



## **Case Summary**

Steven Loyd Brinkley appeals from his convictions for class C felony failure to return to the scene of an accident resulting in death and for class D felony obstruction of justice.

We affirm.

## **Issues**

Brinkley presents five issues, which we restate as follows:

- I. Whether the State presented sufficient evidence to support the conviction for failure to return to the scene of an accident involving death, a class C felony;
- II. Whether the State presented sufficient evidence to support the conviction for obstruction of justice, a class D felony;
- III. Whether the court committed fundamental error by not instructing on the lesser-included offense of failure to return to the scene of an accident involving serious bodily injury/bodily injury;
- IV. Whether defense counsel's failure to object to the instruction that omitted any discussion of lesser-included offenses constituted ineffective assistance; and
- V. Whether the court properly sentenced Brinkley.

Brinkley also requested oral argument, which we deny by separate order today.

## **Facts and Procedural History**

The facts most favorable to the convictions reveal that on the evening of October 7, 2006, Brinkley and Benjamin Gibson decided to go to Muncie. Brinkley drove his mother's silver Nissan Altima. Along the way, they stopped, purchased a beer from a liquor store, and drank it. Next, they stopped at Joker's Wild strip club and shared two pitchers of beer. Thereafter, they arrived at the Ball State campus, found a house party, and consumed one

beer each. They left the first party, found another party, and drank more beer. Later in the evening, Brinkley began to drive the Nissan back to Anderson.

That same night, Jamie Beaty and her boyfriend, David Pyles, went to a party in Muncie, where they drank alcohol. Around 12:45 a.m., Pyles left the party on foot. Beaty began to walk after him down Kilgore Avenue. Pyles turned to look at Beaty just as she crossed the road in front of oncoming traffic. Pyles ran and attempted to push Beaty to safety.

Meanwhile, Brinkley was driving down Kilgore when Gibson saw a female (later identified as Beaty) lying in the road and a man (later determined to be Pyles) kneeling beside her. Before there was time to react, the Nissan hit Beaty. According to Gibson, he felt two quick thumps and said to Brinkley, “I think we hit someone.” Tr. at 358. Brinkley, who continued driving, “didn’t see it and didn’t think he did.” *Id.* When Gibson reiterated that he thought Brinkley’s car had hit someone, Brinkley stopped the Nissan, and the two men exited the car and began walking back toward the accident scene.

By the time they arrived, Beaty had been hit by another vehicle, a black Ford F-150 pick-up truck. The truck had dragged her, parked briefly, and then left. A woman, who had stopped at the scene, followed the departing truck and recorded its license plate. Pyles was leaning over Beaty, “trying to get her to talk to [him].” *Id.* at 290. Additional civilian cars stopped, 9-1-1 was dialed, and police responded. Brinkley inquired if anyone had seen what had happened. *Id.* at 362, 211, 238-39.

Yorktown Police Officer Jeff Whitesell, the first officer to arrive on the scene, saw Beaty and Pyles on the ground and various people standing around them. Bystanders told

Officer Whitesell about the truck, and he relayed that information to another officer, who was instructed to look for the truck. *Id.* at 267. Officer Whitesell was also told that Beaty had no pulse, at which point he radioed dispatch to advise that there was a fatality. Beaty then gasped twice, and Officer Whitesell confirmed she had no pulse. Thereafter, a Muncie police officer arrived and likewise found no pulse.<sup>1</sup>

One onlooker, who had noticed that Brinkley smelled “of very strong whiskey,” inquired whether the police planned to search the cars to check if any had been involved in hitting the victim. *Id.* at 240. Brinkley twice asked an officer if he could leave and gave no indication that he had been involved in the accident. *Id.* at 241-43. Eventually, Brinkley was permitted to leave. As he dropped off Gibson, Brinkley noticed a crack on the right front bumper of the Nissan.

During the next couple days, Brinkley called Gibson and told him that there was a piece missing from the Nissan, that there was blood on the Nissan, and that he did not want Gibson to “say anything to anyone.” *Id.* at 364. Brinkley asked more than once if Gibson had said anything to anyone and explained that he was going to tell his mother that he had hit a dog. *Id.* at 365. Also during that timeframe, Brinkley drove the Nissan to an Anderson collision repair facility for an estimate. *Id.* at 480. Brinkley told the repair shop that he had hit a German Shepherd, that he would perform some of the repairs himself, that he did not wish to submit a claim to insurance, and that the shop should not touch a small bit of blood residue on the bumper cover. *Id.* at 483-84. Brinkley thoroughly washed the Nissan.

