MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Santiago Jesus Heiny,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 21, 2024

Court of Appeals Case No.
23A-CR-1082

Appeal from the
Johnson Circuit Court

The Honorable
Andrew S. Roesener, Judge

Trial Court Cause No.
41C01-2010-F4-58

Memorandum Decision by Senior Judge Robb
Judges Riley and Crone concur.

Robb, Senior Judge.

Statement of the Case

[1] Santiago Jesus Heiny appeals from his convictions of Level 4 felony attempted arson, Level 6 felony strangulation, Level 6 felony intimidation, and Class A misdemeanor domestic battery. He also appeals the sentence the trial court imposed for those convictions. Concluding the court did not err and Heiny has failed to establish his sentence should be revised, we affirm.

Issues

[2] Heiny raises four issues, which we restate as:

I. Whether the trial court erred in denying Heiny's motion to dismiss.

II. Whether the trial court erred in admitting a recording of Heiny's statements.

III. Whether there is sufficient evidence to support Heiny's conviction of attempted arson.

IV. Whether Heiny's sentence is inappropriate in light of the nature of the offenses and his character.

Facts and Procedural History

[3] On October 16, 2020, Carlishia Dooley and an acquaintance went to Brandi Webb's apartment to collect money from Webb. Webb lived in a multistory building that contained sixteen apartments. Dooley approached the apartment while her acquaintance remained in the car. Heiny, who was in a relationship with Webb, allowed Dooley inside. Dooley noted Heiny and Webb had been arguing, and the apartment had a "hostile" atmosphere. Tr. Vol. II, p. 167. Webb told Dooley she did not have the money, and Heiny became angry. Heiny yelled at Webb and hit her repeatedly. Next, he put his hands around her neck, choking her. Dooley told Heiny to stop, and he eventually let Webb go. Webb was crying and hysterical. Her voice was hoarse, and Dooley saw red handprints around her neck.

[4] Dooley activated her phone's camera recorder, which recorded audio and video, and put it in her pocket. Heiny told Webb she was "causing problems" and threatened to "fuck her up" if she did not leave with Dooley to get the money. Tr. Vol. IV, State's Ex. 4, Part 1, at 00:33. He also called Webb "a stupid-ass bitch." *Id.* at 00:55. Even as Webb prepared to leave, Heiny continued to yell at her, threatening to "knock . . . her teeth down her throat." Tr. Vol. II, p. 171.

[5] Dooley took Webb to an ATM, and then she took Webb to a different location for her safety. Heiny called and texted Webb repeatedly, becoming angry again when Webb refused to return to the apartment. Dooley recorded some of

Heiny's calls to Webb, in which he said several times he would burn down the apartment if Webb did not return. Heiny said the apartment would burn "like a Roman candle . . . ." Tr. Vol. IV, State's Ex. 4, Part 6, at 00:18. He also told Webb, "[y]ou're gonna die." *Id.* at 00:31.

[6] Several hours later, Dooley took Webb to a police station to file a report. Officer Jeremy Roll spoke with Dooley and Webb. Next, the officer went to Webb's apartment with Webb and Dooley so that Dooley could retrieve her wallet, which she believed she had left there accidentally. Upon entering the apartment, Officer Roll heard Heiny yelling at Webb. The officer tried to calm Heiny down, but he continued to yell. Officer Roll and other officers handcuffed him and removed him from the apartment.

[7] Officer Roll noticed a bottle of butane, an accelerant, on the stairs inside the apartment. In addition, the officer and Dooley saw fluid all over the floor in the hallway. Officer Roll also saw liquid on the floor in the kitchen, living room, and dining area. The floor had been dry when Dooley had visited the apartment earlier. Based on Officer Roll's experience, he concluded the size of the spill was inconsistent with an accident. The officer also saw a nearly empty bottle of alcohol.

[8] A team of firefighters arrived, and one of the firefighters smelled a strong odor of alcohol in the apartment. In addition, he saw the puddle of fluid, the butane canister, and the mostly empty bottle of alcohol that the officer had noticed.

The firefighter was concerned about the alcohol because it could be used to start a fire. He put a clay substance on the fluid to absorb it.

[9] The State charged Heiny with attempted arson, strangulation, domestic battery,[1] and intimidation. Heiny moved to bar Webb from testifying after she failed to appear for a deposition, and the trial court granted the motion. In addition, Heiny moved to suppress statements he had made to Officer Roll after being removed from the apartment. The court also granted this motion. Next, Heiny moved to dismiss the charges, claiming the rest of the evidence supporting the charges stemmed from his suppressed statements to Officer Roll. The trial court denied that motion.

