MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Benjamin Loheide
Law Office of Benjamin Loheide
Columbus, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Robert M. Yoke
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Tristan V. Santos,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 4, 2022

Court of Appeals Case No. 22A-CR-616

Appeal from the Bartholomew Circuit Court

The Honorable Kelly S. Benjamin, Judge

Trial Court Cause No. 03C01-2012-F4-5790

Mathias, Judge.

[1] Tristan Santos appeals his sentence following his convictions for Level 4 felony burglary, Level 5 felony escape, Level 6 felony resisting law enforcement, Level

6 felony auto theft, Level 6 felony domestic battery, and Level 6 felony invasion of privacy. Santos presents two issues for our review:

I. Whether the trial court identified an invalid aggravator at sentencing.

II. Whether his aggregate sentence exceeds that permitted by Indiana Code section 35-50-1-2.

[2] We affirm.

Facts and Procedural History

[3] Near midnight on November 28, 2020, Santos "pushed his way" into Kilyn Williams's apartment, uninvited.[1] Tr. p. 42. Williams was Santos's former girlfriend, and they have a child together. Santos drank several beers. He refused Williams's pleas for him to leave. And, to make sure that Williams did not leave the apartment, Santos took her car keys and phone, and he forced her to take her clothes off. Overnight, Santos "physically" and "verbally abused" Williams. *Id.* Santos also attempted to force Williams to engage in sex acts.

[4] The next morning, Columbus Police Department officers Adriane Polley and Nicholas Schmitt went to Williams's apartment to look for Santos, who had two active warrants. When they arrived, Santos, who was naked, answered the door. The officers also saw Williams, naked, standing in the living room

[1] In doing so, Santos violated two different no contact orders.

holding her child. The officers told Santos to put on clothes, and they allowed him to go into a bedroom by himself. Williams then told the officers that Santos had previously evaded officers by jumping out of a window in her apartment. Officer Schmitt quickly discovered that Santos had, indeed, fled the apartment through a window.

[5] Approximately fifteen minutes later, after the officers had left Williams's apartment, Santos returned, broke into the apartment, stole Williams's car keys, and stole her car. Williams called the police, and Officers Polley and Schmitt returned to her apartment. Williams told the officers the direction of Santos's travel, and the officers pursued Santos in their vehicle. Santos ultimately crashed the car and fled on foot, with officers in pursuit. Officer Schmitt caught up to Santos, tased him, and placed him in handcuffs. Officer Schmitt then placed Santos in the back seat of his patrol car.

[6] While Officer Schmitt was talking to Santos, Santos "removed his hands from behind his back, [swept them] underneath his feet by tucking his legs up and then plac[ed] his hands in front of him[.]" *Id.* at 36. Officer Schmitt removed the handcuffs in an attempt to reposition Santos's hands behind him, and Santos "pushed through" Officer Schmitt and a medic and fled. *Id.* Officer Schmitt chased Santos, tased him a second time, and again placed him in handcuffs.

[7] The State charged Santos with eleven felonies and four misdemeanors. On January 13, 2022, Santos entered into a plea agreement whereby he pleaded

guilty to Level 4 felony burglary, Level 5 felony escape, Level 6 felony resisting law enforcement, Level 6 felony auto theft, Level 6 felony domestic battery, and Level 6 felony invasion of privacy. In exchange for his plea, the State dismissed the nine remaining charges. The trial court accepted the guilty plea. Following a sentencing hearing, the trial court entered a sentencing order identifying as a "slight" mitigating factor Santos's guilty plea. Appellant's App. Vol. 2, p. 57. The trial court clarified that Santos "also minimized his actions, blamed the victim, stated he had disdain for the victim and that this whole situation is 'bullshit.'" *Id.* The trial court identified eight aggravating factors, namely: Santos's criminal history; his prior probation violations; he was on probation at the time of the instant offenses; prior attempts at rehabilitation through treatment have failed; his IRAS (Indiana Risk Assessment System) score is "high risk"; he shows no remorse; he "has multiple pending cases involving the same victim, a history of violence toward the victim, and is a danger to her safety"; and his character "is one of defiance with no respect for rules or people. He is dangerous." *Id.* at 58.

[8] The court sentenced Santos as follows: twelve years for burglary; six years for escape; and two years each for resisting law enforcement, auto theft, domestic battery, and invasion of privacy. The court ordered that the sentences for domestic battery and invasion of privacy would run concurrent with the burglary sentence. And the court ordered that the remaining sentences would run consecutive to one another, for an aggregate sentence of twenty-two years. This appeal ensued.

Discussion and Decision

Issue One: Invalid Aggravator

[9] Santos contends that the trial court abused its discretion when it identified his IRAS score as an aggravating factor. A trial court abuses its discretion in sentencing if it considers reasons that "are improper as a matter of law." *Anglemyer v. State*, 868 N.E.2d 482, 490–491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id.* at 491.

[10] Santos is correct that a defendant's IRAS score is an improper aggravator. *See Kayser v. State*, 131 N.E.3d 717, 722 (Ind. Ct. App. 2019). However, as the State points out, Santos does not challenge any of the remaining seven aggravators identified by the trial court. It is well settled that if a sentencing court improperly applies an aggravating circumstance but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. *Morrell v. State*, 118 N.E.3d 793, 796 (Ind. Ct. App. 2019). "When we can 'identify sufficient aggravating circumstances to persuade us that the trial court would have entered the same sentence even without the impermissible factor, [we] should affirm the trial court's decision.'" *Id.* (quoting *Means v. State*, 807 N.E.2d 776, 788 (Ind. Ct. App. 2004), *trans. denied*).