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<sup>1</sup> Autopsy results later revealed that Beaty died of multiple blunt force injuries. *Id.* at 394-95; *see also id.* at 399-402 (outlining the numerous injuries suffered as well as noting a tire imprint on the inside of

Thereafter, Brinkley heard a news report that police were searching for a newer silver Nissan. On October 10, 2006, around 8:00 p.m., Brinkley called Madison County Sheriff's Deputy Samuel Hanna, a family friend, telling him that "he thought he was in trouble, that he had hit something on the road, that he had been drinking, and that he didn't know who to go talk to." *Id.* at 194. After making a quick inquiry, Deputy Hanna arranged for Muncie police officers to accompany him to meet with Brinkley. At Brinkley's house, Muncie Police Officer Garreth Vannatta observed damage to the right front bumper of the silver Nissan. Accordingly, the car was towed to a secure storage facility, and Brinkley agreed to go to the police department for questioning. After being advised of his rights by Muncie Police Detective John Leach, Brinkley indicated that he understood them and that he wished to speak to Detective Leach. *Id.* at 520.

Brinkley's version of the relevant events was as follows. He was driving the Nissan alone on the night in question, observed debris on Kilgore, saw what looked like a person, swerved over, hit something, looked back, and saw a woman lying motionless on the street. He stopped the car, ran to the victim, checked for vital signs, saw other people arrive, hugged a bystander, and gathered in a prayer circle. An officer instructed the bystanders to leave. Brinkley told an officer that he thought he had hit something, and the officer responded that it was likely debris and that he should leave. *See Supp. Tr.* at 1-42.

Police found the black Ford F-150 pick-up truck, which had Beaty's DNA on its undercarriage. The truck did not have any damage that would indicate it had struck an upright pedestrian, and no parts of the truck were found at the accident scene. In contrast,

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her thigh).

Nissan parts were found at the scene, and those parts had Beaty's DNA on them. In addition, the Nissan's muffler was damaged and had tissue on it, and its fuel tank tested positive for Beaty's DNA.

On October 16, 2006, the State charged Brinkley with class C felony failure to return to the scene of an accident resulting in death, class D felony obstruction of justice, and class A misdemeanor operating a vehicle while intoxicated. A jury that heard the case in July 2007, found Brinkley guilty of the felonies but not guilty of the misdemeanor. On August 27, 2007, the court sentenced him to an aggregate term of eight years in the Department of Correction.

## **Discussion and Decision**

### ***I. Sufficient Evidence of Failure to Return***

Brinkley asserts that the State did not present sufficient evidence to support his conviction for failure to return to the scene of an accident involving death. Specifically, he contends that there were two separate accidents, that it is unclear whether Brinkley's Nissan or the truck that dragged Beaty caused her fatal injuries, and that therefore his conviction for failure to stop should be vacated or reduced to a class A misdemeanor (bodily injury) or a class D felony (serious bodily injury).

When reviewing the sufficiency of evidence to establish the elements of a crime, we consider only the evidence and reasonable inferences drawn therefrom that support the conviction. *Cherrone v. State*, 726 N.E.2d 251, 255 (Ind. 2000). We do not reweigh evidence or judge the credibility of witnesses and will affirm if there is probative evidence from which a reasonable factfinder could have found the defendant guilty beyond a

reasonable doubt. *Id.* “It is well-established that the trier of fact can infer the defendant’s knowledge from circumstantial evidence.” *Germaine v. State*, 718 N.E.2d 1125, 1132 (Ind. Ct. App. 1999), *trans. denied*.

The statute at issue provides:

The driver of a vehicle involved in an accident that results in the injury or death of a person shall do the following:

(1) Immediately stop the vehicle at the scene of the accident or as close to the accident as possible in a manner that does not obstruct traffic more than is necessary.

(2) Immediately return to and remain at the scene of the accident until the driver does the following:

(A) Gives the driver’s name and address and the registration number of the vehicle the driver was driving.

(B) Upon request, exhibits the driver’s license of the driver to the following:

(i) The person struck.

(ii) The driver or occupant of or person attending each vehicle involved in the accident.

(C) Determines the need for and renders reasonable assistance to each person injured in the accident, including the removal or the making of arrangements for the removal of each injured person to a physician or hospital for medical treatment.

