MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Cory N. Pollard,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

February 16, 2024

Court of Appeals Case No.
23A-CR-1310

Appeal from the Jackson Circuit Court

The Honorable Richard W. Poynter, Judge

Trial Court Cause No.
36C01-2105-F3-6

Memorandum Decision by Judge Tavitas
Judges Mathias and Weissmann concur.

Tavitas, Judge.

Case Summary

[1] Cory Pollard appeals his convictions for aggravated battery, a Level 3 felony, and unlawful possession of a firearm by a serious violent offender, a Level 4 felony. He also appeals his sentence of twelve years in the Department of Correction ("DOC"). Pollard argues that: (1) the trial court abused its discretion by permitting the State to amend the charging information to add an additional count after the omnibus date; (2) the State presented insufficient evidence to support his convictions; and (3) his sentence is inappropriate. We are not persuaded by Pollard's arguments. Accordingly, we affirm.

Issues

[2] Pollard raises three issues, which we restate as:

I. Whether the trial court abused its discretion by permitting the State to add an additional count after the omnibus date.

II. Whether the State presented sufficient evidence to support Pollard's convictions.

III. Whether Pollard's sentence is inappropriate.

Facts

[3] On August 3, 2019, Pollard arranged to meet with Deldrake Ealy, whom he had known for approximately one year, at a liquor store in a busy part of

Seymour. The meeting concerned a $400 drug debt Ealy owed Pollard for heroin. Ealy had informed Pollard that he did not have the money yet, but Pollard insisted on meeting Ealy.

[4] The meeting took place in the evening. Pollard drove to the liquor store and told Ealy to get in the car. Pollard appeared to be angry. He and Ealy drove away from the store, and at a stoplight, Ealy "tried to give the drugs back . . . ." Tr. Vol. II p. 118. Pollard, however, would not accept the drugs and "got pretty upset . . . ." *Id*. Ealy then tried to leave the car; however, Pollard locked the door, pulled out a gun, and struck Ealy in the mouth with it. A physical confrontation ensued, and Ealy eventually managed to unlock the door. As Ealy was "getting out" of the car, Pollard shot him at least three times. *Id*. at 118.

[5] Ealy walked to a nearby business, where police were called. Ealy was taken to the hospital and treated for gunshot wounds to the lower abdomen and groin, injuries which could have been fatal. Meanwhile, Pollard drove away from the scene. Brian Dodd, who witnessed the shooting, attempted to follow him. Dodd saw Pollard "spe[e]d through a stop light" and "weav[e] in and out of traffic . . . ." *Id*. at 140-141. Dodd contacted law enforcement, and Pollard was arrested later that evening.

[6] Law enforcement recovered a cartridge casing on a duffel bag in the backseat of Pollard's car. The duffel bag contained a set of scales and small plastic baggies.

Additionally, law enforcement recovered a Taurus 9 mm handgun along the side of the road on which Pollard had been driving.

[7] On May 17, 2021, the State charged Pollard with three counts: Count I: aggravated battery, a Level 3 felony; Count II: battery by means of a deadly weapon, a Level 5 felony; and Count III: pointing a firearm, a Level 6 felony. On March 17, 2023, the State filed a motion to amend the charging information to add Count IV: unlawful possession of a firearm by a serious violent felon, a Level 4 felony. The trial court held a hearing on the State's motion on April 4, 2023. Pollard objected to the amendment based on the "proximity to the trial" and "duration of the case." *Id*. at 14. The trial court permitted the State to amend the information over Pollard's objection.

[8] A jury trial was held on April 11, 2023. Ealy admitted that he originally told law enforcement that he was shot in a "drive-by shooting" and later told law enforcement that the shooting was over a woman. *Id*. at 131. Ealy explained that he was "disoriented" after the shooting and "didn't want to let the police know what was going on." *Id*. at 132. Dodd testified that Pollard shot Ealy as Ealy stepped outside of the car.

[9] Pollard testified in his own defense and claimed that he shot Ealy in self-defense. Pollard testified to the following: Pollard did not know Ealy before the shooting. Pollard drove to the liquor store to buy beer, and Ealy "flagged" him down. *Id*. at 245. Ealy then entered the car uninvited and offered to sell Pollard a gun. Pollard indicated that he did not want to buy the gun, and Ealy

demanded that Pollard "just drive." *Id*. at 246. When Pollard stopped at a stop light, he and Ealy "struggle[d] for the gun" and "in the process [the gun] went off." *Id*. at 248. Pollard admitted that he drove off without contacting law enforcement and that he "got rid" of the gun. *Id*.

