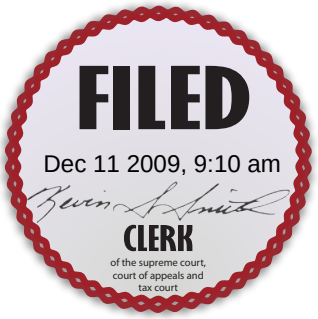

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IN THE
COURT OF APPEALS OF INDIANA

RICKY A. BURGE,	)	
	)	
Appellant- Respondent,	)	
	)	
vs.	)	No. 08A02-0906-CR-563
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Petitioner,	)	

APPEAL FROM THE CARROLL SUPERIOR COURT
The Honorable Jeffrey R. Smith, Judge
Cause No. 08D01-0810-FD-98

December 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Ricky Burge appeals his statutory maximum sentence of three years for intimidation, a Class D felony. Burge raises a single issue for our review, which we restate as whether his sentence is inappropriate in light of the nature of his offense and his character. Concluding Burge's sentence is not inappropriate, we affirm.

Facts and Procedural History[1]

On October 24, 2008, beginning at 7:25 p.m., Burge repeatedly called his estranged wife, Andrea Burge, on her cellular telephone and left voice messages that were "yelling, swearing, and hostile." Appellant's Appendix at 5. The following day, in the late afternoon, Andrea went to the Flora Police Department and spoke with Officer Larimore. While speaking with Officer Larimore, Andrea continued to receive hostile voice messages from Burge. In many of the messages, Burge threatened to kill or batter Chad McDonald, Andrea's former boyfriend who Burge believed Andrea was seeing, if she did not answer the telephone. In at least two of the messages, Burge threatened to kill or batter Andrea if she did not answer the telephone. Burge left approximately thirty messages, which Officer Larimore recorded as Andrea retrieved them from her telephone.

On October 31, 2008, the State charged Burge with two counts of intimidation as Class D felonies. Count I alleged Burge "communicate[d] a threat to commit a forcible felony, to-wit: kill Andrea Burge, with the intent that Andrea Burge engage in conduct against her will, to-wit: answer the telephone." Id. at 3. Count II alleged Burge

[1] Because Burge pled guilty, the facts are necessarily limited to those contained in the probable cause affidavit, adduced through the factual basis at the guilty plea hearing, or testified to at the sentencing hearing.

"communicate[d] a threat to commit a forcible felony, to-wit: Kill or severely batter Chad McDonald, another person," also with the intent that Andrea answer the telephone against her will. Id. at 4. On April 14, 2009, the trial court held a guilty plea hearing. After advising Burge of his rights and explaining the charges against him and the possible penalties, the trial court engaged in the following colloquy:

> Court: And perhaps the Court should confirm that, it's my understanding and apparently the defendant's as well that upon pleading guilty to Count I the State would dismiss Count II, is that correct?
>
> [State]: That is correct, Your Honor.

Transcript at 7. Thereafter, Burge entered a guilty plea to Count I, and the trial court dismissed Count II on the State's motion.

The trial court held a sentencing hearing on May 14, 2009. Burge admitted the accuracy of the presentence investigation report ("PSI"), which detailed Burge's criminal history: three juvenile adjudications between 1991 and 1992, including two for intimidation; three adult convictions for battery, in 1994, 1997, and 2004; and one conviction each for reckless driving in 1993, battery resulting in bodily injury and illegal consumption in 1994, operating while intoxicated in 1995, operating while intoxicated with a prior conviction in 1997, and battery on law enforcement, possession of marijuana, and criminal mischief, all in 2004. Also according to the PSI, Burge had a $101 per week child support obligation for two children he had with his first wife, was $14,000 in arrears on that support, and was in the process of establishing paternity of a third child he had with Andrea in 2005. Regarding Burge's mental health, the PSI stated he was treated at Charter Hospital at age fourteen and diagnosed with bipolar disorder but had not seen a

mental health professional since then. The PSI also reflected Burge's statement acknowledging he needs medication to treat his bipolar disorder. The PSI further reflected Burge's current employment as a full-time construction subcontractor earning approximately $10 per hour. At the sentencing hearing, Burge provided the additional information he had recently lined up a second full time job working nights at a gas station, "where my child support can automatically be deducted out of my pay." Sentencing Transcript at 11.[2]

Burge testified he was not currently taking medication to treat his bipolar disorder and had not done so "for quite some time." Id. at 10. When asked if he thought he needed such medication, Burge stated, "No, I think I just need to keep people that cheat on me and do me wrong . . . out of my life." Id. When asked whether he was currently paying child support, Burge testified he was making payments "[h]ere and there. The weather here lately, it's kinda [sic] hard to put metal roofing on in the rain but that's why I went and picked up this second job." Id. at 13. Burge expressed regret for the instant offense, admitting "I said some things . . . that were not right." Id. at 23. He also expressed continuing anger at Andrea for "[c]heat[ing] on [me] five times throughout that marriage. She stole my whole life from me. Sold it, traded it." Id. at 11. In explaining why he committed the instant offense, Burge said Andrea "had me to an emotional breakdown," leading him "to emotionally hurt her heart like she had hurt mine." Id. at 23.

[2] Although bound in a single volume, the transcripts from Burge's guilty plea hearing and sentencing hearing are separately paginated.