(3) Immediately give notice of the accident by the quickest means of communication to one (1) of the following:

(A) The local police department if the accident occurs within a municipality.

(B) The office of the county sheriff or the nearest state police post if the accident occurs outside a municipality.

(4) Within ten (10) days after the accident, forward a written report of the accident to the:

(A) state police department, if the accident occurs before January 1, 2006; or

(B) bureau, if the accident occurs after December 31, 2005.

Ind. Code § 9-26-1-1.

If a driver involved in an accident fails to meet any of the duties imposed by Indiana

Code Section 9-26-1-1, he commits a criminal offense. *State v. Kimener*, 235 Ind. 191, 193, 132 N.E.2d 264, 265 (1956). “[I]f the accident involves the death of a person,” the offense is a class C felony. Ind. Code § 9-26-1-8. “The purpose of the statute is to provide prompt aid for persons who are injured or whose property is damaged and to sufficiently establish the identity of the parties so that they and police authorities may know with whom to deal in matters growing out of the accident.” *Runyon v. State*, 219 Ind. 352, 357, 38 N.E.2d 235, 237 (1941); *see also Nield v. State*, 677 N.E.2d 79, 82 (Ind. Ct. App. 1997) (“the essence of the statute is to remain at the scene of an accident and fulfill the enumerated duties, regardless of the number of persons injured”); *see also McElroy v. State*, 864 N.E.2d 392, 398 (Ind. Ct. App. 2007) (noting legislature’s policy decision that “failing to stop after an accident resulting in death is itself a very serious crime completely separate from whether the defendant caused the victim’s death”; and citing Ind. Code § 9-26-1-1 for proposition that duty to stop at accident scene “arises when a driver is ‘involved’ in an accident”), *trans. denied*.

Interestingly, Indiana Code Section 9-26-1-1 does not define the term “accident.” We have concluded that in the context of vehicular collisions, an accident means “the entirety of an occurrence that results from a common initiating event, regardless of whether more than two vehicles were involved.” *Nield*, 677 N.E.2d at 82 (reversing one of two convictions on double jeopardy grounds where driver hit two separate motorcycles in one accident); *see also Armstrong v. State*, 848 N.E.2d 1088, 1092 (Ind. 2006) (quoting portion of Court of Appeals opinion interpreting Ind. Code § 9-26-1-1; defining accident as “an unforeseen and unplanned event or circumstance” or an “unexpected and undesirable event, especially one



resulting in damage or harm”). Further, our supreme court has clarified that the duties imposed by Indiana Code Section 9-26-1-1 apply to a “driver of a vehicle *involved in an accident*,” regardless of whether the driver’s vehicle struck anyone or anything. *Id.* (emphasis added).

Applying the caselaw to the evidence most favorable to the conviction outlined *supra*, we conclude that Brinkley was the “driver of a vehicle involved in an accident that result[ed] in the ... death of” Beaty. *See* Ind. Code § 9-26-1-1. The evidence shows that Brinkley’s Nissan struck Beaty and that Beaty died at the accident scene. Regardless of whether the Nissan or the truck, following thereafter, dealt the fatal blow to Beaty, or whether it was a combination, Brinkley was clearly involved in the entirety of the occurrence that resulted from a common initiating event, also known as the accident that led to Beaty’s demise. Accordingly, the duties of Indiana Code Section 9-26-1-1 were triggered. At trial, Brinkley admitted that he did not provide his name, address, driver’s license number, or registration to anyone at the accident scene. In fact, he did not even disclose that he was involved in the accident. Thus, the State presented sufficient evidence to support Brinkley’s conviction for failure to return to the scene of an accident involving death.<sup>2</sup>

