MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Spenser G. Benge
The Law Office of Spenser G. Benge
Anderson, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Indiana Attorney General

Steven J. Hosler
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Eric J. Smith,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

October 31, 2023

Court of Appeals Case No. 23A-CR-692

Appeal from the Sullivan Superior Court

The Honorable Hugh R. Hunt, Judge

Trial Court Cause No. 77D01-2110-F5-674

Memorandum Decision by Judge Crone
Judges Riley and Mathias concur.

Crone, Judge.

Case Summary

[1] Following a jury trial, Smith was convicted of operating a motor vehicle while privileges are forfeited for life, a level 5 felony, and was sentenced to six years executed. On appeal, Smith argues that the trial court abused its discretion in refusing his necessity defense instruction and in considering aggravating and mitigating factors at sentencing. Smith also contends that his sentence is inappropriate in light of the nature of the offense and his character and that it violates the Indiana Constitution's proportionality clause. We affirm.

Facts and Procedural History

[2] On October 10, 2021, Sullivan County Sheriff's Deputy Colt Thompson ran the license plate of a passing pickup truck and discovered that its registered owner, Smith, "was a habitual traffic violator [HTV] for life[,]" i.e., that Smith's driving privileges had been forfeited for life. Tr. Vol. 2 at 135. Deputy Thompson stopped the truck, confirmed that the driver was Smith, and confirmed that Smith "was HTV for life[.]" *Id*. at 140. The deputy determined that Smith's passenger, Brenda St. John, "had a valid driver's license." *Id*. St. John told the deputy that "she was dumped out in the coal mine by her boyfriend, that they had been into a domestic situation, and she had called [Smith] to come pick her up." *Id*. at 144. Smith gave the deputy "the same story[.]" *Id*. at 145. Deputy Thompson arrested Smith.

[3] The State charged Smith with operating a motor vehicle while privileges are forfeited for life, a level 5 felony. A jury trial was held in February 2023. The

State presented testimony from Deputy Thompson, as well as evidence that Smith's driving privileges were forfeited for life in 2010. Smith testified that he had known St. John for approximately thirty years. According to Smith, on October 10, St. John had called him "[v]ery distraught" and "crying profusely[,]" saying that she "and her boyfriend had gotten into a big fight and that he'd slapped her around, threw her and all of her belongings out of the car, that she was out on the rural county road[.]" *Id*. at 174. "She stated that she had called multiple people and couldn't get anybody to answer." *Id*. at 178-79. Smith testified that he drove toward St. John's location and was flagged down by two farmers who had picked her up in their truck. The farmers "threw her belongings in the back of [Smith's] truck, and [St. John] hopped in the truck." *Id*. at 175. Smith claimed that St. John was in no condition to drive his truck at that point because "she was pretty much in hysterics for a while[.]" *Id*. at 176. On cross-examination, Smith acknowledged that St. John had cell service and "could have called the police[.]" *Id*. at 178. Smith also acknowledged that "calling the cops would have been an adequate alternative to [him] driving as an HTV[.]" *Id*. at 184.

[4] At the close of evidence, Smith tendered an instruction on the defense of necessity, which the trial court refused on the basis that Smith himself admitted that "there was another alternative" to him driving his truck to pick up St. John. *Id*. at 193. The jury found Smith guilty as charged. At sentencing, the trial court found Smith's extensive criminal history, including his eleven driving-related convictions, as an aggravating factor, and it found no mitigating factors. The

court remarked that Smith had been convicted of the same offense in Porter County in 2014 and was given "the sentence of six years at the Department of Correction[] with two years suspended, so it's hard for me to go lower than that […] when we've got that." *Id.* at 243. The court sentenced Smith to the statutory maximum of six years executed. This appeal ensued.

Discussion and Decision

Section 1 – The trial court did not abuse its discretion in refusing Smith's necessity defense instruction.

[5] Smith first contends that the trial court erred in refusing his necessity defense instruction. "The giving of jury instructions is a matter within the sound discretion of the trial court, and we review the trial court's refusal to give a tendered instruction for an abuse of that discretion." *Howard v. State*, 755 N.E.2d 242, 247 (Ind. Ct. App. 2001).