[10] The jury found Pollard guilty of Count I: aggravated battery, and Count III: pointing a firearm, and not guilty of Count II: battery by means of a deadly weapon. As for Count IV, unlawful possession of a firearm by a serious violent felon, the jury found that Pollard knowingly or intentionally possessed a firearm. During the second phase of the trial, Pollard stipulated that he was previously convicted of dealing in cocaine, a Class A felony, in Jackson County in 2003. The jury then found Pollard guilty of Count IV. The trial court entered judgments of conviction on Counts I and IV and declined to enter judgment of conviction on Count III based on double jeopardy principles.

[11] At Pollard's sentencing hearing, the trial court sentenced Pollard to twelve years on Count I and nine years on Count IV, all executed, to be served concurrently in the DOC. In discussing this sentence, the trial court noted that Pollard nearly killed Ealy over a $400 drug debt; that Pollard fled the scene; and that, after Pollard got rid of the gun, anyone "could have picked up that gun and found it," and other people "could have been hurt with it." Tr. Vol. III p. 67. Pollard now appeals.

Discussion and Decision

I. Abuse of Discretion—Amendment to the Charging Information

[12] Pollard first argues that the trial court abused its discretion by permitting the State to amend the charging information several weeks before trial to add Count IV: unlawful possession of a firearm by a serious violent felon, a Level 4 felony. We conclude that the trial court did not abuse its discretion.

[13] An amendment to the charging information "may be either a matter of form or substance." *Bright v. State*, 205 N.E.3d 1055, 1059 (Ind. Ct. App. 2023) (citing *Erkins v. State*, 13 N.E.3d 400, 405 (Ind. 2014); Ind. Code § 35-34-1-5)). An amendment is one of substance "'only if it is essential to making a valid charge of the crime.'" *Id*. (quoting *Erkins*, 13 N.E.3d at 406). The State's amendment here is one of substance because an amendment that adds a new count "is patently one of substance as 'charg[ing] the commission of a separate crime . . . is unquestionably essential to making a valid charge of the crime.'" *Mays v. State*, 120 N.E.3d 1070, 1080 (Ind. Ct. App. 2019) (quoting *Fajardo v. State*, 859 N.E.2d 1201, 1208 (Ind. 2007), *superseded by statute*), *trans. denied*.

[14] Amendments of substance are governed by Indiana Code Section 35-34-1-5(b), which provides:

> The indictment or information may be amended in matters of substance and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant at any time:
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> (1) up to:

> (A) thirty (30) days if the defendant is charged with a felony; or
>
> (B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;
>
> before the omnibus date; or
>
> (2) before the commencement of trial;
>
> if the amendment does not prejudice the substantial rights of the defendant. When the information or indictment is amended, it shall be signed by the prosecuting attorney or a deputy prosecuting attorney.

[15] Pollard argues that the trial court abused its discretion by permitting the State to amend the charging information to add Count IV because the amendment prejudiced his substantial rights and was filed after the omnibus date. The amendment prejudiced his substantial rights, Pollard argues, because Pollard was "left to contend with a new theory of the case and the impact of new evidence . . . ." Appellant's Br. p. 13.

[16] We are not persuaded that the amendment prejudiced Pollard's substantial rights.

> "A defendant's substantial rights 'include a right to sufficient notice and an opportunity to be heard regarding the charge; and, if the amendment does not affect any particular defense or change the positions of either of the parties, it does not violate these rights.'" *Erkins*, 13 N.E.3d at 405 (quoting *Gomez v. State*, 907 N.E.2d 607, 611 (Ind. Ct. App. 2009), *trans. denied*). "'Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges.'" *Id.* at 405-06 (quoting *Sides v. State*, 693 N.E.2d 1310,

1313 (Ind. 1998), *abrogated on other grounds by Fajardo*, 859 N.E.2d 1201).

Bright, 205 N.E.3d at 1059.

[17] Here, the State amended the charging information to add Count IV, unlawful possession of a firearm by a serious violent felon. The "possession" element of this offense "'may rest upon proof of actual . . . possession,'" which is "'the direct physical control of the gun.'" *McCoy v. State*, 153 N.E.3d 363, 366 (Ind. Ct. App. 2020) (quoting *Smith v. State*, 113 N.E.3d 1266, 1269 (Ind. Ct. App. 2018)). Pollard had sufficient notice that his possession of a firearm would be an issue at trial. The State alleged, in Count III of the original charging information, that "on or about August 3, 2019 . . . Pollard did knowingly or intentionally point a firearm at [Ealy] . . . ." Appellant's App. Vol. II p. 19. By alleging that Pollard pointed a firearm, the State necessarily alleged that Pollard had possession of that firearm. Pollard, thus, had a reasonable opportunity to prepare for and defend against Count IV, and the amendment did not prejudice Pollard's substantial rights.