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<sup>2</sup> In reaching our conclusion, we are unmoved by Brinkley’s citation to civil cases, mostly from jurisdictions other than Indiana. *See Arterbery v. State*, 249 Ind. 526, 531, 233 N.E.2d 628, 631 (1968) (not applying civil case authority to criminal case where the “entire theory discussed in each of the cited cases was strictly applied to rather narrow civil issues which were disposed of in the respective opinions”); *see also Stevens v. State*, 240 Ind. 19, 27, 158 N.E.2d 784, 787 (1959) (noting, “two civil cases cited by appellant in support of his contention here are not controlling in this [criminal] case”). Specifically, Brinkley cites *Micelli v. Hirsch*, 83 N.E.2d 240, 242 (Ohio Ct. App. 1948), for the proposition that a presumption of life continues until evidence is presented sufficient to establish that the death occurred at some specific time. After filing his reply brief, he submitted additional authorities to the same effect. *See Smith v. Whittaker*, 313 N.J. Super. 165, 713 A.2d 20 (1998); *Fontenot v. S. Farm Bur. Cas. Ins. Co.*, 304 So. 2d 690 (La. Ct. App. 1974); *Smith v. Wells*, 72 Ind. App. 29, 122 N.E. 334 (1919). *Micelli*, an appeal of a personal injury case, discussed three questions: misjoinder of parties, application of the rule of conduct to stop in the assured clear distance ahead,

## *II. Sufficient Evidence of Obstruction of Justice*

Brinkley also challenges the sufficiency of the evidence presented to support his conviction for obstruction of justice. A person who “alters, damages, or removes any record, document, or thing, with intent to prevent it from being produced or used as evidence in any official proceeding or investigation,” commits obstruction of justice, a class D felony. Ind. Code § 35-44-3-4(a)(3).

Recalling only the evidence and reasonable inferences drawn therefrom that support the conviction, and without reweighing evidence or judging witness credibility, we examine whether there is probative evidence from which a reasonable factfinder could have found Brinkley guilty beyond a reasonable doubt. *See Cherrone*, 726 N.E.2d at 255. We also keep in mind that a person’s intent may be determined from his conduct and the natural consequences thereof and may be inferred from circumstantial evidence. *J.J.M. v. State*, 779 N.E.2d 602, 606 (Ind. Ct. App. 2002).

Only after his passenger insisted more than once that the Nissan had hit someone did Brinkley stop. Once at the accident scene, Brinkley asked if anyone had seen what happened, inquired twice whether he could leave, and drove the Nissan away from the accident scene without leaving any identifying information. Upon dropping off Gibson that night, Brinkley saw a crack on the right front bumper of the Nissan. Within the next several

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and whether the jury was properly charged. 83 N.E.2d at 241. In one sentence, the Ohio court wrote, with no citation to authority: “We must assume that life continued until Micelli was found to be dead.” *Id.* at 242. *Smith v. Whitaker* concerned New Jersey’s Wrongful Death Act and Survivor’s Act, concluded that the plaintiff’s survivorship claim for punitive damages was legally valid, and cited various civil cases. 313 N.J. Super. at 186-90. *Fontenot* was an action against an automobile liability insurer for the death of a victim negligently hit by a motorist. 304 So.2d 690. Finally, *Smith v. Wells* dealt with a suit to foreclose a mortgage. 122 N.E. at 339. We do not see how these cases, none of which are criminal cases applying

days, Brinkley called Gibson and told him that there was a piece missing from the Nissan, that there was blood on the Nissan, and that he did not want Gibson to “say anything to anyone.” Tr. at 364. Brinkley asked more than once if Gibson had said anything to anyone and explained that he was going to tell his mother that he had hit a dog. *Id.* at 365. Also during that timeframe, Brinkley sought a repair estimate, reiterated the lie about hitting a dog, stated he would perform some repairs himself, and indicated that he did not wish to submit a claim to insurance. *Id.* at 483-84. He thoroughly washed the Nissan. Not until he heard a news report that police were looking for a newer silver Nissan did Brinkley seek advice regarding his role in the accident. Once he finally spoke with authorities, his story changed more than once and had many inconsistencies. *Id.* at 698, 702; Supp. Tr. at 1-42.

Presented with this information, the jury could certainly determine that Brinkley altered, damaged, or removed the Nissan with intent to prevent it from being produced or used as evidence in any official proceeding or investigation. Concluding that sufficient evidence was presented to support the obstruction of justice conviction, we decline Brinkley’s challenge to reweigh evidence and judge credibility.

### ***III. No Fundamental Error in Failing to Instruct on Lesser-Included Offense***

Next, Brinkley argues that the court should have instructed the jury regarding the lesser-included offenses of failure to return to an accident resulting in bodily injury (class A misdemeanor)/serious bodily injury (class D felony). Acknowledging that his counsel did not submit an instruction on lesser-included offenses, Brinkley relies on the fundamental error doctrine. In essence, he claims that the court committed fundamental error when it read

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Indiana Code Section 9-26-1-1, help Brinkley’s argument.

instruction number 8, which defined failure to return to an accident resulting in death, a class C felony, but did not instruct that the class A misdemeanor or the class D felony were options for the jury to consider.