[11] Santos's criminal history, his history of eight petitions to revoke probation, his history of violence against Williams, and the fact that he was on probation at the time of the instant offenses are aggravating factors that, without more, support his sentence. Moreover, rather than expressing remorse for his actions, Santos expressed disdain for the legal system. We are confident that, without considering the invalid aggravator, the trial court would impose the same twenty-two-year sentence, and we affirm that sentence.

Issue Two: Episode of Criminal Conduct

[12] Santos next contends that his aggregate sentence exceeds that permitted by Indiana Code section 35-50-1-2. As our Supreme Court has explained,

> [g]enerally, "it is within the trial court's discretion whether to order sentences be served concurrently or consecutively." *Myers v. State*, 27 N.E.3d 1069, 1082 (Ind. 2015). But because our legislature is responsible for fixing criminal penalties, a trial court's sentencing discretion must not exceed the limits prescribed by statute. *Pritscher v. State*, 675 N.E.2d 727, 729 (Ind. Ct. App. 1996). With exceptions for "crimes of violence," our Sentencing Cap Statute limits the aggregate sentence a trial court may impose "for felony convictions arising out of an episode of criminal conduct." I.C. §§ 35-50-1-2(c), (d).

Fix v. State, 186 N.E.3d 1134, 1143 (Ind. 2022).

[13] As relevant here, "crimes of violence" include burglary and felony resisting law enforcement. I.C. § 35-50-1-2(a). Thus, Santos's sentences on those counts are exempt from the cap, and we need only consider whether the consecutive sentences for his convictions for escape and auto theft are implicated by the

statute.[2] *See Fix*, 186 N.E.3d at 1143. The Sentencing Cap Statute defines "episode of criminal conduct" as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." I.C. § 35-50-1-2(b).

> "Whether certain offenses constitute a 'single episode of criminal conduct' is a fact-intensive inquiry" determined by the trial court. *Schlichter v. State*, 779 N.E.2d 1155, 1157 (Ind. 2002). While "the ability to recount each charge without referring to the other" offers "guidance on the question of whether a defendant's conduct constitutes an episode of criminal conduct," we focus our analysis on "the timing of the offenses" and "the simultaneous and contemporaneous nature of the crimes," if any. *Reed v. State*, 856 N.E.2d 1189, 1200 (Ind. 2006) (internal citations and quotation marks omitted).

Fix, 186 N.E.3d at 1144. Santos contends that the statutory limit applicable here means that the total of the consecutive terms of imprisonment, beyond the sentences for burglary and resisting law enforcement, may not exceed seven years. *See* I.C. § 35-50-1-2(d)(2).

[14] Santos argues that, while not simultaneous, his escape and auto theft offenses are "sufficiently connected" to implicate the statutory cap. Appellant's Br. at 16. He asserts that he "was at Williams'[s] apartment, was discovered by law enforcement, and he tried several times to avoid arrest. Telling the story of one criminal count in this case really requires telling the entire story." *Id.* at 17. The

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[2] The trial court ordered that the sentences on his convictions for domestic battery and invasion of privacy would run concurrent with the sentence for his burglary conviction.

State, however, contends that the statutory cap does not apply because there was a "'break in the sequence of events'" when Santos was arrested after the auto theft and before his escape. Appellee's Br. at 17-18 (citing *Evans v. State*, 81 N.E.3d 634, 640-41 (Ind. Ct. App. 2017)). We agree with the State.

[15] Officer Schmitt described the events after Santos stole Williams's car as follows:

> So officers then got into a vehicle pursuit with that vehicle. The vehicle ended up crashing out near [a school's] parking lot and a foot pursuit ensued with Mr. Santos. We had ended up chasing him around the Gladstone Apartments complex there and then he ran into the Bodega that was across the street from the apartment complex. Officer Polley and I pursued him through the front door of that business and out the back door. Officer Polley continued to follow him around a garage that was to the south end of that building; seeing him go around the one side, I went around the other side believing he was going to swing back around.

Tr. p. 35. Officer Schmitt tased Santos, arrested him, and placed him in the backseat of his patrol car. Officer Schmitt described the events leading up to Santos's escape as follows:

> [W]e had medics come to check him out to make sure he was medically fit to go to jail. Other officers went to deal with the various other aspects of this case. . . . [S]o I was the only officer there on scene with [Santos]. Had him in my patrol vehicle and at that time he was very friendly, very cooperative. It appeared that he had come to terms with what all had happened; wasn't arguing or fighting, all bit [sic] from complaining about the tightness of his handcuffs. But while he was speaking with me, he had actually gone and while seated in the backseat of my patrol car, removed his hands from behind his back, underneath his feet

> by tucking his legs up and then placing his hands in front of him at that point.

Id. at 36. And when Officer Schmitt removed Santos's handcuffs to reposition his hands behind his back, Santos pushed him and ran away. It was that conduct that supported the escape charge.

[16] While the theft of Williams's car and Santos's escape were part of a series of events during a single day, they were not so connected in terms of "time, place, and circumstance" as to constitute an episode of criminal conduct. *See Reed v. State*, 856 N.E.2d 1189, 1201 (Ind. 2006) (citing I.C. § 35-50-1-2(b)). Santos stole Williams's car, crashed it, and led officers on a foot chase before getting arrested. Santos was checked out by medics and chatted with Officer Schmitt for awhile before he escaped from custody. Each offense can be recounted without reference to the other. *See Fix*, 186 N.E.3d at 1144. We hold that the consecutive sentences for Santos's convictions for auto theft and escape are not implicated by the statutory cap. *See, e.g.*, *Evans v. State*, 81 N.E.3d 634, 641 (Ind. Ct. App. 2017) (holding offenses of possession of a syringe and escape not episode of criminal conduct).

[17] Affirmed.

Riley, J., and Robb, J., concur.