MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Kristin A. Mulholland
Appellate Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Courtney Staton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Omarion Elijah Wilbourn,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 30, 2022

Court of Appeals Case No. 22A-CR-833

Appeal from the Lake Superior Court

The Honorable Diane Ross Boswell, Judge

The Honorable Gina L. Jones, Judge

Trial Court Cause No. 45G03-1809-MR-18

Robb, Judge.

Case Summary and Issues

[1] Omarion Wilbourn was convicted of felony murder. The trial court sentenced Wilbourn to fifty-five years and ordered his sentence to be served consecutive to two unrelated causes for an aggregate sentence of ninety-five years executed in the Indiana Department of Correction ("DOC"). Wilbourn now appeals, raising multiple issues for our review which we restate as: (1) whether there was sufficient evidence to convict Wilbourn of murder; (2) whether Wilbourn's sentence was inappropriate given the nature of the offense and the character of the offender; and (3) whether the trial court abused its discretion by ordering Wilbourn to serve consecutive sentences. We conclude that the State presented sufficient evidence to convict Wilbourn of murder and that his sentence was not inappropriate. However, the trial court abused its discretion by ordering Wilbourn's sentences to be served consecutively without identifying any aggravating circumstances. Therefore, we affirm in part and reverse and remand in part.

Facts and Procedural History

[2] In 2017, Wilbourn lived with his stepfather, Andy Ruiz, and his stepfather's girlfriend, Adriana Garcia. On August 21, Wilbourn left his home between 8:00 p.m. and 9:30 p.m. Wilbourn's brother called Carly Perez, Wilbourn's girlfriend who lived next door, looking for Wilbourn. Perez did not know where Wilbourn was but went out to look for him. Perez was walking around the neighborhood when she saw Wilbourn come out of Lucia Gonzalez's yard.

Perez witnessed Wilbourn running, then stop suddenly to go back and get his bike. Wilbourn stopped at an area down the block by the expressway where there are "a lot of trees and shrubs." Transcript, Volume 3 at 190. Wilbourn then rode past Perez. Perez called Wilbourn's name, but he did not respond. She did not see any blood on him.

[3] Wilbourn returned home and took a shower. Garcia noticed stab wounds "by his rib cage and on his arm" when he got out of the shower. *Id.* at 209. Wilbourn told Garcia that he had gotten into a fight with kids from school at the park and had been stabbed with a fork. Garcia and Ruiz reported the alleged incident to the police.

[4] On August 22, Gonzalez's neighbor Ashley Adkins got a knock on her door and discovered Gonzalez's three children outside her home. One of the children told Adkins that their "[mom] was hurt and that [she] was laying on the floor"[1] and that there was blood everywhere. *Id.* at 37. Adkins called 9-1-1. Officer Enrique Cook of the Hammond Police Department arrived at the scene and discovered Gonzalez lying on the floor dead, with her top pulled up and her pants pulled down. The clothes Gonzalez was wearing at the time of her death were collected and sent for testing. After processing the scene, police realized that Gonzalez's cellphone was missing.

[1] According to Adkins' testimony, the children told her that their father was the one who was injured but it was in fact their mother who was the victim.

[5] That same day, Detective Shawn Ford interviewed Wilbourn regarding the alleged stabbing incident. Detective Ford testified that after speaking to Wilbourn and the individuals Wilbourn alleged were involved, he did not believe Wilbourn's allegation. Detective Ford also went to Ruiz's home and spoke with him. While there, with Ruiz's permission, Detective Ford collected the clothing that Wilbourn had worn the previous day, including a bloody T-shirt that the pair found in the trashcan outside.

[6] Later that day, while on the detective bureau floor, Detective Ford spoke with other detectives who were working on Gonzalez's murder about the whereabouts of Gonzalez's cellphone. The detectives had used cellular phone data to locate the phone. Detective Ford recognized the address as the address to Ruiz's home. Detectives obtained a search warrant, then went to Ruiz's home and found Gonzalez's phone under Wilbourn's pillow. Subsequently, after interviewing Perez, police searched the overgrown area near the expressway where Perez saw Wilbourn stop after leaving Gonzalez's yard. Police located a knife and a crowbar. Forensic scientists tested both items, but the samples collected "failed to demonstrate a sufficient quantity of DNA for further analysis." Tr., Vol. 4 at 216-17.