Fundamental error results from “a blatant violation of basic principles rendering the trial unfair to the defendant and thereby depriving the defendant of fundamental due process.” *Ortiz v. State*, 766 N.E.2d 370, 375 (Ind. 2002). Our supreme court has explicitly held that “failure to give instructions on lesser-included offenses does not constitute fundamental error.” *Metcalf v. State*, 451 N.E.2d 321, 326 (Ind. 1983) (citing *Helton v. State*, 273 Ind. 211, 402 N.E.2d 1263 (1980)). In *Helton*, our supreme court stated: “We hold that the entitlement to included offenses instructions, in an appropriate case, is not a fundamental right but rather is one that must be claimed and the claim preserved, in accordance with established rules of trial and appellate procedure.” 273 Ind. at 213, 402 N.E.2d at 1266. In light of our supreme court’s clear precedent, Brinkley’s argument to the contrary fails.<sup>3</sup>

#### ***IV. Effective Assistance of Counsel***

Brinkley ties his ineffective assistance of counsel argument to his instructional challenge *supra*. Specifically, he maintains that trial counsel was ineffective for failing to object to instruction number 8, which he asserts was improper because it did not discuss failure to return to an accident resulting in bodily injury, a class A misdemeanor, or failure to return to an accident resulting in serious bodily injury, a class D felony, i.e., lesser-included

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<sup>3</sup> To the extent that *Lemond v. State*, 878 N.E.2d 384, 389 (Ind. Ct. App. 2007), *trans. denied*, analyzed a lesser-included offense instruction issue differently, we note that it reached the same result as we have here: no fundamental error. Moreover, we do not know whether *Metcalf* and/or *Helton* were raised, let alone argued, in *Lemond*.

offenses.

Ineffective assistance of counsel claims may be raised either on direct appeal or in post-conviction proceedings. *Benefiel v. State*, 716 N.E.2d 906, 911 (Ind. 1999). However, “[a] postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim.” *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998). This is because presenting such a claim often requires the development of new facts not present in the trial record, and the assessment of such a claim requires a court to consider the overall performance of counsel and the reasonable probability that the alleged error affected the outcome. *McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999). If an ineffective assistance of trial counsel claim is raised on direct appeal, the issue will be foreclosed from collateral review. *Woods*, 701 N.E.2d at 1220.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. *Koons v. State*, 771 N.E.2d 685, 690 (Ind. Ct. App. 2002), *trans. denied*. We review the effectiveness of counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997). To succeed on his ineffective assistance claims, Brinkley must demonstrate, first, that counsel’s performance fell below an objective level of reasonableness based upon prevailing professional norms. *Strickland*, 466 U.S. at 687-88. Second, he must show that the deficient performance resulted in prejudice, which requires showing a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Grinstead v. State*, 845 N.E.2d 1027, 1030 (Ind. 2006).

To prevail on an allegation of ineffective assistance of trial counsel based on a failure to object to jury instructions or a failure to tender proposed instructions, the defendant must establish that if his attorney had made a proper objection or tendered a proper instruction, the trial court would have been required to sustain the objection or give the tendered instruction. *Little v. State*, 819 N.E.2d 496, 506 (Ind. Ct. App. 2005), *trans. denied*. When requested, a court must give an instruction on an inherently or factually included offense if there is a serious evidentiary dispute about the elements distinguishing the offenses. *Wright v. State*, 658 N.E.2d 563, 566-67 (Ind. 1995).

“Few points of law are as clearly established as the principle that ‘[t]actical or strategic decisions will not support a claim of ineffective assistance.’” *Hollins v. State*, 790 N.E.2d 100, 109 (Ind. Ct. App. 2003) (quoting *Sparks v. State*, 499 N.E.2d 738, 739 (Ind. 1986)), *trans. denied*. We give great deference to counsel’s discretion to choose strategy and tactics. This is so even when such choices are subject to criticism or if such choices ultimately prove detrimental to the defendant. *Garrett v. State*, 602 N.E.2d 139, 142 (Ind. 1992).