[18] Because the amendment did not prejudice Pollard's substantial rights, the State was not required to file the amendment prior to the omnibus date. Accordingly, the trial court did not abuse its discretion by permitting the State to amend the charging information.

II. Sufficiency of the Evidence

[19] Pollard next argues that the State presented insufficient evidence to support his convictions. Specifically, he argues that the evidence was insufficient to rebut his claim of self-defense. We conclude, however, that the evidence was sufficient.

A. Standard of Review

[20] When a defendant's self-defense claim is unsuccessful at trial, and the defendant challenges the sufficiency of the evidence to rebut his claim of self-defense on appeal, we employ the same standard of review as we do for other sufficiency of the evidence claims. *Stewart v. State*, 167 N.E.3d 367, 376 (citing *Hughes v. State*, 153 N.E.3d 354, 361 (Ind. Ct. App. 2020)), *trans. denied.* Sufficiency of evidence claims "warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility." *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020) (citing *Perry v. State*, 638 N.E.2d 1236, 1242 (Ind. 1994)). "When there are conflicts in the evidence, the jury must resolve them." *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022).

[21] On appeal, we consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Powell*, 151 N.E.3d at 262 (citing *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). "We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt." *Id.* at 263. We affirm the conviction "unless no

reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Sutton v. State*, 167 N.E.3d 800, 801 (Ind. Ct. App. 2021) (quoting *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007)).

[22] Pollard argues that he acted in self-defense. "Self-defense is a legal justification for an otherwise criminal act." *Stewart*, 167 N.E.3d at 376 (citing *Gammons v. State*, 148 N.E.3d 301, 304 (Ind. 2020)). Indiana Code Section 35-41-3-2 governs claims of self-defense and provides, in relevant part:

> (c) A person is justified in using reasonable force against any other person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. However, a person:
>
> (1) is justified in using deadly force; and
>
> (2) does not have a duty to retreat;
>
> if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony . . . .

Regarding the reasonable belief of imminent harm element, the "'defendant must satisfy both an objective and subjective standard; he must have actually believed deadly force was necessary to protect himself, and his belief must be one that a reasonable person would have held under the circumstances.'"

Washington v. State, 997 N.E.2d 342, 349 (Ind. 2013) (quoting *Littler v. State*, 871 N.E.2d 276, 279 (Ind. 2007)).

[23] If a defendant raises a self-defense claim that finds support in the evidence, the State has the burden of negating at least one of the necessary elements. *Stewart*, 167 N.E.3d at 376 (citing *Hughes*, 153 N.E.3d at 361). The State may meet this burden by rebutting the defense directly—by affirmatively showing the defendant did not act in self-defense—or by simply relying on the sufficiency of its evidence in its case-in-chief. *Id.* (citing *Miller v. State*, 720 N.E.2d 696, 700 (Ind. 1999)).

B. The evidence was sufficient to rebut Pollard's self-defense claim

[24] We conclude that the evidence was sufficient to rebut Pollard's self-defense claim. Pollard argues that he proved his self-defense claim because "under fear of death or great bodily harm, [Pollard] quickly stopped the car and struggled for Ealy's gun. Uncertain if Ealy would continue to attack him or reach for another weapon, Pollard shot at Ealy to prevent further violence." Appellant's Br. p. 16.

[25] At trial, however, the State presented evidence that Ealy was unarmed and that Pollard shot Ealy several times as Ealy was attempting to leave the car. This evidence was sufficient to undercut the reasonable belief of imminent harm element of Pollard's self-defense claim. *See Brown v. State*, 738 N.E.2d 271, 273 (Ind. 2000) (noting that "'the firing of multiple shots undercuts a claim of self-defense'" (quoting *Miller*, 720 N.E.2d at 700); *Smith v. State*, 470 N.E.2d 1316,

1318-19 (Ind. 1984) (finding evidence sufficient to rebut self-defense claim when defendant shot unarmed victim as victim was attempting to run away). To the extent Pollard suggests that Ealy's testimony was not credible, the jury was aware of Ealy's inconsistent statements, and we cannot reweigh the evidence. The evidence was sufficient to rebut Pollard's self-defense claim.

III. Inappropriate Sentence

[26] Lastly, Pollard argues that his sentence is inappropriate. Pollard has not carried his burden of persuasion.