[7] On September 5, 2018, the State charged Wilbourn with felony murder; robbery resulting in serious bodily injury, a Level 2 felony; and theft, a Class A misdemeanor. The matter proceeded to a jury trial. At trial, pathologist John Feczko testified that Gonzalez's autopsy revealed that she sustained "blunt-force-trauma injuries where she was struck by objects, sharp injuries from sharp

objects such as a knife, stab wounds, lacerations, abrasions, [and] multiple wounds." Tr., Vol. 3 at 67. Feczko determined that blunt force trauma to the head and blood loss from the multitude of injures was the cause of death. Feczko also testified that Gonzalez's injuries were consistent with having been caused by a knife and crowbar but could not opine as to whether the specific knife and crowbar found by police were used.

[8] Gonzalez's and Wilbourn's clothes from the day of the incident were tested. Forensic scientist Kimberly Anderson testified that a minor DNA profile of Gonzalez was found in Wilbourn's underwear but stated that it was possible the DNA could have transferred from Gonzalez's phone to the underwear. *See* Tr., Vol. 4 at 225. Further, forensic scientist Melissa Meyers testified that Y-STR analysis on DNA found on Gonzalez's bra showed the presence of a major profile that is "3,891 times more likely if it originated from [Wilbourn] or any of his male paternal relatives than if it originated from an unknown, unrelated male individual[, which] provides moderate support for the inclusion" of Wilbourn as a contributor. Tr., Vol. 5 at 3.

[9] The jury found Wilbourn guilty of all charges. However, the trial court entered judgment of conviction only on Count I, murder. The trial court then sentenced Wilbourn to fifty-five years and ordered the sentence to run consecutive to two twenty-year sentences Wilbourn was already serving in Cause No. 45G03-1809-

F1-28 and Cause No. 45G03-1809-F1-29 for an aggregate of ninety-five years executed in the DOC.[2]

[10] Wilbourn now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Sufficiency of the Evidence

[11] When reviewing the sufficiency of the evidence required to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). Instead, we consider only the evidence supporting the verdict and any reasonable inferences that can be drawn therefrom. *Morris v. State*, 114 N.E.3d 531, 535 (Ind. Ct. App. 2018), *trans. denied.* We consider conflicting evidence most favorably to the verdict. *Silvers v. State*, 114 N.E.3d 931, 936 (Ind. Ct. App. 2018). "We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt." *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009).

[12] Wilbourn argues that the evidence is insufficient to support his conviction of murder. Wilbourn was charged with murder pursuant to Indiana Code section 35-41-1-1(2), which provides that a person who "kills another human being

[2] Wilbourn was convicted of rape in these two causes.

while committing or attempting to commit . . . robbery" commits murder. Therefore, to obtain a conviction of murder in this case, the State was required to prove beyond a reasonable doubt that: (1) Wilbourn (2) knowingly or intentionally (3) killed Gonzalez (4) while committing or attempting to commit robbery. Ind. Code § 35-42-1-1(2); *see* Ind. Code § 35-41-4-1(a) (stating the standard of proof).

[13] Wilbourn argues that the State failed to meet its burden of proving that he "committed the crime of murder when there was no physical evidence which connected [him] to the scene of the crime." Brief of the Appellant at 11. However, a conviction for murder may be based entirely on circumstantial evidence, *Sallee v. State*, 51 N.E.3d 130, 134 (Ind. 2016), and the circumstantial evidence need not overcome every reasonable hypothesis of innocence; instead, "[i]t is enough if an inference reasonably tending to support the verdict can be drawn from the circumstantial evidence[,]" *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995).

[14] Here, the State presented, in part, the following circumstantial evidence. Perez witnessed Wilbourn exiting Gonzalez's yard and then stop in the area where police later located a knife and crowbar. Wilbourn then returned home and immediately took a shower. When he got out of the shower, Garcia noticed he had stab wounds "by his rib cage and on his arm." Tr., Vol. 3 at 209. Wilbourn told her that he had gotten into a fight with kids from school and was stabbed with a fork. Detective Ford interviewed the individuals Wilbourn alleged were

involved and concluded they were not. Police then tracked Gonzalez's cellphone to Ruiz's home and found it under Wilbourn's pillow.

