MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Leroy D. Graham, Jr.,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

May 6, 2024

Court of Appeals Case No.
23A-CR-2330

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No.
02D06-2004-F4-39

Memorandum Decision by Judge Riley
Judges Brown and Foley concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Leroy Graham (Graham), appeals his conviction and sentence for arson, a Level 4 felony, Ind. Code § 35-43-1-1(a)(1).

[2] We affirm.

ISSUES

[3] Graham presents this court with two issues, which we restate as the following three issues:

(1) Whether the State proved beyond a reasonable doubt that it was he who committed arson;

(2) Whether the trial court abused its discretion when it did not find undue hardship to his dependents as a mitigating circumstance; and

(3) Whether his sentence is inappropriate in light of the nature of his offense and his character.

FACTS AND PROCEDURAL HISTORY

[4] Graham and Jennifer Witherspoon (Witherspoon) were in a relationship for seven years and had three children together. The couple broke up in November 2018. In October 2018, Witherspoon had purchased a new home in the 3400 block of Adirondack Drive in Fort Wayne, Indiana, but she allowed Graham to stay there several weeks prior to and through the Christmas and New Year

holidays so that Graham could spend time with their children. Graham did not have a key to Witherspoon's home. He used a garage door opener to enter and exit Witherspoon's home. Graham only had a few clothing items at Witherspoon's home. Witherspoon did not smoke, but Graham smoked cigars. Graham carried lighters in his pocket to light his cigars.

[5] On January 2, 2019, Witherspoon had to leave the house shortly after 4:00 a.m. to drop the children off at her mother's house before Witherspoon started work at 5:00 or 5:30 a.m. As she got ready to leave, Witherspoon observed that Graham was intoxicated. Graham started to rub her face and was speaking strangely, which frightened Witherspoon. Graham told Witherspoon that he would go back to his job as an over-the-road trucker that day. Witherspoon told Graham to leave his garage door opener on the kitchen counter, and then she left. Between the time that Witherspoon left for work and 4:56 a.m., Witherspoon and Graham spoke on their cellphones at least once. Graham continued to call and text Witherspoon, but she stopped responding.

[6] Sometime between the time that Witherspoon left for work and 5:15 a.m. when a neighbor called 9-1-1, Witherspoon's house caught on fire. The Fort Wayne Fire Department responded to the fire, which was intense and fast burning. Due to the neighbor's report that the home was occupied, firefighters made several incursions into the fire to search for victims but found none. Although Witherspoon had closed the garage door when she left that morning, firefighters found the garage door open. There was no sign of forced entry to any of the home's doors. A yellow can containing gasoline was found on the kitchen

floor. The gas can belonged to Graham, and it had not been in the kitchen when Witherspoon left for work. Fire investigators determined that the fire had started in the primary bedroom on Witherspoon's bed. Investigators could find no evidence that the fire had started due to a malfunction of any electric appliances or any other accidental source.

[7] Graham's ex-wife with whom he had two children, Colette Morgan (Morgan), happened to live near Witherspoon in the 5800 block of White Cross Drive. On January 2, 2019, shortly after 5:00 a.m., Morgan looked outside of her home and saw a Black man smoking a cigar walking down the street with a wheeled suitcase. Due to his physical appearance and his gait, Morgan recognized the man as Graham. Graham's cellphone records indicated that he was in the area of Witherspoon's home until shortly after 5:00 a.m. and that he then traveled away from the home via White Cross Drive.

[8] After Witherspoon learned of the fire later that morning, she called Graham, who picked up the call while laughing. Witherspoon asked Graham if he had burned her house down, and Graham continued to laugh. He asked her if she was okay, and Witherspoon terminated the call. A fire investigator also called Graham that morning. Graham answered the call speaking Spanish but then confirmed that he was Graham. When the fire investigator informed Graham that there had been a fire at the home where his children lived, the call ended. Graham did not call the investigator back and did not respond to other attempts by the investigator to reach him.

[9] On April 30, 2020, the State filed an Information, charging Graham with Level 4 felony arson. On July 18, 2023, the trial court convened Graham's three-day jury trial. Evidence consistent with the aforementioned facts was admitted. Witherspoon testified that she had moved to the Adirondack Drive home in an effort to be in a safer neighborhood for her children. Due to fire and water damage, she and the children had lost everything they owned in the fire except the clothes on their backs. Witherspoon had no known enemies and was not fighting with anyone at the time of the fire. A fire investigator who worked on the case testified that he concluded that the fire had been intentionally set, due to the presence of the gas container in the kitchen and the lack of any evidence of an accidental cause for the ignition of the fire. Another fire investigator testified that he found it to be significant that the fire had been started on Witherspoon's bed because that indicated a "revenge-type fire[.]" (Transcript Vol. III, p. 192).