[10] During trial, the State offered State's Exhibit 4, the recordings of interactions and calls between Webb and Heiny. Heiny objected, noting that Webb was unavailable to be questioned about her out-of-court statements. The court overruled Heiny's objection and admitted State's Exhibit 4 along with State's Exhibit 5, a transcript of the recording. Before the jury heard the recording, the court instructed the jury as follows:

> Ladies and gentlemen of the jury, you're gonna see, uh, I'll be seeing and hearing for the first time as well, an audio/video that came from a recording that was made, um, by Ms. Dooley. You're gonna hear voices in there. Uh, the voices of Mr. Heiny

[1] The State initially charged Heiny with domestic battery while having a prior conviction for the same offense, which would enhance the charge from a Class A misdemeanor to a Level 6 felony. Later, the State elected not to attempt to prove the prior conviction, and the charge was presented to the jury as a Class A misdemeanor.

> and the voices of Ms. Webb. My order for you and admonishment for you as it relates to the contents of this is that you are able to consider the statements of, um, Mr. Heiny for the truth of what they're saying. You consider them for what you believe them to be or not believe them to be. The statements of Ms. Webb, who is not here, are offered only to provide context to you of the statements made by Mr. Heiny and are not to be considered for the truth of what they say. I'll also note that 5 is admitted as a demonstrative exhibit. What that means to me is that 5 is to help you understand 4, what you're watching. So to the extent that you can't hear or understand what's being said, 5 is an aid to do that, but 5 is not admitted as substantive evidence, only as an aid, so you're to consider it only in that regard. Ladies and gentlemen of the jury, we will likely collect these transcripts. I may or may not send them back to you during your deliberation, so don't make any marks or write any notes on them at this point, okay?

Tr. Vol. 2, p. 185. The jury determined Heiny was guilty as charged. The trial court imposed an aggregate sentence of ten years, with two years suspended to probation. This appeal followed.

Discussion and Decision

I. Heiny's Motion to Dismiss

[11] Heiny argues the trial court erred in denying his motion to dismiss the charges because he claims the evidence the State presented at trial was obtained via his suppressed statements to Officer Roll. He reasons the evidence is the "Fruit of the Poisonous Tree" and should not have been used to prosecute him. Appellant's Br. p. 143.

[12] "We review a trial court's ruling on a motion to dismiss a charging information for an abuse of discretion, which occurs only if a trial court's decision is clearly

against the logic and effect of the facts and circumstances." *Gutenstein v. State*, 59 N.E.3d 984, 994 (Ind. Ct. App. 2016), *trans. denied*. When a defendant moves to dismiss an information , the facts alleged in the information are to be taken as true. *Fox v. State*, 997 N.E.2d 384, 389 (Ind. Ct. App. 2013), *trans. denied*.

[13] Indiana Code section 35-34-1-4(a) (1983) provides, in relevant part:

> The court may, upon motion of the defendant, dismiss the indictment or information upon any of the following grounds:
>
> * * * *
>
> (5) The facts stated do not constitute an offense.
>
> * * * *
>
> (11) Any other ground that is a basis for dismissal as a matter of law.

[14] The doctrine of the fruit of the poisonous tree, to which Heiny refers, "operates to bar not only evidence directly obtained, but also derivatively gained as a result of information learned or leads obtained during an unlawful search or seizure." *Hanna v. State*, 726 N.E.2d 384, 389 (Ind. Ct. App. 2000). The doctrine has no application when the evidence in question has an independent source. *Id.* (quotation omitted). But the State bears the burden of proving the evidence was independently obtained. *Ogburn v. State*, 53 N.E.3d 464, 475 (Ind. Ct. App. 2016), *trans. denied*.

[15] In Heiny's case, Dooley recorded some of Heiny's telephone calls well before Heiny spoke with Officer Roll. Also, Dooley gave the recording to Officer Roll

before the officer met Heiny. Further, Officer Roll and the firefighter's observations of the fluid and other evidence in Webb and Heiny's apartment did not derive from conversations with Heiny. Officer Roll did not look at Dooley's recordings until after he spoke with Heiny, but there is no evidence that anything Heiny told the officer influenced the officer's decision to review the recordings. In sum, the State showed that the evidence presented at trial was discovered independently from Heiny's suppressed statements to Officer Roll. Under these circumstances, the trial court did not abuse its discretion in denying Heiny's motion to dismiss.

II. Admission of Recording

[16] Heiny argues the trial court erred in admitting into evidence State's Exhibit 4, Dooley's recording of an in-person interaction and phone calls between Heiny and Webb. The decision to admit or exclude evidence is committed to the sound discretion of the trial court and will be reviewed only for an abuse of that discretion. *McMillen v. State*, 169 N.E.3d 437, 441 (Ind. Ct. App. 2021). "An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or the court misinterprets the law." *Gilbert v. State*, 954 N.E.2d 515, 518 (Ind. Ct. App. 2011).