Our supreme court has expressly held that a “tactical decision not to tender a lesser included offense [instruction] does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense.” *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998). The *Autrey* court held that trial counsel was not ineffective for failing to request lesser-included offense instructions on a charge of murder because it represented a reasonable “all or nothing” tactical choice by defense counsel to obtain a full acquittal for the defendant by placing the blame for the victim’s death on

another person and highlighting the “discordant” testimony of the witnesses. *Id.* at 1141-42; *see also Sarwacinski v. State*, 564 N.E.2d 950, 951 (Ind. Ct. App. 1991) (holding that it was not ineffective assistance not to request voluntary manslaughter instruction on a murder charge because it might have undermined defense of self-defense and/or lessened chance of defendant’s acquittal).

A review of the transcript reveals that defense counsel was employing a similar all-or-nothing approach in Brinkley’s case. That is, during closing argument, defense counsel asserted that Brinkley should be acquitted because there were two accidents, and Brinkley’s accident did not result in Beaty’s death. Tr. at 833, 843, 859. Had the jury found the defense theory to be persuasive, its verdict would have been “not guilty” in light of the instruction number 8 that actually was given. However, had defense counsel submitted instructions regarding lesser included offenses, Brinkley could have been found guilty of those offenses rather than being completely exonerated. While Brinkley was not acquitted, he has not shown that his counsel’s strategy, albeit ultimately unsuccessful, constituted deficient performance.

#### ***V. Sentence***

Finally, Brinkley challenges his eight-year aggregate sentence. He contends that in ordering him to serve more than the advisory sentence on both convictions, the court relied on the following improper reasons: a charge that was dismissed, his driving record, the notion that his crime was more serious than “contemplated by the original charged crime,” his initial untruthfulness to authorities, and his unusual degree of care and planning to hide the Nissan/damage. Appellant’s Br. at 37. He also asserts that his sentence is inappropriate

pursuant to Indiana Appellate Rule 7(B).

Where, as here, a defendant's sentence is within the statutory range, the trial court's sentencing decision is subject to review only for abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. A trial court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). A trial court is still required to issue a sentencing statement when sentencing a defendant for a felony. *Anglemyer*, 868 N.E.2d at 490. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Id.* The trial court may abuse its discretion if it omits "reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law." *Id.* at 490-91.<sup>4</sup> To demonstrate an abuse of discretion, Brinkley must show that the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Hollin v. State*, 877 N.E.2d 462, 464 (Ind. 2007).

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<sup>4</sup> The imposition and review of sentences should proceed as follows:

1. The trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence.
2. The reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion.
3. The relative weight or value assignable to reasons properly found or those that should have been found is *not* subject to review for abuse.
4. Appellate review of the merits of a sentence may be sought on the grounds outlined in Appellate Rule 7(B).



Within a five-page sentencing order, the court detailed several circumstances supporting a greater-than-advisory sentence, set out various circumstances supporting a less-than-advisory sentence, and then provided the following additional explanation:

The court finds the conclusion reached in the Evaluation submitted by [Brinkley] is based on several assumptions that are incorrect; the evaluation does not take into account [Brinkley's] multiple contacts with the legal system in some form since he was 15 years old. The Evaluation assumed, in the witness' words, [Brinkley] essentially has never been in trouble before. The Evaluation does not take into account the prior rehabilitative opportunities [Brinkley] has been afforded, which have failed. The Evaluation does not take into account the Nature and circumstances of the incident, which involved a significant harm, impact, and loss to the surviving family. The Court is in the best position to determine the sentence which [Brinkley] should receive, as the Court heard all the evidence at trial. The Court has considered the Evaluation but declines to follow the recommendations in the Evaluation.

In weighing the factors under Count 1 [failure to return, class C felony], the Court finds that the factors supporting an enhanced sentence significantly outweigh the factors supporting a reduced sentence, supporting the imposition of an enhanced sentence. In support, the Court notes the multiple contacts [Brinkley] has had with the juvenile and adult systems, and the rehabilitative opportunities afforded to [Brinkley]. The Court further notes [Brinkley's] pattern and history of disregarding traffic laws in a significant manner. Driving with a suspended license and driving without insurance are significant offenses. To add to the significance of [Brinkley's] record of driving offenses, [Brinkley] had to take a driving safety program not just once but twice. One could look at [Brinkley's] driving record and feel confident that (1) this young man knew very well his responsibilities on the roadways of Indiana, and (2) this young man did not take seriously the obligations imposed by the driving laws of the State of Indiana. Finally, the Court notes [Brinkley's] failure to perform his duty under the law (i.e., stopping and giving aid) caused additional injury and damage to the victim, beyond that which he himself directly caused, because another vehicle struck the victim as well as [Brinkley's] vehicle. [Thus, a six-year sentence was ordered.]

