 6 felony, and the court ordered the sentences to run concurrently, with all but one year and 183 days suspended to probation.

[9] On appeal, Perkins contends that his sentence is inappropriate in light of the nature of the offenses because "his limited intellectual functioning and consequent vulnerability to manipulation by others reduced his overall level of

culpability in that a trusted family member provided him with the device and told him to use it." Appellant's Br. at 9. But the trial court expressly found Perkins' intellectual disability to be a mitigating factor. We agree with the State that, "[b]ecause the present sentence already accounts for Perkins's limited intellectual functioning, Perkins's mild disability does not render his sentence inappropriate in light of the nature of his offenses." Appellee's Br. At 10.

[10] Perkins contends that his sentence is inappropriate in light of his character because he has no criminal history and because he accepted responsibility for his actions and expressed remorse. Again, however, the trial court considered those factors and found them mitigating. Perkins has not shown compelling evidence of either substantial virtuous traits or persistent examples of good character to warrant a revision of his sentence. *See Stephenson*, 29 N.E.3d at 122.

[11] Finally, Perkins contends that his sentence is inappropriate because the trial court ordered him to serve part of his sentence in the Department of Correction. He asserts that, given that the offenses did not cause significant personal injuries or property damage, and given that he has no criminal history, the trial court should have ordered him to serve his sentence in community corrections. Given the force of the explosion, there is no question that the explosive device had the potential to cause personal injuries. And the property damage was significant in that both the exterior and interior entry doors to the Courthouse were severely damaged. We cannot say that Perkins' sentence is inappropriate in light of the nature of the offenses and his character.

Issue Two: Restitution

[12] Perkins contends that the trial court abused its discretion when it ordered him to pay $5,000 in restitution. Our standard of review of a restitution order is clear:

> "[A] trial court has the authority to order a defendant convicted of a crime to make restitution to the victim[ ] of the crime." *Henderson v. State*, 848 N.E.2d 341, 345 (Ind. Ct. App. 2006) (citing I.C. § 35-50-5-3). "The principal purpose of restitution is to vindicate the rights of society and to impress upon the defendant the magnitude of the loss the crime has caused." *Pearson v. State*, 883 N.E.2d 770, 772 (Ind. 2008), *reh'g denied*. "Restitution also serves to compensate the offender's victim." *Id.* An order of restitution lies within the trial court's discretion and will be reversed only where there has been an abuse of discretion. *Kays v. State*, 963 N.E.2d 507, 509 (Ind. 2012). A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances or when the trial court has misinterpreted the law. *Gil v. State*, 988 N.E.2d 1231, 1234 (Ind. Ct. App. 2013).

Dull v. State, 44 N.E.3d 823, 829 (Ind. Ct. App. 2015).

[13] "'A restitution order must be supported by sufficient evidence of actual loss sustained by the victim or victims of a crime.'" *Gil*, 988 N.E.2d at 1235 (quoting *Rich v. State*, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008)); *see* Ind. Code § 35-50-5-3(a)(1). "Evidence supporting a restitution order is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture." *J.H. v. State*, 950 N.E.2d 731, 734 (Ind. Ct. App. 2011) (internal quotations and citations omitted). The State has the

burden of proof in a restitution proceeding to establish a nexus between the victim's damages and the defendant's criminal activity. *See Morgan v. State*, 49 N.E.3d 1091, 1094 (Ind. Ct. App. 2016). Moreover, because restitution is penal in nature, the statute providing for restitution must be strictly construed against the State to avoid enlarging it beyond the fair meaning of the language used. *Id.*

[14] Here, the State submitted two requests for restitution, one for the $3,458.11 to repair the damage to the Courthouse doors, and one for $14,439.21 incurred due to the following expenses: fencing hardware, graffiti remover, fence banners, courthouse fencing, parking garage window and lock, fencing for side of courthouse, window repair, helicopter operations, and $3,101.59 in labor expenses. During the sentencing hearing, the State introduced testimony that the $14,439.21 was what the "county incurred for the demonstration and rioting[.]" Tr. at 52. And Commissioner Murtaugh testified that,

> basically the total cost of [$14,439.21] is basically the cost of having our folks here during the day preparing for what we knew was going to be a demonstration and, and then also it includes the, . . . TEMA had requested that there be a, a gentleman who has a helicopter to fly to observe and then that cost I think is in that as well.

Id. at 53. Commissioner Murtaugh agreed that those costs reflected the "prophylactic measures" to prepare for the protests on May 31, 2020. *Id.* And he agreed that Perkins was not "responsible for all of the costs and expenses to the county on that day," but that "maybe only the [$3,458.11 due to the

damage to the doors] could be directly allocated . . . to [Perkins'] actions." *Id.* at 53-54.

[15] The trial court ordered Perkins to pay a total of $5,000 in restitution, including $3,458 for the door repairs and $1,542, representing a portion of the cost of the "prophylactic measures" taken by the County in preparation for the protest. On appeal, Perkins concedes that he is responsible for $3,458 of the $5,000 restitution order because that amount was proven to be the cost to repair the Courthouse doors that were damaged in the explosion. But he maintains that the State did not present sufficient evidence to show that the additional $1,542 in damages was caused by his offenses.

[16] The State contends that the additional $1,542 was properly charged to Perkins because

> [t]he wages paid for employees who were called in for the emergency totaled $503.73. Additionally, $1044.55 was paid to employees working overtime, for a total additional labor cost of $1548.28. The trial court ordered Perkins to pay $1542 of the $1548.28 in labor costs. These labor costs fall into a statutorily compensable category of restitution because these costs were incurred in repairing the property damage caused by Perkins's actions. I.C. § 35-50-5-3(a)(1). Perkins was properly paying for the damage the explosive device caused, as well as other damage and clean up that might have been necessary because the explosion allowed other rioters to enter the courthouse.

Appellee's Br. at 12 (record citations omitted).

[17] We agree with Perkins that the evidence does not show a nexus or causal relationship between his conduct and the $1,542 part of the restitution order. *See Morgan*, 49 N.E.3d at 1094. Again, restitution must reflect the *actual* loss incurred by the victim. *Rich*, 890 N.E.2d at 51. And, as this Court has held, the harm or loss must come as "a direct and immediate result of the criminal acts of a defendant." *Huddleston v. State*, 764 N.E.2d 655, 657 (Ind. Ct. App. 2002). As Murtaugh testified, Perkins was directly responsible for the cost to repair the Courthouse doors, which included materials and labor totaling $3,458.[1] But the additional $1,542 of the restitution order was supported only by evidence that the County expended a total of $14,439.21 for the protest, and there is no evidence that any part of that expense was attributable to damage from the explosion. The State's contention otherwise is speculation. *See J.H.*, 950 N.E.2d at 734.

[18] The evidence shows that the County would have expended the $14,439.21 whether or not Perkins had attended the protest and thrown the explosive device. The $1,542 amount is arbitrary. The State has not shown that Perkins is directly chargeable with any part of that expense. *See Huddleston*, 764 N.E.2d at 657. Accordingly, we reverse the trial court's restitution order and remand with instructions to revise the restitution order to $3,458.

[19] Affirmed in part, reversed in part, and remanded with instructions.

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[1] The trial court rounded down the amount from $3,458.11 to $3,458.

Bradford, C.J., and Bailey, J., concur.