[15] Further, the State did present physical evidence linking Wilbourn to the crime. Forensic scientist Anderson testified that a minor DNA profile of Gonzalez was found in Wilbourn's underwear. *See* Tr., Vol. 4 at 225. Further, forensic scientist Meyers testified that Y-STR analysis on DNA found on Gonzalez's bra found the presence of a major profile that is "3,891 times more likely if it originated from [Wilbourn] or any of his male paternal relatives than if it originated from an unknown, unrelated male individual." Tr., Vol. 5 at 3.

[16] Wilbourn still argues there is no DNA evidence linking him to the scene of the crime or the suspected murder weapons. However, the State presented testimony explaining the lack of forensic evidence. Forensic scientist Anderson testified that large amounts of blood can overwhelm a scene and obscure the presence of a second person's DNA. *See* Tr., Vol. 4 at 227. Anderson also testified that rain and weather conditions could inhibit the preservation of DNA. *See id.* at 214-15. Here, police found the knife and crowbar outside a week after the murder and Detective Adam Clark testified that the days following the murder were rainy, hot, and humid. *See id.* at 25. Wilbourn's argument is essentially an invitation for us to reweigh the evidence which we will not do. *Drane*, 867 N.E.2d at 146.

[17] Based on the foregoing, we conclude there was sufficient evidence for a jury to conclude that Wilbourn murdered Gonzalez.

II. Inappropriate Sentence

A. Standard of Review

[18] Wilbourn argues that the trial court imposed an inappropriate sentence given the nature of the offense and his character. Indiana Appellate Rule 7(B) permits us to revise a sentence "if, after due consideration of the trial court's decision, [we] find[ ] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Sentencing is "principally a discretionary function" of the trial court to which we afford great deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). "Such deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense . . . and the defendant's character[.]" *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[19] The defendant carries the burden of persuading us that the sentence imposed by the trial court is inappropriate, *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006), and we may look to any factors appearing in the record in making such a determination, *Reis v. State*, 88 N.E.3d 1099, 1102 (Ind. Ct. App. 2017). The question under Rule 7(B) is "not whether another sentence is *more* appropriate; rather, the question is whether the sentence imposed is inappropriate." *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). "The principal role of appellate review should be to attempt to leaven the outliers, . . . not to achieve a perceived 'correct' result in each case." *Cardwell*, 895 N.E.2d at 1225.

B. Nature of the Offense

[20] We begin our analysis of the "nature of the offense" prong with the advisory sentence. *Reis*, 88 N.E.3d at 1104. The advisory sentence is the starting point the Indiana legislature has selected as an appropriate sentence for the committed crime. *Childress*, 848 N.E.2d at 1081. Here, Wilbourn was convicted of felony murder and sentenced to fifty-five years to be served in the DOC. Pursuant to Indiana Code 35-50-2-3(a), a person who commits murder shall be imprisoned for a fixed term between forty-five and sixty-five years, with an advisory sentence of fifty-five years. Wilbourn was given the advisory sentence for his murder conviction.

[21] "Since the advisory sentence is the starting point our General Assembly has selected as an appropriate sentence for the crime committed, the defendant bears a particularly heavy burden in persuading us that his sentence is inappropriate when the trial court imposes the advisory sentence." *Fernbach v. State*, 954 N.E.2d 1080, 1089 (Ind. Ct. App. 2011), *trans. denied.* Therefore, this court is unlikely to consider an advisory sentence inappropriate. *Shelby v. State*, 986 N.E.2d 345, 371 (Ind. Ct. App. 2013), *trans. denied.*

[22] The nature of the offense is found in the details and circumstances of the offenses and the defendant's participation therein. *Lindhorst v. State*, 90 N.E.3d 695, 703 (Ind. Ct. App. 2017). Here, Gonzalez sustained "blunt-force-trauma injuries where she was struck by objects, sharp injuries from sharp objects such as a knife, stab wounds, lacerations, abrasions, [and] multiple wounds." Tr.,

Vol. 3 at 67. Her autopsy revealed at least a dozen stab wounds. Further, when police found Gonzalez, her bra was lifted up and her pants were pulled down. Given the nature of the offense, Wilbourn's advisory sentence was not inappropriate.