In weighing the factors under Count 2, the Court finds the factors supporting an enhanced sentence slightly outweigh the circumstances supporting a reduced sentence, thereby supporting the imposition of a slightly enhanced sentence. The Court finds the slight enhancement is supported by [Brinkley's] continued attempts to deflect the investigation from him, when he

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*See Anglemyer*, 868 N.E.2d at 491.

produced himself to the Muncie Police but continued to lie to the police about his involvement. [Brinkley] admitted during his testimony in the trial that he lied as to numerous details during his statement to the police. The Court also notes in support the unusual planning and efforts [Brinkley] made to continue to conceal the vehicle. The Court is convinced from hearing the evidence during the trial that [Brinkley] decided to come forward only after *The StarPress* published an article about the silver Nissan being involved in the accident, and [Brinkley] was worried his friend would turn him in before [Brinkley] could turn himself in. [Thus, a two-year sentence was ordered.]

*Id.* at 27-31.

The court mentioned Brinkley's "minor history of adult criminal activity," i.e., the domestic battery charge. However, the court clearly noted that the case was dismissed "due to no further complaints," and gave it only slight, not significant weight. The court was much more concerned with the short interval between the dismissal and the commission of the present offenses, which indicated that he had learned little from his recent encounter with the criminal justice system. *Id.* at 27. The court went on to cite Brinkley's theft and incorrigibility juvenile adjudications, but gave them only slight weight and stated that diversion, probation, and treatment were offered. *Id.* The court did list Brinkley's nine infractions including speeding, failing to have insurance, and driving while suspended. Although alone, or in a different context, the infractions would not have been significant, here they reflected a five-year pattern/history of disregarding the driving laws, which is significant in light of a conviction for failure to return to an accident resulting in death. *See Wooley v. State*, 716 N.E.2d 919, 929 n.4 (Ind. 1999).

We are unimpressed with Brinkley's contention that his failure to return was no worse than contemplated by the charged crime. Given the circumstances – a pedestrian victim lying on a roadway at night – it was not an abuse of discretion for the court to note that Brinkley

could have prevented additional injury or “further indignity to her person.” App. at 28. We are likewise unimpressed with Brinkley’s attempt to downplay both his admittedly false statements to authorities and his continued efforts to impede the investigation. We cannot say that the court abused its discretion in assigning “some weight” to these factors. As for Brinkley’s “unusual degree of care and planning in continuing to hide the vehicle” and conceal its damage, the court gave this only minimal, rather than significant, weight. In sum, Brinkley has not shown that the trial court’s sentencing decision is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Hollin*, 877 N.E.2d at 464.

Turning to Brinkley’s Appellate Rule 7(B) challenge, we recall that this rule allows a court on review to revise a sentence if the sentence is inappropriate in light of the nature of the offense and the character of the offender. Although Rule 7(B) does not require this Court to be extremely deferential to a trial court’s sentencing decision, this court still gives due consideration to that decision. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). This court also recognizes the unique perspective a trial court brings to its sentencing decisions. *Id.* The defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate. *Krempetz v. State*, 872 N.E.2d 605, 616 (Ind. 2007).

In *Anglemyer*, the court stated that “regarding the nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” 868 N.E.2d at 494. The advisory sentence for a class C felony is four years, with a fixed term of between two and eight years. Ind. Code § 35-50-2-6. The penalty for a class D felony is between six months and three years, with the advisory sentence being

one and one-half years. Ind. Code § 35-50-2-7.

To reiterate the nature of the offenses, Brinkley was involved in an accident resulting in the death of a young woman. Brinkley neither offered any assistance nor identified himself to authorities at the scene. Indeed, if not for his passenger's insistence, one wonders whether Brinkley would have returned. Brinkley then left in the vehicle, lied to others about how the Nissan was damaged, asked his passenger to keep quiet, quickly sought an estimate to repair the vehicle, and cleaned it. These actions also reflect poorly on Brinkley's character. Brinkley's later fabrications to police, coupled with his history of continued disregard for driving laws, further evidence character issues. Accordingly, we conclude that Brinkley has not met his burden of persuading us that his eight-year sentence was inappropriate.

Affirmed.

BARNES, J., and BRADFORD, J., concur.