> Generally, we will reverse a trial court for failure to give a tendered instruction if: (1) the instruction is a correct statement of the law; (2) it is supported by the evidence; (3) it does not repeat material adequately covered by other instructions; and (4) the substantial rights of the tendering party would be prejudiced by failure to give it.

Id.

[6] In Indiana, the law "is well settled that a defendant in a criminal case is entitled to have the jury instructed on any theory or defense which has some foundation in the evidence." *Toops v. State*, 643 N.E.2d 387, 389 (Ind. Ct. App. 1994).

"And this is so even if the evidence is weak or inconsistent." *Id*. at 390. As reflected in Smith's tendered instruction, "six factors must be present in order to establish a necessity defense." *Hernandez v. State*, 45 N.E.3d 373, 377 (Ind. 2015). One of those factors is that "[t]here was no adequate alternative to the commission of the act[.]" *Id*. at 376.[1] Here, the act at issue was operating a motor vehicle while privileges are forfeited for life, and Smith himself admitted that there *was* an adequate alternative to the commission of that act: calling the police for assistance. Accordingly, we conclude that Smith's instruction was not supported by the evidence, and thus the trial court did not abuse its discretion in refusing it.

Section 2 – The trial court did not abuse its discretion in sentencing Smith.

[7] Smith asserts that the trial court erred in considering aggravating and mitigating circumstances at sentencing. "Sentencing is a discretionary function of the trial court, which we review only for an abuse of discretion." *Scott v. State*, 162 N.E.3d 578, 581 (Ind. Ct. App. 2021). "A trial court abuses its discretion 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*. at 582 (citation and quotation marks omitted).

---

[1] Another factor is that "the act charged as criminal *was the result of an emergency and* was done to prevent a significant harm[.]" *Hernandez*, 45 N.E.3d at 376 (emphasis added). The State points out that Smith's tendered instruction omits the italicized language and thus is not a correct statement of the law.

> A trial court may abuse its discretion at sentencing by: (1) failing to enter a sentencing statement, (2) entering a sentencing statement that includes reasons for imposing a sentence that are unsupported by the record, (3) leaving out factors advanced for consideration and supported by the record, or (4) providing reasons that are improper as a matter of law.

Addis v. State, 212 N.E.3d 183, 185 (Ind. Ct. App. 2023). "A trial court is not obligated to credit proffered mitigating factors in the same manner as the defendant, nor explain why a proffered mitigating circumstance was not found." *T.A.D.W. v. State*, 51 N.E.3d 1205, 1211 (Ind. Ct. App. 2016). "To support the allegation that the trial court failed to find a valid mitigating circumstance, a defendant must demonstrate that mitigating evidence is both significant and clearly supported by the record." *Addis*, 212 N.E.3d at 185 (citation, quotation marks, and brackets omitted).

[8] Smith contends that the trial court abused its discretion in considering his driving-related convictions as an aggravating circumstance, characterizing them as an element of his offense. Our supreme court has stated that "[w]here a trial court's reason for imposing a sentence greater than the advisory sentence includes material elements of the offense, absent something unique about the circumstances that would justify deviating from the advisory sentence, that reason is improper as a matter of law." *Gomillia v. State*, 13 N.E.3d 846, 852-53 (Ind. 2014) (citation and quotation marks omitted). Smith argues,

> [T]he State convicted Mr. Smith of driving a motor vehicle after his license was suspended as a Habitual Traffic Violator. Thus, Mr. Smith being a Habitual Traffic Violator was an element of

> his offense. When the trial court then found aggravation in his criminal history, noting especially his prior driving offenses – including the offenses which caused him to be adjudged a Habitual Traffic Violator and his convictions for operating a motor vehicle after being adjudged a Habitual Traffic Violator – it found an element of Mr. Smith's offense in aggravation for his sentence. This was "improper as a matter of law."

Appellant's Br. at 28 (quoting *Gomillia*, 13 N.E.3d at 853).

