MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Frederick Vaiana
Voyles Vaiana Lukemeyer Baldwin & Webb
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Tyler G. Banks
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

David Robert Vu,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 29, 2023

Court of Appeals Case No. 23A-CR-1214

Appeal from the Hamilton Superior Court

The Honorable William J. Hughes, Judge

Trial Court Cause No. 29D03-2211-F5-7724

Memorandum Decision by Judge Bailey
Judges May and Felix concur.

Bailey, Judge.

Case Summary

[1] David Robert Vu appeals the six-year sentence imposed upon him following his conviction for Strangulation, as a Level 5 felony.[1] He presents the sole issue of whether his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] On October 28, 2022, Vu and seventeen-year-old C.S. were guests in the home of Steven Slinkard. Slinkard offered to show C.S. how to prepare a recipe and C.S. responded that he would watch Slinkard make his "little bitch noodles." (Tr. Vol. II, pg. 246.) Vu approached C.S. from behind and placed him in a chokehold, rendering him unconscious "rather quickly." (*Id.* at 247.) Slinkard watched C.S.'s eyes "roll to the [back] of his head." (Tr. Vol. III, pg. 40.) Fearing for C.S.'s life, Slinkard grabbed a bread knife and held it near Vu's neck. Vu released C.S., who slumped to the floor and laid there one to two minutes before regaining consciousness. Vu stated that he thought C.S. and Slinkard had been "talking shit" about Vu "behind his back." (*Id.* at 45.)

[3] On November 2, the State charged Vu with battery resulting in serious bodily injury and strangulation. The State also alleged that the strangulation offense should be elevated to a Level 5 felony based upon Vu's prior conviction for strangulation. A jury acquitted Vu of battery and convicted him of

[1] Ind. Code § 35-42-2-9.

strangulation. Vu admitted to having a prior conviction for strangulation. On April 28, 2023, the trial court imposed upon Vu a six-year sentence. Vu now appeals.

Discussion and Decision

[4] Vu contends that his sentence is inappropriate in light of the nature of the offense and his character. Indiana Appellate Rule 7(B) provides that "[t]he 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."

[5] The sentencing range for a Level 5 felony is one year to six years, with an advisory sentence of three years. I.C. § 35-50-2-6(b). In imposing the maximum sentence upon Vu, the trial court stated that there were no mitigating factors but there were several aggravating factors. More specifically, the trial court found that Vu had an "extensive history of criminal behavior," and a "history of violence while incarcerated." (Tr. Vol. III, pg. 134.) The trial court observed that Vu had "failed every probation as far as I can tell." (*Id.* at 135.) The court also addressed the circumstances of the crime, which involved C.S. lying on the floor for "a couple of minutes afterwards" and his friend's "worr[y] that he might not even survive." (*Id.* at 134.)

[6] This Court has observed that "[t]he advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed."

Sanders v. State, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017). And the Indiana Supreme Court has explained that:

> The principal role of appellate review should be to attempt to leaven the outliers … but not achieve a perceived "correct" result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Defendant has the burden to persuade us that the sentence imposed by the trial court is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind.), as amended (July 10, 2007), decision clarified on reh'g, 875 N.E.2d 218 (Ind. 2007).

Shoun v. State, 67 N.E.3d 635, 642 (Ind. 2017) (omission in original).

[7] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. Whether we regard a sentence as inappropriate at the end of the day turns on "our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case." *Id*. at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] 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).

[8] As to the nature of the offense, Vu argues that the jury's acquittal on the battery count amounted to a rejection of testimony that C.S. was rendered unconscious and thus, "[t]he trial court sentenced Vu for a crime it wished he were convicted of, rather than the crime he was convicted of." Appellant's Brief at 11. But a sentencing court is not precluded from considering the nature and circumstances of the crime for which the defendant is being sentenced although the defendant has been acquitted on another charge. *Deloney v. State*, 938 N.E.2d 724, 732 (Ind. Ct. App. 2010). In short, Vu simply presents no argument attempting to portray in a positive light the nature of his offense.

[9] As for Vu's character, he has a significant history of delinquency and criminal offenses. As a juvenile, he was twice adjudicated delinquent upon allegations of battery. He was also adjudicated delinquent for consuming alcohol and committing what would be criminal trespass if committed by an adult. He was placed on juvenile probation three times, and nine allegations of probation violations ensued. As an adult in 2014, he was convicted of misdemeanor possession of paraphernalia. Vu was placed on probation, but that probation was revoked. In 2015, he was convicted of felony possession of paraphernalia. Again, he was placed on probation and his probation was revoked. Also in 2015, Vu was convicted of burglary, as a Level 4 felony. He was placed on probation and again his probation was revoked. In 2017, Vu was convicted of Level 4 felony possession of a firearm. He was placed in community corrections, but his placement was revoked. In 2021, he committed the Level 6 felony of unlawful residential entry. Also in 2021, he was convicted of

strangulation and placed on probation. That probation was revoked. He committed misdemeanor domestic battery on February 4, 2021; on the following day, he committed strangulation as a Level 6 felony. He was on probation in two cases when he strangled C.S.

[10] Vu argues that his sentence is inappropriate because his violent tendencies are related to his substance abuse, and he points to defense counsel's assertion at the sentencing hearing that Vu "needs treatment more than he needs anything else." Appellant's Brief at 11. Indeed, Vu's wife testified that his violence came to light only when he was under the influence of intoxicating substances. However, she further testified that she had been the victim in "several" of Vu's criminal cases; she had actively sought a treatment center for Vu; and he had availed himself of no such opportunity. (Tr. Vol. III, pg. 128.) Vu has identified no evidence portraying his character in a positive light.

Conclusion

[11] Vu has not persuaded us that his sentence is inappropriate.

[12] Affirmed.

May, J., and Felix, J., concur.