[17] Heiny claims State's Exhibit 4 was inadmissible because it contains hearsay statements by Webb, whom the trial court had barred from testifying. Hearsay is a "statement that . . . is not made by the declarant while testifying at the trial or hearing; and . . . is offered in evidence to prove the truth of the matter

asserted." Ind. Evid. Rule 801(c). Hearsay is generally inadmissible, subject to specific and limited exceptions. *McMillen*, 169 N.E.3d at 441; *see also* Ind. Evid. R. 802. We will affirm the trial court's hearsay ruling on any legal basis apparent in the record. *McMillen*, 169 N.E.3d at 441.

[18] Heiny does not dispute that his own statements on the recording are admissible. It is well established that statements made by an opposing party and offered against that party are not hearsay. *See* Ind. Evid. Rule 801(d)(2). In *Mack v. State*, 23 N.E.3d 742 (Ind. Ct. App. 2014), *trans. denied*, the Court dealt with the admissibility of a defendant's recorded conversation. In that case, a person recorded his conversation with Mack, and the State offered the recording as evidence at trial. Mack objected on grounds of hearsay, noting the person had not testified. The Court, discussing prior decisions, determined that the person's statements in the recording were not hearsay because they merely provided context for Mack's statements. As a result, we determined the trial court did not err in admitting the recording. *See id.* at 754.

[19] Applying the reasoning set forth in *Mack*, we conclude the trial court properly admitted State's Exhibit 4. Webb's statements to Heiny were not offered for their truth, but only to give context to Heiny's threats. In any event, the trial court promptly admonished the jury, as set forth above, to not consider Webb's statements as substantive evidence, but merely as providing context to Heiny's statements. We presume the jury followed the trial court's admonishment and did not consider Webb's recorded statements for the truth asserted. *See Francis v. State*, 758 N.E.2d 528, 532 (Ind. 2001) (no error in denying motion for

mistrial based on improper statement from witness; trial court directed jurors to disregard it, and the Court on appeal presumed jury properly disregarded the statement during deliberations).

[20] Heiny argues the admonishment was insufficient because Webb's recorded statements were unfairly prejudicial. But he cites no authorities to support his claim that admonishing the jury is an inadequate solution, and our Supreme Court has determined otherwise. *See, e.g., Duncanson v. State*, 509 N.E.2d 182, 186 (Ind. 1987) (trial court did not err in denying Duncanson's motion for mistrial after testifying police officer improperly spoke several times about Duncanson's prior criminal history; admonishment cured inappropriate testimony). The trial court did not abuse its discretion.

III. Sufficiency of the Evidence – Attempted Arson

[21] Heiny argues the State failed to prove beyond a reasonable doubt that he attempted to commit arson. When an appellant challenges the sufficiency of the evidence to sustain a conviction, we neither reweigh the evidence nor judge the credibility of the witnesses. *Belser v.* State, 727 N.E.2d 457, 464 (Ind. Ct. App. 2000), *trans. denied*. We instead consider only the evidence favorable to the verdict and all reasonable inferences that can be drawn therefrom. *Id.* "If there is substantial evidence of probative value sufficient to establish every material element of the crime beyond a reasonable doubt, the trial court's finding will not be disturbed on appeal." *Crump v. State*, 259 Ind. 358, 360, 287 N.E.2d 342, 343 (1972). "It is well established that a conviction may be

supported by circumstantial evidence." *Glover v. State*, 157 Ind. App. 532, 536, 300 N.E.2d 902, 904 (1973).

[22] To obtain a conviction of Level 4 felony attempted arson as charged, the State was required to prove beyond a reasonable doubt that Heiny (1) knowingly or intentionally (2) attempted to (3) damage (4) Webb's dwelling (5) by means of fire or explosion (6) under circumstances that endangered human life. Ind. Code § 35-43-1-1 (2014) (arson); Ind. Code § 35-41-5-1(a) (2014) (attempt); Appellant's App. Vol. 2, p. 28. A person "attempts to commit a crime when, acting with the culpability required for commission of the crime, the person engages in conduct that constitutes a substantial step toward commission of the crime." I.C. § 35-41-5-1(a).

[23] Heiny argues the liquid that Officer Roll, Dooley, and the firefighter observed on the floor in Webb's apartment was merely vodka and posed no threat of fire or explosion. He also claims the State did not show he had any items that could be used to spark a fire.