C. Character of Offender

[23] We conduct our review of a defendant's character by engaging in a broad consideration of his or her qualities. *Moyer v. State*, 83 N.E.3d 136, 143 (Ind. Ct. App. 2017), *trans. denied.* And a defendant's life and conduct are illustrative of his or her character. *Morris*, 114 N.E.3d at 539. A defendant's criminal history is one relevant factor in analyzing his or her character, the significance of which varies based on the "gravity, nature, and number of prior offenses in relation to the current offense." *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). This court has held that "[e]ven a minor criminal record reflects poorly on a defendant's character[.]" *Reis*, 88 N.E.3d at 1105.

[24] Wilbourn argues that his youth – fifteen at the time of this crime – should be considered when analyzing his character. "[A]ge is a major factor that requires careful consideration" when conducting Rule 7(B) review. *Wilson v. State*, 157 N.E.3d 1163, 1182 (Ind. 2020). There are three primary differences between juvenile and adult offenders: (1) juveniles lack maturity; (2) juveniles are more susceptible to negative influences; and (3) juveniles have less developed character. *See e.g.*, *Brown v. State*, 10 N.E.3d 1, 7 (Ind. 2014). However, these differences do not necessarily render lengthy sentences imposed on juveniles

inappropriate. *See Wilson*, 157 N.E.2d at 1183 (stating that "lifetime imprisonment may sometimes be appropriate for a juvenile.").

[25] Here, Wilbourn's juvenile criminal history includes theft, resisting law enforcement, battery, and two convictions in adult court of rape. *See* Appendix of the Appellant, Volume II at 199-201. Accordingly, despite Wilbourn's youth, his criminal history demonstrates poor character. Therefore, given Wilbourn's character, his sentence is not inappropriate.

III. Abuse of Sentencing Discretion

[26] Subject to the appellate courts' review and revise power, sentencing decisions are within the sound discretion of the trial court and are reviewed only for an abuse of that discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs if the 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." *Id*. (citation omitted).

[27] Our supreme court explained in *Anglemyer*:

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement 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.

[28] Wilbourn argues that "the trial court abused its discretion when it failed to articulate a reason for the imposition of consecutive sentences." Br. of the Appellant at 19. The decision to impose consecutive or concurrent sentences lies within the trial court's sound sentencing discretion. *Gellenbeck v. State*, 918 N.E.2d 706, 712 (Ind. Ct. App. 2009); *see also* Ind. Code § 35-50-1-2(c) (stating, in part, that the trial court "may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time"). However, the trial court must find at least one aggravating circumstance before imposing consecutive sentences. *Owens v. State*, 916 N.E.2d 913, 917 (Ind. Ct. App. 2009). And the trial court must provide a rationale for the imposition of a consecutive sentence. *McBride v. State*, 992 N.E.2d 912, 919 (Ind. Ct. App. 2013), *trans. denied.* We may review both the written and oral sentencing statements in order to identify the findings of the trial court. *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007). Here, the trial court did not identify any aggravating or mitigating circumstances at the sentencing hearing. *See* Tr., Vol. 5 at 191-92. Further, the trial court did not include any statement of aggravators or mitigators in its written sentencing statement. *See* App. of the Appellant, Vol. II at 214. As such, the trial court abused its discretion by imposing consecutive sentences without articulating any supporting aggravating factors. *Owens*, 916 N.E.2d at 917.

Conclusion

[29] We conclude the State presented sufficient evidence to convict Wilbourn of murder and that his sentence was not inappropriate given the nature of the offense and his character. However, the trial court abused its discretion by ordering his sentence to be served consecutive to other unrelated sentences without articulating any aggravating circumstances. Accordingly, we affirm in part and reverse and remand in part with instructions for the trial court to either impose a concurrent sentence or to enumerate aggravating circumstances and to provide its rationale for the imposition of consecutive sentences.

[30] Affirmed in part, reversed and remanded in part.

Mathias, J., and Foley, J., concur.