[10] The jury found Graham guilty as charged. On August 18, 2023, the Allen County Probation Department filed its presentence investigation report on Graham, who was forty-five years old. Graham had ten prior misdemeanor convictions for offenses including resisting law enforcement, domestic battery, false informing, public intoxication, and conversion. Graham had five felony convictions for attempted murder, cocaine possession, criminal confinement, criminal recklessness, and unlawful possession of a firearm by a serious violent felon. Graham had his probation revoked on three occasions and had his sentence modified twice. On June 3, 2022, Graham was sentenced to thirty-

eight years for his attempted murder conviction. At the time of his sentencing in the instant matter, Graham had a pending charge in Iowa for dominion/control of a firearm/offensive weapon by a felon. Graham did not actively participate in the compilation of his presentence report. While Graham reported having children, he did not share any details about his children with the presentence investigator. Graham's overall score on the Indiana Risk Assessment System (IRAS) was sixteen, which placed him in the moderate risk to reoffend category. The presentence investigator noted that, due to Graham's lack of participation in the preparation of the report, "the above IRAS information is not accurate." (Appellant's App. Vol. III, p. 28).

[11] On September 1, 2023, the trial court held Graham's sentencing hearing. Witherspoon testified at sentencing about the impact of the arson on her life and the lives of Graham's three children. They had lost all their material possessions in the fire, including their Christmas presents. After the offense, Graham's children had nightmares and difficulty adjusting to the new places they had to live. Witherspoon felt that Graham had selfishly opted out of the lives of his children. Graham's sole argument at sentencing was that his IRAS score put him at a moderate risk to reoffend, indicating that he did not merit a maximum sentence.

[12] The trial court found no mitigating circumstances. The trial court found Graham's criminal record, prior failed attempts at rehabilitation, the impact of the offense on Witherspoon, and Graham's escalating criminal behavior as

aggravating circumstances. The trial court ordered Graham to serve twelve years in the Department of Correction (DOC).

[13] Graham now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

[14] Graham contends that the evidence was insufficient to prove the offense. The State relied on circumstantial evidence to convict Graham. It has long been recognized in Indiana that arson is almost always subject to proof solely by circumstantial evidence. *Bald v. State,* 766 N.E.2d 1170, 1174 (Ind. 2002). When we review the sufficiency of circumstantial evidence supporting an arson conviction, we apply the same scope of review as when the evidence supporting the conviction is direct. *McGowan v. State*, 671 N.E.2d 1210, 1214 (Ind. Ct. App. 1996). That is, we neither reweigh the evidence nor assess witness credibility, and we consider only the evidence and reasonable inferences supporting the verdict. *Id*. We will affirm if "there is substantial evidence of probative value from which the trier of fact might reasonably infer guilt beyond a reasonable doubt." *Id*.

[15] The State charged Graham with arson in relevant part as follows:

> [Graham] did by means of fire, explosion, or destructive device, knowingly or intentionally damage the dwelling of [] Witherspoon [] without the consent of [] Witherspoon[.]

(Appellant's App. Vol. II, p. 35). Graham does not contest that the State established that the fire was intentionally set at Witherspoon's home without her consent; rather, he claims that the evidence did not prove beyond a reasonable doubt that it was he who committed the arson.

[16] Evidence of a defendant's presence at the scene alone or his motive alone or his opportunity to set the fire alone is insufficient to sustain an arson conviction. *Barton v. State*, 490 N.E.2d 317, 318 (Ind. 1986). However, evidence supporting these factors contributes to a reasonable inference that the defendant set the fire at issue. *See McGowan*, 671 N.E.2d at 1214 (holding that evidence of McGowan's motive, his presence at the scene, his conduct before and after the fire, and proof that the fire was set intentionally established that it was McGowan who started the fire).