[27] The Indiana Constitution authorizes independent appellate review and revision of a trial court's sentencing decision. *See* Ind. Const. art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). Our Supreme Court has implemented this authority through Indiana Appellate Rule 7(B), which allows this Court to revise a sentence when it is "inappropriate in light of the nature of the offense and the character of the offender."[1] Our review of a sentence under Appellate Rule 7(B) is not an act of second guessing the trial court's sentence; rather, "[o]ur posture on appeal is [ ] deferential" to the trial court. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016) (citing *Rice v. State*, 6 N.E.3d 940, 946 (Ind. 2014)). We exercise our authority under Appellate Rule 7(B) only in

[1] Though we must consider both the nature of the offense and the character of the offender, an appellant need not prove that each prong independently renders a sentence inappropriate. *See, e.g.*, *State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020) (granting a sentence reduction based solely on an analysis of aspects of the defendant's character); *Connor v. State*, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016); *see also Davis v. State*, 173 N.E.3d 700, 707-09 (Ind. Ct. App. 2021) (Tavitas, J., concurring in result).

"exceptional cases, and its exercise 'boils down to our collective sense of what is appropriate.'" *Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020) (per curiam) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[28] "'The principal role of appellate review is to attempt to leaven the outliers.'" *McCain v. State*, 148 N.E.3d 977, 985 (Ind. 2020) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). The point is "not to achieve a perceived correct sentence." *Id.* "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.'" *Id.* (quoting *Cardwell*, 895 N.E.2d at 1224). Deference to the trial court's sentence "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).

[29] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). In the case at bar, Pollard was convicted of Count I: aggravated battery, a Level 3 felony; and Count IV: unlawful possession of a firearm by a serious violent offender, a Level 4 felony. A person who commits a Level 3 felony "shall be imprisoned for a fixed term of between three (3) and sixteen (16) years, with the advisory sentence being nine (9) years." Ind. Code § 35-50-2-5(b). A person who

commits a Level 4 felony "shall be imprisoned for a fixed term of between two (2) and twelve (12) years, with the advisory sentence being six (6) years." Ind. Code § 35-50-2-5.5(b). Pollard was sentenced to twelve years on Count I and nine years on Count IV to be served concurrently in the DOC.

[30] Our analysis of the "nature of the offense" requires us to look at the nature, extent, heinousness, and brutality of the offense. *See Brown v. State*, 10 N.E.3d 1, 5 (Ind. 2014). Here, Pollard was convicted of aggravated battery, a violent offense. Pollard shot an unarmed Ealy several times using a firearm Pollard was forbidden to possess. The shooting occurred over a $400 drug debt as Ealy was attempting to leave Pollard's car. Ealy's injuries could have been fatal. Nothing about the nature of the offense warrants a revision of Pollard's sentence.

[31] As for our analysis of the "character of the offender," this involves a broad consideration of a defendant's qualities, including the defendant's age, criminal history, background, past rehabilitative efforts, and remorse. *See Harris v. State*, 165 N.E.3d 91, 100 (Ind. 2021); *McCain*, 148 N.E.3d at 985. The significance of a criminal history in assessing a defendant's character and an appropriate sentence vary based on the gravity, nature, proximity, and number of prior offenses in relation to the current offense. *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020). "Even a minor criminal history is a poor reflection of a defendant's character." *Id.*

[32] Here, Pollard has two felony drug related convictions: Pollard was convicted of possession of a narcotic drug with intent to sell, a Class B felony, in 2001 in the state of New York; and dealing in cocaine, a Class A felony, in 2003 in Jackson County. Pollard failed to appear for sentencing in the New York case and has an active bench warrant for his arrest. Pollard also has a misdemeanor conviction for operating a vehicle while intoxicated endangering a person, which occurred in 2013, and a misdemeanor conviction for leaving the scene of an accident, which occurred in 2022, while Pollard was on bond in this case. Additionally, after Pollard shot Ealy, he fled the scene, drove dangerously through traffic, and threw the gun along the side of the road, which could have endangered other people. Lastly, we cannot ignore the fact that, after Pollard's sentence was ordered, Pollard had several impolite words for the trial court, which we will not repeat here. None of this reflects well on Pollard's character.

[33] Pollard argues that his sentence is inappropriate based on his character because: he earned a high school diploma and bachelor's degree, was employed, took responsibility for his actions, was willing to pay restitution, provided for his family, and was "a hard working and productive member of society." Appellant's Br. p. 19. Based on the other factors we have identified, however, we cannot say that Pollard's character warrants a revision of his sentence. Accordingly, Pollard's sentence was not inappropriate.

Conclusion

[34] The trial court did not abuse its discretion by permitting the State to amend the charging information; the State presented sufficient evidence to support

Pollard's convictions; and Pollard's sentence is not inappropriate. Accordingly, we affirm.

[35] Affirmed.

Mathias, J., and Weissmann, J., concur.

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