[9] The only elements of Smith's offense are that he operated a motor vehicle after his driving privileges were forfeited for life. Ind. Code § 9-30-10-17(a)(1). Smith cites no authority for the proposition that the predicate offenses that led to the suspension of his driving privileges for life, or those that were committed after the suspension but prior to the instant offense, are elements of that offense. Moreover, as the State points out, Smith has been convicted of numerous other felonies and misdemeanors. Accordingly, we find no abuse of discretion here.

[10] Smith also contends that the trial court abused its discretion in rejecting three proffered mitigators: (1) there were substantial grounds to justify the offense; (2) the offense neither caused nor threatened serious harm to persons or property; and (3) the offense was the result of circumstances unlikely to recur. We have already determined that there were no substantial grounds to justify the offense, in that Smith himself admitted that there was an adequate alternative to its commission. Regarding the second proposed mitigator, the trial court told Smith,

> Efforts to try to change you, to make you realize the seriousness of driving without a license, you know, I don't know, we haven't been able to get in your head that you just can't do that. You just keep doing it. And you present a danger to the public when you do that. Because, I mean, if you're not licensed, you're not insured. I mean, so you're -- you know, you're out there, you can be involved in a wreck and not have the insurance coverage. I mean, that presents a whole host of issues there.

Tr. Vol. 2 at 243. We find no abuse of discretion in this assessment. And as for the third proffered mitigator, although it may be unlikely that another of Smith's acquaintances will become stranded in the middle of nowhere, it is practically certain that Smith will once again operate a motor vehicle, as evidenced by his criminal history and his statement at the sentencing hearing that "I don't drive unless I absolutely have to." *Id*. at 233. In sum, Smith has failed to establish that the trial court abused its discretion in any respect.

Section 3 – Smith has failed to establish that his sentence is inappropriate in light of the nature of the offense and his character.

[11] Smith also asks us to reduce his sentence pursuant to Indiana Appellate Rule 7(B), which states, "The Court may revise a sentence authorized by statute 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." Smith has the burden of establishing that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Although Appellate Rule 7(B) requires us to consider

both the nature of the offense and the character of the offender, the appellant is not required to prove that each of those prongs independently renders his sentence inappropriate. *Connor v. State*, 58 N.E.3d 215, 218 (Ind. Ct. App. 2016); *see also Moon v. State*, 110 N.E.3d 1156, 1163-64 (Ind. Ct. App. 2018) (Crone, J., concurring in part and concurring in result in part) (quotation marks omitted) (disagreeing with majority's statement that Rule 7(B) "plainly requires the appellant to demonstrate that his sentence is inappropriate in light of both the nature of the offenses and his character."). Rather, the two prongs are separate inquiries that we ultimately balance to determine whether a sentence is inappropriate. *Connor*, 58 N.E.3d at 218.

[12] When reviewing a sentence, our principal role is to leaven the outliers rather than necessarily achieve what is perceived as the correct result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). "We do not look to determine if the sentence was appropriate; instead we look to make sure the sentence was not inappropriate." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). "[S]entencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. "Such deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). As we assess the nature of the offense and character of the offender, "we may look to any

factors appearing in the record." *Boling v. State*, 982 N.E.2d 1055, 1060 (Ind. Ct. App. 2013). Ultimately, whether a sentence should be deemed inappropriate "turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell*, 895 N.E.2d at 1224. Furthermore, when conducting an appropriateness review, the appellate court may consider all penal consequences of the sentence imposed including the manner in which the sentence is ordered served. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

[13] Regarding the nature of the offense, we note that "the advisory sentence is the starting point the Legislature selected as appropriate for the crime committed." *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). The sentencing range for a level 5 felony is between one and six years, with the advisory sentence being three years. Ind. Code § 35-50-2-6. Smith received a fully executed six-year sentence. In claiming that the nature of his offense does not merit this punishment, Smith emphasizes its nonviolent nature and the lack of resulting harm. Be that as it may, this was not Smith's first conviction for the same offense. As the State observes, "Smith chose to drive a car despite his 11 prior driving convictions and his status as a habitual traffic violator for life[,]" when either he or St. John could have called the police for help, and he "continued to drive despite her ability to drive or the potential to ask the two farmers for help." Appellee's Br. at 23-24. We find no grounds for reducing Smith's sentence based on the nature of his offense. *See Kunberger v. State*, 46 N.E.3d 966, 973 (Ind. Ct. App. 2015) ("Our consideration of the nature of the offense recognizes the range of conduct

that can support a given charge and the fact that the particulars of a given case may render one defendant more culpable than another charged with the same offense.").