[17] Here, the State produced evidence that on January 2, 2019, Witherspoon and Graham were no longer in a relationship and that she had foreclosed his re-entry into her home by telling him to leave his garage door opener on the kitchen counter when he left for work that day. Graham was intoxicated and was speaking strangely that morning. Graham kept trying to contact Witherspoon after she left the house, but she stopped answering her cellphone. Graham was the last person known to be in the home before the fire, there was no sign of forced entry to the home's doors, Graham's cellphone records indicated that he was in the vicinity of the home when the fire started, and a gas can belonging to Graham was found in the kitchen which was not there when Witherspoon left for work. Graham left the home shortly before the fire was

reported and was seen by his ex-wife walking down her street with a suitcase and smoking a cigar. When Witherspoon called Graham that morning, he answered the call laughing and kept laughing when she asked him whether he had burned down her house. It was the opinion of fire investigators that the fire, which started on Witherspoon's bed, was intentionally set for revenge. We conclude that this evidence supports the jury's reasonable inference that it was Graham who started the fire at Witherspoon's home. *See id.*

[18] On appeal, Graham acknowledges that there is evidence that he was at the home the morning of the fire, that at least his cellphone was present when the fire started, and that his gas can was found in the kitchen. Graham argues that the State's case was entirely circumstantial and that "[w]hile these facts all mean that it is possible that Graham committed the offense of [a]rson, it makes him no more likely than a next-door neighbor." (Appellant's Br. p. 10). However, Graham's argument fails to take into account the additional evidence supporting his guilt, namely, evidence from which it could be inferred that he was angry at Witherspoon for excluding him from her home, his intoxication, the suspicious timing of his movements that morning in that he left the home just around the time the fire started where there was no evidence that he had to be anywhere at that hour of the morning, his mocking attitude when Witherspoon contacted him after the fire, and his evasiveness with the fire investigator. Graham's argument is unpersuasive, as it essentially requests that we reweigh evidence, which is contrary to our standard of review. *See McGowan*, 671 N.E.2d at 1214. In addition, in conducting our review, we are

not required to find that "circumstantial evidence is adequate to overcome every reasonable hypothesis of innocence but only that an inference may reasonably be drawn therefrom which supports the finding of the jury." *Hoback v. State*, 525 N.E.2d 1257, 1259 (Ind. Ct. App. 1988) (rejecting Hoback's arguments that the State's evidence was merely circumstantial and that no physical evidence linked him to the arson). Here, we conclude that it does. Accordingly, we affirm Graham's conviction.

II. *Sentence*

[19] Graham also challenges the propriety of his sentence. Graham argues that the trial court overlooked the hardship that his incarceration would cause to his dependents, and Graham contends that his sentence is inappropriate. We address each of these contentions in turn.

A. *Hardship to Dependents*

[20] Graham first argues that the trial court should have found undue hardship to his dependents as a mitigating circumstance.[1] We review a trial court's sentencing decisions for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of the trial court's sentencing discretion occurs if its decision is clearly against the

[1] In his appellate argument, Graham blends his abuse of discretion claim with his claim that his sentence is inappropriate. We remind Graham's counsel that these are two separate issues. *Hape v. State*, 903 N.E.2d 977, 1000 n.12 (Ind. Ct. App. 2009), *trans. denied*.

logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id*. One way that a trial court abuses its discretion is by omitting mitigating circumstances that are clearly supported by the record and advanced for its consideration. *Id*. at 490-91.

[21] In addressing this claim, we first observe that, at sentencing, Graham did not advance undue hardship to his dependents as a mitigating circumstance. A defendant waives any claim based on the omission of mitigating circumstances where the mitigator was not presented to the trial court. *See Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000) ("If the defendant does not advance a factor to be mitigating at sentencing, this [c]ourt will presume that the factor is not significant[,] and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal."). Because Graham failed to argue at sentencing that undue hardship to his dependents was a mitigator, he has waived this claim for our consideration. *See Anglemyer*, 875 N.E.2d at 220 (reiterating that an alleged mitigating circumstance not advanced at sentencing is precluded from appellate review).

[22] Graham's waiver of the issue notwithstanding, we find that the trial court did not abuse its discretion by failing to recognize hardship to Graham's children as a mitigating circumstance. A trial court is not obligated to find hardship to a defendant's dependents as a mitigating circumstance. *Benefield v. State*, 904 N.E.2d 239, 247 (Ind. Ct. App. 2009), *trans. denied*. Indeed, our supreme court has held that "[m]any persons convicted of serious crimes have one or more

children[,] and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). On appeal, Graham relies on evidence in the record that he purchased clothes for some of his children and sometimes gave Witherspoon money for the support of their three children. This evidence does not establish any "special circumstances" or undue hardship. *See id*. We find no abuse of the trial court's discretion in failing to recognize this waived and unsupported mitigating circumstance.

B. *Inappropriateness of Sentence*

[23] Graham next argues that "it was inappropriate for the court to sentence [him] to the maximum possible sentence under Indiana law." (Appellant's Br. p. 12). Pursuant to Indiana Appellate Rule 7(B), we

> may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.