[24] We disagree. Heiny repeatedly and emphatically threatened to set Webb's apartment on fire after she refused to return home, and he said she was going to die. When Dooley arrived at the apartment with Officer Roll, Heiny was present and there was fluid on the floor in several rooms. The pattern of spillage was inconsistent with an accident, and the fluid had not been present when Dooley was in the apartment earlier. In addition, the apartment smelled of alcohol, and a can of butane was present. A firefighter described the fluid as

a large spill and noted that even drinking alcohol, such as vodka, presents a risk of fire. A jury could have reasonably determined from this evidence beyond a reasonable doubt that Heiny took a substantial step toward setting a fire in the apartment, posing a risk to the lives of Webb and her neighbors. *See Glover*, 157 Ind. App. at 539, 300 N.E.2d at 905 (evidence sufficient to sustain attempted arson conviction; Glover was observed at site of home, and firefighter detected odor of accelerant). Heiny's arguments amount to a request to reweigh the evidence, which our standard of review forbids.

IV. Appropriateness of Sentence

[25] Heiny asks the Court to exercise our constitutional power to review his sentence and reduce it by an unspecified amount. Article 7, section 6 of the Indiana Constitution authorizes the Court to review and revise sentences. Indiana Appellate Rule 7(B) implements this authority, stating the Court may revise a sentence "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."

[26] Sentencing review under Appellate Rule 7(B) is deferential to the trial court's decision, and "we avoid merely substituting our judgment" for that of the trial court. *Nicholson v. State*, 221 N.E.3d 680, 684 (Ind. Ct. App. 2023), *trans. denied.* Instead, the main purpose of review under Appellate Rule 7(B) is to "leaven the outliers." *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018). "[W]e may look to any factors appearing in the record" in our review. *Boling v. State*, 982 N.E.2d

1055, 1060 (Ind. Ct. App. 2013). Heiny bears the burden of persuading us that his sentence is inappropriate. *Nicholson*, 221 N.E.3d at 684.

[27] At the time Heiny committed his offenses, the maximum sentence for a Level 4 felony was twelve years, with a minimum sentence of two years and an advisory sentence of six years. Ind. Code § 35-50-2-5.5 (2014) And for a Level 6 felony, the maximum was three years, with a minimum sentence of six months and an advisory sentence of one and one-half years. Ind. Code § 35-50-2-7(b) (2019). Finally, the maximum sentence for a Class A misdemeanor was one year. Ind. Code § 35-50-3-2 (1977).

[28] The trial court sentenced Heiny to ten years for Level 4 felony attempted arson, two years each for Level 6 felony strangulation and Level 6 felony intimidation, and one year for Class A misdemeanor domestic battery. The court ordered Heiny to serve his sentences concurrently, for a total of ten years, with two years suspended to probation. Heiny's aggregate executed sentence of eight years is above the advisory sentence for a Level 4 felony but is well short of his maximum possible sentence of fifteen years.

[29] "The nature of the offenses is found in the details and circumstances of the commission of the offenses and the defendant's participation." *Croy v. State*, 953 N.E.2d 660, 664 (Ind. Ct. App. 2011). Heiny hit and strangled Webb in her own home before ordering her to leave with Dooley. When Webb refused to return to the apartment, Heiny threatened her life and repeatedly threatened to set fire to the apartment. He then poured a flammable liquid on the floor in

several rooms of the apartment, partially carrying out his threat. Besides endangering Webb, Heiny put the lives of neighbors at risk.

[30] We turn to the second element of the Rule 7(B) analysis, the character of the offender. "The character of the offender is found in what we learn of the offender's life and conduct." *Croy*, 953 N.E.2d at 664. Heiny was forty-one years old at sentencing. He has three prior felony convictions: Class D dealing in a sawed-off shotgun, Class D possession of marijuana, and Level 6 felony pointing a firearm at another. In addition, Heiny has two prior misdemeanor convictions: Class A domestic battery and Class C driving while intoxicated. He has been placed on probation twice and has been found in violation of the terms of his probation once. Also, after the State filed the current case, the State charged Heiny with two counts of Class A misdemeanor invasion of privacy, and he pleaded guilty to both counts. Previous contacts with the criminal justice system have not deterred Heiny from wrongdoing. To the contrary, in this case he escalated his misconduct by committing a Level 4 felony.

[31] Heiny argues he cares for his elderly father and has a son. But the record fails to show no one else could step in to assist his father. Further, Heiny does not have custody of his son, and there is no formal child support order in place. He next argues he has a solid work history, but he also has steadily accrued new criminal convictions as he has worked. Under these circumstances, Heiny has failed to persuade us his aggravated sentence, which falls short of the maximum, is an outlier needing revision.

Conclusion

[32] For the reasons stated above, we affirm the judgment of the trial court.

[33] Affirmed.

Riley, J., and Crone, J., concur.

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