Following the sentencing hearing, the trial court entered a sentencing order stating "the court considered the following aggravating circumstances: The defendant has: a history of criminal activity; violated probation; failed to get mental health treatment and stay on medication; failed house arrest; and the defendant's attempts to place the victim in fear were repeated." Appellant's App. at 8. As a result, the trial court sentenced Burge to three years, all executed, at the Indiana Department of Correction. Burge now appeals.

Discussion and Decision

I. Standard of Review

This court has authority to 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." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and recognize the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). When determining whether a sentence is inappropriate, we must examine both the nature of the offense and the defendant's character, and in making this examination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited . . . to a simple rundown of the aggravating and mitigating circumstances found by the trial court."). The burden is on the defendant to demonstrate

that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).[3]

II. Appropriateness of the Sentence

Burge received the statutory maximum sentence for a Class D felony. See Ind. Code § 35-50-2-7(a) ("A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years."). As a corollary to our supreme court's observation that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss, 848 N.E.2d at 1072, this court has observed repeatedly that maximum sentences should be reserved for the worst offenses and offenders, see Roney, 872 N.E.2d at 207; Haddock v. State, 800 N.E.2d 242, 248 (Ind. Ct. App. 2003). At the same time, however, reading this observation narrowly "would reserve the maximum punishment for only the single most heinous offense." Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied. Instead, a reviewing court "should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." Id. With these principles in mind, we turn to the nature of Burge's offense and his character.

[3] Citing Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003), trans. denied, the State contends this court should exercise "great restraint" when reviewing a sentence pursuant to Rule 7(B). The State's contention overlooks our admonition in Stewart v. State, 866 N.E.2d 858, 865 (Ind. Ct. App. 2007), that the State should "discontinue citing earlier cases from this court stating that our review of sentences under Rule 7(B) is 'very deferential' to the trial court and that we exercise our authority to revise sentences 'with great restraint.'" But see Hollin v. State, 877 N.E.2d 462, 466 (Ind. 2007) (Dickson, J., concurring and dissenting) ("Appellate sentence modifications [under Rule 7(B)] should be extraordinary events that almost never occur.").

A. Nature of the Offense

As to the nature of Burge's offense, Burge made repeated attempts to place Andrea in fear, calling her approximately thirty times over a nearly twenty-four hour period, which the trial court found an aggravating circumstance. Yet Burge made no face-to-face contact with Andrea during that time and did not attempt to cause her physical harm. Moreover, there is no evidence Burge's offense was part of an escalating pattern of threats or harassment. As a result, Burge's offense is not a particularly egregious instance of intimidation, which at first blush would suggest the maximum sentence may be inappropriate.

B. Character of the Offender

Burge's character is a different matter, however, as he has an extensive criminal history of eleven prior convictions and three probation revocations. The significance of a defendant's criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Harris v. State, 897 N.E.2d 927, 930 (Ind. 2008) (quotation omitted). Here, a considerable number of Burge's prior offenses are similar in nature and gravity to his current offense, including three convictions of generic battery and one each of battery on law enforcement and battery resulting in bodily injury. Burge's battery on law enforcement conviction and one of his generic battery convictions are from 2004. In addition, Burge's probation was revoked in December 2005, and following that revocation, in August 2006, he violated his terms of home confinement and was ordered to serve 528 days of a previously-suspended sentence at the Department of Correction. Burge's history of convictions and probation violations reflects quite

negatively upon his character, demonstrating Burge has little regard for the law and has failed to take advantage of past instances of leniency.

Burge argues his negative criminal history should be balanced against his history of mental illness and his need for treatment of his bipolar disorder. We are sympathetic to Burge's concern incarceration may fail to provide avenues for mental health treatment, and we acknowledge his mental illness may weigh in favor of a lesser sentence, see Lopez v. State, 869 N.E.2d 1254, 1260 (Ind. Ct. App. 2007), trans. denied. However, we are also mindful that Burge, despite being diagnosed with bipolar disorder as an adolescent and his frequent involvement in the criminal legal system, has failed to seek treatment for his mental disorder and has not taken medication despite recognizing, at times, his need for treatment or medication. The fact that Burge's failure to seek treatment for his mental illness may well result in future offenses that, like the instant offense, are related to his uncontrolled emotions, weighs in favor of a heightened sentence. Taken together, Burge's history of mental illness and his history of not seeking treatment do not reflect favorably upon his character.

Other factors appearing in the record do not shed significant positive light on Burge's character. Although Burge pled guilty to Count I, the State agreed to dismiss Count II in consideration for the guilty plea. Because Burge therefore received a substantial benefit from his plea, it does not weigh significantly in his favor. See Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. Although Burge expressed regret for his offense and acknowledged he acted wrongly, he also expressed continuing anger at the victim, blaming her for setting him up for an "emotional

breakdown." Sent. Tr. at 23. Burge further argues he should receive a lesser sentence because of his need to support three children and his ability to do so through a second job acquired just before his sentencing hearing. However, Burge admitted he has a pattern of paying child support irregularly, and we cannot overlook his admission he is $14,000 in arrears, which reflects negatively upon his character and casts doubt upon the extent of hardship his children would suffer as a result of his incarceration. Burge bears the burden of persuading this court his sentence is inappropriate, Childress, 848 N.E.2d at 1080, and particularly in light of his extensive criminal history, he has failed to do so.

Conclusion

Burge's three-year sentence is not inappropriate in light of the nature of his offense and his character.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.