The purpose of our review under Rule 7(B) is to attempt to leaven the outliers, not to achieve some perceived more-correct result. *Smith v. State*, 188 N.E.3d 63, 68 (Ind. Ct. App. 2022). In light of this purpose, in conducting our review, we do not determine whether another sentence is more appropriate; rather, we determine whether the sentence imposed by the trial court is inappropriate. *Id*. The defendant appealing his sentence has the burden of persuading us that his sentence is inappropriate. *Malone v. State*, 191 N.E.3d 870, 877 (Ind. Ct. App.

2022). At the end of the day, whether we determine that a particular sentence is 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 v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008).

[24] When considering the nature of the offense for purposes of a Rule 7(B) review, "the advisory sentence is the starting point for determining the appropriateness of a sentence." *Belcher v. State*, 138 N.E.3d 318, 328 (Ind. Ct. App. 2019) (citing *Anglemyer*, 868 N.E.2d at 494), *trans. denied.* Graham was convicted of Level 4 felony arson. A Level 4 felony has a sentencing range of between two and twelve years, with an advisory sentence of six years. I.C. § 35-50-2-5.5. The trial court sentenced Graham to the maximum sentence of twelve years.

[25] The nature of Graham's offense merits the maximum sentence imposed here. In assessing the nature of a defendant's offenses, we consider the surrounding details and circumstances of the offenses and the defendant's participation in them. *Woodcock v. State*, 163 N.E.3d 863, 878 (Ind. Ct. App. 2021), *trans. denied*. Seeking revenge, Graham burned down the house where his children and their mother lived, depriving them of all their possessions and their peace of mind. Witherspoon felt "defeated" after the fire because she had to start all over again. (Tr. Vol. III, p. 28). Graham's actions are particularly galling because Witherspoon had just moved into the home and did so in order to provide their children a safer environment. In addition, Graham exposed the firefighters who responded to the arson to increased danger, as they unnecessarily made

several trips into the home looking for victims who were not there. On appeal, Graham does not offer any argument that his sentence is inappropriate in light of the nature of his offense, and, therefore, he has failed to persuade us that his sentence is inappropriate on that basis. *See Malone*, 191 N.E.3d at 877 (the defendant bears the burden of persuasion on appeal of the inappropriateness of his sentence).

[26] Neither has Graham established that his maximum sentence is inappropriate in light of his character. In reviewing a defendant's character for purposes of a Rule 7(B) review, we broadly consider a defendant's qualities. *Pritcher v. State*, 208 N.E.3d 656, 668 (Ind. Ct. App. 2023). It is well-established that we may consider a defendant's criminal history when assessing his character. *Williams v. State*, 170 N.E.3d 237, 246 (Ind. Ct. App. 2021), *trans. denied*. Here, Graham has a criminal record consisting of ten misdemeanors for various offenses and five felony convictions for attempted murder, cocaine possession, criminal confinement, criminal recklessness, and unlawful possession of a firearm by a serious violent felon. Graham has had the benefit of unsupervised probation, rehabilitative programs including theft intervention programming and alcohol countermeasures, criminal diversion, probation, shorter jail sentences, and shorter sentences with the DOC. Three months prior to his sentencing in this matter, Graham was sentenced to thirty-eight years for his attempted murder conviction, and, when the trial court sentenced Graham in the instant matter, he had a pending felony firearm charge in Iowa. Thus, Graham has a

significant history of criminality which prior attempts at rehabilitation have failed to curb.

[27] Apart from his criminal record, we note that Graham refused to participate in the preparation of his presentence investigation report, which belies a disdain for the legal process. We also observe that Graham laughed at the mother of his children when she asked him if he had burned down her house. Neither of these circumstances reflect well on Graham's character.

[28] Graham's argument concerning his character is that his maximum sentence is inappropriate given that his IRAS score placed him at a moderate risk to reoffend. However, the presentence investigator noted that Graham's failure to participate in the preparation of the report meant that his IRAS information was inaccurate. Graham does not provide us with any legal authority indicating that a sentence is inappropriate based on inaccurate IRAS information, and we are unaware of any. In short, Graham has failed to establish that his sentence is inappropriate. *See Oberhansley v. State*, 208 N.E.3d 1261, 1267 (Ind. 2023) (holding that our deference to the trial court's sentencing decision will prevail in the face of an inappropriateness challenge unless the defendant presents compelling evidence portraying the nature of his offense and his character in a positive light).

CONCLUSION

[29] Based on the foregoing, we hold that the State proved beyond a reasonable doubt that Graham committed arson. We further hold that the trial court did

not abuse its discretion in sentencing Graham and that his maximum twelve-year sentence is not inappropriate given the nature of his offense and his character.

[30] Affirmed.

Brown, J. and Foley, J. concur

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