[14] Likewise, Smith's character does not support a reduced sentence. An offender's character is shown by his "life and conduct." *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019) (citation omitted). We assess a defendant's character by engaging in a broad consideration of his qualities. *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). A typical factor we consider when examining a defendant's character is criminal history, with its significance varying based on the gravity, nature, and number of prior offenses. *See McFarland v. State*, 153 N.E.3d 369, 374 (Ind. Ct. App. 2020), *trans. denied* (2021). Since 1986, Smith has been convicted of fifteen misdemeanors and eight felonies, including resisting law enforcement, battery, possession of marijuana, public intoxication, disorderly conduct, criminal recklessness, operating while intoxicated, and operating after being adjudged an HTV. He has also violated probation eight times, which indicates that "prior showings of leniency and attempts of rehabilitation have failed." *Brock v. State*, 983 N.E.2d 636, 643 (Ind. Ct. App. 2013). Smith's prior convictions and statements at the sentencing hearing demonstrate that he does not take either the law or the lifetime forfeiture of his driving privileges seriously, and he has failed to establish that his fully executed six-year sentence is inappropriate.

Section 4 – Smith's sentence does not violate the Indiana Constitution's proportionality clause.

[15] Finally, Smith argues that his sentence is unconstitutionally disproportionate to the nature of his offense. Article 1, Section 16 of the Indiana Constitution provides in pertinent part that "[a]ll penalties shall be proportioned to the nature of the offense." Our supreme court has stated that although Article 1, Section 16 "sweeps somewhat more broadly" than the Eighth Amendment's bar on "cruel and unusual" punishments, "its protections are still narrow. It is violated only when the criminal penalty is not graduated and proportioned to the nature of the offense[.]" *Knapp v. State*, 9 N.E.3d 1274, 1289 (Ind. 2014) (citation and quotation marks omitted), *cert. denied* (2015). More precisely, a sentence violates the proportionality clause where it is so severe and entirely out of proportion to the gravity of offense committed as to shock public sentiment and violate the judgment of a reasonable people. *Pritscher v. State*, 675 N.E.2d 727, 731 (Ind. Ct. App. 1996).

[16] Smith cherry-picks several violent or salacious level 5 felony offenses (such as involuntary manslaughter, reckless homicide, robbery, and child solicitation)[2] and suggests that, by comparison, the sentence that he received for his level 5 felony "traffic" offense is disproportionate. Appellant's Br. at 31. Smith's

[2] We note that other level 5 felony offenses include selling cigarette packages with counterfeit tax stamps (Indiana Code Section 6-7-1-21), fraudulently representing oneself as an agent of a postsecondary propriety educational institution (Section 22-4.1-21-38), destroying or altering a livestock brand to conceal the identity of the livestock's owner (Section 15-19-6-20), and disbursing funds in a funeral trust for unauthorized purposes (Section 30-2-9-7).

argument is misguided. *See Baird v. State*, 604 N.E.2d 1170, 1183 (Ind. 1992) (stating that Article 1, Section 16 "does not mandate comparative proportionality review, but review based on the nature of the instant offense and offender"), *cert. denied* (1993). Smith asserts that his "non-violent driving offense … harmed nobody and nothing and was done to help someone in serious need[,]" Appellant's Br. at 31, but we have already dispensed with this assertion above. Smith received a six-year sentence with two years suspended to probation when he committed the same offense in 2014, and he obviously failed to curb his behavior. His fully executed six-year sentence in this case is not out of proportion to the gravity of the offense, so we affirm it.

[17] Affirmed.

Riley, J., and Mathias, J., concur.